SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 7, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2028 Rezplex, L.L.C., Index 260123/08
Petitioner-Appellant,

-against-

The New York City Department of Housing Preservation and Development, et al.,
Respondents-Respondents.

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Goodman & Leopold, L.L.P., New York (Howard B. Leopold of counsel), for appellant.

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

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Judgment (denominated an order), Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered November 26, 2008, denying the petition and dismissing the article 78 proceeding, reversed, on the law, without costs, and the petition granted.

Denial of petitioner's protest of the charges and lien imposed for the emergency repair of a condition on its property was arbitrary and capricious, as the record establishes that

petitioner never owned the retaining wall in question, nor the property under it, and had no responsibility to maintain or repair the wall. Respondent Department of Housing Preservation and Development ("HPD") may require owners of real property to maintain and repair their property (Administrative Code of the City of New York §§ 27-2125 *et seq*.). Furthermore, HPD also has the authority to correct a dangerous condition if the property owner fails to do so, and "all expenses incurred by [HPD] . . . shall constitute a debt recoverable from the owner" (Administrative Code § 27-2128).

The record clearly shows that petitioner was not the owner of the property upon which the wall was located, nor a responsible party. Thus, respondent was without authority to look to petitioner for the cost of repairing the retaining wall located on another's property.

The dissent's contention that petitioner, "having failed to assert the ownership issue before HPD . . . may not advance it for the first time before the court," is error for several reasons. First, it was incumbent upon HPD to establish ownership of the offending wall, and the record before the Department of Buildings demonstrated that petitioner did not own the wall. Secondly, HPD's jurisdiction to levy against petitioner's property is strictly circumscribed by statute as described above.

Lastly, HPD's decision to levy against petitioner for a dangerous condition on property petitioner did not own is prima facie irrational and cannot serve as a basis for its final determination.

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

TOM, J. (dissenting)

In 2001, New York City Department of Housing Preservation and Development (HPD) undertook repairs to a retaining wall and billed the cost to petitioner's predecessor, Bronx Real Estate Services. The company protested the charges in December 2001, and HPD ultimately denied the protest in April 2005. The cost of repair was entered as a lien against the property under Administrative Code of the City of New York § 27-2144 (*see Rosenbaum v City of New York*, 96 NY2d 468, 473 [2001]). In the interim, the property was transferred to petitioner, which has the same principal as its predecessor. In the ensuing CPLR article 78 proceeding, Supreme Court rejected the contention contained in the affidavit of petitioner's principal that the retaining wall is not located on its property.

Supreme Court properly ruled that, having failed to assert the ownership issue before HPD, petitioner may not advance it for the first time before the court (*see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]). In conducting a review under CPLR article 78, "the court may not consider arguments or evidence not contained in the administrative record" (*Brusco v New York State Div. of Hous. & Community Renewal*, 170 AD2d 184, 185 [1991], *appeal dismissed* 77 NY2d 939 [1991], *cert denied* 502 US 857 [1991]).

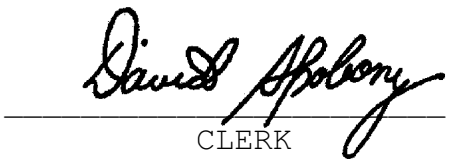
The determination of the Environmental Control Board (ECB) that the subject retaining wall was not on petitioner's property was properly accorded no consideration by Supreme Court since petitioner did not supply the purported supporting evidence (consisting of its principal's affidavit) until late May 2005, after the challenged administrative proceeding was concluded by issuance of a final determination dated April 15, 2005. As noted, "[j]udicial review of administrative determinations is confined to 'the facts and record adduced before the agency'" (*Matter of Yarbough*, 95 NY2d at 347, quoting *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1982], *affd for reasons stated below* 58 NY2d 952 [1983]). The rule advances sound judicial policies, among which is that a contrary rule "would deprive the administrative agency of the opportunity to prepare a record reflective of its expertise and judgment" (*Yarbough* at 347 [internal quotation marks and citations omitted]). Additionally, a reviewing court is bound by the record (*Block v Nelson*, 71 AD2d 509 [1979]), on the content of which an appeal must be decided (*Fehlhaber Corp. v State of New York*, 65 AD2d 119, 131 [1978], *lv denied* 48 NY2d 604 [1979]). In the matter at bar, HPD was not afforded an opportunity to challenge the accuracy of the ECB determination or petitioner's purported evidence, and neither the issue nor the evidence having

been before the agency, the record does not permit this Court's review. The late-submitted survey depicting two retaining walls is dehors the record, and the majority's reliance on it is clearly improper *(see Matter of Gilman v* New York State *Div. of Hous. & Community Renewal*, 99 NY2d 144, 150 [2002], *revg* 290 AD2d 280 [2002]).

Accordingly, the order should be affirmed.

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

ENTERED: SEPTEMBER 7, 2010



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

2639-
2639A Nama Holdings, LLC, etc., et al., Index 601054/08
Plaintiffs-Respondents,

-against-

Greenberg Traurig LLP, etc., et al.,
Defendants,

Shawn Samson, et al.,
Defendants-Appellants.

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Dorsey & Whitney LLP, New York (Roger L. Magnuson, of the Minnesota Bar, admitted pro hac vice, of counsel), for appellants.

Sidley Austin LLP, Los Angeles, CA (Ronald C. Cohen, of the California Bar, admitted pro hac vice, of counsel), for respondents.

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Orders, Supreme Court, New York County (Richard B. Lowe III, J.), entered November 18, 2009, which denied defendants Samson and Kashani's motion to stay the action; 2) denied their joint motion with defendants Greenberg Traurig LLP, and Robert J. Ivanhoe to dismiss the action; and 3) granted plaintiffs' motion for a temporary restraining order, unanimously modified, on the law, to vacate the temporary restraining order, effective five days from the date of this order, and otherwise affirmed, without costs.

The IAS court properly found that this Court's May 26, 2009

order staying the proceeding expired by its terms upon the "arbitral determination," that is, the award by the arbitrators in the California arbitration. Nor did the court abuse its discretion by declining to stay the proceedings pending the defendants' appeal to the Ninth Circuit of a District Court decision holding that they had abandoned and waived their right to arbitrate the claims at issue here. The District Court's findings of bad faith and procedural gamesmanship undermine any finding of merit in defendants' appeal (*64 B Venture v American Realty Co.*, 179 AD2d 374 [1992] [not an abuse of discretion to deny stay pending appeal where appeal did not appear to have merit], *lv denied* 79 NY2d 756, 757 [1992]).

The motion to dismiss was properly denied. The forum selection clause by its terms only applies to proceedings to enforce the arbitration award; this is a plenary action, albeit factually related to that proceeding. Moreover, while it is true that the transaction and many of the parties are located outside of New York, the facts that three of the defendants reside here, documents relevant to the action are located here, and no defendant has made any showing of burden or inconvenience demonstrate that the IAS court's retention of jurisdiction was not an abuse of discretion (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 [1984], *cert denied* 469 US 1108 [1985]).

Nor should this case be barred by the collateral estoppel effect of the arbitration. On the one hand, that portion of defendants' appeal is rendered moot by the IAS court's grant of leave to amend the complaint (*Miglietta v Kennecott Copper Corp.*, 22 AD2d 874 [1964]). Were we to reach the merits, we would find that the determinations of the arbitration support, more than preclude, the plaintiffs' claims here.

However, we vacate the TRO because plaintiffs' complaint does not state a cause of action for a permanent injunction or otherwise meet the requirements of CPLR 6301 (*see Halmar Distribs., Inc. v Approved Mfg. Corp.*, 49 AD2d 841 [1975]). We also note that the record contains material factual issues with respect to the merits of provisional relief.

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

ENTERED: SEPTEMBER 7, 2010

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Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1984-
1984A Richard Makarius, Index 113401/03
Plaintiff-Respondent,

-against-

Port Authority of New York
and New Jersey,
Defendant-Appellant,

S. E. Elite, Inc., et al.,
Defendants.

[And Other Actions]

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Kathleen G. Miller, New York, for appellant.

Bisogno & Meyerson, Brooklyn (Elizabeth Mark Meyerson of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered January 29, 2009, which insofar as appealed from as limited by the briefs, denied defendant Port Authority's motion for summary judgment dismissing plaintiff's causes of action under Labor Law §§ 200 and 240(1) and for common law negligence, modified, on the law, to dismiss the cause of action under Labor Law § 240(1), and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered January 27, 2009, which granted plaintiff's motion for partial summary judgment on the

issue of the Port Authority's liability under Labor Law § 240(1), dismissed, without costs, as academic.

Román, J. concurs in a separate memorandum; Andrias, J.P. and McGuire, J. concur in part and dissent in part in a separate memorandum by McGuire, J.; and Moskowitz and Freedman, JJ. concur in part and dissent in part in a separate memorandum by Moskowitz, J.

ROMÁN, J. (concurring)

This action is for common-law negligence and violations of Labor Law §§ 200 and 240(1). Plaintiff, an employee of a nonparty, was injured while working at premises owned by defendant Port Authority of New York and New Jersey (the Port Authority). The premises had been leased by the Port Authority to nonparty United Stated Post Office, which, for purposes of altering the same, hired plaintiff's employer. On the date of plaintiff's accident, during work performed by one of plaintiff's coworkers, there was a break in a domestic water pipe inside an electrical closet. As plaintiff and one of his coworkers attempted to repair the pipe, a transformer that had been affixed to the wall, at a height of six to seven feet, fell, striking plaintiff in the head. At the time of the accident, plaintiff was standing on the ground, holding the ladder on which his co-worker stood.

Weeks before plaintiff's accident the wall to which the transformer was affixed had been repeatedly exposed to water emanating from pipes that the Port Authority was obligated to repair. The Port Authority was notified about these leaks, and weeks before both plaintiff's accident and the installation of the transformer the leaks were repaired and the wall had dried.

The leak that plaintiff and his coworker were attempting to repair, however, caused the wall to which the transformer was affixed to become wet. The Port Authority was notified of the leak and shut off the main water supply, allowing plaintiff and his coworker to attempt a repair of the broken pipe.

The Port Authority's construction supervisor testified that "[a]ll mains [were to be] repaired by Port Authority. And the branches [all other pipes] are repaired by the tenant." She also testified that the leak on the date of the accident emanating from a domestic pipe was the Port Authority's responsibility to repair. When asked whether the water that had fallen on the wall had compromised its strength and integrity, she further testified that once it dried, the wall's strength "should be the same."

Labor Law § 240(1) applies where the work being performed subjects those involved to risks related to elevation differentials (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Specifically, the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level" (*Gordon*

at 561 [internal quotation marks omitted]). Since Labor Law § 240(1) is intended to prevent accidents where ladders, scaffolds, or other safety devices provided to a worker prove inadequate to prevent an injury related to the forces of gravity (*id.*), it applies equally to injuries caused by falling objects and falling workers (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]). However, not every accident at a work site means that Labor Law § 240(1) has been violated (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003]) inasmuch as not every fall from a scaffold or ladder nor every instance of a falling object constitutes a violation of Labor Law § 240(1) (*Narducci* at 267). Thus, a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240(1) and those caused by general hazards specific to a workplace *(id.* at 268-269). The former give rise to liability under Labor Law § 240(1), the latter do not (*Thompson v St. Charles Condominiums*, 303 AD2d 152, 153 [2003], *lv dismissed* 100 NY2d 556 [2003]).

