SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 27, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Richter, Clark, JJ.

12326 In re Kameisa Richards, Index 104257/11
Petitioner-Respondent,

-against-

Board of Education of the City School
District of the City of New York, et al.,
Respondents-Appellants.

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Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for appellants.

Richard E. Casagrande, New York (Eric W. Chen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lucy Billings, J.), entered July 5, 2012, to the extent appealed from as limited by the briefs, denying respondents' cross motion to dismiss the petition to annul petitioner teacher's unsatisfactory annual performance rating (U-rating) for the 2009-2010 school year, granting the petition to annul the U-rating, and remanding the proceeding to respondents for a new determination of her rating for that year, unanimously reversed, on the law, without costs, respondents' cross motion granted, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed. The Clerk is directed to enter judgment accordingly.

Petitioner was a probationary teacher who took over a class in the second week of November 2009, during her second year of teaching. The principal issued a year-end U-rating based on facts indicating a lack of progress toward implementing suggestions to improve the teaching and learning environment, along with a view that petitioner inherited a well-managed class without instructional and disciplinary concerns, which deteriorated under petitioner's leadership.

Under the circumstances presented, we find that the court erred in annulling petitioner's U-rating. Petitioner failed to demonstrate that the U-rating was arbitrary and capricious, or made in bad faith. The record shows a rational basis for the conclusion that petitioner's performance was unsatisfactory, as evidenced by the three formal classroom observation reports describing petitioner's poor performance in class management and engagement of students (*see Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]). While petitioner asserts that she did not receive any mandatory pre-observation conferences before any of her classroom observations, she has not established that the U-rating was made in violation of a lawful procedure or substantial right (*see Matter of Cohn v Board of Educ. of City Sch. Dist. of the City of N.Y.*, 102 AD3d 586, 587 [1st Dept 2013]).

Petitioner alleges that she was never provided a curriculum or a professional development plan, that the school's administration did not help her manage the class's continued disciplinary problems, and that no member of the administration modeled lesson plans for her. Notwithstanding, the record established that petitioner received professional support and that she had not sufficiently progressed during the year. Respondents conducted three classroom observations; petitioner received unsatisfactory ratings as to the last two. Each observation report detailed areas of improvement and made specific recommendations for addressing the deficiencies. Further, petitioner was sent to professional development sessions after she received her first unsatisfactory report. Nevertheless, the same instructional deficiencies continued to appear in the following observation report. These results indicated that petitioner had not implemented the recommendations for improvement.

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

ENTERED: MAY 27, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11653 Zachary Towbin, etc., Index 653370/11
Plaintiff-Appellant,

-against-

Robert Towbin, et al.,
Defendants-Respondents.

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Irwin, Lewin, Cohn & Lewin, P.C., New York (Edward Cohn of counsel), for appellant.

McDermott Will & Emery LLP, New York (Andrew B. Kratenstein of counsel), for respondents.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered October 4, 2012, dismissing the complaint with prejudice pursuant to an order, same court and Justice, entered August 23, 2012, which, inter alia, granted defendants' motion to dismiss the complaint with prejudice, unanimously affirmed, with costs.

The theory of the complaint is that in 1996, defendant A. Robert Towbin (the settlor) made a completed gift of the shares and proprietary lease interest appurtenant to his cooperative apartment to a grantor retained income trust (GRIT) of which plaintiff is the successor trustee. A GRIT is an estate planning device that allows a grantor to transfer ownership of an asset while retaining the income derived from or use of the property during the trust term. Plaintiff bases his claims upon an

irrevocable GRIT agreement executed by the settlor, on April 23, 1996. The GRIT agreement recited the settlor's intention to "transfer and deliver" the apartment to the trustees. The 15-year trust term set forth in the agreement expired on April 23, 2011. It is alleged in the complaint that the settlor executed a stock power and an assignment of the proprietary lease at the time he entered into the GRIT agreement.

