SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 21, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11339 The People of the State of New York, Ind. 5047/01
Respondent,

-against-

Clive Scott,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Cheryl P. Williams of counsel), for appellant.

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

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Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered on or about June 7, 2010, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Initially, we decline to dismiss this appeal on the ground that defendant has been deported (*see People v Ventura*, 17 NY3d 675, 679-680 [2011]). Although this is a civil appeal, we recognize the potential consequences of the SORA adjudication and conclude that defendant should be given an opportunity for

intermediate appellate review of the issues presented here.

The People failed to present clear and convincing evidence that defendant had a history of alcohol abuse or was abusing alcohol at the time of the sex offense (*see People v Palmer*, 20 NY3d 373 [2013]). Therefore, the court incorrectly assessed 15 points under that risk factor, and defendant's correct point score would render him a level one offender. Nevertheless, we affirm on an alternative ground (*see People v Larkin*, 66 AD3d 592, 593 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]). We agree with the Board of Examiners that an upward departure was warranted in light of the extreme seriousness of defendant's actions after the sex offense, including his attempt to hire an undercover police officer to murder the victim of his crime.[1] These aggravating factors are reflected in the record before us,

[1] Even if we were to accept defendant's argument that he should not have been assessed points for lack of supervision because he now is in another country, an affirmance still would be appropriate because of the upward departure.

and were not otherwise adequately accounted for in the risk assessment instrument.

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

ENTERED: JANUARY 21, 2014

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10662 Merchants Capital Access, LLC, Index 651229/12
Plaintiff-Appellant-Respondent,

-against-

Starr Surplus Lines Insurance Company,
et al.,
Defendants-Respondents-Appellants,

LVL Claims Services, LLC,
Defendant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about December 14, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 12, 2013,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JANUARY 21, 2014

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11304-
11304A Norma Rosario,
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant,

High View Owners Inc., et al.,
Defendants.

Index 309737/08

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Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for appellant.

Panzavecchia & Associates, PLLC, Garden City (Mark A. Panzavecchia of counsel), for respondent.

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Amended judgment, Supreme Court, Bronx County (Julia Rodriguez, J.), entered March 8, 2013, upon a jury verdict awarding plaintiff damages against defendant City of New York, and bringing up for review orders, same court and Justice, which denied the City's motions for a directed verdict and/or judgment notwithstanding the verdict, unanimously reversed, on the law, without costs, the motions granted, the judgment vacated, and the complaint dismissed. The Clerk is directed to enter judgment accordingly. Appeal from judgment, same court and Justice, entered June 6, 2012, unanimously dismissed, without costs, as superseded by the appeal from amended judgment.

To impose liability on defendant City for a defective condition of a tree well, plaintiff must show that the municipality either received prior written notice of the alleged defect or caused or created the defective condition through an affirmative act of negligence (*see Tucker v City of New York*, 84 AD3d 640, 642-643 [1st Dept 2011], *lv denied* 17 NY3d 713 [2011]; *Oboler v The City of New York*, 8 NY3d 888, 889 [2007]).

Plaintiff makes no claim that the City had prior written notice of the claimed defect. There is no view of the evidence in the record that the City created the dangerous condition that caused plaintiff to fall. Plaintiff's testimony is that on November 7, 2007, she fell after stepping into a hole in a tree well because the dirt was not even with the sidewalk. She described the hole as being 3 inches in depth. The evidence also shows that more than one year before the accident, the City identified and removed a dead tree in the tree well, leaving a stump behind. The City inspector testified that although he determined that removal of the dead tree was necessary, he did not notice the level of the dirt in the well at that time. The City inspector further testified that in his years of experience, the removal of trees would not disrupt the level of dirt in a tree well. According to the City inspector, any disruption of

the dirt in the tree well ensues when the tree stump is removed, which in this case did not occur until after plaintiff's accident. Plaintiff had no personal knowledge of the cause of the differential of the dirt in the well (*see Hammond v City of New York*, 100 AD3d 563, 564 [1st Dept 2012], *lv denied* 21 NY3d 853 [2013]; *Bielecki v City of New York*, 14 AD3d 301, 302 [1st Dept 2005]). There is no basis on this record to conclude that the City caused or created that differential.

Plaintiff asserted at trial that the City's negligence consisted of the failure to remove the tree stump after it cut down the tree. However, plaintiff did not fall on or over the stump, but testified that she tripped on a two or three inch hole between the level of the soil in the tree well and the level of the sidewalk. Thus, the failure to remove the stump was not the proximate cause of the accident.

We also reject plaintiff's argument that the City created a hazard because the removal of the tree from the well without replanting created an optical illusion obscuring the tree well. Leaving aside the parties' procedural arguments, the argument fails on its merits. The only photograph of the condition, taken from some distance away, shows that the tree stump was above sidewalk level and visible. It also clearly depicts the tree

well, in line with another tree well on the street. The tree well was in front of the building in which plaintiff resided. Although plaintiff testified that she did not see the tree well before she fell, she also testified that there were containers on the street in her path that caused her to move to her left. There is no view of this evidence to support a conclusion that the City, by cutting down a dead tree and leaving a tree stump, created a dangerous condition by obscuring the visibility of the tree well.

Here there was no conflicting evidence as to the cause of the accident, and the verdict could not have been reached by any fair interpretation of the evidence against the City (*see Vavosa v Stiles*, 220 AD2d 363, 364 [1st Dept 1995]).

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

ENTERED: JANUARY 21, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11314- Index 6094/07
11314A Carlos Alberto Garcia, et al.,
Plaintiffs-Respondents-Appellants,

-against-

The Neighborhood Partnership Housing Development Fund Company, Inc., et al.,
Defendants-Appellants-Respondents.

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Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for appellants-respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for respondents-appellants.

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Orders, Supreme Court, Bronx County (John A. Barone, J.), entered January 9, 2013, which, to the extent appealed from as limited by the briefs, denied defendants' Transcorp Construction Corp.'s motion for summary judgment dismissing plaintiffs' complaint, denied defendant The Neighborhood Partnership Housing Development Fund Company, Inc.'s motion for summary judgment dismissing plaintiffs' claims pursuant to Labor Law §§ 200 and 241(6), and common law negligence, and denied plaintiffs' motion for partial summary judgment on their claims pursuant to Labor Law §§ 240(1) and 241(6), unanimously modified, on the law, to grant plaintiffs' motion for partial summary judgment on their Section 240(1) claims, and otherwise affirmed, without costs.

Plaintiffs established, prima facie, that the partial building collapse that severely injured both of them and killed a coworker was foreseeable, and that defendants owner and general contractor were on notice of the hazard. Since defendants, in opposition, failed to raise a triable issue of fact as to the foresseability of the building collapse, plaintiffs are entitled to partial summary judgment on their Section 240(1) claim.

Section 240(1) should be "construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985] [internal quotation marks omitted]), since the statute was intended to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" (1969 NY Legis. Ann. at 407). It is elementary, of course, that comparative negligence is not a defense to an action predicated on Section 240(1). A plaintiff in a case involving collapse of a permanent structure must establish that the collapse was "foreseeable," not in a strict negligence sense, but in the sense of foreseeability of exposure to an elevation-related risk (*Jones v 414 Equities LLC,* 57 AD3d 65 [1st Dept 2008]; *Mendoza v Highpoint Assocs., IX, LLC,* 83 AD3d 1, 10-11 [1st Dept 2011]).