Since the hazards that Labor Law § 240(1) is intended to prevent are those that by virtue of height differentials, e.g., work being performed at elevations or loads being hoisted or positioned above a worker, relate to the effects of gravity (see *Toefer v Long Is. R.R.*, 4 NY3d 399, 407 [2005]), there can be no

liability under the statute where the work is not being performed at an elevated level (*see Misseritti v Mark IV Constr. Co.*, 86 NY2d 487 [1995]) or where there is no appreciable height differential between a worker and the falling object that strikes him or her (*Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909 [1998]; *Malecki v Wal-Mart Stores*, 222 AD2d 1010 [1995]; *Ruiz v 8600 Roll Rd.*, 190 AD2d 1030 [1993]); *cf Thompson* at 154 [Plaintiff injured by objects that fell off a collapsing scaffold only four feet high; absence of appreciable height differential not dispositive where accident caused not merely by gravity but also by "absence of, or a defect in, a (listed) protective device needed for the job"]).

In denying the Port Authority's motion for summary judgment dismissing plaintiff's claim under Labor Law § 240(1) and in granting plaintiff partial summary judgment on that claim, the motion court erred because plaintiff was not working at an elevation and there was no appreciable height differential between plaintiff's head and the falling transformer. The accident occurred when the transformer, mounted six to seven feet off the ground, fell on top of plaintiff's head as he stood on the ground near it. Plaintiff is five feet, eight inches tall, meaning that the distance between his head and the transformer

was less than two feet. Nor does *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2010]) avail plaintiff. While the Court of Appeals in *Runner* stated that the relevant inquiry with respect to Labor Law § 240(1) is "whether the harm flows directly from the application of the force of gravity to the object" (*id.* at 604), the court first stated that "the single dispositive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising *from a physically significant elevation differential*" (*id.* at 603 [emphasis added]) and it later stated that "[t]he elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating" (*id.* at 605). Clearly a significant height differential between the work being performed and the object being hoisted or secured continues to be a required element of the statute (*Narducci* at 269-270).

Under Labor Law § 200, in addition to liability for a dangerous condition arising from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision and/or control, liability can also arise when the accident is caused by a dangerous condition at the worksite, that was either created by the owner or general

contractor or about which they had prior notice (*see Mitchell v New York Univ.*, 12 AD3d 200, 201 [2004]; *Ortega v Puccia*, 57 AD3d 54, 61-62 [2008]); *Paladino v Society of N.Y. Hosp.*, 307 AD2d 343, 345 [2003]). Similarly, under the common law, no liability lies absent proof that a defendant created the dangerous condition alleged to have caused a plaintiff's accident or unless the defendant has prior actual or constructive notice of the same (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v Woolworth Co.*, 24 NY2d 936, 937 [1969]; *Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317, 318 [2001]; *Wasserstrom v New York City Tr. Auth.*, 267 AD2d 36, 37 [1999] *lv denied* 94 NY2d 761 [2000]).

Here, at least three issues of fact preclude summary judgment in the Port Authority's favor on plaintiff's Labor Law § 200 and common law claims: whether the leak on the date of the accident was a dangerous condition on the Port Authority's property that did not arise from the methods used by plaintiff's employer, arising instead from a defect in the pipes, whether the water falling on the wall on the date of the accident emanated from pipes that the Port Authority was obligated to repair and maintain, and whether the water falling on the wall to which the transformer was affixed had so weakened the wall as to contribute to the transformer's fall.

To the extent that the record evinces that the water leak on the date of plaintiff's accident was emanating from a preexisting domestic pipe, there is a question of fact as to whether the leak arose from the methods employed by plaintiff and his employer or whether the same arose from a dangerous condition on the Port Authority's premises, e.g., defective pipes. Similarly, because the Port Authority had notice of this leak and through its construction manager testified that it was obligated to repair it, there is a question of fact as to whether the Port Authority breached its duty to the plaintiff in failing to repair it before his accident. Lastly, since at the time of the accident the wall was wet and the Port Authority's construction manager testified that wet walls have less strength than dry walls, there is a question of fact as to whether the wet wall proximately caused the accident.

McGUIRE, J. (concurring in part, dissenting in part)

Plaintiff was standing on the floor holding a ladder for a coworker who was trying to fix a pipe in the ceiling that had been broken earlier that day when another coworker was removing a sink. While plaintiff was holding the ladder, a transformer mounted on the wall at eye level came loose and hit plaintiff in the head. A reasonable inference from the evidence is that the transformer fell when the coworker stepped on it, but what exactly caused the transformer to fall is irrelevant. The transformer had been installed two or three weeks before the accident; the workers who mounted the transformer were standing on the floor when they installed it.

Although Justice Moskowitz is correct that "[t]he protections of section 240(1) are not limited to circumstances where the falling object was in the process of being hoisted or secured," "strict liability under section 240(1) is limited only to risks associated with elevation differentials" and "[n]ot every gravity-related hazard falls within the statute" (*Daley v City of New York Metro. Transp. Auth.*, 277 AD2d 88, 89 [2000], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490-491 [1995]). As the Court of Appeals has explained, "'The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a

difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured'" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 407 [2005], quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Where, however, workers or objects fall but the plaintiffs "'w[ere] exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240(1),' the plaintiff[s] cannot recover under the statute" (*id.*, quoting *Rodriguez v Margaret Tietz Ctr. for Nursing Care, Inc.*, 84 NY2d 841, 843 [1994]).

Thus, for example, the Court of Appeals found the statute inapplicable where the plaintiff's decedent, a mason who was performing work on townhouses being constructed, was severely injured when a completed, concrete-block fire wall collapsed (*Misseritti*, 86 NY2d at 491). The Court explained that under those circumstances, there was "no showing that the decedent was working at an elevated level at the time of his tragic accident. Nor can it be said that the collapse of a completed fire wall is the type of elevation-related accident that section 240(1) is intended to guard against" (*id.*). Similarly, the Court found the statute inapplicable where the plaintiff was removing a steel

window frame from a fire-damaged warehouse when a large piece of glass from an adjacent window frame fell and severely cut his arm (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 265-266 [2001]). The Court explained that "the glass that fell on plaintiff was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell, and thus Labor Law § 240(1) does not apply" (*id.* at 268). The Court further explained that "[t]he absence of a necessary hoisting or securing device of the kind enumerated in Labor Law § 240(1) did not cause the falling glass" (*id.* at 268-269). Rather, it "was clearly a general hazard of the workplace" and not one that is subject to the statute (*id.* at 269).

Likewise, in *Capparelli v Zausmer Frisch Assoc.* (96 NY2d 259 [2001]), the companion case decided with *Narducci*, the plaintiff, who was standing on a ladder while installing a light fixture in a 10-foot ceiling, was injured when the light fixture began to fall from the ceiling before he was able to secure it and he cut his hand and wrist (*id.* at 266-267). The Court noted that although the ceiling was 10 feet high, the plaintiff was standing half way up an 8-foot ladder when the light fixture fell (*id.* at 269). It held that under these facts, "there was no height differential between plaintiff and the falling object" since the plaintiff "was working at ceiling level when his accident

occurred" (*id.* at 269-270).

Here, plaintiff was standing on the floor when the transformer, which was installed at eye level and was no more than six or seven feet high, came loose and hit him. There was no elevation differential between plaintiff and the transformer and the transformer was neither an object being hoisted nor a load that required securing at the time it fell. In fact, the transformer was completely unrelated to plaintiff's task of holding the ladder while his coworker worked on a pipe in the ceiling (*see Narducci*, 96 NY2d at 268).

The relevant facts of this case are indistinguishable from those in *Narducci* and *Capparelli*, and summary judgment should have been granted to the Port Authority for this reason alone. Justice Moskowitz all but expressly concedes that *Narducci* and *Capparelli* cannot be distinguished, for she contends only that these precedents "predate the Court of Appeals' expansive reading [of Labor Law § 240(1)] in *Runner*." In essence, then, Justice Moskowitz's position is that in *Runner* the court overruled these precedents sub silentio. But nothing in the opinion in *Runner* suggests that its analysis proceeds down a new and "expansive" path. Moreover, as discussed below, *Runner* and *Narducci* are not inconsistent, a circumstance that Justice Moskowitz appears to acknowledge when she first cites *Narducci*. In any event, one

should not leap to the conclusion that *Narducci* is no longer good law, in the absence of an express statement to that effect by the Court of Appeals.

Summary judgment for the Port Authority should have been granted on the § 240(1) claim for an independent reason: there is no support in the record for concluding, as Justice Moskowitz does, that the transformer fell because of the absence of one of the enumerated safety devices. The statute requires contractors and owners to "furnish or erect . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices" to provide proper protection to workers engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law § 240[1]). This list of required safety devices, "all of which are used in connection with elevation differentials, evinces a clear legislative intent to provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured'" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993], quoting *Rocovich*, 78 NY2d at 514).

In support of her assertion that "the failure of the bolts [on the water-damaged wall] was the proximate cause of the

accident," Justice Moskowitz concludes that the "anchor bolts" that secured the transformer to the wall are a "safety device" under the statute. Not surprisingly, Justice Moskowitz cites no support for this startling conclusion. To rebut it, I think it is sufficient to note that based on this reasoning, a nail would be a safety device.

This rationale for affirmance is one that will come as a surprise to plaintiff, as well as the Port Authority, for it was conceived and constructed by Justice Moskowitz. Plaintiff certainly does not argue that the bolts that secured the transformer are a "safety device." Rather, he argues that the lag bolts temporarily secured the transformer to the wall, braces were supposed to provide additional support, and the installation of the braces had not occurred as of the date of the accident. Although plaintiff testified that the lag bolts were temporarily used to secure the transformer to the wall, he subsequently testified that he did not know whether braces, or "a cable or a chain," were going to be utilized to further secure the transformer. Because "there was no detail" on the print for installation of the transformer, he inquired with the architect, who "sent out a memo for adding knee braces for extra support." However, the testimony of the architect made clear that at the time of plaintiff's inquiry, it was not yet known that the

transformer specified by the electrical engineer was one "that had an integral flange attached to the transformer project and this flange had holes in it that were designed to receive bolts, which were to be anchored to the . . . wall substrate." Thus, the transformer was installed according to its specifications, the installation was not temporary, and braces were not required.

As for the rationale created by Justice Moskowitz, it cannot be relied on since the Port Authority never had the opportunity to address it (*see Misicki v Caradonna*, 12 NY3d 511, 519 [2009]["For us now to decide this appeal on a distinct ground that we winkled out wholly on our own would pose an obvious problem of fair play"]). In any event, the braces referred to are not the type intended by the statute. In *Misseritti*, the Court of Appeals specifically construed the "braces" referred to in the statute "to mean those used to support elevated work sites not braces designed to shore up or lend support to a completed structure" (86 NY2d at 491). Thus, here, as in *Misseritti*, the statute is not applicable.

