SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 2, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Friedman, Acosta, Renwick, Abdus-Salaam, JJ.

1646 Carmen Wellington, Index 13589/06
Plaintiff-Appellant,

-against-

Manmall, LLC, et al.,
Defendants-Respondents.

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

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for Manmall, LLC and HRO Asset Management, LLC, respondents.

Eustace & Marquez, White Plains (Heath A. Bender of counsel), for Cushman & Wakefield, LLC, respondent.

Gallo Vitucci & Klar, New York (Kimberly A. Ricciardi of counsel), for Onesource Holdings, LLC, respondent.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered January 12, 2009, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she was injured when she slipped and fell on a drying, sticky brown substance on a staircase outside the food court of the Manhattan Mall. She testified at her deposition that she did not see the alleged sticky substance on

the stairway before she fell. Plaintiff's evidence was insufficient to show that defendants had actual notice of the allegedly dangerous condition of the stairway or that the condition had been visible and apparent for long enough to permit defendants to discover and remedy it, and, in opposing the motion, plaintiff did not identify any evidence tending to show either actual or constructive notice.

As previously stated by this Court, "[w]hile a defendant moving for summary judgment has the burden of demonstrating entitlement to dismissal as a matter of law, there is no need for a defendant to submit evidentiary materials establishing a lack of notice where the plaintiff failed to claim the existence of notice of the condition" (*Frank v Times Equities*, 292 AD2d 186, 186 [2002]). In other words, a defendant is not required to prove lack of notice where the plaintiff has not pointed to any evidence of notice (*see e.g. Crawford v MRI Broadway Rental*, 254 AD2d 68 [1998]). In this case, therefore, defendants' summary judgment motions were properly granted.

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

ENTERED: FEBRUARY 2, 2010

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

1997-
1998 11 Essex Street Corp., Index 600176/04
Plaintiff-Respondent,

-against-

Tower Insurance Company of New York,
Defendant-Appellant.

Law Offices Of Max W. Gershweir, New York (Max W. Gershweir of counsel), for appellant.

Weg & Myers, P.C., New York (D. Christopher Mason of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 16, 2008, which, in an action by a building owner (11 Essex) against, inter alia, an adjoining property owner (7 Essex) to recover property damages allegedly caused by the negligent performance of excavation work on 7 Essex's property, denied the motion of 11 Essex's property insurer (Tower) to intervene as a plaintiff so as to assert a potential subrogation claim against 7 Essex, unanimously affirmed, with costs. Order, same court and Justice, entered November 5, 2008, which, in an action by 11 Essex against Tower for breach of a policy of property insurance, denied Tower's motion to amend its answer so as to include affirmative defenses asserting the policy's exclusions for negligent work and for wear and tear, with leave to renew as to the proposed negligent work defense upon submission of an expert's affidavit, unanimously reversed, on the

law, without costs, and the motion is granted in all respects.

Tower should not be allowed to intervene in 11 Essex's tort action against 7 Essex. First, the policy limits Tower's right of subrogation to payments it makes under the policy, and no such payments have yet been made (*see Humbach v Goldstein*, 229 AD2d 64, 66 [1997], *lv dismissed* 91 NY2d 921 [1998]). Second, based on evidence obtained in 11 Essex's tort action against 7 Essex, Tower now disclaims coverage for the same reason that 7 Essex denies fault -- that 11 Essex destabilized its own building by lowering its basement floor below the foundation wall level after 7 Essex's engineer had inspected the basement and just before commencement of the excavation work on 7 Essex's property, without disclosing to 7 Essex its intention to perform such lowering work and the resulting need for 7 Essex to revise its underpinning plan. Such disclaimer tends to ally Tower with 7 Essex's defenses to 11 Essex's tort claims, raising a potential conflict of interest between Tower and its insured, 11 Essex (*cf. Berry v St. Peter's Hosp. of City of Albany*, 250 AD2d 63 [1998], *lv dismissed* 92 NY2d 1045 [1999]).