The proprietary lease contains a lessor's consent provision by which no assignment of the lease can be effective against the cooperative unless (1) a written assignment is approved by and delivered to the cooperative, (2) the assignee agrees, in a form approved by the cooperative, to be bound by the terms of the proprietary lease or executes a new lease at the cooperative's request, and (3) there is approval of the assignment by the cooperative's board or, absent the board's approval, a vote of the owners of at least 65% of the cooperative's outstanding shares. It is alleged in the complaint that the settlor did not "effectuate the transfer of record of the Stock and the Assignment of the Lease, on the books and records of [the cooperative]." Nonetheless, the relief sought under the first cause of action was a judgment declaring that a gift of the settlor's shares and lease interests was completed when he entered into the GRIT agreement on April 23, 1996. According to

plaintiff's brief, the remaining causes of action, that include conversion of the shares and lease, are "premised on the fact that the gift of the Stock and Lease was complete in 1996." The motion court correctly granted defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7), finding that documentary evidence and the facts alleged in the complaint demonstrated that there had not been a completed gift to the trust.

A valid gift requires a donor's intent to make a present transfer, actual or constructive delivery of the gift to the donee and the donee's acceptance (*Gruen v Gruen*, 68 NY2d 48, 53 [1986]). "[The] delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit" (*id.* at 56-57 [internal quotation marks and citations omitted]). An interest in a cooperative apartment is sui generis in property law and essentially consists of a right to possess real property (*Matter of Carmer*, 71 NY2d 781, 784 [1988]). Plaintiff unpersuasively argues that the subject of the gift, i.e., the settlor's interest in the cooperative apartment, was actually delivered upon the execution of the GRIT agreement and the accompanying documents. We note that, in support of the conversion cause of action, plaintiff alleged that defendants

converted the stock and proprietary lease. "Conversion is the 'unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights'" (*State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002] [citations omitted]). In light of the complaint's assertions and the elements of conversion, we infer that the settlor's shares and proprietary lease were not delivered to the trust. Plaintiff argues however that the stock power and an acceptance of assignment and assumption of lease executed by the trustees sufficed for purposes of constructive or symbolic delivery of the settlor's interest in the cooperative apartment. Here, plaintiff correctly cites *Pell St. Nineteen Corp. v Yue Er Liu Mah* (243 AD2d 121 [1st Dept 1998], *lv denied* 93 NY2d 808 [1999]) for the proposition that constructive or symbolic delivery as opposed to physical delivery of a stock certificate may suffice to transfer shares in a corporation (*id.* at 126). To be sufficient, however, a symbolic delivery must proceed to "a point of no return" (*Matter of Szabo*, 10 NY2d 94, 98 [1961]).

We are persuaded by the bankruptcy court's reasoning in *In re Lefrak* (215 BR 930 [Bankr SD NY 1998], *affd* 227 BR 222 [SD NY 1998]). The issue in *Lefrak* was whether the debtor's interest in a cooperative apartment had been effectively transferred by virtue of the execution of an assignment of the proprietary lease

and an acceptance and assumption agreement (*id.* at 933). The lease in *Lefrak* contained a lessor's consent provision that is materially identical to the one before this Court (*id.* at 933). The court found that the debtor's interest in the apartment had not been transferred prior to the bankruptcy because the shares had not been delivered to the transferee and "the Corporation [like the cooperative in this case] never recorded the transfer on its stock records." (*id.* at 936). As aptly noted by the *Lefrak* court, the point of no return had not been reached because the debtor could have transferred the shares and lease to a third party without the purported transferee's knowledge or consent (*id.* at 938). In this case, as in *Lefrak*, a showing of the requisite surrender of dominion and control is lacking (*id.; see also Matter of Szabo*, 10 NY2d at 98). We have considered plaintiff's remaining contentions and find them unavailing.

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11669 Abu Dhabi Commercial Bank PJSC, Index 652191/11
Plaintiff-Respondent,

-against-

Saad Trading, Contracting and
Financial Services Company,
Defendant-Appellant.