The evidence submitted on the motion establishes, prima facie, that the partial collapse of the building, including the stairwell and floor joists in the area from the second through fifth floors, was foreseeable. The architect's field report dated December 19, 2006, seven days prior to the accident, noted "[c]onditions appear to be unsafe and the building is completely open to the elements. G.C. to make safe and shore as required." A New York City building violation issued the date of the accident described the conditions as "hazardous," and cited a "[f]ailure to carry out demolition operations in safe and proper manner." The violation noted that the removal of interior bearing and non-bearing partitions throughout had caused the floor joists to collapse from the top of the building to ground level at the center," and ordered that all work be stopped.

Plaintiffs' expert engineer noted that one week prior to the accident a number of timber joists (i.e., structural floor elements) located along the length of the staircase were observed to be severely sagging as much as two feet, and opined that "[t]he magnitude of this downward deflection is an indication of their poor, deteriorated and dangerous condition which indicates a loss of structural integrity." Plaintiffs' expert noted that the joists, which were not shored or posted in any manner, were

"clearly visible," providing notice of an "imminent danger" "forshadow[ing] the collapse." Plaintiffs' expert opined that the removal of weight-bearing walls, combined with the approximate 100-year age of the building and its timber joists, was a substantial and proximate cause of the foreseeable collapse.

The evidence upon which defendants rely in opposition to the 240(1) claims fails to raise a triable issue of fact. The "building demolition survey" was prepared five months prior to plaintiffs' accident, before demolition had even begun, and thus does not speak to the condition of the building's interior once demolition was underway.

Vasquez v Urbahn Assoc. Inc. (79 AD3d 493 [1st Dept 2010]), in which we held that the evidence presented a triable issue of fact as to whether the collapse of permanent stairs was foreseeable, does not dictate a different result. In *Vasquez*, there was conflicting testimony as to whether certain stairs were "old and destroyed," or in good condition prior to the plaintiff's accident. Here, defendants present no evidence concerning the condition of the building in the months preceding the collapse. The "building demolition survey" undertaken prior to the commencement of demolition does not suffice to raise a

triable issue of fact where the record establishes that unsound demolition practices, including the removal of weight-bearing walls, had compromised the integrity of the floors and "foreshadowed" the collapse. Similarly, the fact that plaintiffs failed to complain about the condition of the staircase does not speak to the general integrity of the structure. It should be noted that *Vasquez* involved not the foreseeability of a partial building collapse comprising several floors, but rather, the foreseeability of a particular staircase collapsing.

Issues of fact preclude summary judgment on plaintiffs' common-law negligence and Section 200 claims.

The record presents issues of fact precluding summary resolution of plaintiff's Labor Law § 241(6) claim based on an alleged violation of 12 NYCRR § 23-1.7(f) (*see Vasquez*, 79 AD3d at 493, *citing Murphy v American Airlines*, 277 AD2d 25, 26 [2000]), since it is unclear whether it was the staircase or the surrounding framing that was defective. Questions of fact also exist concerning whether defendants violated 12 NYCRR §§ 23-3.3(b)(1) and (c), since there is conflicting evidence

regarding how demolition operations were performed, and whether defendants made continuing inspections during the demolition.

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

ENTERED: JANUARY 21, 2014

CLERK

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

11387 Marcus Deonarine, Index 304407/08
Plaintiff-Respondent,

-against-

Montefiore Medical Center,
Defendant-Appellant.

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

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered July 19, 2012, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss the complaint pursuant to CPLR 3211 and 3212, and denied defendant's motion to preclude plaintiff's use of his deposition at trial, unanimously affirmed as to the denial of defendant's motion to dismiss, and the appeal therefrom otherwise dismissed, without costs.

The court properly denied the motion to dismiss the complaint inasmuch as it was based solely on defendant's assertion that plaintiff would be unable to make out a prima facie case at trial by reason of his anticipated "unavailability to testify as a result of his imminent deportation . . ."

Accordingly the motion was actually a prematurely made motion for judgment pursuant to CPLR 4401, which has to await the close of plaintiff's case at trial even if plaintiff's ultimate success in the action is improbable (*see Cass v Broome County Coop. Ins. Co.*, 94 AD2d 822, 823 [3rd Dept 1983]). The court's denial of defendant's motion to preclude was effectively an evidentiary ruling made in advance of trial and, as such, is not appealable (*see Balcom v Reither,* 77 AD3d 863, 864 [2nd Dept 2010]). We have considered defendant's remaining contentions and find them to be without merit.

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

ENTERED: JANUARY 21, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11508 The People of the State of New York, Respondent,
Ind. 4817/02
7799/02

-against-

Lionel Pittman,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about June 22, 2012, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant defendant a downward departure to level one (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US 1011 [2009]; *People v Mingo*, 12 NY3d 563, 568 n 2 [2009]). The risk assessment instrument adequately took into account the absence of a prior sex crime and defendant's prison record. Further, neither defendant's age (late 40s) nor any of the other factors

he relied on warranted a downward departure in light of the seriousness of his offense against two very young children (*see e.g. People v Thomas*, 105 AD3d 640 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]).

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

ENTERED: JANUARY 21, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11509 Marina Seleznyov, Index 110778/08
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents.

_____

William Pager, Brooklyn, for appellant.

Law Office of Wallace D. Gossett, Brooklyn (Michael Gregg Rabinowitz of counsel), for respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered March 2, 2012, which granted the motion of defendant New York City Transit Authority (NYCTA) for summary judgment dismissing the complaint as against it, and sua sponte dismissed the complaint as against defendant City of New York, unanimously reversed, on the law, without costs, NYCTA's motion denied, and the complaint reinstated as against both defendants.

NYCTA failed to establish entitlement to judgment as a matter of law, in this action where plaintiff was injured when she slipped and fell on debris as she descended the stairs at a subway station. NYCTA did not show the absence of actual or constructive notice of the condition that allegedly caused plaintiff to fall. Although the affidavit from NYCTA's employee

shows that the stairs were cleaned in accordance with a cleaning schedule, the employee averred that she began cleaning after the accident, and NYCTA did not submit any evidence showing when the stairway was last cleaned or inspected before the accident (*see Gautier v 941 Intervale Realty LLC*, 108 AD3d 481 [1st Dept 2013]; *Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept 2009]; *cf. Harrison v New York City Tr. Auth.*, 94 AD3d 512 [1st Dept 2012]). Contrary to defendants' contention that the affidavit established a reasonable cleaning schedule, the affidavit in fact raises questions as to the adequacy and reasonableness of the schedule (*cf. Harrison* at 514). Moreover, plaintiff adequately identified the condition that caused her fall as a piece of newspaper with a hard object underneath it (*compare Kwitny v Westchester Towers Owners Corp.*, 47 AD3d 495 [1st Dept 2008]).

Because NYCTA failed to satisfy its prima facie burden,

there is no need to address the sufficiency of plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: JANUARY 21, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11510 In re Sylvia G., and Others,

Dependent Children Under Eighteen
Years of Age, etc.,

Barbara G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child Sylvia G.

Tamara A. Steckler, The Legal Aid Society, New York (Adira Hulkower of counsel), attorney for the children Keith H. and Michael M.