Justice Moskowitz's reliance on *Runner v New York Stock Exch. Inc.* (13 NY3d 599 [2009]) is misplaced. In *Runner*, the plaintiff was assisting coworkers in moving an 800-pound reel of wire down a set of approximately four stairs and was injured when the reel descended and pulled him into a metal bar. Thus, there

was a height differential in *Runner*. More critically, the lack of an enumerated safety device was the proximate cause of the accident. Indeed, the Court of Appeals specifically noted that "[e]xperts testified that a pulley or hoist should have been used to move the reel safely down the stairs" (*id.* at 602).

With respect to the Labor Law § 200 and common-law negligence claims, where, as here, such claims are based on alleged defects or dangers arising from a contractor's methods or materials, "liability cannot be imposed on an owner . . . unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner] controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*id.* [emphasis omitted]). Accordingly, the fact that the Port Authority hired a construction inspector who was present at the site for the purpose of ensuring that the work was in accordance with the pre-approved plans and was performed in a safe manner is insufficient to raise a triable issue of fact with respect to whether the Port Authority exercised the requisite degree of supervision and control over the work being performed (*id.* at 309). Likewise, the fact that the construction inspector had the

authority to stop work for safety reasons is insufficient (*id.*).

Contrary to the assertions of Justices Román and Moskowitz, there is no evidence that prior water leaks damaged the wall, creating a dangerous condition that caused plaintiff's accident. To be sure, there is evidence of prior leaks. But there is no evidence at all that these leaks affected the masonry wall to which the transformer was affixed. Moreover, it is undisputed that the wall was dry when the transformer was installed, and that on the day of the accident the wall was dry prior to the rupture of the water pipe.

Once again, the ground for affirmance is based on a rationale conceived and constructed by justices of this Court and not by the party urging that we affirm. Plaintiff does not argue that there are questions of fact regarding whether there was a "dangerous condition on the Port Authority's property that did not arise from the methods plaintiff's employer used" or whether "the water falling on the wall that day emanated from pipes the Port Authority was responsible for or had assumed the responsibility to repair." Rather, plaintiff argues that the Port Authority is not an out-of-possession landowner that relinquished its authority to supervise and control the work being performed. To the extent that plaintiff argues on appeal that the motion court correctly found that the Port Authority

failed to prove that its own "negligence in repairing or failing to repair the water leaks was not a contributing cause of the accident," he as well as Justices Moskowitz and Román ignore that there is no evidence of any problems with the wall or the installation of the transformer prior to the rupture of the pipe on the day of the accident. Thus, although the Port Authority had notice of prior leaks, it had no notice that the wall was damaged. Indeed, nothing but pure speculation supports the notion that the wall had been damaged by prior leaks. Moreover, the Port Authority had no notice of the specific leak that plaintiff's co-worker was trying to fix just before the accident occurred, and there is no evidence that the prior leaks were caused by anything like what caused the latter leak.

MOSKOWITZ, J. (concurring in part, dissenting in part)

In this Labor Law §§ 240(1) and 200 case, plaintiff, a site supervisor for the general contractor, was injured when a transformer, that had been temporarily secured directly to sheet rock at a height of six or seven feet, fell on his head. On the day of the accident, a flood occurred in the area of the accident when the general contractor broke a water line while removing a sink. Plaintiff was holding the base of a ladder for a 200 to 240-pound coworker who was taking out a section of pipe in the ceiling. The coworker may have had one foot on the ladder and the other on the transformer, rather than both feet on the ladder. Or, the ladder may have struck the transformer. Nevertheless, while plaintiff was holding the ladder, the transformer's anchors came loose from the wet sheet rock and the transformer struck plaintiff on the head. The record demonstrates that only lag bolts secured the transformer box to the wall. There is evidence in the record that knee braces were supposed to have been installed to provide additional support, but this installation had not occurred as of the date of the accident. In the weeks leading up to this incident, the wall on which the transformer was mounted had frequently become wet from leaking water. Plaintiff had complained about the leaks and defendant Port Authority, the premises' owner, had repaired them.

Labor Law § 240(1) requires contractors and owners to:

> "furnish or erect, or cause to be furnished or erected . . ., scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to [workers on the premises]."

The statute does not cover the type of ordinary and usual perils to which a worker is commonly exposed at a construction site (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Rather, the statute requires the use of safety devices when not using them creates a direct risk from an elevation differential (*see Buckley v Columbia Grammar & Prepatory*, 44 AD3d 263, 270 [2007]) *lv denied* 10 NY3d 710 [2008]; *see also Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001] [section 240(1) applies "where the falling of an object is related to a significant risk inherent in the relative elevation at which materials or loads must be positioned or secured"] [internal quotation marks and ellipses omitted]).

The protections of section 240(1) are not limited to circumstances where the falling object was in the process of being hoisted or secured (*see Boyle v 42nd St. Dev. Project, Inc.*, 38 AD3d 404, 406 [2007]). Rather, 'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved

inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person' (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009] [emphasis omitted] quoting *Ross*, 81 NY2d at 501). In cases of falling objects, the question is "whether the harm flows directly from the application of the force of gravity to the object" (*id.*). That the transformer fell only a few feet is of no moment.

What is important is whether the injury was a direct consequence of defendants' failure to provide and place the necessary safety devices the statute mandates under the circumstances (*see id. at* 604, 605; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [2003], *lv dismissed* 100 NY2d 556 [2003]). Here, anchor bolts secured the transformer. It is undisputed that these bolts supporting the transformer did not hold, perhaps due to the water-damaged wall, and that the failure of the bolts was the proximate cause of the accident. Accordingly, the accident fell within the parameters of Labor Law § 240(1) because a falling object struck plaintiff that a safety device had not adequately secured (*see Runner* at 604, *see also Gallagher v New York Post*, 14 NY3d 83 [2010]).

The Port Authority argues that the motion court improperly concluded that the failure of the support bolts on the water-

weakened wall caused the accident. Instead, the Port Authority argues that it is likely that the 200 to 240-pound, 6-foot tall coworker stood on the transformer and caused it to fall. However, the electrician who installed the transformer testified that he used bolt expansions with lag bolts that should have been able to support 400 to 500 pounds. Thus, if these bolts were sufficient, the 200 to 240-pound co worker should have been able to place his full weight on the top of the transformer. Moreover, there is no evidence in the record whatsoever that the coworker fell when the transformer's supporting lag bolts failed. This leads to the inescapable conclusion that the coworker could not have been standing full weight on the transformer when it fell. But, even if the coworker were standing on the transformer, and somehow did not fall, it is irrelevant. This is because the proximate cause of the accident was not a worker standing on the transformer, but the failure of the bolts on the water-damaged wall.

Justice McGuire's reliance on *Misseritti v Mark IV Constr. Co. Inc*, (86 NY2d 487 [1995]) is not persuasive. He relies on this case to conclude that there is no support in the record that the transformer fell because of the absence of enumerated safety devices. According to Justice McGuire, *Misseritti* stands for the proposition that the braces the statute refers to are not those

that would have been necessary to secure installation of the transformer.

Justice McGuire reads the statute too narrowly, an approach that the Court of Appeals criticized in *Runner* (13 NY3d at 603 ["The breadth of the statute's protection has, however, been construed to be less wide than its text would indicate"]). The situation in *Runner* is instructive. There, the plaintiff and some coworkers were moving an 800-pound reel of wire down a flight of stairs. To prevent the reel from rolling, the workers tied one end of a 10-foot length of rope to the reel and then wrapped the rope around a metal bar. They then placed this metal bar across the door jamb on the same level as the reel. The plaintiff and two others held the loose end of the rope while two other workers began to move the reel down the stairs. As the reel descended, it pulled the plaintiff toward the metal bar. The plaintiff injured his hands against the metal bar.

The Court of Appeals allowed recovery under section 240(1), even though an object did not strike plaintiff and even though the workers were not hoisting or securing the object from above. To the Court, the Labor Law applies to those types of accidents where the safety device was inadequate to protect the worker and the harm flowed directly from the force of gravity to an object or person. Thus, the operation of the force of gravity in

causing the accident was the critical factor. This case fits squarely within the *Runner* criteria: (1) the safety device (i.e., the anchor bolts) were not sufficient to support the transformer and (2) the force of gravity caused the transformer to fall on plaintiff. The decisions the Port Authority rely on are no longer viable because they predate the Court of Appeals' expansive reading in *Runner* (*compare Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 270 [2001] ["The fact that gravity worked upon this object which caused plaintiff's injury is insufficient to support a section 240(1) claim"], *with Runner*, 13 NY3d at 604 ["The relevant inquiry. . . is rather whether the harm flows directly from the application of the force of gravity to the object"]).

Moreover, the list of safety devices in section 240(1) is not exclusive. The statute specifically contemplates "other devices" necessary to protect workers. Thus, even if *Misseritti's* construction of "braces" were applicable here, the statute's language qualifies the knee braces in this case as a safety device, because the knee braces fall under the statute's category for "other devices" and were necessary to protect plaintiff from having the transformer fall on his head.

With respect to the common-law and section 200 claims, I disagree that this accident necessarily arose out of the manner or methods of the work.

"Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept. 2008]). "Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition" (*id.*).

With respect to the common-law and section 200 claims here, the record reveals that before the incident, plaintiff had complained to a Port Authority inspector about wet conditions in the wall where the transformer was located and that the Port Authority repeatedly attempted to fix the leaks. Thus several questions of fact preclude summary judgment in the Port Authority's favor: whether the water leaks were a dangerous condition on the Port Authority's property that did not arise from the methods plaintiff's employer used, whether the Port Authority was responsible for the repairs, whether prior leaks affected the sheetrock's ability to hold up the transformer and

whether the water falling on the wall that day emanated from pipes the Port Authority was responsible for or had assumed the responsibility to repair. The evidence in the record is thus sufficient to defeat summary dismissal on the section 200 claims (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 353 [1998]). There is no merit to the Port Authority's arguments that it did not have constructive or actual notice of any defective condition. At the very least, a witness for the Port Authority testified that she was aware that there was a leak in the electrical closet on the morning of the accident. Moreover, the Port Authority's own construction manager testified that wet walls have less strength than dry walls. This raises a question about whether the prior leaks weakened the wall.

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

ENTERED: SEPTEMBER 7, 2010

CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2215 Elline Farrington, Index 305081/08
Plaintiff-Respondent,

-against-

Go On Time Car Service, et al.,
Defendants,

Miguel A. Chavez,
Defendant-Appellant.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Steven N. Feinman of counsel), for appellant.

Silbowitz, Garafola, Silbowitz & Schatz, New York (David M. Kert of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about September 16, 2009, which denied defendant Chavez's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against that defendant.

