SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 6, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, DeGrasse, Freedman, Abdus-Salaam, JJ.

4741 &
M-226 Ike Essilfie-Obeng, an Infant by His Mother and Natural Guardian, Lydia Davies, Plaintiff-Appellant, Index 8967/04

-against-

Godfried R. Ahyia, et al., Defendants,

1075 Concourse Tenants Corporation, et al., Defendants-Respondents.

_____

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for appellant.

Furman, Kornfeld & Brennan, LLP, New York (Michael E. Soffer of counsel), for 1075 Concourse Tenants Corporation, respondent.

Epstein Gialleonardo & Rayhill, Elmsford (Jonathan R. Walsh of counsel), for All Area Property Management Co. and Tasos Magoulas, respondents.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered May 26, 2010, following a jury verdict in plaintiff's favor on the issue of liability, which, to the extent appealed from as limited by the briefs, granted defendant 1075 Concourse Tenants Corporation's "motion to dismiss," unanimously reversed, on the law, without costs, the motion denied, the verdict

reinstated as against defendant Concourse only, and the matter remanded for a trial on damages as to defendant Concourse.

Local Law 1 of 1982 placed the duty of abating lead paint upon "[t]he owner of a multiple dwelling" (former Administrative Code of City of New York § 27-2013 [h]), a term which the regulation did not define. Contrary to the parties' contentions, the manner in which "owner" is construed under the Multiple Dwelling Law, the Rent Stabilization Code, or the Housing and Maintenance Code is neither controlling nor instructive. "The owner of a multiple dwelling" contemplates ownership as it relates to a building in its entirety. An owner of shares of a cooperative which entitle that entity to possession of a particular unit is distinct from an owner of a multiple dwelling (*see Frisch v Bellmarc Mgt.*, 190 AD2d 383, 387 [1993]), and Local Law 1 of 1982 only places the duty to abate lead paint upon the latter (*see generally Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 638 [1996]). Thus, the cooperative corporation was responsible for the lead-based paint hazard in the subject apartment.

The reliance placed upon the proprietary lease by the parties and the motion court was in error. The lease may define the scope and extent of responsibility within the unit, which, in turn, may speak to practical ownership of the unit, but Local Law 1 of 1982 only concerns itself with ownership of the "multiple

dwelling" which is distinct.

We also reject the cooperative corporation's contention that there was insufficient evidence to support a finding of notice or that such a finding was against the weight of the evidence. The finding of notice was amply supported by the evidence and the cooperative corporation's contentions pertaining to the credibility of the testimony are unpersuasive inasmuch as such determinations are within the exclusive province of the jury.

We have considered the remaining contentions and find them unpersuasive.

The Decision and Order of this Court entered herein on April 7, 2011 is hereby recalled and vacated (*see* M-226 decided simultaneously herewith).

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5730 &
M-5408 The People of the State of New York, Ind. 6516/07
Respondent,

-against-

Kevin Combs,
Defendant-Appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James Yates, J.), rendered on or about July 29, 2008,

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 hereby affirmed.

The Decision and Order of this Court entered herein on October 18, 2011 is hereby recalled and vacated (see M-5408 decided simultaneously herewith).

ENTERED: MARCH 6, 2012

CLERK

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

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6941 Bank of America, N.A., Index 602717/09
Plaintiff-Respondent,

-against-

Marc A. Zirogiannis, et al.,
Defendants,

Sterling National Mortgage Company, Inc., et al.,
Defendants-Respondents,

SunTrust Mortgage, Inc.,
Defendant-Appellant.

_____

Ellenoff Grossman & Schole LLP, New York (Eric Weinstein of counsel), for appellant.

Zeichner Ellman & Krause LLP, New York (Anthony I. Giacobbe, Jr., of counsel), for Bank of America, N.A., respondent.

Meyer, Suozzi, English & Klein, P.C., Garden City (Robert N. Zausmer of counsel), for Sterling National Mortgage Company, Inc., respondent.

Hogan Lovells US LLP, New York (Renee Garcia of counsel), for Wells Fargo Bank, N.A., respondent.

Eric T. Schneiderman, Attorney General, New York (Robert C. Weisz of counsel), for Lawyers' Fund for Client Protection, respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered August 1, 2011, which, to the extent appealed from, granted Sterling Mortgage Company, Inc.'s motion and Wells Fargo Bank, N.A.'s cross motion for summary judgment for a pro rata distribution of funds from the Mark A. Zirogiannis IOLA account

held at Bank of America, and denied SunTrust Mortgage, Inc.'s cross motion for a return of the funds it deposited into the IOLA account, unanimously reversed, on the law, without costs, Sterling's motion and Wells Fargo's cross motion denied, SunTrust's motion granted, and the matter remanded for distribution of the funds consistent with the decision herein.

The court improperly found that the appropriate remedy in this interpleader action was to order a pro rata distribution to all of the claimants of the funds held in the IOLA account. SunTrust is entitled to the funds since it was able to identify and trace its specific funds to the money in the account at the time that Bank of America commenced the interpleader action (*Matter of Reece*, 122 Misc 2d 517, 518 [1983], citing *Matter of Cavin v Gleason*, 105 NY 256, 262 [1887]). Consistent with the relief requested by Wells Fargo, the balance of the funds should be distributed pro rata among the interpleader defendants who can establish the validity of their claim.

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

ENTERED: MARCH 6, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6957N & M-140 — In re Commerz Markets LLC, formerly known as Dresdner Kleinwort Securities LLC, Petitioner-Appellant, -against- Christian P. Miller, et al., Respondents-Respondents. — Index 103738/11

Epstein Becker & Green, P.C., New York (Kenneth J. Kelly of counsel), for appellant.

James M. Griffin, Cold Spring Harbor, for respondents.

Order and judgment(one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered October 12, 2011, which, upon confirming an arbitration award of the Financial Industry Regulatory Authority in favor of respondents, awarded judgment to them in the total amount of $3,882,470, plus interest, unanimously affirmed, without costs.

Petitioner has not established that the arbitration award was marked by a manifest disregard of the law, as there has been no showing that the arbitrators ignored or refused to apply an applicable legal principle (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-481 [2006], *cert dismissed* 548 US 940 [2006]). The arbitrators were presented with evidence that petitioner's predecessor, Dresdner Kleinwort Securities LLC,

was respondents' employer and was liable to them for unpaid bonus compensation.

M-140 - *Commerz Markets, LLC, etc. v Christian P. Miller, et al.*

Motion to enlarge the record granted.

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6980 The People of the State of New York, Ind. 58077C/04
Respondent,

-against-

Jesus Pratts,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lindsey Ramistella of counsel), for respondent.

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Order, Supreme Court, Bronx County (John P. Collins, J.), entered on or about September 29, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, as a matter of discretion in the interest of justice, the motion granted, the order replaced by an order specifying and informing defendant of a proposed sentence of two years plus one year of postrelease supervision, and the matter remanded for further proceedings.

