SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 13, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

864 & M-1336	People of the State of New York by Eric T. Schneiderman, etc., Plaintiff-Respondent,	Index 451802/12
	-against-	
	Credit Suisse Securities (USA) LLC, formerly known as Credit Suisse First Boston LLC, et al., Defendants-Appellants.	

Cravath, Swaine & Moore LLP, New York (Richard W. Clary of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Steven C. Wu of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 24, 2014, which, insofar as appealed from, denied the motion of defendants Credit Suisse Securities (USA) LLC, f/k/a "Credit Suisse First Boston LLC," DLJ Mortgage Capital, Inc., Credit Suisse First Boston Mortgage Securities Corporation, Asset Backed Securities Corporation and Credit Suisse Mortgage Acceptance Corporation (collectively, Credit

Suisse) to dismiss the complaint pursuant to CPLR 3211(a)(5), affirmed, with costs.

The motion court correctly found that the Attorney General's claims are not time-barred. Credit Suisse was involved in the creation and sale of residential mortgage-backed securities (RMBS) in 2006 and 2007. As of March 21, 2012, the parties entered into a tolling agreement stating that the Attorney General was investigating Credit Suisse's business practices, and that the parties agreed to toll the applicable limitations period for any potential claim by the Attorney General. The tolling period began on March 8, 2012 and ended three years from the agreement's execution date.

On November 20, 2012, the Attorney General commenced this action, interposing causes of action for securities fraud under the Martin Act (General Business Law article 23-A, § 352 *et seq.*) and for persistent fraud or illegality under Executive Law § 63(12). In this complaint, the Attorney General alleges that Credit Suisse failed to abide by its representations that it was taking a variety of steps to ensure the quality of the loans underlying its RMBS. Specifically, the Attorney General alleges, Credit Suisse's actual due diligence process was very different from its public representations about the quality of its due diligence, in that it falsely represented to investors that it

had conducted a thorough examination of loans pursuant to a philosophy of ensuring the borrowers' ability to repay. Further, the Attorney General alleges that while Credit Suisse acknowledged internally the bad quality of the loans that the originators sold, Credit Suisse falsely represented to investors that it "influence[d]" originators to "utilize appropriate origination practices." Credit Suisse also allegedly represented that its quality control process was designed to "increase" the "quality" of loans in its RMBS, though, in reality, Credit Suisse continued to securitize loans from the same originators that its quality control process identified as problematic. The essence of the Attorney General's claims under both Executive Law § 63(12) and the Martin Act is that Credit Suisse made false representations in order to induce investors to purchase the securities.

General Business Law § 353(1) states, "Whenever the attorney general shall believe . . . that any person . . . has engaged in . . . fraudulent practices, he may bring an action . . . to enjoin such person . . . from continuing such fraudulent practices." Moreover, section 353(3) provides, "Upon a showing by the attorney general that a fraudulent practice . . . has occurred, he may include . . . an application to direct restitution of any moneys or property obtained . . . by any such

fraudulent practice."

In turn, Executive Law § 63(12) states, in relevant part, "Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on . . . of business, the attorney general may apply . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, [and] directing restitution and damages."

As originally enacted, however, § 63(12) provided no definition of the term "fraud" (*see* L 1956, ch 592, § 1). Rather, the section's definition of that term was added in 1965 (*see* L 1956, ch 666, § 1) – specifically, "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suspension, false pretense, [or] false promise."

As this Court previously held in *State of New York v Bronxville Glen I Assoc.* (181 AD2d 516, 516 [1st Dept 1992]), the statute of limitations for an action brought by the Attorney General under the Martin Act alleging investor fraud "is six years pursuant to CPLR 213(8), and not three years pursuant to CPLR 214" (*see also Podraza v Carriero*, 212 AD2d 331, 340 [4th Dept 1995], *lv dismissed* 86 NY2d 885 [1995]; *Loengard v Santa Fe Indus. Inc.*, 573 F Supp 1355, 1359 [SD NY 1983]). More recently in *Matter of People v Trump Entrepreneur Initiative LLC* (137 AD3d

409 [1st Dept 2016]), *lv granted* 2016 NY Slip Op 73667[U] [May 17, 2016] (*Trump*) we analyzed the issue of the statute of limitations for claims brought under Executive Law § 63(12). In conducting this analysis, we first noted that the language of §63(12) parallels the language of the Martin Act (*Trump*, 137 AD3d at 417-418). Additionally, we noted, section 63(12) "'did not 'make' unlawful the alleged fraudulent practices, but *only provided standing in the Attorney-General to seek redress and additional remedies for recognized wrongs which pre-existed the statute* []'" (*id.* at 416, quoting *State of New York v Cortelle Corp.*, 38 NY2d 83, 85 [1975]). We further found that "section 63(12) does not encompass a significantly wider range of fraudulent activities than were legally cognizable before the section's enactment" (*Trump* at 418, citing *State of New York v Bronxville Glen I Assoc.*, 181 AD2d at 516). Thus, we concluded, the Attorney General's "fraud claim under [Executive Law] § 63(12) . . . is subject to the residual six-year statute of limitations in CPLR 213(1)" because the section "does not create any liability nonexistent at common law, at least under the court's equitable powers" (*Trump* at 418).

We adhere to that determination here. The conduct targeted under § 63(12) parallels the conduct covered under the Martin Act's definition of fraud in that both the Martin Act and §

63(12) target wrongs that existed before the statutes' enactment, as opposed to targeting wrongs that were not legally cognizable before enactment. Accordingly, § 63(12) is not subject to the three-year statute of limitations under CPLR 214 (*see Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 174 [1984]).

The dissent maintains that the complaint is based on statutory violations encompassing a larger range of claims than were legally cognizable before § 63(12)'s enactment. But, as noted above, and as we noted in *Trump*, the conduct at issue in this action was, in fact, always subject to granting of relief under the courts' equitable powers (*see e.g. People v Federated Radio Corp.*, 244 NY 33, 38-39 [1926]).

Further, CPLR 213(1), rather than CPLR 214(2), is applicable to an Executive Law § 63(12) claim based on a scheme to obtain ownership of distressed properties by means of fraudulent misrepresentations (*Cortelle Corp.*, 38 NY2d 83).

The argument that *Bronxville Glen I Assoc.* and *Cortelle Corp.* have been superseded by *Gaidon v Guardian Life Ins. Co. of Am.* (96 NY2d 201 [2001]), is unavailing (*see Trump*, 137 AD3d at 418). In *Gaidon*, which applied CPLR 214(2) to a General Business Law § 349(h) claim, the Court stated that "General Business Law § 349, *as invoked in this case*, falls in the . . . category" of "claims which, although akin to common-law causes, *would not*

exist but for the statute" (*Gaidon* at 209 [internal quotation marks omitted]).

Contrary to the dissent's conclusion, the complaint sets forth the elements of common-law fraud, including scienter or intent, reliance, and damages. The allegations in the complaint describe a specific scheme whereby Credit Suisse "benefit[ed] [itself] at the expense of investors." As the trial court correctly found, "these claims seek to impose liability on [Credit Suisse] based on the classic, longstanding common-law tort of investor fraud," thus invoking a six-year statute of limitations.

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

ANDRIAS, J. (dissenting)

In November 2012, the State Attorney General commenced this action alleging that defendants violated the Martin Act (General Business Law § 352 *et seq.*) and Executive Law § 63(12) by committing multiple fraudulent and deceptive acts in connection with the promotion and sale of residential mortgage-backed securities (RMBS) through the end of 2007. The majority affirms the denial of defendants' motion to dismiss the complaint as time- barred, finding that the Martin Act and Executive Law § 63(12) claims are governed by the six-year limitation periods of CPLR 213(8) and CPLR 213(1), respectively. Because I believe that the three-year statute of limitations of CPLR 214(2) applies to the Attorney General's claims, as pleaded in this action, I respectfully dissent.

Neither the Martin Act nor Executive Law § 63(12) contains its own statute of limitations. Thus, to determine the applicable statute of limitations, we must examine the complaint to identify "the gravamen or essence of the cause[s] of action" (*Western Elec. Co. v Brenner*, 41 NY2d 291, 293 [1977]).

Where claims are "to recover upon a liability . . . created or imposed by statute" (CPLR 214[2]), and the liability, although akin to common-law causes, "would not exist but for [the] statute" (*Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 174

[1986]), the three-year statute of limitations of CPLR 214(2) applies (*see Gaidon v Guardian Life Ins. Co. of Am.* 96 NY2d 201, 208 [2001][*Gaidon II*]). In contrast, where a statute "merely codifies and affords new remedies for what in essence is a common-law ... claim[,]" CPLR 214(2) does not apply and "the Statute of Limitations for the statutory claim is that for the common-law cause of action which the statute codified or implemented"(*id.* at 208).

In the complaint, the Attorney General alleges, inter alia, that defendants' fraud was their failure to abide by their representations that they had carefully evaluated and would continue to monitor the quality of the loans underlying their RMBS, and that they would encourage loan originators to implement sound origination practices. Instead, defendants routinely ignored defects discovered in their due diligence reviews and did not seek to influence originators to utilize appropriate origination practices, choosing instead to misuse their quality control process to obtain significant monetary settlements from originators, which defendants improperly kept for themselves. Based on this conduct, in the first cause of action, labeled "Securities Fraud - General Business Law Article 23-A", the Attorney General alleges that:

"The acts and practices of Defendants alleged herein

violated Article 23-A of the General Business Law in that Defendants employed deception, misrepresentations, concealment, suppression, fraud and false promises regarding the issuance, exchange, purchase, sale, promotion, negotiation, advertisement and distribution of securities."

In the second cause of action, labeled "Persistent Fraud or Illegality - Executive Law § 63(12)," the Attorney General alleges that:

> "The acts and practices alleged herein constitute conduct proscribed by § 63(12) of the Executive Law, in that Defendants engaged in repeated fraudulent or illegal acts (in violation of, inter alia, the Martin Act) or otherwise demonstrated persistent fraud or illegality in the carrying on, conducting or transaction of business."

These claims, as pleaded, fall within the category of claims that would not exist but for the statutes, creating a new basis for liability, not a new remedy, and the three year statute of limitations of CPLR 214(2) applies (*see Gaidon II*, 96 NY2d at 208-209; *State of New York v Daicel Chem. Indus., Ltd.*, 42 AD3d 301, 303 [1st Dept 2007]).