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Gibson, Dunn & Crutcher LLP, New York (Robert F. Serio of counsel), for appellant.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Matthew C. Daly and Michael S. Devorkin of counsel), for respondent.

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Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 29, 2012, in an action seeking recognition and enforcement of a foreign country money judgment pursuant to CPLR article 53, awarding plaintiff the aggregate amount of $40,141,014.85, unanimously affirmed, with costs.

Plaintiff, a bank incorporated under the laws of the United Arab Emirates, entered into certain loan agreements with defendant, a limited partnership formed under the laws of the Kingdom of Saudi Arabia. These included an international swaps and derivatives agreement (ISDA) in which the parties consented to the non-exclusive jurisdiction of the English courts.

In 2009, based on an alleged event of default under the ISDA, plaintiff commenced a breach of contract action against

defendant in the Commercial Court, Queen's Bench Division, of the English High Court of Justice. Defendant appeared and did not contest jurisdiction. On July 27, 2010, the English court entered a judgment awarding plaintiff damages, plus prejudgment interest.

In August 2011, plaintiff filed this action seeking to domesticate and enforce the English judgment pursuant to CPLR 3213 and 5303. In opposition, defendant argued that the action should be dismissed on the grounds of lack of personal jurisdiction in New York and forum non conveniens, because neither defendant nor the underlying agreements and transactions had any connection to New York, and defendant did not have any assets in the state. Supreme Court rejected these arguments and entered judgment in plaintiff's favor in the total amount of the English judgment, together with postjudgment interest.

Defendant argues that the court erred in permitting plaintiff to domesticate the English judgment without first establishing a basis for asserting jurisdiction over defendant or its assets. Defendant contends that, as opposed to actions seeking recognition of a sister-state judgment under CPLR article 54, where a plaintiff need only register a judgment with a county clerk and personal jurisdiction need not be established, actions pursuant to CPLR 5303 for enforcement of foreign country money

judgments are not exempted from the due process requirements of personal jurisdiction. For the following reasons, we reject defendant's arguments.

"New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts" (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 221 [2003], *cert denied* 540 US 948 [2003]). "Historically, New York courts have accorded recognition to the judgments rendered in a foreign country under the doctrine of comity . . . [a]bsent some showing of fraud in the procurement of the foreign country judgment or that recognition of the judgment would do violence to some strong public policy of this State" (*Sung Hwan Co., Ltd. v Rite Aid Corp.*, 7 NY3d 78, 82 [2006] [internal quotation marks omitted]).

In accordance with this tradition, New York adopted the Uniform Foreign Country Money-Judgments Recognition Act as CPLR article 53 (*see John Galliano, S.A. v Stallion, Inc.*, 15 NY3d 75, 79 [2010], *cert denied* _ US_, 131 S Ct 288 [2010]), which was intended to codify and clarify existing case law applicable to the recognition of foreign country money judgments based on principles of international comity, "and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive

streamlined enforcement here" (*CIBC Mellon*, 100 NY2d at 221).

Generally, a foreign country judgment is "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" (CPLR 5303), "unless a ground for nonrecognition under CPLR 5304 is applicable" (*Galliano*, 15 NY3d at 80). CPLR 5304(a) provides that "[a] foreign country judgment is not conclusive if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law" (subd [1]) or "the foreign court did not have personal jurisdiction over the defendant" (subd [2]). CPLR 5304(b) permits nonrecognition on eight other grounds. Significantly, "in proceeding under article 53, the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment" (*CIBC Mellon*, 100 NY2d at 222, quoting *Lenchyshyn v Pelko Elec.*, 281 AD2d 42, 49 [4th Dept 2001]; *see also Galliano*, 15 NY3d at 81; *CDR Creances S.A. v Euro-American Lodging Corp.*, 40 AD3d 421 [1st Dept 2007]).