While 7 Essex's engineer did not set forth in detail the cause-and-effect relationship between 11 Essex's undisclosed lowering of its basement floor and the destabilizing of its building, or state his opinion of such a relationship to a reasonable degree of engineering certainty, his testimony, along

with that of 7 Essex's principal, both based on personal observations, was sufficient for purposes of 7 Essex's motion to amend its answer so as to assert that the negligent work exclusion applies because of such relationship (*see generally Thompson v Cooper*, 24 AD3d 203, 205 [2005]). The prior dismissal of Tower's negligent work exclusion defense (30 AD3d 348) does not collaterally estop Tower from reasserting that defense where the defense originally alleged negligent work only on 7 Essex's premises and later deposition testimony revealed to Tower, for the first time, the allegedly negligent work performed on 11 Essex's own premises. It does not avail 11 Essex to argue that it is prejudiced by this late amendment where it did not disclose its basement work and Tower did not unreasonably delay in moving to amend once it learned of such work.

The proposed wear and tear policy exclusion defense does not appear to be devoid of merit especially considering the age of 11 Essex's building. 11 Essex would not be prejudiced by the inclusion of this new defense inasmuch as leave to amend the answer is being granted on the basis of the negligent work exclusion.

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

ENTERED: FEBRUARY 2, 2010

DEPUTY CLERK

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

2077 Carolyn Thomas French, Index 100207/98
Plaintiff-Appellant,

-against-

Alfred L. Schiavo, et al.,
Defendants-Respondents.

Ronemus & Vilensky, Garden City (Lisa M. Comeau of counsel), for appellant.

Mauro Goldberg & Lilling LLP, Great Neck (Katherine Herr Solomon of counsel), for respondents.

Judgment, Supreme Court, New York County (Milton Tingling, J.), entered April 30, 2009, upon a jury verdict in plaintiff's favor, and bringing up for review an order, same court (John E.H. Stackhouse, J.), entered on or about November 19, 2008, which granted defendants' motion for a declaration that postjudgment interest pursuant to CPLR 5003 stopped running as of January 18, 2008, when their insurance carrier unconditionally tendered all lump sums due and owing, plus costs and interest to that date, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

On January 18, 2008, defendants made an unconditional tender of both the lump sum payments and the future periodic payments due under the judgment, thereby terminating the accrual of

postjudgment interest as of that date (*see Meiselman v Allstate Ins. Co.*, 197 AD2d 561 [1993]). Plaintiff's failure to provide the carrier with certain reasonable requests for information needed to finalize the annuity contract, which it is undisputed had been purchased at the time of the lump sum tender on January 18, 2008, left defendants with no alternative but to present the specimen contract for court approval.

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

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

ENTERED: FEBRUARY 2, 2010

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

2078-
2079 MAP Marine Limited, Index 602517/08
Plaintiff-Respondent,

-against-

China Construction Bank Corp.,
Defendant,

Banca Monte dei Paschi di Siena SpA,
Defendant-Appellant.

[And A Third-Party Action]

Reed Smith LLP, New York (Steven Cooper of counsel), for appellant.

Blank Rome LLP, New York (Jack A. Greenbaum of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered August 14, 2009, awarding plaintiff the principal sum of $5,950,000 on a letter of credit, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered July 2, 2009, which granted plaintiff's motion for summary judgment against defendant Banca Monte, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Banca Monte, the advising and transferring bank, failed to raise an issue of fact with respect to its assertion that the presentment documents necessary for plaintiff to draw on its

transfer letter of credit were fraudulent (*see generally Mennen v J.P. Morgan & Co.*, 91 NY2d 13, 20-21 [1997]). Plaintiff's conduct in seeking a change in the letter of credit to reflect that it was for the shipping service rather than for the cargo, and in seeking rapid payment, was properly found reasonable in the context of the shipping industry and in relation to its charter agreement with a nonparty. Plaintiff did not improperly attempt to seek payment despite knowledge that more extensive documentation was required under the letter of credit issued in favor of the purchaser of the cargo, inasmuch as the obligations under plaintiff's letter of credit and the underlying sale of the cargo were independent (*id.*). Banca Monte failed to raise an issue of fact with respect to the alleged falsity of the documentation presented by plaintiff. The authoritativeness of the Web site on which Banca Monte relied regarding the location of plaintiff's vessel was questionable and not an appropriate subject of judicial notice (*see Hotel Empls. & Rest. Empls. Union, Local 100 v City of New York Dept. of Parks & Recreation*, 311 F3d 534, 549 [2d Cir 2002]). The invoice for payment upon "delivery" of the vessel meant unambiguously, as set forth in a treatise excerpt submitted by Banca Monte, that payment was due for the availability of the vessel, not for its having been loaded or having completed its journey.

