SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 29, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Saxe, Catterson, Acosta, Román, JJ.

6636 Rudolph C. Carryl, Index 118999/06
Plaintiff-Appellant,

-against-

MacKay Shields, LLC, et al.,
Defendants-Respondents.

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Sack & Sack, Esqs., New York (Jonathan Sack of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Mark W. Lerner of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered May 20, 2010, which granted defendants' motion for summary judgment dismissing the complaint, deemed appeal from judgment, same court and Justice, entered June 18, 2010, dismissing the complaint, and, as so considered, unanimously affirmed, without cost.

In this action for racial discrimination, plaintiff, an African American, alleges that his former employer, defendant MacKay Shields, LLC, an investment firm, discriminated against him by paying him less than a Caucasian peer. During the

relevant period, plaintiff and his Caucasian peer were co-heads of the firm's Growth Equity Products team and both held the title of Senior Managing Director, but they were not paid equally.

Plaintiff met his initial burden of establishing a prima facie case of racial discrimination in pay by showing that he was a member of a protected class and was paid less than a Caucasian peer (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35 [2011]). However, the firm offered legitimate, non-discriminatory reasons for the disparity. Defendant Ravi Akhoury, MacKay Shields' former Chief Executive Officer, explained that, though they shared the same title and primary responsibilities, plaintiff and his Caucasian "peer" were not similarly situated, with his peer, inter alia, taking on additional duties and having a larger role with regard to the product which brought in the majority of the team's revenue and drove its bonus pool.

In opposition to the motion, plaintiff failed to show that defendants' stated reasons for the disparity were false or pretextual or that, "regardless of any legitimate motivations the defendants may have had, the defendant[s] [were] motivated at least in part by discrimination" (*Bennett*, at 39; *see also Williams v New York City Hous. Auth.*, 61 AD3d 62, 78, n 27 [2009], *lv denied* 13 NY3d 702 [2009] ["discrimination shall *play no role* in decisions relating to employment"] [emphasis added];

Weiss v JP Morgan Chase & Co., 2010 WL 114248, 2010 US Dist LEXIS 2505 [SD NY 2010] [the City HRL "requires only that a plaintiff prove that [protected status] was 'a motivating factor' for an adverse employment action"]).

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6717 David Gordon, et al., Index 103229/10
Plaintiffs-Respondents,

-against-

305 Riverside Corp., etc.,
Defendant-Appellant.

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Kucker & Bruh, LLP, New York (Robert H. Berman of counsel), for appellant.

Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 11, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant is the owner of a building located at 305 Riverside Drive in Manhattan. From 1988 through 2005, apartment 5D was occupied by a rent-stabilized tenant. The July 2005 rent registration statement filed with the Division of Housing and Community Renewal (DHCR) lists the legal regulated rent of the apartment as $1,418.42. After that tenant left in 2005, the apartment was vacant for a period of time.

In February 2006, defendant and plaintiffs entered into a lease agreement for a term beginning March 15, 2006 and ending March 31, 2008, at a monthly rent of $3,095. The first page of the lease states: "This lease is not subject to rent regulation"; the last page states: "This apartment is not subject to rent regulation since the monthly rent is, at least, $2,000.00 which classifies this unit as a luxury deregulated apartment." In July 2006, defendant filed a rent registration statement listing the apartment as permanently exempt due to "high rent vacancy." The record contains no information about how defendant determined the unit was subject to luxury deregulation. The parties subsequently entered into a renewal lease for the term of April 1, 2008 through March 31, 2010 at a monthly rent of $3,300.

At the time defendant removed the apartment from regulated status, the building was receiving J-51 real property tax exemptions (*see* Administrative Code of City of NY § 11-243 [previously § J51-2.5]). In October 2009, the Court of Appeals decided *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), which held that the owners of rent-stabilized apartments in New York City "[are] not entitled to take advantage of the luxury decontrol provisions of the Rent Stabilization Law [Administrative Code § 26-501 *et seq.*] while simultaneously

receiving tax incentive benefits under the City of New York's J-51 program" (*id*. at 280).

In March 2010, in light of *Roberts*, plaintiffs brought this action seeking, inter alia: (1) a declaration that the apartment is subject to rent stabilization; (2) an order compelling defendant to register the apartment with DHCR as a rent-stabilized unit and provide plaintiffs with a rent-stabilized lease; and (3) a money judgment for alleged overcharges that defendant had collected since March 2006. After issue was joined, defendant moved for summary judgment dismissing the complaint; plaintiffs did not cross move for any affirmative relief. In a decision entered July 11, 2011, the court denied the motion.

On appeal, defendant acknowledges that the building was receiving J-51 benefits at the relevant time and that, under *Roberts*, the apartment is rent stabilized and is not subject to luxury deregulation.[1] Defendant also agrees that plaintiffs are now entitled to a rent-stabilized lease. Relying on the four-year statute of limitations for rent overcharge claims (*see* CPLR 213-a), defendant contends that the base date for calculating any

[1] Defendant concedes that *Roberts* is retroactive here, a position in accord with recent decisions of this Court (*see Roberts v Tishman Speyer Props., L.P.*, 89 AD3d 444, 445 [2011]; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 198 [2011]).

overcharge is March 16, 2006, four years before the date the summons and complaint were served upon the Secretary of State. According to defendant, the rent on that date was $3,095, the amount provided for in the March 15, 2006 non-rent-stabilized lease. Defendant maintains that it is entitled to summary judgment dismissing the complaint because it has recalculated the legal regulated rents based on the $3,095 figure, and has credited plaintiffs for any overpayments.

The motion court properly denied defendant's motion. At the outset, in light of defendant's admissions, no basis exists to dismiss plaintiffs' claims seeking a declaration that the apartment is rent-stabilized and an order directing that plaintiffs be provided with a rent-stabilized lease. With respect to the overcharges, defendant has failed to establish, as a matter of law, that the base date rent should be $3,095. Supreme Court correctly concluded that the base date for determining any overcharge is March 11, 2006. Rent Stabilization Code (9 NYCRR) § 2520.6(f)(1) defines "[b]ase date" as "[t]he date four years prior to the date of the filing [with DHCR] of such [rent overcharge] complaint." Where, as here, plaintiffs have instituted an action in court asserting a rent overcharge claim, the base date is four years prior to commencement of the action (*see Wasserman v Gordon*, 24 AD3d 201, 202 [2005]).

Because this action was commenced on March 11, 2010, the base date for determining any overcharge is March 11, 2006. There is no merit to defendant's argument that the base date should be measured back from the March 16, 2010 date of service of the complaint. An action is commenced on the date the summons and complaint are filed with the clerk of the court, not the date of service (*see* CPLR 304[a]; 2102). Defendant's citation to CPLR 203(b) confuses the interposition of a claim, which determines its timeliness for statute of limitations purposes, with the commencement of an action.

Alternatively, defendant argues that even if the base date is March 11, 2006, the legal regulated rent should still be $3,095 because the apartment was vacant on that date. In support, defendant points to Rent Stabilization Code (9 NYCRR) § 2526.1(a)(3)(iii), which provides that "[w]here a housing accommodation is vacant . . . on the base date, the legal regulated rent shall be the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy . . ., and reserved in a lease or rental agreement." This section has no applicability here because it requires that the "legal regulated rent" after a vacancy be "agreed to by the owner and the *first rent stabilized tenant*" (*id.*) (emphasis added). This language necessarily presumes that the first tenant after a

vacancy is offered a rent-stabilized lease. Here, the parties' initial lease explicitly stated, on two separate pages, that the apartment was not subject to rent regulation. Moreover, the rent agreed to by the parties was not a regulated rent, and was not registered as such with DHCR. Thus, notwithstanding that plaintiffs were the first tenants to occupy the apartment after the vacancy, they do not qualify, within the meaning of section 2526.1(a)(3)(iii), as "the first rent stabilized tenant[s] taking occupancy after such vacancy" (*see 656 Realty, LLC v Cabrera*, 27 Misc 3d 1225[A], 2009 NY Slip Op 52767[U], *3-4 [2009], *affd* 27 Misc 3d 138[A], 2010 NY Slip Op 50899[U][2010]).

Because defendant has not established as a matter of law that the base date rent should be $3,095, its motion for summary judgment was properly denied. We need not decide, for purposes of this appeal, the proper method of determining the base date rent. As the motion court correctly noted, since the parties have not conducted any discovery, the record is not sufficiently developed to resolve that issue. We hold only that the base date

is March 11, 2006, and that section § 2526.1(a)(3)(iii) of the Rent Stabilization Code cannot be used to set the base date rent.

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

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

ENTERED: MARCH 29, 2012

CLERK

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

6931-
6932 Collin A. Cole, Index 14613/07
Plaintiff-Respondent, 83944/09

-against-

Homes for the Homeless Institute, Inc.,
Defendant-Appellant-Respondent,

Brink Elevator Corp., et al.,
Defendants-Respondents-Appellants,

Herk Maintenance Co., Inc., et al.,
Defendants.

- - - - -

Brink Elevator Corp., etc.,
Third-Party Plaintiff-
Respondent-Appellant,

-against-

Homes for the Homeless, Inc.,
Third-Party Defendant-
Appellant-Respondent.

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Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP, Hauppauge (Scott G. Christesen of counsel), for appellant-respondent/appellant-respondent.

Rosenbaum & Taylor, P.C., White Plains (Dara L. Rosenbaum of counsel), for respondents-appellants/respondent-appellant.

Burns & Harris, New York (Blake G. Goldfarb of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered September 27, 2010, which, insofar as appealed from as limited by the briefs, denied defendant Brink Elevator Corp.'s motion for summary judgment dismissing the complaint and all cross claims as

against it, and for summary judgment on its third-party claim for contractual indemnification against third-party defendant Homes for the Homeless, Inc. (Homes), and denied the motion of defendant Homes for the Homeless Institute, Inc. (Institute) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff, an employee of Homes, was injured when the elevator he was operating dropped suddenly. When it came to an abrupt stop, the elevator's ceiling collapsed on top of plaintiff. Homes was the tenant in the building, Institute was the owner of the building, and Brink was the company charged with maintaining the elevator pursuant to a contract with Homes.

