SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 22, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10814 In re Kenneth Jennings, Index 113435/11
Petitioner-Respondent,

-against-

Dennis Walcott, etc., et al.,
Respondents-Appellants.

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Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for appellants.

Thomas D. Shanahan, P.C., New York (Thomas D. Shanahan of counsel), for respondent.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered on or about March 15, 2012, granting the petition to declare arbitrary and capricious respondents' policy of deferring in educational decisions to the parent with primary physical custody, and ordering respondents to include petitioner as a joint legal guardian on his child's school file, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

It is the policy of respondent Department of Education to take direction from the parent with primary physical custody

where, as here, the divorced parents of a student have joint legal custody of the student and are unable to agree on a decision as to the student's education, and there is no court order specifying who is entitled to make educational decisions. Respondent adopted this policy to avoid becoming entangled in custody disputes. Given the options available to the Department of Education for resolving such a disagreement, it cannot be said that the policy is without a rational basis in the record and is therefore arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Nor does the policy affect petitioner's legal rights as a parent with joint legal, but not primary physical, custody. Petitioner is free to pursue a modification of his judgment of divorce to provide for joint decision-making as to the child's education.

Since petitioner failed to raise his argument that

respondent's policy violates the City Administrative Procedure Act (New York City Charter § 1041 *et seq.*) in his petition, we decline to consider it (*see Matter of Cherry v Horn*, 66 AD3d 556 [1st Dept 2009]).

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

ENTERED: OCTOBER 22, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10816 Radames Mercado, Index 17873/99
Plaintiff-Appellant,

-against-

Rafael Ovalle, et al.,
Defendants-Respondents.

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Powers & Santola, Albany (Michael J. Hutter of counsel), for appellant.

Donohue Law Firm, New York (Sara Azarm of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 17, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants, a grocery store and its owner, established entitlement to judgment as a matter of law. Defendants demonstrated that they did not own or harbor the two pit bulls that attacked plaintiff and did not own or control the adjacent lot on which the dogs were kept (*see Smith v City of New York*, 68 AD3d 445, 446 [1st Dept 2009]; *Williams v City of New York*, 306 AD2d 203, 206-207 [1st Dept 2003]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's only evidence of defendants' ownership and/or control over the dogs and the subject lot consisted of hearsay

statements from a mechanic who operated out of the lot which the dogs guarded and his own observations that defendant Ovalle fed the dogs at an unidentified frequency and walked the dogs on one occasion, that men from the grocery store and Ovalle's relatives were involved in the dogs' care, and that men from the grocery store accessed the lot. Such evidence does not establish that defendants harbored the dogs (*cf. Dufour v Brown*, 66 AD3d 1217 [3d Dept 2009]). Moreover, plaintiff had never seen the dogs on defendants' premises and does not claim to have ever seen Ovalle enter the lot. Plaintiff's speculation that Ovalle employed the aforementioned mechanic and had an interest in a nearby auto parts store and that the store was associated with the lot, does not establish that defendants owned or controlled the lot.

Plaintiff's argument that defendants' failure to annex the answer mandates denial of the motion (*see* CPLR 3212[b]) is unpreserved (*see Tranes v Independent Health Assn.*, 275 AD2d 410 [2d Dept 2000]). Had plaintiff raised the issue earlier, defendants would have had an opportunity to supplement the record (*see Ayer v Sky Club, Inc.*, 70 AD2d 863 [1st Dept 1979], *appeal dismissed* 48 NY2d 705 [1979]). In any event, this procedural defect does not bar consideration of the motion as defendants explained the absence of the answer and submitted a copy of Ovalle's deposition transcript, wherein he denied the relevant

allegations concerning ownership and control of the dogs and lot. Accordingly, the record was sufficiently complete to consider the motion (*see Chan v Garcia*, 24 AD3d 197, 198 [1st Dept 2005]).

Furthermore, plaintiff has not established any basis to revive his abandoned negligence claim (*see Bard v Jahnke*, 6 NY3d 592 [2006]; *compare Hastings v Sauve*, 21 NY3d 122 [2013]).

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

ENTERED: OCTOBER 22, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10817-
10818-
10819-
10820-
10821 Index 302122/08

Mhill Gjuraj, etc.,
Plaintiff-Respondent,

-against-

Uplift Elevator Corp., et al.,
Defendants-Appellants,

Lift Enterprises, Inc.,
Defendant.

_____

Menaker & Herrmann LLP, New York (Richard G. Menaker of counsel), for appellants.

Wexler Burkhart Hirschberg & Unger, LLP, Garden City (David Hirschberg of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered March 26, 2013, to the extent appealed from as limited by the briefs, awarding plaintiff damages as against defendants Uplift Elevator Corp., Ivica Lubina, and Paul Caldararo, and dissolving defendant Uplift, unanimously modified, on the law, to vacate the judgment as against Caldararo and to vacate the dissolution of Uplift, and otherwise affirmed, without costs. Appeal from orders, same court and Justice, entered August 16, 2012, September 13, 2012, and on or about January 30, 2013, unanimously dismissed, without costs, as subsumed in the

appeal from the aforesaid judgment. Appeal from order, same court and Justice, entered on or about January 24, 2013, which denied defendant Caldararo's motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable paper.

Plaintiff, a 15% minority shareholder in Uplift, has standing to bring his breach of fiduciary duty claims as direct, as well as derivative, causes of action, since defendants' freezing him out of the corporation and failing to pay him his share of the profits harmed him individually, and he would receive the benefit of any recovery (*see Yudell v Gilbert*, 99 AD3d 108, 113-114 [1st Dept 2012]; *see also Abrams v Donati*, 66 NY2d 951 [1985]).

As the majority shareholder of Uplift, a closely held corporation, Lubina had a fiduciary duty to plaintiff, a minority shareholder (*O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 282 [1st Dept 2007]; *see also Wolff v Wolff*, 67 NY2d 638 [1986]). He breached this duty by, inter alia, distributing profits to Caldararo, an employee of the corporation, without making a 15% distribution of profits to plaintiff, as required, by relocating the corporation's office without plaintiff's knowledge and without giving plaintiff access to it, and by closing out the corporation's bank account on which plaintiff was a signatory and

opening another corporate account on which plaintiff was not a signatory.

Defendants contend that Lubina's actions are protected by the business judgment rule, which "prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990] [internal quotation marks omitted]). However, defendants failed to raise this argument as an affirmative defense in their answer, and their motion to amend the pleadings to conform to the trial evidence several weeks after the court had issued its post-trial order finding breaches of fiduciary duty was properly rejected as devoid of merit (*see id.*).

Lubina is properly subject to personal liability for the corporation's debts to plaintiff, since "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced" (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 558 [1st Dept 2009] [internal quotation marks and emphasis omitted]).

Caldararo, however, was an employee of the corporation, and did not have a fiduciary duty to plaintiff; although he received profits from Lubina, there is no evidence that he also shared in the corporation's losses (*Vitale v Steinberg*, 307 AD2d 107, 108 [1st Dept 2003]). Nor is there any other evidence of a fiduciary relationship between Caldararo and plaintiff (*see People v Coventry First LLC*, 13 NY3d 108, 115 [2009]). For this reason, Caldararo cannot be held personally liable for Uplift's debts to plaintiff. Contrary to plaintiff's unpreserved contention that Caldararo "aided and abetted" Lubina in Lubina's breach of his fiduciary duty, the evidence does not support a finding that Caldararo "knowingly ... participated in the breach" (*see Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]).