The court properly exercised its discretion in denying a

stay of the action in favor of an earlier-commenced federal arbitration proceeding, since the action had progressed to the point of determining liability while the arbitration was still in its infancy (*cf. NAMA Holdings, LLC v Greenberg Traurig, LLP*, 62 AD3d 578, 579 [2009]); moreover, the requisite identity of parties and issues was lacking (*see Somoza v Pechnik*, 3 AD3d 394 [2004]; *see also Fewer v GFI Group Inc.*, 59 AD3d 271 [2009]).

Although plaintiff's motion was made soon after service of the answer, Banca Monte's claimed need for discovery reflects but a "mere hope," which is ineffectual in forestalling summary disposition (*see Moran v Regency Sav. Bank*, 20 AD3d 305, 306 [2005]).

We have considered Banca Monte's other contentions and find them unavailing.

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

ENTERED: FEBRUARY 2, 2010

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

2080-
2080A Christine Sampson, Index 21502/06
Plaintiff-Appellant,

-against-

Vinlo Cab Corp., et al.,
Defendants-Respondents,

J&Y Express Cab Corp., et al.,
Defendants.

Harold Chetrick, P.C., New York (Harold Chetrick of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered February 25, 2009, which granted defendants' motion for summary judgment dismissing the complaint for lack of a serious injury, unanimously modified, on the law, the motion denied and the complaint reinstated only to the extent of the 90/180 claim, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered July 27, 2009, which denied plaintiff's motion to renew the motion for summary judgment, unanimously dismissed, without costs, as academic in view of the foregoing.

The reports of defendants' experts based on examinations performed more than three years after the subject accident and addressed only to the permanency of plaintiff's injuries fail to

make a prima facie showing that plaintiff did not sustain a 90/180 injury (*see Loesburg v Jovanovic*, 264 AD2d 301 [1999]; *Alexandre v Dweck*, 44 AD3d 597 [2007]). Nor did defendants submit any other evidence, such as deposition testimony, tending to show that plaintiff did not sustain such an injury. However, with respect to plaintiff's claims of permanent and significant limitations, her experts failed to sufficiently respond to defendant's evidence and hence Supreme Court properly granted summary judgment on those claims.

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

ENTERED: FEBRUARY 2, 2010

David Spolzino

DEPUTY CLERK

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

2081 Kerwin Park, Index 122075/01
Plaintiff-Appellant-Respondent,

-against-

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

East 8th Street Equities, et al.,
Defendants-Respondents-Appellants.

Law Offices of Kenneth A. Wilhelm, New York (Rory M. Shectman of counsel), for appellant-respondent.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Nicholas Figueroa, J.), entered October 29, 2009, which, in an action for personal injuries sustained by a worker on a construction site, granted defendants-respondents' motion to set aside the jury's awards of $1,500,000 for past pain and suffering over 7.5 years and $800,000 for future pain and suffering over 32.7 years to the extent of directing a new trial on the issue of past pain and suffering unless plaintiff, within 20 days of service of the order with notice of entry, stipulated to a reduction of the award for past pain and suffering to $600,000, unanimously modified, on the facts, to also direct a new trial on the issue of future pain and suffering unless plaintiff, within 20 days of service of this order with notice of entry, stipulates to a reduction of the award for future pain and suffering to $400,000,

and otherwise affirmed, without costs.

We affirm the trial court's reduction of the jury's award for past pain and suffering, and direct a reduction of the jury's award for future pain and suffering to the extent indicated, based on cases involving a comminuted fracture to the elbow/arm, multiple surgeries, potential additional surgery, and permanent pain and limitation of motion (*see Baez v New York City Tr. Auth.*, 15 AD3d 309 [2005], citing *Martinez v Gouverneur Gardens Hous. Corp.*, 184 AD2d 264, 267 [1992], *lv denied* 80 NY2d 759 [1992], citing *Roshwalb v Regency Mar. Corp.*, 182 AD2d 401 [1992], *lv denied* 80 NY2d 756 [1992]; *see also Fudali v New York City Tr. Auth.*, 6 Misc 3d 1020[A], 2005 NY Slip Op 50136[U], *3 [Jan 7, 2005]). The fracture to plaintiff's nondominant wrist, which did not involve surgery and appears to have resolved by the time of trial, adds little value to the case, although it does warrant an award at the top of the range indicated by the cases cited above (*cf. Claudio v City of New York*, 280 AD2d 403, 403-404 [2001]).

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

ENTERED: FEBRUARY 2, 2010

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

2082-
2082A Ruth Shomron, etc., Index 102882/02
Plaintiff-Respondent,

-against-

Ethel J. Griffin, Public Administrator
of New York County, etc., et al.,
Defendants-Appellants.

