SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 3, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

2233 Christian Altamirano, Index 400888/04
Plaintiff-Appellant,

-against-

Door Automation Corp.
Defendant-Respondent.

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McMahon, McCarthy & Verrelli, Bronx (Matthew J. McMahon of counsel), for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Howard J. Snyder of counsel), for respondent.

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Judgment, Supreme Court, New York County (Debra A. James, J.), entered August 25, 2008, which, following a jury verdict in defendant's favor, dismissed the complaint, reversed, on the law, without costs, the judgment vacated, the complaint reinstated and the matter remanded for a new trial.

This personal injury action was brought by a security guard at Lincoln Center, who was operating a large motorized door when part of the mechanism for opening the door - a metal arm - broke off and hit him in the head. The defendant, Door Automation Corp. (DAC), had contracted with Lincoln Center to do repairs, and had repaired the door in question eleven times in the year preceding plaintiff's accident. Apparently, DAC informed Lincoln

Center that the doors were being used to push garbage dumpsters - a practice which put undue force on them, and was causing them to repeatedly break. In their initial repair of the door, DAC manufactured an arm and connector for it. DAC did this by copying the existing components. However, while the connector on the existing door was a shear pin (a device designed to break under excess stress), the manual for this type of door required a "Woodruff key," which would prevent the arm from falling in the event that the connection was broken.

In a prior appeal denying DAC's summary judgment motion to dismiss as against it, we found issues of fact as to whether DAC's repairs brought it "within the exception to the rule normally precluding contractual third-party tort liability" (*Altamirano v Door Automation Corp.*, 48 AD3d 308, 309 [2008]).

At the ensuing trial, the court instructed the jury that plaintiff had the burden of proving:

> "One, that the defendant [DAC], was negligent in performing repair services under its contract with Lincoln Center and that such negligence launched a force or instrument of harm; and, two, that the force or instrument of harm that was launched was a substantial factor in causing plaintiff's injury."

The charge repeated the phrase "launched a force or instrument of harm" several times, despite the fact that this language is a quotation from *Moch Co. v Rensselaer Water Co.* (247 NY 160, 168 [1928]), a case addressing the appropriate breadth of the zone of tort liability for third party contractor defendants. On this

appeal, plaintiff contends that by repeating the "launched a force or instrument of harm" language throughout its charge, the court confused and misled the jury, precluding its fair consideration of the facts. We agree.

The court is required to clearly define for the jury what it must find in order to determine whether there was negligence (*see Green v Downs*, 27 NY2d 205 [1970]). A charge must be precise, specifically related to the claim of liability, and it must state and outline separately the disputed issues of fact as the nature of the case and the evidence require (*id.* at 208-209). Here the court's instructions did not concisely explain, in fact-specific terms, what the jury needed to find in order to determine DAC's liability for alleged negligent repair work. Instead, it was both misleading and confusing, because the charge included instructions regarding third party contractors' tort liability. Because the error precluded the jury's fair interpretation of the evidence, we remand for a new trial (*Ortiz v Kinoshita & Co.*, 30 AD2d 334, 337 [1968]; *Placakis v City of New York*, 289 AD2d 551, 552 [2001]).

All concur except Nardelli and Abdus-Salaam, JJ. who dissent in a memorandum by Nardelli, J. as follows:

NARDELLI, J. (dissenting)

Inasmuch as I believe that the court's charge was not confusing and that it did not include extraneous information about tort liability of third party contractors, I would affirm.

In this Court's prior decision (*Altamirano v Door Automation Corp.*, 48 AD3d 308 [2008]), it was stated, "Defendant failed to make a prima facie showing of entitlement to judgment as a matter of law because there are factual issues as to whether defendant's repair of the door created an unreasonable risk of harm to others" (*id.*). The appeal was from a denial of defendant's motion for summary judgment. The record in the prior appeal shows that the motion court had found that there were issues of fact as to whether the repair of the door created an unreasonable risk of harm and this court agreed there were issues of fact precluding the grant of the motion. On a motion for summary judgment, "[i]ssue-finding, rather than issue-determination, is the key to the procedure'" (*Sillman v Twentieth Century Fox*, 3 NY2d 395, 404 [1957], quoting *Esteve v Avad*, 271 App Div 725, 727 [1947]). "If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment" (*Esteve* at 727).

Thus, since this Court denied the motion for summary judgment with a finding that there were factual issues, its inquiry was over. Any other observations made in the decision were, at best, explanations in support of its holding that issues of fact were presented, or, at worse, dicta, that contradict this holding.

Nevertheless, at trial, plaintiff erroneously sought to rely on the dicta when he made his requests to charge. For instance, during colloquy with the court at the charge conference, counsel stated, "[B]ecause what the law is, and what was found by the Appellate Division, is that [it] had a duty." This Court made no such finding as between plaintiff and defendant.

Plaintiff alluded to this Court's prior decision on several occasions during the colloquy, all the while misinterpreting the import of the decision. At one point counsel said, "[T]hey're saying there's a question of fact as to the first [whether defendant's repair of the door created an unreasonable risk of harm to others], and they're saying there's no question of fact as to the second [whether a force or instrument of harm was launched]."