The court properly concluded that defendant, through his medical experts, made a prima facie showing that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) in her accident on January 13, 2008. Indeed, even where there is objective medical proof of an injury, summary dismissal

of a serious injury claim may be appropriate when additional contributory factors, such as preexisting conditions, interrupt the chain of causation between the accident and the claimed injury (*see Pommells v Perez*, 4 NY3d 566, 572 [2005]). Here, plaintiff claims she suffered degenerative disc herniations and disc bulges in her lower back as a result of the accident, as well as injuries to her head, neck, shoulder and left knee. Chavez supported his motion with the reports of three physicians. Neurologist Michael J. Carciente, who examined plaintiff on March 18, 2009, opined that there were no objective findings such as myotomal weakness, dermatomal sensory deficits, asymmetric reflexes or atrophy supporting the presence of a cervical or lumbosacral radiculopathy. Dr. Carciente concluded that there was no evidence of a causally related neurological injury or disability, or the need for any specific neurological treatment in reference to the accident. Orthopedic surgeon John H. Buckner, who also examined plaintiff 14 months after the accident, concluded that her spinal examination was normal except for degenerative changes common for a person of her age, physique and preexisting scoliosis. In particular, Dr. Buckner noted that the ranges of motion of plaintiff's cervical spine were greater than most standard tables, while those of her thoracic and lumbar spine were lower. He attributed the difference to preexisting

idiopathic scoliosis unrelated to any injury. Dr. Buckner also opined that MRI findings with respect to plaintiff's left knee were indicative of a preexisting condition. In this respect, he also noted that the first medical report submitted for his review, which is dated a month after the accident, does not mention complaints of left knee pain or injury. David A. Fisher, a radiologist, reviewed MRIs of plaintiff's cervical and lumbar spine and left knee which were taken two months after the accident. As to the spinal MRIs, Dr. Fisher found degenerative changes consistent with a preexisting condition. He further opined that there was no radiographic evidence of recent traumatic or causally related injury to plaintiff's cervical or lumbar spine, or to the left knee. Hardly conclusory, the reports of all of defendants' examining physicians cite cervical, lumbar and left knee MRIs taken two months after the accident. In addition, the reports of Drs. Carciente and Buckner recite a review of reports prepared by plaintiff's treating physicians.

Notwithstanding Chavez's prima facie showing that plaintiff did not suffer a serious injury, the court denied his motion, finding the reports of plaintiff's physicians sufficient to enable her to survive the motion for summary judgment. This was error because plaintiff's physicians did not address the medical

findings of preexisting degenerative conditions (*see e.g. Depena v Sylla*, 63 AD3d 504, 505 [2009], *lv denied* 13 NY3d 706 [2009]; *Valentin v Pomilla*, 59 AD3d 184 [2009]; *cf. Linton v Nawaz*, 62 AD3d 434 [2009], *affd* 14 NY3d 821 [2010]). In addition, plaintiff's deposition testimony that she stayed home for a few days after the accident and lost no time from work demonstrates prima facie that she did not sustain a 90/180-day injury (*see Cruz v Aponte*, 60 AD3d 431, 432 [2009]), and the medical evidence she submitted in opposition to defendant's motion fails to substantiate any qualifying injury or impairment (*Nelson v Distant*, 308 AD2d 338, 339-340 [2003]).

All concur except Moskowitz and Manzanet-Daniels, JJ. who dissent in part in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting in part)

I take issue with the majority's conclusion that plaintiff's medical evidence failed to address defendant's alleged expert opinions that her claimed limitations are the result of preexisting conditions and not attributable to the January 13, 2008 accident.

Defendant's experts merely alleged, in entirely conclusory terms, that plaintiff's injuries were attributable to a "pre-existing condition." In this case there is no "persuasive" evidence of a pre-existing injury of the type described in *Pommells v Perez* (4 NY3d 566 [2005]). Because I believe these conclusory assertions do not satisfy defendant Chavez's burden on a motion to dismiss for lack of serious physical injury, the burden never shifted to plaintiff. Even assuming the burden had shifted to plaintiff, the affirmations of plaintiff's treating physicians and experts more than sufficed to raise a triable issue of fact. Plaintiff's treating physicians and experts, upon examination and after considering all of the medical records, unequivocally opined that her injuries were caused by the January 13, 2008 accident. Therefore, I respectfully dissent.

The record evidence herein shows that plaintiff, 49 years old, had never suffered prior injuries to her neck, back or left knee. Prior to the accident, she was asymptomatic. Only after

the accident did she complain of neck, back and knee pain. She was found, upon examination, to have range-of-motion limitations in the left knee and in the cervical and lumbar spine. A cervical EMG showed the existence of left-sided C-7 radiculopathy and bilateral median sensory entrapment neuropathies at the wrists. MRI studies on March 29, 2008 showed bulging and herniated discs at multiple levels in the cervical (C2-3, C3-4, C4-5, C5-6, C6-7, C-7-T1) and lumbar (L2-3, L3-4, L4-5, L5-S1) spine, with thecal sac and nerve root impingement. The reports noted disc dessication and degenerative endplate changes at L5-S1, but did not describe the numerous other positive findings as degenerative in nature. The radiological reports noted, in passing, that axial images demonstrated counterclockwise rotary scoliosis. An MRI study of the left knee revealed a lateral shift of the patella, with mild arthrosis, a tear of the posterior horn of the medial meniscus, degenerative thinning of the anterior cruciate ligament, and scarring of the medial collateral ligament.

Plaintiff commenced physical therapy immediately after the accident, which she continued until it was determined, in December 2008, that she had reached the maximum medical improvement from conservative management. Approximately six months after the accident, she underwent arthroscopic knee

surgery for chondral erosion of the patella femoral joint and a partial thickness tearing of the posterior horn of the lateral meniscus.

Chavez moved for summary judgment, relying, inter alia, on the affirmed medical reports of Dr. Carciente, a neurologist, Dr. Buckner, an orthopedist, and Dr. Fischer, a radiologist. Both Dr. Carciente and Dr. Buckner, in rendering their opinions, reviewed plaintiff's medical records, including the MRI reports, but did not review the MRI films. Dr. Carciente found "no correlation between the findings allegedly found in the spine MRI reports" and plaintiff's examination, which he described as normal, observing that as "is well known, bulges and herniations may also be seen in completely asymptomatic and atraumatic individuals."

Dr. Buckner concluded that plaintiff's spinal examination was normal except for degenerative changes common to a person of her age, physique and pre-existing scoliosis. He opined there were "no reported findings" on the MRI "to suggest recent onset of any of the putative abnormalities," that in fact the "'findings' [we]re more consistent with normal findings for a person of her age, habitus and pre-existing scoliosis than with any trauma or injury." With regard to the positive findings on the MRI study of plaintiff's left knee, Dr. Buckner opined that

they were "clearly pre-existing." If a knee injury had been related to the accident, plaintiff would have been fitted with an immobolizer and crutches in the emergency room.

Chavez also relied on the report of Dr. Fischer, who reviewed the MRI studies of plaintiff's left knee and cervical and lumbar spine. With respect to the cervical spine, Dr. Fischer opined that the study demonstrated "mild diffuse degenerative changes" consistent with a pre-existing condition, with no evidence of herniations or bulges, and no evidence of recent trauma. With respect to the lumbar spine, Dr. Fischer opined that the study demonstrated degenerative changes at the level of L5/S1 consistent with a preexisting condition, with no herniations and only a "mild" disc bulge at L5/S1 that was compatible with the amount of degenerative change present. He opined that there was no evidence of recent trauma. As to the left knee, Dr. Fischer opined that it showed "[g]rade II signal within the posterior horn of the medial meniscus," and "[m]ild diffuse articular cartilage loss," consistent with a preexisting condition. Dr. Fischer found no discrete meniscal or ligament tear, nor evidence of recent trauma.

In my opinion, defendant's expert affirmations failed to meet defendant's prima facie burden of showing lack of "serious injury" within the meaning of the Insurance Law. The

affirmations of defendants' neurologist and orthopedist were entirely conclusory and insufficient to satisfy their burden. Dr. Carciente merely opined, in entirely conclusory terms, that there was "no correlation" between the positive findings in plaintiff's MRI reports and plaintiff's examination, which he described as normal. Dr. Buckner similarly opined, in conclusory fashion, that there were no reported findings in the MRI studies to suggest recent onset of any of the putative abnormalities and that the findings were "more consistent" with normal findings for a person of her age, habitus and pre-existing scoliosis.

Defendants' expert radiologist, Dr. Fischer, opined that the MRI of the cervical spine demonstrated "mild diffuse changes," most pronounced at C5-6 and C6-7, which he does not describe, and which he similarly attributed, in conclusory fashion, to "a preexisting condition." Dr. Fischer opined that the "degenerative changes" at the L5/S1 level shown in the MRI of plaintiff's lumbar spine were "consistent" with a pre-existing condition, but did not address the other positive findings in the lumbar spine. Dr. Fischer opined that plaintiff suffered degenerative changes of the knee, but failed to address the positive findings in the March 2008 report, namely, that in addition to a degenerative thinning of the anterior cruciate ligament, plaintiff had also suffered a "lateral shift of the

patella," and a tear of the posterior horn of the medial meniscus. The radiologist further failed to address the various disc herniations and bulges, at multiple levels, clearly identified in the contemporaneous MRI studies of the cervical and lumbar spine, and failed to address the evidence of patella shift and meniscal tear shown in the contemporaneous MRI study of the left knee.

The conclusory assertions of defendants' experts – which, I note, are couched in conditional terms such as "more consistent with" – were insufficient to meet Chavez's prima facie burden. Nowhere do these experts explain how the injuries suffered by plaintiff – who, it is undisputed, was previously asymptomatic and had never been in an accident – were attributable to a "degenerative" condition rather than to the January 13, 2008 accident. Defendant cannot shift the burden of proof merely by submitting expert affidavits that aver, in conclusory terms, that a previously asymptomatic plaintiff, with no history of prior (or subsequent) accidents, suffers from degenerative changes that are the cause of her current complaints.

Even assuming – which I do not concede – that Chavez satisfied his initial burden, plaintiff's submissions raise a triable issue of fact. Plaintiff's treating physicians and experts reviewed the relevant MRI reports, discussing at length

the positive findings of the respective MRIs (including, for example, degenerative thinning of the anterior cruciate ligament), yet nonetheless opined that her injuries were attributable to the January 13, 2008 accident, thus refuting the defense experts' contention that the evidence was consistent with pre-existing degenerative changes (*see Norfleet v Deme Enter., Inc.*, 58 AD3d 499 [2009]).

Dr. Alexander Visco, plaintiff's treating physiatrist, examined plaintiff shortly after the accident and noted range-of-motion restrictions in the cervical and lumbar spine, as well as the left knee. Visco opined that plaintiff had suffered these injuries as a result of the January 13, 2008 accident. MRIs taken two months after the accident showed disc bulges and herniations at multiple levels of the cervical and lumbar spine. An MRI of the left knee disclosed a tear of the medial meniscus and a lateral shift of the patella. An April 2, 2008 EMG showed left-sided C7 radiculopathy.

On July 18, 2008, Dr. Dov Berkowitz performed arthroscopic surgery on plaintiff's knee. Dr. Berkowitz found plaintiff, on examination, to have limited range of motion in the knee and attributed her knee injuries to the accident. Dr. Visco's follow-up reports, dated April 1, May 20, July 8, September 16, and December 17, 2008, discussed the positive findings detailed

in the respective MRIs of plaintiff's cervical and lumbar spine and left knee, as well as the EMG, noted range-of-motion restrictions, and continued to describe plaintiff as a patient "status post motor vehicle accident on January 13, 2008 with cervical disc herniations and disc bulges, left C7 cervical radiculopathy, lumbar disc herniations and bulges and left knee sprain and internal derangement." In June 2009, plaintiff's expert physiatrist, Dr. Gautam Khakhar, examined plaintiff and noted her still to have significant range-of-motion restrictions. Dr. Khakhar noted that plaintiff suffered from disc herniations and bulges at multiple levels of the cervical and lumbar spine, left-sided C7 radiculopathy, and left knee internal derangement, status post arthroscopic procedure, and opined that her injuries were attributable to the January 13, 2008 accident. Dr. Khakhar, like Dr. Visco, reviewed the relevant MRIs and electrodiagnostic studies.