The court properly declined to dismiss the complaint as against Brink. We recognize that pursuant to the maintenance contract, Brink undertook to "regularly and systematically examine" the elevator and, when in its "judgment conditions warrant, repair or replace" any defective parts. However, the contract also required Homes to "shut down the equipment immediately upon manifestation of any irregularity in operation or appearance in the equipment, notify [Brink] at once, and keep the equipment shut down until completion of repairs."

The record is clear that on the day of the accident Homes' employees experienced recurring problems with the elevator in

question. Rather than notifying Brink at once and taking the elevator out of service, the employees toggled the elevator's circuit breakers and continued to operate the elevator up until the accident. Thus, plaintiff cannot establish that Brink had notice of the defective condition based upon its maintenance obligations alone. This does not end the inquiry.

On a motion for summary judgment, the movant bears the burden of adducing affirmative evidence of its entitlement to summary judgment *(Torres v Industrial Container*, 305 AD2d 136 [2003]). A few months prior to the accident, Brink performed a seven-week-long modernization of the elevator which included replacing the hoist cables that travel over the traction sheave. Brink failed to put forth any evidence of whether the sheave was repaired or replaced in the modernization or, indeed, why it and the cables needed to be replaced as part of Brink's post-accident repair of the elevator. Thus, Brink has failed to establish its prima facie entitlement to summary judgment.

Institute's summary judgment motion was also properly denied because while it asserts that it was an out-of-possession owner of the property, Institute has not established that it did not retain a right of reentry to make repairs. Indeed, Institute has not included a copy of its alleged lease agreement with Homes. Accordingly, questions of fact exist as to whether Institute

remains bound by the landowner's statutory duty to keep premises in good repair (*see* Multiple Dwelling Law § 78; *Bonifacio v 910-930 S. Blvd.*, 295 AD2d 86, 90-91 [2002]; *Manning v New York Tel. Co.*, 157 AD2d 264, 267-268 [1990]).

Institute's contention that it lacked actual or constructive notice of any problem with the elevator is unavailing. As noted, the record here contains evidence of problems with the maintenance of the elevator, and "an owner's nondelegable duty under Multiple Dwelling Law § 78 to keep its premises in good repair includes elevator maintenance" (*Bonifacio* at 91). Although Institute has proffered an affidavit averring that it lacked actual notice of any problems with the elevator, on this record, Institute has failed to establish as a matter of law that it did not have constructive notice (*id.*).

Factual issues as to the negligence of both Brink and Homes preclude the granting of Brink's motion for summary judgment on

its contractual indemnification claim (*see Owens v Stevenson Commons Assoc., L.P.*, 64 AD3d 517, 518 [2009]).

We have considered the parties' remaining contentions and find them to be unavailing.

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7206 The People of the State of New York, Ind. 5637/07
Respondent,

-against-

Antonio Rodriguez,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 3, 2008, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 2½ to 5 years, and otherwise affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). Defendant failed to preserve any of his procedural objections to the court's disposition of the application (*see People v Richardson*, 100 NY2d 847, 853 [2003]). Defendant's substantive *Batson* arguments were insufficient to alert the trial court to defendant's claim that it had failed to follow the *Batson* protocol, and we decline to

review defendant's procedural claims in the interest of justice.

As an alternative holding, we also reject them on the merits. The prosecutor disclosed her reasons for her challenges, which were race-neutral, and the court heard defense counsel's arguments as to why the reasons were pretextual. Thus, by permitting the peremptory challenges to stand, the court implicitly rejected the pretext arguments and found the proffered reasons nonpretextual (*see People v Pena*, 251 AD2d 26, 34 [1998], *lv denied* 92 NY2d 929 [1998]; *compare Dolphy v Mantello*, 552 F3d 236, 239 [2d Cir 2009]), even if "the court may have used the wrong nomenclature in describing its step-three ruling" (*People v Washington*, 56 AD3d 258, 259 [2008], *lv denied* 11 NY3d 931 [2009]), a defect that could have been readily cured had defendant made a contemporaneous objection. The court's finding of nonpretextuality is supported by the record with respect to each of the panelists at issue, and it is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).

There was no violation of defendant's right to be present at material stages of the trial. Defendant did not object to his absence from the proceedings at which the court clarified its *Molineux* ruling, or at which his CPL 330.30 motion was argued and decided. While a defendant need not object to his absence from a

material stage of a trial (*see People v Torres*, 80 NY2d 944, 945 [1992]), these proceedings were not material. Because defendant's presence would not have had a substantial effect on his ability to defend against the charges, these claims are unpreserved (*see People v Pagan*, 93 NY2d 891, 892 [1999]), and we decline to review them in the interest of justice.

As an alternative holding, we also reject them on the merits. Defendant was present at the initial proceeding, when the parties presented their *Molineux* arguments and the court made a ruling. This provided defendant with the opportunity for meaningful input regarding the uncharged crimes (*see People v Spotford*, 85 NY2d 593, 597 [1995]). Thus, his presence was not necessary at a subsequent proceeding that did not modify the ruling, but only made a slight clarification (*see People v Liggins*, 19 AD3d 324 [2005], *lv denied* 5 NY3d 853 [2005]). The second proceeding essentially involved a legal question that did not "involve[] factual matters about which defendant might have peculiar knowledge" (*see People v Rodriguez*, 85 NY2d 586, 589-590 [1995]). Similarly, defendant's presence was not required at the discussion of his CPL 330.30 motion. The motion involved a legal issue relating to undisputed facts (*see People v Fabricio*, 3 NY3d 402, 406 [2004]).

Although the People's posttrial disclosure of certain grand

jury minutes violated *People v Rosario* (9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]), defendant is not entitled to a new trial. Defendant raised his *Rosario* claim by way of a CPL 330.30(3) motion to set aside the verdict on the ground of newly discovered evidence. That type of motion requires a showing that the new evidence created a probability of a more favorable result, and defendant fell far short of meeting that standard. In any event, regardless of any procedural issues, defendant has not shown prejudice under the "reasonable possibility" standard contained in CPL 240.75. The grand jury minutes at issue did not contain any useful impeachment material, and defendant's claim that their nondisclosure nevertheless impaired his trial strategy is unpersuasive.

Defendant's claim of ineffective assistance of counsel is not reviewable on direct appeal because it involves matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668

[1984]). Counsel's alleged deficiencies did not deprive defendant of a fair trial, affect the outcome of the case, or cause defendant any prejudice (*see Strickland*, 466 US at 694).

We find the sentence excessive to the extent indicated.

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7207 Jessica Rosado, Index 305487/08
Plaintiff-Respondent,

-against-

Phipps Houses Services, Inc., et al.,
Defendants-Appellants.

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Kral Clerkin Redmond Ryan Perry & Van Etten, LLP, New York (James V. Derenze of counsel), for appellants.

Kresman & Weiner, LLP, New York (David J. Kresman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kibbie F. Payne, J.), entered May 10, 2011, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she slipped and fell in a puddle located on an exterior landing of premises owned, managed and/or operated by defendants, and that two yellow caution cones had been placed against the wall, to her right and left, as she exited, but not in the area of the liquid condition. The presence of caution cones here created a triable issue of fact as to prior actual notice of the condition, as defendants' witness admitted that they would place such caution cones to alert others to a slippery condition and plaintiff denied that the cones were being used to prop open a door, as had been alleged by

defendants' witness (*see Felix v Sears, Roebuck & Co.*, 64 AD3d 499 [2009]; *Hilsman v Sarwil Assoc., L.P.*, 13 AD3d 692 [2004]). Additionally, while the hearsay portions of a witness affidavit submitted in opposition to the motion, which referred to an unidentified person or persons having admitted prior notice of the condition, were inadmissible (*see Cassanova v General Cinema Corp. of N.Y.*, 237 AD2d 155 [1997]; *Pascarella v Sears, Roebuck and Co.*, 280 AD2d 279 [2001]), the witness's first hand account of providing defendants with notice of the condition at least 45 minutes before the accident raised triable issues of fact as to prior actual and constructive notice of the condition.

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7209 The People of the State of New York, Ind. 7198/99
Respondent,

-against-

John Brown,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

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Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered November 24, 2010, resentencing defendant, as a second violent felony offender, to a term of 14 years, with 5 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: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7210 Charles Jones, Index 105489/10
Plaintiff-Appellant,

-against-

The Riese Organization, etc., et al.,
Defendants-Respondents.

_____

Charles Jones, appellant pro se.

Segal McCambridge Singer & Mahoney, Ltd., New York (Simon Lee of counsel), for The Riese Organization, respondent.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for Board of Managers of 761-779 Seventh Avenue Condominium and Board of Managers of Executive Plaza Condominium, respondents.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered September 16, 2010, which, insofar as appealed from as limited by the briefs, granted defendants' motions to dismiss the complaint, and denied plaintiff's motion for a preliminary injunction and a temporary restraining order, unanimously affirmed, without costs.

Plaintiff's current claim that ongoing emissions from a vertical exhaust flue outside his eighth-story window aggravated his preexisting respiratory condition is time-barred (*see* CPLR 214[5]; 214-c[2]). Plaintiff contends that he first learned of the latent effects of exposure to the flue emissions in 2008. However, he alleged a health hazard related to this flue, which

has operated continuously since 1990, in an action brought against these defendants and others in 2003. The current claim is also barred by the doctrine of res judicata, since all claims asserted against defendant Riese Organization in the 2003 action were dismissed on statute of limitations grounds in a December 2005 order that, contrary to plaintiff's contention, finally disposed of these claims (*see Burke v Crosson*, 85 NY2d 10, 15 [1995]; *Smith v Russell Sage Coll.*, 54 NY2d 185, 194 [1981]), and the claim could have been, although it was not, raised against the remaining defendants in the 2003 action (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]).