In *Gaidon II*, the Court of Appeals applied the three-year limitations period of CPLR 214(2) to a General Business Law § 349 claim on the ground that misrepresentations in promotional materials used in selling vanishing premium insurance policies

"did not rise to the level necessary to establish a common-law fraud claim," but were actionable under § 349, "a creature of statute based on broad consumer-protection concerns" (*Gaidon II* at 209 [internal quotation marks omitted]). The Court reasoned that while § 349 "may cover conduct 'akin' to common-law fraud, it encompasses misrepresentations that the Court did not consider sufficiently material to be common-law fraud" but nevertheless could deceive the public. Thus, examining the Attorney General's allegations "as invoked" in the case, the Court explained that:

> "substantive differences between the claims under General Business Law § 349 here and common-law fraud were most pointedly demonstrated by our disposition of those respective causes of action in *Gaidon I*. There, we held that, because of the disclaimers in the promotional illustrations Guardian Life used in selling its vanishing premium policies, the *misrepresentations* in those materials and by sales agents did not rise to the level necessary to establish a common-law fraud claim. Yet we also held that the disclaimers were not sufficient to dispel the deceptiveness of Guardian Life's sales practices with respect to the same illustrations for purposes of alleging violation of General Business Law § 349. Thus, despite plaintiffs' and the Attorney General's contentions to the contrary, it is not merely the absence of scienter that distinguishes a violation of section 349 from common-law fraud; section 349 encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law" (96 NY2d at 209-210).

This rationale applies equally to the General Business Law § 352 securities fraud claim that the Attorney General has pleaded herein.

General Business Law §§ 352 and 353 authorize "the Attorney General to investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York State" (*Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 243 [2009] [internal citations omitted]). General Business Law § 352(1) defines "fraudulent practice" in relevant part as:

> "any device, scheme or artifice to defraud or for obtaining money or property by means of any false pretense, representation or promise, or . . . any deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise, or . . . any practice or transaction or course of business relating to the purchase, exchange, investment advice or sale of securities or commodities which is fraudulent or in violation of law and which has operated or which would operate as a fraud upon the purchaser. . . ."

Because the purpose of the law is to prevent all kinds of fraud in connection with the sale of securities and commodities, "the terms 'fraud' and 'fraudulent practices' [are] to be given a wide meaning so as to embrace all deceitful practices contrary to the plain rules of common honesty, including all acts, even though not originating in any actual evil design to perpetrate fraud or injury upon others, which do tend to deceive or mislead the purchasing public" (*People v Lexington Sixty-First Associates*, 38 NY2d 588, 595 [1976]; *see also People v Federated Radio Corp.*, 244 NY 33, 38-41 [1926]). Thus, unlike an action

for common-law fraud, where "the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]), to state a claim under General Business Law § 352 *et seq.* the Attorney General does not have to allege scienter or intentional fraud, or reliance (*see State of New York v Rachmani Corp.*, 71 NY2d 718, 725, n 6 [1988] ["to establish liability for fraudulent practices in an enforcement proceeding under the Martin Act, the Attorney-General need not allege or prove either scienter or intentional fraud"]; *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 350 [2011] [same]; *State of New York v Sonifer Realty Corp.*, 212 AD2d 366, 367 [1st Dept 1995] ["Even if the disclaimers in the offering plan were sufficiently specific..., they cannot bar claims brought under the Martin Act (General Business Law § 352-c; see, also, Executive Law § 63 [12]), since the fraudulent practices targeted by the statute need not constitute fraud in the classic common law sense, and reliance need not be shown in order for the Attorney General to obtain relief (General Business Law §

352-c[1][c]"]).[1] Furthermore, because the Martin Act does not require a showing of reliance, a disclaimer that may render unreasonable reliance by a private plaintiff investor has no legal significance in an enforcement action brought on behalf of the public (*see State of New York v Sonifer Realty Corp.*, 212 AD2d 366, 367 [1st Dept 1995] ["Even if the disclaimers ... were sufficiently specific..., they cannot bar claims brought under the Martin Act (General Business Law § 352-c; *see also* Executive Law § 63[12]), since the fraudulent practices targeted by the statute need not constitute fraud in the classic common law sense, and reliance need not be shown in order for the Attorney General to obtain relief"]).

The Attorney General's Martin Act claim invoked in this case does not allege scienter or justifiable reliance, and liability would be imposed based solely on a misrepresentation or an omission of a material fact. None of the allegations of the complaint accuses defendants of knowingly or recklessly misrepresenting a fact to an investor in order to deceive that investor (*see Friedman v Anderson*, 23 AD3d 163, 166-67 [1st Dept 2005]). Furthermore, the marketing materials contained clear

[1]Similarly, although equitable fraud does not require scienter, reliance is still an element (*see People v Federated Radio Corp.*, 244 NY at 40-41).

warnings that they should not be relied upon in connection with the purchase of RMBS Certificates and the official offering documents contained the only statements on which the purchaser could rely. Accordingly, as in Gaidon *II*, the claim would not exist at common-law because it makes "actionable conduct that does not necessarily rise to the level of fraud," (*Gaidon II*, 96 NY2d at 209), and the three year limitations period of CPLR 214(2) applies.

To hold that the six year limitations period of CPLR 213(8) applies, the majority relies on *State of New York v Bronxville Glen I Associates*, 181 AD2d 516 [1st Dept 1992], which predates *Gaidon II*. In *Bronxville*, this Court held that a six-year limitations period under CPLR §213(8) applied because "[l]iability for investor fraud was not created by the Martin Act, but is recognized in case law predating that legislation" (181 AD2d 516). The court reasoned that liability was considered to be created by statute if the state established a unique species of liability entirely unknown at common law. Because liability for investor fraud was not created by the Martin Act, but was recognized in case law predating its legislation, the court held that CPLR 214(2) did not apply. However, as defendant's argue, under *Gaidon II*, it is not sufficient for a statutory claim to be merely "recognized" in case law for the

common law statute of limitations to be applied. Rather, *Gaidon II* requires a more searching analysis and reaffirms that a statutory claim "akin to" but sufficiently different from a common law claim is governed by CPLR 214(2)'s three year statute of limitations (*Gaidon II*, 96 NY2d at 208-10; *see also United States ex rel. Bilotta v Novartis Pharms. Corp.*, 50 F Supp 3d 497, 549-550 [SD NY 2014] ["While it may be true that these statutes 'incorporate [ ] already existing standards applied to fraudulent behavior always recognized as such,' this factor is not dispositive, because these statutes 'may in part expand the definition of fraud so as to create a new liability in some instances,' such that C.P.L.R. § 213 applies instead"]).

Furthermore, *Bronxville* relied on *Reusens v Gerard* (160 App Div 625, 627 [1st Dept 1914]), where this Court held that the complaint at issue alleged "all the essentials of an action for fraud and deceit, i.e., a representation by acts for the public, and, therefore, for the plaintiffs, to act upon, falsity, scienter, deception and injury" (*see also Liberty Mut. Ins. Co. v Excel Imaging, P.C.*, 879 F Supp 2d 243, 267 [ED NY 2012] [comparing a 1975 case on which *Bronxville* relied, which had stated that the Martin Act "incorporates already existing standards applied to fraudulent behavior always recognized as such," with *Gaidon II*, which "explained that the liabilities

imposed by the [consumer fraud statute] were different from common-law fraud in several critical ways, since the statute did not require proof of scienter and outlawed conduct that did not necessarily rise to the level of fraud" and holding that CPLR 214(2) applied to insurers' claims under New York's no-fault laws]).

Similarly, under Executive Law § 63(12), the test for fraud is whether the targeted act has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud" (*People v General Elec. Co.*, 302 AD2d 314, 314 [1st Dept 2003]).[2] As with General Business Law § 352 *et seq.*, fraud may be established without proof of scienter or reliance (*see State ex rel. Spitzer v Daicel Chem. Indus., Ltd.*, 42 AD3d at 301-02, 303; *People v American Motor Club*, 179 AD2d 277, 283 [1st Dept 1992], *appeal dismissed* 80 NY2d 893 [1992]).

In *Daicel*, the Attorney General appealed from the dismissal

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[2]Executive Law § 63(12) provides in relevant part: "Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts . . . The word 'fraud' or 'fraudulent' as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions."

of a complaint that the manufacturers conspired to fix the price of food additives. This Court, following *Gaidon II*, held that "[the AG's] second and third causes of action, under Executive Law § 63(12) and General Business Law § 349, were properly found to be time-barred by the three-year statute of limitations. These claims rely on allegations of conduct made illegal by statute, and do not even allege all the elements of common-law fraud, and as such they are covered by CPLR 214(2)" (42 AD3d at 303).

Consequently, because the Attorney General's Executive Law §63(12) claim is derived from the General Business Law § 352 claim, and does not allege scienter or reliance, the three-year limitation period prescribed in CPLR 214(2) also applies (*see United States ex rel. Bilotta v Novartis Pharms. Corp.*, 50 F. Supp. 3d at 547-551; *People, ex rel. Spitzer v Pharmacia Corp.*, 27 Misc. 3d 368, 37 [Sup Ct Albany County 2010] ["An examination of the complaint reveals that the State's allegations fall well short of alleging fraud actionable at common law. The State acknowledged as much in its written submissions and at oral argument. Thus, this is not a case in which the State simply is relying upon the generous remedies made available to the [Attorney General] under [Executive] Law § 63(12), but rather one in which the State seeks to establish liability that arises

solely from statute"]; *People v City Model & Talent Dev.*, 29 Misc 3d 1205(A) [Sup Ct, NY County 2010] ["While the six-year limitation period would apply if the conduct alleged were sufficient to constitute common-law fraud, here the petitioner does not plead the elements of fraud but only statutory violations which do not rise to the level of fraud and, as such, encompass a far greater range of claims that were never legally cognizable before [their] enactment"]; *Cuomo v Empire Prop. Solutions, LLC*, 2011 NY Slip Op 33040[U], *16-17 [Sup Ct, Nassau County 2011]).

Relying on this Court's recent decision in *Matter of People of the State of N.Y. by Eric T. Schneiderman v Trump Entrepreneur Initiative LLC* (137 AD3d 409, 417-418 [1st Dept 2016]), the majority disagrees and holds that a six-year limitations period applies. In *Trump*, which dealt with the issue of whether the Attorney General could bring a standalone fraud claim under Executive Law § 63(12), the panel recognized that fraud under § 63(12) may be established without proof of scienter or reliance, that the Attorney General need not limit itself to a claim for common law fraud only, and that the section defines the conduct that it prohibits and authorizes the Attorney General to commence an action or proceeding to foreclose that conduct. Nevertheless, the panel applied a six years limitations period, on the ground

that § 63(12) "does not create any liability nonexistent at common law, at least under the court's equitable powers ... and does not encompass a significantly wider range of fraudulent activities than were legally cognizable before the section's enactment." However, in light of the holding in *Gaidon II*, which remains the controlling precedent, and our decision in *Daicel*, I do not believe that a six year limitations period always applies to Martin Act and Executive Law § 63(12) claims, where, as here, the complaint does not plead scienter and reliance or is otherwise based on statutory violations that encompass a greater range of claims than was legally cognizable before the statute's enactment.