When asked by the court what charge should be offered, counsel said, "I would say that the alternative charge could be that, in undertaking to repair the door, [defendant] had a duty

to not create an unreasonable risk of harm." It is thus evident that the entire premise of plaintiff's objections to the charge, and his own request, was that it had already been determined that, as a matter of law, defendant owed plaintiff a duty. In essence, plaintiff sought a directed verdict - i.e., a ruling that defendant had launched a dangerous instrument, and left for the jury only the virtually academic question of whether the launching of the dangerous instrument created an unreasonable risk of harm.

In pertinent part, the charge stated:

> "Under that contract, the defendant performed repairs to the doors on the garage room belonging to Lincoln Center, and that was on an on-call basis. Now, you heard how defendant Door Automation Corporation would be responsible only to Lincoln Center, the entity with whom it had a contract, and would not be responsible – would have no duty, that is – to the plaintiff, Christian Altamirano, who's not a party to the contract.
>
> "However, jurors there are three exceptions to that rule; that is, three situations in which a party entering into a contract to render services to another may be liable to third parties. Now, jurors, I will instruct you, happily, only with respect to one of the three exceptions, as the other two are not applicable here.
>
> "Now, that exception that constitutes the law applicable to this case is that a contracting party may be liable in negligence to third parties – that is, again, someone who's not a party to the contract – where the contracting

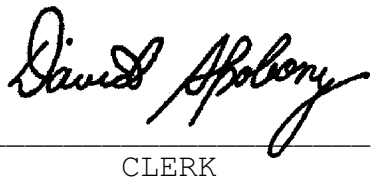
> party, in failing to exercise reasonable care in performing work under that contract, launches a force or instrument of harm that injuries a third person.
>
> "So, in order to recover, jurors, plaintiff Christian Altamirano has the burden of proving: [o]ne, that the defendant, Door Automation Corporation, was negligent in performing repair services under its contract with Lincoln Center and that such negligence launched a force or instrument of harm; and two, that the force or instrument of harm that was launched was a substantial factor in causing plaintiff's injury.
>
> "So, jurors, you must first consider whether defendant Door Automation Corporation was negligent in performing the repair services under the contract that thereby launched a force or instrument of harm.
>
> "If you find that the defendant Door Automation Corporation was negligent in performing the repair services under the contract and thereby launched a force or instrument of harm, you must then consider whether such force or instrument of harm was a substantial factor in bringing about injury to the plaintiff."

This charge accurately tracked the law with regard to when a third-party contractor may have tort liability (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002], and explained to the jurors the circumstances under which they could find applicable the exception to the general proscription against liability for such contractors. Nothing in the charge was incorrect or confusing - defendant could only be liable to plaintiff if the jury found that it had "launched a force or instrument of harm."

Consequently, since the charge was clear and accurate, as given, I would affirm.

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

ENTERED: AUGUST 3, 2010



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Friedman, J.P., Catterson, Acosta, DeGrasse, Abdus-Salaam, JJ.

2076 Edward Beazer, Index 117030/04
Plaintiff-Respondent,

-against-

New York City Health and
Hospitals Corporation, et al.,
Defendants,

Beys Contracting, Inc.,
Defendant-Appellant.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Mark D. Levi of counsel), for appellant.

David Horowitz, P.C., New York (Steven J. Horowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower J.), entered June 15, 2009, which, inter alia, denied defendant Beys Contracting Inc.'s (Beys) motion for summary judgment dismissing the common-law negligence cause of action as against it, affirmed, without costs.

Plaintiff was an employee of the construction manager for a project at Bellevue Hospital. He was injured while using an unguarded power grinder, which was owned by Beys, to cut exposed steel from a concrete floor. Conflicting testimony as to whether plaintiff selected the grinder from his employer's gang box or was given it by Beys presents an issue of fact whether there was

a bailment of the grinder. If there was a bailment, a further triable issue arises as to whether the bailment was one for the mutual benefit of Beys and plaintiff's employer, which would render Beys liable to plaintiff for injuries caused by its negligence in providing him with dangerous equipment, notwithstanding that the defect was patent (*see Fili v Matson Motors*, 183 AD2d 324, 328-329 [1992]; *Dufur v Lavin*, 101 AD2d 319, 324 [1984], *affd* 65 NY2d 830 [1985]; *see also Ruggiero v Braun & Sons*, 141 AD2d 528 [1988], *lv denied* 73 NY2d 707 [1989]). *Vargas v New York City Tr. Auth.* (60 AD3d 438 [2009]) is inapposite, as the ladder lent to the plaintiff by the contractor (Atlantic) dismissed from that case was not alleged to be defective, unlike the grinder at issue here. In addition, Atlantic had no interest in the task the *Vargas* plaintiff was performing. Furthermore, we do not "conflate[]" differing duties of care because the issue is whether, to the extent there was a bailment and to the extent that bailment was one for mutual benefit as opposed to being gratuitous, Beys discharged the higher duty of care it owed to plaintiff.

While we are in basic agreement with the principles enunciated by the dissent, we reach a different conclusion because, in our view, there is an issue of fact whether the

bailment (assuming there was one) was gratuitous or for mutual benefit. Significantly, it is undisputed that Beys was a contractor on the project for which plaintiff's employer served as construction manager. Plaintiff, pursuant to an assignment from his foreman, was using the grinder to perform a task in furtherance of that project, which Beys and plaintiff's employer arguably had a common interest in seeing to completion. In this regard, the record indicates that plaintiff was using the grinder lent by Beys to finish a cement floor, and Beys was the contractor responsible for tiling the floors. Thus, inapposite are cases in which the record established as a matter of law that the bailment was gratuitous in that the bailee was not using the item to accomplish a purpose of mutual benefit to both bailor and bailee (*see Acampora v Acampora*, 194 AD2d 757 [1993], *lv denied* 82 NY2d 664 [1994] [shotgun lent for hunting excursion]); *Ruggiero v Braun & Sons*, 141 AD2d at 529 [meat grinder lent by one provisions dealer to another]).