Snitow Kanfer Holtzer & Millus, LLP, New York (Franklyn H. Snitow of counsel), for appellants.

The Halperin Law Firm, PLLC, New York (Guy S. Halperin of counsel), for respondent.

Interlocutory judgment, Supreme Court, New York County (John E. H. Stackhouse, J.), entered November 28, 2006, after a non-jury trial, directing, among other things, the rescission of the sale of four apartments to defendants and the reconveyance of the stock certificates and proprietary leases appurtenant, based upon a finding of fraud, the return of the purchase price paid for the four apartments to defendants, and the imposition of a constructive trust on defendant Mali Fuks over rents and profits received from the rental of the apartments since the purchase, unanimously affirmed, with costs. Appeal from decision, same court and Justice, entered September 27, 2006, upon which the judgment was based, unanimously dismissed, without costs, as taken from a non-appealable paper.

Plaintiff brought a complaint seeking the rescission of the

sale of four apartments on the basis of fraud, and based on the evidence presented at trial, the court properly found that rescission was the appropriate remedy under the circumstances, as the evidence showed that defendants' fraud caused more than a negligible injury to plaintiff and plaintiff lacked a complete and adequate remedy at law (*see Frame v Maynard*, 39 AD3d 328 [2007]; *Dunkin' Donuts v HWT Assoc.*, 181 AD2d 711 [1992]).

Plaintiff's causes of action for a constructive trust and breach of fiduciary duty were not barred by the applicable statutes of limitations as they were timely asserted as counterclaims in a prior proceeding later consolidated with the instant matter (CPLR 203[d]). The fraud cause of action was also timely filed after Shomron's discovery of the fraud in 2000.

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

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

ENTERED: FEBRUARY 2, 2010

DEPUTY CLERK
CLERK

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

2083 The People of the State of New York, Ind. 6089/02
Respondent,

-against-

Alton Brown,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J. at hearing; Robert Seewald, J. at jury trial and sentence), rendered September 5, 2006, convicting defendant of criminal possession of marijuana in the first degree and sentencing him, as a second violent felony offender, to a term of 3 to 6 years, unanimously modified, on the law, to the extent of vacating the second violent felony offender adjudication and substituting a second felony offender adjudication, and otherwise affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

Immediately after the court charged the jury, sent it to the jury room, and discharged the alternate jurors, it became apparent to all parties that a regular juror was grossly

unqualified. At that point, with defendant's consent, the court excused the unqualified juror and replaced him with the first alternate, who was still present in court. On appeal, defendant argues that this was defective because the alternate, having already been discharged, was unqualified to serve (*see People v Gomez*, 308 AD2d 460 [2003], *lv denied* 1 NY3d 572 [2003]), and because jury deliberations had allegedly commenced, requiring defendant's personal written consent to a substitution (*see* CPL 270.35[1]).

Defendant's claim that the recently discharged alternate was unqualified is a claim that clearly requires preservation, and defendant's argument to the contrary is without merit (*see People v Agramonte*, 87 NY2d 765 [1996]). We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we also reject it on the merits. The record reflects that the interval between the discharge of the alternate, who was still in court, and his reinstatement was de minimis (*cf. People v Pearson*, 67 AD3d 600 [2009] [court has authority to make immediate retraction of discharge of jury]).

Regardless of whether defendant's claim that the substitution occurred after deliberations had commenced (thus violating the written consent requirement) requires preservation, that claim is unsupported by the record (*see People v Velasquez*, 1 NY3d 44, 48 [2003]; *People v Kinchen*, 60 NY2d 772 [1983]). On

the contrary, the record satisfactorily establishes that, in this fast-paced sequence of events, the jury did not deliberate until after the alternate was substituted. We also reject defendant's request for a reconstruction hearing.

As the People concede, defendant should only have been adjudicated a second felony offender, not a second violent felony offender.

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

ENTERED: FEBRUARY 2, 2010

DEPUTY CLERK

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

2084 Citicorp North America, Inc., et al.,
Plaintiffs-Appellants,

-against-

Fifth Avenue 58/59 Acquisition Company, LLC, et al.,
Defendants-Respondents,

Longstreet Associates L.P.,
Defendant.

Index 117846/06

Moses & Singer LLP, New York (David Rabinowitz of counsel), for appellants.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for Fifth Avenue 58/59 Acquisition Company, LLC and Fifth Avenue 58/59 Acquisition Company, LP, respondents.