Their conclusions that plaintiff's symptoms were related to the accident were not speculative or conclusory, but rather, based on physical examinations of the patient made shortly after the onset of her complaints of pain and other symptoms, which she claimed arose after the January 13, 2008 accident. The affirmations of plaintiff's experts raised an issue of triable fact, and a jury was entitled to determine which medical opinion

deserved greater weight (*see Linton v Nawaz*, 62 AD3d 434 [2009], *aff'd* 14 NY3d 821 [2010]). As we stated in *Linton* (at 443) there is "no basis on this record to afford more weight to defendants' expert's opinion and there are no 'magic words' which plaintiff's expert was required to utter to create an issue of fact" concerning whether the injuries alleged were degenerative in nature. "If anything, plaintiff's expert's opinion is entitled to more weight [and] that opinion constituted an unmistakable rejection of defendants' expert's theory."

Plaintiff's experts were clearly aware of the relevant MRI findings, yet ascribed her injuries to the accident. For example, in his July 2009 report, Dr. Khakhar discussed at length the abnormal findings as noted in the relevant studies, attributing these findings to the accident:

> "As a result of the accident of January 13, 2008, [plaintiff] has sustained significant injuries to her left knee and cervical and lumbar spine.
>
> "The impact caused by the accident exerted pressure to the structural integrity of the patient's left knee resulting in a meniscal tear causing the patient significant pain and difficulty with the left knee . . .
>
> "Furthermore, the impact caused by the accident exerted tremendous pressure to the structural integrity of the nucleus pulposus, annulus fibrosis and facet joints of the cervical and lumbar spine resulting in multiple cervical (C2-3, C6-7 and C7-T1) and

> lumbar (L4-5 and L5-S1) disc herniations, in addition to cervical (C3-4, C4-5 and C5-6) and lumbar (L2-3, L3-4) disc bulges. . . In addition, range of motion testing revealed consistent and significant limitations in cervical and lumbar range of motion. Cervical R.O.M. was restricted up to 25%, and lumbar R.O.M. was limited up to 33%. . .
>
> "These pathologies are clinically correlated with the patient's symptomatology, exam findings and physical limitations. The above objective findings help to explain the ongoing pain and impairments of the patient's cervical and lumbar spine, as well as her left knee. Also, the absence of prior trauma at these levels suggests that the left knee tear, disc pathologies and nerve injuries did not pre-exist the above noted accident."

I would affirm the order of the lower court insofar as it denied Chavez's motion to dismiss plaintiff's claims alleging "serious injury" based on significant limitation of use or permanent consequential limitation of use of a body function or system.

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

ENTERED: SEPTEMBER 7, 2010

CLERK

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

2386N In re Robert Kelley, Index 102085/09
Petitioner-Respondent,

-against-

New York City Health and Hospitals Corporation,
Respondent-Appellant.

_____

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

Zucker & Bennett, P.C., Brooklyn (Gary A. Zucker of counsel), for respondent.

_____

Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered May 6, 2009, which granted a petition for leave to serve a late notice of claim, unanimously reversed, on the law and the facts, without costs, the petition denied, and the proceeding dismissed.

The issue on this appeal is whether Supreme Court properly granted petitioner's application for leave to serve on respondent New York City Health and Hospitals Corporation a notice of claim after the statutory 90 days had expired. In determining an application for leave to serve a late notice of claim (General Municipal Law § 50-e[5]), "the court must consider relevant factors and circumstances, including whether an infant is involved, whether there is a reasonable excuse for the delay,

whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter, and whether the public corporation's defense on the merits would be substantially prejudiced by the delay" (*Seymour v New York City Health & Hosps. Corp.*, 21 AD3d 1025, 1026 [2005]). Not a single one of the relevant factors weighs in petitioner's favor.

Petitioner, who was then 29 years old, was seen at Harlem Hospital in the early morning hours of December 1, 2007, after being punched in the left eye. The hospital record indicates that he had swelling and bruising from above his left eye extending down to his cheek. CAT scans were taken of petitioner's head and maxillofacial bones. The hospital records indicate that there were "soft tissue swelling/hematoma" and no fractures and that "[t]he extraocular muscles, the optic nerve/sheath complexes and remaining intraconal and extraconal fat and soft tissue structures appear unremarkable." Petitioner was released later that day after being directed to return if he experienced headaches, vomiting, trouble seeing or fever. The records further indicate that petitioner was directed to see his primary care physician within 5 days.

Petitioner did not return to the hospital and did not comply with this instruction to see his primary care physician within 5

days. Rather, even though he alleges that "[d]uring the ensuing months [his] vision continued to deteriorate," he did not seek any further medical treatment for more than one year. On December 24, 2008, while visiting his mother in California, petitioner consulted with a doctor who petitioner asserts, advised him that he had "a severe retinal detachment in [his] left eye." Thereafter, upon returning to New York, petitioner asserts that he consulted with a retinal specialist on January 7, 2009 and was advised "that as a result of the failure to promptly treat the injury . . . following the . . . assault, [he] developed a severe retinal detachment that has caused permanent diminution of vision in [his] left eye and may result in total blindness in the eye."

On or about February 12, 2009, more than 14 months after petitioner was seen at Harlem Hospital, petitioner sought leave to serve a late notice of claim. In the petition, he asserts that although there was swelling and tenderness in the area in and around his left eye, "there was no examination or evaluation by an ophthalmologist," an ophthalmology consult was not requested, and he was not given a referral to an ophthalmologist. Petitioner then asserts that "an evaluation by an ophthalmologist should have been performed," and "that as a result of the failure to promptly treat the injury . . . [he] developed a severe

retinal detachment that has caused permanent diminution of vision . . . [which] may result in total blindness in the eye." Petitioner makes no effort to support these assertions with an affidavit from a physician. Nonetheless, he contends that he should be permitted to serve a late notice of claim because respondent "is in possession of the relevant medical records" and he "had no knowledge until recently that his retina had been injured."

In the first place, petitioner is an adult and was an adult at the time of the incident. Second, he clearly failed to provide a reasonable excuse for the delay of approximately 11 months in seeking to serve a notice of claim. While he alleges that his failure to see a specialist was due to respondent's failure to provide a proper diagnosis or referral, he does not deny that he was advised to return to the hospital if he suffered any difficulty with his vision and to see his primary care physician in five days. Additionally, he admits that his vision began to deteriorate in the "ensuing months" but fails to provide any details regarding when he first experienced difficulty with his vision. If all the deterioration occurred in February or March of 2008, petitioner's delay would be manifestly inexcusable. But for all that can be gleaned from petitioner's motion, that well may be the case. Of course, moreover, the

burden is on petitioner (*Matter of Lauray v City of New York*, 62 AD3d 467). Furthermore, petitioner also failed to provide any details regarding why he neglected to follow the advice given to him by the hospital staff.

Petitioner maintains that the fact that he waited more than a year to seek treatment is only relevant to the issue of comparative fault. To the contrary, it is clearly relevant to the issue of whether he provided a reasonable excuse. In the absence of any information regarding when the deterioration began and why he did not seek treatment despite the deterioration, petitioner has offered no excuse, let alone a reasonable one, for his delay in seeking leave to serve a notice of claim.

Petitioner relies on respondent's possession of the medical records in asserting that it had actual knowledge of the facts constituting the claim. As the Court of Appeals has stressed, however, "[m]erely having or creating medical records, without more, does not establish actual knowledge of a potential injury *where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff*'" (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006] [emphasis added]; *see also Delgado v City of New* York, 39 AD3d 387 [2007]; *Matter of Nieves v New York Health & Hosps. Corp.*, 34 AD3d 336, 338 [2006]).

In *Delgado*, this Court stressed that the "Fire Department's ambulance report contained no information from which notice of a claim of negligence on respondent's part could have been readily gleaned" (39 AD3d at 388). What was true in *Delgado* is true here, too. And here, as in *Nieves*, "petitioner[] fails to identify anything in the records which would have afforded respondent notice of the facts constituting [his] claim, or to alert it as to any potential negligence on its part" (34 AD3d at 338). This Court has repeatedly held that a motion to serve a late notice of claim should not be granted where, as here, there is no reasonable excuse and the possession of the medical records fails to establish that the respondent had actual knowledge (*see e.g. id.; Velazquez v City of N.Y. Health & Hosps. Corp.* [*Jacobi Med. Ctr.*], 69 AD3d 441 [2010]; *Webb v New York City Health & Hosps. Corp.*, 50 AD3d 265 [2008]).

To be sure, a claim of malpractice can be evidenced from the face of medical records (*see e.g. Bayo v Burnside Mews Assoc.*, 45 AD3d 495 [2007] [plaintiffs submitted affirmations from physician establishing that medical records, on their face, evidence failure to provide infant plaintiff with preventive care against lead poisoning]; *Greene v New York City Health & Hosps. Corp.*, 35 AD3d 206, 207 [2006] [plaintiff's experts based opinion on records that included incomplete sonogram showing that infant

plaintiff's left kidney was dilated and no follow-up sonogram]). However, even petitioner does not argue that this is such a case. Rather, he maintains that because the petition states that his claim relates specifically to the failure to have an ophthalmologist examine his left eye or render prompt and appropriate treatment to prevent the severe retinal detachment that caused permanent diminution of vision, respondent was apprised of the acts or omissions that are the basis of his claim.

This argument is devoid of merit. Its obvious flaw is that it conveniently assumes that a review of the medical record would reveal that his retina had become detached or that an ophthalmologist should have examined petitioner. Nothing in the hospital records provides support for this assumption and petitioner did not submit an affidavit from an expert that would support it. This Court has repeatedly stressed the presence of such an affidavit in upholding grants of motions for leave to serve a late notice of claim (*see e.g. Lisandro v New York City Health & Hosps. Corp.* [*Metropolitan Hosp. Ctr.*], 50 AD3d 304 [2008], *lv denied* 10 NY3d 715 [2008] ["plaintiff submitted affirmations from physicians establishing that the available medical records, on their face, evinced that defendants failed to provide the infant plaintiff with proper care"]; *Talavera v New*

York City Health & Hosps. Corp., 48 AD3d 276, 277 [2008] ["Plaintiffs submitted affirmations from a physician establishing that the medical records, on their face, evince that defendant failed to provide proper care to plaintiffs"]; *Bayo v Bainside Mews Assoc.*, 45 AD3d 495, *supra*).

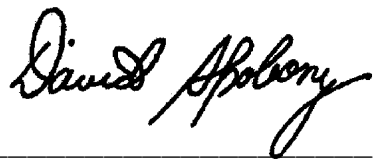
Notably absent from the hospital records is any complaint by petitioner that he was experiencing difficulty with his vision. In fact, the hospital records establish that petitioner had no complaints other than being punched in the eye. Further, the hospital records expressly state that "[t]he extraocular muscles, the optic nerve/sheath complexes and remaining intraconal and extraconal fat and soft tissue structures appear unremarkable." One needs no medical expertise to know that this statement cannot possibly support the conclusion that it would be apparent from the face of the records that a detached retina should have been diagnosed or that petitioner should have been referred to an ophthalmologist. It may be that a medical expert nonetheless might opine that it is apparent from the records that petitioner should have been referred to an ophthalmologist. Of course, however, since no expert affidavit was submitted and we cannot glean from the medical records what an expert may have been able to provide, we cannot say that respondent had actual knowledge of the facts constituting his claim of malpractice.