In fact, comparative analysis of the situation at bar with *Acampora* and *Ruggiero*, the two Second Department cases upon which the dissent relies, provides support for the conclusion we reach. In *Acampora*, the plaintiff borrowed a shotgun from the defendant, his father, to go hunting with a friend in November 1985; the defendant had purchased the shotgun in the early 1960s. During the hunt, the plaintiff was injured when the shotgun

malfunctioned. In concluding that the trial court had charged the jury on the appropriate standard of care, the Second Department stated: "Under these circumstances, it is clear that the loan of the shotgun was a gratuitous bailment" (194 AD2d at 758). The borrowing of a shotgun to go hunting is in no way akin to the present plaintiff's use of a grinder borrowed from Beys to work on the building that both Beys and plaintiff were in the midst of building. Similarly, in *Ruggiero*, the plaintiff, an employee of Meatland, sued Braun for injuries she sustained from a meat grinding machine that Braun had lent to Meatland while the latter's grinder was being repaired. The Second Department held that the evidence was insufficient to support a conclusion that the lending of the meat grinder was a bailment for mutual benefit. Again, and unlike the instant case, Meatland and Braun were not engaged in a common task or seeking to accomplish a common purpose.

The court properly permitted plaintiff to submit a surreply in response to Beys's reply papers, which advanced a certain argument for the first time through a supplemental affidavit by its expert (*see* CPLR 2214[c]; *Matter of Kushaqua Estates v Bonded Concrete*, 215 AD2d 993, 994 [1995]).

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

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

CATTERSON, J. (dissenting)

Because I believe that there is no material issue of fact on the issue of bailment, I respectfully dissent and would grant summary judgment to defendant Beys.

A brief review of the law of bailments is necessary to a resolution of this case because the majority has not set forth any principles of bailments that would control the outcome of this dispute.

> "As this Court stated in Martin v. Briggs (235 AD2d 192, 197 [1997]): A '[b]ailment does not necessarily and always, though generally, depend upon a contractual relation. It is the element of lawful possession, however created, and duty to account for the thing as the property of another that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not.' (Foulke v. New York Consolidated R.R. Co., 228 N.Y. 269, 275 [1920]). A bailment 'may arise from the bare fact of the thing coming into the actual possession and control of a person fortuitously, or by mistake as to the duty or ability of the recipient to effect the purpose contemplated by the absolute owner.' (Phelps v. People, 72 N.Y. 334, 358 [1878]). A bailment 'may be created by operation of law. It is the element of lawful possession, and the duty to account for the thing as the property of another, that creates the bailment, whether such possession results from contract or is otherwise lawfully obtained. It makes no difference whether the thing be intrusted to a person by the owner or by another. Taking lawful possession without present intent to appropriate creates a bailment'."

Pivar v. Graduate School of Figurative Art of N.Y. Academy of Art, 290 AD2d 212, 212-213, 735 N.Y.S.2d 522, 524 (1st Dept. 2002).

It is beyond dispute that "[a] gratuitous bailment is, by definition, the transfer of possession or use of property without

compensation." Fili v. Matson Motors, 183 AD2d 324, 328, 590 N.Y.S.2d 961, 963 (4th Dept. 1992); see also Leventritt v. Sotheby's, Inc., 5 AD3d 225, 773 N.Y.S.2d 60 (1st Dept. 2004).

A bailment for hire for the mutual benefit of both parties, on the other hand, requires the same transfer of possession or use of property, but either payment by the bailor to the bailee or a tangible benefit conferred upon both parties by nature of the bailment itself. Fili, 183 AD2d at 328-329, 590 N.Y.S.2d at 963-964; see e.g. Mack v. Davidson, 55 AD2d 1027, 391 N.Y.S.2d 497 (4th Dept. 1977); Jays Creations v. Hentz Corp., 42 AD2d 534, 344 N.Y.S.2d 784 (1st Dept. 1973).

In the instant case, plaintiff contends, and the majority accepts the premise, that the defendant Beys, as bailor, may be liable to plaintiff, as bailee, for an injury sustained by plaintiff while using the very article that was the subject of the bailment. In my view, this theory conflates the duty of care imposed on the bailee with respect to the chattel bailed, with that of the duty of the bailor to third parties to create a theory of liability on the bailor for personal injury to the bailee.

In a gratuitous bailment, the bailee is only liable to the bailor for the bailee's "gross or wanton negligence." Linares v. Edison Parking, 97 Misc 2d 831, 832, 414 N.Y.S.2d 661, 662 (Civ. Ct., N.Y. County 1979). This is normally applied to the bailee's

conduct concerning the bailed chattel itself. I could find no authority for the proposition that the bailor owes a bailee any concomitant duty in a gratuitous bailment, but for a duty to warn of known defects that were not readily discernable. Acampora v. Acampora, 194 AD2d 757, 599 N.Y.S.2d 614 (2d Dept. 1993), lv. denied, 82 NY2d 664, 610 N.Y.S.2d 151, 632 N.E.2d 461 (1994).