Loanzon Sheikh LLC, New York (Tristan C. Loanzon of counsel), for 767 Fifth Avenue LLC, respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered on January 14, 2009, which dismissed the complaint in its entirety, unanimously affirmed, with costs.

In March 1991, plaintiff tenant Banco National entered into a 16-year lease with defendant Longstreet for commercial space in Manhattan. The premises were subsequently sold to defendant 767 Fifth Avenue f/k/a Trump 767 Fifth Avenue, and then to defendant Fifth Avenue 58/59 Acquisition, as successor landlords. Banco National's tenancy interest was transferred first to plaintiff Citibank and then to plaintiff Citicorp North America. The lease contained a porters' wage escalation clause, which allowed for an

increase in rent by a certain amount per square foot whenever the building porters received a wage increase.

Plaintiffs allege that since 1993, defendants have been calculating the porters' wage escalation rent increases in a manner resulting in plaintiffs being overbilled for rent by approximately $564,531. Following discovery, the court denied plaintiffs' motion for partial summary judgment, granted Fifth Avenue 58/59's cross motion to dismiss the complaint against it, and after searching the record, summarily dismissed the complaint against all other defendants.

It is undisputed that plaintiffs, highly sophisticated entities, made no inquiry for approximately nine years regarding the amount of rent they were paying, and never compared the rent provisions of their lease to the rent amounts invoiced by defendants in order to determine if they were being overcharged. Rather, they paid the invoiced rent amounts "without protest or even inquiry, and were not laboring under any material mistake of fact when they did so" (*Westfall v Chase Lincoln First Bank*, 258 AD2d 299, 300 [1999]; *see Eighty Eight Bleecker Co., LLC v 88 Bleecker St. Owners, Inc.*, 34 AD3d 244 [2006]). Making such payments without any effort to learn what their legal obligations were demonstrated a clear lack of diligence on plaintiffs' part

(*Gimbel Bros. v Brook Shopping Ctrs.*, 118 AD2d 532, 535-536 [1986]). The complaint was thus barred under the voluntary payment doctrine (*see Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525 [2003]).

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

ENTERED: FEBRUARY 2, 2010

David Friedman

DEPUTY CLERK

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

2085 The People of the State of New York, Ind. 871/07
Respondent,

-against-

Jose Parra,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Allen J. Vickey 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 (Charles Solomon, J.), rendered on or about January 11, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: FEBRUARY 2, 2010

DEPUTY CLERK
CLERK

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

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

2086 Ramona Ulerio, Index 23888/03
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Wallace D. Gossett, New York (Steve S. Efron of counsel), for appellant.

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

Judgment, Supreme Court, Bronx County (Alexander W. Hunter Jr., J.), entered May 29, 2008, after a jury trial, to the extent appealed from as limited by the brief, awarding plaintiff $381,322 for future medical expenses, $441,163 for future custodial care, and $214,318 for future rehabilitation services over a period of 20 years, unanimously affirmed, without costs.

Plaintiff fell after catching her foot on a stairway while descending from an elevated subway station. The injury to her back caused continuous debilitating pain that was not relieved by two surgeries, physical therapy, narcotic pain medication and epidural injections. This pain prevented her from engaging in everyday activities with her children and daily household tasks.

The damages awarded do not materially deviate from what would be reasonable compensation under the circumstances (CPLR 5501[c]). The testimony of the plaintiff's doctors and economist

was sufficient to support the damages awarded (*see generally Serrano v 432 Park S. Realty Co., LLC*, 59 AD3d 242, 243 [2009], *lv denied* 13 NY3d 711 [2009]), particularly since defendant offered no expert testimony to counter that of the economist (*see Rubin v First Ave. Owners*, 209 AD2d 367 [1994]). The award for future rehabilitative services was proper even though plaintiff had discontinued physical therapy, in view of her explanation that she had stopped because she could no longer afford it (*see Reed v City of New York*, 304 AD2d 1, 8 [2003], *lv denied* 100 NY2d 503 [2003]). The awards for custodial or home care services and future medical expenses were not excessive, in light of the doctors' testimony that plaintiff had failed-back syndrome and would require home care assistance notwithstanding future surgeries, pain medication and injections, and physical therapy; such treatments might prevent further deterioration but would not cure her condition (*see Kihl v Pfeffer*, 47 AD3d 154, 161-162 [2007]; *cf. Schultz v Harrison Radiator Div. Gen. Motors Corp.*, 90 NY2d 311, 320-321 [1997]).