Plaintiff's claims against the condominium boards for breach of fiduciary duty and negligence are time-barred since the allegations in the complaint establish that they accrued no later than 1990 (*see* CPLR 214[4], [5]; *Yatter v Morris Agency*, 256 AD2d 260, 261 [1998]). The claims of breach of fiduciary duty are also barred by the doctrine of res judicata, since they arise from the transactions underlying the 2003 complaint and were dismissed, with prejudice, pursuant to so-ordered stipulations that settled and discontinued that action and a 2005 action (*see e.g. Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292, 294 [2005]; *Matter of Hofmann*, 287 AD2d 119, 123 [2001]).

Similarly, the cause of action for an injunction against

ongoing emissions from the flue is barred by the doctrine of res judicata. In any event, plaintiff has not established a likelihood of success on the merits, irreparable harm, or that a balance of the equities tips in his favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]). The flue was formally authorized by the condominium boards and had operated uninterrupted for 20 years, and there is no evidence that any other unit owners had complained about it. In addition, there is no medical evidence in the record on this appeal or in the records of the prior actions that supports plaintiff's contention that his respiratory condition is attributable to the flue emissions.

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7212 Transparent Value, L.L.C., etc., Index 602440/09
Petitioner-Appellant,

-against-

Wade Emory Johnson,
Respondent-Respondent.

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Augustine & Eberle LLP, New York (Joseph P. Augustine of counsel), for appellant.

Susman Godfrey L.L.P., New York (Arun Subramanian of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 22, 2011, confirming an arbitral award in respondent's favor, unanimously affirmed, with costs.

Contrary to petitioner's claim, the award does not violate public policy. When a court is asked to vacate an arbitral award on public policy grounds, "[t]he focus of inquiry is on the *result*, the award itself" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327 [1999] [emphasis in original]). "[W]here the final result creates an *explicit* conflict with other laws and their attendant policy concerns," a court will vacate the award (*id.* [emphasis in original]). In the case at bar, as in *Correctional Officers* (*see id.* at 327-328), the award does not violate a law.

Petitioner will not violate any laws by paying respondent x dollars or transferring y units to him. Petitioner's reliance on a letter from ALPS Distributors, Inc., the distributor of petitioner's mutual funds, is unavailing; ALPS has no obligation to pay respondent anything.

"An arbitration award may be vacated on public policy grounds only where it is clear on its face that public policy precludes its enforcement" (*Matter of Jaidan Indus. v M.A. Angeliades, Inc.*, 97 NY2d 659, 661 [2001]; *see also Matter of Metrobuild Assoc., Inc. v Nahoum*, 51 AD3d 555, 556-557 [2008], *lv denied* 11 NY3d 704 [2008]). That is not the case here.

It is true that "a court will not enforce a contract that violates public policy" (*Correctional Officers*, 94 NY2d at 327). However, "the courts must be able to examine an arbitration agreement . . . on its face, without engaging in extended factfinding or legal analysis, and conclude that public policy precludes its enforcement" (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 631 [1979]). On its face, the agreement between the parties does not require respondent to perform brokerage services (*see Foundation Ventures, LLC v F2G, Ltd.*, 2010 WL 3187294, *1, *7,

2010 US Dist LEXIS 81293, *3, *21 [SD NY, Aug. 11, 2010][1]).

Whether someone is a broker obliged to register with the SEC is a factual determination requiring consideration of various factors (*see e.g. Torsiello Capital Partners LLC v Sunshine State Holding Corp.*, 2008 NY Slip Op 30979[U], *8-9 [Sup Ct, NY County 2008]). It was for the arbitrators – not the IAS court or this Court – to make that determination (*see Metrobuild*, 51 AD3d at 557; *Matter of Wertlieb [Greystone Partnerships Group]*, 165 AD2d 644, 647 [1991]).

Petitioner's contention that the arbitrators manifestly disregarded the law is unavailing. "[M]anifest disregard of the law means more than an error or misunderstanding of the applicable law" (*Matter of Roffler v Spear, Leeds & Kellogg*, 13 AD3d 308, 310 [2004]). Rather, "[t]o modify or vacate an award on the ground of manifest disregard of the law, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480 [2006] [internal quotation marks

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[1] Contrary to petitioner's claim, a subsequent decision in *Foundation Ventures* (2011 WL 1642245, 2011 US Dist LEXIS 45157 [Apr. 21, 2011]) did not render the 2010 decision without any precedential value.

omitted], *cert dismissed* 548 US 940 [2006]). Neither of these requirements is present in this case.

One of the grounds for vacating an arbitral award is that the arbitrators exceeded their powers (*see* CPLR 7511[b][1][iii]). "[A]rbitrators may be said to have done so only if they gave a completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties" (*Matter of Natl. Cash Register Co. [Wilson]*, 8 NY2d 377, 383 [1960]). The arbitrators in the instant case did not do so. They had the right to fashion equitable relief (*see Sprinzen*, 46 NY2d at 629 ["An arbitrator's paramount responsibility is to reach an equitable result . . ."]). "[I]t is not for the courts to interpret the substantive conditions of the contract or to determine the merits of the dispute" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 82-83 [2003] [internal quotation marks omitted]). "This is true even where the apparent, or even the plain, meaning of the words of the contract has been disregarded" (*id.* at 83 [internal quotation marks omitted]).

The arbitrators' award of compensation to respondent, even though he did not directly introduce petitioner to the entity that ended up engaging in a transaction with petitioner, was not

irrational. "[P]arties may, in particular circumstances, reach a specific understanding that a finder's commission will be payable even if the finder's efforts are not a direct or procuring cause of the acquisition" (*Beverley v Mickelberry Corp.*, 161 AD2d 292, 293 [1990]; *see also Barrister Referrals v Windels, Marx, Davies & Ives*, 169 AD2d 622, 623 [1991]).

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

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7213 Fanny Pena, Index 106041/07
Plaintiff-Appellant,

-against-

R & B Transportation, et al.,
Defendants-Respondents.

_____

Luis Guerrero, New York, for appellant.

Law Offices of Charles J. Siegel, New York (Alfred T. Lewyn of counsel), for respondents.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered December 28, 2010, which granted defendants' motions to confirm a special referee's report and, accordingly, to dismiss the complaint for lack of personal jurisdiction, unanimously modified, on the law, to deny the motion as to defendant R & B Transportation (R & B), and otherwise affirmed, without costs.

Defendant R & B is a federally regulated motor carrier, covered by the Motor Carrier Act of 1935. Pursuant to that act, it appointed an agent for service of process in New York (49 USC 13304). The IAS court adopted the referee's finding that this was not a consent to jurisdiction over R & B in New York. This was error. We have previously addressed this precise question, and found that the appointment of an agent under the act is

consent to suit in this State (*Eagle v Hall & Sons, Inc.*, 265 AD 809 [1942]; *see also Brinkmann v Adrian Carriers, Inc.*, 29 AD3d 615, 617 [2006]).

Truck driver Boyd, a Georgia resident, was driving from Florida to Massachusetts when the accident occurred in New Jersey. As such, there is no basis for personal jurisdiction over him (*Daniel B. Katz & Assoc. Corp. v Midland Rushmore, LLC*, 90 AD3d 977 [2011]).

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7214 In re Angel C.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about March 10, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the third degree and menacing in the third degree, and placed him on enhanced supervision probation for a period of 12 months, unanimously modified, on the law, to the extent of vacating the finding as to menacing in the third degree and dismissing that count of the petition, and otherwise affirmed, without costs.

The court properly denied appellant's motion to suppress identification testimony. The evidence established that the police arrived at the scene of the incident while it was still in progress and that, before being asked any questions, the victim

spontaneously identified appellant as one of her assailants (*see People v Dixon*, 85 NY2d 218, 222-23 [1995]; *see also People v Santiago*, 2 AD3d 263, 264 [2003], *lv denied* 2 NY3d 765 [2004]).

The court's finding as to the assault charge was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the court's determinations concerning identification and credibility. The evidence established that, while acting in concert with another person (*see* Penal Law § 20.00), appellant caused physical injury to the victim (*see e.g. People v Hodge*, 83 AD3d 594, 595 [2011], *lv denied* 17 NY3d 859 [2011]). However, the menacing charge was not established, in that there was no evidence of any threatening behavior separate from the assault (*see Matter of Shenay W.*, 68 AD3d 576 [2009]).

The court properly exercised its discretion when it denied appellant's request for a third continuance in order to attempt to secure the testimony of another participant in the assault, who had entered an admission to the delinquency petition against her. Appellant did not show that the proposed witness could provide materially exculpatory testimony, or any likelihood that he could obtain the witness's testimony if granted another adjournment (*see Matter of Anthony M.*, 63 NY2d 270, 283-284 [1984]; *People v Foy*, 32 NY2d 473, 476 [1973]).

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and placing him on probation under the enhanced supervision program. The court adopted the least restrictive dispositional alternative consistent with appellant's needs and those of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). This disposition was justified by the seriousness of the incident, in which appellant kicked the fallen victim in the face, as well as appellant's poor school attendance and other behavioral issues.

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7217 The People of the State of New York, Ind. 6011/08
Respondent,

-against-

Spencer Vixama,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista 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 (Lewis Bart Stone, J.), rendered on or about July 22, 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 29, 2012

CLERK

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

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7220 In re Derek J. Whitter, Jr.,
Petitioner-Appellant,

-against-

Susan Ramroop,
Respondent-Respondent.

_____

Janet A. Bastawros, New York, for appellant.

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

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about October 29, 2010, which, inter alia, denied petitioner father's petition for modification of a custody order entered in New Jersey awarding custody of the subject child to respondent maternal grandmother, unanimously affirmed, without costs.