In a bailment for hire for the mutual benefit of both bailor and bailee, the Third Department has held that the bailor "who supplied the chattel for his own business purpose, owes a duty to exercise reasonable care to make the chattel safe for the intended use." Snyder v. Kramer, 94 AD2d 860, 861, 463 N.Y.S.2d 591, 593 (3d Dept. 1983); see Dufur v. Lavin, 101 AD2d 319, 476 N.Y.S.2d 389 (3d Dept. 1984), aff'd, 65 NY2d 830, 493 N.Y.S.2d 123, 482 N.E.2d 919 (1985). Initially, it should be noted that no other Department has articulated this standard vis-a-vis the bailor's duty to the bailee. The standard of reasonable care running from bailor to bailee articulated in Snyder and Dufur seems to be derived from the line of cases imposing such a duty on a bailor *with respect to third parties*, or a commercial lessor "in the business of placing products into the stream of commerce." Winckel v. Atlantic Rentals & Sales, 159 AD2d 124, 129, 557 N.Y.S.2d 951, 954 (2d Dept. 1990). Neither scenario is presented here.

In my view, Beys at best was either a gratuitous bailor or a casual lessor of the grinder. As such, while Beys could only be "liable for ordinary negligence on a theory of failure to warn, '[a]t most, the duty of a casual or occasional seller [or lessor] would be to warn the person to whom the product is supplied of known defects that are not obvious or readily discernable.'" Burns v. Haines Equip., 284 AD2d 922, 923, 726 N.Y.S.2d 516, 519 (4th Dept. 2001), quoting Sukljian v. Ross & Son Co., 69 NY2d 89, 97, 511 N.Y.S.2d 821, 825, 503 N.E.2d 1358, 1362 (1986) (no liability where safety guard obviously removed from loading machine); see also Ruggiero v. Braun & Sons, 141 AD2d 528, 529 N.Y.S.2d 144 (2d Dept. 1988), lv. denied, 73 NY2d 707, 540 N.Y.S.2d 238, 537 N.E.2d 623 (1989) (no liability where safety guard removed from meat grinder, danger was patent); Sofia v. Carlucci, 122 AD2d 263, 505 N.Y.S.2d 178 (2d Dept. 1986) (no liability where absence of safety railings was patent).

Consistent with the above precedent is the principle that there is no duty to warn where "the injured party is already aware of the specific hazard." Yong Hwan Chae v. Lee Natl. Corp., 261 AD2d 240, 240, 690 N.Y.S.2d 238, 239 (1st Dept. 1999) (internal quotation marks and citation omitted).

Plaintiff testified that he was fully aware that the grinder was missing its original safety guard at the time he received it from Beys. Indeed, this case is factually indistinguishable from

Ruggiero, and Sofia, where the Second Department found no liability on behalf of the bailor. Thus, whether it is a gratuitous bailment or a casual lease of the grinder, Beys had no duty to warn plaintiff of the missing guard.

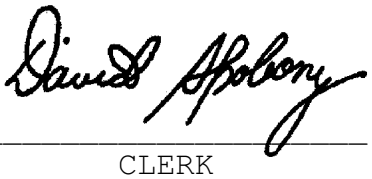
The majority's contention that "plaintiff . . . was using the grinder to perform a task in furtherance of [the] project, which Beys and plaintiff's employer arguably had a common interest in seeing to completion," simply has no support in the record but for plaintiff's counsel's argument. An examination of the record citation behind plaintiff's position that Beys would suffer adverse financial consequences if plaintiff did not perform his own work using Beys's grinder discloses only that the construction manager was responsible to coordinate the trades and "take the necessary measures to eliminate the circumstances which may lead to a delay." Indeed, the record contains the contract between the owner and the construction manager, but no complete contract for Beys. Similarly, no one, including the majority, cites to any Beys contract provision which supports the novel proposition that Beys, as a subcontractor, was in some way united with all of the other subcontractors and the construction manager, in "common interest."

Finally, in attempting to distinguish Acampora and Ruggiero, because they did not involve a mutual benefit, the majority draws

the wrong lesson from both cases. Both cases, as well as the remaining precedent cited above, stand for the proposition that without proof of record of a tangible financial benefit to the bailor from the bailment itself, the bailor's duty is limited to the above described duty to warn.

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

ENTERED: AUGUST 3, 2010



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Tom, J.P., Andrias, Friedman, Nardelli, Catterson, JJ.

2118 Agnes Lee Ghin, Index 112713/03
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent,

Con Edison Company of New York Inc., et al.,
Defendants.

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

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondent.

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Amended judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered October 3, 2008, dismissing the complaint, unanimously affirmed, without costs.

The City had no prior written notice of the sidewalk condition, and no exception to the notice requirement applied (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]).

Plaintiff's notice of claim failed to give notice of the theory that inadequate lighting or the scaffolding by which the City allegedly made special use of the sidewalk, caused plaintiff's fall (*see Chieffet v New York City Tr. Auth.*, 10 AD3d 526, 527 [2004]; see also *Semprini v Village of Southhampton*, 48 AD3d 543, 544 [2008]). Although the notice of claim stated that plaintiff tripped on a raised metal plate, it did not allege, nor

did plaintiff present any proof at trial, that the City derived any special benefit from the metal plate (*see Poirier v City of Schenectady*, 85 NY2d 310, 314-315 [1995]; *Schleif v City of New York*, 60 AD3d 926, 928 [2009]; *Smith v City of Syracuse*, 298 AD2d 842, 842 [2002]). Nor did plaintiff establish that the City derived any special use from the scaffolding or the fence.