Nor does *State v Cortelle Corp.* (38 NY2d 83, 88-89 [1975]), cited by the majority on which *Trump* relied, hold that claims brought under § 63(12) are always governed by a six-year limitation period. In *Cortelle*, plaintiff alleged that defendants had induced distressed owners of residences whose mortgages were about to be foreclosed to enter into sale-leaseback agreements by making "representations [that] were willfully false and part of a scheme to obtain the permanent ownership of distressed properties by fraud" (*id.* at 85-86, 89). Although the *Cortelle* court applied a six-year limitation period, it did so after analyzing the nature of plaintiff's claim and

concluding that it was based on longstanding common law principles of fraud, with the Attorney General alleging all elements of the pre-existing "common-law theory of promissory fraud" (*id.* 38 NY2d at 86), which requires proof of both intent and reliance.

Accordingly, as the Attorney General is seeking relief under a broader definition of fraud created by the statutes, defendants' motion to dismiss the Martin Act and Executive Law § 63(12) claims as time barred under CPLR 214(2) should be granted.

M-1336 - ***People of State of N.Y. by Eric T. Schneiderman v Credit Suisse Secs. (USA) LLC***

Motion to file supplemental briefs granted.

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

ENTERED: DECEMBER 13, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1430 Joaquin Burgos, Index 150201/14
Plaintiff-Respondent,

-against-

Premiere Properties, Inc.,
Defendant-Appellant,

D.P. Consulting Corp.,
Defendant.

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Mauro Lilling Naparty LLP, Woodbury (Gregory A. Cascino of counsel), for appellant.

Morgan Levine Dolan, P.C., New York (Duane R. Morgan of counsel), of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about January 5, 2016, which denied defendant Premiere Properties, Inc.'s motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs.

Plaintiff, Joaquin Burgos, a building porter, commenced this action against defendants Premiere, a building management company, and D.P. Consulting Corp., a construction company, for personal injuries he sustained when he tripped over a D.P. tool bag left on a building stairway, causing him to fall. At the time, plaintiff was working for the building's owner, nonparty Promenade Condominiums.

Plaintiff testified that he worked for the owner as a porter responsible for, among other things, cleaning garbage rooms and stairwells on floors 7 through 22 of a residential condominium building located at 530 East 76th Street in Manhattan. On July 30, 2013, plaintiff was traveling between the eighth and sixth floors to obtain a replacement light bulb. He entered the building's internal staircase on the eighth floor, then walked down to the seventh floor landing, where he saw tools, two tool bags, and construction dust from work being performed on the seventh floor. The tool bags were not blocking plaintiff's way, but after turning right to go down the stairs to the sixth floor, he tripped over a bag of tools that he had not seen previously.

Plaintiff also testified that his supervisors both worked for the owner, and that the building was managed by defendant Premiere, which plaintiff claimed "supervises the construction work done in the building." He stated that Joseph Grimes was Premiere's representative in the building, but that Grimes did not supervise him and never asked him to do anything.

Jose Rodriguez, another porter for the owner, testified that in July 2013, there were renovations to the building's hallways, and Grimes was overseeing the project. He also testified that during the week preceding July 30, 2013, the seventh floor stairway door was propped open by a construction cart filled with

tools, that D.P. employees stored their tools in duffle bags on the seventh floor landing, and that there was "construction sand, like dust," on the floor of the landing. He further stated that D.P., not the porters, was responsible for cleaning up the construction dust.

Joseph Grimes testified that he was the owner and CEO of Premiere, and also served as the assistant secretary of the building owner. He stated that Premiere's role was to serve as the "day-to-day management of the building," which included hiring and scheduling repair people, and overseeing the quality of their work. In doing so, Grimes interacted with construction teams, including D.P., on a day-to-day basis, and would let them know if he was displeased with work, make decisions regarding the work, and remind them "to move materials from one place to another so that there was clear access to people's apartments as well as stairways." Grimes was authorized to shut down the job "if there was a dangerous or unsafe condition." He further stated that D.P. was responsible for cleaning up after its own work, but that at the end of each day, the building superintendent (an employee of the owner) "would send [the porters] through the hallways to vacuum and dust." He further testified that before July 30, 2013, he and the superintendent spoke with D.P. workers about "the laying out of tools [in] the

common areas and the construction dust that was left in the common areas," and directed them to correct those issues.

The complaint alleges that Premiere and D.P. were "negligent, reckless and careless in [their] ownership, operation, management, maintenance, control, inspection and repair" of the building, allowing debris to remain on the staircase for an unreasonable amount of time. While the complaint does not specify any applicable Labor Law provisions, the verified bill of particulars alleges, among other things, that the defendants violated Labor Law §§ 200, 240(1), and 241(6).

Premiere moved for summary judgment dismissing the complaint as against it, arguing that the Labor Law claims were abandoned and that it was not liable under the common law because it did not own the building and was not in complete and exclusive control of the management or operation of the building, and did not cause or create the open and obvious condition. It also argued that plaintiff was not covered under the Labor Law because he was not involved in the construction project. Supreme Court denied the motion, stating, among other things, that "it is not clear to the Court what 'labor law' provisions have been alleged to have been violated by [Premiere]," and that only the trier of fact could determine the proximate cause of the accident and

whether Premiere was negligent.

Plaintiff raised no arguments concerning his claims under Labor Law §§ 240(1) and 241(6) either in opposition to defendant's motion or on appeal. Accordingly, those claims are deemed abandoned.

There are issues of fact, however, regarding the Labor Law § 200 claim. "Section 200(1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work" (*Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139, 143 [1st Dept 2012]). Statutory agents of the owner and general contractor are also potentially liable under Labor Law § 200 (*see DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623 [1st Dept 2015]).

Given its responsibilities regarding the construction work - responsibilities that resemble those of a construction manager - there are issues of fact as to whether Premiere was a statutory agent of the owner and general contractor, i.e., whether it exercised general control over the work site (*Rainer v Gray-Line Dev. Co.*, LLC, 117 AD3d 634, 635 [1st Dept 2014]), rather than the exclusive control that it claims on appeal. Premiere CEO Grimes's testimony supports plaintiff's claim that Premiere exercised general control over the work site. Not only did Grimes hire and schedule the repair people and oversee the

quality of their work, but he also interacted with construction teams on a day-to-day basis, told them if he was displeased with work, made decisions about the work, and reminded the teams to move materials around to insure clear access to apartments and stairways. He was authorized to shut down the job "if there was a dangerous or unsafe condition," and before plaintiff's injury he and the superintendent spoke with D.P. workers about not leaving tools and construction dust in the common areas. From theses facts, a jury could find that Premiere exercised general control.[1]

The facts of this case are similar to those in *Voultepsis v Gumley-Haft-Klierer, Inc.* (60 AD3d 524 [1st Dept 2009]). There, the plaintiff was the superintendent of a cooperative apartment building. His employer was the cooperative corporation, and the appellant was the defendant managing agent of the building pursuant to an agreement with the cooperative corporation. The plaintiff was injured while replacing a wooden floor in the building's subbasement, when the ladder he was using slid, causing him to fall to the ground. This Court found that there

[1]Inasmuch as Premiere did not supervise plaintiff, it cannot raise a Workers' Compensation Law Defense even if it is found to be a statutory agent of the owner pursuant to the Labor Law (*Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 525 [1st Dept 2009]).

were issues of fact as to the "scope" of the managing agent's "oversight and control of the work" for statutory agency purposes (*id.* at 525 [internal quotation marks omitted]).

There are also issues of fact as to whether Premiere had constructive or actual notice of the condition that caused the accident, and whether the tool bag that plaintiff tripped over "was readily observable by reasonable use of the senses, considering [plaintiff's] age, intelligence and experience" (*Bodtman v Living Manor Love, Inc.*, 105 AD3d 434 [1st Dept 2013]).

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

ENTERED: DECEMBER 13, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1531 Claudio Vera, et al., Index 156861/12
Plaintiffs-Respondents,

-against-

Low Income Marketing Corp.,
Defendant-Appellant-Respondent,

Skyline Scaffolding Group, Inc.,
Defendant-Respondent-Appellant,

New York Fast General Contracting Corp.,
Defendant.

- - - - -

[And a Third-Party Action]

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for appellant-respondent.

Wade Clark Mulcahy, New York (Georgia Coats of counsel), for respondent-appellant.

Rosenberg, Minc, Falkoff & Wolff, LLP, New York (Jesse Minc of counsel), for respondents.

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about July 16, 2015, which, insofar as appealed from, granted plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim as against defendant Low Income Marketing Corp. (LIMC), denied LIMC's motion for summary judgment dismissing the Labor Law § 88, § 240(1), and § 241(6) claims as against it and on its indemnification claims against defendant Skyline Scaffolding Group, Inc., and denied Skyline's

motion for summary judgment dismissing the common-law negligence claim and LIMC's cross claims against it, modified, on the law, without costs, to grant Skyline's motion, and otherwise affirmed.

The motion court properly granted plaintiffs' motion for partial summary judgment on their Labor Law § 240(1) claim as against defendant owner LIMC, and properly denied LIMC's motion for summary judgment dismissing the Labor Law § 88, § 240(1), and § 241(6) claims as against it. The finding of the Workers' Compensation Board (WCB) that plaintiff Claudio Vera was not an "employee" of the general contractor is not entitled to preclusive effect. Plaintiff has established that he was "employed" within the meaning of the Labor Law, i.e., he was suffered and permitted to work at the job site, entitling him to partial summary judgment on the issue of liability on the section 240(1) claim.

The doctrine of collateral estoppel, or issue preclusion, bars relitigation of issues of ultimate fact where the issues have been conclusively determined against one party in a proceeding where that party had a full and fair opportunity to litigate the issue (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *Gilberg v Barbieri*, 53 NY2d 285, 291 [1981]). As the party seeking to invoke collateral estoppel, it was LIMC's burden to establish identity of issue (*see Parker v Blauvelt Volunteer*

Fire Co., 93 NY2d 343, 349 [1999]).

The WCB found that there was no employer/employee relationship between plaintiff and the general contractor, defendant New York Fast General Contracting Corp. (NY Fast), so as to require NY Fast to provide workers' compensation benefits. There was no identity of issue as to the material question of plaintiff's "employment" at the site, given the different statutory definitions of "employment" in the Labor Law and the Workers' Compensation Law (*see Baker v Muraski*, 61 AD3d 1373, 1374 [4th Dept 2009] [determination by the WCB that the plaintiff was not employed by the defendant was not entitled to preclusive effect as the definitions of "employee," "employer," and "employed" in Labor Law § 2(5) through (7) differ from those of "employer," "employee," and "employment" in sections 201(4) through (6) of the Workers' Compensation Law]). In addition, the WCB made no determination that plaintiff was in any way a "volunteer" at the site. While the dissent would find an issue of fact requiring denial of plaintiffs' motion for partial summary judgment, it agrees that there is no identity of issue between the WCB hearing and this action.[1] We accordingly find

[1]The dissent quibbles over the precise import of the *Baker* decision, but does not dispute that *Baker* held that in view of the differing definitions of "employee" in the Workers' Compensation Law and the Labor Law, there was no identity of

that the determination of the WCB is not entitled to preclusive effect.

