SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 14, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

5513 The People of the State of New York, Respondent, Ind. 3686/08

-against-

Alberto DeLuna,
Defendant-Appellant.

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

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

Upon remittitur from the Court of Appeals (__ NY3d __, 2012 NY Slip Op 03576, [2012]) judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about February 23, 2010, unanimously affirmed.

We find that the sentence was not excessive.

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

ENTERED: JUNE 14, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6883 In re 73 Warren Street, LLC, Index 116585/09
Petitioner-Appellant,

-against-

State of New York Division of Housing
and Community Renewal, et al.,
Respondents-Respondents.

Tenenbaum & Berger LLP, Brooklyn (David M. Berger of counsel) for appellant.

Gary R. Connor, New York (Martin B. Schneider of counsel), for New York State Division of Housing and Community Renewal, respondent.

Law Office of Noel Dennis & Associates, New York (Noel Dennis of counsel), for Victor Schrager, respondent.

Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered August 13, 2010, which denied the petition seeking to annul the determination of respondent New York State Division of Housing and Community Renewal (DHCR) denying petitioner's application to deregulate a rent-stabilized apartment pursuant to the high-income rent decontrol provisions, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner is the owner of a residential building in which respondent Victor Schrager has rented an apartment since 1984. The building was not rent regulated until 1977, at which time it

became rent stabilized when petitioner began to receive J-51 tax benefits. It is undisputed that no lease received by Schrager ever advised him that his apartment was subject to regulation when the tax benefits expired, which they did in 1990.

Petitioner commenced a high-rent/high-income decontrol proceeding before DHCR, in which it requested that Schrager verify that his household income was less than $175,000 for the two preceding calendar years. The rent administrator denied the petition, stating that because petitioner became subject to the Rent Stabilization Law (RSL) (Administrative Code of City of NY § 26-501 *et seq*.) by virtue of receiving J-51 tax benefits, the exclusion from "luxury decontrol" codified at Administrative Code § 26-504.1 applied.

Petitioner sought administrative review of the order, arguing that the expiration of the J-51 tax benefits made the apartment eligible for luxury decontrol. It pointed to certain language in *Roberts v Tishman Speyer Props. L.P.* (62 AD3d 71 [2009], *affd* 13 NY3d 270 [2009]) that it claimed reflected this Court's view that the luxury decontrol exclusion only applies while a building is currently receiving J-51 benefits. Petitioner argued alternatively that Real Property Tax Law § 421-a(2)(f)(i) expressly allows for luxury decontrol of an apartment where the building became rent stabilized as a result of

receiving a tax abatement, notwithstanding the Administrative Code § 26-504.1 exclusion. DHCR denied the petition for administrative review, finding that the exclusion from luxury decontrol applies to those housing accommodations that became or become subject to the RSL and regulations "solely by virtue of the receipt of tax benefits" pursuant to the J-51 program, even after the expiration of such benefits. DHCR rejected the applicability of *Roberts*, noting that in that case the J-51 benefits had not yet expired at the time of the dispute. As for petitioner's contention concerning RPTL 421-a(2)(f)(i), DHCR acknowledged that "those apartments which become subject to rent stabilization by virtue of the receipt of 421-a tax benefits do become eligible for luxury decontrol upon the expiration of those tax benefits." However, it noted that petitioner did not receive the tax benefits it enjoyed pursuant to that particular statutory scheme.

Petitioner commenced this proceeding to challenge the DHCR determination. It asserted that the determination was arbitrary and capricious, and contrary to law because it failed to recognize that, pursuant to *Roberts*, petitioner became entitled to apply for luxury decontrol when the J-51 benefits expired. It further urged that all of the various statutory provisions of the RSL applicable to buildings receiving an RPTL 421-a tax abatement

should be read in pari materia with those applicable to buildings receiving a J-51 abatement, including the provision permitting luxury decontrol of apartments regulated by virtue of RPTL 421-a. DHCR and Schrager argued that both *Roberts* and the exception to the luxury decontrol prohibition contained in RPTL 421-a(2)(f)(I) were inapplicable and lent no support to petitioner's position that luxury decontrol was available to it.

The court denied the petition and dismissed it. It distinguished *Roberts*, noting that *Roberts* "did not answer the question about whether luxury decontrol would be available after the [tax] benefits [had] expired." It further reasoned that "[p]ursuant to RSL § 26-504.1, luxury decontrol does not apply to properties that are part of the 421-a program, except as provided in RPTL § 421-a(2)(f)(i) . . . [which] expressly permits luxury decontrol after the expiration of the benefit period," but that "there is no similar express provision for the J-51 program." The court determined that RPTL 421-a and 489 should not be read in pari materia, so that luxury decontrol is permitted upon the expiration of J-51 benefits, because the provisions do not concern the same subject matter, and because, in any event, the statutes are not ambiguous in providing that luxury decontrol is not available to building owners participating in the J-51 program.

Our standard of review on this appeal is whether DHCR acted in an arbitrary and capricious manner, in violation of lawful procedures, or in excess of its jurisdiction *(see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]). This case turns on the meaning of several statutes and regulations, and the deference we are required to give the agency extends to its interpretation of them (*see Matter of Salvati v Eimicke*, 72 NY2d 784, 791 [1988]; *Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal*, 18 NY3d 446, 454 [2012]).

The first relevant statute to consider is Administrative Code § 26-504(c), which provides, in pertinent part:

> "Upon the expiration or termination for any reason of the benefits of section 11-243[1] or section 11-244 of the code or article eighteen of the private housing finance law any such dwelling unit shall be subject to this chapter until the occurrence of the first vacancy of such unit after such benefits are no longer being received or if each lease and renewal thereof for such unit for the tenant in residence at the time of the expiration of the tax benefit period has included a notice in at least twelve point type informing such tenant that the unit shall become subject to deregulation upon the expiration of such tax benefit period and states the approximate date on which such tax

[1] J-51 benefits derive from this section.

> benefit period is scheduled to expire, such dwelling unit shall be deregulated as of the end of the tax benefit period; provided, however, that if such dwelling unit would have been subject to this chapter or the emergency tenant protection act of nineteen seventy-four in the absence of this subdivision, such dwelling unit shall, upon the expiration of such benefits, continue to be subject to this chapter or the emergency tenant protection act of nineteen seventy-four to the same extent and in the same manner as if this subdivision had never applied thereto."

Pursuant to this section, an apartment that becomes rent stabilized upon the building owner's receipt of J-51 benefits remains stabilized upon the expiration of those benefits, except in two distinct instances: where the stabilized tenant vacates, or where the stabilized tenant had been consistently and properly notified in his leases that the apartment would become deregulated upon expiration of the tax benefits. The statute also provides that if the building was already regulated when the owner began to receive tax benefits, it continues to be regulated upon expiration of the tax benefits under the statutory scheme that initially gave rise to regulation. Here, it is undisputed that because Schrager is still in possession and was not given the requisite notices, the apartment continued to be rent stabilized after the expiration of the J-51 benefits.

The second statute we must grapple with is Administrative

Code § 26-504.1, enacted as part of the Rent Regulation Reform Act of 1993. It provides:

> "Upon the issuance of an order by the division, 'housing accommodations' shall not include housing accommodations which: (1) are occupied by persons who have a total annual income, as defined in and subject to the limitations and process set forth in section 26-504.3 of this chapter, in excess of the deregulation income threshold, as defined in section 26-504.3 of this chapter, for each of the two preceding calendar years; and (2) have a legal regulated monthly rent that equals or exceeds the deregulation rent threshold, as defined in section 26-504.3 of this chapter. Provided, however, that this exclusion shall not apply to housing accommodations which became or become subject to this law (a) by virtue of receiving tax benefits pursuant to section four hundred twenty-one-a or four hundred eighty-nine of the real property tax law,[2] except as otherwise provided in subparagraph (i) of paragraph (f) of subdivision two of section four hundred twenty-one-a of the real property tax law, or (b) by virtue of article seven-C of the multiple dwelling law."