Plaintiff's claim on appeal that the City created the defect or hazard through an affirmative act of negligence is unavailing (*see e.g. Yarborough v City of New York*, 10 NY3d 726 [2008]). It is only by speculation that a jury could find that the dangerous sidewalk condition was the immediate result of the City's actions (*see Oboler v City of New York*, 8 NY3d 888, 888-890 [2007]; *Brooks v Village of Horseheads*, 14 AD3d 756 [2005]).

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

ENTERED: AUGUST 3, 2010

CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2917 In re Brandon C.,

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

_____

Frederic P. Schneider, New York, for appellant.

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

_____

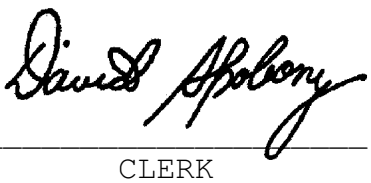
Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about May 28, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed an act which, if committed by an adult, would constitute the crime of criminal trespass in the third degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The evidence establishes that although appellant had been a guest of a tenant earlier in the evening, he had been asked to leave at least a half hour earlier and did not have permission to return

to - or privilege to be in - a Housing Authority building at the time of his encounter with the police. Appellant's version of what occurred differed in part from that of other witnesses, but did not establish lawful presence on the premises.

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

ENTERED: AUGUST 3, 2010



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Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2969 Rui Salsinha, et al., Index 105106/07
Plaintiffs-Appellants,

-against-

Malcolm Pirnie, Inc., et al.,
Defendants-Respondents.

_____

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

Law Offices of Charles J. Siegel, New York (Peter E. Vairo of counsel), for Malcolm Pirnie, Inc., respondent.

Fabiani Cohen & Hall, LLP, New York (Mary J. Joseph of counsel), for municipal respondents.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 1, 2009, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing plaintiff's Labor Law § 241(6) and Labor § 200 and common-law negligence claims, unanimously modified, on the law, to deny so much of the motion as sought to dismiss the Labor Law § 241(6) cause of action, and otherwise affirmed, without costs.

Defendant Malcolm Pirnie Inc. contends that, as the construction manager on the project, it cannot be held liable under Labor Law § 241(6) (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). We find that whether Pirnie is subject to statutory liability in this case cannot be determined as a matter

of law, in view of the terms of Pirnie's contract with defendant Department of Environmental Protection (DEP), which permitted Pirnie to choose subcontractors, and the testimony of the safety engineer for the injured plaintiff's employer that Pirnie was in charge of construction (while another entity hired by DEP was in charge of safety inspection) (*see Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428 [2007]).

The Labor Law § 200 and common-law negligence claims were correctly dismissed, since the record demonstrates that the injured plaintiff's injuries arose from the manner in which plaintiff performed his work, not from a defective condition of the workplace, and that none of the defendants exercised any control over plaintiff's work methods (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Blessinger v Estee Lauder Cos.*, 271 AD2d 343 [2000]).

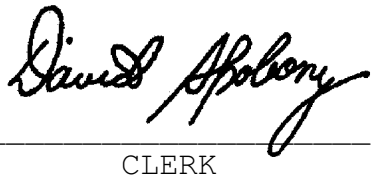
While the other Industrial Code (12 NYCRR) provisions relied on by plaintiff are either inapplicable to the facts of this case or insufficiently specific to permit recovery under Labor Law § 241(6), the record presents issues of fact that preclude summary dismissal of the section 241(6) claim insofar as it is based on an alleged violation of 12 NYCRR 23-9.2(a). This provision "imposes an affirmative duty on employers to 'correct[] by necessary repairs or replacement' 'any structural defect or unsafe condition' in equipment or machinery '[u]pon discovery' or

actual notice of the structural defect or unsafe condition" (*Misicki v Caradonna*, 12 NY3d 511, 521 [2009][quoting the regulation]). The record demonstrates that the driver's side door of the truck plaintiff used could not be opened from the inside; that, as a result, plaintiff had begun starting the truck while sitting in the driver's seat with one leg outside to keep the door from closing; and that on the day of the accident the truck moved while plaintiff was in that position, plaintiff fell onto the ground, and one wheel of the truck rolled over him. Whether the inability to open the truck door constitutes a "structural defect or unsafe condition" within the meaning of 12 NYCRR 23-9.2(a) and, if so, whether this structural defect or unsafe condition was the proximate cause of plaintiff's injuries must be determined by a factfinder (*see Misicki*, 12 NY3d at 521). Contrary to defendants' contention, their own lack of notice of the condition of the truck door is of no moment, since the record demonstrates that plaintiff's employer had been alerted to the problem before the day of the accident (*see id.*; *Leon v Peppe Realty Corp.*, 190 AD2d 400, 408-409 [1993]). We note that

defendants have not challenged the application of subpart 23-9 of the Industrial Code (which includes section 23-9.2) to a truck of the kind involved in the subject incident.

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

ENTERED: AUGUST 3, 2010



CLERK

Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2299 Yan Ping Xu, Index 109534/08
Petitioner-Appellant,

-against-

The New York City Department of Health,
Respondent-Respondent.