Further, plaintiff was entitled to partial summary judgment as against LIMC. For purposes of determining the liability of an owner, such as LIMC, under Labor Law § 240(1), the issue of whether plaintiff was employed by NY Fast or some other entity is of no moment, as long as it is undisputed that plaintiff was "permitted or suffered to work" on the premises on the date of the accident (*Whelen v Warwick Vall. Civic & Social Club*, 47 NY2d 970, 971 [1979]; *see e.g. Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700, 701 [2d Dept 2013]; *Knauer v Anderson*, 299 AD2d 824, 825 [4th Dept 2002]). The owner is liable for a breach of section 240(1) even if he did not supervise or control the work being performed and despite the fact that the person injured was an independent contractor engaged to do the work (*see Haimes v New York Tel. Co.*, 46 NY2d 132 [1978]). The purpose of section 240(1) of the Labor Law is "to minimize injuries to employees by placing ultimate responsibility for safety practices on owners and contractors, rather than on the workers, who as a practical matter lack the means of protecting themselves from accidents"

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issue between a WCB proceeding and a Labor Law action. The further comment the court made concerning the element of payment does not detract from this essential holding.

(*Martinez v City of New York*, 93 NY2d 322, 325 [1999]).

Plaintiff submitted evidence demonstrating that his company was hired by NY Fast to supply containers and that plaintiff was properly at the work site. He testified that he had an agreement with a principal of NY Fast to help load the dumpsters and that he received compensation for doing so. The dissent complains that plaintiff's submissions do not include an affidavit from the NY Fast foreman. However, plaintiff's testimony on the issue is not hearsay and was uncontroverted.[2]

A contractor properly on the site to off-load dumpsters cannot be characterized as a "volunteer." The NY Fast foreman unlocked the street-level entrance door in order to permit plaintiff entry. From there, plaintiff proceeded to a second-floor scaffold where he helped other workers load debris into a container. The NY Fast foreman instructed plaintiff concerning which materials to place in the dumpster, and of course, plaintiff was atop the scaffold at the time of the accident, refuting any suggestion that plaintiff was somehow unauthorized or a volunteer.

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[2]The testimony of Oscar Velasquez, the president and owner of NY Fast, was not probative as Mr. Velasquez was not present at the time of the accident and had no firsthand knowledge concerning how plaintiff was injured or what he was asked or permitted to do at the site.

The sole issue at the workers' compensation hearing was whether plaintiff was an employee of NY Fast so as to be entitled to workers' compensation benefits. The sole finding made by the ALJ was that plaintiff was an "independent contractor" not entitled to receive workers' compensation. The ALJ made no determination as to the scope of that work. Indeed, the ALJ noted that plaintiff testified that "he charges two different bills. . . . [H]e can pay just for the dumpster or a dumpster and personnel to help out." The ALJ did not find that plaintiff's work was "on his own" volition. Plaintiff testified that he was injured when a scaffold collapsed underneath him while he was helping to load a container with construction debris.

LIMC fails to point to any evidence demonstrating that plaintiff was not "employed" on the premises on the date of the accident, and therefore, fails to raise a triable issue of fact. Having established that he was "employed" within the meaning of the Labor Law, plaintiff is entitled to partial summary judgment on the issue of liability on his section 240(1) claim.

The common-law negligence claim must be dismissed as against Skyline, because there is no evidence that Skyline created the condition that resulted in the collapse of the scaffold (*see Urbina v 26 Ct. St. Assoc., LLC*, 12 AD3d 225, 226 [1st Dept 2004]). The record shows that the scaffold did not receive any

code violations following a city inspection and that there were no complaints about the condition of the scaffold after its installation, and plaintiff's testimony establishes that the scaffold was sturdy before the accident.

In view of the foregoing, Skyline is entitled to summary judgment dismissing LIMC's cross claims against it.

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

SWEENY, J.P. (dissenting in part)

The record clearly demonstrates that there is a material issue of fact whether plaintiff Claudio Vera was an employee entitled to the protections of Labor Law § 240(1).

Defendant LIMC hired defendant NY Fast to demolish a building on its premises. NY Fast hired Vera Contracting, owned and operated by plaintiff, to deliver three empty dumpsters to the demolition site and to haul them away when full. Plaintiff stated that he was paid extra to assist with the loading of building debris into the dumpsters. He claimed that this work was done pursuant to an oral agreement with an employee of NY Fast. To perform this work, plaintiff stated that the site foreman unlocked the door to a scaffold erected next to the building by defendant Skyline in order to give him access. After filling two dumpsters and taking them to the dump, plaintiff began filling the third dumpster. He was standing atop the scaffold depositing debris into a dumpster when the scaffold planks collapsed under him, causing him to fall 6 to 10 feet, fracturing his heel bone.

Oscar Velasquez, the president and owner of NY Fast, testified at his deposition that Vera Contracting was hired pursuant to an oral contract "only to drive their truck, drop the container on the street and leave." Vera was to return to pick

up the container once it was filled by NY Fast employees. Velasquez testified that plaintiff was not an employee of NY Fast, had not been hired to work on the site, and did not have the right or permission to enter the demolition site or use the scaffolding. He also denied that plaintiff was paid for working on the demolition site beyond the delivery of the dumpsters. Although not present at the site at the time of plaintiff's fall, he did see plaintiff deliver containers to the site on that day.

After the accident, plaintiff asked Velasquez to file a claim for him through NY Fast's workers' compensation policy but Velasquez refused since plaintiff did not work for NY Fast.

A Workers' Compensation Board (WCB) hearing was held on April 30, 2013. Both plaintiff and Velasquez testified at the hearing consistent with their deposition testimony. The WCB Administrative Law Judge (ALJ) disallowed plaintiff's claim, finding that there was no employer/employee relationship between plaintiff and NY Fast. The ALJ determined that plaintiff was "clearly an independent contractor" and was hired "just to drop off the dumpsters."

The premise underlying the majority's conclusion that plaintiff is entitled to invoke the protections of Labor Law § 240(1) rests on the definitions contained in that statute. The majority contends that plaintiff "established that he was

'employed' within the meaning of the Labor Law, i.e., he was suffered and permitted to work at the job site," as defined in Labor Law § 2(7). As a result, the majority finds he is covered by the provisions of Labor Law § 240(1). However, "[t]o come within the special class for whose benefit absolute liability is imposed upon contractors, owners and their agents to furnish safe equipment for employees under section 240 of the Labor Law, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent" to perform that work (*Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]). Put another way, "[a]lthough the Labor Law defines an individual 'employed' as including one who is 'permitted or suffered to work' (§ 2, subd 7), this definition must be read in conjunction with that of 'employee', which is defined as 'a mechanic, workingman or laborer working for another for *hire*' (§ 2, subd 5)" (*id.*). Evidence that a person is a hired employee, bringing him or her within the special protections of Labor Law § 240, includes the existence of a "voluntary undertaking of a mutual obligation – the employee agrees to perform a service in return for compensation" from the employer, who "may exercise authority in directing and supervising the manner and method of the work" and who usually "decides whether the task undertaken by

the employee has been completed satisfactorily" (*Stringer v Musacchia*, 11 NY3d 212, 215-216 [2008]).

Applying these principles to the facts of this case, there is a material question of fact whether plaintiff falls within the protection of the statute.

The WCB ALJ found after a hearing that plaintiff had not been hired to load debris into the dumpster but had been hired solely to deliver dumpsters to the demolition site and that any other work he performed was done voluntarily. He also determined that no employee/employer relationship existed as between plaintiff and NY Fast. While a determination by the WCB after a hearing may have preclusive effect in subsequent litigation (*Vogel v Herk El. Co.*, 229 AD2d 331, 332-333 [1st Dept 1996]), I agree with the majority that, under these facts, such preclusion is not warranted, since the definition of "employee" in the Workers' Compensation Law, although substantially similar, differs from that in the Labor Law.[1] However, the facts here do

[1]The majority cites in support of this proposition *Baker v Muraski* (61 AD3d 1373 [4th Dept 2009]),a nonbinding memorandum decision which does not explain how, as a matter of law, the difference in definition would have an effect on our decision in any significant way. The *Baker* court provided no examples as to what these differences are. It found that there was no testimony at the WCB as to the element of payment, a requirement of coverage under Labor Law § 240(1) and thus concluded, as we do

not support the majority's conclusion that, as a matter of law, plaintiff was a covered employee under the Labor Law warranting summary judgment in his favor.

The only evidence plaintiff submitted to support his claim that he was working for NY Fast was a hearsay statement that he was "tasked" to help load the dumpster by a Mr. Barrero, a foreman for NY Fast. No affidavit or other evidence from Barrero or any other principal or employee of NY Fast was submitted in support of plaintiff's claim. Hearsay statements cannot be considered as evidence to support a motion for summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 560, 563 [1980]; *Batista v Santiago*, 25 NY3d 326 [1st Dept 2006]). Additionally, no evidence of payment for plaintiff's work by NY Fast or any other entity on the job site for this work appears in the record.

Although the majority dismisses the testimony of Velasquez as "not probative" on the issue of employment, his testimony is equally compelling, if not more so, than that of plaintiff. Moreover, although not preclusive, I must note that despite the majority's contention that the WCB made "no determination that plaintiff was in any way a 'volunteer' at the site" so as to

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here, that there was no identity of issue between the WCB hearing and the subsequent personal injury litigation (*id.*) at 1373-1374).

remove him from the protection of section 240(1), the ALJ specifically found that plaintiff was "hired just to drop off the dumpsters" and that whatever he did after that was "on his own." It is certainly not illogical, as the majority suggests, for a person to properly be on a job site and yet not be an employee of one of the contractors at that site, particularly where, as here, plaintiff was clearly an independent contractor. This, conceededly, does not automatically make him a volunteer. However, at the very least, defendant NY Fast raises a material question of fact that requires the denial of plaintiff's motion for summary judgment (*International Customs Assoc. v Bristol-Meyers Squibb Co.*, 233 AD2d 161, 162 [1st Dept 1996]).

The cases cited by the majority do not support plaintiff's position. In each of those cases, the injured plaintiff was performing the work for which he was hired, whether as an employee or independent contractor and thus, there was no question as to whether he was a "volunteer" or that he was covered by the protections of Labor Law § 240(1).

I would therefore deny plaintiff's motion for partial summary judgment and leave this issue for determination at trial.

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

ENTERED: DECEMBER 13, 2016

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2415N- Index 654137/15
2416N Maxim Inc., et al., 162933/15
Plaintiffs-Respondents,

-against-

Jason Feifer, et al.,
Defendants,

Hearst Newspapers, LLC, et al.,
Proposed Intervenors-Appellants.

- - - - -

Maxim Inc., et al.,
Plaintiff-Respondent,

-against-

Jason Feifer, et al.,
Defendants,

Hearst Newspapers, LLC, et al.,
Proposed Intervenors-Appellants.

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The Hearst Corporation, New York (Jonathan R. Donnellan of counsel), for appellants.