_____

Order of fact-finding and disposition, Family Court, New York County (Jody Adams, J.), entered on or about July 6, 2012, which, to the extent appealed from as limited by the briefs, determined that respondent mother neglected her adopted daughter by inflicting excessive corporal punishment upon her, and derivatively neglected her two grandsons, Keith H. and Michael M., unanimously affirmed, without costs.

The Family Court properly balanced the subject child's

mental and emotional well being with respondent's due process rights by permitting the child to testify outside of respondent's presence at the fact-finding hearing, utilizing closed circuit video, which allowed all parties to observe the child's testimony and demeanor, and afforded respondent's counsel the opportunity to contemporaneously cross-examine the child after consulting with respondent (*see Matter of Arlenys B. [Aneudes B.]*, 70 AD3d 598, 599 [1st 2010]).

The finding of neglect is supported by a preponderance of the evidence. The record demonstrates that respondent inflicted excessive corporal punishment on her adopted daughter by striking her repeatedly in the head with a two-foot wooden paddle (*see* Family Court Act § 1012[f][i][B]). There is no basis to disturb the court's credibility determinations crediting the testimony given by the subject child after extensive cross-examination and discrediting respondent's testimony which was evasive (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]). Respondent's contention that the child's testimony was not credible because no one observed any bruising is belied by her own testimony and the child's testimony that respondent kept the child home from school following the incident during which the child testified that she was struck with the

paddle. Moreover, the absence of a physical injury to the subject child is not dispositive (*see Matter of Jonathan F.*, 294 AD2d 121 [1st Dept 2002]).

The derivative finding of neglect was proper. Respondent's inappropriate and excessive corporal punishment of her adopted child demonstrates that she has a sufficiently faulty understanding of her parental duties, warranting an inference that she is an ongoing danger to her grandsons (*see* Family Court Act § 1046[a][i]; *Matter of Joseph C. [Anthony C.]*, 88 AD3d 478, 478 [1st Dept 2011]).

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

ENTERED: JANUARY 21, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11513-
11514 In re Dakim S.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about June 20, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the third degree, and placed him on probation for a period of 18 months, unanimously reversed, on the law, without costs, and the petition dismissed. Order of disposition, same court, Judge and entry date, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and placed him on probation

for a period of 18 months, unanimously reversed, as a matter of discretion in the interest of justice, without costs, and the petition dismissed.

As the presentment agency concedes, the court's finding as to sexual abuse in the third degree was based on legally insufficient evidence because there was a lack of independent evidence to corroborate appellant's confession (*see* Family Ct Act § 344.2[3]).

The presentment agency also concedes that the sexual abuse case influenced the court's determination to adjudicate appellant a juvenile delinquent in the stolen property case rather than granting an adjournment in contemplation of dismissal, and it therefore requests a remand for a new dispositional hearing. However, since the period of probation has now expired, we instead exercise our interest of justice jurisdiction to dismiss the petition.

In view of these determinations, we find it unnecessary to address appellant's remaining arguments.

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

ENTERED: JANUARY 21, 2014

CLERK

CORRECTED ORDER - JANUARY 23, 2014

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11515 The People of the State of New York, Respondent,

Ind. **4105/10**

-against-

Elisiel Rivera,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J. at plea; Rena K. Uviller J. at sentencing), rendered on or about March 10, 2011,

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: JANUARY 21, 2014

CLERK

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

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11516-
11517 Daisy Echevarria,
Plaintiff-Respondent,

Index 15891/02
83512/03
83809/12

-against-

158th St. Riverside Drive Housing Co., Inc., et al.,
Defendants-Appellants.

- - - - -

158th St. Riverside Drive Housing Co., Inc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Edwin Gould Foundation For Children,
Third-Party Defendant-Respondent.

- - - - -

[And a Second Third-Party Action]

_____

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellants.

Michelstein & Associates PLLC, New York (Peter P. Ferraiuolo of counsel), for Daisy Echevarria, respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for Edwin Gould Services For Children and Families, sued herein as Edwin Gould Foundation For Children, respondent.

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Orders, Supreme Court, Bronx County (John Barone, J.), both entered November 29, 2012, which, respectively, granted the motion of third-party defendant Edwin Gould Services for Children and Families (Gould Services), s/h/a Edwin Gould Foundation for

Children (Gould Foundation), for summary judgment dismissing the third-party claims against it, and denied defendants-third-party plaintiffs' (Riverside) motion for summary judgment dismissing the complaint and denied as moot Riverside's motion for summary judgment declaring that Gould Foundation is contractually obligated to indemnify Riverside, unanimously affirmed, without costs.

The motion court properly denied Riverside's motion for summary judgment dismissing the complaint against it. Plaintiff, an employee of Gould Services, who leased the unit at issue from a nonparty to these two actions, alleged that she injured herself while repairing a crack in a terrace door when a gust of wind blew the door closed, causing the door to shut, and the cracked piece to hit her and knock her off of a stool. Riverside, the owner of the building, failed to eliminate any triable issue whether it had a duty, pursuant to an occupancy agreement, to repair the door. The occupancy agreement required Riverside to repair "partitions," and Riverside presented no evidence to eliminate any triable issue whether a door is a partition. Furthermore, "[p]arties to a contract are able to alter or waive portions of an agreement by their course of conduct (*see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 11 [1st Dept

2009]); the evidence that Riverside had previously made repairs to that unit, including the same door, suggests that any provision in the occupancy agreement requiring the unit owner to repair the door might have been modified by the parties' subsequent course of conduct.

Triable issues of fact also exist whether Riverside had actual or constructive notice of the defective door, as plaintiff testified she and her supervisor had notified Riverside's building maintenance men and security guard of the crack in the door roughly one month earlier and shortly before the incident at issue (*see Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]).

Riverside failed to eliminate triable issues of fact whether plaintiff's actions in climbing on the stepstool, as well as the gust of wind that blew the door shut, were supervening causes of her injuries. Plaintiff testified that the cracked piece of the door came loose and hit her as she tried to repair the door, at least arguably a foreseeable consequence of an alleged failure to repair a crack in the door (*see Devoy v 1110/1130 Stadium Owners Corp.*, 270 AD2d 131 [1st Dept 2000]).

The motion court properly granted third-party defendant Gould Services' motion for summary judgment dismissing

Riverside's third-party complaint. Workers' Compensation Law § 11 prohibits most third-party claims for indemnification against an employer for injuries sustained by an employee acting within the scope of employment, except when the employee has sustained a "grave injury," or when there is a "written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to . . . indemnification of the claimant" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 367 [2005]).

Riverside does not dispute that there was no grave injury, or that Gould Services was plaintiff's employer. Rather, Riverside relies on the indemnification agreement in the occupancy agreement between it and the Gould Foundation. Riverside presented no evidence whether the occupancy agreement, entered into in 1964, was still in effect at the time of the incident in December 1999. In any case, Gould Services was not a party to that agreement. Riverside does not allege any other agreement between Gould Services and Riverside, and thus, the motion court correctly held that Gould Services was under no contractual obligation to indemnify Riverside. Although Riverside maintains that it sued Gould Foundation, not Gould Services, Riverside never raised any formal objection and instead

retained Gould Services' answer and proceeded to litigate the matter against Gould Services (*see Glass v Captain Hulbert House, LLC,* 103 AD3d 607, 608-609 [2d Dept 2013]; *see* CPLR 3024).