The petition was properly denied without a hearing since the father failed to make the requisite evidentiary showing of changed circumstances requiring a modification to protect the continued best interests of the child (*see Matter of Patricia C. v Bruce L.*, 46 AD3d 399 [2007]). The alleged changes in circumstances included, inter alia, that the maternal grandmother was facing criminal charges for theft. However, such charges do

not provide a basis for modification of the custody order, as they were pending for more than five years, and were based on allegations from petitioner that the grandmother stole from him while he was incarcerated (*see People v Cook*, 37 NY2d 591, 596 [1975] ["(t)he mere fact that a person has been previously charged or accused has no probative value"]).

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

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7221 In re Jeffrey Hughes, Index 113654/10
Petitioner-Appellant,

-against-

Raymond Kelly, as Police Commissioner
of the City of New York, etc., et al.,
Respondents-Respondents.

_____

Bartlett, McDonough & Monaghan, LLP, White Plains (Ryan K. Allen of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered March 18, 2011, denying the petition seeking, inter alia, to annul the determination of respondents, dated June 14, 2010, which denied petitioner accidental disability retirement benefits and ordinary disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

There was a rational basis for respondents' determination (*see generally Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). The record shows that after reviewing the medical evidence submitted by petitioner and the findings from its physical examinations of petitioner, the Medical Board concluded that there was no objective evidence of a

disability. The Board found that the deficits in petitioner's range of motion were attributable to voluntary guarding and there were no objective radiographic studies presented showing abnormal findings. Moreover, contrary to petitioner's contention, the Medical Board did consider evidence from petitioner's doctors in 2009, and provided a rational explanation for its medical judgment. It is well established that the court may not substitute its judgment for that of the Medical Board (*see Matter of Appleby v Herkommer*, 165 AD2d 727, 728 [1990]).

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7222-
7222A The People of the State of New York, Ind. 3486/06
Respondent, 4065/06

-against-

Carlos M. Rosario,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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Judgments, Supreme Court, Bronx County (Efrain Alvarado, J. at pleas; Barbara F. Newman, J. at sentencing), rendered July 17, 2009, convicting defendant of two counts of criminal sale of a controlled substance in the third degree, and sentencing him to concurrent terms of one year, unanimously affirmed.

Defendant did not preserve his challenges to the voluntariness of his guilty pleas (*see People v Lopez*, 71 NY2d 662 [1988]); *People v Doumbia*, 45 AD3d 436, 437 [2007], *lv denied* 10 NY3d 764 [2008]), and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

Before accepting defendant's guilty pleas, the court warned him that his pleas would subject him to deportation proceedings

and that he should "assume" he would be deported. We find nothing in the remainder of the plea colloquy that could have misled defendant into thinking that deportation would not be a consequence of his pleas (*see Zhang v United States*, 506 F3d 162, 169 [2d Cir 2007]). To the extent that defendant is suggesting that *Padilla v Kentucky* (559 US __, 130 S Ct 1473 [2010]) expands the duties of a trial court upon accepting a guilty plea from a noncitizen, we reject that argument (*see People v Diaz*, __ AD3d __, 937 NYS2d 225 [2012]).

Defendant's argument that his trial counsel misadvised him as to the deportation consequences of a conviction is unavailing, because defendant has not made the necessary showing of prejudice (*see People v McDonald*, 1 NY3d 109, 115 [2003]). Finally, defendant's responses to the court's questions at the plea proceeding demonstrate that he was able to speak and understand English and was not in need of an interpreter (*see People v Ramos*, 26 NY2d 272 [1970]).

In view of the foregoing, we find it unnecessary to reach any other issues.

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7223 In re Carrie Martin, Index 401065/10
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Carrie Martin, appellant pro se.

Sonya M. Kaloyanides, New York (Kimberly W. Wong of counsel), for respondent.

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered December 13, 2010, which denied the petition seeking to annul respondent New York City Housing Authority's determination, dated January 13, 2010, denying petitioner's remaining family member (RFM) grievance, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, the judgment vacated, the petition treated as one transferred to this Court for de novo review, and, upon such review, respondent's determination confirmed, the petition denied, and the proceeding dismissed, without costs.

Rather than reach the issue of substantial evidence, Supreme Court should have transferred the proceeding to this Court pursuant to CPLR 7804(g). However, we will "treat the substantial evidence issues de novo and decide all issues as if

the proceeding had been properly transferred" (*Matter of Filonuk v Rhea*, 84 AD3d 502, 502 [2011], quoting *Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1992]).

Respondent's determination has a rational basis and is supported by substantial evidence (*see* CPLR 7803[4]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Indeed, the record, including petitioner's testimony, shows that she moved into the subject apartment without the written permission of the housing manager or other authorization, and she thereafter occupied the apartment for less than one year before the tenant of record's death (*see Rosello v Rhea*, 89 AD3d 466, 466 [2011]). Under the circumstances, petitioner's timely payment of rent is irrelevant (*see Matter of Weisman v New York City Hous. Auth.*, 91 AD3d 543, 544 [2012]), and her arguments pertaining to her health and finances do not constitute a basis for annulling respondent's determination (*see Matter of Guzman v New York City Hous. Auth.*, 85 AD3d 514 [2011]; *Matter of Fermin v New York City Hous. Auth.*, 67 AD3d 433, 433 [2009]).

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

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

ENTERED: MARCH 29, 2012

CLERK

Mazarelli J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7224 Roza Ayzenberg, Index 116013/10
Plaintiff-Respondent-Appellant,

-against-

Bronx House Emanuel Campus, Inc., etc.,
Defendant-Appellant-Respondent.

_____

Mound Cotton Wollan & Greengrass, Garden City (Rodney E. Gould of counsel), for appellant-respondent.

Hill & Moin, LLP, New York (Cheryl Eisberg Moin of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 13, 2011, which denied defendant's motion to stay the proceeding and compel arbitration pending further discovery, unanimously reversed, on the law, without costs, the motion to compel arbitration granted, and the action stayed.

In this action for personal injuries allegedly suffered by plaintiff while she and her husband were guests at defendant's camp facility, defendant moved to stay the proceeding and compel arbitration based on an arbitration clause contained in the application for defendant's camp program that was filled out by plaintiff's husband and bears his signature. We find that the arbitration clause is binding on plaintiff. Irrespective of whether there was a language barrier that precluded plaintiff and her husband from understanding the content of the application,

they are bound by its enforceable terms (*see Shklovsky v Kahn*, 273 AD2d 371, 372 [2000]). Although plaintiff's husband signed the application, which provided for the couples' joint participation in defendant's program, plaintiff is bound by it since her husband had, at the very least, apparent authority to sign for her (*see* Restatement, Agency 2d, § 8 and § 27).

Plaintiff's assertion that the arbitration clause does not apply to this personal injury action because it provides for the submission of claims "pursuant to the Commercial Rules of the American Arbitration Association," is unavailing. The clause provides for arbitration of "*any dispute* resulting from [their] stay at" defendant's facility (italics supplied), and thus, this matter is not excluded (*see Marmet Health Care Center, Inc., et al. v Brown*, __ US __, 132 S Ct 1201 [2012]; *see also Remco Maintenance, LLC v CC Mgt. & Consulting, Inc.*, 85 AD3d 477 [2011]).

Contrary to plaintiff's argument, we find that the sale/purchase of the services defendant provided constitutes a transaction "involving commerce" within the meaning of the Federal Arbitration Act (*see Citizens Bank v Alafabco*, 539 US 52,

56 [2003]). Thus, we find that to the extent GBL §399-c may prohibit the subject arbitration clause, it is preempted by federal law.

We have reviewed plaintiff's remaining contentions and find them unavailing.

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

ENTERED: MARCH 29, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7225N Elijah Bowser, an Infant by his Mother and Natural Guardian, Latonia Almeyda,
Plaintiff-Respondent,

-against-

New York Health and Hospitals Corporation, doing business as Jacobi Medical Center,
Defendant-Appellant,

The Health Center at Tremont, et al.,
Defendants.

Index 23137/04

_____

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for appellant.

Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell Gittin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered August 17, 2010, which, insofar as appealed from as limited by the briefs, in this action alleging medical malpractice, granted plaintiffs' motion to deem the previously served notice of claim to be timely filed nunc pro tunc, unanimously affirmed, without costs.

The court providently exercised its discretion in deeming the notice of claim timely (General Municipal Law § 50-e[5]). Although ignorance of the law by infant plaintiff's mother is not a reasonable excuse for the failure to have served

a timely notice of claim (*see Rodriguez v New York City Health & Hosps. Corp.*, 78 AD3d 538 [2010], *lv denied* 17 NY3d 718 [2011]; *Harris v City of New York*, 297 AD2d 473 [2002], *lv denied* 99 NY2d 503 [2002]), infant plaintiff should not be deprived of a remedy under the circumstances presented.

The record shows that defendant's possession of the medical records sufficiently constituted actual notice of the pertinent facts. Plaintiffs submitted an affirmation from a physician stating that the medical records, on their face, evinced that defendant failed to properly diagnose the infant plaintiff's meningitis, leading to brain injury (*compare Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]). Moreover, defendant's possession of the relevant medical records belies its contention that it would be substantially prejudiced by the delay (*see Matter of McMillan v City of New York*, 279 AD2d 280 [2001]).

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

ENTERED: MARCH 29, 2012

CLERK

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

7226 The People of the State of New York, Respondent, Ind. 3204/07

-against-

Pete Arroyo,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dineen A. Riviezzo, J. at motion; William I. Mogulescu, J. at plea and sentencing), rendered May 1, 2009, as amended May 15, 2009, convicting defendant of criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 2½ years, unanimously affirmed.

Defendant's constitutional speedy trial claim is unreviewable because he has not provided the minutes of any of the relevant adjournments (*see e.g. People v Flemming*, 27 AD3d 257 [2006], *lv denied* 7 NY3d 755 [2006]). To the extent that the present record permits review, we find no violation of

defendant's constitutional right to a speedy trial (*see People v Taranovich*, 37 NY2d 442, 445 [1975]). In particular, defendant has not established that a significant amount of delay was caused by the People, or that he was prejudiced by any delay.