Sack & Sack, LLP, New York (Eric R. Stern of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about May 4, 2016, which, to the extent appealed from as limited to the briefs, denied the motion of nonparty appellants Hearst Newspapers, LLC and Daily News L.P., to intervene in the action bearing Index No. 654137/2015 for the limited purpose of obtaining access to court records, and to

grant public access to certain redacted records, unanimously reversed, on the law, without costs, and the motion granted in accordance with this memorandum. Order, same court and Justice, entered on or about May 3, 2016, which denied the motion of nonparty appellants to intervene in the action bearing Index No. 162933/2015 for the limited purpose of obtaining public access to court records, and to grant public access to the complete case file in this action, unanimously reversed, on the law, without costs, and the motion granted in accordance with this memorandum.

This appeal involves two related actions. In the first action, plaintiffs Maxim Inc. and Sardar Biglari brought claims for defamation, breach of contract, and fraudulent inducement against defendants Jason Feifer and Wayne Gross. In the second action, plaintiff Maxim sought, among other things, to enjoin defendants Feifer and Charna Sherman from disclosing confidential business information. In the first action, plaintiffs redacted several documents before filing them with the clerk's office, and these documents remain redacted. In the second action, the motion court completely sealed the record based on a joint stipulation between the parties, which the court so-ordered. That stipulation did not fully explain the reasons for sealing or make reference to the standards in the applicable court rule. The proposed intervenors, Hearst Newspapers and Daily News, filed

a motion to intervene in each action for the limited purpose of obtaining access to the sealed documents.[1] The motion court denied the motions in identical one-sentence orders which contained no discussion of the press's specific interest or analysis of whether the parties met their burden to justify sealing. These appeals followed, and we now reverse.

This Court has previously held that there is a "broad presumption that the public is entitled to access to judicial proceedings and court records" (*Mosallem v Berenson*, 76 AD3d 345, 348 [1st Dept 2010], citing *Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 501 [2d Dept 2007]). The right of public access includes the right of the press to read and review court documents, unless those documents have been sealed pursuant to a statutory provision or by a properly issued sealing order. To allow them to assert their interests here, the proposed intervenors should be allowed to intervene in both actions for the limited purpose of obtaining access to court records (*see Mancheski* at 501 ["prior to issuance of an order to seal judicial documents, the court is obligated, where possible, to afford news

[1] Because the proposed intervenors did not have access to the redacted documents in the first action and the entire sealed record in the second action, they did not know the contents of each document. This Court obtained the sealed record from the Supreme Court.

media an opportunity to be heard"], citing *Matter of Herald Co. v Weisenberg*, 59 NY2d 378, 383 [1983]).[2]

Furthermore, because confidentiality is the exception and not the rule (*Mancheski* at 501, citing *Matter of Hofman*, 284 AD2d 92, 93-94 [1st Dept 2001]), "the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access" (*Mosallem* at 349, citing *Mancheski* at 502). Having reviewed the record, we see no basis to seal the entire court record in the second action; therefore, we vacate the sealing order. It appears that the motion court sealed the second action because the parties stipulated to it. Before sealing, the motion court should have made its own written finding of good cause, as is required by the provisions of the Uniform Rules for Trial Courts (22 NYCRR) § 216.1(a) (*see Mosallem* at 349-353; *Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1, 6-8 [1st Dept 2000]).

We conclude that there was no basis for the May 3, 2016 order, because the record contains many non-confidential items. For example, the motion court's March 21, 2016 order, which among other things, directed the parties "to extend courtesy to each

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[2] Because the press filed a written motion to intervene for the limited purpose of obtaining public access to court records, we need not address whether this request could have been made orally.

other" and set forth certain scheduling directions, was filed under seal. Nothing in that order involves trade secrets, confidential business information, or proprietary information. Another example of a document which was incorrectly sealed is a request for judicial intervention form, which clearly does not contain any information that would satisfy the good cause requirement. We recognize that it may be easier for the parties and the motion court to seal an entire court record, rather than make a determination on a document by document basis about sealing, but administrative convenience is not a compelling reason to justify sealing. In addition, although the parties might prefer there be no further publicity about this case, that is not a sufficient basis for sealing. While the second action seeks an injunction preventing defendants from making public confidential business information of Maxim's parent company and releasing recordings of business meetings, that allegedly confidential information is not contained in the complaint.[3]

The proposed intervenors on appeal also seek access to several documents that plaintiffs redacted before filing them

[3] It does not appear that the allegedly misappropriated records, photographs, and recordings are in the court record that was obtained by us. If they are in another part of the clerk's office and the parties wish to seal these items, they must, on notice to the proposed intervenors, file a sealing motion.

with the clerk's office. The motion court, in that action, correctly recognized that good cause must be established for sealing, but failed to adequately explain the reason for the redactions. Although it is difficult to discern any basis for redactions in the memorandum of law and affirmation, and the unredacted documents have not been obtained by us, the briefs on appeal fail to provide specific reasons to redact the two documents.

Therefore, as to the first action, to the extent that certain documents remain redacted, plaintiffs are directed to file unredacted copies of the above documents. As to the second action, the sealing order is vacated. While these appeals have been pending, we do not know if other documents have been filed in the second action that might contain confidential business or proprietary information. The clerk shall not release for 10 days from the date of this order, any documents in the second action that have been filed since the May 3, 2016 order, or the unredacted documents in the first action that are the subject of this motion. In the event that any party wishes to continue to redact[4] the previously redacted documents in the first action, or

[4] We recognize there are court rules concerning redaction of personally identifiable information, but those rules are not implicated here.

to seal or redact specific post May 3, 2016 documents in the second action, they shall make this request to the trial court by an order to show cause on notice to the parties and the proposed intervenors, filed within the 10-day time period set forth above, and the trial court shall decide the motion in a written decision that complies with section 216.1(a) of the Uniform Rules for Trial Courts. If such a motion is made within this 10-day period, the clerk shall not release any documents sought to be sealed by that motion until the motion court rules.

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2441 The People of the State of New York, Respondent, Ind. 3714/13

-against-

Sheldon Fenton, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered July 8, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People did not meet their burden of establishing, by clear and convincing evidence, that defendant was actually armed with a dangerous instrument during the commission of the offenses (*see People v Pearce*, 135 AD3d 722 [2d Dept 2016]). Accordingly, 20 points were incorrectly assessed. However, after those points are deducted, resulting in a point score of 75, defendant remains a level two offender, and we find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There

were no mitigating factors that were not adequately taken into account by the risk assessment instrument.

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2442 Kirk Davis, Index 22958/14E
Plaintiff-Respondent,

-against-

Lauren Elizabeth Sanseverino, et al.,
Defendants-Appellants.

_____

Law Office of John Trop, Yonkers (David Holmes of counsel), for appellants.

Scott A. Wolinetz, P.C., New York (Scott A. Wolinetz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered June 4, 2015, which denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

This personal injury action stems from a motor vehicle accident in which plaintiff's car was struck by defendants' car as defendants' car was backing out of a driveway. Lauren Sanseverino previously commenced a timely action in Queens County against Davis, who served an answer in which he asserted an affirmative defense of comparative negligence. That action has been settled. After the applicable three-year statute of limitations had elapsed (CPLR 214[5]), Davis commenced this action against the Sanseverinos.

Plaintiff's attempt to rely on the relation back doctrine to render this independent action timely is improper, since he is not seeking to amend a pleading in a timely-commenced action (*see* CPLR 203[f]; *Buran v Coupal*, 87 NY2d 173, 177-178 [1995]). Plaintiff would have the instant complaint relate back to the date of Lauren's complaint filed *against* him in a *prior* action or, alternatively, to the date of the answer filed by him in that prior action, which did not itself assert any counterclaims. Plaintiff cites no authority supporting such an expansion of the relation back doctrine.

Even if the relation back doctrine did apply, relation back would not be proper because his delay in bringing suit was not due to any "mistake" with respect to defendants' identities, which were known to plaintiff at all relevant times (*see Royce v DIG EH Hotels, LLC*, 139 AD3d 567, 569 [1st Dept 2016]; *Crawford v City of New York*, 129 AD3d 554 [1st Dept 2015]; *Meralla v Goldenberg*, 89 AD3d 645 [1st Dept 2011]).

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2443 In re Landyn M.,

A Dependent Child Under the Age of Eighteen Years, etc.,

Laquanna W.,
Respondent-Appellant,

Jewish Child Care Association of New York,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (James M. Abramson of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about August 31, 2015, which denied respondent mother's motion to vacate her default at a hearing to determine if she violated the conditions of a suspended judgment, thereby freeing the subject child for adoption, unanimously affirmed, without costs.

We decline to reach respondent's argument, advanced for the first time on appeal, that the Indian Child Welfare Act of 1978 (ICWA) applies to the child. Were we to consider this argument, we would find that respondent has failed to show that she or the child is a member or is eligible for membership in an Indian

Tribe such that the ICWA would apply (*see* 25 USC § 1903[4]; *Matter of Cain Keel L. [Derzerina L.]*, 78 AD3d 541, 542 [1st Dept 2010], *lv dismissed* 16 NY3d 818 [2011]).

We likewise decline to reach respondent's arguments, also advanced for the first time on appeal, that her attorney was ineffective for his failure to participate in the hearing, and that her due process rights were violated by proceeding in her absence. Were we to consider these arguments, we would find them unavailing since respondent's attorney made the prudent strategic choice to preserve for her the opportunity to move to vacate the default (*see e.g. Matter of Lenea'jah F. [Makeba T.S.]*, 105 AD3d 514, 515 [1st Dept 2013]). Furthermore, contrary to respondent's contention, the record establishes that she was not dissuaded from bringing the instant appeal.

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2444 William Kitchen, Index 303748/10
Plaintiff-Respondent,

-against-

Crotona Park West Housing Development Fund Corporation, et al.,
Defendants-Appellants.

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Perry, Van Etten, Rozanski & Primavera, LLP, New York (Amara S. Faulkner of counsel), for appellants.

Simon Eisenberg & Baum, LLP, New York (Eric M. Baum of counsel), for respondent.

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Appeal from order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered October 21, 2015, which, in this action for personal injuries sustained when part of the ceiling in plaintiff's apartment fell on his head, denied defendants' motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable order.

Following the filing of a note of issue, defendants moved for summary judgment dismissing the complaint. Supreme Court denied the motion because it was untimely and defendants had failed to demonstrate good cause to excuse the untimeliness (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]); defendants did not appeal from that order.

Defendants moved to reargue and the court denied the motion.

Defendants' appeal from that order must be dismissed since no appeal lies from the denial of a motion for reargument (*see D'Alessandro v Carro*, 123 AD3d 1, 7 [1st Dept 2014]). Furthermore, since defendants did not appeal from the order that denied their motion for summary judgment, their arguments on the merits are not properly before this Court (*see D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]).

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2445 Segundo Quishpi, Index 150289/12
Plaintiff-Respondent-Appellant,

-against-

80 WEA Owner, LLC, et al.,
Defendants-Appellants-Respondents.

- - - - -

80 WEA Owner, LLC,
Third-Party Plaintiff-Appellant,

Air Export Mechanical,
Third-Party Defendant-Respondent.