Substantial justice does not dictate denial of resentencing pursuant to the Drug Law Reform Act of 2009 (*see e.g. People v Milton*, 86 AD3d 478 [2011]). Defendant's prison record,

including his participation in rehabilitation programs, was generally favorable, and there was nothing about the underlying offense or defendant's criminal history that was so serious as to outweigh the positive factors.

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6981 In re John Zaborowski, Index 115489/09
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

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Jeffrey L. Goldberg, P.C., Lake Success (Jeffrey L. Goldberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for respondents.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered May 17, 2010, denying the petition to annul respondents' denial of accidental disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination was not arbitrary and capricious, an abuse of discretion or contrary to law. Credible evidence, including petitioner's medical records, supports the Medical Board's finding that petitioner's ventricular tachycardia was not caused by hypertension or any other stress-related condition, and rebuts the statutory presumption that petitioner's disabling

heart condition is job-related (*see* General Municipal Law § 207-k; *see Matter of McNamara v Kelly*, 32 AD3d 747 [2006], *lv denied* 8 NY3d 810 [2007]). The Board of Trustees was entitled to rely on the Medical Board's findings (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]).

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6982 In re Contest Promotions-NY LLC, Index 112333/10
Petitioner-Respondent,

-against-

New York City Department of Buildings, etc., et al.,
Respondents-Appellants.

_____

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for appellant.

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 12, 2011, converting this proceeding brought pursuant to CPLR article 78 into a declaratory judgment action, and declaring that signs consistent with petitioner's business model qualify as "accessory" signs under New York City Zoning Resolution (ZR) § 12-10 and that respondents may not reject outright permit applications for such signs on the ground that they do not meet the definition of "accessory use" under ZR § 12-10, unanimously reversed, on the law, without costs, the judgment vacated, the petition denied, and the proceeding dismissed.

Petitioner's failure to exhaust its administrative remedies

precludes judicial review of its non-constitutional claims (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *Slater v Gallman*, 38 NY2d 1, 3 [1975]; *Young Mens Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375 [1975]). Petitioner did not appeal from what it views as the "final determination" by respondent Department of Buildings (DOB) — letters from DOB written in May and July, 2010 — although, in its last letter, DOB expressly advised petitioner to appeal the matter to the Borough Superintendent (or Borough Commissioner) (*see* NY City Charter § 645[b][1], [c]). Sign permit applications that are disapproved by the Borough Commissioner may then be appealed to the Board of Standards and Appeals (NY City Charter § 648; Administrative Code of City of NY § 28-103.4).

As to petitioner's constitutional claims, the first claim is that DOB's refusal to approve petitioner's signs constitutes an unjustifiable, content-based restriction on commercial speech. This claim requires a detailed assessment of the nature, content, and setting of petitioner's model signs, thus presenting a mixed factual and legal question (*see Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 420 [1998]). It requires "the resolution of factual issues

reviewable at the administrative level" (*see Matter of Schulz v State*, 86 NY2d 225, 232 [1995], *cert denied* 516 US 944 [1995]; *see also Sumner v Hogan*, 73 AD3d 618, 619 [2010]; *Siao-Pao v Travis*, 23 AD3d 242, 243 [2005]). Therefore, the claim is barred by petitioner's failure to exhaust its administrative remedies.

Petitioner's second constitutional claim is that ZR § 12-10 is "facially unconstitutional" because it vests DOB with unbridled discretion to determine which signs are accessory. This claim presents a purely legal question that may be resolved by review of the regulatory scheme without regard to the facts, and thus is properly presented for judicial review. Petitioner contends that ZR § 12-10 provides no "objective criteria" by which to define the terms "incidental to" and "customarily found in connection with" contained within the definition of "accessory use." In view of the detailed criteria set forth in both ZR § 12-10 and the enabling regulations promulgated by DOB, we find that this claim is without merit.

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6983 In re Jessica W.,

- - - - -

Sandra A.H., et al.,
Petitioner-Respondent,

-against-

Josefina M., etc.,
Respondent-Appellant.

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Steven N. Feinman, White Plains, for appellant.

Julian A. Hertz, Larchmont, for Sandra A.H., respondent.

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

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

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Order, Family Court, Bronx County (Peter Kuper, Referee), entered on or about January 19, 2011, which, after a hearing, granted the paternal grandmother's petition for custody of the subject child, with visitation to respondent mother, unanimously affirmed, without costs.

Family Court properly found that extraordinary circumstances existed and that it was in the child's best interests to grant custody to petitioner (*see Matter of Bennett v Jeffreys*, 40 NY2d 543 [1976]). The record shows that the child has lived with petitioner for most of her life and has thrived under her care (*see Matter of Shemeek D. v Teresa B.*, 89 AD3d 608, 609 [2011]).

By contrast, there was a finding of neglect against respondent mother based on her mental illness, which has persisted and prevented the child from developing a trusting and loving relationship with respondent.

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6984 Pedro Garcia Tzic, etc., et al., Index 302038/08
Plaintiffs-Respondents, 83936/08

-against-

Christina Serafis Kasampas, et al.,
Defendants-Appellants-Respondents,

MSS Construction Corp., et al.,
Defendants-Respondents-Appellants.

- - - - -

Christina Serafis Kasampas, et al.,
Third-Party Plaintiffs-Appellants-Respondents,

-against-

Champion Builder & Construction Corp.,
Third-Party Defendant-Respondent-Appellant.

_____

Gannon, Lawrence & Rosenfarb, New York (Lisa L. Gokhulsingh of counsel), for appellants-respondents.

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for MSS Construction Corp., s/h/a/ MSS Construction Corp., Sidewalk Sheds & Scaffolding aka MSS Construction Corp. aka M.S.S. Sidewalk Bridges and Scaffolding, respondents-appellants.

O'Connor & Redd, LLP, White Plains (Amy L. Fenno of counsel), for Champion Builder & Construction Corp, respondent-appellant.

Carolyn Sanchez, Garden City, for respondents.

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered January 31, 2011, which, insofar as appealed from, granted plaintiffs' motion for partial summary judgment as to liability on their cause of action under Labor Law § 240(1)

against defendants Christina Serafis Kasampas and Nicholas Serafis, denied those defendants' cross motion for summary judgment on their indemnification claims, denied in part MSS Construction Corp. and Sidewalk Sheds and Scaffolding's (MSS) cross motion for summary judgment dismissing all claims and cross claims asserted against MSS, and determined that the injured plaintiff suffered a "grave injury" within the meaning of section 11 of the Workers' Compensation Law, unanimously affirmed, without costs.

The injured plaintiff alleges that while engaged in construction work at 135 Waverly Place in Manhattan, he fell 15 feet from an opening in a "sidewalk shed" (sidewalk bridge) that extended around the perimeter of the building. Plaintiff was employed by third party defendant Champion Builder & Construction Corp. (Champion). The owner of the building was defendant Christina Serafis Kasampas, who gave power of attorney over the building's operation to her father, defendant Nicholas Serafis (collectively, the owners). The owners hired Champion to restore the building's facade. Champion hired defendant MSS to build the sidewalk bridge.