Finally, Riverside's notice to admit requested that Gould Services admit that Gould Foundation agreed to maintain and repair the door at issue, and that Gould Foundation contractually agreed to indemnify Riverside pursuant to the occupancy agreement. As both were contested issues and ultimate facts in the case, Riverside was not entitled to have those issues deemed admitted (*Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6, 6 [1st Dept 2000]).

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

ENTERED: JANUARY 21, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11518 Muriel Lavyne, Index 117182/08
Plaintiff-Respondent,

-against-

MTA/New York City Transit Authority, et al.,
Defendants-Appellants,

Sattur Mohamed,
Defendant.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Donna Mills, J.), entered on or about June 6, 2013,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated December 9, 2013,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JANUARY 21, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11520 Yuliana Hernandez, Index 308475/10
Plaintiff-Respondent,

-against-

21 Realty Co., et al.,
Defendants-Appellants.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Tracy P. Hoskinson of counsel), for appellants.

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered December 24, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants' motion was properly denied in this action where plaintiff was injured when she slipped on an accumulation of water and fell in the bathroom of her apartment in a building owned and managed by defendants. The water that caused plaintiff's fall came from a leak in the bathroom ceiling. The record shows that issues exist as to whether defendants had notice of the leak in the ceiling. Defendants failed to demonstrate that they owed no duty to plaintiff. Moreover, the conflicting expert affidavits, as well as plaintiff's deposition

testimony as to the manner in which she fell, raise issues that are inappropriate for summary judgment (*see e.g. Bradley v Soundview Healthcenter*, 4 AD3d 194 [1st Dept 2004]).

The court also properly determined that issues remain as to the applicability of the doctrine of res ipsa loquitur, including whether the leaking ceiling causing an accumulation of water on the bathroom floor was in the exclusive control of defendants (*see Mejia v New York City Tr. Auth.*, 291 AD2d 225, 227 [1st Dept 2002]). Furthermore, the court properly considered the tax returns submitted in opposition to defendants' motion as some support for plaintiff's claim of lost wages.

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

ENTERED: JANUARY 21, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11521 Alexander Pereira, Index 17575/97
Plaintiff-Appellant,

-against-

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

_____

John De Chiaro, Larchmont, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered September 13, 2011, which denied plaintiff's motion to set aside a jury verdict in favor of defendants, and to direct judgment in plaintiff's favor, or, in the alternative, for a new trial on the ground that the verdict was against the weight of the evidence, unanimously affirmed, without costs.

This case arises from an incident in which defendant John Salvato, an off-duty detective, fired multiple shots at a vehicle driven by plaintiff. Several rounds hit the vehicle, although none struck plaintiff, who was physically unharmed.

The jury's verdict that Salvato did not violate New York City Police Department (NYPD) Patrol Guidelines by discharging his weapon at plaintiff was not against the weight of the

evidence (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]). Contrary to plaintiff's contentions, Salvato never admitted that he violated the Guidelines. Moreover, in light of the consistent testimony of the three individual defendants that two shots were fired immediately before plaintiff's vehicle sped towards Salvato, nearly running him down, there was ample basis for the jury to find that Salvato was faced with, or reasonably thought he was faced with, gunfire, warranting a response with deadly physical force (*see Johnson v City of New York*, 15 NY3d 676, 681 [2010]). The fact that the Firearm Discharge Review Board determined that Salvato had violated NYPD firearm guidelines does not, in and of itself, serve as a predicate for liability in this negligence action (*see Blackwood v New York City Tr. Auth.*, 36 AD3d 522 [1st Dept 2007]).

Since the post trial motion to set aside the verdict plainly lacked merit, we need not decide whether the trial judge's assignment to another borough justified reassignment of the motion.

The trial court providently exercised its discretion in denying plaintiff's motion for a mistrial (*see Heraud v Weissman*, 276 AD2d 376, 377 [1st Dept 2000], *lv denied* 96 NY2d 705 [2001]).

Defendants' counsel had an evidentiary basis to ask plaintiff if he was associated with another person at the scene who had allegedly stolen a radio from the car of defendant Conway. Plaintiff's argument that the trial court erred in redacting a provision from the Patrol Guidelines regarding moving vehicles, is unpreserved. Were we to consider this argument, we would find it unavailing.

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

ENTERED: JANUARY 21, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11523 The People of the State of New York, Ind. 698/08
Respondent,

-against-

Charles Santana,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Seth Rosenbloom of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered June 25, 2010, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 20 years, unanimously affirmed.

Defendant did not preserve his present challenges to a detective's testimony concerning statements made by a nontestifying declarant, and we decline to review them in the interest of justice. First, defendant acquiesced when it became clear that, despite detailed warnings by the court and prosecutor, the jointly tried codefendant was opening the door to this testimony. To the extent that defendant ultimately objected

to the prosecutor's redirect examination concerning the declarant, defendant again acquiesced when the court and prosecutor fashioned a remedy that limited this testimony. Defendant never gave the court any clear indication that this relief was inadequate. In any event, any specific objection actually made by defendant was grounded in state evidentiary law, and thus failed to preserve a Confrontation Clause claim (*see People v Kello*, 96 NY2d 740, 743-744 [2001]; *People v Maher*, 89 NY2d 456, 462-463 [1997]). We also note that while defendant emphasizes that any door-opening was done not by him but by the codefendant, defendant never moved, before or during trial, for a severance on the ground that he might be prejudiced by his codefendant's strategy.

As an alternative holding, we reject, on the merits, defendant's Confrontation Clause and hearsay arguments concerning the challenged testimony. The detective's testimony was admissible for the legitimate nonhearsay purposes of explaining the police investigation in the context of issues raised at trial (*see Tennessee v Street*, 471 US 409 [1985]; *People v Tosca*, 98 NY2d 660 [2002]; *People v Rivera*, 96 NY2d 749 [2001]), and for the related reason that the codefendant unequivocally opened the door to such testimony (*see People v Reid*, 19 NY3d 382 [2012]).

In any event, any error in receiving the challenged testimony was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's challenges to the prosecutor's summation and to the court's limitations on cross-examination, including his constitutional claims, are likewise unpreserved, and defendant's arguments on the subject of preservation are without merit. We decline to review these challenges in the interest of justice. As an alternative holding, we reject them on the merits. We likewise find that any errors regarding these matters were harmless.

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

ENTERED: JANUARY 21, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11524- Index 602335/09
11525N-
11526N-
11527N-
11528N Alexander Gliklad,
Plaintiff-Respondent,

-against-

Michael Cherney,
Defendant-Appellant.

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Friedman Kaplan Seiler & Adelman LLP, New York (Philippe Adler of counsel), and Frankfurt Kurnit Klein & Selz, P.C., New York (Brian E. Maas of counsel), for appellant.

Winston & Strawn LLP, New York (W. Gordon Dobie of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered February 3, 2012, which, inter alia, granted plaintiff's motion to compel the production of certain documents pursuant to CPLR 3124 and 3126, unanimously affirmed, with costs. Order, same court and Justice, entered July 19, 2012, which, inter alia, granted plaintiff's motion to strike defendant's first affirmative defense and first counterclaim seeking reformation of the promissory note to reflect plaintiff as the borrower, unanimously affirmed, with costs. Order, same court and Justice, entered March 25, 2013, which, inter alia, denied

defendant's motion to renew plaintiff's motion to strike the first affirmative defense and first counterclaim, unanimously affirmed, with costs. Order, same court and Justice, entered August 20, 2013, which granted plaintiff's motion to strike defendant's ninth affirmative defense asserting a lack of consideration for the promissory note, unanimously affirmed, with costs. Order, same court and Justice, entered April 25, 2013, which denied defendant's motion for summary judgment based on lack of personal jurisdiction, and granted plaintiff's cross motion for summary judgment on the issue on personal jurisdiction, unanimously affirmed, with costs.