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

ENTERED: FEBRUARY 2, 2010

DEPUTY CLERK

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

2088 Ottaviano Bevilacqua, et al., Index 117815/05
Plaintiffs-Respondents, 591004/06
590227/08
590683/08

-against-

Bloomberg, L.P.,
Defendant-Appellant-Respondent,

Scales Industries Technologies, Inc.,
Defendant-Respondent-Appellant,

Quincy Compressor,
Defendant-Appellant.

- - - -

[And A Third-Party Action]

- - - -

Scales Industrial Technologies, Inc.,
Second Third-Party Plaintiff-Respondent,

-against-

Quincy Compressor,
Second Third-Party Defendant-Appellant.

- - - -

Scales Industrial Technologies, Inc.,
Third Third-Party Plaintiff-Respondent,

-against-

Coltec Industries, Inc.,
Third Third-Party Defendant-Appellant.

Gallo Vitucci & Klar, New York (Yolanda L. Ayala of counsel), for appellant-respondent.

Segal, McCambridge, Singer & Mahoney, Ltd., New York (Theodore Eder of counsel), for Quincy Compressor and Coltec Industries, Inc., appellants.

Savona, D'Erasmo & Hyer, LLC, New York (Raymond M. D'Erasmo of counsel), for respondent-appellant/respondent.

Daniel P. Buttafuoco & Associates, PLLC, Woodbury (Ellen Buchholz of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered March 31, 2009, which denied the motion of defendant Bloomberg, L.P. and the cross motion of Scales Industries Technologies, Inc. for summary judgment dismissing the complaint and all cross claims as against them, the motions of defendant Quincy Compressor to dismiss the complaint and the second-third party complaint as against it, the motion of third third-party defendant Coltec Industries, Inc. to dismiss the third third-party complaint against it, and granted plaintiffs' cross motion for leave to serve a second amended complaint, unanimously modified, on the law, to grant Bloomberg's motion and Scale's cross motion, to vacate that portion of the order denying Quincy's motion to dismiss plaintiff's amended complaint for lack of personal jurisdiction and remand the matter for a traverse hearing, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff Ottaviano Bevilacqua was injured when, while working for his employer American Building Maintenance (ABM), he slipped and fell on oil located on the floor near two air compressors in a chiller plant owed by Bloomberg. According to plaintiff, an internal oil leak in one of the air compressors caused oil to leak onto the floor. ABM provided engineering services at the building pursuant to a service maintenance contract with Bloomberg. Quincy, an unincorporated division of

Coltec, manufactured the air compressors, and Scales, an authorized distributor of Quincy compressors, inspected and repaired the air compressors at the building pursuant to the manufacturer's warranty.

The motion court improperly denied Bloomberg's motion and Scales's cross motion for summary judgment dismissing the complaint and all cross claims as against them. A general awareness of an internal oil leak in the compressors is insufficient to raise an issue of fact as to whether Bloomberg and Scales had actual or constructive notice of the oil on the floor (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]). There is also no evidence that Scales was negligent in performing its services, or that its services caused the oil on the floor (*see Ledesma v Aragona Mgt. Group*, 50 AD3d 510, 511 [2008]). "In the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of any purported defects" (*Daniels v Kromo Lenox Assoc.*, 16 AD3d 111, 112 [2005]).

The motion court improperly denied that portion of Quincy's motion to dismiss the amended complaint for improper service. While the process server's sworn affidavits of service constituted prima facie evidence of proper service pursuant to CPLR 311(a)(1), the affidavits of the persons who accepted service denying that they were authorized to do so, were

sufficiently specific to warrant a traverse hearing (*see Dunn v Pallet*, 42 AD3d 807 [2007]).

The motion court properly denied that portion of Quincy's motion to dismiss asserting that plaintiffs' present counsel lacked the authority to amend the complaint because it did not file a consent to change attorney form pursuant to CPLR 321(b). Because Quincy communicated with plaintiffs' present firm, albeit regarding Quincy's motion to dismiss, prior to plaintiffs' filing the change of attorney form, the actions of the present firm prior to the filing of the consent to change attorney form should not be nullified (*see Juers v Barry*, 114 AD2d 1009, 1010 [1985]; *Deacon's Bench, Inc. v Hoffman*, 88 AD2d 734 [1982]). In any event, as the motion court noted, plaintiffs' mistake of not filing the consent to change form is, under the circumstances, a mere formality and Quincy has shown no prejudice by plaintiffs' noncompliance with CPLR 321(b).