The failure to provide an adequate safety device is a per se violation of Labor Law § 240(1) for which the owner and

contractor are held strictly liable (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 8 [2011]). To prevail on a summary judgment motion premised on section 240(1) liability, plaintiff must demonstrate that the statute was violated and that such violation was a proximate cause of his injuries (*id.* at 9-10). According to the testimony of Champion's president, John Hussain, plaintiff was provided with a hard hat and a safety harness with a safety line and was supposed to use the line to secure the harness to a fire escape when working near one. Plaintiffs' expert testified that using the fire escape as anchorage was improper, and that a proper personal fall system was lacking. In opposition, the owners did not come forward with evidence contesting plaintiffs' expert's assertion. Since it is uncontested that an adequate safety device was not provided, Hussain's testimony that certain other safety devices were provided is irrelevant (*see id.*).

It is true that "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" under Labor Law § 240 (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). However, to raise an issue of fact regarding plaintiff's recalcitrance, the owners were required to show that: (a) plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to

use them; (c) for "no good reason" he chose not to use them; and (d) had he used them, he would not have been injured (*see Auriemma*, 82 AD3d at 10).

The owners' assertion that plaintiff covered the opening with tarp and then carelessly walked over it is of no moment. First, this assertion is speculative. Second, once the statutory violation has been established as a proximate cause of the accident, plaintiff's alleged contributory negligence becomes irrelevant (*see Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363, 364 [2007]).

The motion court correctly denied the owners' motion seeking summary judgment on their indemnification claims. Summary judgment on common law indemnification claims is only warranted where "there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (*Coque v Wildflower Estates Developers., Inc.*, 31 AD3d 484, 489 [2006]).

The evidence here suggests that the owners exercised sufficient control over the safety issue presented by the opening to raise an issue of fact regarding their negligence, i.e., Hussain's testimony about Serafis's direct involvement in safety issues, and, in particular, the safety of the subject opening in the sidewalk bridge. Hussain testified that Serafis instructed

him not to cover the opening with planks, so that Hussain used guardrails. If credited, such testimony would establish that the owners "possessed the requisite supervisory control over that portion of the work activity bringing about the injury to enable [them] to prevent the creation of the unsafe condition or plaintiff's exposure to it" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 353 [1998]; *cf. Singh v Black Diamonds LLC*, 24 AD3d 138, 139-140 [2005]).

The motion court correctly determined that plaintiff suffered a "grave injury" (Worker's Compensation Law § 11). Since the medical affidavit proffered by Champion failed to address facts in the record (*see Kaplan v Hamilton Med. Assoc.*, 262 AD2d 609, 610 [1999]), such as that plaintiff had no orientation to place and time, was the subject of a court-ordered guardianship, required 24-hour-a-day supervision and the care of a nursing facility, and, due to his cognitive impairments, was not capable of giving any testimony whatsoever in this action, the affidavit failed to raise a triable issue of fact regarding

whether plaintiff was employable "in any capacity" (*see Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]).

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: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6985 William Fernandez, et al., Index 600221/08
Plaintiffs-Respondents,

-against-

Richard Hencke,
Defendant-Appellant.

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D'Errico Dreeben, LLP, Garden City (Frank N. D'Errico of counsel), for appellant.

Rappaport, Hertz, Cherson & Rosenthal, P.C., Forest Hills (Jeffrey M. Steinitz of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 7, 2011, after a nonjury trial, awarding the principal amount of $80,064.54 to plaintiff El Viajero Corp., unanimously affirmed, with costs.

Defendant Richard Hencke, plaintiff William Fernandez, and a third person not a party to this action formed plaintiff corporation for the purpose of opening a restaurant. During the construction phase of the restaurant, Fernandez permitted defendant to draw advances from the corporation's account against "future profits and salaries." The restaurant never opened and its assets were sold for $200,000.

After the failed joint venture, Fernandez, who had funded the corporation, and the corporation commenced this action against defendant, seeking to recover the advances defendant had

drawn, totaling $80,064.54. Neither Fernandez nor the other individual, both of whom were equal shareholders with defendant, had gained any profits from the failed venture or taken any salary from the corporation.

Defendant's argument that the corporation could not properly bring a lawsuit against him because there was no corporate resolution authorizing such an action has been waived since it is an affirmative defense that defendant did not raise until after the trial (*see* CPLR 3018[b]). In any event, it lacks merit. Where there is no direct prohibition by the board, the president of a corporation has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the corporation (*Rothman & Schneider, Inc. v Beckerman*, 2 NY2d 493, 497 [1957]; *Family M. Found. Ltd v Manus*, 71 AD3d 598 [2010], *lv dismissed* 15 NY3d 819 [2010]).

The evidence establishes that both parties intended the advances to be repaid when the restaurant opened, and thus the trial court properly concluded that the advances were loans (*see People v Grasso*, 13 Misc 3d 1227[A], *20-*21 [2006], *mod on other grounds* 54 AD3d 180 [2009]). Although the terms of the repayment are unclear since the agreement was not in writing and neither party anticipated that the restaurant would fail when they entered into the agreement, the evidence supports a finding that

the earning of "future salaries and profits" was not intended to be a condition precedent to repayment but was an assumption upon which the agreement was based. As the trial court found, defendant, as a shareholder, is entitled to an accounting once the funds are repaid.

We have reviewed defendant's remaining arguments and find them unavailing.

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6986 Leonard Cedano, Index 14687/05
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

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Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for appellant.

Michelle S. Russo, P.C., Port Washington (Michelle S. Russo of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered September 3, 2010, after a jury trial, awarding plaintiff damages in the principal amounts of $250,000 for past pain and suffering, and $300,000 for future pain and suffering over 20.9 years, plus interest, costs and disbursements, and bringing up for review an order, same court and Justice, entered May 7, 2009, which denied defendant City's post-trial motion for judgment or, in the alternative, to set aside the verdict and grant a new trial, unanimously affirmed, without costs.

Plaintiff presented a prima facie case of negligence by the City. Based on trial testimony, the jury could reasonably have concluded that the City, not some other entity, had paved the roadway around the manhole covers, leaving it in a dangerous

condition and causing plaintiff's injury (*see Welch v Riverbay Corp.*, 273 AD2d 66 [2000]). Further, plaintiff established that the City's negligence proximately caused his accident, as he consistently testified that he fell because of the height difference between the street and the manhole cover (*see Vitanza v Growth Realties*, 91 AD2d 917 [1983]).

The jury's award of $250,000 for past pain and suffering and $300,000 for future pain and suffering does not deviate materially from what would be reasonable compensation under the circumstances.

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6988- Ind. 2166/08
6989 The People of the State of New York, 6423/08
Respondent,

-against-

Oswaldo Serrata, etc.,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered June 30, 2009, as amended December 21, 2009, convicting defendant, after a jury trial, of burglary in the first degree, assault in the third degree, and operating a motor vehicle while intoxicated (two counts), and sentencing him to an aggregate term of five years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations The fact that the jury acquitted defendant of some counts does not warrant a different result (*see People v Rayam*, 94 NY2d 557 [2000]).

The victim's testimony supported the conclusions that defendant unlawfully entered the victim's building by forcing

open a door, and that defendant did so with intent to commit an assault. The credible evidence also disproved beyond a reasonable doubt defendant's justification defense to the assault charge.