This provision authorizes luxury decontrol for eligible stabilized apartments, with one important general exception; those apartments that are regulated "by virtue of receiving tax benefits" cannot be decontrolled based on income or the amount of the legal rent (we set aside for now the "exception" to the "exclusion" provided for in RPTL 421-a[2][f][i]).

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[2] This act enabled the institution of tax incentives to rehabilitate buildings, including the J-51 program.

Petitioner asserts that the exclusion contained in Administrative Code § 26-504.1 does not apply to Schrager's apartment. In so arguing, it attempts to read into the otherwise silent statute a caveat that ineligibility for luxury decontrol is limited to apartments that are *currently* receiving tax benefits. For this, it relies on certain of this Court's statements *in Roberts v Tishman Speyer Props., L.P.* (62 AD3d 71 [2009], *supra*). In *Roberts*, we interpreted section 26-504.1 to provide that a building receiving J-51 tax benefits is subject to the luxury decontrol prohibition even if it was already subject to rent stabilization at the time it accepted the benefits. We stated that "it is clear to us that the impact of the J-51 and rent stabilization statutes is that all apartments in buildings receiving J-51 tax benefits are subject to the RSL during the entire period in which the owner receives such benefits" (62 AD3d at 81 [emphasis supplied]). Petitioner seizes on the emphasized language as support for its position that once J-51 benefits expire, a building is still subject to the RSL (except for apartments that are vacated or received the requisite notice under Administrative Code § 26-504[c]) but not the luxury decontrol prohibition. We reject this interpretation. First, on its face, the language only addresses the application of rent stabilization to buildings receiving tax benefits, and not the

application of the luxury decontrol exclusion. Moreover, in *Roberts*, the building was still receiving J-51 benefits, and this Court had no reason to consider whether upon their expiration the owner could apply for luxury decontrol of individual apartments.

Petitioner further points out that in *Roberts* we stated that "the RSL provides that upon expiration of the J-51 tax benefit period, those apartments previously subject to regulation by other mechanisms continue to be covered 'to the same extent and in the same manner as if [the J-51 benefits] had never applied thereto (RSL § 26-504[c])'" (62 AD3d at 83). Petitioner claims that the phrase "'[a]s if [the J-51 benefits] had never applied thereto' necessarily means that luxury decontrol would return as an available decontrol method once the benefits expired." This interpretation also is wrong. First, this Court was not construing Administrative Code § 26-504(c) in *Roberts*. Rather, by quoting it, we were merely offering support for our point that "the overall statutory scheme [of subjecting buildings receiving tax benefits to rent regulation] . . . makes no distinction based on whether a J-51 property was already subject to regulation prior to the receipt of such benefits" (*id.*). Further, and in any event, it is plain from the statute that the Legislature simply intended to provide that a building that is already regulated when it begins to receive J-51 benefits continues to be

regulated for the original reason when the tax benefits expire and an apartment is vacated or a non-vacating tenant received the notice described in the section. Presumably, under those circumstances the owner could resort to luxury decontrol. However, here there was no vacatur or notice, so even if the building had been regulated before the receipt of tax benefits, that fact would be irrelevant.

Petitioner argues alternatively that, even if the exclusion from luxury decontrol continued after the J-51 benefits expired, the exception to the exclusion provided by Administrative Code § 26-504.1 applies. Again, that section states that luxury decontrol does not apply to buildings regulated by virtue of the receipt of tax benefits, "except as otherwise provided in subparagraph (i) of paragraph (f) of subdivision two of section four hundred twenty-one-a of the real property tax law, or (b) by virtue of article seven-C of the multiple dwelling law." Real Property Tax Law § 421-A provides an exemption from local taxes for new multiple dwellings. Subsection (2)(f)(i) provides that after the expiration of the benefit, the building remains regulated but the owner may seek to deregulate apartments based on luxury decontrol.

The subsection is clear that it applies only to buildings exempted from taxes pursuant to RPTL 421-a. Nevertheless,

petitioner argues that RPTL 421-a(2)(f)(i) should be construed to include buildings receiving tax benefits of any stripe, including J-51 benefits. It contends that the subsection should be read in pari materia with RPTL 489, the enabling legislation for J-51 benefits, because both statutes advance a similar goal of encouraging the creation of residential housing, and both should be construed to provide the same system of advantages and disadvantages. Thus, the argument goes, if one scheme permits the owner to seek luxury decontrol notwithstanding the receipt of tax benefits, so should the other.

DHCR and Schrager argue that there is no need to compare the two statutory schemes because the Legislature, in enacting RPTL 421-a, said clearly that only buildings receiving tax benefits under that section are entitled to apply for luxury decontrol, and explicitly and purposely excluded buildings receiving J-51 benefits. In any event, they argue, the two statutory schemes are sufficiently distinctive that the doctrine of in pari materia does not apply. For example, they argue, the benefits under RPTL 421-a are essentially for residential buildings that come into being because of new construction, while J-51 benefits are essentially reserved for existing buildings that are substantially rehabilitated. They assert that it is not surprising that the Legislature permitted luxury decontrol for

owners of the former type of building but not the latter.

"Statutes in pari materia are to be construed together and as intended to fit into existing laws on the same subject unless a different purpose is clearly shown" (*BLF Realty Holding Corp. v Kasher*, 299 AD2d 87, 93 [2002] [internal quotation marks omitted], *lv dismissed* 100 NY2d 535 [2003]). However, "[t]he general rule that the meaning of a statute may be determined from its construction in connection with other statutes *in pari materia* is not one of universal application, but is resorted to only in search of legislative intent; and the rule cannot be invoked where the language of the statute is clear and unambiguous" (McKinney's Cons Laws of NY, Book 1, Statutes § 221[a], Comment). This rule of construction does not apply here because the legislative intent is clear. Administrative Code § 26-504.1 expressly states that, generally, luxury decontrol shall not apply to buildings that are stabilized because of their receipt of tax benefits pursuant to either the RPTL 421-a program or the J-51 program. However, the exception to this exclusion refers to the former only. A strong assumption can be made that had the Legislature meant to create an exception to the prohibition for both types of tax benefit programs, it would have done so. Further, if the exception were to be construed to apply to both tax benefit schemes, then the exception would entirely

swallow the rule and render the exclusion meaningless. Well established rules of statutory construction require the avoidance of such a result (*see Canal Carting, Inc. v City of N.Y. Bus. Integrity Commn.*, 66 AD3d 609, 611 [2009], *lv denied* 14 NY3d 710 [2010]). Because the legislative intent is clear, we need not address petitioner's argument that the statutory schemes underlying RPTL 421-a tax benefits and J-51 tax benefits are substantially similar.

DHCR's interpretation of the relevant statutes was rational. Accordingly, the court properly upheld its determination denying the petition for administrative review of the order dismissing the high-rent/high-income decontrol proceeding.

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

ENTERED: JUNE 14, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román JJ.

7547 In re Michael Owen He'ron, Index 250149/11
Petitioner-Appellant,

-against-

Office of the District Attorney,
Bronx County,
Respondent-Respondent.

Michael Owen He'ron, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered on or about May 19, 2011, which, to the extent appealed from as limited by the briefs, dismissed the petition brought pursuant to CPLR Article 78, seeking, inter alia, to compel respondent to provide the records of criminal convictions and/or pending charges against one George Santos, a purported witness at petitioner's 1980 murder trial, which petitioner sought through a Freedom of Information Law (FOIL) request, unanimously affirmed, without costs.

Respondent satisfied the requirements of Public Officers Law § 89(3) by certifying that a diligent search had been conducted and the documents could not be located in respondent's files (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873 [2001]; *Matter of Alicea v New York City Police Dept.*, 287 AD2d

286 [2001]). An agency is not required to create records in order to comply with a FOIL request (Public Officers Law § 89[3]; *see Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 464 [2007]).