Petitioner also fails to demonstrate the lack of any prejudice to respondent from his unexplained delay. Respondent's possession of medical records that could not alert it to a claim of malpractice obviously cannot, ipso facto, establish a lack of prejudice. Moreover, petitioner was seen once in the emergency room with some swelling and bruising on his face, hardly an incident likely to have been burned into the memories of the hospital staff who treated him. More importantly, petitioner bears the burden of showing a lack of prejudice (*Matter of Lauray*, 62 AD3d 467, *supra*), but asserts nothing to demonstrate that the passage of time has not caused prejudice. Of course, the likelihood of the staff having any recollection of petitioner is diminished by the passage of time. Here, as in *Nieves*, where there was a one-year period of delay, "other than conclusory assertions to the contrary, petitioner[] ha[s] failed to rebut respondent's claim that [the] delay in filing the notice of claim

prejudiced its ability to investigate and defend the claim (34 AD3d at 338).

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

ENTERED: SEPTEMBER 7, 2010



CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2592 Abeyakaran Janakan Suppiah, Index 103367/05
Plaintiff-Appellant,

-against-

Mark C. Kalish,
Defendant-Respondent.

_____

Ressler & Ressler, New York (Bruce J. Ressler of counsel), for appellant.

Morrison Mahoney LLP, New York (Demi Sophocleous of counsel), for respondent.

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Order, Supreme Court, New York County (Edward H. Lehner, J.), entered April 1, 2009, which granted defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiff, a native of Sri Lanka, originally came to the United States on a student visa. In 1997, after completing his studies in electrical engineering, plaintiff accepted a job with nonparty Wireless Facilities, Inc. (WFI). Defendant is an immigration attorney whom WFI regularly engaged to handle immigration matters for its foreign employees. WFI's policy was to pay defendant's fees if its employees utilized his services. In December 1997, defendant successfully petitioned, on plaintiff's behalf, for an H1-B nonimmigrant temporary working

visa, with an expiration date of August 1, 1999. Prior to that expiration date, defendant filed a petition that resulted in an extension of the H1-B visa to July 15, 2002.

In or about August 1999, plaintiff stopped working for WFI. The reason for the cessation of work is sharply controverted by the parties. According to plaintiff, he informed WFI that he was interested in gaining employment elsewhere. He also maintains that WFI refused to provide him with his original H1-B visa approval notice and other documents, which were in WFI's exclusive possession and were necessary for him to prove his immigration status to prospective employers. Then, plaintiff claims, WFI retaliated against him by "benching" him, i.e., refusing to assign him any more work. Plaintiff alleges that the benching caused him to violate his visa, which required him to work to maintain his legal immigration status. WFI denies that it benched plaintiff and claims that it terminated him for legitimate business reasons. In December 2000, plaintiff resumed working for WFI. Plaintiff claims that the benching ended because he made clear his desire to continue working for WFI. WFI asserts that it simply decided to rehire plaintiff.

In May 2002, with the expiration date of his H1-B visa approaching, plaintiff asked defendant to take steps to ensure his continued legal status. Instead of petitioning for an

extension of plaintiff's existing H1-B visa, which he had done previously, defendant filed a petition for a new H1-B visa. It is unclear from the record whether plaintiff was aware of this decision, since defendant primarily communicated with WFI, and relied on WFI to pass relevant information on to plaintiff. Plaintiff now contends that he would not have agreed to defendant's chosen course of action. That is because in order to secure a new visa, as opposed to extending the current one, plaintiff would have been required to travel to Sri Lanka to have the new visa validated, and he considered the political situation in that country to be threatening. Indeed, plaintiff did refuse to leave the United States, and as a result he lost his legal immigration status in February 2003, forcing WFI to terminate him. As it turned out, plaintiff would have had difficulty traveling to Sri Lanka after February 2002, when his passport expired.

Plaintiff commenced this action against defendant, alleging that defendant committed legal malpractice by seeking to renew, rather than extend, his legal status. After the completion of discovery, defendant moved for summary judgment. In support of his motion, defendant submitted the affirmation of his attorney and several exhibits. The exhibits included the deposition transcripts of plaintiff and defendant and various records from

plaintiff's WFI employment file. The employment records were accompanied by a "Certification" executed by an employee of WFI purporting to be authorized to authenticate the documents. Defendant argued that judgment in his favor was required as a matter of law because the employment records conclusively established that plaintiff was terminated from WFI, not benched. Therefore, defendant asserted, extending plaintiff's work visa was impossible since plaintiff could not establish that he had been continuously employed during the period of the visa. Defendant further argued that plaintiff concurred in the decision to procure a new visa, and that plaintiff was solely responsible for the futility of that strategy since he neglected to maintain a current passport and thus could not travel abroad to validate a new visa. Finally, defendant maintained that because plaintiff permitted his passport to expire, summary judgment was mandated, since plaintiff was required by federal law (specifically, 8 CFR 214.1[a][3][i] to maintain a valid passport at all times in order to be entitled to extend his visa.

In opposition to the motion, plaintiff submitted his own affidavit, the affirmation of his attorney, and the affidavit of Charles H. Kuck, Esq., an attorney purporting to be an expert in immigration law. Plaintiff argued that the motion should be denied because the employment records, upon which defendant's

motion so heavily depended, were not properly certified and were hearsay. Accordingly, he asserted, defendant failed to satisfy his prima facie burden. At oral argument of the motion, plaintiff further claimed that defendant failed to establish his right to judgment as a matter of law in the first instance because he failed to submit the affidavit of an expert. In any event, plaintiff argued, he raised an issue of fact through his own affidavit and deposition testimony that he had been improperly benched. His expert explained that defendant committed malpractice by failing to take the position that plaintiff was benched, not terminated, and so was continuously employed. Such a position, according to Kuck, would have supported a petition for extension of the existing visa. As for the fact that plaintiff permitted his passport to expire, Kuck stated that "An expired passport is a technical violation, easily cured, and in all my years of practice, I have never had a client deported on this basis."

The IAS court granted defendant's motion and dismissed the complaint. The court did not expressly address plaintiff's position that defendant did not establish his prima facie entitlement to summary judgment. However, it did find that plaintiff failed to raise an issue of fact regarding his claim that defendant committed malpractice.

We reverse because defendant failed to satisfy his prima facie burden of establishing entitlement to judgment as a matter of law. The issues in this case are not part of an ordinary person's daily experience, and to prevail at trial, plaintiff will be required to establish by expert testimony that defendant failed to perform in a professionally competent manner (*see Gertler v Sol Masch & Co.*, 40 AD3d 282 [2007]; *Merlin Biomed Asset Mgt., LLC v Wolf Block Schorr & Solis-Cohen LLP*, 23 AD3d 243 [2005]). As this is a motion for summary judgment, the burden rests on the moving party - here, defendant - to establish through expert opinion that he did *not* perform below the ordinary reasonable skill and care possessed by an average member of the legal community (*see R.A.B. Contrs. v Stillman*, 299 AD2d 165 [2002]; *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 284 [1999]). Also, defendant was required, on this motion, to establish through an expert's affidavit that even if he did commit malpractice, his actions were not the proximate cause of plaintiff's loss (*see Tran Han Ho v Brackley*, 69 AD3d 533 [2010]). By failing to submit the affidavit of an expert, defendant never shifted the burden to plaintiff.

Defendant also failed to establish as part of his prima facie case that plaintiff was legitimately terminated from WFI and not benched. This is the critical issue, because if

plaintiff can establish at trial that he was benched, a jury may conclude that defendant breached his duty to plaintiff by not petitioning for an extension of plaintiff's visa. However, defendant did not submit the affidavit of anyone with personal knowledge of what caused plaintiff not to work between August 1999 and December 2000. Instead, defendant relied entirely on the WFI employment records. However, those records were inadmissible despite having been "certified," as the certification did not, by itself, meet the requirements of CPLR 4518(a), i.e., show that the records were made in the ordinary course of business, that it was the ordinary course of WFI's business to make such records, and that the records were made at the time of plaintiff's separation from WFI or within a reasonable time thereafter. Accordingly, they were hearsay. Because defendant did not identify any other nonhearsay evidence it could offer at trial to prove that WFI terminated plaintiff, the records are inadmissible for purposes of defendant's summary judgment motion (*see Kramer v Oil Servs., Inc.*, 56 AD3d 730 [2008]). Without the records, we have no basis to conclude, as a matter of law, that plaintiff was terminated, leaving defendant no option but to petition for a new visa.

Contrary to defendant's contention, the issue of plaintiff's expired passport was not within the experience of an ordinary

factfinder. Defendant's argument that the expired passport would have been fatal to any effort to extend the visa relies on 8 CFR 214.1(a)(3)(i), which provides, in pertinent part:

> An alien applying for extension of stay must present a passport only if requested to do so by the Department of Homeland Security. The passport of an alien applying for extension of stay must be valid at the time of application for extension, unless otherwise provided in this chapter, and the alien must agree to maintain the validity of his or her passport and to abide by all the terms and conditions of his extension.

The regulation fails to state what the actual effect of this regulation would be on a visa extension application made by an alien with an expired passport. It is unclear whether the application would be denied outright, whether the alien would be afforded an opportunity to cure the lapse (as plaintiff's expert argued without opposition), or whether there would be some different consequence. Certainly the issue is beyond the ordinary experience of a factfinder who has no familiarity with the byzantine world of immigration law. Accordingly, defendant, as the proponent of summary judgment, was required to present an expert's affidavit in order to explain exactly what the consequence would have been. His failure to do so should have compelled denial of the motion.

Moreover, even if it could be said that defendant, despite

the lack of an expert, sustained his prima facie burden simply by pointing to plaintiff's failure to maintain a valid passport, plaintiff raised an issue of fact sufficient to defeat the motion. Plaintiff's expert opined in his affidavit that in his experience, the failure to maintain a valid passport has never resulted in a person's loss of legal immigration status. Defendant failed to rebut this. Therefore, a trial is necessary to determine whether plaintiff's actions excuse defendant from liability.

Not even defendant makes the argument, advanced by the dissent, that even assuming plaintiff was illegally benched and had a valid passport, it still would have been proper for defendant to petition for a renewal of the visa. In any event, the argument is meritless. First, the dissent places the burden on plaintiff to explain what he was doing during the 16 months he was not working for WFI, when it was defendant's burden to negate the allegation in the complaint that plaintiff was illegally benched. The dissent fails to address the fact that defendant presented not one whit of admissible evidence that plaintiff voluntarily separated himself from WFI.

Furthermore, the dissent's view would permit an unlawful and vindictive act by an employer to work to the detriment of an innocent alien. We find it improbable that defendant would have

lacked any ability to present these unique facts to immigration authorities and explain the extraordinary prejudice that would befall plaintiff were he forced to make a trip to a war-torn country to validate a renewed visa that could have simply been extended had his employer not acted in a manner contrary to law. Even if the regulations were so inflexible, as the dissent believes, it would have been necessary for defendant to support his position with expert testimony explaining why even under such extreme circumstances his hands were tied. Indeed, as discussed above, the immigration regulations at issue here, including the section requiring a valid passport at the time an application for extension is filed, are hardly self-explanatory, nor is it possible to conclude from their face that defendant had no chance of successfully securing an extension of plaintiff's visa. Accordingly, we reject the dissent's position that Supreme Court was "able to assess the adequacy of the legal services rendered, and require[d] no expert guidance."