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Yan Ping Xu, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered January 29, 2009, modified, on the law, the petition reinstated, the matter remanded for further proceedings consistent herewith, and otherwise affirmed, without costs.

Opinion by Nardelli, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Eugene Nardelli
James M. Catterson
Leland G. DeGrasse
Sallie Manzanet-Daniels, JJ.

2299
Index 109534/08

_____x

Yan Ping Xu,
Petitioner-Appellant,

-against-

The New York City Department of Health,
Respondent-Respondent.
_____x

Petitioner appeals from the order and judgment (one paper) of the Supreme Court, New York County (Paul G. Feinman, J.), entered January 29, 2009, which granted respondent's motion pursuant to CPLR 7804(f) and 3211(a)(7) to dismiss petitioner's CPLR article 78 proceeding seeking reinstatement to her former position with back pay and removal of an unsatisfactory rating, and denied petitioner's cross motion for leave to file a late notice of claim.

Yan Ping Xu, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein and Leonard Koerner of counsel), for respondent.

NARDELLI, J.

In this article 78 proceeding the pro se petitioner alleges that she was terminated from her employment with the New York City Department of Health after reporting evidence of alleged wrongdoing in the accumulation of data concerning the distribution of child vaccines in New York City. Her petition was dismissed for several reasons, including failure to exhaust administrative remedies, failure to establish that she reported the wrongdoing to the appropriate authorities, and failure to file a timely notice of claim.

On this record we cannot determine as a matter of law that petitioner either failed to exhaust administrative remedies or take the necessary steps to protect her whistleblower status. Accordingly, we remand the petition for a hearing on these issues, and also for further consideration of the merits of her request to file a late notice of claim.

The following factual recitation, to which we accord deference in assessing the City's motion to dismiss, is taken from the petition. It is axiomatic that, on a motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit

within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

On June 4, 2007, petitioner was hired as a City Research Scientist for the Vaccine for Children Program (VFC) of the City of New York's Bureau of Immunization (BOI), a division of the Department of Health and Mental Hygiene (DOH). She alleges that her duties primarily involved data analysis and improving the methodology by which the databases were formulated in the storage and handling of vaccines in City schools. During her nine months of employment she did not receive any formal performance evaluations, but claims to have informally received verbal and written compliments from her superiors.

She prepared a VFC Annual Program Management Survey Qualification report at the request of her supervisor, the Deputy Assistant Commissioner for the BOI, on February 29, 2008. Petitioner contends that the report exposed the fact that significantly inaccurate data had been submitted to the Center for Disease Control and Prevention (CDC) for many years, and that one of the reasons for the data inaccuracy was that the BOI did not comply with the CDC guideline, which requires that the Provider Enrollment Form be signed annually and the Provider

Profile be updated annually. Petitioner further alleged that on March 4, 2008 she reported to her supervisor that she had uncovered data discrepancies which had been reported to the CDC, and these discrepancies indicated that BOI personnel were not following CDC's rules.

Petitioner claims that as a result of her reports she was terminated less than two weeks later, by letter dated March 13, 2008, although her performance evaluation was not dated until March 14, 2008, the day after her termination. The evaluation, covering the period June 4, 2007 through March 14, 2008, rated her work unsatisfactory in areas relating to her ability to conduct scientific research and work with other personnel to develop strategies and operational plans, and her willingness to accept work assignments. Neither the evaluation report nor the letter of termination advised petitioner of any process for challenging her termination, although the evaluation did recite that petitioner could offer a written rebuttal "for future reference."

This proceeding was commenced on July 14, 2008, and was amended twice on August 19, 2008, and September 8, 2008. The petition sought removal of the unsatisfactory ratings,

reinstatement and back pay. The essence of petitioner's claims is that the termination was made in bad faith because she exposed wrongdoing in VFC's reporting of data to the CDC, and that this inaccurate reporting presented a clear danger in that children were not being immunized.

By notice of motion dated September 30, 2008 and filed January 29, 2009, respondent DOH moved to dismiss the three petitions. Respondent contended that the petitions should be consolidated and dismissed because a notice of claim, which had not been filed, is a precondition to bringing a whistleblower's claim against the City. Additionally, respondent argued the claim was inadequate because under Civil Service Law § 75-b (the Whistleblower's Law) a report of wrongdoing to a supervisor alone is insufficient. Respondent claims the employee must also have made a report both internally to "the appointing authority" and to a "governmental body." Respondent also contended that petitioner had been hired subject to a one-year probationary period, and had failed to state a claim that she had been terminated in bad faith, citing Personnel Rules and Regulations of City of New York (55 RCNY) Appendix A, R 5.2.1(a). That Rule also requires that "[a]ppointees shall be informed of the applicable probationary period."

Petitioner opposed the motion, and, by notice dated November 11, 2008 (eight months after her March 13, 2008 termination), cross-moved for leave to file a late notice of claim and amended petition, and annexed a proposed notice of claim. She denied that at the time of her termination she was still a probationary employee, since she had completed what she contends was the applicable six-month period. Petitioner also contended that she had given notice of her whistleblower claim within 90 days of her termination.

The motion court found that the petition was improperly commenced because it was served before it was filed in violation of CPLR 304(a). Nevertheless, the court recognized that petitioner was self-represented and did not use this finding as a basis for its ultimate disposition of dismissal.