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

ENTERED: JUNE 14, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7566-
7567 Index 650125/11

In re Bear, Stearns & Co. Inc.,
now known as J.P. Morgan Securities,
LLC, et al.,
Petitioners-Respondents,

-against-

International Capital & Management
Company LLC,
Respondent-Appellant.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Paul D. Sarkozi of counsel), for appellant.

Freshfields Bruckhaus Deringer US LLP, New York (Gabrielle Gould of counsel), for respondents.

Amended and superseding judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered October 25, 2011, awarding petitioners the total amount of $339,698.94, unanimously affirmed, without costs. Appeal from order and judgment (one paper), same court and Justice, entered June 20, 2011, unanimously dismissed, without costs, as moot.

The arbitration panel did not exceed its powers or violate a strong and well defined public policy by awarding attorneys' fees (*see Matter of Goldberg v Thelen Reid Brown Raysman & Steiner LLP*, 52 AD3d 392 [2008], *lv denied* 11 NY3d 749 [2008]). The record reflects that the parties consented to the arbitration panel's consideration of an award of attorneys' fees in their

pleadings and in agreeing to the application of rules that permitted such an award (*see Matter of Warner Bros. Records [PPX Enters.]*, 7 AD3d 330, 330-331 [2004]). Respondent reiterated its demand for attorneys' fees during the hearing, thereby acknowledging the power of the panel to award fees, in contrast to the actions of the litigants in *Matter of Matza v Oshman, Helfenstein & Matza* (33 AD3d 493 [2006]) and *Matter of Stewart Tabori & Chang v [Stewart]* (282 AD2d 385 [2001], *lv denied* 96 NY2d 718 [2001]). Moreover, respondent did not attempt to withdraw its consent until its closing statement at the conclusion of the proceedings, which spanned more than two years, when it was apparent that the arbitration panel was likely to award petitioner attorneys' fees incurred in connection with the claim that respondent withdrew.

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

ENTERED: JUNE 14, 2012

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

7649N Ana Delia Romero, as Administrator of the Estate of Ana M. Figuereo, deceased, etc., Plaintiff-Respondent, Index 304324/08

-against-

St. Anthony Community Hospital, et al., Defendants,

Stanislaw Landau, M.D., et al., Defendants-Appellants.

Martin Clearwater & Bell LLP, New York (Stewart G. Milch of counsel), for appellants.

Queller, Fisher, Washor, Fuchs & Kool, LLP, New York (Ephrem J. Wertenteil of counsel), for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered March 30, 2011, which denied defendants' motion, pursuant to CPLR 510(3), for a change of venue from Bronx County to Orange County, unanimously affirmed, without costs.

A motion pursuant to CPLR 510(3) should be made "within a reasonable time after commencement of the action" (*id.*)

Defendants' motion, made more than two years after the commencement of the action, was untimely (*see Mena v Four Wheels Co.*, 272 AD2d 223 [2000]; *Herrera v St. Luke's/Roosevelt Hosp. Ctr.*, 224 AD2d 323 [1996]), and, in any event, was properly denied.

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7935 The People of the State of New York, Respondent, Ind. 579/07 SCI. 434/09

-against-

David J. Hall, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Judith Lieb, J.), rendered on or about February 18, 2009,

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

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

ENTERED: JUNE 14, 2012

CLERK

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

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7936 Rose Welsh Dollard,
Plaintiff,

Index 117084/09
590494/10
590159/11

-against-

WB/Stellar IP Owner, LLC, et al.,
Defendants.

- - - - -

[And A Third Party Action]

- - - - -

WB/Stellar IP Owner, LLC,
Second Third-Party Plaintiff-Respondent,

-against-

New York City Economic
Development Corporation,
Second Third-Party Defendant,

Friends of Greenwich Street, Inc.,
Second Third-Party Defendant-Appellant.

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Willkie Farr & Gallagher LLP, New York (Dan C. Kozusko of counsel), for appellant.

Brill & Associates, P.C., New York (Corey M. Reichardt of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered November 4, 2011, which denied the motion of second third-party defendant Friends of Greenwich Street, Inc. (Friends) to dismiss the second third-party complaint as against it, unanimously affirmed, without costs.

Plaintiff was injured when she allegedly tripped and fell on a cracked and uneven portion of the sidewalk that abutted a

building owned by defendant/second third-party plaintiff WB/Stellar IP Owner, LLC (Stellar). Stellar commenced this second third-party action against, inter alia, Friends and asserted claims for contribution and common-law indemnification.

"In assessing a motion under CPLR 3211(a)(7). . . a court may freely consider affidavits submitted by the [non-moving party] to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [internal quotation marks and citations omitted]). Here, the court properly concluded that the pleadings together with the affidavit from Stellar's property manager sufficiently alleged claims for contribution and common-law indemnification against Friends. Stellar and its property manager stated that Friends installed, inspected and maintained the portion of the sidewalk on which plaintiff fell and that it did so in a negligent manner

(*see generally Raquet v Braun*, 90 NY2d 177, 182-183 [1997]; *see Velez v 19-27 Orchard St. LLC*, 70 AD3d 488 [2010]; *Peretich v City of New York*, 263 AD2d 410, 411 [1999]).

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7937 In re Clint B.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about April 8, 2011, which adjudicated appellant a juvenile delinquent upon a finding that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree and grand larceny in the fourth degree, and placed him on probation for a period of 18 months, with restitution in the amount of $241.28, unanimously affirmed, without costs.

The court's finding was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility. The record establishes the victim's ability to recognize appellant as a student in the same school.

In the course of arguing that the court's finding was against the weight of the evidence, and that the petition should be dismissed on that basis, appellant also challenges several procedural or evidentiary rulings made by the court. However, were we to find that any of these rulings constituted reversible error, the proper remedy would be a remand for further proceedings rather than a determination that the court's finding was against the weight of the evidence. In any event, we find appellant's claims to be unavailing.

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7938 Diana Rodriguez, Index 108217/05
Plaintiff-Appellant,

-against-

The Mount Sinai Hospital,
Defendant-Respondent.

Suckle Schlesinger, PLLC, New York (Howard A. Suckle of counsel), for appellant.

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for respondent.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered July 11, 2011, which, to the extent appealed as limited by the briefs, upon converting defendant hospital's motion to dismiss the medical malpractice claims as barred by the statute of limitations into a motion for summary judgment, granted the motion to the extent of dismissing all claims arising from the bilateral prophylactic mastectomy performed on November 20, 2001, unanimously affirmed, without costs.

Defendant met its burden on the motion by submitting evidence showing that plaintiff's claims relating to her mastectomy are time-barred (*see* CPLR 214-a; *Cox v Kingsboro Med. Group*, 88 NY2d 904, 906 [1996]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether the statute of limitations was tolled by the

continuous treatment doctrine or the provisions of CPLR 208. With respect to the continuous treatment doctrine, the record shows that plaintiff's mastectomy on November 20, 2001 and her breast reconstruction surgery on September 26, 2002 were separate and discrete procedures, as further treatment after plaintiff's mastectomy was not "explicitly anticipated" by both plaintiff and her doctors (*Cox*, 88 NY2d at 906-907; *cf. Blaier v Cramer*, 303 AD2d 301, 302 [2003]). With respect to the tolling provisions of CPLR 208, the record shows that, despite plaintiff's depression and anxiety, she was able to protect her legal rights and function in society (*see McCarthy v Volkswagen of Am.*, 55 NY2d 543, 548-549 [1980]; *see also Burgos v City of New York*, 294 AD2d 177, 178 [2002]).

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7939 Enver Muriqi, Index 300841/09
Plaintiff-Respondent, 84186/09

-against-

Charmer Industries Inc.,
Defendant-Respondent,

P & P Construction and Painting,
Defendant-Appellant.