_____

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for 80 WEA Owner, LLC, appellant-respondent.

Kerley, Walsh, Matera & Cinquemani, P.C., Seaford (Lauren B. Bristol of counsel), for Kras Interior Contracting Corp., appellant-respondent.

Silberstein, Awad & Miklos, PC, Garden City (Joseph Awad of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 29, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on his Labor Law § 240(1) claim and granted defendants' motions for summary judgment dismissing that claim, denied defendants' motions for summary judgment dismissing the Labor Law § 241(6) claim insofar as it is predicated on violations of Industrial Code (12 NYCRR) §§ 23-1.8(c)(1) and 23-3.3(c), and denied defendant 80 WEA Owner, LLC's motion for a default

judgment on its third-party complaint, unanimously modified, on the law, to grant defendants' motions as to the Labor Law § 241(6) claim, and otherwise affirmed, without costs, except as to the denial of 80 WEA's motion for a default judgment, the appeal from which is unanimously dismissed, without costs, as academic. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff was injured during the demolition of an elevator shaft when he tried to take down two 12-foot vertical steel beams topped by a horizontal steel beam approximately two feet long. He cut into the two vertical beams until they fell over in a "V" shape, and the horizontal beam, still attached to them, hit the floor. When plaintiff bent over to sever the horizontal beam from the left vertical beam, the beam sprang up and hit him in the face.

The Labor Law § 240(1) claim was correctly dismissed, because the record demonstrates that plaintiff's injuries were not the result of a failure to provide proper protection against "the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]), but rather the result of the propulsion of the vertical beam upward by "the kinetic energy of the sudden release of tensile stress in the [beam]" (*Medina v City of New York*, 87 AD3d 907 [1st Dept 2011]).

The Industrial Code provisions on which the Labor Law § 241(6) claim is predicated are inapplicable to the facts of this case. 12 NYCRR 23-1.8(c)(1) requires hard hats where there is a risk of "being struck by falling objects or materials or where the hazard of head bumping exists" (*Modeste v Mega Contracting, Inc.*, 40 AD3d 255, 255-256 [1st Dept 2007]). 12 NYCRR 23-3.3(c) requires inspections during demolition of a structure "to detect any hazards ... resulting from weakened or deteriorated floors or walls or from loosened material," which refers to "structural instability caused by the progress of demolition" (*see Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 93 [1st Dept 2012]).

In view of the foregoing, we need not reach 80 WEA Owner's alternative argument as to its motion for a default judgment on the third-party complaint.

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2446 The People of the State of New York, Respondent, Ind. 6342/95

-against-

Johnny Parker, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (William Terrell of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (James M. Kindler, J.), entered September 9, 2014, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence demonstrated that defendant was "armed with a dangerous instrument" at the time of the underlying sexual offenses, justifying the assessment of 30 points under risk factor one (*see People v Pettigrew*, 14 NY3d 406, 409 [2010]). The record supports the inference that, as to the first sexual attack, there was a continuing incident during which defendant pointed a handgun at the victim. In the second sexual attack on the same victim, the circumstantial evidence supported the inference that defendant was likewise armed with a

handgun.

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors on which defendant relied were adequately accounted for in the risk assessment instrument, and were outweighed by the egregiousness of defendant's conduct.

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom. J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2447-
2448 In re LAWS Construction Corp., Index 154730/15
159473/14
Petitioner-Appellant,

-against-

The Contract Dispute Resolution Board, et al.,
Respondents-Respondents.

- - - - -

General Contractors Association of New York, Inc.,
Amicus Curiae.

- - - - - -

In re LAWS Construction Corp.,
Petitioner-Appellant,

-against-

Contract Dispute Resolution Board, et al.,
Respondents-Respondents.

_____

Rich, Intelisano & Katz, LLP, New York (Daniel E. Katz of counsel), for appellant.

Tynia Richard, New York, for the Contract Dispute Resolution Board of the City of New York, respondent.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for City of New York (Department of Parks and Recreation), respondent.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Mark A. Rosen of counsel), for amicus curiae.

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Order and judgment (one paper), Supreme Court, New York County (Ellen M. Coin, J.), entered February 16, 2016, denying the petition seeking to annul a determination of respondent

Contract Dispute Resolution Board (CDRB), dated January 14, 2015, which denied petitioner's claim seeking damages in connection with a construction project, and dismissing the proceeding brought pursuant to article 78, unanimously affirmed, without costs. Order and judgment (one paper), same court and Justice, entered on or about July 8, 2015, denying the petition seeking to annul CDRB's determination, dated May 28, 2014, which denied another claim seeking damages in connection with the project, and dismissing the proceeding brought pursuant to article 78, unanimously affirmed, without costs.

CDRB's determinations that petitioner waived its claims had a rational basis (*see generally Matter of Beck-Nichols v Bianco*, 20 NY3d 540, 559 [2013]). The contract governing the construction project required any request for an extension of time filed by petitioner to include a statement, "in detail," that petitioner "waives all claims except for those delineated in the application, and the particulars of any claims which [petitioner] does not agree to waive." CDRB rationally found that the claims at issue in both proceedings were not set forth with sufficient particularity in the broadly worded list of reserved claims in petitioner's sixth extension request (*see Mars Assoc. v City of New York*, 70 AD2d 839 [1st Dept 1979], *affd* 53 NY2d 627 [1981]).

Petitioner's reliance on the parties' course of conduct as to petitioner's previous five extension requests is precluded by the contractual provision stating that the City of New York and its agents may not be estopped by any decision made by the City's agents, as well as the general "unavailability of estoppel against governmental entities" (*Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 279 [1988], *appeal dismissed & cert denied* 488 US 801 [1988]).

In any event, CDRB rationally determined that petitioner's claim that its replacement of contaminated cover layer materials was made more costly by changes to the design of the golf course under construction, which had occurred during the delay in procuring the materials, was not an extra work claim but a delay damages claim precluded by the no-damages-for-delay clause in the contract (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 313 [1986]; *Commercial Elec. Contrs., Inc. v Pavarini Constr. Co., Inc.*, 50 AD3d 316, 317-318 [1st Dept 2008]).

Petitioner's claim of agency bias is unpreserved and, in any event, unavailing in the absence of any "proof that the outcome flowed from" any alleged bias (*Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 197 [1981], *cert denied* 454 US 1125 [1981]).

We have considered petitioner's remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2450 The People of the State of New York, Ind. 4651/13
Respondent,

-against-

Keith Mitchell,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Ellen Dille of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered August 4, 2014, as amended November 18, 2014, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the first degree (two counts) and jostling, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Daniels*, 9 NY3d 342 [2007]). There is no basis for

disturbing the jury's credibility determinations, including its evaluation of any inconsistencies in testimony.

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2451 Prime Properties USA 2011, LLC, Index 651891/13
Plaintiff-Appellant,

-against-

Laura Richardson et al.,
Defendants-Respondents,

Rubin Associates International Law, P.C.,
Defendant.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

Kellner Herlihy Getty & Friedman, LLP, New York (Thomas Vandenabeele of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered September 12, 2014, which granted the motion of defendants Laura Richardson and Roland Richardson to dismiss the claims against them pursuant to CPLR 327(a), unanimously affirmed, with costs.

Contrary to the Richardsons' contention, this appeal is not moot, even though the court in the parallel French proceeding already issued a decision on the merits after trial. If we had reversed the motion court's decision, this would have affected the parties' rights (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]) – plaintiff and the Richardsons would have been forced to litigate here.

The Richardsons moved to dismiss based on lack of personal jurisdiction and forum non conveniens. "The court should have addressed the issue of personal jurisdiction before forum non conveniens because, if a court lacks jurisdiction over a defendant, it is without power to issue a binding forum non conveniens ruling as to that defendant" (*Flame S.A. v Worldlink Intl. [Holding] Ltd.*, 107 AD3d 436, 437 [1st Dept 2013] [internal quotation marks omitted], *lv denied* 22 NY3d 855 [2013]). New York has specific personal jurisdiction over the Richardsons pursuant to CPLR 302(a)(1) (*see e.g. George Reiner & Co. v Schwartz,* 41 NY2d 648, 653 [1977]; *Kleinfeld v Rand,* ___ AD3d __, 2016 NY Slip Op 6751 [1st Dept 2016]).

The court providently exercised its discretion by granting the Richardsons' forum non conveniens motion (*see e.g. Islamic Republic of Iran v Pahlavi,* 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). At its heart, this case involves real estate located in the French Antilles, not in New York (*see Regal Knitwear Co. v Hoffman & Co.,* 96 Misc 2d 605, 610-611 [Sup Ct, NY County 1978]). The court properly considered the pendency of the French action (*see World Point Trading PTE v Credito Italiano,* 225 AD2d 153, 161 [1st Dept 1996]). "[O]ur courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no

substantial nexus with New York" (*Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 [1972]).

Plaintiff's argument that this case should be remanded to a different justice is rendered academic by our affirmance and the Justice's retirement from the bench; in any event there was no evidence of bias.

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2452-
2453 Metro Foundation Contractors, Inc., Index 600520/09
Plaintiff-Appellant,

-against-

Marco Martelli Associates, Inc.,
Defendant-Respondent.

_____

Bryan Ha Attorney at Law, White Plains (Bryan Ha of counsel), for appellant.

Mastropietro Law Group, PLLC, New York (Robert J. Egielski of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Anil C. Singh, J.), entered May 11, 2015, which, to the extent appealed from, granted defendant's motion for leave to amend its answer and for summary judgment dismissing the complaint, and denied plaintiff's motion for partial summary judgment on its second, third, and fourth causes of action, unanimously affirmed, with costs.

The court properly granted defendant leave to amend its answer to assert the defenses of collateral estoppel and res judicata since plaintiff failed to show that it was prejudiced by the amendment of the answer to assert legal theories not requiring additional discovery or trial preparation (*see Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 60 AD3d 585, 585 [1st Dept 2009]; CPLR 3025[b]).

The court correctly dismissed the breach of contract causes

of action as barred by the doctrine of collateral estoppel (*see Friedman v Park Lane Motors*, 18 AD2d 262, 268 [1st Dept 1963]). The judgment dismissing the action brought by plaintiff in federal court against defendant's surety (based on defendant's alleged failure to pay plaintiff in accord with the contract), although obtained on default, is a proper basis for collateral estoppel since it resulted from plaintiff's willful and repeated refusal to provide discovery in that action (*see Kanat v Ochsner*, 301 AD2d 456 [1st Dept 2003]; *Matter of Abady*, 22 AD3d 71, 85 [1st Dept 2005]). Plaintiff may not re-litigate the contract issues against defendant, because those issues, which plaintiff had a full and fair opportunity to litigate in the federal action but "affirmatively chose not to by [its] own failure to comply with court orders" (*Kanat*, 301 AD2d at 458), are dispositive here.

Plaintiff's claims for quantum meruit and unjust enrichment are precluded by the valid contract between the parties

(*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2454 The People of the State of New York, Ind. 1996N/10
Respondent,

-against-

Jocelyn Pierre,
Defendant-Appellant.