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

ENTERED: MARCH 29, 2012

CLERK

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

7229 Benson Park Associates LLC, Index 102966/08
Plaintiff-Appellant,

-against-

Alexander Herman,
Defendant.
- - - - -
Rita Herman,
Nonparty-Respondent.

_____

Tsyngauz & Associates, P.C., New York (Yevgeny Tsyngauz of counsel), for appellant.

Alexander Herman, Brooklyn, for respondent.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered March 24, 2011, which denied plaintiff's motion to hold nonparty Rita Herman in contempt for failing to comply with a judicial subpoena, unanimously affirmed, without costs.

It was error for the motion court to sua sponte deny the motion on the ground that plaintiff sought contempt against Ms. Herman by way of a motion instead of a special proceeding (*see Long Is. Trust Co. V Rosenberg*, 82 AD2d 591, 597 [1981]). The parties had no notice that the issue would be considered by the court and thus no opportunity to address it. Moreover, that particular challenge to the court's personal jurisdiction was waived because it was not raised in Ms. Herman's answering papers (*see People ex rel. Golden v Golden*, 57 AD2d 807 [1977]).

Nevertheless, Ms. Herman's conclusory denial of service is insufficient to rebut the affidavit of service of the order to show cause (*see Matter of de Sanchez*, 57 AD3d 452, 454 [2008]).

The motion should have been denied on the merits, as "[c]ontempt is a drastic remedy which should not be granted absent a clear right to the relief" (*Pinto v Pinto*, 120 AD2d 337, 338 [1986]). Here, Ms. Herman appeared for a scheduled deposition. Her refusal to answer questions regarding her children, who are not parties to the action or alleged to have been involved in any transfers of assets, relevant to this post-judgment proceeding cannot be considered "disobedience to a lawful mandate of the court" (Judiciary Law § 753[a][3]).

Moreover, Ms. Herman's failure to appear for the continued deposition on the advice of counsel based upon an imminent bankruptcy filing, does not warrant holding her in contempt. Although the failure to appear was disobedience of a court order, plaintiff failed to show that it was prejudiced (*see Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 402 [1996]). The record

establishes that any claims of prejudice are unpersuasive since plaintiff's counsel failed to pursue relevant questions in the earlier deposition and is still able to depose Ms. Herman.

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

ENTERED: MARCH 29, 2012

CLERK

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

7232 The People of the State of New York, Respondent, Ind. 5474/08

-against-

Milton Gonzalez, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered February 2, 2010, convicting defendant, after a jury trial, of robbery in the second degree and criminal impersonation in the first degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Williams*, 12 NY3d 726 [2009]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). The court's compromise ruling was generally favorable to defendant, in that while it permitted the People to elicit the existence of numerous convictions, it only permitted these convictions to be identified as unspecified felonies and misdemeanors.

Defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that the isolated omissions by trial counsel at issue on appeal deprived defendant of a fair trial, affected the outcome of the case, or caused defendant any prejudice (*see Strickland*, 466 US at 694).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 29, 2012

CLERK

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

7233 In re Michele Amanda N.,

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

Elizabeth N.,
Respondent-Appellant,

Cardinal McCloskey Services,
Petitioner-Respondent.

_____

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

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about December 23, 2010, which, upon a fact-finding determination that respondent-appellant suffers from a mental illness, terminated her parental rights to the subject child and transferred the custody and guardianship of the child to the Commissioner of Social Services and petitioner-respondent Cardinal McCloskey Services for the purpose of adoption, unanimously affirmed, without costs.

Petitioner agency presented clear and convincing evidence demonstrating that respondent is presently and for the foreseeable future unable to provide proper and adequate care for

her child by reason of mental illness (*see* Social Services Law §§ 384-b[4][c], [6][a]). The agency's submissions included unrebutted expert testimony that respondent suffers from a longstanding paranoid schizophrenic condition that has prevented her from acting in accordance with the child's needs, as well as the testifying psychologist's detailed report, which was prepared after a 90-minute interview with the respondent, a 50-minute period of psychological and psychoeducational testing, a review of respondent's prior mental health treatment records, including those from her adolescent years, and petitioner's agency records *see Matter of Isaiah J. [Janice J.]*, 82 AD3d 651 [2011]; *Matter of Roberto A. [Altagracia A.]*, 73 AD3d 501 [2010], *lv denied* 15 NY3d 703 [2010]). The court properly denied respondent's request for post-termination visitation with the child, in view of the fact that the child is currently living with her pre-adoptive parents. Nor is there any evidence such visits would have been in the child's best interests (*see Matter of April S.*, 307 AD2d 204 [2003], *lv denied* 1 NY3d 504 [2003]).

We have reviewed the respondent's remaining contentions, including her challenges to the reliability of the testifying psychologist's conclusions, and find them to be unpreserved or unavailing.

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

ENTERED: MARCH 29, 2012

CLERK

DeGrasse, J.P., Freedman, Richter, Román, JJ.

7234-
7235 Eighth Avenue Garage Corp., et al., Index 150228/09
Plaintiffs-Appellants,

-against-

Kaye Scholer LLP, et al.,
Defendants-Respondents.

_____

Schwartz & Ponterio, PLLC, New York (Matthew F. Schwartz of counsel), for appellants.

Kaye Scholer LLP, New York (Jennifer B. Patterson of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered April 8, 2011, dismissing the amended complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered February 17, 2011, which granted defendants' motion to dismiss the amended complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs failed to allege facts in support of their claim of legal malpractice that "permit the inference that, but for defendants' [alleged negligence], [they] would not have sustained actual, ascertainable damages" (*Pyne v Block & Assoc.*, 305 AD2d 213 [2003]). Although they maintain that as a result of defendants' negligence in failing to obtain an estoppel certificate from the landlord of the premises where the garage is

located, they were unable to sell the subject parking garage, they failed to demonstrate that they would have sold the subject garage but for defendants' alleged malpractice. In any event, plaintiffs are precluded by the doctrine of collateral estoppel from litigating the issue of whether the landlord's failure to give them the certificate damaged them, as that issue was raised and decided against plaintiff Eighth Avenue Garage Corporation in a prior proceeding (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404 [2009], *lv dismissed* 12 NY3d 880 [2009]; *see Hirsch v Fink*, 89 AD3d 430 [2011]).

Supreme Court properly considered the evidence submitted on the motion, including the e-mails, which conclusively disposed of plaintiffs' claims (*see Pitcock v Kasowitz, Benson, Torres & Friedman LLP*, 74 AD3d 613 [2010]). Accordingly, it is of no moment that discovery has not been conducted. In addition, plaintiffs have not asserted that facts essential to justify opposition to the motion may have existed but could not be stated

(*see* CPLR 3211[d]).

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

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

ENTERED: MARCH 29, 2012

CLERK

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

7236 The People of the State of New York, Respondent, Ind. 4106/09

-against-

John Harris, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 3, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony drug offender, to an aggregate term of three years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supported the conclusion that defendant participated in a drug transaction by, among other things, accepting money from the buyer.

The evidence at the *Hinton* hearing established an overriding

interest that warranted a limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]), and the closure order did not violate defendant's right to a public trial. The officer testified, among other things, that he would be continuing his undercover work in the vicinity of the charged crimes, that he had open investigations, lost subjects and pending cases, that he had been threatened in other undercover investigations, and that he took precautions to protect his identity. This demonstrated that his safety and effectiveness would be jeopardized by testifying in an open courtroom, and it satisfied the requirement of a particularized showing (*see e.g. People v Plummer*, 68 AD3d 416, 417 [2009], *lv denied* 14 NY3d 891 [2010]). Furthermore, the court considered alternatives to full closure and made adequate findings. Instead of ordering a complete closure, the court permitted defendant's family to attend, as well as inviting defense counsel to propose other persons who would be permitted to attend (*see Presley v Georgia*, 558 US __, __, 130 S Ct 721, 724 [2010]; *People Mickens*, 82 AD3d 430 [2011], *lv denied* 17 NY3d 798 [2011], *cert denied* 565 US __, 132 S Ct 527 [2011]; *People v Manning*, 78 AD3d 585, 586 [2010], *lv denied* 16 NY3d 861 [2011], *cert denied* 565 US __, 132 S Ct 268 [2011]).

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Williams*, 12 NY3d 726 [2009]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). The court's compromise ruling was generally favorable to defendant, in that while it permitted the People to elicit the existence of numerous convictions, it only permitted these convictions to be identified as unspecified felonies and misdemeanors. None of these convictions was unduly remote under the circumstances. Although not a ground for reversal, we note that the better practice would have been to give the standard charge on accessorial liability rather than create a hypothetical.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal on the merits.

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

ENTERED: MARCH 29, 2012

CLERK

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

7237 Arthur F. Tsavaris, etc., Index 103246/11
Plaintiff-Appellant,

-against-

Frank G. Tsavaris, et al.,
Defendants-Respondents.

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Scoppetta Seiff Kretz & Abercrombie, New York (Eric A. Seiff of counsel), for appellant.

Jeffrey I. Baum & Associates, P.C., Garden City (Jeffrey I. Baum of counsel), for respondents.

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Order, Supreme Court, New York County (Louis B. York, J.), entered October 7, 2011, which, to the extent appealable, denied plaintiff's motion for renewal of a prior motion to remove defendants from their positions as co-trustees of the Josephine Tsavaris Irrevocable Trust, unanimously affirmed, without costs. Appeal from the foregoing order, to the extent it denied plaintiff's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

Plaintiff's claim that he did not know that the basement unit in the building owned by the trust had been rented, allegedly in violation of the trust agreement, does not constitute "reasonable justification" for his failure to present that fact on the prior motion, given his role as a fiduciary and his unfettered access to the building (*see* CPLR 2221[e]; *Henry v*

Peguero, 72 AD3d 600, 602 [2010], *appeal dismissed* 15 NY3d 820 [2010]). In any event, the motion court correctly found that the "new" evidence would not have changed the prior determination. The act of renting the unit did not constitute a breach of loyalty to the trust (*see Matter of Duke*, 87 NY2d 465, 471-472, 475-476 [1996]).