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6991 Christopher Higgins, Index 109560/04
Plaintiff-Appellant,

-against-

Consolidated Edison Company of New York, Inc., et al.,
Defendant-Respondent.

_____

Gregory J. Cannata & Associates, New York (Gregory J. Cannata of Counsel), for appellant.

White Quinlan and Staley, LLP, Garden City (Arthur T. McQuillan of counsel), for Consolidated Edison Company of New York, Inc., respondent.

O'Connor Redd, LLP, White Plains (Amy L. Fenno of counsel), for Case Contracting, LTD., respondent.

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Order, Supreme Court, New York County (Judith A. Gische, J.), entered September 14, 2010, which granted plaintiff's motion to renew an order, same court and Justice, entered August 27, 2009, inter alia, which granted defendants Consolidated Edison Company of New York, Inc.'s and Case Contracting Ltd.'s motions for summary judgment dismissing plaintiff's Labor Law § 240(1) cause of action, and upon renewal, adhered to its prior decision, unanimously modified, on the law, the motions for summary judgment denied, and otherwise affirmed, without costs.

The motion court properly granted the motion to renew in

light of the Court of Appeals' decision in *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]) (*see* CPLR 2221[e][2]). However, upon renewal, plaintiff's Labor Law § 240(1) should have been reinstated.

An issue of fact exists as to whether plaintiff's injuries were the direct consequence of the failure to provide adequate protection against the risk arising from "tugging" the cable to the sixth floor above (*see Runner*, 13 NY3d at 603). Because the record presents markedly different versions as to how the accident occurred, summary resolution of the Labor Law § 240(1) claim is inappropriate.

The reinstatement of plaintiff's Labor Law § 240(1) cause of action renders Consolidated Edison's motion for indemnification against Case Contracting no longer academic. However, the motion should be considered by the motion court in the first instance (*see e.g. Commissioner of State Ins. Fund v Weissman*, 90 AD3d 417 [2011]).

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6992 Michael D'Antonio, Index 113885/07
Plaintiff-Appellant,

-against-

Manhattan Contracting Corporation, et al.,
Defendants-Respondents.
- - - - -
Manhattan Contracting Corporation,
Third-Party Plaintiff,

-against-

Wilkstone, LLC,
Third-Party Defendant-Respondent.

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Wingate, Russotti & Shapiro, LLP, New York (Kenneth J. Halperin of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for Manhattan Contracting Corporation and 112 West 34th Street Company, LLC, respondents.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for Wilkstone, LLC, respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 24, 2011, which denied plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action, unanimously affirmed, without costs.

Plaintiff, an employee of third-party defendant Wilkstone, LLC, was working at a construction site owned by defendant 112 West 34th Street Company, LLC and managed by defendant Manhattan Contracting Corporation, when he was injured while installing

temporary lighting. Plaintiff was standing on the third rung of a closed A-frame ladder that was propped up against a wall, when he was struck on the head by a conduit pipe that housed wires, which partially detached from the wall and swung downward.

Summary judgment was properly denied as there are triable issues of fact which exist regarding whether the conduit pipe constituted a falling object within the meaning of Labor Law § 240(1) and whether the events leading to plaintiff's injury were due to the absence or inadequacy of a safety device of the type enumerated in the statute (*see generally Wilinski v 334 East 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]).

Additionally, although plaintiff maintains that he fell from the ladder when he was hit on the head, there is conflicting evidence as to whether he deliberately jumped, was knocked off by the pipe, or lost his footing when the ladder allegedly "shook," precluding a determination, as a matter of law, that the ladder

constituted an inadequate safety device (*see Antenucci v Three Dogs, LLC*, 41 AD3d 205 [2007])

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

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6994 Highmount Olympic Fund, LLC, Index 651103/10
Plaintiff, 651109/10

-against-

PIPE Equity Partners, LLC, et al.,
Defendants.
- - - - -
PIPE Equity Partners, LLC,
Plaintiff-Respondent,

-against-

Highmount Olympic Fund, LLC,
Defendant-Appellant.

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Cadwalader, Wickersham & Taft LLP, New York (Hal S. Shaftel of counsel), for appellant.

Seward & Kissel LLP, New York (Mark J. Hyland of counsel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 17, 2010, which, in this consolidated action, denied the motion of Highmount Olympic Fund, LLC to dismiss the complaint of PIPE Equity Partners, LLC pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in Highmount's favor dismissing the complaint.

Equity Partners seeks to rescind an investment agreement based on a mutual mistake where the value of the in kind investment contribution that it accepted from Highmount turned

out to be less than was represented.

Insofar as the alleged mistake was as to the value of Highmount's interest in AJW, the complaint fails to state a cause of action, for two reasons. First, where there is a mutual mistake as to valuation, as opposed to the subject of the parties' exchange, rescission or restitution is not warranted (*In re Leslie Fay Cos., Inc. Sec. Litig.*, 918 F Supp 749, 771 [SD NY 1996]). The parties here were not mistaken as to the subject of the exchange: a Class B limited liability interest in AJW for a membership interest in PIPE (*compare Simkin v Blank*, 80 AD3d 401, 403 [2011] [parties were mistaken about the actual existence of an account, not about its value]). Second, the parties' agreement says that PIPE is not relying on any representations, warranties, or statements by Highmount, except for a representation that is not at issue in this case, and that the value of Highmount's interest in AJW is that ascribed to it by nonparty AJW Manager, LLC, not by Highmount (*see M.R. Eason & Co. v Golub*, 177 AD2d 368 [1991]).

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6997 Vera Salnikova, etc., et al., Index 117881/09
Petitioners-Appellants,

-against-

Andrew Cuomo, etc., et al.,
Respondents-Respondents.

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McLaughlin & Stern, LLP, New York (Richard L. Farren of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Robert C. Weisz of counsel), for Andrew Cuomo, respondent.

Rosenberg & Estis, P.C., New York (Deborah E. Riegel of counsel), for S&P Associates of New York, LLC, respondent.

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Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about October 12, 2010, granting respondents' cross motion to deny the amended petition and to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The Attorney General's determination not to further investigate petitioners' claims, after hearing from their representatives and the sponsor prior to acceptance of the condominium offering plan amendment for filing, is not subject to judicial review (*see People v Bunge Corp.*, 25 NY2d 91, 97-98 [1969]). Acceptance of the amendment for filing was not arbitrary and capricious because it contained the required disclosure and a sufficient number of sales had been made to bona

fide purchasers to declare the plan effective. There is no merit to petitioners' claim of any right to a price reduction after the exclusive purchase period set forth in the plan or to their contention that discounted prices offered to nontenant purchasers were discriminatory inducements (*see* General Business Law § 352-eeee[2][c][i]; *Karpf v Turtle Bay House Co.*, 127 Misc 2d 154, 156 [1984]).