- - - - -

Charmer Industries Inc.,
Third-Party Plaintiff-Respondent,

-against-

P & P Construction and Painting,
Third-Party Defendant-Appellant.

_____

Jacobson & Schwartz, LLP, Jericho (Paul Goodovitch of counsel), for appellant.

Block O'Toole & Murphy LLP, New York (David L. Scher of counsel), for Enver Muriqi, respondent.

Law Office of Lori D. Fishman, Tarrytown (D. Bradford Sessa of counsel), for Charmer Industries Inc., respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about October 24, 2011, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) claim as against defendant P & P, denied P & P's cross motion for summary judgment dismissing the § 240(1) claim against it, and granted defendant/third-party plaintiff Charmer's

cross motion for summary judgment on its claim of common-law indemnification against P & P, unanimously modified, on the law, to deny Charmer's cross motion, and otherwise affirmed, without costs.

Plaintiff made a prima facie showing of his entitlement to judgment as a matter of law by submitting evidence that P & P was a statutory agent of the owner or a general contractor liable under Labor Law § 240(1). Indeed, the record shows that P & P had "plenary authority" over the work at the site, including the work being performed by plaintiff at the time of the accident (*see Naughton v City of New York*, 94 AD3d 1, 9-10 [2012]). In opposition, P & P failed to raise a triable issue of fact. The testimony of its principal was riddled with internal contradictions and failures of memory. Indeed, although he and his brother both worked at the site, P & P's principal could not recall whether P & P hired either another company or day laborers to assist them with the job. Further, while P & P's principal denied knowing the company that plaintiff claims hired him, P & P offered no explanation as to how plaintiff came to be performing a portion of the work P & P had agreed to perform for Charmer.

Charmer, however, should not have been granted summary judgment on its claim for common-law indemnification against P & P since it made no showing that P & P was actively negligent, or

that P & P exercised actual supervision or control over plaintiff's work (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011]; *Naughton v City of New York*, 94 AD3d 1, 10 [2012]).

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7940 225 East 64th Street, LLC, Index 651095/10
Plaintiff-Respondent-Appellant, 590807/10

-against-

Janet H. Prystowsky, M.D. P.C.,
Defendant/Third-Party
Plaintiff-Appellant-Respondent,

-against-

Noyack Medical Partners LLC, et al.,
Third-Party Defendants-Respondents.

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Shebitz Berman Cohen & Delforte, P.C., New York (Frederick J. Berman of counsel), for appellant-respondent.

Andrew Greene & Associates, P.C., White Plains (Paul T. Vink of counsel), for respondent-appellant and respondents.

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Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 12, 2011, which, insofar as appealed from as limited by the briefs, granted so much of plaintiff's motion for summary judgment as sought to dismiss defendant's affirmative defenses, counterclaims and third-party claims of constructive eviction due to an alleged fire code violation and due to plaintiff's failure to provide proper air conditioning and ventilation during a roof repair to the extent defendant seeks to recover for the period following the completion of the repair, and defendant's third-party claims for fraud and nuisance, and denied so much of plaintiff's motion as sought summary judgment

on its claim for unpaid rent, and granted defendant's motion for summary judgment on its eighth affirmative defense and first counterclaim to the extent they allege constructive eviction due to plaintiff's failure to provide proper air conditioning and ventilation during the aforesaid roof repair, on its counterclaim for breach of the covenant of quiet enjoyment, and on its counterclaim for the return of its security deposit, unanimously modified, on the law, to grant plaintiff's motion as to defendant's affirmative defense of accord and satisfaction, and otherwise affirmed, without costs.

Defendant was prevented from using the demised premises, which it leased from plaintiff, for most of the period during which the owner of the building performed repairs to the area of the roof directly above and adjacent to those premises. Although plaintiff assured defendant that its dermatological practice would not be disturbed by the roof repair, the demised premises became unusable due, in part, to the poor air quality, and when plaintiff's attempts to resolve the problem failed, defendant was forced to find another location in which to operate a portion of its practice. Since plaintiff failed to meet its responsibility for supplying defendant with air conditioning and proper ventilation, defendant is entitled to summary judgment on its claim of constructive eviction during the approximately one-month

period in which the roof repairs were performed (*see Pacific Coast Silks, LLC v 247 Realty, LLC*, 76 AD3d 167, 172 [2010], citing *Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]).

Defendant's claim of constructive eviction after the roof repair had been completed, however, is defeated by the undisputed facts that defendant retook possession of the demised premises, which had been fully restored, and remained therein for eight months (*see Pacific Coast Silks*, 76 AD3d at 172).

Defendant's claims of a fire code violation by plaintiff were both conclusory and based entirely upon hearsay.

Defendant's fraud claim was unsupported by any proof that the statement it allegedly relied upon was false when made (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Defendant's nuisance claim was unsupported by any proof that plaintiff created the complained-of nuisance.

Defendant is entitled to the return of its security deposit, with interest from the date of the inception of the lease, because plaintiff failed to prove that it did not commingle the security deposit with its own funds (*see Tappan Golf Dr. Range, Inc. v Tappan Prop., Inc.*, 68 AD3d 440, 441 [2009]).

Defendant's affirmative defense of accord and satisfaction

should be dismissed because the lease precluded partial payments in settlement of unpaid rent. The lease also precluded waiver of any of its terms absent a writing by plaintiff.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7941 In re Juelle G.,
Petitioner-Appellant,

-against-

William C.,
Respondent-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Louise Belulovich, New York, for respondent.

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

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about February 17, 2011, which granted respondent father's motion to dismiss the petition to modify a prior order of the same court (Susan R. Larabee, J.), entered on or about May 15, 2007, which awarded custody of the parties' daughter to respondent, unanimously affirmed, without costs.

Viewing the evidence in the light most favorable to petitioner, we find that petitioner failed to make a prima facie showing that modification of the custody order is warranted on any of the grounds alleged in the petition (*see Matter of Patricia C. v Bruce L.*, 46 AD3d 399, 399 [2007]; *David W. v Julia W.*, 158 AD2d 1, 6-7 [1990]). The record contains no evidence, or even an allegation, that the child was neglected or otherwise

inadequately cared for during the relevant time period of May 2007 to May 2008. There is no evidence either that the child was diagnosed with depression or that there is any other basis for concluding that she required therapy during the relevant time period. There is no evidence that respondent thwarted efforts by the supervising agency to arrange for the child to join in visits by petitioner's other children. The record does not establish verbal abuse warranting a modification of custody. Given the court order forbidding petitioner to telephone the child during the relevant time period, respondent's refusal to permit the child to call petitioner using his cell phone does not constitute a substantial change of circumstances.

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7942 In re G.K. Las Vegas Limited Partnership,
Petitioner-Appellant,

-against-

Boies Schiller & Flexner LLP,
Respondent-Respondent.

Index 652486/11

Kennedy Berg LLP, New York (James W. Kennedy of counsel), for appellant.

Boies, Schiller & Flexner LLP, Armonk (Richard E. Weill of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered November 22, 2011, which denied petitioner client's motion to vacate the arbitration award granting respondent law firm's motion to dismiss the arbitration proceeding, and granted the law firm's cross motion to confirm the award, unanimously affirmed, without costs.

In this proceeding alleging the law firm's breach of performance of a retainer agreement, including breach of an alleged oral agreement to have a particular attorney in its firm serve as lead counsel in an underlying matter, the client failed to preserve its arguments that the law firm did not meet its burden of demonstrating that the client fully understood the terms of the parties' retainer agreement, and that public policy

rendered such retainer agreement unenforceable, as these arguments were not sufficiently brought to the attention of the arbitrator. (*see Edward M. Stephens, M.D., F.A.A.P. v Prudential Ins. Co. of Am.*, 278 AD2d 16 [2000]; *see also Matter of Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 13 NY3d 168, 173-174 [2009]). The client did not explicitly argue that the law firm violated public policy by failing to ensure that the client fully understood the terms of the parties' retainer agreement. It only argued that parol evidence was needed because the retainer agreement, as written, was allegedly incomplete and/or ambiguous.