The court noted that respondent had not submitted an affidavit from petitioner's supervisor or any person with knowledge of her work, while petitioner had produced copies of e-mails and notes showing positive statements had been made by her supervisor and others concerning her work, and nothing in these showed she was failing to meet standards. Further, the court observed, neither side had provided a copy of any information

provided to petitioner at the time of hiring concerning the length of her probationary service, or that "sufficiently established the authenticity or currency of the document relied upon to show petitioner's status."

Therefore, the court observed, there were questions of fact concerning petitioner's employment status at the time of her termination, and, thus, as to whether her termination itself was procedurally proper.

The court concluded, however, that petitioner's whistleblower claim was undermined by her failure to sufficiently disclose to the agency that the wrong data was being used, because she only apprised her immediate supervisor, who was the individual who had committed the wrongdoing. It also found that if petitioner were a permanent employee, as she contended, she was first required to appeal her performance evaluation to an appeals board under Rule 7.5.5(a) and (b) of the Personnel Rules and Regulations. Finally, the court found, a timely notice of claim, which petitioner did not file, was a condition precedent to a claim of retaliatory firing.

On the appeal, petitioner argues, first, that she was a permanent employee who could not be fired at will. Respondent

does not pursue its claim that she was a probationary employee, but argues, however, that even if petitioner were not a probationary employee, the petition was premature because permanent sub-managerial employees have an appeals process for challenging performance evaluations (Rule 7.5.5[a] and [b]) which petitioner could not bypass.

The City Personnel Rules and Regulations referenced by the court do provide a mechanism for "permanent sub-managerial employees" to appeal unfavorable performance evaluations [Rule 7.5.5]. The record, however, indicates that petitioner sought administrative review of her negative evaluation prior to commencing suit, but was rebuffed. She wrote an e-mail to her supervisor on May 19, 2008 requesting review of her performance evaluation and a letter to the Bureau of Human Resources on June 18, 2008, also seeking review of her performance evaluation. At a minimum, these items of correspondence suggest that petitioner did seek review, and apparently did not receive any response. Consequently, it cannot be concluded, as respondent avers, that petitioner failed to exhaust her administrative remedies. Thus, the matter should be remanded for a hearing as to whether she was given the opportunity to avail herself of the appeals process.

If, at such hearing, it is determined that she did not, the entire proceeding should be referred back to the agency so that petitioner can be afforded the appropriate internal appeals process.

Petitioner also challenges the court's finding that the whistleblower claim under Civil Service Law § 75-b should fail because she did not comply with the notification requirement. Petitioner's primary complaint is that the unsatisfactory evaluation was issued, and she was then terminated, after she reported to her supervisor that a report to be provided to CDC was based on outdated data, and insisted that a supplemental report be provided disclosing the inaccuracies to the CDC. Her allegations implicate Civil Service Law § 75-b - the Whistleblower's Law - which provides, in pertinent part, that a public employee cannot be subject to adverse action for having disclosed to a "governmental body" information which either concerns a violation of a regulation that presents a substantial and specific danger to public health, or which he or she "reasonably believes constitutes an improper governmental action:"

> "2. (a) A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public

> employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action."

The employee also must have made a "good faith effort" to provide the information to the "appointing authority" and provide the "appointing authority or [his or her] designee a reasonable time to take appropriate action unless there is imminent and serious danger to public health or safety" (Civil Service Law §75-b[2][b]). If the employee does provide such information to the appointing authority, he or she "shall be deemed to have disclosed information to a governmental body under paragraph (a) of this subdivision" (*id.*).

Respondent contends that it is undisputed that petitioner did not provide the "mandated notification to the appointing authority," and therefore her pleadings are inadequate to state a whistleblower claim. On this record, however, there is no basis for concluding that petitioner's notification to her supervisor, who apparently then discussed the matter with his superior, the Assistant Commissioner, was insufficient. Petitioner alleges that she discussed the matter with him and urged that a report be

submitted to the CDC explaining the problem with the data in the report that had been submitted. Respondent does not explain who else petitioner could have, or should have notified (*see Tipaldo v Lynn*, 48 AD3d 361 [2008]). Thus, the hearing on remand should inquire into the issues of what other persons petitioner should have contacted, and whether her failure to do so precluded the assertion of this lawsuit.

Respondent also claims, without citation, that it is impermissible for a public employee to bring a whistleblower claim within an article 78 proceeding. Yet, courts have entertained article 78 petitions brought by public employees alleging they were terminated in violation of the Whistleblower's Law (*see e.g. Matter of Garrity v University at Albany*, 301 AD2d 1015 [2003] [reinstating article 78 claim alleging unlawful retaliatory discharge, although petitioner could not establish all elements of whistleblower claim]; *Matter of Chamberlin v Jacobson*, 260 AD2d 317 [1999] [in article 78 proceeding, petitioner failed to demonstrate that he was terminated solely for reasons violative of Whistleblower's Law]; *Matter of Weber v County of Nassau*, 215 AD2d 567 [*lv dismissed in part, denied in part* 87 NY2d 1053 [1996] [in article 78 proceeding, trial court correctly directed trial of probationary employee's claim that

she was terminated in violation of Whistleblower's Law because she insisted on reporting child abuse by a patient at the psychiatric hospital where she worked; petitioner did not establish merits of claim]).