The denial of a motion to reargue is not appealable (*Prime Income Asset Mgt., Inc. v American Real Estate Holdings L.P.*, 82 AD3d 550, 551 [2011], *lv denied* 17 NY3d 705 [2011]).

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 29, 2012

CLERK

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

7238 &
M-1036 Matthew Prince, Individually and on Behalf of D'Lites L.A.M.D. B.H. Inc., Plaintiffs-Respondents, Index 107129/11

-against-

Fox Television Stations, Inc., et al., Defendants-Appellants.

Hogan Lovells US LLP, New York (Katherine M. Bolger of counsel), for appellants.

Napoli Bern Ripka Shkolnik, LLP, New York (Adam Julien Gana of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 23, 2011, which, insofar as appealed from, denied defendants' motion to dismiss the defamation claim of plaintiff D'Lites L.A.M.D. B.H. Inc. and the product disparagement claim of plaintiffs relating to a D'Lites ice cream store in Babylon, New York, unanimously modified, on the law, to the extent of dismissing the product disparagement claim in connection with damages for lost customers, and otherwise affirmed, without costs.

Plaintiff D'Lites L.A.M.D. B.H. Inc. sustained its burden of pleading that the alleged defamatory consumer report produced and broadcast by defendants was "of and concerning" plaintiff (*see Giaimo v Literary Guild*, 79 AD2d 917 [1981]; *see generally Golden*

Bear Distrib. Sys. v Chase Revel, Inc., 708 F2d 944 [5th Cir 1983]).

Plaintiffs' product disparagement claim should have been dismissed to the extent it seeks damages in connection with lost customers, as plaintiffs failed to plead such special damages with the requisite specificity (*see Drug Research Corp. v Curtis Publ. Co.*, 7 NY2d 435, 440-441 [1960]; *Christopher Lisa Matthew Policano, Inc. v North Am. Precis Syndicate*, 129 AD2d 488, 490 [1987]).

M-1036 ***Matthew Price, etc., et al. v Fox Television Station, Inc.***

Motion to supplement the record denied.

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

ENTERED: MARCH 29, 2012

CLERK

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

7239 Blandina Pinzon, Index 303303/07
Plaintiff-Appellant,

-against-

Christina F. Gonzalez,
Defendant-Respondent.

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Law Office of Alexander Dranov, LLC, New York (Alexander Dranov of counsel), for appellant.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about March 1, 2011, which granted defendant's motion for summary judgment seeking to dismiss the complaint on the ground that plaintiff did not raise an issue of fact as to whether she suffered a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendant met her prima facie burden on summary judgment with the submission of the affirmed reports of experts that established that plaintiff did not suffer a serious injury as a result of the accident at issue and found instead that she suffered from pre-existing degenerative conditions.

However, plaintiff raised an issue of fact as to whether she sustained serious injuries to her left knee, cervical spine, and

lumbar spine by submitting the affirmed reports of radiologists stating that the MRIs of those body parts showed a tear of the medial meniscus and tear of the medial collateral ligamentous complex, disc herniations of the cervical spine, and lumbar disc bulging, along with a contemporaneous examination by plaintiff's treating physician showing limited ranges of motion in each of those body parts (Insurance Law § 5102[d]; *see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002]).

Plaintiff raised an issue of fact as to the permanence of those injuries by submitting the affirmed report of a neurologist who conducted a recent examination showing limited ranges of motion in all of those body parts (*see Antonio v Gear Trans Corp.*, 65 AD3d 869 [2009]; *Thompson v Abbasi*, 15 AD3d 95, 97 [2005]). Contrary to defendant's argument, this report does refute the findings of defendant's experts as to the degenerative nature of plaintiff's condition by specifically attributing the injuries to the accident (*see Williams v Perez*, __ AD3d __, 2012

NY Slip Op 01176 [2012]), and specifically identifying and disagreeing with two of defendant's experts (*see Perl v Meher*, 18 NY3d 208 [2011]; *Fuentes v Sanchez*, 91 AD3d 418 [2012]).

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

ENTERED: MARCH 29, 2012

CLERK

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

7240 Oliver Fraser, Index 109320/08
Plaintiff-Respondent,

-against-

Pace Plumbing Corp.,
Defendant-Appellant,

75 Wall Associates, LLC, et al.,
Defendants-Respondents,

C2 Plumbing Corp., etc., et al.,
Defendants.
- - - - -
75 Wall Associates, LLC, et al.,
Third-Party Plaintiffs,

-against-

FMC Construction, LLC,
Third-Party Defendant-Respondent.

_____

Gallo Vitucci Klar LLP, New York (Chad E. Sjoquist of counsel), for appellant.

Alpert, Slobin & Rubenstein, LLP, New York (Daniel J. Watts of counsel), for Oliver Fraser, respondent.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for 75 Wall Associates, LLC, ESM Construction Corp., HRH Constructiion LLC, 75 Wall Management Corp., Hakimian Management Corporation, respondents.

Baxter Smith & Shapiro, P.C., Hicksville (Dennis S. Heffernan of counsel), for FMC Construction, LLC, respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 30, 2011, which denied the motion of defendant Pace Plumbing Corp. (Pace) for summary judgment dismissing the

complaint and all cross claims as against it, unanimously affirmed, without costs.

The motion court properly denied Pace's motion for summary judgment in this action where plaintiff was injured when the scaffold on which he was standing slipped into an open, uncovered hole in the concrete floor, and tipped over. The record shows that the contract between Pace and the construction manager of the renovation project required Pace to cut, fit, patch and protect its work. Although the specifications portion of the contract provides that the openings left in the floor shall be covered and protected "by others," this does not avail Pace since the agreement provides, in the event of a conflict, that the agreement takes priority over the specifications (*see e.g. Podhaskie v Seventh Chelsea Assoc.*, 3 AD3d 361, 363 [2004]). Accordingly, in light of Pace's obligations under the contract, triable issues of fact remain as to whether it is a statutory agent of the construction manager (*see Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [2011]), and thus, may be held liable under Labor Law §§ 240(1), 241(6) and 200 *see O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60 [1999]).

Moreover, Pace is not entitled to summary judgment on the common-law negligence or Labor Law § 200 claims, since the record presents triable issue as to whether Pace was negligent. These

issues include whether Pace created the hole into which the scaffold slipped; whether Pace's workers removed the plywood coverings from the holes, in light of the evidence that the coverings were piled in the same manner that Pace's witness described; and whether Pace's witness was credible when he described how the site supervisor was notified after the holes were drilled, considering that another subcontractor drilled the holes (*see Andrade v Triborough Bridge & Tunnel Auth.*, 35 AD3d 256, 257 [2006]).

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

ENTERED: MARCH 29, 2012

CLERK

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

7241 The People of the State of New York, Respondent, Ind. 230/10

-against-

Victor Hurt,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 10, 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 2½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant sought to enter a homeless shelter that required all entrants to be searched via metal detectors, and that their belongings pass through X ray machines to search for contraband, such as weapons or drugs. Defendant first set off the walk-through magnetometer, and a handheld scanner subsequently alerted a Department of Homeless Services officer to the presence of something in defendant's waistband.

Defendant complied with the officer's request to lift up his

shirt, which revealed a black plastic bag tucked into defendant's waistband. At that point, defendant turned his body slightly away from the officer. The officer took the bag, and felt it without being able to determine its contents. When defendant did not answer the officer's question about the contents of the bag, the officer opened it and found a large quantity of drugs.

Defendant had lodged at the shelter on at least four other occasions, and the arresting officer had personally observed him standing on line to be searched on at least two previous occasions. Accordingly, the evidence showed that defendant was knowledgeable of the search requirements, but he nevertheless tried to enter the facility. Persons with notice of an impending security checkpoint search who nonetheless seek entry relinquish any reasonable expectation of privacy and impliedly consent to the search (*People v Rincon*, 177 AD2d 125, [1992], *lv denied* 79 NY2d 1053 [1992]).

We reject defendant's argument that his implied consent was limited to the magnetometer search. When a person sets off a magnetometer by passing through it, the person can reasonably expect that security personnel will not permit entry into the restricted premises without taking whatever measures are necessary to find out what triggered the magnetometer. Otherwise, the magnetometer would have little value.

Since defendant never abandoned his attempt to enter the shelter, he implicitly consented to an expanded search. Defendant was free to cut off the search by turning around and walking out. The officer did nothing to suggest otherwise, and defendant never indicated that he no longer wished to enter.

Furthermore, defendant's attempt to avoid the X ray machines by sneaking the bag into the facility on his person, along with the officer's awareness that the magnetometer and handheld scanner had most likely been set off by something metallic in the bag, created a reasonable suspicion of criminal activity. Since touching the bag was insufficient to determine if it contained a weapon, especially a small weapon such as a razor blade, it was reasonable for the officer to remove it from defendant's grabbable area and search it (*see People v Brooks*, 65 NY2d 1021, 1023 [1985]).

Defendant's remaining suppression arguments are unpreserved

and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 29, 2012

CLERK

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

7242 Tower Insurance Company of New York, Index 106833/10
Plaintiff-Respondent,

-against-

Camille Khan, et al.,
Defendants-Appellants.

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Stephen David Fink, Forest Hills, for Camille Khan, appellant.

Shayne, Dachs, Corker, Sauer & Dachs, Mineola (Norman H. Dachs of counsel), for Jose Reyes, appellant.