Were we to reach the merits of the client's public policy argument, we would find it unavailing. The parties agreed to arbitrate any disputes arising from their retainer agreement, and there is no basis to conclude that the asserted public policy ground (requiring a client's full knowledge and understanding of an attorney-client retainer agreement) was violated. The arbitrator's award dismissing the client's challenge to the legal fees that were due in accordance with the express terms of the parties' amended written retainer agreement had a rational basis, inasmuch as the Arbitrator found the written retainer arrangement to be unambiguous and to constitute a fully integrated agreement that would satisfy the requirements of 22 NYCRR 1215.1 (*see*

generally Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co., 89 NY2d 214, 223-224 [1996]). The arbitrator's rejection of the sophisticated client's argument that sought inclusion of claimed oral terms that would modify the clear terms of the amended retainer agreement was rationally based in contract principles, including New York's parol evidence rule, and the criteria for allowing modification of written terms without altering them was not established by the client (*see Mitchill v Lath*, 247 NY 377 [1928]; *Chemical Bank v Weiss*, 82 AD2d 941 [1981], *appeal dismissed* 54 NY2d 831 [1981]). Since the terms of the fully integrated retainer agreement were unambiguous, there was no basis to consider parol evidence (*see Slotnick, Shapiro & Crocker, LLP v Stiglianese*, 92 AD3d 482 [2012]; *Moore v Kopel*, 237 AD2d 124, 125 [1997]).

Moreover, the client's argument that the arbitrator, in deciding the dismissal motion, denied it "fundamental fairness" by refusing to accept the truth of its allegations regarding the oral promise, including that the parties intended this oral promise to be a component of the parties' retainer agreement, thereby precluding it from offering evidence to demonstrate the parties' understanding in regard to the alleged oral promise, is unavailing. It was within the province of the arbitrator to find, as a matter of law, that the retainer agreement was not

ambiguous (*see W.W.W Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]), notwithstanding the client's claims that alleged oral promises were intended to be added as components of the written retainer agreement. Since an arbitrator's award ordinarily will not be vacated even if founded upon errors of law and/or fact (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-480 [2006], *cert dismissed* 548 US 940 [2006]), there is no basis to vacate this award founded upon applicable contract principles (*see Szabados v Pepsi Cola Bottling Co. of N.Y.,* 191 AD2d 367 [1993]).

Furthermore, the arbitrator appropriately rejected the client's attempt to modify the clear terms of the parties' fully integrated retainer agreement. There was no basis to conclude that the alleged oral agreements were merely collateral to the retainer agreement (as amended), that they did not tend to contradict the terms of the retainer, and that the oral modifications would otherwise ordinarily be omitted from a

writing (*see Mitchill v Lath*, 247 NY 377 [1928], *supra*; *Chemical Bank v Weiss*, 82 AD2d at 942).

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

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7943 The People of the State of New York, Respondent, Ind. 4465/09

-against-

Eddie Colon, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered November 9, 2010, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's motion to suppress physical evidence. There is no basis for disturbing the court's credibility determinations, including its resolution of any inconsistencies in testimony. At the hearing, the court had the

opportunity to observe the physical evidence and determine whether the officer was able to observe contraband in plain view.

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7944-
7944A Index 651193/11

OneBeacon America Insurance Company,
Plaintiff-Appellant,

-against-

Colgate-Palmolive Company,
Defendant-Respondent,

Liberty Mutual Insurance Company,
Defendant.

Hardin, Kundla, McKeon & Poletto, P.A., New York (George R. Hardin of counsel), for appellant.

Anderson Kill & Olick, P.C., New York (Alexander Hardiman of counsel), for respondent.

Interim orders, Supreme Court, New York County (Carol R. Edmead, J.), entered November 10, 2011, which, inter alia, granted defendant Colgate-Palmolive Company's motion to stay this action, and stayed plaintiff's motion to compel discovery, unanimously affirmed, without costs.

Supreme Court properly stayed this action pending the resolution of an appeal in a related action among the parties in Massachusetts (*see* CPLR 2201; *Asher v Abbott Labs.*, 307 AD2d 211 [2003]). The issues, relief sought, and parties in the two actions are substantially identical (*see id.*). Plaintiff's argument that the Massachusetts action is no longer pending

because it was dismissed is unavailing, since an appeal was taken from the order of dismissal (*see Rael Automatic Sprinkler Co. v Solow Dev. Corp.*, 58 AD2d 600 [1977]; *D'Aprile v Blythe*, 53 AD2d 1059, 1060 [1976]). The duplication of effort, waste of judicial resources, and possibility of inconsistent rulings in the absence of a stay outweigh any prejudice to plaintiff resulting from the fact that defense counsel is located in New York (*see Asher*, 307 AD2d at 212), particularly since the materials that may be relevant to whether plaintiff is entitled to independent counsel, i.e., liability insurance policies, correspondence from the insurance companies, and the insurance claims files, and insurance company witnesses, are located in Massachusetts.

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

ENTERED: JUNE 14, 2012

CLERK

Corrected Order - June 18, 2012

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7945 Jessica Hirsh, Index 303905/10
Plaintiff-Respondent,

-against-

David Hirsh,
Defendant-Appellant.

_____

Bressler, Amery & Ross, P.C., New York (David H. Pikus of counsel), for appellant.

Aronson, Mayefsky & Sloan, LLP, New York (Allan E. Mayefsky of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered January 3, 2012, which, to the extent appealed from as limited by the briefs and the stipulation of the parties, denied defendant's cross motion for an award of interim counsel and expert fees, unanimously affirmed, without costs.

The court reviewed the financial circumstances of both parties as well as all the other circumstances of the case, and properly determined that interim fees were unwarranted (*see* Domestic Relations Law § 237[a]; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]). Indeed, the record shows that the parties' financial circumstances were comparable, as they had no marital assets and were both gainfully employed with the

financial means to pay their own attorneys (*see Cvern v Cvern*, 198 AD2d 197, 198 [1993]). Moreover, the court properly found that defendant had contributed only minimally to the care of the parties' child.

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7946 The People of the State of New York, Ind. 7218/03
Respondent,

-against-

Nelson Villanueva,
Defendant-Appellant.

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

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

Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered July 27, 2010, resentencing defendant, as a second violent felony offender, to a term of eight years, with five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Sweeny, Manzanet-Daniels, Román, JJ.

7947-
7947A-
7947B

Index 117348/08
117349/08
117350/08

New York Community Bank,
Plaintiff-Respondent,

-against-

Parade Place, LLC, et al.,
Defendants-Appellants,

99 Associates, Inc., et al.,
Defendants.

Shapiro & Associates, PLLC, Brooklyn (Robert J. Stone, Jr. of counsel), for appellants.

Farber Rosen & Kaufman, P.C., Rego Park (Richard C. Lunenfeld of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered May 4, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as against defendant Parade Place, LLC, under index no. 117349/08, and orders, same court and Justice, entered on or about May 5, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's motions for summary judgment as against Parade Place and defendants Saadia Shapiro and Marla Shapiro under index nos. 117348/08 and 117350/08, unanimously affirmed, with costs.

Pursuant to CPLR 5520(c), we deem Saadia Shapiro's and Marla

Shapiro's appeals from the order under index no. 117350/08 appeals from the order under index no. 117348/08 as well.

In opposition to plaintiff's prima facie showing that it was entitled to foreclosure, defendants contended that plaintiff did not give the requisite notice of default under the respective mortgages. However, their argument consists of the assertion that plaintiff failed to *allege* that it gave the notice and the conditional statement that "if" it had not complied with the notice requirement, it could not foreclose. These assertions do not raise an issue of fact whether plaintiff gave the requisite notice. Moreover, defendants never argued before the motion court that they had not received notice or that there was anything whatsoever improper about the notice, and they may not raise these arguments for the first time on appeal.