_____

Mischel & Horn, P.C., New York (Monique Ferrell of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered February 9, 2012, as amended March 1, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree (four counts), criminally using drug paraphernalia in the second degree, and three counts each of endangering the welfare of a child and unlawfully dealing with a child, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of six years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no

basis for disturbing the jury's credibility determinations, including its rejection of defendant's claim that the police who executed a search warrant planted various contraband and a large amount of cash in defendant's apartment. The fact that defendant was not convicted of all the charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2455 In re Thelma U.,
Petitioner-Appellant,

-against-

Miko U.,
Respondent-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

_____

Order, Family Court, New York County (Monica D. Shulman, Referee), entered on or about July 10, 2014, which, upon a fact-finding determination, inter alia, dismissed the petition seeking an order of protection due to insufficient evidence of a family offense, unanimously affirmed, without costs.

The determination that respondent's actions did not rise to the family offense of either disorderly conduct or harassment in the second degree is supported by a fair preponderance of the evidence (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]; Penal Law §§ 240.20 and 240.26[3]). The offense of disorderly conduct was necessarily dismissed since none of the acts alleged occurred in public, were intended to cause a public inconvenience, annoyance or alarm, or recklessly created such a risk (*see Matter of Janice M. v Terrance J.*, 96 AD3d 482 [1st Dept 2012]).

As for the offense of harassment in the second degree,

petitioner failed to adduce evidence that would support a finding that respondent engaged in a course of conduct or repeatedly committed acts which alarmed or seriously annoyed petitioner, and which served no legitimate purpose (Penal Law § 240.26 [3]). Petitioner's testimony that respondent had banged on the door because he was locked out did not establish conduct that served no legitimate purpose (*see generally Matter of Marquardt v Marquardt*, 97 AD3d 1112 [4th Dept 2012]). Nor did respondent's use of foul and disparaging language to petitioner, although immature and inappropriate, rise to the level of harassment (*see Matter of Lewis v Robinson*, 41 AD3d 996 [3d Dept 2007]); *see also Matter of Christina MM. v George MM.*, 103 AD3d 935 [3d Dept 2013]). Issues of credibility were properly resolved by the fact-finder (*see Matter of F.B. v W.B.*, 248 AD2d 119 [1st Dept 1998]).

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2460 The People of the State of New York, Ind. 3561N/13
Respondent,

-against-

Terrell Kitt,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Brittany N. Francis of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered September 16, 2014, as amended November 5, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of eight years, unanimously affirmed.

We find that the court properly denied defendant's motion challenging a search warrant. We have reviewed the unredacted search warrant affidavit, and we conclude that it clearly

established probable cause (*see People v Salas*, 29 AD3d 451 [1st Dept 2006], *lv denied* 7 NY3d 794 [2006]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2461 The People of the State of New York, Respondent, Ind. 5345/13

-against-

Ricardo Rodriguez, Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 20, 2014, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and menacing in the second degree, and sentencing him, as a second felony offender to an aggregate term of two to four years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters of strategy, trial preparation and attorney-client consultations that are not reflected in the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. Defendant may not sidestep the requirement of a CPL

440.10 motion, which carries a number of procedural considerations, by simply asking this Court to remand for a hearing to further develop the record. In the alternative, to the extent the existing record 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]).

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2462 The People of the State of New York, Ind. 2464/13
Respondent,

-against-

Jose Barrientos, also known as John Doe,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus J. at plea; Daniel Conviser J. at sentence), rendered August 27, 2015,

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: DECEMBER 13, 2016

CLERK

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

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2463 Julia Irizarry, Index 20626/09
Plaintiff-Appellant,

-against-

St. Barnabas Hospital, et al.,
Defendants-Respondents.

George Piccorelli, M.D., et al.,
Defendants.

_____

Silberstein, Awad & Miklos, PC, Garden City (Chan Park of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered March 6, 2015, dismissing the complaint as against defendants St. Barnabas Hospital, St. Barnabas Community Enterprises, Inc., Olusunmade Adekunle, D.O. s/h/a Ouisukmade Adekuhledo, M.D., and Francisco Solis, D.O. (collectively, St. Barnabas), and bringing up for review an order, same court and Justice, which granted said defendants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

In this medical malpractice action, plaintiff alleges that she sustained injury to her left leg as a result of, inter alia, St. Barnabas staff members' failure to alert the attending

physician, George Piccorelli, M.D., of the many issues plaintiff faced upon her return home before she was discharged from the hospital.

St. Barnabas established, via the testimony of its employees and plaintiff's hospital records, that its staff members, including its social workers and physical therapists, were working under Dr. Piccorelli's supervision in preparing plaintiff for discharge (*see Bialick v Camins*, 135 AD3d 479 [1st Dept 2016]). These workers are not liable to plaintiff, since they may not "ordinarily invade the area of a physician's responsibility" (*Garzione v Vassar Bros. Hosp.*, 36 AD2d 390, 392 [1st Dept 1971], *affd* 30 NY2d 857 [1972]).

Defendants Adekunle and Solis were residents, also working under Dr. Piccorelli's supervision, and had no authority to discharge plaintiff, nor did they exercise any "independent medical judgment" in the decision to discharge her (*see MacDonald v Beth Israel Med. Ctr.*, 136 AD3d 516, 516 [1st Dept 2016]).

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

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2464N Ashley Kozel, Index 350045/15
Plaintiff-Respondent,

-against-

Todd Kozel,
Defendant.
- - - - -
Ira S. Kaufman,
Nonparty Appellant.

Katten Muchin Rosenman LLP, New York (Jay W. Freiberg of counsel), for appellant.

Meister Seelig & Fein LLP, New York (Kevin A. Fritz of counsel), for respondent.

Order, Supreme Court, New York County (Lucy Billings, J.), entered February 24, 2016, which, to the extent appealed from, denied nonparty Ira S. Kaufman's motion to quash a subpoena and for a protective order against further discovery requests, unanimously affirmed, without costs.

As Kaufman failed to establish conclusively that he lacks information to assist plaintiff, the judgment creditor, in obtaining satisfaction of the judgment against defendant, her ex-husband, plaintiff is entitled to pursue discovery against him (*Gryphon Dom. VI, LLC v GBR Info. Servs., Inc.*, 29 AD3d 392 [1st Dept 2006]; *see* CPLR 5223; *see also ICD Group v Israel Foreign Trade Co. [USA]*, 224 AD2d 293 [1st Dept 1996]). Kaufman handled

the closing on a condominium unit originally purchased by an LLC whose sole member was a trust that the Florida court, in rendering the original judgment, concluded was controlled by defendant and funded with marital shares of stock (*see Kozel v Kozel*, 2015 WL 5446389 [Fla Cir Ct 2015]). Moreover, the Florida court issued an asset injunction expressly prohibiting the sale of that condominium, thus implicitly finding that defendant directly or indirectly owned it, and that plaintiff might have a claim to it. Defendant (through the LLC) then sold the condominium to a buyer, whom Kaufman represented in the closing.

Kaufman also argues that the subpoena should be served in a related pending action against the LLC, in which plaintiff seeks a constructive trust and equitable lien on the condominium. The instant enforcement proceeding involves a judgment rendered against defendant, not the LLC, and issues in the proceeding against the LLC may not completely overlap with those in the instant proceeding. Moreover, while discovery was stayed in the LLC proceeding, the instant proceeding has not been stayed, and plaintiff is entitled to disclosure to enforce the judgment (*compare Stern v Carlin Communications*, 210 AD2d 110 [1st Dept 1994]).

Nor is the subpoena impermissibly vague or overbroad, since it seeks only documents relevant to the condominium unit and its

buyer, seller, and occupants, to ensure that defendant did not improperly sell the asset to frustrate plaintiff's efforts to collect on the judgment. Use of the language "including but not limited to," which describes discrete categories of records relevant to defendant's assets, does not render the subpoena overbroad since the request for information is reasonably precise (*see Soho Generation of N.Y. v Tri-City Ins. Brokers*, 236 AD2d 276 [1st Dept 1997]; *see also Donovan v Mehlenbacher*, 652 F2d 228, 230–31 [2d Cir 1981]).

Kaufman cites no authority suggesting that a nonparty attorney is exempt from the standard, or subject to a different standard, on a motion to quash a subpoena. Regarding an attorney's concerns of attorney-client privilege, the trial court instructed Kaufman to submit a privilege log of any documents he withheld on that ground. The court may conduct an in camera review of any purportedly privileged records, as well as any records that Kaufman claims should be withheld as confidential, even if they are not privileged (*see Cunningham & Kaming v Nadjari*, 53 AD2d 520, 521 [1st Dept 1976]; *see also Wise v Consolidated Edison Co. of N.Y.*, 282 AD2d 335 [1st Dept 2001], *lv denied* 96 NY2d 717 [2001]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.6[a]).

Finally, as the court noted, Kaufman was paid, and is not

entitled to more than, the fees required pursuant to CPLR 5224(b).

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2465N Carmen Manzo, Index 20000/15E
Plaintiff-Respondent,

-against-

Nelson Acevedo,
Defendant,

The Guidance Center of
Westchester, Inc., et al.,
Defendants-Appellants.

_____

Stewart Bernstiel Rebar & Smith, New York (Cathleen Kelly Rebar of counsel), for appellants.

Bailly and McMillan, LLP, White Plains (Keith J. McMillian of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 6, 2015, which denied the motion of defendants the Guidance Center of Westchester, Inc., the Guidance Center of New Rochelle, Inc., and the Guidance Center Inc. (collectively, GC) to change venue from Bronx County to Westchester County, unanimously affirmed, without costs.

GC's argument that Bronx County is an improper venue as its placement in that county is tenuous in view of evidence that its employee, defendant Acevedo, was in a rehabilitation facility in Montrose, New York when the pleadings were served upon his mother at her Bronx County residence, is unavailing given the documentation that Acevedo's stay at the rehabilitation facility

was temporary and that he resided with his mother in Bronx County (*see Farrington v Fordham Assoc., LLC*, 129 AD3d 591, 592 [1st Dept 2015]). Nor has GC sufficiently shown that a change of venue was warranted for "the convenience of material witnesses and the ends of justice" (CPLR 510[3]).

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

ENTERED: DECEMBER 13, 2016

CLERK

Tom, J.P., Friedman, Saxe, Feinman, Kahn, JJ.

2466 In re Gilberto Diaz, Ind. 453/11
[M-5142] Petitioner,

-against-

Hon. Arlene Goldberg, etc.,
Respondent.

- - - - -

Cyrus R. Vance, Jr., etc
Nonparty Respondent.

_____

Gilberto Diaz, petitioner pro se.

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

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

DECEMBER 13, 2016

CLERK

Friedman, J.P., Saxe, Richter, Gische, Kapnick, JJ.