Law Office of Max W. Gershweir, New York (Max W. Gershweir of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Joan M. Kenney, J.), entered September 9, 2011, which granted plaintiff's motion for summary judgment declaring that it was not obligated to defend or provide coverage to its insured, defendant Camille Khan, in the underlying personal injury against her brought by defendant Jose Reyes, and denied the cross motion of Reyes for summary judgment declaring that plaintiff has a duty to defend and indemnify Khan in the underlying action, unanimously affirmed, without costs.

Plaintiff established its entitlement to summary judgment declaring that it had no obligation to defend Khan under the terms of the policy based on her misrepresentation in the application process. The policy was for a one or two family

primary residence. However, Khan acknowledged that she did not use the covered premises as her primary residence. Moreover, plaintiff's underwriting guidelines make clear that it will not insure certain risks, such as where there is construction or renovation on the premises or a commercial use of the premises.

Here, Khan was renovating the property to include one or two apartments on the top floor, and commercial space on the first floor and in the basement. The failure to disclose that the use of the premises was outside of the scope of the policy was a material misrepresentation in the application for the policy, warranting a disclaimer of coverage for the injuries sustained by Reyes while working on the renovation. The fact that Khan's admission was contained in an unsigned deposition transcript does not preclude its use as an admission against her interest (*see Morchik v Trinity School,* 257 AD2d 534, 536 [1999]).

Moreover, plaintiff's disclaimer of coverage was not untimely as it came 17 days after it had obtained and confirmed all the facts warranting the disclaimer of coverage (*see Wausau Bus. Ins. Co. v 3280 Broadway Realty Co. LLC*, 47 AD3d 549 [2008]). Nor should plaintiff be estopped from disclaiming coverage based on its undertaking to defend Khan, while preserving its defense under the policy, until the facts warranting disclaimer became clear. The question of the

propriety of plaintiff providing coverage is separate and distinct from the question of the insured's liability in the underlying action (*see Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392, 401 n [1981]).

We have considered defendants' remaining arguments, including that plaintiff's motion was premature and that further discovery was necessary, and find them unavailing.

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

ENTERED: MARCH 29, 2012

CLERK

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

7243 TADCO Construction Corp., Index 600039/07
Plaintiff-Appellant,

-against-

Dormitory Authority of the
State of New York,
Defendant-Respondent.

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Bryan Ha, New York, for appellant.

Holland & Knight LLP, New York (Deborah C. Roth of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 15, 2010, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the first, second, fourth, fifth, eighth and tenth causes of action, unanimously affirmed, without costs.

Defendant established prima facie that plaintiff's alleged extra concrete restoration work was within the stipulated allowances of the parties' contract, by submitting the contract, which authorized the architect to determine the amount of work necessary for that item. The architect had specifically determined that the concrete restoration work at issue was within the contract allowances and did not constitute extra work (*see Savin Bros. v State of New York*, 62 AD2d 511, 516 [1978], *affd* 47 NY2d 934 [1979]). In opposition, plaintiff failed to raise an

issue of fact. Its assertion that the contract did not unambiguously give the architect the authority to make the determination at issue is belied by the plain language of the contract.

Defendant established prima facie that it did not authorize plaintiff to replace, rather than repair, the dock and to submit a change order for the increased costs later. The minutes of an August 12, 2004 meeting reflect that defendant informed plaintiff that "[r]eplacement of docks will be approved, if there is no increase in contract price." Plaintiff's assertion that it understood that defendant had agreed to address the additional cost at a later date is insufficient to raise an issue of fact.

As to plaintiff's claims for increased steel costs, the record shows that plaintiff failed to present documentation of those costs.

Plaintiff's claims for unjust enrichment and quantum meruit are precluded by the existence of the parties' contract (*see Clark-Fitzpatrick v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Since plaintiff did not appeal from a prior order that dismissed its cause of action alleging breach of the implied covenant of good faith and fair dealing, the issue is not properly before this Court. We note that plaintiff also failed to submit the record of the proceedings in which the order was

issued. In any event, the cause of action cannot be maintained because "the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Bostany v Trump Org. LLC*, 73 AD3d 479, 481 [2010] [internal quotation marks omitted]).

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

ENTERED: MARCH 29, 2012

CLERK

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

7244N & M-562 — Public Administrator Bronx County, etc., Plaintiff-Appellant, -against- Montefiore Medical Center, et al., Defendants-Respondents. — Index 302089/11

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Sinel & Associates, PLLC, New York (Raymond E. Gazer of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (James S. Makris of counsel), for Montefiore Medical Center, respondent.

Kaufman Borgeest & Ryan, LLP, New York (Dennis J. Dozis of counsel), for Morningside House Nursing Home, respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered July 25, 2011, which, in this action to recover damages arising out of defendants' alleged negligence and medical malpractice while decedent was a patient at their facilities, granted defendant Morningside's motion and defendant Montefiore's cross motion to change venue from Bronx County to Westchester County, unanimously affirmed, without costs.

The forum selection clauses in the admission agreements at issue provide that "[a]ny and all actions arising out of or related to th[e] Agreement[s] shall be brought in . . .

Westchester County." Because this action arises out of or relates to Morningside's duties and obligations under the agreements, the clauses apply and thus venue was properly transferred to Westchester County (*see Buhler v French Woods Festival of Performing Arts*, 154 AD2d 303 [1989]; *cf. De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 56 AD3d 365, 366 [2008]). Plaintiff has failed to show that enforcement of the forum selection clauses would violate public policy or that a trial in Westchester County would be so impracticable and inconvenient that he would be deprived of his day in court (*see Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 288 [2006]; *cf. Yoshida v PC Tech U.S.A. & You-Ri, Inc.*, 22 AD3d 373 [2005]). Moreover, there is no allegation that the agreements at issue were the result of fraud or overreaching (*cf. DeSola Group v Coors Brewing Co.*, 199 AD2d 141, 141-142 [1993]). Although defendant Montefiore was not a party to the agreements, in order to avoid inconsistent verdicts, the entire action was properly

transferred to Westchester County (*see Woodhouse v Orangetown Pediatrics*, 213 AD2d 362 [1995]).

M-562 - *Public Administrator Bronx County v Montefiore Medical Center, et al.*

Motion to strike plaintiff's record and brief and to dismiss the appeal, granted to the extent of striking pages 108-169 from the record and those points in plaintiff's brief with no factual basis, and otherwise denied.

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

ENTERED: MARCH 29, 2012

CLERK

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

5865 Cesar Ortega, et al., Index 114945/08
Plaintiffs-Appellants,

-against-

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

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Borchert, Genovesi, LaSpina & Landicino, P.C., Whitestone (Gregory M. LaSpina of counsel), for appellants.

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

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered March 30, 2011, reversed, on the law, without costs, and the motion for partial summary judgment under Labor Law § 240(1) granted.

Opinion by Acosta, J. All concur except Andrias, J.P. and Sweeny, J. who concur in a separate Opinion by Sweeny J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Helen E. Freedman
Sallie Manzanet-Daniels, JJ.

5865
Index 114945/08

_____x

Cesar Ortega, et al.,
Plaintiffs-Appellants,

-against-

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

_____x

Plaintiffs appeal from an order of the Supreme Court, New York County (Michael D. Stallman, J.), entered March 30, 2011, which denied their motion for partial summary judgment under Labor Law § 240(1).

Borchert, Genovesi, LaSpina & Landicino, P.C., Whitestone (Gregory M. LaSpina and Gary E. Rosenberg of counsel), for appellants.

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

ACOSTA, J.

At issue in this case is whether a plaintiff seeking summary judgement on his Labor Law § 240(1) claim must establish as part of his prima facie case that the injury was foreseeable. We hold that a plaintiff is not required to demonstrate that the injury was foreseeable, except in the context of a collapse of a permanent structure (*see e.g. Jones v 414 Equities LLC*, 57 AD3d 65 [2008]). Outside the permanent structure collapse context, a plaintiff simply needs to show that he or she was injured while engaged in a covered activity, and that the defendant's failure to provide adequate safety devices of the type listed in Labor Law § 240(1) resulted in a lack of protection. Accordingly, in the present case, there is no need for plaintiff to submit expert testimony on foreseeability or otherwise establish that the accident was foreseeable as part of his prima facie case.

Background

Plaintiff Cesar Ortega, an employee of a subcontractor on the Second Avenue Subway Tunnel Construction Project, was injured while connecting pipes that were to be used to pour concrete underground using the "Tremie Concrete" method. In order to perform this work, plaintiff stood on a work platform located eight feet above the ground and contained within a metal cage known as a tremie rack. This was a rectangular structure,

approximately 12 feet high. In addition to housing a work platform, the tremie rack contained vertical slots in which heavy tremie pipes were held. These pipes had a collar at one end and were kept in place by square shaped holders referred to as "keepers." The rack was resting on unsecured wooden planking that was meant to level the gravel surface below. Plaintiff was ejected from the platform when the collar of a tremie pipe that was being hoisted by a multi-ton rig got caught on the keeper, and caused the tremie rack to tip over onto its side.

Ronald Knott, site safety director employed by defendant Skanska, testified at his deposition that upon his investigation of the accident, he concluded that the accident occurred for several reasons, including the stability of the underside of the tremie rack, the weight distribution of the pipes and the fact that the rack was taller than it was wide. Plaintiffs relied on this testimony in arguing that the tremie rack, which we view as a scaffold, albeit one designed specifically for the task at hand, was not secured to the ground. Specifically, citing *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494, 501 [1993] ["Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object

or person"]), they argued that the tremie rack was "not fixed, welded or bolted in the ground."

In denying plaintiffs' motion for partial summary judgment, Supreme Court found that issues of fact remained, including whether the accident was foreseeable and whether defendant failed to assure proper placement of the tremie rack. The court noted that "foreseeability may be inherent in the work in which the plaintiff may be engaged," and that the failure of the furnished protective device to prevent a foreseeable external force from causing plaintiff to fall from an elevated work station entitled plaintiff to judgment as a matter of law. The court, however, found that issues of fact existed due to plaintiffs' failure "to provide expert testimony which would elucidate, among other issues, what standards govern the interplay of drilling rigs and tremie racks, and what measures were foreseeably necessary to ensure the safety of workers performing in the circumstances."