Defendants also failed to raise issues of fact as to fraud in the inducement and unclean hands. In her affidavit, Saadia Shapiro makes conclusory and unsubstantiated assertions and does not actually state that plaintiff had agreed not to foreclose until the assemblage was complete or that plaintiff knew about, and acquiesced, to the secondary financing (*see Bank Leumi Trust Co. of N.Y. v Lightning Park*, 215 AD2d 246 [1995]; *Friesch-Groningsche Hypotheekbank Realty Credit Corp. v Ward Equities*, 188 AD2d 397 [1992]). Furthermore, defendants appear to be

impermissibly trying to use discovery as a "fishing expedition [because] they cannot set forth a reliable factual basis for their suspicions" (*see Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 116 [1998]).

The complaints' description of the properties subject to foreclosure is sufficient since the respective parcels can be identified and located with reasonable certainty (*see Wilshire Credit Corp. v Y.R. Bldrs.*, 262 AD2d 404 [1999]). The mortgaged properties are identified by their addresses and references to tax maps, and for two of the three properties, a metes and bounds description is given as well. Furthermore, defendants failed to provide any documentation, or citation to a public or other record, or any other evidence in admissible form, to support their assertion that all three properties are now a single tax lot.

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7948 Danielle Pecile, et al., Index 110490/10
Plaintiffs-Appellants,

-against-

Titan Capital Group, LLC, et al.,
Defendants-Respondents.

Thompson Wigdor LLP, New York (David E. Gottlieb of counsel), for appellants.

Gordon & Rees LLP, New York (Diane Krebs of counsel), for Titan Capital Group, LLC, Marc Abrams, Russell Abrams, Sandra Abrams and Steve Skalicky, respondents.

Stillman & Friedman, P.C., New York (John B. Harris of counsel), for Ronald M. Green, Barry Asen and Epstein Becker & Green, P.C., respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about June 27, 2011, insofar as it granted the motions to dismiss the second and sixth causes of action only as they relate to defamation, and the eleventh cause of action for defamation, as against defendants Titan Capital Group LLC, Marc Abrams, and Russell Abrams, dismissed the complaint as against defendant Steve Shalicky, and dismissed the complaint as against defendants Epstein Becker & Green, P.C., Ronald M. Green and Barry Aspen, unanimously affirmed, without costs.

The complaint was properly dismissed as against the law firm defendant Epstein Becker & Green, P.C., and the individual

attorney defendants, Ronald M. Green and Barry Aspen. It is well settled that attorneys are "immunized from liability under the shield afforded attorneys in advising their clients, even when such advice is erroneous, in the absence of fraud, collusion, malice or bad faith" (*Beatie v DeLong*, 164 AD2d 104, 109 [1990]). To the extent the complaint alleges fraud, collusion, malice or bad faith on the part of the Epstein Becker defendants, the allegations are wholly conclusory and insufficient to state a claim. Indeed, the allegations in the complaint do not suggest that the Epstein Becker defendants "acted in any capacity other than as an attorney" (*Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 607 [2010]). Nor did the allegations concerning the retaliation claims sufficiently allege that the Epstein Becker defendants actually participated in the improper conduct relating to the claims of sexual harassment and employment discrimination (*see Frank v Lawrence Union Free School Dist.*, 688 F Supp 2d 160, 174 [EDNY 2010]).

The defamation claim and those claims related to it (second and sixth causes of action) were also properly dismissed since the alleged defamatory statement contained non-actionable opinion and/or loose, hyperbolic language (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]). The statement, made to the media, that plaintiffs' suit was without merit constituted

mere opinion, and was therefore nonactionable (*El-Amine v Avon Prods.*, 293 AD2d 283, 283-84 [2002]). The use of the term "shakedown" in the statement did not "convey the specificity that would suggest" that the Titan defendants "were seriously accusing [plaintiffs] of committing the crime of extortion" (*McNamee v Clemens*, 762 F Supp 2d 584, 604 [ED NY 2011]).

We have considered plaintiffs' remaining claims and find them unavailing.

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7951 In re Gianna W., etc.,

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

Jessica S., etc.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent,

Administration for Children's
Services,
Petitioner.

_____

George E. Reed, Jr., White Plains, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for Saint Dominic's Home, respondent.

Wendy J. Claffee, Bronx, attorney for the child.

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Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about May 10, 2011, which, to the extent appealed from as limited by the briefs, upon a finding that respondent mother had violated the terms of a suspended judgment, terminated her parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously reversed, on the law and the facts, without costs, the disposition as to the child vacated, and the matter remanded for an immediate hearing

as to the child's best interests.

The mother does not dispute the court's finding that she violated the terms of the suspended judgment by not obtaining suitable housing. However, she does challenge the determination to terminate her parental rights as a result of that violation. In particular, the mother argues that it was improper to terminate her parental rights on the sole ground that she had failed to obtain suitable housing, and without hearing current evidence as to the child's best interests.

Contrary to the mother's contention, a court may terminate parental rights after a finding of noncompliance with a suspended judgment (*Matter of Kendra C.R. [Charles R.]*, 68 AD3d 467, 467-468 [2009], *lv dismissed in part, denied in part* 14 NY3d 870 [2010]), even where, as here, the sole ground for noncompliance is the failure to secure suitable housing. Indeed, the failure to obtain suitable housing is a "material violation of the terms of the suspended judgment, and constitute[s] independent grounds for revocation" (*id*. at 467).

However, the matter should be remanded for a dispositional hearing with respect to the best interests of the child. The Family Court limited all evidence at the violation hearing to facts occurring up until the filing of the violation petition. Although this was proper with respect to the fact-finding portion

of the hearing, evidence of matters that occurred after the filing of the petition is "relevant to the issue of the child's best interests, and [should have been] considered at the dispositional [phase of the] hearing" (*Matter of Christian Lee R.*, 38 AD3d 235, 235 [2007], *lv denied* 8 NY3d 813 [2007]), especially where, as here, there is evidence that the mother complied with all other agency requirements. She visited regularly with the child every weekend, remained sober and maintained steady employment since her release from prison and obtained suitable housing by the time of the hearing.

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7952N Courtney Dupree, Index 653412/11
Plaintiff-Respondent,

-against-

Scottsdale Insurance Company,
Defendant-Appellant.

Boundas, Skarzynski, Walsh & Black, LLC, New York (Alexis J. Rogoski of counsel), for appellant.

Schlam Stone & Dolan LLP, New York (Bradley J. Nash of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 4, 2012, which, to the extent appealed from, sua sponte, granted plaintiff insured a temporary restraining order directing defendant insurer to pay, from the date of the order until the determination of plaintiff's motion for a preliminary injunction, attorneys' fees and costs related to plaintiff's defense of a criminal action pending against him in federal court, unanimously affirmed, with costs.

Supreme Court providently exercised its discretion in granting the temporary restraining order (*see* CPLR 6301; *Wyndham Co. v Wyndham Hotel Co.*, 236 AD2d 220 [1997]). The failure of an insurance company to advance payments covering defense costs and fees under a directors and officers liability policy, like the one at issue here, constitutes a direct, immediate and

irreparable injury, as it would deprive the insured of the benefit bargained for through payment of the policy premium (*see Wedtech Corp. v Federal Ins. Co.*, 740 F Supp 214, 221 [SD NY 1990]; *Nu-Way Envtl., Inc. v Planet Ins. Co.*, 1997 WL 462010, *3, 1997 US Dist LEXIS 11884, *9 [SD NY, Aug. 12, 1997, No. 95-Civ-573(HB)]). Defendant's argument that it has been relieved of the requirement to provide coverage and/or advance legal costs and fees under the policy because plaintiff's conduct violated the policy's exclusions is unavailing at this juncture. Absent a final adjudication that plaintiff's alleged wrongdoing does indeed fall under the policy's exclusions, the policy remains in effect and defendant is required to pay attorneys' fees and defense costs, subject to recoupment in the event it is ultimately determined that the exclusions apply (*see Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 42 [2005]).