The motion court also properly denied that portion of Quincy's motion to dismiss asserting that plaintiffs' amended complaint is invalid because plaintiffs did not obtain leave of the court or act on an effective stipulation as required by CPLR 1003 and CPLR 3025(b). Because plaintiffs served the amended complaint naming Quincy as a defendant after the service of the third-party complaint upon Quincy and before Quincy served a third-party answer, plaintiffs properly commenced a direct action

against Quincy pursuant to CPLR 1009 (*see Guarino v 233 E. 69th St. Owners Corp.*, 14 AD3d 652 [2005]).

The motion court properly denied that portion of Quincy's/Coltec's motion to dismiss the second third-party complaint for lack of jurisdiction. Where, as here, a foreign corporation authorized to do business in the State is mistakenly served under the more stringent procedures of Business Corporation Law (BCL) § 307, rather than under BCL 306, personal delivery of process to the Secretary of State in Albany is sufficient for the completion of service and the irregularities caused by proceeding under the wrong section should be disregarded (*see Marine Midland Realty Credit Corp. v Welbilt Corp.*, 145 AD2d 84 [1989]). Scales's failure to name Coltec in the second third-party summons and complaint is a mere irregularity which in no way affects jurisdiction (*see generally Household Fin. Realty Corp. v Emanuel*, 2 AD3d 192 [2003]; *Marine Midland Realty Credit Corp.*, 145 AD2d at 89).

The motion court properly denied that portion of Quincy's/Coltec's motions to dismiss the second and third-party complaints on the ground of untimeliness and undue delay. Although the second and third-party complaints were filed past the deadline set forth in a so-ordered stipulation, and more than 2½ years after the commencement of the main action, Quincy/Coltec has failed to shown that it was prejudiced by the delay. Since

no note of issue has been filed by plaintiffs nor any final discovery deadline mandated by the court, Quincy will be allowed to conduct discovery in this matter. Furthermore, Scales has provided a reasonable excuse for the delay, namely that it needed to conduct discovery in order to determine if there was a good faith basis to implead Quincy (*compare DeLeon v 650 W. 172nd St. Assoc.*, 44 AD3d 305, 306 [2007], *with Juncal v W 12/14 Wall Acquisition Assoc.*, 15 AD3d 447, 449 [2005]).

The motion court properly denied that part of Coltec's motion to dismiss asserting that Scales improperly brought successive third-party actions. Neither CPLR 1007, nor CPLR 1011, forbids a defendant from bringing successive third-party actions. In any event, as the motion court held, a motion can be made or the parties can agree to consolidate the third-party actions.

The motion court properly granted plaintiffs' cross motion for leave to file a second supplemental summons and amended complaint. Because the second third-party complaint was properly filed and served, plaintiffs' claims against Quincy and Coltec, asserted in the amended complaint, relate back, for statute of limitation purposes, to the date of service of the second third-party complaint (*see* CPLR 203[f]; *Duffy v Horton Mem. Hosp.*, 66 NY2d 473 [1985]; *Peretich v City of New York*, 263 AD2d 410, 411 [1999]). Although Scales attempted to serve the second third-

party complaint upon Quincy pursuant to BCL 307, the motion court did not abuse its discretion in determining that service was properly effectuated pursuant to BCL 306, and thus that service was complete when the Secretary of State was served on April 4, 2008, within the applicable three-year statute of limitations (*see* CPLR 214[5]).

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

ENTERED: FEBRUARY 2, 2010

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

2089 In re Winston Capital, LLC, et al., Index 107466/08
Petitioners-Appellants,

-against-

A. Abadiam, et al.,
Respondents-Respondents.

Kunstlinger & Steinmetz, LLC, Lakewood, NJ (David C. Steinmetz of counsel), for appellants.

Steve Queller, New York, for respondents.

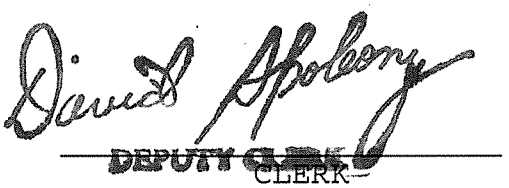
Judgment, Supreme Court, New York County (Alice Schlesinger, J), entered September 8, 2008, dismissing the petition brought pursuant to CPLR article 52 seeking an order cancelling the sheriff's levy and voiding the execution notices with respect to apartment 6X at 400 Central Park West and apartment 18X at 392 Central Park West, unanimously reversed, on the law, without costs, the petition reinstated and the matter remanded for further proceedings consistent herewith.