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

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

ENTERED: MARCH 6, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6998 The People of the State of New York, Ind. 1381/09
Respondent,

-against-

Eliesel Gutierrez,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about June 23, 2010,

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: MARCH 6, 2012

CLERK

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

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6999-
6999A-
6999B 230 East 44th Street Associates, LLC, Index 112075/08
Plaintiff-Respondent,

-against-

Park on 44th Corp.,
Defendant-Appellant,

The Department of Consumer Affairs
of The City of New York,
Defendant.

_____

Jeffrey D. Ullman, New York, for appellant.

Rivkin Radler LLP, New York (Merril S. Biscone of counsel), for respondent.

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Judgment, Supreme Court, New York County (Debra A. James, J), entered February 9, 2011, awarding plaintiff attorney's fees as against defendant Park on 44th Corp., and bringing up for review an order, same court and Justice, entered September 2, 2010, which denied said defendant's motion to vacate an order granting a default judgment, and an order, same court (Lance B. Hewitt, Special Referee), entered February 8, 2011, which directed an award of attorney's fees, unanimously reversed, on the law, without costs, the judgment vacated, and the motion granted. Appeals from the aforesaid orders unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court should have vacated the default judgment. Defendant proffered a sufficient excuse for its default and demonstrated a meritorious defense.

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

ENTERED: MARCH 6, 2012

CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4810 Brenda Cornell, Index 113104/04
Plaintiff-Appellant,

-against-

360 West 51st Street Realty, LLC, et al.,
Defendants,

360 W.51st Street Corp., et al.,
Defendants-Respondents.

[And a Third-Party Action]

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Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for appellant.

Bonner Kiernan Trebach & Crociata LLP, New York (Alan L. Korzen of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 13, 2010, modified, on the law, to reinstate the complaint as against defendant 360 W. 51st Street Corp., and otherwise affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur except Andrias, J.P. and Catterson, J. who dissent in part in an Opinion by Catterson, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B, Saxe
James M. Catterson
Sheila Abdus-Salaam
Sallie Manzanet-Daniels, JJ.

4810
Index 113104/04

_____x

Brenda Cornell,
Plaintiff-Appellant,

-against-

360 West 51st Street Realty, LLC,
et al.,
Defendants,

360 W. 51st Street Corp., et al.,
Defendants-Respondents.

[And a Third-Party Action]
_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered January 13, 2010, which, inter alia, granted the motion of defendants 360 W. 51st Street Corp. and Geoffrey Shotwell for summary judgment dismissing the complaint as against them.

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz and Beatrice Lesser of counsel), for appellant.

Bonner Kiernan Trebach & Crociata LLP, New York (Alan L. Korzen and Mindy L. Jayne of counsel), for respondent.

MANZANET-DANIELS, J.

The motion court incorrectly interpreted our ruling in *Fraser v 301-52 Townhouse Corp.* (57 AD3d 416 [2008], *appeal dismissed* 12 NY3d 847 [2009]), as setting forth a categorical rule requiring dismissal of plaintiff's toxic mold claim due to failure meet the standard of scientific reliability set forth in *Frye v United States* (293 F 1013 [DC Cir 1923]). In *Fraser*, another case involving injuries arising out of exposure to toxic mold, we affirmed dismissal of the plaintiff's personal injury claim because the plaintiff's submissions failed to raise a triable issue of fact. We never disavowed the underlying theory that exposure to mold may, under certain circumstances, give rise to respiratory and other ailments. Indeed, this Court was careful to limit its holding in *Fraser*, explicitly stating, "We stress that our holding does not set forth any general rule that dampness and mold can never be considered the cause of a disease, only that such causation has not been demonstrated by the evidence presented by plaintiffs here" (57 AD3d at 418).

The motion court erred in finding that plaintiff's proof was not "strong enough to constitute a causal relationship," or that the methodologies used to evaluate her condition failed to meet the *Frye* standard. The focus of the *Frye* inquiry "should not be upon how widespread [a] theory's acceptance is, but should

instead consider whether a reasonable quantum of legitimate support exists in the literature for [an] expert's views" (*Marsh v Smyth*, 12 AD3d 307, 312 [2004, Saxe, J., concurring]). Even the dissent does not dispute that plaintiff's theory of causation finds some support in the scientific literature[1] (*compare Lara v New York City Health & Hosps. Corp.*, 305 AD2d 106, 106 [2003] [complete absence of any clinical data or formal studies supporting expert's theory that a precipitous delivery, without significant bleeding, could give rise to cerebral palsy arising six months after birth; trial court noted that expert "could not point to a reported case and could not point to a medical writing that set forth his theory in even general terms"]).[2] Since plaintiff's expert's opinions relating plaintiff's condition to the mold infestation find "some support in existing data, studies

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[1]The dissent's criticisms of the studies relied on by plaintiff unfairly adjudge the quality of the data, not the quantum of data. For example, the dissent derides the data in one study as "represent[ing] initial steps toward defining the pathophysiological mechanisms" for certain "aeroirritant effects" associated with excess mold growth. This statement in no way detracts from the study's conclusion, however, that "there remains a large population of patients who do suffer medical problems related to damp indoor home environments."

[2]*See also* Jonathan Vatner, *Battling Mold Infestations*, New York Times [Feb. 11, 2011] [discussing fact that the Department of Housing Preservation and Development issued 14,290 violations in 2010 alone for mold in residential buildings, and noting that the building industry may soon adopt mold-resistant drywall as a standard, quoting source as stating, "This is a very low-cost proposal with substantial health benefits"].

[and] literature" (*Marsh*, 12 AD3d at 313), namely, studies that have found a statistically significant relationship between mold and various respiratory maladies, the *Frye* standard is satisfied.

Plaintiff has lived in the subject apartment since 1997. The apartment is located directly above the basement area of the building. Plaintiff testified that she had occasion to walk through the public areas of the basement throughout her tenancy and described the area as damp, musty, and harboring bugs and mice. Floods in the summer of 2002 and 2003 resulted in water damage in the basement stairwell and on the walls of the basement. During the summer of 2003, a steam pipe broke in plaintiff's apartment, releasing steam. In July 2003, after the pipe broke and water leaked in the basement, plaintiff noticed a small amount of mold in her bathroom. Plaintiff testified that when she entered the bathroom she began to feel ill, experiencing a body rash, shortness of breath, fatigue, disorientation and headaches. She testified that the landlord placed a dehumidifier in the bathroom and advised her to wash the area with bleach. Plaintiff did so and her symptoms disappeared.

During the course of plaintiff's tenancy, on or about September 5, 2003, 360 West 51st Street Realty, LLC[3] purchased the

[3]360 West 51st Street Realty, LLC has settled with plaintiff and is not an appellant.

building from defendants-respondents 360 West 51st Street Corp. and Geoffrey Shotwell. On October 1, 2003, the new owner began renovations in the basement. On the day debris removal commenced, plaintiff experienced dizziness, chest tightness, congestion, shortness of breath, a rash, swollen eyes and a metallic taste in her mouth. Despite allergy medicines prescribed by her doctor, plaintiff's symptoms only subsided when she left the premises for a period of time.