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

ENTERED: JUNE 14, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7953N Karly Servais, et al., Index 112278/10
Plaintiffs-Respondents,

-against-

Silk Nail Corp.,
Defendant-Appellant,

Charming Nails Inc., et al.,
Defendants.

Law Offices of Charles J. Siegel, New York (Robert S. Cypher of counsel), for appellant.

The Law Firm of Allen L. Rothenberg, New York (Scott J. Rothenberg of counsel), for respondents.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 16, 2011, which, insofar as appealed from, in this action for personal injuries, denied defendant Silk Nail Corp.'s motion to vacate the note of issue and certificate of readiness, unanimously affirmed, without costs.

Supreme Court properly denied Silk Nail Corp.'s motion because its answer had been stricken by the court's prior order. Accordingly, Silk Nail Corp. was not entitled to any further discovery (*see Hall v Penas*, 5 AD3d 549 [2004]), including discovery "in preparation for an appearance at inquest" (*Yeboah v Gaines Serv. Leasing*, 250 AD2d 453, 454 [1998]; *see Gray v Jaeger*, 57 AD3d 303 [2008]). Silk Nail Corp.'s attempt to

relitigate the merits of the order striking its answer is improper as no appeal was taken from that order, and the time in which to seek reargument or to take an appeal from that order has long since lapsed (CPLR 2221[d][3]; 5513).

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

ENTERED: JUNE 14, 2012

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6204-
6204A Index 14897/07

Leon Griffin,
Plaintiff-Appellant-Respondent,

-against-

Clinton Green South, LLC., et al.,
Defendants-Respondents-Appellants.

_____

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

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

_____

Second amended order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered April 6, 2011, modified, on the law, the award for past economic damages set aside and a new trial ordered, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered March 23, 2011, dismissed, without costs, as superseded by the appeal from the order entered April 6, 2011.

Opinion by Román, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
James M. Catterson
Sheila Abdus-Salaam
Nelson S. Román, JJ.

6204-
6204A
Index 14897/07

_____x

Leon Griffin,
Plaintiff-Appellant-Respondent,

-against-

Clinton Green South, LLC., et al.,
Defendants-Respondents-Appellants.

_____x

Plaintiff appeals from the order of the Supreme Court, Bronx County(Mary Ann Brigantti-Hughes, J.), entered March 23, 2011, which, inter alia, granted defendant's motion to dismiss his Labor Law §§ 200 and 241(6) and common-law negligence causes of action, vacate the directed verdict in favor of plaintiff on his Labor Law § 240(1) cause of action and order a new trial as to liability on this cause of action, and on the awards for future economic damages and past future pain and suffering. Cross appeals from the second amended order of the same court and Justice, entered April 6, 2011, which, in addition to the aforesaid relief, vacated the awards for future economic damages and past and future pain and suffering and vacated the judgment, same court and Justice, entered May 24, 2010.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac and Seth R. Harris of counsel), for appellant-respondent.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone and Deirdre E. Tracey of counsel), for respondents-appellants.

ROMÁN, J.

In this action for personal injuries, we hold, inter alia, that while CPLR § 4401, when properly applied, promotes judicial economy by narrowing, and at times even removing, issues submitted to the jury, it is reversible error to grant a motion for a directed verdict prior to the close of the party's case against whom a directed verdict is sought.

On June 6, 2006, plaintiff, an employee of nonparty DiFama Concrete, was injured while working at a construction site owned by defendant Clinton Green South, LLC. Clinton Green, which was erecting several buildings and a theater complex, hired defendant Bovis Lend Lease LMB, Inc. as its general contractor. Bovis in turn hired several subcontractors, including DiFama, a concrete contractor. On the date of his accident, plaintiff had been tasked with dismantling a scaffold which had been erected after the installation of a ceiling within one of the building's floors. The scaffold was 12 feet high and plaintiff, along with two other DiFama employees, was dismantling it. As plaintiff was on the floor, on his hands and knees, stacking pieces of the scaffold as it was dismantled by his coworkers, a piece of the scaffold suddenly fell, striking him in the back.

Plaintiff commenced this action for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). This

case was tried before a jury and at trial plaintiff testified to the facts described above, and those related to his injuries. In addition, plaintiff called Ralph Didonato, Bovis's General Superintendent of Field Operations, who testified that Bovis was responsible for site safety, conducted safety meetings, had the authority to insist that subcontractors adhere to Bovis's safety guidelines, and could stop a subcontractor's work if Bovis deemed it unsafe. Didonato further testified that when dismantling a scaffold, the area adjacent to the scaffold should be cordoned or taped off to prevent all, except those engaged in the dismantling, from entering.

At the conclusion of plaintiff's case in chief, he moved for a directed verdict on his cause of action pursuant to Labor Law § 240(1). The court granted plaintiff's motion over defendants' objection. Plaintiff thereafter elected not to pursue his remaining causes of action, characterizing them as moot.

Upon the conclusion of defendants' case, the action was submitted to the jury solely on the issue of damages. The jury awarded plaintiff the following damages: $131,243 for past lost income; $3,127,091 for future lost income; $22,748 for past lost health insurance, $1,835,711 for future lost health insurance; $20,414 for past lost annuity funding; $494,935 for future lost annuity funding; $1,230,630 for future lost retirement pension;

$700,000 for future lost social security; $0 for past pain and suffering; and $5,000,000 for future pain and suffering.

Defendants made a posttrial motion seeking, inter alia: 1) to vacate the trial court's directed verdict on liability with respect to plaintiff's Labor Law § 240(1) claim; 2) to dismiss plaintiff's remaining causes of action as unsupported by sufficient evidence; 3) to set aside the jury's verdict on economic damages as against the weight of the evidence and/or unsupported by sufficient evidence, and; 4) to set aside the jury's verdict with respect to damages for future pain and suffering as excessive. Plaintiff, without opposing the portion of defendants' motion seeking dismissal of his common-law cause of action and causes of action pursuant to Labor Law §§ 200, and 241(6), opposed all other aspects of defendants' motion. Additionally, plaintiff cross-moved to set aside the jury's award for past pain and suffering as against the weight of the evidence and alternatively as insufficient.

The trial court granted defendants' motion to vacate the verdict on plaintiff's cause of action pursuant to Labor Law § 240(1) and directed a new trial on that cause of action. The court also granted defendants' motion to dismiss plaintiff's remaining causes of action, finding that the evidence at trial failed to establish any liability thereunder. Partially granting

defendants' motion to set aside or dismiss the jury's award for economic damages, the trial court set aside the award for future economic damages, and as to those damages, ordered a new trial. Noting that the jury's award for past pain and suffering was insufficient and that the jury's award for future pain and suffering was excessive, the trial court set aside those damages and ordered a new trial if the parties did not stipulate to an amount with regard to those damages.

The parties appealed from the trial court's order. With the exception of the trial court's finding that the jury's award for past pain and suffering was inadequate, plaintiff appealed every other aspect of the order. Defendants cross-appealed, asserting that the trial court erred in failing to set aside the jury's award for past economic damages and ordering a new trial with respect to those damages. In addition, defendants argue that the trial court erred in failing to dismiss the claim for lost health insurance. We now modify.