2284-
2285 Index 302337/08

Glen Landi, et al.,
Plaintiffs-Respondents,

-against-

SDS William Street, LLC, et al.,
Defendants-Appellants,

_____

Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Christopher Simone of counsel), for appellants.

Fortunato & Fortunato, PLLC, Brooklyn (Louis A. Badolato of counsel), for respondents.

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Orders, Supreme Court, Bronx County (Norma Ruiz, J.), entered December 14, 2015 and December 17, 2015, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
David B Saxe
Rosalyn H. Richter
Judith J. Gische
Barbara R. Kapnick JJ.

2284-
2285
Index 302337/08

_____x

Glen Landi, et al.,
Plaintiffs-Respondents,

-against-

SDS William Street, LLC, et al.,
Defendants-Appellants,
_____x

Defendants appeals from the orders of the Supreme Court, Bronx County (Norma Ruiz, J.), entered December 14 and December 17, 2015, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim as against defendants SDS William Street, LLC, 15 William Street, LLC, Bovis Lend Lease, Inc., Bovis Lend Lease LMB, Inc., and Liberty Mechanical Contractors, LLC, and denied those defendants' motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as against them.

Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Christopher Simone and Jonathan P. Shaub of counsel), for appellants.

Fortunato & Fortunato, PLLC, Brooklyn (Louis A. Badolato and Annamarie Fortunato of counsel), for respondents.

SAXE, J.

This appeal concerns whether Labor Law § 240(1) applies where a heavy pallet jack being maneuvered down a ramp ran over the foot of the worker controlling it, after water on the ramp left him unable to control its descent.

Plaintiff, Glen Landi, who was employed on a construction project site at 15 William Street in Manhattan, was injured in an accident that occurred at the site. Plaintiff explained in his deposition testimony that his employer, Mastercraft, was responsible for erecting interior walls in the three basement levels of the building, designated "C1," "C2," and "C3." A concrete ramp led from street level down to each basement level; plaintiff said the ramp from each level to the next measured about 30 feet long and 20 feet wide. To transport materials from delivery trucks on the street down to the three basement levels, plaintiff was required to use a motorized "pallet jack," an approximately 2,500-pound, 4-foot-wide device capable of lifting and carrying a load of 6,000 pounds. The jack had three wheels: two large wheels, one under each of the jack's two forks and a third, smaller wheel under the steering handle.

To move the jack, plaintiff had to grasp its steering handle and angle it downward from its initial upright position, and then hold down a button on the handle. The jack would stop moving

when he removed his finger from the button or lifted the handle back to the upright position. Plaintiff had been trained to stand directly in front of the jack, with the forks sticking out behind, when maneuvering a load down a ramp, since the load could fall off the jack if the forks were facing the front.

On the date of his accident, May 31, 2007, plaintiff was assigned to transport cinder blocks from street level to level C3. The blocks were packaged on individual skids, and each skid contained slots into which the forks of the jack were inserted. Plaintiff loaded two skids of cinder blocks, which weighed about 3,000 pounds, onto the jack. On his first trip to C3, plaintiff noticed water running down the ramp between the ground floor and C1, which seemed to be caused by "core drilling" being done to create a space for a pipe. On subsequent trips to the basement that day, plaintiff saw that water was building up and accumulating on the ramp between the ground floor and C1, and then between C1 and C2. On his fifth trip to the basement, plaintiff felt his footing worsen, and the jack started sliding a little although it did not seem out of control. Although the jack seemed to be "turning by itself," plaintiff still managed to stop it effectively and guide it down the ramp in a "nice and easy" manner. On perhaps his sixth or eighth trip down to the basement level, plaintiff once again began to descend the ramp in

front of the jack, with the forks and load facing upward, but this time, while descending the ramp between C1 and C2, about five feet below C1, "the jack started picking up speed on its own." The jack accelerated, and although plaintiff lifted the handle in an attempt to stop it, the jack kept sliding down. Although plaintiff tried to get out of its way, he was prevented by the debris and materials on the side of the ramp, which he did not have time to pick his way through. At that point, the front wheel of the jack ran over his right foot. In his affidavit, plaintiff stated that by looking at photographs taken after the accident, he was able to recognize that the weight of the load caused the jack to tip and to "hydroplane," and the load struck a wall.

Plaintiff said he had never been instructed not to use the jack on wet surfaces, and had previously used one outside in the rain, and on snow and ice, without incident.

Plaintiffs moved for partial summary judgment on the injured plaintiff's Labor Law §§ 240(1) and 241(6) claims, and defendants moved for summary judgment dismissing those claims. The motion court granted plaintiffs' motion for partial summary judgment against defendants on the Labor Law § 240(1) claim, and denied defendants' motion for summary judgment dismissing the Labor Law

§§ 240(1) and 241(6) claims, and defendants appeal.[1] We now affirm.

Plaintiff relies primarily on *Aramburu v Midtown West B, LLC* (126 AD3d 498 [1st Dept 2015]), in support of his motion for partial summary judgment on his Labor Law § 240(1) claim; defendants counter that this case is controlled by *Nicometi v Vineyards of Fredonia, LLC* (25 NY3d 90 [2015]), which was issued after our *Aramburu* decision.

In *Aramburu*, the plaintiff and a coworker were guiding a heavy reel of wire down a plywood ramp, when the plaintiff, who was walking backwards in front of the reel, slipped and fell on a patch of ice on the ramp, at which time the reel rolled over his shoulder and neck (*id.* at 499). This Court held that the plaintiff was entitled to partial summary judgment on the issue of liability on his Labor Law § 240(1) claim (*id.*). We rejected the defendant's suggestion that the plaintiff's injuries resulted from slipping on ice, rather than from any elevation-related risk, explaining that the plaintiff's accident was *also* proximately caused by the lack of any safety devices, such as a pulley, to prevent the heavy equipment from being pulled downward due to gravity caused by the significant elevation differential

[1] The dismissal of the complaint as against Rael Automatic Sprinkler Co. Inc. is not at issue on appeal.

(*id.*, citing *Gove v Pavarini McGovern, LLC*, 110 AD3d 601 [1st Dept 2013]).

The Court of Appeals' decision in *Nicometi v Vineyards of Fredonia, LLC* (25 NY3d 90 [2015]), issued shortly after this Court's *Aramburu* decision, does not preclude Labor Law § 240(1) liability here, or even contradict *Aramburu*'s ruling. In *Nicometi*, the plaintiff was standing on stilts to install insulation in a construction site ceiling when he slipped on a patch of ice (*id.* at 94). The Court explained that the plaintiff slipped and fell due solely to the hazardous icy condition, unrelated to his elevated position on stilts, so Labor Law § 240(1) did not apply (*id.* at 96). In applying the rule of a similar, previous case, *Melber v 6333 Main St.* (91 NY2d 759 [1998]), the Court pointed to the line in *Melber* stating that "[t]he protective equipment envisioned by [Labor Law § 240(1)] is simply not designed to avert the hazard plaintiff encountered here," namely electrical conduit protruding from the unfinished floor (25 NY3d at 98, quoting *Melber*, 91 NY2d at 763). Stating *Nicometi*'s conclusion another way, the plaintiff's elevation did not proximately cause his slip and fall; it simply contributed to the distance he fell. Although the plaintiff's elevation at the time he slipped and fell may arguably have contributed to the severity of his injuries, it did not cause his slipping and

falling. Here, contrary to defendants' contention, plaintiff's accident was not due solely to a hydroplaning piece of equipment; it was due to the slide down a slope of a heavy piece of hydroplaning equipment whose traction and braking mechanism were not up to the task.

Consideration of *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]) may also help answer why Labor Law § 240(1) applies although plaintiff was not struck by an object being hoisted or secured. In *Runner*, the plaintiff and his coworkers were assigned to move an 800-pound reel of wire down some stairs, and were instructed to attempt to control its descent by tying a 10-foot rope to the reel, wrapping the rope around a metal bar placed horizontally across a door jamb, and having the other end of the rope held by the plaintiff and his coworkers, putting the plaintiff and his coworkers in the position of counterweights (*id.* at 602). Rather than this makeshift counterweight system controlling the descent of the reel down the stairs, instead, the reel's descent caused the rope to pull the plaintiff uncontrollably into the metal bar, causing injury to his hands (*id.*). Rejecting the analysis suggested by the *Runner* defendants, namely, that Labor Law § 240(1) applies only where workers fall or objects fall on them, the Court explained that "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" (*id.* at 603).

Plaintiff's testimony here established that his accident was proximately caused by the combination of the traction-reducing water condition and the slope, which caused the heavy, loaded pallet jack to slide downhill while the breaking mechanism was rendered useless. The jack, with its built-in braking mechanism, failed to provide him adequate protection against the gravity-related risk inherent in transporting the heavy load down the water-covered ramp. Therefore, defendants failed "to provide adequate protection against" the risk that was created in part by the "'significant elevation differential'" of the ramp (*Aramburu* at 499, quoting *Runner*, 13 NY3d at 603).

It does not avail defendants to argue that there was no safety device that could have been provided by defendants. The jack itself *was* a safety device (*see Guanopatin v Flushing Acquisition Holdings, LLC*, 127 AD3d 812 [2d Dept 2015]), but it proved insufficient to protect plaintiff from circumstances where he had to move a heavy load down a ramp when that ramp was covered with water, which rendered the process more hazardous. Nor can the height differential be said to be de minimis; in that respect, this case is comparable to *Marrero v 2075 Holding Co.*

LLC, 106 AD3d 408, 409 [1st Dept 2013]), where two 500-pound steel beams fell from the top of an A-frame cart that tipped over, and the steel beams landed on the plaintiff's calf and ankle, and this Court held that "[g]iven the beams' total weight of 1,000 pounds and the force they were able to generate during their descent, the height differential was not de minimis."

Finally, any inconsistencies or doubtful details in plaintiff's accounts of the accident do not raise triable issues of fact, since plaintiff is entitled to partial summary judgment in any event (*see Aramburu*, 126 AD3d at 500; *Nerney v 1 World Trade Ctr. LLC*, 140 AD3d 459, 460 [1st Dept 2016] [experts' suggestions that the accident could not have occurred as the plaintiff testified did not prevent summary judgment to the plaintiff, in light of the lack of needed safety devices]; *Lipari v AT Spring, LLC*, 92 AD3d 502, 504 [1st Dept 2012] ["Although there are different versions of how plaintiff was injured, the accident occurred because plaintiff was not given proper protection to prevent his fall"]).

In light of the foregoing, the Labor Law § 241(6) claim need not be addressed (*see e.g. DaSilva v Everest Scaffolding, Inc.*, 136 AD3d 423, 424 [1st Dept 2016]).

Accordingly, the orders of the Supreme Court, Bronx County (Norma Ruiz, J.), entered December 14 and December 17, 2015,

which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim as against defendants SDS William Street, LLC, 15 William Street, LLC, Bovis Lend Lease, Inc., Bovis Lend Lease LMB, Inc., and Liberty Mechanical Contractors, LLC, and denied those defendants' motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as against them, should be affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 13, 2016

CLERK