On October 7, 2003, plaintiff left the apartment due to difficulty breathing. In November 2003, plaintiff informed defendant landlord that she was unable to live in the apartment due to the ongoing renovation work and was withholding rent for the month of November. Plaintiff moved in with a friend and never again slept in the apartment.

360 West 51st Street Realty commenced a summary nonpayment proceeding against plaintiff in the Civil Court. Plaintiff answered and asserted counterclaims for, inter alia, constructive eviction and breach of the warranty of habitability. Following a 17-day trial, the Civil Court found in plaintiff's favor, awarding her a 100% abatement for the months of October 2003 through April 2004, as well as a 20% abatement in July 2003 when the pipe broke in plaintiff's apartment and plaintiff first noticed mold and experienced physical symptoms.

At the Civil Court trial, plaintiff's experts testified that the damp conditions in the basement had created the ideal environment for growth of fungus, and that the contractors disturbed years of spores and dust when they cleaned out the basement. Plaintiff's witnesses theorized that a hazardous suspension of these particles moved up a dumbwaiter shaft and through cracks in the floor, entering plaintiff's apartment and contaminating the space.

Lawrence B. Malloy, an environmental investigator and consultant concerning indoor air quality and toxic materials abatement, visited the premises on November 3, 2003 and took samples. His tests confirmed the presence of molds including aspergillus/penicillium, stachybotrys and chaetoium. Mr. Malloy noted that stachybotrys cannot exist without a continuous source of water and opined that there is no acceptable indoor level of the mold.

Dr. Chin S. Yang, a microbiologist, testified that samples collected in March 2004 from plaintiff's apartment showed contamination from aspergillus/penicillium, stachybotrys, chaetoium and paecilomyces verioti. Dr. Yang stated that stachybotrys and chaetoium are excellent indicators of water damage and opined, based on the combinations and different species of fungi found in the apartment, that the environment had

sustained long-term water damage.

Jay Danilczyk, an environmental consultant, inspected and took samples in the basement, apartment and air shaft in March 2004. Danilczyk also found mold growing under the floorboards in the apartment.

The evidence showed that defendant landlord was on notice of the mold condition as early as October 1998, as demonstrated by a "mold testing" report dated October 14, 1998 that it commissioned from an environmental consultant. The report noted, inter alia, the presence of mold in the cellar, "mold stained sheetrock walls," and a variety of fungi including aspergillus and penicillium. The testing was done specifically in response to "tenant concerns regarding mold" and discovery of mold in the apartment of a basement tenant.

Defendant ordered additional testing of the basement in July 2003 in response to further complaints by the basement tenant. The consultant stated that its primary purpose was to test the apartment for the presence of mold following a water infiltration episode. The consultant noted that aspergillus/penicillium spores were the "dominant finding" in the apartment location and recommended cleaning of the impacted area and re-testing. Thus, the evidence supports the inference that a mold condition existed in the basement for years prior to defendant's sale of the

building.

Defendants and plaintiff cross-moved for summary judgment. Defendants' expert, Dr. Michael Phillips, M.D., acknowledged that "[m]olds can cause a wide spectrum of illnesses, including allergies, irritation, hypersensitivity pneumonitis and direct infection." Defendant's expert opined that mold was "ubiquitous" and that mold under floorboards "generally constitute no significant exposure." Defendant's expert did not examine plaintiff in arriving at his conclusion that mold had not caused her ailments, concluding, upon a review of her medical records, that "in the case of Ms. Cornell, molds caused no significant, objectively documented illness."

Plaintiff relied on the affidavit of her treating physician, Dr. Eckhard Johanning. Dr. Johanning opined that exposure to damp buildings with excessive and atypical mold contamination was a recognized cause of respiratory health complaints and conditions such as asthma, rhino-sinutis, bronchitis, allergy, infections and irritant-type reactions of the skin and mucous membranes.

Dr. Johanning opined, with a reasonable degree of medical certainty, that plaintiff's irritative and allergic-type symptomatology was caused by exposure to building dampness and excessive and atypical mold exposure, over time, at her

apartment. In arriving at his conclusion concerning plaintiff's physical health and its cause, Dr. Johanning considered plaintiff's medical and occupational history and history of environmental exposure, other competing/confounding environmental/occupational exposures, a detailed physical examination of plaintiff, diagnostic laboratory studies, the medical and scientific literature, and details of the environmental and exposure data.

Dr. Johanning conducted a number of different blood tests/panels that included an evaluation of the liver, kidneys and immunological system, hormones (to assess thyroid function), protein chemistry, heavy metal analysis, urinalysis, allergy specific IgE and IgG, and respiratory function tests such as spirometry, inhaler studies and diffusion tests, and other examinations. Dr. Johanning opined that plaintiff still exhibited immune mediated hypersensitivity reactions (IG antibodies) to microbes typically found in very wet and damp environments, consistent with her medical history and exposure.

Dr. Johanning stated that in arriving at a conclusion assessing the health effects of building dampness and mold exposure in plaintiff (or any other patient), he used a differential diagnosis, the universally accepted methodology used by physicians in assessing causation and diagnosing illness.

Dr. Johanning stated there was "no question" that the conditions existing in plaintiff's apartment, including dust, microbial growth, mold, heavy metals and a diversity of fungi and bacteria that had come up through the floorboards and the air shaft in the apartment as a result of demolition work in the basement, contamination from flooding, as revealed by long-term water damage, as well as dust, standing water, moisture and streaking on the walls, "had a host of deleterious effects" on plaintiff's health.

In forming his opinions, Dr. Johanning relied on a number of peer-reviewed studies, including a 2004 publication of the Institute of Medicine in the National Academies, entitled *Damp Indoor Spaces and Health*, relied upon by the *Fraser* plaintiffs, as well as two studies which post-date *Fraser*, a 2007 study entitled *Excess dampness and mold growth in homes: An evidence-based review of the aeroirritant effect and its potential causes* (28 Journal of Allergy and Asthma Proceedings, May/June 2007), and an article published in 2008 entitled *Hydrophilic Fungi and Ergosterol Associated with Respiratory Illness in a Water-Damaged Building* (116 Environmental Health Perspectives, June 2008). The first study reviewed the major epidemiological and biological studies, concluding that "[t]he preponderance of epidemiological data supports a link between exposure to dampness and excess mold

growth and the development of aeroirritant symptoms," and that studies "support the role of VOCs [volatile organic compounds] in contributing to the aeroirritant symptoms of occupants of damp and mold-contaminated homes." The authors noted, in reviewing the data, that "[m]ultiple studies [] have found a dose-response relationship between the numbers of indicators of dampness present and aeroirritant symptoms." These studies found statistically significant relationships between visible mold growth and eye, nose and throat/respiratory symptoms.

The second study found that among workers in a building with long-term water damage, "respiratory illnesses showed significant linear exposure-response relationships to total culturable fungi." The authors stated that they had found "significant linear exposure-response relationships between various microbial measurements (total fungi, fungi requiring Aw ≥ 0.8, hydrophilic fungi, ergosterol and endotoxin) in dust and health outcomes (respiratory cases, epi-asthma cases, and post-occupancy asthma cases)." The authors found that the associations between health outcomes and fungi were mostly driven by exposure to fungi requiring Aw ≥ 0.8, and specifically hydrophilic fungi in both floor and chair dust, that exposure to hydrophilic fungi in floor and chair dust was associated with about a two-fold increase in the chances of being a post-asthma occupancy case, and that of

all the environmental variables, hydrophilic fungi in floor dust were most strongly associated with post-occupancy asthma cases.