The trial court properly relied on plaintiff's expert's valuation methodology (*see Matter of North Star Elec. Contr.-N.Y.C. Corp.*, 174 AD2d 373 [1st Dept 1991], *lv denied* 79 NY2d 752 [1992]).

The court used the correct standard in determining that plaintiff had a right to common-law dissolution (*see Fedele v Seybert*, 250 AD2d 519, 521 [1st Dept 1998]). However, we find that a buy-out of plaintiff's interest for fair value, as opposed to both the buy-out and dissolution, is the more appropriate

remedy here (*see Leibert v Clapp*, 13 NY2d 313, 318 [1963]; *Matter of Davis [Shayne-Levy Assoc.]*, 174 AD2d 449 [1st Dept 1991], *lv dismissed in part, denied in part* 79 NY2d 820 [1991]).

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: OCTOBER 22, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10822 In re Cevon W., and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Talisha W.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

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

Andrew J. Baer, New York, attorney for the child Cevon W.

Karen Freedman, Lawyers For Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child Anthony J.

_____

Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about July 18, 2012, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that appellant mother neglected her son and derivatively neglected her daughter, unanimously affirmed, without costs.

The Family Court's neglect finding as to appellant's son, a child with special needs, was supported by a preponderance of the evidence (*see Matter of Ameena C. [Wykisha C.]*, 83 AD3d 606 [1st

Dept 2011]; *Matter of J. Children*, 216 AD2d 159 [1st Dept 1995]). The court's neglect finding was also procedurally proper, as there was no need to conform the petition to the evidence, since the petition alleged that the mother failed to exercise a minimum degree of care toward her son, including excessive corporal punishment (*see* Family Court Act § 1012(f); *Matter of Shawn BB*, 239 AD2d 678, 680 [3rd Dept 1997]).

The mother's argument that, since her inappropriate actions at a parent-teacher conference were a one-time incident, the Family Court's finding of neglect was not based on legally sufficient evidence is unavailing, inasmuch as "[a] single incident 'where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm' can sustain a finding of neglect" (*Matter of Kayla W.*, 47 AD3d 571, 572 [1st Dept 2008]).

The record also supports a finding of derivative neglect with respect to the daughter, since the mother's behavior towards

her son demonstrates a sufficiently faulty understanding of her parental duties to warrant an inference of an ongoing danger to her daughter as well (*see Ameena C.*, 83 AD3d at 607).

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

ENTERED: OCTOBER 22, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10823 The People of the State of New York, Ind. 2883/07
Respondent,

-against-

Randy Barnell, also known as Randall Bennett,
Defendant-Appellant.

_____

Robert S. Dean, Center For Appellate Litigation, New York (Lauren Springer of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Eugene Oliver, Jr., J.), rendered on or about February 2, 2012,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: OCTOBER 22, 2013

CLERK

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

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10824 Joseph Budano, Index 301199/09
Plaintiff-Appellant,

-against-

Andrew Gurdon,
Defendant-Respondent.

_____

O'Hare Parnagian LLP, New York (Robert A. O'Hare, Jr. of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered June 28, 2012, which, in an action for personal injuries allegedly sustained when plaintiff slipped and fell as he ascended the stairs in defendant's building, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established his entitlement to judgment as a matter of law. Defendant submitted, inter alia, photographs of the subject step and staircase, showing that the claimed defect, a worn and slippery step, was too trivial to be actionable (*see Cintron v New York City Tr. Auth.*, 77 AD3d 410, 411 [1st Dept 2010]; *Gaud v Markham*, 307 AD2d 845 [1st Dept 2003]; *Outlaw v Citibank, N.A.*, 35 AD3d 564, 565 [2d Dept 2006]). Defendant also demonstrated that there were a lack of prior complaints or

injuries relating to the step (*see Santiago v United Artists Communications*, 263 AD2d 407 [1st Dept 1999]).

In opposition, plaintiff failed to raise a triable issue of fact. His affidavit, wherein he states that the loose handrail and inconsistent stair dimensions contributed to his inability to prevent his fall, was inconsistent with his testimony that he simply slipped (*see Gemini v Christ*, 61 AD3d 477 [1st Dept 2009]). Moreover, the findings of plaintiff's expert concerning uneven riser heights and a loose handrail were insufficient to connect plaintiff's fall to any purported defect in the risers (*see Raghu v New York City Hous. Auth.*, 72 AD3d 480, 482 [1st Dept 2010]).

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

ENTERED: OCTOBER 22, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10825 Nigen Vosper, et al., Index 101311/09
Plaintiffs-Appellants,

-against-

Fives 160th, LLC,
Defendant-Respondent,

BLM Inc.,
Defendant.

_____

Powers & Santola, LLP, Albany (Michael J. Hutter of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas Hurzeler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about May 21, 2012, which, to the extent appealed from as limited by the briefs, granted defendant Fives 160th LLC's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff Nigen Vosper testified that he was injured when he slipped and fell on the front entrance landing of his apartment building as he left for work at approximately 8:00 a.m. on December 24, 2008. He testified that the landing was covered in a transparent sheet of ice, apparently caused by overnight precipitation.

The motion court erred in applying Administrative Code of

the City of New York § 16-123 to this case and finding that defendant Fives 160th LLC should have had until 11:00 a.m. to remedy the icy condition on the landing. Section 16-123, by its plain language, only governs property owners' duty to remove snow, ice, and other debris from the public sidewalks; it does not apply to their own property. We reject defendant's claim that its landing should be considered part of the sidewalk. The record does not show that the landing fits the definition of "sidewalk" found in Administrative Code of the City of New York § 19-101(d), and the photographs clearly depict the location of the accident as several feet away from the abutting sidewalk flag.

The record presents issues of fact as to the applicability of the "storm in progress" rule (*see Powell v MLG Hillside Assoc.*, 290 AD2d 345 [1st Dept 2002]). The undisputed weather data shows that on the day of plaintiff's accident, a light mixture of sleet and freezing rain fell in the vicinity of the building between 3:00 and 4:00 a.m., and only freezing rain was falling by 4:00 a.m. and normal rain by no later than 6:00 a.m., when the temperature rose above freezing, and that from 6:00 a.m. onward, there was only trace or light rainfall, with hourly accumulations of less than one-tenth of an inch (*see id.* at 345-46; *see also Tucciarone v Windsor Owners Corp.*, 306 AD2d 162, 163 [1st Dept 2003]; *Pipero v New York City Tr. Auth.*, 69 AD3d 493

[1st Dept 2010]). Moreover, as defendant's live-in superintendent was present, questions of fact exist whether the two hours between the cessation of freezing rain and the accident should have afforded him enough time to notice the condition and whether he should have taken steps to remedy it (*see Powell*, *supra*, 290 AD2d at 346).