In a prior appeal, we held that the promissory note contained a clause selecting New York as the forum (97 AD3d 401, 402 [1st Dept 2012]). The motion court correctly found that this ruling constituted law of the case, since defendant had a full and fair opportunity to litigate the issue in the prior appeal. The expert witness evidence that defendant proffered following that appeal in support of his claim that the note contained only a choice of law clause does not constitute "subsequent" or "new" evidence that was previously unavailable for the purpose of avoiding the law of the case doctrine (*see Carmona v Mathisson*, 92 AD3d 492, 492-493 [1st Dept 2012]; *Clark Constr. Corp. v BLF*

Realty Holding Corp., 54 AD3d 604 [1st Dept 2008]). Given the binding ruling as to the forum selection clause, the court correctly found that defendant was barred from asserting a defense based on lack of jurisdiction.

The court's finding that defendant's conduct in connection with certain discovery requests was willful and contumacious is supported by the record; thus, the court properly imposed the discovery sanction of striking defendant's first counterclaim and his first and ninth affirmative defenses as a result of that conduct (*see Matter of Lawrence*, 106 AD3d 607, 610 [1st Dept 2013]).

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

ENTERED: JANUARY 21, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, DeGrasse, Gische, JJ.

10958 Graham Court Owner's Corp., Index 70520/07
Petitioner-Respondent, 570661/10

-against-

Kyle Taylor,
Respondent-Appellant.

_____

Bierman & Palitz LLP, New York (Mark H. Bierman of counsel), for appellant.

Kucker & Bruh, LLP, New York (Nativ Winiarsky of counsel), for respondent.

_____

Order of the Appellate Term, First Department, entered March 1, 2012, modified, on the law, respondent's claim for attorneys' fees pursuant to Real Property Law § 234 granted, and the matter remanded to Civil Court for a hearing to determine the amount of the fees, and otherwise affirmed, without costs.

Opinion by Renwick, J. All concur except Sweeny, J.P., and DeGrasse, J. who dissent in an Opinion by DeGrasse, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Dianne T. Renwick
Karla Moskowitz
Leland G. DeGrasse
Judith J. Gische, JJ.

10958
Index 70520/10
570661/10

_____x

Graham Court Owner's Corp.,
Petitioner-Respondent,

-against-

Kyle Taylor,
Respondent-Appellant.

_____x

Respondent appeals from the order of the Appellate Term, First Department, entered March 1, 2012, which, to the extent appealed from as limited by the briefs, modified an order of the Civil Court, New York County (Jean T. Schneider, J.), entered on or about July 26, 2010, granting respondent's claim for attorneys' fees under Real Property Law § 223-b and denying respondent's claim for attorneys' fees under Real Property Law § 234, to deny respondent's claim for attorneys' fees under Real Property Law § 223-b.

Bierman & Palitz LLP, New York (Mark H. Bierman of counsel), for appellant.

Kucker & Bruh, LLP, New York (Nativ Winiarsky and Patrick K. Munson of counsel), for respondent.

RENWICK J.

This appeal concerns a tenant, respondent Kyle Taylor, who successfully defended a holdover proceeding commenced by petitioner, Graham Court Owner's Corp., in which the landlord sought to recover the leasehold on the ground that the tenant breached the lease by making unauthorized alterations to the premises. After a nonjury trial, Civil Court dismissed the holdover proceeding and awarded the tenant attorneys' fees pursuant to Real Property Law § 223-b, based upon a finding that this proceeding was retaliatory in nature. The Appellate Term, however, reversed the award of attorneys' fees, but otherwise affirmed. It also rejected the tenant's alternative claim that he is entitled to attorneys' fees pursuant to Real Property Law § 234. We disagree with that view, and modify the order of the Appellate Term, taking this opportunity to examine and reconcile an apparent conflict within this Department with respect to whether a similarly worded lease provision, which permits a landlord to recover attorneys' fees for re-renting an apartment after prevailing in a holdover proceeding, is adequate to invoke the reciprocal mandate of Real Property Law § 234.

The history of this landlord-tenant relationship had an unauspicious start. In May 2004, the tenant and landlord entered into a rental lease for $2,200 a month, for an unregulated

apartment in Manhattan. In October 2005, however, the tenant filed a rent overcharge complaint with the New York State Division of Housing and Community Renewal (DHCR), claiming that his $2,200 rent was an overcharge because he was never made aware that the apartment was subject to the Rent Stabilization Law and Code when he took occupancy. In opposition, the landlord claimed that the apartment had become deregulated because $60,000 in renovations were performed to the apartment before the tenant took occupancy. In response, the tenant submitted proof that he -- not the landlord -- performed renovation work at the apartment.[1] In January 2007, DHCR found that there had been an overcharge and that the apartment remained rent-regulated. Supreme Court dismissed the landlord's Article 78 petition challenging DHCR's determination, and this Court affirmed the dismissal.[2]

The travails between the tenant and the landlord did not end

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[1] The work consisted mostly of electrical work in the kitchen, including replacing wiring, switches, outlets, a distribution panel, ceiling fixtures, and under-counter lighting.

[2] This Court found that since DHCR had rejected the landlord's documentation for the claimed improvements, some of which, such as painting, plastering and floor maintenance, did not in any event constitute improvements, the landlord failed to carry its burden of establishing entitlement to a major capital improvement increase (*Graham Court Owners Corp. v Division of Hous. & Community Renewal*, 71 AD3d 515 [1st Dept 2010]).

there. Subsequently, the landlord accused the tenant of making unauthorized alterations to the apartment. Under paragraph 7 of the lease, the tenant is permitted to make alterations only after obtaining the landlord's "prior written consent." Paragraph 15 of the lease contains detailed provisions regarding the landlord's remedies in the event of the tenant's default. In pertinent part, that paragraph provides:

> "A. Landlord must give Tenant written notice of default stating the type of default. The following are defaults and must be cured by Tenant within the time stated:
> ...
>
> "IV Failure to comply with any other term or Rule in the Lease, 10 days.
>
> "If Tenant fails to cure the default in the time stated, Landlord may cancel the Lease by giving Tenant a cancellation notice .... Tenant continues to be responsible as stated in this Lease.
> ...
>
> "C. If (1) the Lease is cancelled, ... Landlord may, in addition to other remedies, take any of the following steps: (a) peacefully enter the Apartment and remove Tenant and any person or property, and (b) use eviction or other lawsuit method to take back the Apartment.
>
> "D. If this Lease is cancelled, or Landlord takes back the Apartment, the following takes place:

> "(1) Rent and added rent for the unexpired Term is due and payable.[3]
>
> "(2) Landlord may relet the Apartment and anything in it ... Tenant stays liable and is not released except as provided by law.
>
> "(3) Any rent received by Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amounts Tenant owes under this Lease. Landlord's expenses include the costs of getting possession and re-renting the Apartment, including, but not only reasonable legal fees, brokers fees, cleaning and repairing costs, decorating costs and advertising costs."