The court granted defendant's cross motion for summary judgment dismissing the complaint, finding that it was constrained by this Court's decision in *Fraser v 301-52 Townhouse Corp.* (57 AD3d 416 [2008], *appeal dismissed* 12 NY3d 847 [2009], *supra*), to dismiss plaintiff's claims for personal injuries caused by exposure to mold. The court stated, with respect to the issue of general causation:

> "Higher appellate review is awaited, given that this dispute arises in the context of widespread public concern and increasing litigation about the effects of mold on health. For purposes of this opinion, however, the *Fraser* majority has resolved the issue of the sufficiency of the current epidemiological evidence to demonstrate causation. As the majority found that the epidemiological evidence on which Dr. Johanning relied was not sufficiently strong to permit a finding of general causation, and as the limited supplemental studies that are submitted in this action plainly do not remedy the insufficiency found by the *Fraser* majority, this court is constrained to hold that plaintiff is unable to prove general causation."

The court also found that *Fraser* had foreclosed plaintiff's evidence of specific causation, stating that "*Fraser* rejected Dr. Johanning's claim to have established causation by means of 'differential diagnosis.'" The court concluded:

> "The scientific theory advanced in *Fraser* is the same theory advanced here, by the same witness, Dr. Johanning, on the basis of largely the same scientific evidence. While stressing that its holding did not 'set forth any general rule that dampness and mold can never be considered the cause of a disease,' *Fraser* found that such causation had not been demonstrated by the plaintiffs there... *Fraser* mandates this court's dismissal of plaintiff's personal injury cause of action."

Despite this Court's admonition in *Fraser*, that *Fraser* "does not set forth any general rule that dampness and mold can never be considered the cause of a disease" (*Fraser*, 57 AD3d at 418), the motion court nonetheless interpreted *Fraser*, erroneously in our view, as requiring rejection of plaintiff's personal injury claim based on exposure to mold. The scientific evidence shows that exposure to molds, particularly the types of molds whose presence in plaintiff's apartment was confirmed by sampling, i.e., aspergillus/penicillum, stachybotrys and chaetoium, can cause the types of ill effects experienced by plaintiff.

The evidence offered on the motion easily satisfied the test of scientific reliability set forth in *Frye*. The motion court found that the supplemental studies relied on by Dr. Johanning "plainly do not remedy the insufficiency found by the *Fraser* majority." However, a thorough reading of the studies relied on by plaintiff's expert demonstrate a clear relationship between exposure to mold and respiratory and other symptoms. One study

found "significant linear exposure-response relationships between various microbial measurements (total fungi, fungi requiring A*w* ≥ 0.8, hydrophilic fungi, ergosterol and endotoxin) in dust and health outcomes (respiratory cases, epi-asthma cases, and post-occupancy asthma cases)." Another, upon a review of the epidemiological data, concluded that "*[t]he preponderance of epidemiological data* supports a link between exposure to dampness and excess mold growth and the development of aeroirritant symptoms" (emphasis added).

The results in the studies relied on by plaintiff were found to be statistically significant, meaning the strength of the association was sufficient to conclude, within the range of probability, that exposure to mold caused the identified ill-health effects. Scientists do not report their results in terms of black and white causality, but rather, in terms of the strengths of the associations found. These associations having been found sufficiently strong by the literature as to be indicative of a causal relationship, plaintiff's evidence must be deemed to meet the *Frye* standard.

Plaintiff has also adequately established specific causation. The evidence confirmed the presence of these types of molds in plaintiff's apartment. Plaintiff's expert opined that plaintiff's exposure to these fungi, including their by-products

such as allergens, mycotoxins, and microbial volatile organic compounds, caused plaintiff's ailments. Plaintiff's expert opined that plaintiff still exhibited immune mediated hypersensitivity reactions, as confirmed by IG testing, to microbes typically found in very wet and damp environments.

The motion court found that plaintiff had failed to adequately set forth her exposure levels to the molds identified in the apartment. Yet we have stated, time and time again, in cases involving environmental contamination and exposure to toxic substances, that it is generally difficult or impossible to quantify a plaintiff's exposure to a toxin.

The Court of Appeals, in *Parker v Mobil Oil Corp.* (7 NY3d 434 [2006]), made clear that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community" (*Parker*, 7 NY3d at 448; *see Wright v Willamette Indus., Inc.*, 91 F3d 1105, 1107 [8th Cir 1996] ["We do not require a mathematically precise table equating levels of exposure with levels of harm, but there must be evidence from which a reasonable person could conclude that a defendant's emission has probably caused a particular plaintiff the kind of harm of which he or she complains"]).

The motion court's reasoning runs counter to that of the Court of Appeals in *Parker* and is contrary to the views expressed by our sister Departments in cases involving exposure to toxic mold (*see e.g. Cabral v 570 W. Realty, LLC*, 73 AD3d 674 [2d Dept 2010] [denying summary judgment where, inter alia, defendant failed to meet its initial burden of establishing, through scientifically reliable methodology, that no causal link existed between the plaintiff's injuries and their exposure to mold]; *Rashid v Clinton Hill Apts. Owners Corp.*, 70 AD3d 1019 [2d Dept 2010]). The Fourth Department, in *B.T.N. v Auburn Enlarged City School District* (45 AD3d 1339 [2007]), affirmed denial of defendant's motion for summary judgment in a case alleging harm from exposure to atypical molds, stating:

> "The record contains sufficient epidemiological evidence to support a finding of general causation, i.e., that the atypical molds found to be present in the school building can cause plaintiffs' symptoms. In addition, the affidavit of plaintiffs' expert is sufficient to support a finding of causation. There is no requirement that an expert precisely quantify exposure levels or establish a dose-response relationship. Rather, an expert may use a methodology generally accepted in the scientific community in concluding that the particular exposure caused the plaintiffs' symptoms."

(*id.* at 1340 [citations omitted]; *see also Martin v Chuck Hafner's Farmers' Mkt., Inc.*, 28 AD3d 1065 [4th Dept 2006] [the

plaintiff's expert affidavit raised a triable issue of fact as to whether the plaintiff's exposure to aspergillus mold caused his injuries]).

Moreover, this Court, in *Daith v Naman* (25 AD3d 458 [2006]), seemingly embraced the theory that exposure to mold can cause personal injuries. In denying cross motions for summary judgment, this Court stated, "The conflicting opinions of the parties' experts raise issues of fact as to . . . whether such mold caused plaintiffs' alleged injuries" (25 AD3d at 459).