In any event, there are issues of fact whether the landing's alleged structural defects may have contributed to or exacerbated the hazardous condition on the landing. Plaintiff's architectural expert averred that defendant violated several specific provisions of the New York City Building Code when, the year before the accident, it removed the first step of the landing, which was the tenants' sole means of entering and exiting the building, and replaced it with the sloped landing at issue. He explained that the modification violated the Code's provision requiring level platforms across doorways. He opined that the uneven, sloped nature of the landing made it dangerous and likely to produce a fall, and that when covered in snow or ice, the risk greatly increased, presenting the "perfect trap," particularly since pursuant to the Code the landing's excessive slope ratio required handrails, and there were none.

The motion court erred in finding that the structural defects alleged by plaintiff's expert could not have been a proximate cause of his fall because plaintiff testified that he

slipped on ice on the landing, and did not attribute his fall to the defects. There is no evidence that such technical knowledge was within plaintiff's purview. It is sufficient that he identified the slippery condition of the icy landing as the cause of his fall, and his expert, who physically inspected the landing, explained that the structural defects he observed, all in violation of applicable Building Code provisions, caused or contributed to the condition (*see e.g. Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555 [1st Dept 2012]; *Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440-41 [1st Dept 2010]). Defendant's expert's disagreement with plaintiff's expert's findings or methodology presents issues of fact and credibility for a jury to resolve.

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

ENTERED: OCTOBER 22, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10826 The People of the State of New York, Ind. 3848/10
Respondent,

-against-

Dwayne Jones,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about March 23, 2011, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 22, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10827 Tewksbury Management Group, LLC, Index 652201/11
Plaintiff-Appellant,

-against-

Rogers Investments NV LP,
Defendant-Respondent.

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Bruce Levinson, New York, for appellant.

Oved & Oved LLP, New York (Aaron J. Solomon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 19, 2012, which, to the extent appealed from, granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The first and second causes of action allege that defendant landlord breached the parties' lease by failing, inter alia, to obtain a valid certificate of occupancy for the building, to remove building violations that interfered with plaintiff tenant's intended use of the premises as specified in the lease agreement, to provide heat, and to deliver to plaintiff the entire premises as described in the lease. Since plaintiff could have raised these claims in defendant's 2008 summary proceeding for nonpayment of rent, which resulted in consent judgments of possession and arrears in defendant's favor, the causes of action were correctly dismissed pursuant to the doctrine of res judicata

(*see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]; *Ruth v Shalom Bros.*, 276 AD2d 408 [1st Dept 2000]; *99 Cents Concepts, Inc. v Queens Broadway, LLC*, 70 AD3d 656 [2d Dept 2010]). These claims were inextricably intertwined with defendant's claims in the summary proceeding (*see All 4 Sports & Fitness, Inc. v Hamilton, Kane, Martin Enters., Inc.*, 22 AD3d 512 [2d Dept 2005]). The doctrine of res judicata also bars the fifth cause of action, which alleges that defendant lacked capacity to bring the summary proceeding since it was not authorized to do business in New York State, and the sixth cause of action, which seeks an injunction directing that plaintiff be restored to possession of the premises, based on the contention that defendant was not entitled to bring the summary proceeding (*see Henry Modell & Co. v Minister, Elders & Deacons of Ref. Prot. Dutch Church of City of N.Y.*, 68 NY2d 456, 461 [1986]).

The third cause of action, which alleges that defendant was unjustly enriched by the value of the improvements plaintiff made to the premises, was correctly dismissed on the ground that it is conclusively refuted by documentary evidence (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). The lease agreement provided that fixtures added to the premises would become part of the premises and that any non-fixtures left behind by plaintiff would be deemed abandoned by it. Moreover, plaintiff's principal

signed a release stating that any personal items left behind by plaintiff would be deemed abandoned. The fourth cause of action, to the extent it alleges conversion of property, was correctly dismissed for the same reasons. To the extent it alleges that defendant converted plaintiff's security deposit, the fourth cause of action is flatly refuted by the lease provision allowing defendant to use the security deposit towards plaintiff's unpaid rent obligations and the stipulations and final judgment wherein plaintiff acknowledged that it owed rent arrears well in excess of the amount of the security deposit.

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

ENTERED: OCTOBER 22, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10830 Pano Seretis, etc., Index 602191/07
Plaintiff-Appellant,

-against-

Fashion Vault Corp. et al.,
Defendants-Respondents.

_____

James W. Hyde, IV, Wells, for appellant.

Wachtel Missry LLP, New York (David Yeger of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Sue Ann Hoahng, Special Referee), entered August 21, 2012 (as an order) and October 9, 2012 (as a judgment), dismissing plaintiff's claims, unanimously affirmed, without costs.

By the time of trial, the only remaining causes of action were the first, for an accounting; the second, alleging that defendant Frederick Margulies had converted and misappropriated nominal defendant Fashion Vault Corp.'s assets; the third, alleging that Margulies had breached his fiduciary duty to Fashion Vault; and the eighth, alleging that Margulies had breached the shareholders' agreement among plaintiff, Margulies, and Fashion Vault. The order of reference did not specify what the referee was to hear and determine; however, the parties agreed that it was the valuation of Fashion Vault's inventory and shares.

The complaint pleads the second and third causes of action as derivative claims. Furthermore, "allegations of . . . diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually" (*Abrams v Donati*, 66 NY2d 951, 953 [1985]).

The first cause of action seeks an accounting on behalf of both Fashion Vault and plaintiff individually. As a shareholder in a close corporation, plaintiff had the right to an accounting (*see United Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]). At trial Margulies produced the financial records of Fashion Vault and testified under oath regarding the disposition of the corporate assets, which fulfills defendants' obligation to account (*see Malone v Sts Peter and Paul's Church Brooklyn*, 64 NE 961 [1902]; *Schreier v Mascola*, 81 AD2d 909 [2nd Dept 1981]). Plaintiff's objections to the adequacy of the information provided were considered and rejected by the trial court, finding instead that the corporation's liabilities exceed its assets and that there was nothing to distribute to the shareholders (*see e.g. Bartlett v Drew*, 57 NY 587, 589 [1874]).

It is also true that plaintiff's eighth cause of action is an individual claim. However, contrary to the allegation of the complaint, Margulies' breach of the shareholders' agreement did

not cause Fashion Vault's demise; rather, the corporation had financial problems from the beginning, when plaintiff was still involved in running it. Therefore, the court's error in implicitly classifying this cause of action as derivative is harmless.

We are not persuaded by plaintiff's contention that Margulies failed to meet his burden to come forward with evidence with respect to his disposition of Fashion Vault's assets. In response to plaintiff's evidence that Fashion Vault's inventory had a value of $1,911,788.33 at cost as of February 28, 2005, Margulies testified that inventory reports such as the one introduced by plaintiff did not reflect shrinkage, i.e., theft by employees and/or customers. Second, Margulies testified that he returned some inventory to Fashion Vault's vendors after February 28, 2005; his testimony was partially corroborated by a vendor and by documents. Third, Margulies testified that he caused some of Fashion Vault's inventory to be sold and that he used the proceeds from those sales to pay down Fashion Vault's debt to nonparty Valley National Bank; again, his testimony was partially corroborated by documentary evidence.

"[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large

measure on considerations relating to the credibility of witnesses" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992] [internal quotation marks omitted]).

Contrary to plaintiff's claim, the Special Referee's decision satisfies CPLR 4213(b) (*see e.g. Marks v Macchiarola*, 250 AD2d 499 [1st Dept 1998]).