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

TOM, J.P. (dissenting)

The complaint, as supplemented by the averments contained in the affidavit, alleges that defendant committed malpractice by failing to seek extension of plaintiff's visa. The absence of an expert affidavit notwithstanding, defendant demonstrated his entitlement to summary judgment dismissing the complaint as a matter of law by establishing that plaintiff failed to maintain a continuous valid visa status, rendering it ineligible for extension. Plaintiff, in opposition, failed to even allege, by submission of an affidavit by someone with personal knowledge of the facts, that he met the conditions required to maintain the validity of his visa for an extension. He thus failed to establish a prima facie case by asserting that but for defendant's alleged malpractice, his visa would have been extended.

Pursuing a cause of action for professional malpractice against an attorney requires the plaintiff to establish three elements: negligence by the attorney, which is the proximate cause of the loss sustained, and proof of actual damages (*Mendoza v Schlossman*, 87 AD2d 606 [1982]). If the plaintiff cannot establish that but for the alleged negligence of his attorney, a substantially better resolution of the underlying matter would

have been achieved (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007], the cause of action is deficient and must be dismissed (*Katash v Richard Kranis, P.C.*, 229 AD2d 305, 306 [1996], *lv dismissed* 89 NY2d 981 [1997]). Because plaintiff's failure to satisfy one or more conditions of his visa precluded its extension, he cannot establish that he would have been granted a visa extension but for his attorney's failure to exercise the requisite degree of professional skill and care.

Plaintiff, a national of Sri Lanka, came to the United States on an F-1 student visa on January 5, 1995, and obtained a master of science degree from Washington University in St. Louis in December 1996. That same month, plaintiff received employment authorization from the Immigration and Naturalization Service, enabling him to pursue optional practical training, and in March 1997 he began working as an engineer for nonparty Wireless Facilities, Inc. (WFI). Since plaintiff's employment authorization only remained valid for a period of one year, expiring on December 26, 1997, WFI began the process of filing a petition to obtain an H1-B temporary work visa for plaintiff (*see generally Rogers v Ciprian*, 26 AD3d 1 [2005]). Though the I-129 application was initiated by another law firm, it was successfully completed by defendant, and plaintiff was issued an H1-B visa, valid from December 30, 1997 through August 1, 1999.

It is uncontested that defendant later filed an application to renew WFI's petition, obtaining an extension of plaintiff's visa through July 15, 2002.

According to company records, plaintiff's employment with WFI ceased in August 1999 with his "separation," effective after his last day of work on August 15. Although the paperwork evaluates plaintiff as "Eligible for rehire," the annotation "Job Abandonment/Stop-payment of check" is handwritten at the top of the form.

Plaintiff's version of the events preceding his separation is recounted by his expert and differs markedly. According to the affidavit of the expert, Charles H. Kuck, an attorney specializing in immigration law, WFI took retaliatory action after plaintiff informed the company that he wished to change jobs, at which point WFI refused to assign him any further work or provide any further compensation for a period of 16 months. Furthermore, WFI refused to supply documentation necessary to enable plaintiff to obtain an H1-B visa with another employer. Kuck relates that such action is known as "benching," which is illegal.

Whatever may have transpired between plaintiff and his employer to cause his separation from employment, it is uncontested that WFI again sought to avail itself of plaintiff's

services in December 2000. As concerns defendant, plaintiff's only complaint up until this juncture was that when he requested pertinent "immigration documents so that I could demonstrate to potential new employers . . . that I was eligible to work in the United States," defendant "simply advised me to take it up with WFI." While the complaint alleges only that plaintiff was prevented from changing employers in 1999 because "WFI, without cause of [*sic*] legal basis refused to give Plaintiff a copy of his renewed H1B petition approval until February, 2001," the Kuck affidavit asserts that "Kalish's failure to give Suppiah the documents he requested was a departure from good and accepted immigration legal practice." While Kuck asserts that defendant "should have remained in possession of Suppiah's immigration filing," he later concedes that it was WFI that ultimately provided plaintiff with a copy of his H1-B petition. Kuck's affidavit never explains why defendant should be held responsible for WFI's conduct, either in refusing to assist plaintiff to change employers or in terminating his work assignments and salary. Nor does Kuck attempt to demonstrate that defendant's failure to keep a copy of plaintiff's documents, separate and apart from the records maintained by WFI, constitutes malpractice.

In any event, the misfeasance that the complaint, which was never amended, attributes to defendant as malpractice concerns events that took place in 2002, after WFI rehired plaintiff. The pertinent facts are addressed only in the Kuck affidavit, according to which, after WFI reinstated plaintiff, "WFI advised Suppiah that he had to leave the United States in order to obtain an H1-B visa stamp on his passport." Defendant then filed the disputed petition seeking a new visa rather than an extension of the existing visa. An internal e-mail dated March 12, 2002 from WFI's human resources department to plaintiff states that "WFI will file your case as a new H1B visa as to avoid any issues," and defendant's deposition testimony indicates that plaintiff's separation from employment warranted the filing of a new petition. In any event, the petition was approved shortly thereafter, as indicated by a notice dated March 29, 2002 stating that a class H1-B visa would be "Valid from 07/16/2002 to 12/16/2004." The notice bears the annotation "Consulate: CHENNAI" (formerly known as Madras), which is located in southern India. The Kuck affidavit relates that "Suppiah thereafter consulted Kalish in May 2002 for legal advice concerning his immigration status and to assist Suppiah in obtaining permanent residency status in the United States."

Based on plaintiff's 16-month separation from his employment

with WFI, Kuck alleges, "In light of his benching Suppiah would have been eligible for a visa extension without leaving the United States . . . Kalish's failure to act on Suppiah's credible allegations of benching was a departure from good and accepted immigration legal practice, and was a proximate cause of Suppiah's current Un[it]ed States immigration status." Kuck does not state what that current status is, and this Court is left to presume that plaintiff has no passport, no visa and has remained in the United States illegally. Kuck does not explain how the alleged benching might have affected the visa application, and characteristically cites no authority for his inference that it was material to the application process.

On appeal, as on the motion, defendant takes the position that he properly filed an application for a new petition and visa because plaintiff did not meet the continuous employment requirement that otherwise would have permitted the extension of WFI's petition and plaintiff's then-existing visa. Plaintiff's 16-month separation from his employment with WFI makes him unqualified for a visa extension. To obtain the new visa, defendant states, plaintiff would have been required to depart from the United States with the visa approval notice issued March 29, 2002, submit the notice and supporting documents to an

American consulate outside the United States for the required H1-B visa stamp, and return to the United States to be admitted on the new visa. Defendant asserts that plaintiff's inability to obtain a new visa was due entirely to his failure to abide by the conditions imposed by law on the holder of an H1-B visa.

The record supports defendant's contention that plaintiff's difficulties with his immigration status resulted from his failure to comply with the requirement to present himself at a consulate outside the United States for a visa interview. The notice of approval of the visa application specifically states, "Please contact the consulate with any questions about visa issuance. THIS FORM IS NOT A VISA AND MAY NOT BE USED IN PLACE OF A VISA." It is uncontroverted that plaintiff never left the United States and that no new visa ever became effective. Plaintiff's passport bears an expiration date of April 29, 2002, and he conceded during his examination before trial that he never obtained a new valid passport. He further admitted that defendant took no part in processing his passport renewal application.

As expressed by Kuck, the conduct alleged to constitute malpractice is that defendant, on behalf of WFI (denominated "petitioner" under regulations), could have filed for an extension of WFI's petition for plaintiff (denominated

"beneficiary" under the regulations), rather than filing a new petition. As Kuck opines, defendant "could have obtained an extension for Suppiah of his existing H1-B visa beyond July 15, 2002," instead of filing a new visa petition.

Kuck's contentions do not find support in the applicable regulations. "A request for a petition extension may be filed only if the validity of the original petition has not expired" (8 CFR 214.2[h][14]). Generally, "An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed" (8 CFR 214.1[c][4]). To excuse a "failure to file before the period of previously authorized status expired," it must be shown, in addition to other requirements, that "[t]he alien has not otherwise violated his or her nonimmigrant status" (8 CFR 214.1[c][4][ii]). A petition is subject to revocation if "[t]he beneficiary is no longer employed by the petitioner in the capacity specified in the petition" (8 CFR 214.2[h][11][iii][A][*1*]). Whether plaintiff’s employment separation with WFI was caused by self-abandonment or benching, there was clearly a 16-month break in his employment resulting in revocation of his visa and precluding visa renewal.

Kuck asserts, in conclusory fashion, that "an application

for extension of the visa status . . . would have allowed Suppiah to extend his visa status without ever leaving the United States." However, the requirements for extension are clear and could not be met due to the conceded 16-month break in plaintiff's employment with WFI, which rendered the company's original petition invalid. If the only viable course was to petition for a new visa, defendant can hardly be faulted for pursuing it. Plaintiff, via his expert, cites no statutory or other authority in support of the suggestion that benching might afford a beneficiary with an exception to the rule that the validity of an H1-B visa depends upon a beneficiary's continuous employment with the employer who petitioned for his visa. Therefore, plaintiff has provided no basis for his claim that defendant's failure to seek a visa extension constitutes attorney malpractice.

Nor can defendant be held liable for plaintiff's failure to obtain renewal of his passport, another condition necessary to maintaining the validity of his visa. Kuck asserts, again in conclusory fashion and without citation of authority, that "[a]n expired passport is a technical violation, easily cured, and in all my years of practice, I have never had a client deported on this basis." He asserts that the passport need only be valid at the time of application for an extension (8 CFR 214.1[a][3]), and

that under the statute, "Suppiah only had to agree to maintain the validity of his passport." He offers no explanation why plaintiff's violation of his agreement "to maintain the validity of his passport" should have no adverse effect on either the validity of his then-existing H1-B visa or the availability of an extension. Kuck maintains that "the passport 'issue' could easily have been cleared up by Suppiah briefly visiting his country to obtain a current passport, and then re-entering the [United States] with that passport and with his current H1-B visa prior to July 15, 2002" (the expiration date of the visa). However, Kuck fails to cite either statute or case law for this proposition, and again presumes that plaintiff's H1-B visa remained valid (8 CFR 214.2[h][14]) so as to permit his re-entry into the United States in compliance with the general requirement that an alien applying for an extension of admission present a valid visa to "establish that he or she is admissible to the United States" (8 CFR 214.1[a][3][i]). Where an "expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

The failure of proof on the dismissal motion lies not with

defendant, but with plaintiff. Significantly, the reason for plaintiff's "separation" from his employment — whether benching, as plaintiff now maintains, or abandonment of his job, as WFI records indicate — presents a question of fact. Plaintiff has submitted no affidavit in opposition to the motion explaining why he left WFI or what he was doing during the ensuing 16 months; nothing in the record provides an explanation, including the Kuck affidavit, which — as the affidavit of an attorney unaccompanied by documentary evidence — is without probative value (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). In the absence of a submission, in admissible form, attesting that plaintiff at all times met the conditions of his H1-B visa, the opposition fails to allege that but for defendant's malpractice, plaintiff could have received a visa extension (*see Yong Wong Park v Wolff & Samson, P.C.*, 56 AD3d 351 [2008], *lv denied* 12 NY3d 704 [2009]). The expert's submission is thus procedurally deficient, warranting dismissal of the complaint on that basis alone (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 327 [1986]), since plaintiff has failed to provide a viable theory of malpractice by defendant supported by the requisite factual predicate.