On March 30, 2007, the landlord served the tenant with a notice to cure, alleging that the tenant violated paragraph 7 of the lease by "installing an entire new electrical system in the kitchen" without the landlord's prior written consent. The notice advised that, in the event of the tenant's failure to cure by April 10, 2007, the landlord would elect to terminate the tenancy in accordance with applicable law. On April 23, 2007, the landlord served a notice of termination of the lease effective May 11, 2007, citing the tenant's failure to cure, and advising the tenant that failure to quit would result in the commencement of appropriate proceedings to recover possession.

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[3] The term "added rent," as set forth in paragraph 15, is defined in paragraph 3 of the lease as "other charges [due] to Landlord under the terms of this Lease" which the tenant "may be required to pay."

On May 14, 2007, the landlord commenced this summary holdover proceeding in Civil Court alleging that the tenant had continued in possession without the landlord's permission beyond the date set forth in the notice of termination. In its petition, the landlord sought, among other things, an award of possession of the premises and "legal fees in the amount of $3,000." The tenant filed an answer asserting a defense of retaliatory eviction under Real Property Law §223-b and counterclaims for attorneys' fees and damages. With respect to the alleged alterations to the apartment, the tenant claimed that the "performance or installation of the alleged work described in the petition [did] not violate the lease between the parties" and that such work "was performed to remedy hazardous conditions existing in the subject premises."

At the nonjury trial, the tenant testified that in April 2004, he went to the office of the landlord and discussed with the landlord's principal, Frankel, electrical improvements that would have to be made in order for him to take the apartment. Frankel told the tenant that he could go into the apartment before the lease began and perform the agreed upon work.[4] The

[4] Frankel, however, testified, inter alia, that he never gave the tenant prior approval to perform electrical work at the apartment.

superintendent gave the tenant access to the apartment before the lease commencement date in May 2004. The tenant had an electrician perform the work, leaving the original wiring in the walls and running new wires and installing new switches and outlets on the outside of the walls.

In May 2004, the tenant wrote to the landlord that the work was completed. The tenant enclosed the electrical bill invoices and requested reimbursement and a five year lease extension. In response, on June 9, 2004, a landlord's officer, Becker, came to the apartment and verified the electrical work had been done. Becker told the tenant that he would not be reimbursed but that the landlord would agree to extend the lease to a three-year term.

In a July 2010 order, Civil Court dismissed the holdover proceeding. The court found that since the landlord's agents had specifically authorized the tenant to make the alterations, he had not breached the lease by making those alterations. The court found the tenant's testimony in this regard credible, and it disregarded as "entirely incredible" the testimony of Frankel, who "lied repeatedly and obviously" at trial. The court further found that the landlord had commenced the instant proceeding in retaliation for the tenant's successful rent overcharge claim. Finally, the court found that, "[a]lthough [the landlord]

correctly points out that the attorneys' fee clause in the lease between these parties is not enforceable under current case law, [the tenant] is entitled to collect his attorneys' fees as part of his damages for retaliatory eviction."

The landlord appealed to the Appellate Term insofar as Civil Court dismissed the proceeding and awarded attorneys' fees to the tenant under Real Property Law § 223-b(5). The tenant cross-appealed from that portion of the order dismissing his claims for attorneys' fees pursuant to Real Property Law § 234 and compensatory damages for "mental anguish" and other emotional injuries pursuant to Real Property Law § 223-b(5). The Appellate Term modified the order of Civil Court to the extent of denying the tenant attorneys' fees under RPL § 223-b, and otherwise affirmed. The Appellate Term found that the landlord was estopped from enforcing the "no alterations provision" of the lease, based upon the tenant's persuasive showing that the landlord's authorized agents expressly consented to the electrical work and the evidence that the landlord, in connection with prior proceedings before DHCR, falsely asserted that its own contractors had effectuated the electrical work. The court added, "We note that the above-cited provision does not meet the requirement that a statute expressly authorize an award of attorneys' fees." Finally, the court found that the arguments

raised by the tenant in his cross appeal were lacking in merit. This Court granted leave to the tenant, who appeals solely from the denial of attorneys' fees.

We now find that, having prevailed in his defense of the landlord's holdover proceeding, the tenant is entitled to recover attorneys' fees pursuant to Real Property Law § 234. That section states that when a lease provides for a landlord's recovery of attorneys' fees resulting from a tenant's failure to perform any covenant under a lease, a reciprocal covenant "shall be implied" for the landlord to pay attorneys' fees incurred as a result of either its failure to perform a covenant under the lease or a tenant's successful defense:

> "Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease."

The overriding purpose of the statute is to provide a level playing field between landlords and tenants, by creating a mutual obligation that is an incentive to resolve disputes quickly and

without undue expense (*Duell v Condon*, 84 NY2d 773, 780 [1995]). As a remedial statute, Real Property Law § 234 should be accorded its broadest protective meaning consistent with legislative intent (*see Marsh v 300 West 106th St. Corp.*, 95 AD3d 560 [1st Dept 2012]; *245 Realty Assocs. v Sussis*, 243 AD2d 29 [1st Dept 1998]). The outcome of any claim pursuant to Real Property Law § 234 depends upon an analysis of the specific language of the lease provision at issue in each case to discern its meaning and import *(see Matter of Casamento v Juaregui*, 88 AD3d 345, 346 [2d Dept 2011]).

In this case, as indicated, the landlord began a holdover proceeding pursuant to subparagraph 15 of the lease, predicated upon the factual allegations that the tenant performed unauthorized alterations in the apartment and then failed to cure this default. Specifically, subparagraph 15(A)(5) recites that, if the tenant fails to cure the default in the time stated, the landlord may cancel the lease and the tenant "continues to be responsible as stated in this Lease." Under subparagraph 15(C)(1)(b), if the lease is cancelled, the landlord "may, in addition to other remedies . . . use eviction or other lawsuit method to take back the Apartment." Under subparagraph 15(D)(1), if the landlord "takes back the Apartment, . . . [r]ent and added rent for the unexpired Term is due and payable." The term "added

rent" is defined in paragraph 3 as "other charges to Landlord under the terms of this Lease" which the tenant "may be required to pay." Further, under subparagraph 15(D)(2), if the lease is cancelled, the landlord "may relet the Apartment" and the tenant "stays liable and is not released except as provided by law." Finally, under subparagraph 15(D)(3), "[a]ny rent received by Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amounts Tenant owes under this Lease. Landlord's expenses include the costs of getting possession and re-renting the Apartment, including, but not only reasonable legal fees."

We interpret the remedial scheme of Paragraph 15 to permit the landlord, in the event of a lease default by the tenant, to cancel the lease and regain possession of the premises via the means of a summary holdover proceeding, and then recoup the attorneys' fee incurred in the litigation by re-renting the premises. Any new rent received by the landlord after re-renting the apartment would be used first to pay the "Landlord's expenses," including "reasonable legal fees." Paragraph 15, thus, literally fits within the language of Real Property Law § 234, since it does "provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to

perform any covenant or agreement contained in such lease" *(see Smith v IG Second Generation Partners, L.P.*, 27 AD3d 265 [1st Dept 2006]).

The dissent, however, argues that Real Property Law § 234 is inapplicable because the "language [,] attorneys' fees [as subsumed in the term 'Landlord expenses'] merely provides for the offset of rents collected in the event of a reletting." We reject the dissent's suggestion that the attorneys' fees scheme falls outside the ambit of Real Property Law § 234 because the landlord can only recover the attorneys' fees indirectly through re-renting. We find such limitations of the award of attorneys' fees of no moment as to whether the clause triggers the reciprocal mandate of Real Property Law § 234.