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

ENTERED: OCTOBER 22, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10831 Ciprian Brito-Galbez, Index 302025/09
Plaintiff,

-against-

841-853 Broadway Associates, LLC, et al.,
Defendants.

- - - - -

841-853 Broadway Associates, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Cosi Sandwich Bar, Inc.,
Third-Party Defendant-Appellant.

_____

Law Offices of Tobias & Kuhn, New York (Michael V. Dimartini of counsel), for appellant.

Hitchcock & Cummings, LLP, New York (Christopher B. Hitchcock of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered April 30, 2013, which denied third-party defendant Cosi Sandwich Bar, Inc.'s (Cosi) motion for summary judgment dismissing the third-party complaint seeking contractual indemnification, unanimously reversed, on the law, with costs, the motion granted, and the third-party complaint dismissed. The Clerk is directed to enter judgment accordingly.

Cosi is a restaurant operating out of a commercial space leased from third-party plaintiff 841-853 Broadway Associates, Inc. (Broadway Associates). Plaintiff, Ciprian Brito-Galbez, an employee of Cosi, alleges that he was injured while taking

garbage out of the restaurant, when the double doors of the building's freight entrance slammed on his hand. After plaintiff commenced an action against Broadway Associates and Broadwall Management alleging negligent maintenance of the freight doors, they commenced this third-party action seeking contractual indemnification pursuant to the indemnification clause in the lease agreement between Cosi and Broadway Associates.

Under the lease, Cosi agreed, subject to the waiver of subrogation provision, to indemnify Broadway Associates against liability arising from injury to persons in the demised premises or in connection with its use of the demised premises. In the referenced waiver of subrogation provision, the parties agreed to "release[] each other . . . from any liability and waive[] on behalf of its insurer . . . any claim for any loss or damage . . . which loss or damage is of the type required to be covered by the insurance required to [be] maintained by the parties regardless of any negligence on the part of the released persons which may have contributed to or caused such loss or damage." Further, the parties agreed that Broadway Associates was required to maintain "commercial general liability insurance covering the common areas against claims for bodily injury . . . occurring upon, in or about the common areas," while Cosi was required to maintain insurance indemnifying Broadway Associates "against any and all claims for injury or damage to persons . . . occurring

upon, in or about the Demised Premises." Thus, the third-party claim for contractual indemnification arising from plaintiff's claim that he suffered bodily injury in the common areas of the building should be dismissed, as Broadway Associates agreed to release Cosi from liability and waived subrogation for damages incurred as a result of a claim arising out of "bodily injury . . . occurring upon, in or about the common areas" (*see Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654 [1997]).

Plaintiff's claim for bodily injury that occurred in a common area is "of the type" that is to be covered by insurance that Broadway Associates was required to maintain. Because the indemnification clause is "[s]ubject to the waiver of subrogation," it has not been triggered under the circumstances here. Accordingly, we need not address the parties' arguments concerning whether the indemnification clause is void and unenforceable under General Obligations Law § 5-321.

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

ENTERED: OCTOBER 22, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10832 Cobble Creek Consulting, Inc., et al., Plaintiffs-Appellants, Index 103299/11

-against-

Sichenzia Ross Friedman Ference LLP, Defendant-Respondent.

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Mintz & Fraade, P.C., New York (Edward C. Kramer of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Cristina R. Yannucci of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 26, 2012, which granted defendant's motion to dismiss the complaint alleging legal malpractice and breach of fiduciary duty, unanimously affirmed, without costs.

The motion court properly dismissed the claim of legal malpractice, as plaintiffs failed to allege how any negligence was the proximate cause of their damages (*see O'Callaghan v Brunelle*, 84 AD3d 581, 582 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]; *McLoughlin v Sullivan Papain Block McGrath & Cannavo, P.C.*, 18 AD3d 245, 246 [1st Dept 2005], *lv denied* 5 NY3d 709 [2005]). The motion court considered plaintiffs' allegations, quoted in its decision, that defendant acted in a manner contrary to its discussions with plaintiffs by assisting the subject corporation in eliminating the Preferred A shares. As the motion

court noted, plaintiffs alleged only that the parties had discussed, and defendant failed to include, a provision in the Certificate of Designation that prevented changes in the common stock structure from affecting the conversion rate of plaintiffs' Preferred A Stock. Plaintiffs did not challenge the inclusion of language in the Certificate of Designation that allows changes in the value or voting rights of Preferred A shares by a majority vote of Preferred A shareholders. The complaint reveals that a vote held pursuant to this latter provision is what altered the conversion ratio, allegedly rendering plaintiffs' stock virtually worthless. Thus, inclusion of the anti-dilution provision plaintiffs cite would not have altered the result. Accordingly, plaintiffs failed to set forth facts showing that, but for defendant's conduct, plaintiffs would not have incurred any damages.

Plaintiffs further alleged, without elaborating, that defendant failed to advise them to seek independent counsel at any time. Plaintiffs failed to allege how this omission proximately caused their injuries. Any claim that independent counsel could have negotiated a provision prohibiting changes to the Certificate or any changes to the conversion ratio, even upon a majority vote, or could have insulated plaintiffs from incurring any losses upon a conversion, is speculative.

The motion court correctly dismissed the breach of fiduciary

duty claim as duplicative, because it was based on the same facts and alleged the same damages as the legal malpractice claim (*Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 416 [1st Dept 2011]; *cf. Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 8 [1st Dept 2008]).

The motion court properly dismissed the complaint with prejudice. Plaintiffs do not elaborate on how any defects in the complaint would have been addressed if they had been given leave to amend (*see generally Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]).

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

ENTERED: OCTOBER 22, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10834N 104 West 27th St. Realty, Inc., Index 111106/11
Plaintiff-Respondent,

-against-

Young Jae Lim, etc.,
Defendant-Appellant.

_____

Hauser & Associates, P.C., New York (Seth A. Hauser of counsel), for appellant.

Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 10, 2012, which granted plaintiff's motion to strike defendant's affirmative defenses and for summary judgment in the amount of $402,952.22, based on a written Guaranty making defendant personally liable for certain unpaid rent, and directed a hearing to determine the reasonable attorneys' fees to be awarded to plaintiff, unanimously affirmed, with costs.

On or about September 21, 1994, defendant entered into a personal Guaranty with plaintiff landlord, agreeing to pay any unpaid rent pursuant to a lease between plaintiff and nonparty tenant prior to tenant surrendering the "premises." Although the "premises" of the original lease was the second floor only, the Guaranty also contained a provision stating: "If the Lease is modified by agreement between Landlord [plaintiff] and Tenant,

the obligations hereunder of the Guarantor shall extend and apply with respect to the Lease, as modified." On or about December 4, 2002, plaintiff and tenant entered into an extension and modification agreement, combining the tenant's first-floor lease, including part of the basement, with the second floor lease, and deeming it "one lease for the [newly defined] demised premises," which included the first floor, a portion of the basement and the second floor. All provisions of the first-floor lease and the second-floor lease remained in full force and effect, except as modified. On or about January 30, 2006, tenant entered into an Amended and Partial Surrender of Lease agreement, by which the tenant surrendered the second floor of the premises. This agreement expressly defined the "original lease" as including both the first-floor lease and the second-floor lease.