The trial court properly granted defendants' posttrial motion to set aside and vacate its prior order directing a liability verdict in plaintiff's favor on his Labor Law § 240(1) cause of action. CPLR § 4401 states that "[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter

of law, *after the close of the evidence presented by an opposing party with respect to such cause of action or issue* (emphasis added)." By its express language, the statute authorizes the grant of a motion for a directed verdict only if the opponent of the motion has presented evidence and closes his/her case. "The requirement that each party await the conclusion of the other's case before moving for judgment [under CPLR § 4401] is designed to afford all of them a day in court" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4401:5). Accordingly, the timing of a motion prescribed by CPLR § 4401 must be strictly enforced and "the grant of a dismissal [pursuant to CPLR § 4401] prior to the close of the opposing party's case will be reversed as premature even if the ultimate success of the opposing party in the action is improbable" (*Cass v Broome County Coop., Ins. Co.*, 94 AD2d 822, 823 [1983] [internal citations omitted]; *see also Alevy v Uminer*, 88 AD3d 477, 477-478 [2011] [same]; *Boulevard Hous. Corp. v Bisk*, 80 AD3d 430, 430 [2011] [directed judgment in favor of landlord premature when made prior to presentation of tenant's case since it deprived tenant of an opportunity to present proof]; *Sullivan v Goksan*, 49 AD3d 344, 345 [2008] [motion for directed verdict premature when made prior to the close of opponent's case]; *Cetta v City of New York*, 46 AD2d 762, 763 [1974]).

Here, plaintiff's salient argument in opposition to vacatur of the trial court's initial grant of his motion for a directed verdict is that it was clear at the close of his case that defendants were not going to present any evidence on liability on their case in chief. As such, plaintiff avers that there was no impediment and indeed no prejudice to defendants when his application for a directed verdict was granted at the close of his case since the evidence before the court when he made his motion would be the very evidence before the court had he waited to make his motion at the close of defendants' case. While persuasive, plaintiff's argument nevertheless finds no support in either CPLR § 4401 or the relevant case law. The statute is clear and unambiguous with regard to the timing of the motion such that here it was error for the trial court to grant plaintiff's motion prior to the close let alone the commencement, of defendants' case. Whether a party plans to present evidence sufficient to defeat a motion for a directed verdict on his/her case in chief should in no way be dispositive to a court's resolution of a premature motion pursuant to CPLR § 4401 since a party is not always wedded to the presentation of evidence disclosed to the court and an adversary. This is especially true since a party can alter its trial strategy and in most cases its proof. Accordingly, granting a motion for a directed verdict

prior to the presentation of an opponent's case deprives the opponent of the opportunity to present the very evidence needed to defeat the motion.

Plaintiff's contention that defendants failed to preserve their objection to the trial court's grant of his motion for a directed verdict is unavailing. An issue is unpreserved for appellate review when a party fails to object or objects on a different ground than the one raised on appeal (*People v Autar*, 54 AD3d 609, 609 [2008], *lv denied* 11 NY3d 922 [2009]; *see also Matter of Gonzalez v State Liq. Auth.*, 30 NY2d 108, 112 [1972] ["The rule is, that in order to preserve on appeal the constitutional and legal issue . . . a specific objection on constitutional and legal grounds must be made during the trial or hearing"] [internal quotations omitted]). Here, in opposition to plaintiff's motion for a directed verdict, defendants' counsel stated that the motion was "premature in that defendant hadn't had a chance to put on a defendant's case." Defendants also raised the prematurity argument in their memorandum submitted in support of their posttrial motion seeking to set aside the directed verdict. Accordingly, the record belies plaintiff's assertion that defendants' objection to his motion for a directed verdict was merely that questions of fact precluded judgment in his favor.

Plaintiff's causes of action for common law negligence and violations of Labor Law §§ 200 and 241(6) were properly dismissed insofar as plaintiff's evidence at trial was legally insufficient to establish defendants' liability thereunder. Preliminarily, we note that the trial court erred in failing to decide defendants' motion for a directed verdict on these causes of action simply because it had granted plaintiff's motion for a directed verdict on his cause of action pursuant to Labor Law § 240(1). Absent the grant of defendants' motion to dismiss those claims or discontinuance by plaintiff, these causes of action did not become moot and should have been submitted to the jury. Notwithstanding the foregoing, defendants, within their posttrial motion, sought to have those causes of action dismissed, which the trial court, apparently realizing that these claims required disposition, properly granted.

Labor Law § 200 codifies an owner's and general contractor's common-law duty to provide workers with a safe place to work (*Rizzutto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 [1993]; *Russin v Picciano & Son*, 54 NY2d 311, 316-317 [1981]; *Allen v Cloutier Construction Corp.*, 44 NY2d 290, 299 [1978]). Supervision and control are preconditions to liability under Labor Law § 200. In other words, the party against whom

liability is sought must "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Rizzutto* at 352). However, “[t]he retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200" (*Dennis v City of New York*, 304 AD2d 611, 612 [2003]; *Brown v New York City Economic Development Corporation*, 234 AD2d 33, 33 [1996] [oversight responsibility for work insufficient to impose liability under Labor Law § 200]; *Carty v Port Auth. of N.Y. and N.J.*, 32 AD3d 732, 733 [2006], *lv denied* 8 NY3d 814 [2007]). Here, since none of the evidence presented by plaintiff at trial established that defendants had the ability to control or supervise plaintiff’s work, “there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion,” that defendants are liable under common-law negligence or pursuant to Labor Law § 200 (*Cohen v Hallmark Cards,* 45 NY2d 493, 499 [1978]).

Labor Law § 241(6) imposes a duty of reasonable care upon owners, contractors and their agents, requiring them to provide reasonable and adequate protection to those employed in all areas

where construction, excavation, or demolition is being conducted (*Rizzutto* at 348; *Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 502 [1993]). Since, by its express terms, the statute empowers the Commissioner of the Department of Labor to "make rules to carry into effect the provisions of this subdivision," liability under the statute requires proof that a particular, non-general rule promulgated by the commissioner (those rules found in the Industrial Code) has been violated (*Rizutto* at 502-503; *Ross* at 349-350).

Here, while plaintiff alleged that defendants violated both 12 NYCRR 23-1.7(a)(1) and (2), his evidence at trial belied his assertions. 12 NYCRR 23-1.7(a)(1) requires that "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects [] be provided with suitable overhead protection." Since plaintiff was breaking down a scaffold erected to prevent injury from a newly-installed collapsing ceiling, it is patently clear that defendants provided the very protection required by 12 NYCRR 23-1.7(a)(1). Morever, because the work had been completed and the scaffold was being dismantled, the area where the accident occurred was no longer an area normally "exposed to falling material or objects."

12 NYCRR 23-1.7(a)(2) requires that "[w]here persons are lawfully frequenting areas exposed to falling material or objects

but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas." Clearly, this section of the code requires barricades to cordon off areas for the safety of those *not* required to work within the sectioned-off area. Since the very area where plaintiff was required to work was the area where he was injured, he was required to perform his work therein and no barricades were thus required. Accordingly, no rational view of the evidence proffered by plaintiff established a violation of Labor Law § 241(6).

Having determined that plaintiff must retry his cause of action pursuant to Labor Law § 240(1), we find that all damages must also be retried as a result (*Soto v City of New York*, 276 AD2d 449, 450 [2000] ["[A] money judgment in plaintiff's favor cannot be permitted to stand in advance of any sustainable verdict as to liability against defendant"]). Accordingly, and for this reason, the trial court properly set aside the jury's awards for past and future pain and suffering as well as future economic damages. Based on the foregoing, however, the trial court erred in failing to set aside the awards for past economic damages.

Accordingly, the second amended order of the Supreme Court,

Bronx County (Mary Ann Brigantti-Hughes, J.), entered April 6, 2011, which, inter alia, granted defendants' motion to dismiss plaintiff's Labor Law §§ 200 and 241(6) and common-law negligence causes of action, vacate the directed verdict in favor of plaintiff on his Labor Law § 240(1) cause of action, and order a new trial as to liability on this cause of action and on the issue of plaintiff's future economic damages and past and future pain and suffering, should be modified, on the law, to set aside the awards for past economic damages and direct that the new trial include the issue of past economic damages, and otherwise affirmed, without costs. The appeal from the order of the same court and Justice, entered March 23, 2011, should be dismissed, without costs, as superseded by the appeal from the order entered April 6, 2011.

All concur.

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

ENTERED: JUNE 14, 2012

CLERK