To be sure, an attorneys' fees clause in a lease may be narrowly tailored to permit fees only under certain circumstances, or for particular types of proceedings. Awards of fees under such provisions should be limited to the situations for which they are provided under the lease. This is true whether the landlord is seeking fees, or whether the tenant is seeking fees pursuant to the reciprocal right to fees under Real Property Law § 234. In such context, what is significant for purposes of Real Property Law § 234 is whether the landlord's right to attorneys' fees is triggered by the tenant's failure to

perform a covenant in the lease (*see Duell*, 84 NY2d at 773 [since eviction based upon nonprimary residence implicated a lease provision requiring the tenant to vacate upon the expiration or termination of the lease, the tenants were entitled to fees]).

In this case, the dissent cannot seriously dispute that the subject lease provision, Paragraph 15, would be triggered by a breach of the lease covenants. Nor can it be disputed that, had the landlord prevailed in the instant holdover proceeding, it would have been entitled to get possession and re-rent the apartment, and thereby collect its costs, including, but not limited, to reasonable legal fees pursuant to subparagraph 15(D)(3). Indeed, the landlord itself reads this provision as including the right to recover legal fees within the costs of the holdover proceeding as demonstrated by the landlord's inclusion of the relief of attorneys' fees in its petition.

Our interpretation of the remedial scheme of Paragraph 15, as triggering the reciprocal mandate of section 234, is supported by our holding in *Bunny Realty v Miller* (180 AD2d 460 [1st Dept 1992]). In that case, this Court held that Real Property Law § 234 applied to a lease provision establishing, like here, that upon the cancellation of the lease, any new rent received by the landlord after re-renting the apartment "shall be used first to pay the Landlord's expenses," including "reasonable legal fees"

(*id.* at 462). In *Bunny Realty*, the landlord initiated a nonpayment proceeding after the tenant began withholding rent in an attempt to force the landlord to perform mandated services. After a nonjury trial, Civil Court held in favor of the tenant and awarded abatement of rent and attorneys' fees. The relevant portion of the lease provision at issue was as follows:

> "Any rents received by the Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amount Tenant owes under this lease. Landlord's expenses include the cost of getting possession and re-renting the Apartment, including, but not only reasonable legal fees, brokers fees, cleaning and repairing costs, decorating costs and advertising costs" (*id.*).

This Court reversed the order of the Appellate Term, First Department, which denied the tenant's application for an award of attorneys' fees, reasoning, in pertinent part:

> "Thus, while the subject lease clearly permits the landlord to recover legal fees for obtaining possession of the apartment, the Appellate Term has interpreted the section to mean that because it does not specifically contain the words 'due to the tenant's default,' it somehow limits the latter's reciprocal rights thereunder. Yet, this clause is sufficiently broad to allow the landlord to procure counsel fees for any reason, including breach of lease, so long as the ultimate result would be to take possession or re-rent the apartment. Acceptance of the Appellate Term's argument in this respect would enable, if not encourage, landlords to undermine entirely the effectiveness of Real Property Law 234 through artful draftsmanship" (id. at 462–463).

More recently, in *Casamento* (88 AD3d 345 [2011]), the Second

Department held that the same paragraph as the one in the lease at issue here (denominated Paragraph 16 in the lease at issue in *Casamento*) triggered Real Property Law § 234. The Second Department found that this Court's "reasoning in *Bunny Realty* is persuasive and perhaps even more forcefully salient to the case before us than it was to the facts presented there" (*id.* at 346). As *Casamento* explained: "Unlike the Appellate Term's interpretation of the lease provision in *Bunny Realty*, here, Paragraph 16 specifically covers an attorney's fee incurred by a landlord due to the tenant's default" (*id.*). Specifically, the landlord in *Casamento*, like the landlord in this case, was "authorized to cancel the lease due to the tenant's default and, upon cancellation, may institute a summary proceeding to repossess" (*id.*). Thus, the *Casamento* Court stated, "The landlord . . . may recoup the attorneys' fees incurred in the litigation by re-renting, in the same manner as the quoted portion of the lease provision in Bunny Realty" (*id.* at 346).

The Second Department's analysis of Paragraph 16 of the lease in *Casamento* is consistent with our analysis of the similar paragraph (Paragraph 15) of the lease at issue in this case, as explained above. Furthermore, we concur with the Second Department's conclusion: "To deny the tenant's motion pursuant to [Real Property Law] 234 simply because [Paragraph 15] does not

include a more direct method for the landlord's recovery of his attorneys' fees would be only to reward 'artful draftsmanship' and undermine the salutary purpose of section 234" (*id.* at 357 quoting *Bunny Realty,* 180 AD2d at 463).

Indeed, as particularly relevant in this case, where the landlord was found to have engaged in improper retaliation, a contrary conclusion based on the dissent's narrow construction of Real Property Law § 234 would undermine one of the key purposes of Real Property Law § 234. As the Court of Appeals stated in *Duell v Condon* (84 NY2d at 780), "[a]n additional purpose of [section 234] is to discourage landlords from engaging in frivolous litigation in an effort to harass tenants, particularly tenants without the resources to resist legal action, into terminating legal occupancy."

Here, the landlord makes no attempt to distinguish *Bunny Realty* and *Casamento*. Instead, the landlord contends that two recent decisions from this Court (i.e., *Oxford Towers Co., LLC v Wagner*, 58 AD3d 422 [1st Dept 2009], and *Madison-68 Corp. v Malpass*, 65 AD3d 445 [1st Dept 2009]), overruled *Bunny Realty*. Neither case, however, cites *Bunny Realty*. More importantly, *Oxford Towers*, which denied a tenant an award of attorneys' fees, is distinguishable. As this Court noted in *Oxford Towers*, "the action arises out of the 1995 agreement, not the lease" and, the

tenants incurred the attorney's fee in their successful defense of the landlord's cause of action to rescind the 1995 agreement (*Oxford Towers*, 58 AD3d at 423). Thus, the attorneys' fees provision was not triggered by a breach of the lease. Under the circumstances, as pointed out by the Second Department in *Casamento*, the statement in *Oxford Towers* that the lease provision at issue was "not the type of provision covered by Real Property Law § 234 cannot be construed literally to hold that any lease provision containing the language quoted in the First Department's decision and order in *Oxford Towers* is, as a matter of law, insufficient to trigger the implied covenant under section 234" (*Casamento,* 88 AD3d at 347). We concur with the Second Department that, "[t]o the extent that the phrase can be so interpreted, it constitutes dicta which we decline to follow" (*id.*).

The second case relied upon by the landlord, *Madison-68,* is equally unavailing. In *Madison-68*, this Court tersely stated that "it was error for the JHO to determine that [the tenants] were entitled to an award of attorneys' fees" and that "[i]n *Oxford Towers* . . ., this Court held that an identical lease provision was not covered by Real Property Law § 234" (*Madison-68*, 65 AD3d at 445). However, while it appears that the Court in *Madison-68* considered a lease provision identical to

that in *Oxford Towers*, which, in turn, contained some language similar to the portion of the lease provision quoted in *Bunny Realty*, the Court did not expressly overrule *Bunny Realty* or even cite it.