The motion court properly found that tenant's surrender of the second floor did not extinguish the Guaranty, as the second-floor lease had been modified to include the first-floor lease. Such modification fell within the Guaranty, and extended and applied defendant's guaranty obligations to the new modified

lease (*see Davimos v Halle*, 60 AD3d 576, 577 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009], citing Banque Worms v Andre Café., 183 AD2d 494 [1st Dept 1992]; *see also White Rose Food v Saleh*, 292 AD2d 377, 378 [2d Dept 2002], *affd* 99 NY2d 589 [2003]).

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

ENTERED: OCTOBER 22, 2013

CLERK

Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10366 Leonard Hutchinson, Index 307060/09
Plaintiff-Appellant,

-against-

Sheridan Hill House Corp.,
Defendant-Respondent.

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

Kenny & Zonghetti, LLC, New York (Kevin J. O'Donnell of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered July 27, 2012, which granted defendant's motion for summary judgment dismissing the complaint, affirmed, without costs.

Plaintiff Leonard Hutchinson seeks damages for injuries sustained when he tripped and fell on a sidewalk located in front of the premises owned by defendant Sheridan Hill House Corp. Plaintiff testified that on April 23, 2009, a sunny and warm day, between 10:00 a.m. and 11:00 a.m., he was walking to the supermarket, which was two blocks from his home. While walking on the sidewalk in front of 1413 Sheridan Avenue, his right foot got caught on a round metal screw or other object that was protruding from the sidewalk. The metal object or screw appeared to have been placed in the concrete as part of the construction of the sidewalk and was never removed. According to plaintiff,

he saw the metal object after he fell, and had never seen it before, although he had passed the location at least one hundred times before the accident.

Defendant established its entitlement to judgment as a matter of law. The record presented failed to establish that the claimed defect was actionable. Defendant established that the the metal screw or other object was just five-eighths of an inch in diameter and protruded only about three-sixteenths of an inch above the surface. This minor height differential alone is insufficient to establish the existence of a dangerous or defective condition (*see Mangar v Parkash 180 LLC*, 99 AD3d 607 [1st Dept 2012]); *Schwartz v Bleu Evolution Bar & Rest. Corp.*, 90 AD3d 488 [1st Dept 2011]; *Burko v Friedland*, 62 AD3d 462 [1st Dept 2009]).

Plaintiff has not come forward with any evidence to show that this trivial defect could have been "a trap or snare by reason of its location, adverse weather or lighting conditions or other circumstances (*Burko v Friedland*, 612 AD2d 462). The report of his expert was insufficient to raise such an issue since the expert visited the site more than two years after the accident. By that time, the condition had been corrected. Thus, the expert's opinion was speculative, conclusory and not based on foundational facts, such as the exact measurements of the defect at the time of the accident *(see Vazquez v JPG Realty Corp*, 81

AD3d 555 [1st Dept 2011]; *Burko v Friedland*, 612 AD2d 462).

Defendant also demonstrated that it did not have notice of any defect by submitting testimony from its maintenance personnel who stated that they cleaned the sidewalk every morning and had never noticed the metal object until after the accident. Defendant also showed that there was no record of complaints about the condition of the sidewalk (*see Burko v Friedland*, 62 AD3d 462). Contrary to the dissent's allegations that the "photos establish that the piece of metal was sufficiently visible," the photographs reflect an object that is barely discernable since it does not appear to protrude significantly above the surface of the sidewalk. In fact, as indicated, plaintiff himself had never seen it before the accident, despite passing the locations at least one hundred times in the past.

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

SAXE, J. (dissenting)

I would reverse the order on appeal and deny defendant's motion for summary judgment dismissing the complaint. The majority's dismissal is based on an assessment of the sidewalk defect as too trivial to be actionable, and on an asserted lack of notice. However, in my view, the submissions offered in support of defendant's motion do not justify dismissal on either basis.

Plaintiff asserts that he tripped and fell while walking on the sidewalk in front of defendant's premises, when his right foot got caught on a round metal object protruding from the sidewalk. Defendant moved for summary judgment dismissing the complaint, contending that the defect was trivial in nature and therefore non-actionable, that defendant neither created nor had notice of the condition, and that the defect was created by an independent contractor over whom defendant had no control.

Defendant's reliance on a claimed lack of notice must be rejected. For purposes of this motion, the photos establish that the piece of metal was sufficiently visible, and other submissions tend to indicate that the piece of metal became embedded in the pavement when a new sidewalk was installed in June 2007, over two years before plaintiff's accident. The statements by defendant's maintenance workers that they had never noticed the piece of metal sticking up out of the sidewalk in the

course of cleaning the sidewalk, while they might arguably support a claimed lack of actual notice, cannot suffice to establish, as a matter of law, an absence of constructive notice. Nor does the assertion that the defect's presence was due to the work of an independent contractor protect the property owner from liability for the defect on its property; a property owner always has a duty to maintain its property in a reasonably safe condition (*see Basso v Miller*, 40 NY2d 233 [1976]).

I disagree with the majority's conclusion that the size of the protruding piece of metal renders it too small to constitute an actionable defect as a matter of law. According to photos and measurements taken by defendant's representatives, the round piece of metal rose approximately one-quarter inch above the sidewalk, and was slightly over a half-inch wide. As the Court of Appeals explained in *Trincere v County of Suffolk*, "there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (90 NY2d 976, 977 [1997] [quotation marks and citation omitted]). "Instead, whether a dangerous or defective condition exists . . . so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*id.*).

In *Argenio v Metropolitan Transp. Auth.*, this Court denied summary judgment where the plaintiff's toe became caught in a

depression in the floor, measuring two inches in length and width, and one-half inch in depth; we explained that "[w]hile a gradual, shallow depression is generally regarded as trivial [citations omitted], the presence of an edge which poses a tripping hazard renders the defect nontrivial" (277 AD2d 165, 166 [1st Dept 2000]). That description of a tripping hazard is apt in the present case, as well. Similarly, in *Rivera v 2300 X-tra Wholesalers*, this Court affirmed a denial of summary judgment where the metal plate over which the plaintiff allegedly tripped was "no more than one-half inch higher than the floor" (239 AD2d 268 [1st Dept 1997]). Specifically, we held that "[t]here is no rule that a hole in a public thoroughfare must under all circumstances be of a particular depth before its existence can give rise to a legal liability" and that it could not be said as a matter of law "this projection had 'none of the characteristics of a trap or a snare'" (*id.* [citations omitted]). And, in *Elliott v East 220th St. Realty Co.* (1 AD3d 262 [1st Dept 2003]), where the plaintiff alleged that she was caused to trip and fall when her heel got caught in a hole at the edge of a staircase tread, and the defendant claimed the defect was nonactionable because the hole was only one inch in width at its widest point, and one-half inch in depth at its deepest point, this Court denied summary judgment; we explained that even assuming the defendant's measurements of the defect were correct, there were

issues of facts regarding whether the defect was "so sharp and abrupt that a shoe heel could become caught in it" (*id.* at 263; *see also Abreu v New York City Hous. Auth.*, 61 AD3d 420 [1st Dept 2009]; *Tineo v Parkchester S. Condominium*, 304 AD2d 383 [1st Dept 2003]).