Plaintiff's opposition evades discussion of the circumstances under which he left WFI and what he was doing during the 16 months before he was rehired, and fails to address

such matters as whether he took alternative employment to support his family (a wife and a child born in February 1999) during this period. The opposition to the motion only suggests, by indirection, that there was some misconduct on the part of WFI in connection with plaintiff's separation from his employment with the company, but neglects to supply any information to support that intimation or to connect it to the conduct alleged to constitute malpractice. Finally, plaintiff coyly offers only the affidavit of his purported expert in immigration law, in lieu of a sound legal argument supporting his cause of action.

This Court's decision in *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo* (259 AD2d 282 [1999]), on which plaintiff relies, acknowledges expert evidence regarding a professional's duty of care is unnecessary "where 'ordinary experience of the fact finder provides sufficient basis for judging the adequacy of the professional service'" (*id.* at 283, quoting *S & D Petroleum Co. v Tamsett*, 144 AD2d 849, 850 [1988]). Here, the court is uniquely qualified and able to assess the adequacy of the legal services rendered, and requires no expert guidance. The conclusory assertions of malpractice, such as those contained in the affidavit of plaintiff's expert, are insufficient to raise a triable issue of fact so as to withstand

summary judgment dismissing the action (*see Margolese v Uribe*, 238 AD2d 164, 166 [1997]).

Accordingly, the order should be affirmed.

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

ENTERED: SEPTEMBER 7, 2010

CLERK

Saxe, J.P., Friedman, Nardelli, Moskowitz, Richter, JJ.

3132- RNK Capital LLC, et al., Index 603483/06
3133- Plaintiffs-Appellants/Respondents,
3134

-against-

Natsource LLC, et al.,
Defendants-Respondents/Appellants,

Ben Richardson,
Defendant.

_____

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Alexander H. Schmitd of counsel), for appellants/respondents.

Carter Ledyard & Milburn LLP, New York (Lawrence F. Carnevale of counsel), for respondents/appellants.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 10, 2009, which, insofar as appealed from, denied defendants-appellants' motion for summary judgment dismissing plaintiffs' causes of action for breach of contract, breach of fiduciary duty and aiding and abetting breach of fiduciary duty, unanimously reversed, on the law, with costs, and the motion granted. Order, same court and Justice, entered October 28, 2009, which, upon reargument, adhered to the July 10, 2009 determination that plaintiffs cannot recover damages for lost profits, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered February 17, 2010, which,

upon defendants-appellants' motion in limine to preclude plaintiffs from offering certain evidence at trial, modified, sua sponte, the order of July 10, 2009 solely to the extent of dismissing the breach of contract cause of action, unanimously dismissed, without costs, as moot in light of our disposition of the appeal from the July 10, 2009 order.

As the motion court ultimately recognized in its order rendered on the motion in limine, the breach of contract claim is barred by the statute of frauds (General Obligations Law § 5-701[a][10]), as the e-mails relied on by plaintiffs demonstrate that the parties did not reach agreement to enter into a broker/principal relationship or on the essential term of the putative broker's compensation, and intended that any agreement reached be reduced to a formal writing (*see Oui Cater, Inc. v Lantern Group, Inc.*, 71 AD3d 555 [2010]; *Langer v Dadabhoy*, 44 AD3d 425 [2007], *lv denied* 10 NY3d 712 [2008]).

Plaintiffs failed to raise a triable issue of fact with respect to the causes of action for breach of fiduciary duty and aiding and abetting same. The evidence does not support the complaint's allegation that a relationship of trust and confidence giving rise to fiduciary duties preexisted the alleged brokerage agreement, which agreement, as noted above, failed to satisfy the statute of frauds. On this record, the most

plaintiffs have shown is that the parties had engaged in a series of transactions in which, as a principal of plaintiffs admitted, defendants represented plaintiffs on a nondiscretionary basis, with no authority to bind plaintiffs to any deal without the latter's "specific authorization." This kind of non-agency relationship is not fiduciary in nature (*see Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 302 [2008] ["brokers for nondiscretionary accounts do not owe clients a fiduciary duty"]; *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 268-269 [2003]). The averments by a former executive for one of the defendant entities that he believed plaintiffs and their principal had placed full trust and confidence in him and relied on his superior knowledge and expertise not only is conclusory (*see Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260, 264-265 [2001]; *Gaidon v Guardian Life Ins. Co. of Am.*, 255 AD2d 101, 101-102 [1998], *mod on other grounds* 94 NY2d 330 [1999]) but also purports to state a belief in reliance by another who did not make averments to that effect. Nor do plaintiffs' own "subjective claims of reliance on defendants' expertise" suffice to establish a fiduciary relationship (*Societe Nationale d'Exploitation Industrielle des Tabacs et Allumettes v Salomon Bros. Intl.*, 251 AD2d 137, 137 [1998], *lv denied* 95 NY2d 762 [2000]). Moreover, that defendants may have had superior

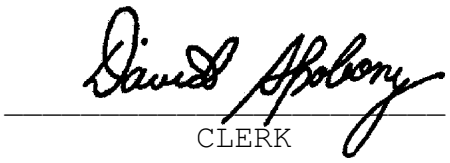
knowledge of the particular type of investment products involved does not, without more, create a fiduciary relationship (*see Batas,* 281 AD2d at 264-265; *Gaidon,* 255 AD2d at 101-102), especially given that plaintiffs themselves are highly sophisticated business entities. The claim of a fiduciary relationship is further negated by the testimony of plaintiffs' principal that "it's not [his] contention that [defendants] weren't allowed to" compete against plaintiffs for a business opportunity, although this competition is precisely the crux of the complaint.

In sum, on this record it could not reasonably be concluded that "[plaintiffs] repose[d] a high level of confidence and reliance in [defendants], who thereby exercise[d] control and dominance over [plaintiffs]" (*People v Coventry First LLC*, 13 NY3d 108, 115 [2009]). Nor would the evidence support a finding that there existed between these highly sophisticated parties "a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005], citing *Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162 [1993]). Rather, plaintiffs' allegations of breach of fiduciary duty merely duplicate the breach of contract claim barred by the statute of frauds.

Since the fiduciary breach causes of action were not viable, the claim for resulting lost profits was properly dismissed. In addition, the record established that plaintiffs' ability to realize profits from the allegedly usurped investment opportunity was contingent on certain conduct by third parties and authorization from a government-sanctioned oversight entity, both of which were highly uncertain and well beyond the scope of defendants' influence or control (*see Laub v Faessel*, 297 AD2d 28, 30 [2002] [plaintiff asserting cause of action for breach of fiduciary duty "must establish that the alleged . . . misconduct w(as) the direct and proximate cause of the losses claimed"]).

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

ENTERED: SEPTEMBER 7, 2010



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Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3217 Albert Nigri, Index 602950/06
Plaintiff-Appellant,

-against-

Liberty Apparel Company, Inc., et al.,
Defendants-Respondents.

_____

Daniele Dermesropian, New York, for appellant.

David Laniado, Cedarhurst, for respondents.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 30, 2009, which granted defendants' motion for partial summary judgment to the extent of declaring their entitlement to reimbursement of (1) half the attorneys' fees incurred in defense of a certain customs matter and (2) all the attorneys' fees incurred in pursuing their counterclaims in this action, and referring the calculation of those fees to a special referee, unanimously affirmed, with costs.

To induce the individual defendants to purchase his shares in defendant corporation, plaintiff promised to pay certain "Guaranteed Obligations," which are defined in Article VI of the subject agreement as

> "one-half of all claims, actions, litigation, and other liabilities[,] costs and expenses (a) in [certain pending legal actions, including a customs matter] and (b) of any

> type or nature of the Company . . . which arise on account of the period up to and including the Closing Date, . . . provided, however, that in the event that the Seller is required to pay any Guaranteed Obligations under part (b) of this sentence: (x) the Company and the Seller shall agree together on how to defend and dispose of such Guaranteed Obligations (such as the imposition of counterclaims, litigation strategy, settlement decisions and the like) except that the Seller shall choose counsel after consultation with the Buyer and the Company, . . . (y) the Seller shall not be obligated to make payments on Guaranteed Obligations that first arise after September 1, 2006, and (z) the Seller's obligation to make payments on such Guaranteed Obligations shall commence when the Company's fees and costs (including attorney's fees) equal $100,000, at which point the Seller shall be obligated for his half of such initial $100,000 plus one-half of all additional amounts expended in or constituting such Guaranteed Obligations."

Furthermore, "provided [defendants] are successful in establishing [plaintiff's] liability under this guarantee," plaintiff promised to pay "all out-of-pocket expenses (including reasonable attorneys' fees and disbursements) . . . incurred by [defendants] . . . in enforcing or collecting upon this Guaranty."

The motion court concluded that the agreement required plaintiff to pay half the attorneys' fees incurred by defendants in defending the customs matter referred to in part (a) of Article VI. In so concluding, the court read the phrase "all

claims, actions, litigation, and other liabilities, costs and expenses" as broad enough to include indemnification of attorneys' fees incurred in litigation against third parties, and the specific reference to such fees in part (b) as simply "a straightforward clarification of the costs and expenses that should be counted to reach the $100,000 mark."

We agree with the motion court's conclusion that Article VI unambiguously requires payment of attorneys' fees as to part (a) matters. The clause "all claims, actions, litigation, and other liabilities[,] costs and expenses" constitutes broad language that is generally interpreted to encompass attorneys' fees (*see e.g. DiPerna v American Broadcasting Cos.*, 200 AD2d 267, 270, n3 [1994]; *Breed, Abbott & Morgan v Hulko*, 74 NY2d 686 [1989], *affg* 139 AD2d 71, 74 [1988]). Plaintiff contends, however, that reading the clause to include attorneys' fees would render the specific references to such fees in the other provisions of article VI as "mere surplusage" (citing *Sagittarius Broadcasting Corp. v Evergreen Media Corp.*, 243 AD2d 325, 326 [1997]). This argument is unpersuasive because the clause containing the first parenthetical reference to attorneys' fees effectively defines the term "expenses" to include attorneys' fees. That same term later appears in the definition of "Guaranteed Obligations," and thus there was no need to repeat what is clear from the first

parenthetical reference. Moreover, the second parenthetical reference, in clause (z), follows the words "fees and costs," and makes clear that attorneys' fees also fall within the scope of one or both words. In any event, the second parenthetical reference does not render equivocal the clear statement that the term "expenses" includes "attorneys' fees."

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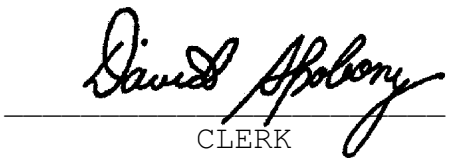

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