More importantly, to the extent *Madison-68* relies exclusively upon the aforementioned dicta in *Oxford Towers*, this Court's holding in *Madison-68* has limited precedential value. Indeed, more recently, in *Katz Park Ave. Corp. v Jagger* (98 AD3d 921 [1st Dept 2012]), this Court, in granting attorneys' fees to a landlord, distinguished *Oxford Towers* on the ground that, "[i]n that case, we denied attorneys' fees where the agreement was not a lease and the landlord sought rescission of that agreement" (*id.* at 921-922). Moreover, in support, this Court in *Katz Park Ave.* cited approvingly to *Casamento*, which, as explained above, rejects the dicta in *Oxford Towers* upon which *Madison-68* relies (*id.*).

In short, "while judicial interpretation of similarly worded lease provisions has a long and variegated history" (*354 E. 66th St. Realty Corp. v Curry*, 40 Misc 3d 20, 21 [App Term, 1st Dept 2013], citing *Casamento v Juaregui,* 88 AD3d at 362), we now hold explicitly what was implicit in *Katz Park Ave.* That is, we concur with the Second Department in holding that the type of

lease clause at issue here is sufficient "to trigger the implied covenant in the tenant's favor pursuant to [Real Property Law §] 234" (*Casamento*, 88 AD3d at 362). In view of this determination, we see no need to address the tenant's alternative contention that he is entitled to an award of attorneys' fees pursuant to Real Property Law § 223-b.

Accordingly, the order of the Appellate Term, First Department, entered March 1, 2012, which, to the extent appealed from as limited by the briefs, modified an order of the Civil Court, New York County (Jean T. Schneider, J.), entered on or about July 26, 2010, dismissing respondent's claim for attorneys' fees pursuant to Real Property Law § 234, and granting respondent's claim for attorney's fees under Real Property Law § 223-b, to dismiss the claim for attorneys' fee under Real Property Law § 223-b, should be modified, on the law, to grant respondent's claim for attorneys' fees pursuant to Real Property Law § 234, the matter remanded to Civil Court for a hearing to determine the amount of the fees, and otherwise affirmed, without costs.

All concur except Sweeny J.P., and DeGrasse J. who dissent in an Opinion by DeGrasse J.

DEGRASSE, J. (dissenting)

> "Legislative enactments in derogation of common law, and especially those creating liability where none previously existed, must be strictly construed" (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]).

On the basis of this bedrock principle of statutory construction, I dissent because, in my view, the lease that is before this Court provides no predicate for the reciprocal attorneys' fee provision under Real Property Law § 234.

After conducting a nonjury trial, Civil Court ruled in favor of tenant to the extent of dismissing the instant holdover petition, found tenant to be entitled to an award of attorneys' fees under Real Property Law § 223-b but dismissed tenant's claim for attorneys' fees under Real Property Law § 234. The Appellate Term modified the Housing Court's order to the extent of vacating the determination that tenant was entitled to an award of attorneys' fees pursuant to Real Property Law § 223-b. The issue on this appeal is whether attorneys' fees are recoverable under either section of the statute.

Real Property Law § 234 enables tenants who prevail in landlord-tenant disputes to recover attorneys' fees where their leases provide for such recovery by their landlords. The section

provides:

> "Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy."

Therefore, under the reciprocal provisions of Real Property Law § 234, a tenant may recover attorneys' fees only where the lease provides for the landlord's recovery of such fees (a) in an action or special proceeding or (b) as additional rent. Neither situation is present here. Instead, the parties' lease provides, in pertinent part:

> "15(D) If this Lease is canceled, or Landlord takes back the Apartment, the following takes place:

> "(1) Rent and added rent for the unexpired Term is due and payable.
>
> "(2) Landlord may relet the Apartment and anything in it. The reletting may be for any term. Landlord may charge any rent or no rent and give allowances to the new tenant. Landlord may, at Tenant's expense, do any work Landlord reasonably feels needed to put the Apartment in good repair and prepare it for renting. Tenant stays liable and is not released except as provided by law.
>
> "(3) Any rent received by Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amounts Tenant owes under this Lease. *Landlord's expenses include the costs of getting possession and re-renting the Apartment, including, but not only reasonable legal fees, brokers fees, cleaning and repairing costs, decorating costs and advertising costs* [emphasis added]."

Nothing in the above lease provision provides for tenant's payment of attorneys' fees. The language merely provides for an offset of rents collected in the event of a reletting. Therefore, Real Property Law § 234 is inapplicable.

The majority relies on *Bunny Realty v Miller* (180 AD2d 460 [1st Dept 1992]), in which this Court found that Real Property Law § 234 was applicable, reasoning that a similar reletting expenses provision was "sufficiently broad to allow the landlord to procure counsel fees for any reason, including breach of lease, so long as the ultimate result would be to take possession or re-rent the apartment" (*id.* at 462-463, *see Casamento v*

Juaregui, 88 AD3d 345, 356 [2nd Dept 2011] [quoting this portion of *Bunny Realty*]).

At common law, attorneys' fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule (see *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). After *Bunny Realty* was handed down, the Court of Appeals decided *Gottlieb v Kenneth D. Laub & Co.* (82 NY2d 457 [1993]) where it held that a statute providing for an award of attorneys' fees should be narrowly construed in light of New York's adherence to the common-law rule disfavoring any award of attorneys' fees to a prevailing party in litigation (*id.* at 464-465, *citing* McKinney's Cons Laws of NY, Book 1, Statutes § 301 [a]).

> "'The common law is never abrogated by implication, but on the contrary it must be held no further changed than the clear import of the language used in a statute absolutely requires'" (*Gottlieb*, 82 NY2d at 465, *quoting* McKinney's Cons Laws of NY, Book 1, Statutes § 301 [b]).

Because the lease in question does not provide for an award of attorneys' fees, I submit that the majority's interpretation of Real Property Law § 234 as well as our decision in *Bunny Realty* cannot be reconciled with the strict construction standard articulated by the Court in *Gottlieb*. As the majority correctly

notes, Real Property Law § 234 is a remedial statute and such statutes are generally construed liberally. However, where, as in this case, "[r]emedial statutes create liability not otherwise existing, or increase common law liability, the rule of liberal construction does not apply, but on the contrary the statute must be followed with strictness" (McKinney's Cons Laws of NY, Book 1, Statutes § 321).

In *Matter of Duell v Condon* (84 NY2d 773 [1995]), the Court stated:

> "The overriding purpose of Real Property Law § 234 was to level the playing field between landlords and residential tenants, creating a mutual obligation that provides an incentive to resolve disputes quickly and without undue expense. The statute thus grants to the tenant the same benefit the lease imposes in favor of the landlord" (*id.* at 780).

The result reached by the majority enables tenant to recover attorneys' fees by virtue of a determination in his favor. At the same time, there can be no doubt that the language of the lease would not have provided for a similar recovery by landlord if it had prevailed. Within the meaning of *Duell*, the mere possibility of landlord's offset of reletting expenses can hardly be considered the "same benefit" as today's outright award of attorneys' fees to tenant. Today's ruling makes for the mutuality of a "heads, I win; tails, you still don't win" coin toss.

I agree with the Appellate Term that there is no basis for an award of attorneys' fees under Real Property Law § 223-b inasmuch as the statute does not explicitly provide for such relief (*see Campbell v Citibank*, 302 AD2d 150, 154 [1st Dept 2003]). For these reasons, I would affirm the order of the Appellate Term.

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

ENTERED: JANUARY 21, 2014

CLERK