The trivial defect cases cited by the majority are distinguishable from this case (*see Schwartz v Bleu Evolution Bar & Rest. Corp.*, 90 AD3d 488 [1st Dept 2011]; *Burko v Friedland*, 62 AD3d 462 [1st Dept 2009]). In *Schwartz*, this Court observed that the showing made by plaintiff on the motion had failed to establish that the asserted gap or height differential between two sidewalk flags "presented a significant hazard" (90 AD3d at 488). Similarly, in *Burko*, the asserted defect, as described by the plaintiff, did not appear to be characterized by a sharp or abrupt rise or edge creating a tripping hazard, and "did not appear to be a trap or snare by reason of its location, adverse weather or lighting conditions or other circumstances" (62 AD3d at 462); additionally, we rejected the assessment of the cited defect by the plaintiff's expert, which was based on the condition of the cited defect more than three years after the accident (*id.*).

The defect at issue here, unlike those in *Schwartz and Burko*, has been clearly established to be a potential trap or

snare, creating a tripping hazard for the unwary pedestrian. When the "width, depth, elevation, irregularity and appearance of the defect" are considered (*Trincere*, 90 NY2d at 978), an issue of fact remains as to whether the protruding piece of metal may be characterized as a trap or a snare such as could, without warning, snag a passerby's shoe.

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

ENTERED: OCTOBER 22, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Freedman, Clark, JJ.

10539 Harold Lopez, Index 301969/08
Plaintiff-Appellant,

-against-

The Actor's Studio, Inc., et al.,
Defendants-Respondents.

[And a Third-Party Action]

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Alexander J. Wulwick, New York, for appellant.

DeCicco, Gibbons & McNamara, P.C., New York (Daniel J. McNamara of counsel), for The Actor's Studio, Inc., respondent.

Ginsburg & Misk, Queens Village (Gerard N. Misk of counsel), for West Wind Enterprises, INC., respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered September 18, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff testified that he was standing on two wooden beams four or five feet above the dirt floor of the basement of a building undergoing renovation, threading electrical cable through metal studs on the wall four or five feet above the beams, when he fell between the beams, striking his shoulder on one of them. He said that no one had directed him to stand on the beams but that it was necessary for him to do so to reach the studs. The president of the general contractor, defendant West

Wind Enterprises, who was at the site almost daily, testified that the dirt floor was, at most, 30 inches below the beams and that a person of average height could have threaded cable through the studs on the wall from a standing position on the floor.

The conflicting testimony presents an issue of fact whether plaintiff, who was 6-feet-1-inch tall, had to elevate himself to perform his task or could have done so standing on the floor, in which event Labor Law § 240(1) would be inapplicable to his case.

In addition, an issue of fact exists whether the accident could have happened as plaintiff described it. Plaintiff testified that the two beams on which he was standing were 16 or 18 inches apart. However, the general contractor's president stated that he measured the distance between the beams and found it to be approximately 10½ inches. The record shows that plaintiff weighed 230 pounds at the time of the accident. Thus, a factfinder could reasonably find that plaintiff could not have fallen between the beams.

Plaintiff's contention that the general contractor's president's testimony was not probative because he did not identify when he inspected the premises is unavailing. The president submitted an affidavit which stated that his beliefs regarding the level of the beams and how the accident occurred were based on measurements he took a few years after the accident, and also on his "personal knowledge of the construction

work ongoing [at] the time of the plaintiff's alleged accident and from [his] personal knowledge of the premises upon which plaintiff alleges to have had his accident." This was sufficient to raise a credibility issue and, accordingly, defeat summary judgment.

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

ENTERED: OCTOBER 22, 2013

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, JJ.

10833 Benito R. Fernandez, Index 111874/11
Petitioner-Appellant,

-against-

Robert Cohen, et al.,
Respondents-Respondents.

Adolph D. Seltzer, New York, for appellant.

Manuel A. Arroyo, New York, for respondents.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered on or about October 19, 2012, denying the petition for a permanent stay of arbitration, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

This proceeding arose in connection with a merger involving nonparty Emerging Vision, Inc., in which companies owned by the parties were shareholders. The merger was to proceed pursuant, inter alia, to a March 30, 2011 "Contribution Agreement" signed by the parties on behalf of their respective companies. However, the parties disagreed over the number of shares owned by Horizons Investors Corp., one of petitioner's companies. Hence, they attached as an exhibit to the Contribution Agreement a list of shareholders and the numbers of their respective shares, with a note stating, "Shares contributed and Units to be issued to Horizons Investors Corp. to be adjusted per Memorandum of

Understanding, dated March 30, 2011, by and among Robert Cohen, Benito R. Fernandez and Harvey Ross." The Memorandum of Understanding (MOI) set forth Horizons' and Emerging Vision's differing "beliefs" as to the number of shares owned by Horizons, and stated that if the dispute was not resolved by June 20, 2011, it would be submitted to binding arbitration.

We reject petitioner's argument that the six-year statute of limitations on respondents' claims has expired because the justiciable controversy arose on December 31, 2003, when Horizons entered into a "Rescission Agreement" with Emerging Vision. Pursuant to the Rescission Agreement, shares and warrants of Emerging Vision owned by Horizons were rescinded in exchange for a promissory note. However, Horizons refused to return the previously issued stock certificate so that a new certificate could be issued reflecting the number of shares it owned as a result of the Rescission Agreement. This refusal to return the stock certificate is of no moment. Respondents' claims arose when petitioner refused to enter into the 2011 Contribution Agreement because it reflected what he asserted was an incorrect number of shares for Horizons.

We reject petitioner's disingenuous arguments that the MOU was not signed by all the necessary parties, because he signed his name only and his companies are not expressly named, and that the MOU did not incorporate, amend, supplement, affect or modify

either the 2003 Rescission Agreement or the 2011 Contribution Agreement. The Contribution Agreement and the MOU were executed at the same time, by the same parties, and for the same purpose, and therefore are, "in the eye of the law, one instrument" (*BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 852 [1st Dept 1985]).

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

ENTERED: OCTOBER 22, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10408 Warberg Opportunistic Trading Fund, L.P., et al., Plaintiffs-Respondents, Index 652332/12

-against-

GeoResources, Inc., Defendant-Appellant.

_____

Simpson Thacher & Bartlett LLP, New York (Joseph M. McLaughlin and Joshua M. Slocum of counsel), for appellant.

O'Melveny & Myers, LLP, New York (Gary Svirsky and Steven Kress of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 11, 2012, affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
David B. Saxe
Helen E. Freedman, JJ.

10408
Index 652332/12

_____x

Warberg Opportunistic
Trading Fund, L.P., et al.,
Plaintiffs-Respondents,

-against-

GeoResources, Inc.,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 11, 2012, which, to the extent appealed from, denied its motion to dismiss the breach of contract cause of action and plea for specific performance.

Simpson Thacher & Bartlett LLP, New York (Joseph M. McLaughlin, Joshua M. Slocum and Patrick M. Connorton of counsel), for appellant.

O'Melveny & Myers, LLP, New York (Gary Svirsky, Steven Kress, Karen L. Koniuszy, Tancred V. Schiavoni and Elizabeth T. Augustine of counsel), for respondents.

ACOSTA, J.