Petitioner also contends that the court erred in dismissing the article 78 claim for failure to file a notice of claim within 90 days. She argues that she suffered a retaliatory firing, which is not a tort claim governed by General Municipal Law § 50-e. Petitioner urges instead that a retaliatory filing suit is akin to an employment claim under the Human Rights Law, specifically Executive Law §296.

Petitioner is correct that a cause of action under section 296 does not, under certain circumstances, require as a condition precedent the filing of a notice of claim (*see e.g. Picciano v Nassau County Civ. Serv. Comm.*, 290 AD2d 164, 169-174 [2001]; *Sebastian v New York City Health & Hosps.* Corp., 221 AD2d 294 [1995]; *Mills v County of Monroe*, 89 AD2d 776 [1982], *affd* 59 NY2d 307 [1983], *cert denied* 464 US 1018 [1983]. Nevertheless, the Court of Appeals made clear in *Mills* that even a cause of action under the Executive Law will be subject to dismissal for failure to file a notice of claim if the only right sought to be vindicated is a private one (59 NY2d at 311-312). As noted

above, petitioner only seeks claims unique to herself, i.e., name clearing, reinstatement and back pay.

In any event, petitioner's attempt to analogize her section 75-b claim under the Civil Service Law[1] to causes of action under the Executive Law is unavailing. Jurisprudence has made clear that a notice of claim is required as a condition precedent in cases similar to petitioner's (*see e.g. Rigle v County of Onondaga,* 267 AD2d 1088, 1088-1089 [1999], *lv denied* 94 NY2d 764 [2000] [similar claim against county requires filing of notice of claim pursuant to prior General Municipal Law § 50-a and County Law § 52]); *Roens v New York City Tr. Auth.*, 202 AD2d 274 [1994] [wrongful discharge claim against New York City Transit Authority must be preceded by a notice of claim pursuant to Public Authorities Law § 1212]). Thus, in order for petitioner to pursue her wrongful discharge claim, compliance with General Municipal Law § Section 50-e was required.

This does not, however, end the inquiry. Petitioner did cross-move within this proceeding for permission to file a late notice of claim. Although respondent argues that such an application must be made in a separate, special proceeding, it is

[1]Petitioner's attempt to invoke Labor Law § 740 is also unavailing, since that statute is not applicable to wrongful discharge claims against public employers (*Hanley v New York State Exec. Dept., Div. for Youth*, 182 AD2d 317, 320 [1992]).

clear that the law provides otherwise and that the court had jurisdiction to entertain the request. "In the absence of a pending action, an application for leave to serve a late notice of claim must be brought as a special proceeding" (*Matter of Jordan v City of New York*, 38 AD3d 336, 338 n 2 [2007] [internal quotation marks and citation omitted). "Where, as here, the court has obtained jurisdiction over the parties, it shall not dismiss an action for lack of proper form but must 'make whatever order is required for its proper prosecution'" (*Matter of Sullivan v Lindenhurst Union Free School Dist. No. 4*, 178 AD2d 603, 604 [1991], quoting CPLR 103[c], *see also Matter of Kovarsky v Housing & Dev. Admin. of City of N.Y.*, 31 NY2d 184 [1972]. Thus, although a successful special proceeding to file a late notice of claim cannot be converted to a plenary action, since the requirements of CPLR 304 and 306-a must be met (*see Harris v Niagara Falls Bd. of Educ.*, 6 NY3d 155 [2006]), a request to file a late notice of claim can be determined within the confines of an otherwise properly commenced action.

Section 50-e(5) provides for a discretionary extension of the 90-day time limit within which to file a notice of claim (*Casias v City of New York*, 39 AD3d 681, 682 [2007]; *see* General Municipal Law § 50-e[1][a]; [5]). The purpose of the requirement

is "to protect those public and municipal corporations against stale tort claims, and to provide them with an opportunity to timely and efficiently investigate those claims" (*Casias* at 682). "The statute enumerates various factors relevant to an application for an extension, but it sets one apart from all the others: 'the court shall consider, in particular, whether the public corporation . . . acquired actual knowledge of the essential facts constituting the claim within the [90-day period] or within a reasonable time thereafter'" (*id.*, quoting General Municipal Law § 50-e[5]). The statute also requires the showing of a reasonable excuse for the delay and a showing of lack of prejudice to the public corporation in its defense on the merits (*see Matter of Dell'Italia v Long Is. R.R. Corp.*, 31 AD3d 758, 759 [2006]).

The record indicates that petitioner sent a letter dated April 28, 2008 promptly to the Department of Investigation advising of her whistleblower claim, and an e-mail to her former supervisor on June 18, 2008 (outside the 90-day period), which claimed that she had been wrongfully terminated. Inasmuch as the motion court denied the application to file a late notice partly on grounds that the City did not acquire knowledge of the essential facts within 90 days, the directed hearing should also

inquire into whether, at least, the letter to the Department of Investigation gave the requisite notice.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Paul G. Feinman, J.), entered January 29, 2009, which granted respondent's motion pursuant to CPLR 7804(f) and 3211(a)(7) to dismiss petitioner's CPLR article 78 proceeding seeking reinstatement to her former position with back pay and removal of an unsatisfactory rating, and denied petitioner's cross motion for leave to file a late notice of claim, should be modified, on the law, the petition reinstated, the matter remanded for further proceedings consistent herewith, and otherwise affirmed, without costs.

All concur.

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

ENTERED: AUGUST 3, 2010

CLERK