It is undisputed that exposure to toxic molds is capable of causing the types of ailments from which plaintiff suffers. Plaintiff's expert, via differential diagnosis, arrived at the scientifically sound conclusion that exposure to the toxic molds in plaintiff's apartment was a cause, within a reasonable degree of medical certainty, of her documented medical ailments. The motion court reasoned that "*Fraser* rejected Dr. Johanning's claim to have established causation by means of 'differential diagnosis.'" However, this Court has never rejected differential diagnosis as an unsound scientific procedure. Rather, this Court has stated that in order to be considered as a possible cause, in a differential diagnosis matrix, a given agent must be capable of causing the harm observed. Thus, in *Marso v Novak* (42 AD3d 377 [2007], *lv denied* 12 NY3d 704 [2009]), we rejected an expert's

opinion as to causation, arrived at through differential diagnosis, not because the differential diagnosis was an unreliable methodology, but because the medical literature did not support the premise that bradychardia was a risk factor for the type of stroke suffered by the plaintiff (*compare B.T.N. v Auburn Enlarged City School District*, 45 AD3d 1339 [4th Dept 2007], *supra* [the plaintiff's expert opinion that the plaintiff's injuries were caused by toxic mold exposure, arrived at through differential diagnosis, met test of scientific reliability]).

Here, on the other hand, plaintiff's expert and defendant's experts all agree that mold is capable of causing the ill-health effects experienced by plaintiff. Defendant's expert opined that "[m]olds can cause a wide spectrum of illnesses, including allergies, irritation, hypersensitivity pneumonitis and direct infection." Defendant's expert did not examine plaintiff in arriving at his conclusion that mold had not caused her ailments, concluding that "in the case of Ms. Cornell, molds caused no significant, objectively documented illness."

Defendant argues that it is not liable because plaintiff's symptoms arose in October 2003, when demolition commenced in the basement, one month after defendant had sold the building. However, the evidence supports the inference that the molds found in the basement were indicative of long-standing water damage

occurring while defendant owned the building, and that the long-standing mold had migrated through the floorboards and the air shaft as a result of the demolition work in the basement.

Based on the foregoing, we modify the order appealed from and reinstate plaintiff's claims against defendant 360 W. 51st Street Corp. Plaintiff, however, failed to raise an issue of fact whether defendant Shotwell acted in his individual capacity rather than in his capacity as an officer and shareholder of 360 W. 51st Street Corp., and thus, the complaint was properly dismissed as against him (*see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109 [2002]).

Accordingly, the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered January 13, 2010, which, inter alia, granted the motion of defendants 360 W. 51st Street Corp. and Geoffrey Shotwell for summary judgment dismissing the complaint as against them, should be modified, on the law, to

reinstate the complaint as against defendant 360 W. 51st Street Corp., and otherwise affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur except Andrias, J.P. and Catterson, J. who dissent in part in an Opinion by Catterson, J.

CATTERSON, J. (dissenting in part)

In my opinion, the plaintiff's expert failed to establish the reliability of his theory under the Frye standard of review -- namely that his theory is generally accepted in the scientific community. The majority is persuaded by the "significant" findings in the two studies relied on by the plaintiff's expert. However, the majority disregards Frye's requirement that those "significant" findings must be "generally" accepted. There is nothing in the record nor does the majority address whether these studies that link mold with respiratory illness are "generally accepted in the relevant scientific community." Therefore, I must respectfully dissent.

The plaintiff in this case is the tenant of an apartment on the first floor of a building in Manhattan. Defendant 360 W. 51st Street Corp. owned the apartment building until September 5, 2003, when it was sold to 360 West 51st Street Realty, LLC. On the day that the new owner began removing debris from the basement in order to renovate, the plaintiff allegedly became ill from dust, dirt, mold and debris that was purportedly released into the air and infiltrated her apartment. The plaintiff brought this personal injury action against, inter alia, the

defendant and an individual shareholder.[1]

On January 25, 2008, the defendant and shareholder moved for summary judgment. The motion court granted the motion and dismissed the plaintiff's complaint. For the reasons set forth below, I would affirm the motion court's order in its entirety.

Although the plaintiff alleges that from 1997 through 2004 the basement of the building was damp and musty, the record suggests that her alleged injuries coincided not with the presence of mold or damp conditions in the basement, but with the demolition work performed in October 2003, when the defendant no longer owned the building. Moreover, there is no evidence in the record as to the level of mold or toxic substances present in the plaintiff's apartment during the time that the defendant owned the building. Thus, the plaintiff fails to raise an inference that her alleged injuries were proximately caused by any breach of duty by the defendant.

In any event, the plaintiff's submissions do not establish that her theory of causation is generally accepted within the relevant scientific community. The Frye test, articulated in Frye v. United States, 293 F. 1013 (DC Cir. 1923), requires that the reliability of a new test, process, or theory be "generally

[1]Plaintiff settled with the new owner, defendant 360 West 51st Street Realty, LLC.

accepted" within the relevant scientific community. Marsh v. Smyth, 12 A.D.3d 307, 310-311, 785 N.Y.S.2d 440, 444 (1st Dept. 2004) (Saxe, J., concurring). Reliability is typically established by considering whether other experts in the same field accept the reliability of the theory. Id., citing People v. Wesley, 83 N.Y.2d 417, 439, 611 N.Y.S.2d 97, 110, 633 N.E.2d 451, 464 (1994) ("[t]he Frye test emphasizes counting scientists' votes") (Kaye, J., concurring) (internal quotations marks and citation omitted).

The plaintiff put forward the affidavit of an expert who opined that the plaintiff's injuries were the result of exposure to "an unusual mixture of atypical microbial contaminants," including mold. The expert supported his conclusion through the use of his differential diagnosis of the plaintiff. In Fraser v. 301-52 Townhouse Corp. (57 A.D.3d 416, 870 N.Y.S.2d 266 (1st Dept. 2008), appeal dismissed 12 N.Y.3d 847, 881 N.Y.S.2d 391, 909 N.E.2d 84 (2009)), this Court rejected this theory as not generally accepted in the scientific community.

The majority contends that the plaintiff's scientific evidence was sufficient to establish that "exposure to molds... can cause the types of ill effects experienced by plaintiff." Similarly, the majority finds that the plaintiff's evidence "easily satisfied the test of scientific reliability set forth in

Frye."

While the plaintiff's expert may have sought to demonstrate that there was scientific evidence that mold caused the plaintiff's injuries, the expert failed to establish the essential requirement of Frye, general acceptance of the expert's theory within the relevant scientific community. Indeed, the first of the two post-Fraser studies, relied on by the plaintiff's expert and the majority, plainly states that, "[t]he data reviewed here represent *initial* steps toward defining the pathophysiological mechanisms for the aeroirritant effects of damp homes and associated excess mold growth" (emphasis added).

Similarly, the second post-Fraser study relied on by the plaintiff's expert for the exposure-response relationship was based on a study of a single office building in 2001-2002. The study contains no evidence that the conclusions were adopted by the National Institute for Occupational Safety and Health, the agency sponsoring the study; nor does the plaintiff make that claim.

These two studies fall short of establishing general acceptance in the scientific community that there is a causal connection between exposure to mold and the plaintiff's injuries. As such, I would not depart from our holding in Fraser.

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

ENTERED: MARCH 6, 2012

CLERK