The primary issue in this case is whether a contract's "notwithstanding" clause controls, where the clause would render inoperative a detailed formula in a correlated contract provision. We hold that it does. However, because plaintiffs have adduced evidence that the contract initially included a different floor price – and that defendant altered that price, perhaps due to a scrivener's error – they should be permitted to proceed to discovery. If the error can be confirmed, plaintiffs may be entitled to reformation of the contract. At this stage in the litigation, dismissal would be premature. We therefore affirm the motion court's denial of defendant's motion to dismiss.

On or around June 5, 2008, two institutional affiliates of plaintiff Waterstone Capital Management, L.P. (Waterstone) – among other nonparty investors – entered into a purchase agreement with defendant, GeoResources, Inc. (GeoResources). Waterstone's affiliates are accredited investors as defined by the U.S. Securities Act of 1933. According to the purchase agreement, Waterstone purchased more than 400,000 shares of defendant's common stock and warrants to purchase nearly 200,000 additional shares. A warrant is a contract "entitling the holder to purchase a specified number of shares of stock for a specific

price during a designated time period" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]).

Plaintiffs Warberg Opportunistic Trading Fund L.P. (Warberg) and Option Opportunities Corp. (OOC) – also accredited investors under federal securities law – purchased warrants in GeoResources from nonparty Warrant Strategies Fund on November 19, 2010. Those warrants are, for purposes relevant to this appeal, essentially identical to plaintiff Waterstone's warrants.

Each warrant empowered its holder with the right to purchase a specified number of shares at any time from six months after the purchase date until June 9, 2013, at an exercise price of $32.43 per share. Additionally, each warrant included anti-dilution provisions, which were intended to protect the warrant holder's investment in the event that GeoResources paid a dividend, made a distribution, split its shares, performed a reverse stock split, or merged with another corporation.

Sections 8(f) and 8(h) of the warrants are the anti-dilution provisions that form the centerpiece of the parties' dispute. Section 8(f) contains a formula that provided for the adjustment of the exercise price if GeoResources issued or sold shares for less than the exercise price (of $32.43) or for no consideration at all. The warrants refer to such an issuance or sale as a "Trigger Issuance," presumably because it would trigger the

operation of the adjustment formula. Section 8(h) supplies a different formula by which the number of purchasable warrant shares would be adjusted upon an adjustment of the exercise price.

At the heart of the matter is section 8(h)'s "notwithstanding" clause, which provides a floor price. The clause reads:

> "Notwithstanding any other provisions of Section 8(f) to the contrary, no adjustment provided for in Section 8(f) shall result in a reduction of the Exercise Price to an amount less than $32.43 per Warrant Share (as appropriately adjusted for the occurrence of any events listed in [other anti-dilution clauses of Section 8])."

It may strike the reader as bizarre that Section 8(h) prevents the reduction of the exercise price below $32.43, the exact exercise price initially established in the warrant. It seems that the formula in Section 8(f) would never come into effect because the exercise price could never be reduced. Indeed, this is the core issue, and it will be dealt with in the discussion below.

In November 2009, and again in January 2011, GeoResources sold shares for less than the exercise price of $32.43.[1] Plaintiffs allege that both occurrences constituted trigger

[1] GeoResources sold shares for $10.20 per share in 2009, and for $23.40 per share in 2011.

issuances that required defendant to adjust the exercise price and the number of warrant shares according to the formulas provided, respectively, in Sections 8(f) and 8(h) of the warrants. Thereafter, plaintiffs requested that defendant adjust the quantity of warrant shares.[2] Defendant refused to alter the exercise price or the number of warrant shares, presumably relying on the "notwithstanding" clause in Section 8(h) and claiming that the issuances did not require such adjustments.

Plaintiffs commenced the instant action on July 3, 2012, alleging that defendant breached the contract by failing to adjust the exercise price or the amount of warrant shares, and seeking damages and specific performance.[3]

Defendant moved to dismiss pursuant to CPLR 3211(a)(1) and (7). In opposition to the motion, plaintiffs submitted, inter

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[2] It is unclear whether plaintiffs also demanded that defendant reduce the exercise price in accordance with the 8(f) formula. The complaint only alleges that plaintiffs initially asked defendant to adjust the quantity of warrant shares. However, Section 8(h)'s adjustment formula appears to only operate when an adjustment of the exercise price under Section 8(f) has already taken place.

[3] Plaintiffs included claims of fraudulent inducement, declaratory relief, promissory estoppel, and unjust enrichment. The motion court dismissed those causes of action, granting plaintiffs leave to replead their fraudulent inducement claim. However, plaintiffs failed to do so. Thus, the breach of contract cause of action and plea for specific performance are all that remain relevant to this appeal.

alia, emails dated June 6 and 9, 2008, which were sent to employees of Waterstone with an attached final form of the warrant. In that version, the "notwithstanding" clause of Section 8(h) indicated that the exercise price would not be reduced below *$28.07* per warrant share (rather than the floor price of $32.43 in the other warrants). In their brief, plaintiffs argued that defendant unilaterally altered the floor price, from $28.07 to $32.43, "after the parties had reached agreement, but before hard copies of the Warrants were delivered to the original purchasers (after the closing of the Purchase Agreement)."

The motion court stated that "plaintiff has at least set forth a claim for breach of contract, which may or may not be able to be proven down the line." Therefore, the court declined to dismiss the breach of contract claim and it allowed plaintiffs to retain their demand for specific performance.

Because this is an appeal from the denial of a motion to dismiss under CPLR 3211, we are required to "give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference" (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]). Further, "[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the

asserted claims as a matter of law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks omitted]). Applying these standards to this case, we conclude that plaintiffs have produced sufficient evidence to survive the motion to dismiss.

It is well settled that trumping language such as a "notwithstanding" provision "controls over any contrary language" in a contract (*Handlebar, Inc. v Utica First Ins. Co.*, 290 AD2d 633, 635 [3d Dept 2002], *lv denied* 98 NY2d 601 [2002]; *see also e.g. Bank of N.Y. v First Millennium, Inc.*, 607 F3d 905, 917 [2d Cir 2010] ["This Court has recognized many times that under New York law, clauses similar to the phrase '(n)otwithstanding any other provision' trump conflicting contract terms"]). This Court has likewise noted that "inconsistency provisions" – i.e. those that dictate which of two contract provisions should prevail in the event of an inconsistency – "are frequently enforced by courts" (*Bank of N.Y. Mellon Trust Co., N.A. v Merrill Lynch Capital Servs. Inc.*, 99 AD3d 626, 628 [1st Dept 2012]).

In construing statutes and contracts, the U.S. Supreme Court has remarked that "the use of . . . a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section" (*Cisneros v Alpine Ridge Group*, 508 US 10, 18

[1993]). Thus, the effect of a "notwithstanding" clause will prevail "even if other provisions of the contract[] might seem to require . . . a [conflicting] result" (*id.* at 18-19).

Here, the "notwithstanding" provision in Section 8(h) clearly overrides any conflicting provisions in Section 8(f). To the extent that Section 8(h) sets the floor price of purchasable warrant shares at $32.43 – the initial exercise price listed in the warrant – it renders the adjustment formula in Section 8(f) impotent. To be sure, one is compelled to wonder how Section 8(f)'s formula could have any effect whatsoever if 8(h)'s "notwithstanding" clause prevents the reduction of the initial exercise price of $32.43 to a lower amount. Nonetheless, the "notwithstanding" clause governs the contract, despite the presence of conflicting provisions. Plaintiffs are sophisticated institutional investors, and they could have appreciated the effect of Section 8(h)'s trumping language.