On appeal, plaintiffs argue that they established a violation of Labor Law § 240(1), as defendant failed to provide plaintiff with proper safety devices and failed to assure that the tremie pipe was properly hoisted so that it would not knock over the tremie rack. With respect to expert testimony, they argued that such testimony was not needed to establish that the injury was foreseeable because the tremie rack was an elevated,

temporary structure, that was not secured to the ground. In response, defendant argues that the order denying plaintiffs' motion for partial summary judgment should be affirmed, inter alia, because plaintiffs did not establish that the manner in which the accident occurred was foreseeable, and failed to identify which safety device was defective or not provided.

Analysis

In reversing, we hold that there is no requirement that plaintiff offer expert testimony on the foreseeability of the accident to prevail on a Labor Law § 240(1) claim outside the permanent structure context. Indeed, it has been firmly established that in order to make out a valid claim under Labor Law § 240(1), a "plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendans' conduct was foreseeable" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]). In other words, when a worker is performing one of the inherently dangerous activities covered by Labor Law § 240(1), some injury is foreseeable from the failure of a contractor or owner to provide the worker with proper safety devices (*Gordon*, 82 NY2d at 562). Thus, a plaintiff merely has to demonstrate that he or she was injured when an elevation-related safety device failed to

perform its function to support and secure him from injury (*see Morin v Machnick Bldrs.*, 4 AD3d 668, 670 [2004]).

A defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]; *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009] ["the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential"]). Indeed, the question of circumstantial reasonableness is irrelevant when safety devices are required pursuant to Labor Law § 240(1), and an owner or contractor is absolutely liable in damages for injuries sustained by a covered worker (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 519 [1985]; *see also Runner v New York Stock Exchange*, 13 NY3d at 603; *Perez v NYC Partnership Hous. Dev. Fund Co., Inc.*, 55 AD3d 419, 420 [2008] ["it is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent the [structure] from slipping or protecting plaintiff from falling were absent"] [internal quotation marks omitted]).

Thus, contrary to the IAS court, expert testimony on foreseeability was unnecessary for plaintiffs to prevail on the

§ 240(1) claim. To be sure, this Court has created a limited exception with respect to foreseeability where the accident involves the collapse of a permanent structure (*see Jones v 414 Equities LLC*, 57 AD3d 65 [2008] [demolition worker fell when a permanent second story floor collapsed]; *Espinosa v Azure Holdings II, LP*, 58 AD3d 287 [2008] [plaintiff fell when the sidewalk on which he was standing collapsed due to the failure of the cellar vault below it]; *Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493 [2010] [plaintiff fell when permanent staircase collapsed during demolition of a building]). But, that is not the case here.

Notwithstanding the clear holdings in cases such as *Wilinski, Gordon* and *Runner*, defendants in the present case are seeking to expand the limited foreseeability requirement beyond the confines of permanent structures such as those *Jones, Espinosa* and *Vasquez* dealt with (*see Vasquez*, 79 AD3d at 498, where I noted in dissent that by reading a foreseeability requirement into the statute, contractors would be encouraged "to take a head-in-the-sand approach to their statutory obligations,"

which is exactly what defendants are doing in the present case).[1] We thus decline to extend the foreseeability requirement to anything other than permanent structures that are not safety devices by their nature. Indeed, defendants seek to burden plaintiffs with expert testimony showing that the precise nature of the accident was foreseeable as part of his prima facie case even though the tremie rack where the accident occurred was clearly not a permanent structure. This Court, however, will not

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[1]Although I do not agree with this line of cases because I believe that they graft a foreseeability requirement to the statute where the legislature and Court of Appeals precedent require none (*see* my dissent in *Vazquez,* 79 AD3d at 497-502), I am constrained by stare decisis to follow them. Indeed, although members of this Court may occasionally have good faith disagreements about the applicability of a particular precedent or line of precedents (*see e.g. Johnson v New York City Tr. Auth.*, 88 AD3d 321 [2011]; *Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406 [2011]), the members of this Court endeavor to give our precedents full effect whenever we find them to be relevant (*see e.g. Matter of Midland Ins. Co.*, 71 AD3d 221 [2010]). That being said, however, I agree with Brian J. Shoot, *Labor Law Section 240(1) and the Problem With Permanence* (NYLJ, Feb. 3, 2012, at 3, col 1) where he posits that a "simpler and more sensible test," is that courts abandon artificial distinctions and

> "instead apply *Runner*'s 'single decisive test' for elevation-relatedness to what is, at bottom, an attempt to distinguish special, construction-related risks from ordinary risks.
>
> "Very simply, was the worker confronted with a 'physically significant differential' that was different than the kind of risk any invitee might encounter long after the job was completed?"

read such a requirement into the statute. To do so would go directly against the legislative intent (*see e.g., Zimmer*, 65 NY2d at 520 [Court of Appeals has recognized this legislative intent of placing ultimate responsibility for safety on owners and general contractors, rather than workers who "are scarcely in a position to protect themselves from accident"] [internal citations omitted]; Mem of Sen Calandra and Assemblyman Amann, 1969 NY Legis Ann, 1969 at 407 ["(t)he Labor Law was enacted for the *sole* purpose of protecting workmen" (emphasis added)].

Rather, in the present case, a device precisely of the sort enumerated by the statute was not "placed and operated" as to provide adequate protection to plaintiff (*Runner*, 13 NY3d at 603). The tremie rack, which was taller than it was wide, was not in a fixed position, but rather, rested upon wooden planks atop an uneven, gravel surface. Plaintiffs made out a prima facie case in that they established with evidence in admissible form that plaintiff Cesar Ortega was working at a construction site and was injured as the result of the gravity-related hazard created by the elevation differential of the tremie rack in which plaintiff was working, and that the rack, which should have been secured to the ground, but was not, failed to protect him. Indeed, here, unlike *Wilinski*, where the plaintiff failed to demonstrate that protective devices could have prevented the

accident, plaintiffs submitted testimony indicating that the accident could have been prevented had the tremie been secured to the ground (*see also Howell v Bethune W. Assoc., LLC.*, 33 Misc. 3d 1215 [Sup Ct, NY County 2011]). Accordingly, they were entitled to summary judgment on the Labor Law § 240(1) claim (*Perez*, 55 AD3d at 420; *Cruz v Turner Constr. Co.*, 279 AD2d 322, 322-323 [2001]). Thus, I agree with Justice Sweeny's concurring opinion that foreseeability is a non-issue in establishing Labor Law § 240(1) liability in this case. We address it, however, because it was a central issue raised by the parties and it formed a basis for the IAS court's holding. In any event, "it is our responsibility to resolve pure questions of law for the parties and the Bar" (see *Phillips v City of New York*, 66 AD3d 170, 190 [2009]). This is particulary true in an area that is developing, such as grafting a negligence concept like foreseeability into a Labor Law 240(1) claim.

In any event, if foreseeability were a required element, plaintiffs have nevertheless demonstrated their entitlement to partial summary judgment as to liability on the Labor Law § 240(1) claim. It was foreseeable both that the plaintiff could fall off the elevated work platform and that the entire tremie rack could topple over because the tremie rack on which plaintiff was working was a mobile, elevated work platform that, as noted

above, was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface.

Accordingly, the order of the Supreme Court, New York County (Michael D. Stallman, J.), entered March 30, 2011, which denied plaintiffs' motion for partial summary judgment under Labor Law § 240 (1), should be reversed, on the law, without costs, and the motion granted.

All concur except Andrias, J.P. and Sweeny, J. who concur in a separate Opinion by Sweeny J.

SWEENY, J. (concurring)

Plaintiff Cesar Orgeta, an employee of a subcontractor on the Second Avenue Subway Tunnel Construction Project, was injured while he was connecting pipes which were to be used in order to pour concrete underground using the "Tremie Concrete" method. In order to perform this work, plaintiff stood on a work platform located eight feet above the ground and contained within a metal cage, also referred to as a tremie rack.

The tremie rack was a considerable, rectangular structure, with its height greater than its width and was estimated to stand as tall as 12 feet high. In addition to housing a work platform, the tremie rack contained vertical slots in which heavy tremie pipes were held, which pipes had a collar at one end and were kept in place by square shaped holders, also referred to as "keepers." The rack was resting on unsecured wooden planking which was meant to level the gravel surface below, and the tremie pipes, which were estimated to be 10' high and weigh 300 pounds each, were all located on one side of the rack.

Plaintiff's accident occurred when, as he was standing on the platform, the collar of a tremie pipe which was being hoisted by a multi-ton rig got caught on a keeper, causing the tremie rack to tip over onto its side and eject plaintiff.

Since the work platform, which functioned as a safety

device, failed to protect plaintiff from the foreseeable risk of falling from an elevation, judgment as a matter of law under Labor Law § 240(1) is warranted (*Gordon v Eastern Ry. Supply*, 82 NY2d 555 [1993]; *Cruz v Turner Constr. Co.*, 279 AD2d 322, 322-323 [2001]). Clearly, expert testimony was not needed to establish that such an injury could occur, given that the tremie rack, inter alia, was taller than it was wide, rested on unsecured planking atop an uneven gravel surface, and was unevenly weighted by the distribution of pipes (*see Kulak v Nationwide Mut. Ins. Co.*, 40 NY2d 140, 148 [1976]; *Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 211 [1988]).

Accordingly, I concur in the result reached by the majority. In so doing, there is no need to address the foreseeability issue as the majority does. This is an issue which, in any event, has been the subject of extensive analysis in this Court (*see Vasquez v Urbahn Assoc. Inc.* 79 AD3d 493 [2010]) and does not need further elucidation here.

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

ENTERED: MARCH 29, 2012

CLERK