In this special proceeding to prevent execution against properties and rents subject to a mortgage, petitioners established their prima facie entitlement to judgment as a matter of law by demonstrating their prior, recorded mortgage against the subject apartments and rents derived therefrom (*see Dime Sav. Bank of N.Y. v Roberts*, 167 AD2d 674, 675-676 [1990], *lv dismissed* 77 NY2d 939 [1991]). In opposition, respondents raised a triable issue as to petitioners' good faith in entering into

the mortgage, including facts suggesting that petitioner mortgage broker, Winston Capital, LLC, and its general counsel participated with petitioner judgment debtor in a sham conveyance of an apartment to the judgment debtor's wife (*see* Debtor and Creditor Law § 273-a). Given the existence of genuine factual disputes that could not be resolved on the papers, Supreme Court, rather than dismissing the proceeding, should have ordered disclosure and a trial (*see e.g. People v Zymurgy, Inc.* 233 AD2d 178 [1996]; *Matter of General Motors Acceptance Corp. v Norstar Bank of Hudson Val.*, 156 AD2d 876 [1989]; CPLR 5239).

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

ENTERED: FEBRUARY 2, 2010



CLERK

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

2090 Dwayne Fuller, Index 17264/05
Plaintiff-Appellant

-against-

PSS/WSF Housing Company, L.P., et al.,
Defendants-Respondents.

Victor Tsai, New York for appellant.

Smith & Laquercia, LLP, New York (Reed M. Podell of counsel), for PSS/WSF respondents.

McCabe Collins McGeough & Fowler, Carle Place (Doron Rosenheck of counsel), for Frank Corigliano Contractor, Inc., respondent.

Appeal from order, Supreme Court, Bronx County (Howard R. Silver, J.), entered February 9, 2009, which, in an action for personal injuries allegedly sustained when plaintiff tripped in the dirt area of a tree well cut out of a public sidewalk and fell into the tree, granted defendants' motions for summary judgment, deemed to be an appeal from judgment, same court and Justice, entered May 15, 2009 (CPLR 5501[c]), dismissing the complaint, and so considered, said judgment unanimously affirmed, without costs.

Defendants established their prima facie entitlement to summary judgment by submitting, inter alia, plaintiff's deposition testimony that, while jogging to catch a bus, he looked over his left shoulder to see the bus, at which point he tripped in the dirt area of the tree well; plaintiff was aware of

the presence of the tree before he started jogging. In opposition, plaintiff failed to raise a triable issue of fact as to whether defendants' adjacent construction fence, which, in accordance with the permit issued by the City was five feet from the curb of the sidewalk, constituted a hazard, or had any role in the accident. The motion court properly held that the tree area was not part of the sidewalk for purposes of tort liability under Administrative Code of City of NY § 7-210 (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]. Furthermore, even assuming that defendants' use of the fence constituted a "special use," plaintiff did not present any evidence showing that anything other than his own inattention was the proximate cause of his accident, or that the presence of the fence had an impact upon his actions (*see Taubenfeld v Starbucks Corp.*, 48 AD3d 310 [2008], *lv denied* 10 NY3d 713 [2008]; *Pinto v Selinger Ice Cream Corp.*, 47 AD3d 496 [2008]).

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

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

ENTERED: FEBRUARY 2, 2010

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

2093N Alexis Maisonette, et al., Index 6072/93
Plaintiffs-Appellants,

-against-

New York City Housing Authority,
Defendant-Respondent,

Hi-Tech Mechanical,
Defendant.

Solomon Rosengarten, Brooklyn, for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent.

Order, Supreme Court, Bronx County (Bertram Katz, J.), entered April 20, 2004, which denied plaintiff's motion to restore the action to the trial calendar, unanimously affirmed, without costs.

Apart from the preclusive effect of the never-vacated prior order denying a prior motion to restore by plaintiff when neither side appeared to argue the motion (CPLR 5015), plaintiff fails to explain his utter lack of diligence in prosecuting the action or show a meritorious cause of action beyond the conclusory

allegations in his notice of claim (CPLR 3404; *see Muriel v St. Barnabas Hosp.*, 3 AD3d 419, 420 [2004]).

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

ENTERED: FEBRUARY 2, 2010