Plaintiffs' assertion that the "notwithstanding" provision leads to an absurd result, because it renders the Section 8(f) formula meaningless, is unfounded. It is true that "[a] reading of [a] contract should not render any portion meaningless" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). However, *Sommer* did not consider the effect of a notwithstanding clause, and the Court of Appeals has set a high bar for declaring a contract

absurd. For example, in *Matter of Wallace v 600 Partners Co.* (86 NY2d 543 [1995]), a lease provision, "[i]f read literally, . . . require[d] that the determination of the rent amount for the first renewal term – which commenced on July 1, 1993 – take place 32 years after the term began, in 2025" (*id.* at 546). Nevertheless, the Court found that "the provision at issue . . . [did] not lead to an absurd result" (*id.* at 545); *see also Jade Realty LLC v Citigroup Commercial Mtge. Trust 2005-EMG*, 20 NY3d 881, 884 [2012] [borrower's interpretation of note resulting in potentially lower prepayment premium for lender in first six years than in seventh through tenth years did "not render the result (t)here absurd"]). Similarly, a "notwithstanding" clause that renders a formula in a corresponding provision inoperative is not absurd. It is possible that GeoResources used boilerplate language in its warrants and simply inserted the $32.43 amount into Section 8(h) rather than deleting the entire provision in Section 8(f). The parties may very well have assented to the agreement on those terms.

Moreover, plaintiffs' contention that Section 8(h) can be read in a manner consistent with Section 8(f) is unavailing. Even if, as plaintiffs argue, Section 8(h) "was simply intended to comply with a NASDAQ rule that limits the number of shares a company may issue without shareholder approval," the warrants

themselves contain no qualifying language to that effect. "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous" (*Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 29 [2008] [internal quotation marks omitted]. "'[T]he question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence'" (*Reiss v Financial Performance Corp.*, 97 NY2d at 199, quoting *Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 157 [2d Dept 1983]).

The warrants in this case are facially unambiguous. The "notwithstanding" clause in Section 8(h) clearly indicates that the formula in Section 8(f) cannot achieve a reduction in the exercise price below $32.43. Consequently, this Court will not look elsewhere for the provision's meaning. Without evidentiary support in the contract itself, plaintiffs' assertion that the trumping language in 8(h) was only intended to comply with a NASDAQ rule cannot be accepted.

Nor can we accept plaintiffs' argument that Sections 8(f) and 8(h) can be reconciled by entitling plaintiffs to "recover the equivalent value that would have otherwise resulted from a change in Exercise Price under Section 8(f)" in a different form of compensation. The warrants themselves provide no support for this claim. For example, whereas Section 8(a) provides for adjustment of the purchasable warrant shares and the exercise

price only, there is no mention of an entitlement to other economic value or monetary compensation. Section 8(b), on the other hand, includes a provision for "Transactional Consideration," whereby the warrant holder would be entitled to "shares of stock, securities, or assets" in the event of a fundamental change in GeoResources. Yet Sections 8(f) and 8(h), the key sections at issue here, appear only to contemplate the reduction of the exercise price and an adjustment of the number of warrant shares. Thus, there can be no other method by which plaintiffs could have been compensated under those anti-dilution provisions.

Despite the dominance of the "notwithstanding" provision in Section 8(h), the evidence that plaintiffs submitted merits denial of defendant's motion. A court can consider evidence submitted in opposition to a motion to dismiss "to remedy defects in the complaint" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). This is because "[m]odern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one" (*id.* [internal quotation marks omitted]). The email and warrant that plaintiffs submitted suggests that, at least with respect to plaintiff Waterstone, the originally agreed upon "notwithstanding" clause in Section 8(h) established a floor price of "$28.07 per Warrant

Share," not $32.43.[4] Whether plaintiffs will be entitled to reformation of the contract depends on the strength of their evidence.

Before a court will grant reformation of a contract, the party demanding this equitable remedy "'*must establish his right to such relief by clear, positive and convincing evidence*'" (*Schultz v 400 Coop. Corp.*, 292 AD2d 16, 19 [1st Dept 2002], quoting *Amend v Hurley*, 293 NY 587, 595 [1944]). The purpose of reformation is not to "alleviat[e] a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties" (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). In order to "overcome the heavy presumption" that the contract embodies the parties' true intent, the party seeking reformation must "show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties" (*id.*).

In the present case, plaintiffs have set forth evidence that

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[4] We note that the email appears to have been sent only to employees of Waterstone and not to Warberg or OOC. Unless there is evidence to prove that the floor price error applies to all plaintiffs' warrants, then the claims by Warberg and OOC should be dismissed because the floor price in their warrants would remain $32.43. However, that is an issue to be determined by the trial court after some discovery.

the trumping language in Section 8(h) of the warrants originally contained a floor price of $28.07, and that defendant unilaterally changed the price to $32.43. It is unclear whether plaintiffs contend that this alleged alteration was due to a scrivener's error or fraud; indeed, they did not replead their fraudulent inducement claim. According to plaintiffs' brief, they contend that "when the Purchase Agreement was signed by the original Warrant purchasers,[5] Section 8(h) provided for a 'floor price' of $28.07." The emails in the record appear to be unsigned, as defendant noted. Nevertheless, a motion to dismiss should not be granted "so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists" (*Rovello*, 40 NY2d at 634).

It is possible that plaintiffs can adduce an executed version of the warrant that contains the alleged $28.07 floor price. If that is the case, the formula in Section 8(f) would become operative and plaintiffs would have a claim for breach of contract. At this juncture, however, it is unascertainable whether plaintiffs can meet the stringent requirements of reformation; discovery ought to reveal whether they are capable

[5] Plaintiffs do not specify who they assert are the original purchasers, but we assume they are referring to Waterstone's affiliates who entered into the purchase agreement with GeoResources.

of doing so. Therefore, the motion court properly denied defendant's motion to dismiss as to the breach of contract claim.

Lastly, with respect to plaintiffs' demand for specific performance, defendant correctly notes that "specific performance is an equitable remedy for a breach of contract, rather than a separate cause of action" (*Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002]). However, plaintiffs' plea for specific performance should not be dismissed due to the improper characterization of a type of relief as a cause of action. Furthermore, "whether plaintiff may be entitled to specific performance is a matter that should be determined by the trial court on a fuller record, not on a motion to dismiss" (*id.*). As in *Cho*, "the same factual issues that remain[] as to plaintiff[s'] breach of contract cause of action underlay plaintiff[s'] plea for specific performance" (*id.*). Plaintiffs may yet be able to prove their breach of contract claim. Thus, the motion court properly denied defendant's motion to dismiss with respect to plaintiffs' specific performance "cause of action."

Accordingly, the order of the Supreme Court, New York County

(Barbara R. Kapnick, J.), entered December 11, 2012, which, to the extent appealed from, denied defendant's motion to dismiss the breach of contract cause of action and plea for specific performance, should be affirmed, without costs.

All concur.

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

ENTERED: OCTOBER 22, 2013

CLERK