In the present action, defendant has actual notice of the enforcement action and does not argue that the English judgment fails to meet the requirements of CPLR 5303 or that any grounds

for nonrecognition of a foreign country money judgment exist. Nor does defendant provide a reason why the judgment should not be recognized as a matter of substance. Under these circumstances, "a party seeking recognition in New York of a foreign money judgment (whether of a sister state or a foreign country) need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts," because "[n]o such requirement can be found in the CPLR, and none inheres in the Due Process Clause of the United States Constitution, from which jurisdictional basis requirements derive" (*see Lenchyshyn*, 281 AD2d at 47; *see also Haaksman v Diamond Offshore [Bermuda], Ltd.*, 260 SW3d 476, 480 (Tex App 2008); *Pure Fishing, Inc. v Silver Star Co., Ltd.*, 202 F Supp 2d 905 [ND Iowa 2002]). Although CPLR 5304(a) provides that the trial court may refuse recognition of the foreign country judgment if the foreign country court did not have personal jurisdiction over the judgment debtor, it does not provide for non-recognition on the ground that the New York court lacks personal jurisdiction over the judgment debtor in a CPLR article 53 proceeding.

Nor does the CPLR require the judgment debtor to maintain property in New York for New York to recognize a foreign money judgment. While CPLR 5304 provides a list of specific reasons

why the trial court may refuse recognition of the foreign country judgment, the lack of property in the state is not one of them. Thus, "even if defendant[] do[es] not presently have assets in New York, plaintiff[] nevertheless should be granted recognition of the foreign country money judgment pursuant to CPLR article 53, and thereby should have the opportunity to pursue all such enforcement steps in futuro, whenever it might appear that defendant[] [is] maintaining assets in New York, including at any time during the initial life of the domesticated [English] money judgment or any subsequent renewal period" (*Lenchyshyn*, 281 AD2d at 50).

The procedural differences between CPLR articles 53 and 54 do not imply additional jurisdictional requirements in foreign country money judgment proceedings (*see Lenchyshyn*, 281 AD2d at 49). Rather, they exist because sister-state judgments must be given recognition under the Full Faith and Credit Clause of the United States constitution (US Const, art IV, § 1) and sister-state courts are presumed (rebuttably) to be impartial and to apply procedures compatible with due process of law. Thus, the Legislature placed the burden of staying or vacating a registered sister-state judgment on the judgment debtor (CPLR 5402). In contrast, judgments of foreign countries are accorded recognition only through comity. "[T]he inquiry turns on whether exercise of

jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares our notions of procedure and due process of law" (*Sung Hwan Co.*, 7 NY3d at 83). "If the above criteria are met, and enforcement of the foreign judgment is not otherwise repugnant to our notion of fairness, the foreign judgment should be enforced in New York under well-settled comity principles without microscopic analysis of the underlying proceeding" (*id.*). Accordingly, the Legislature reasonably placed the burden on the proponent of a foreign judgment of showing that the foreign court was impartial and followed basic principles of due process (*see* CPLR 5304(a); *Lenchyshyn*, 281 AD2d at 49).

Shaffer v Heitner (433 US 186 [1977]) does not require otherwise. In *Shaffer*, the United States Supreme Court stated that "[o]nce it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter" (433 US at 210 n.36). *Shaffer* requires minimum contacts between the defendant and the forum in the action that determines the defendant's liability to the plaintiff and CPLR article 53 satisfies this due

process requirement by providing that New York courts, in performing their ministerial function, will only recognize foreign judgments where the defendant had minimum contacts with the judgment forum (*see* CPLR 5304, 5305(a); *Sung Hwan Co.*, 7 NY 3d at 82-83). In other words, since CPLR article 53 and the English court are already protecting the defendant's due process rights, including personal jurisdiction, the court charged with recognition and enforcement should not be required to grant further protection during a ministerial enforcement action (*see Lenchyshyn*, 281 AD2d at 49). There is no unfairness to the defendant if the plaintiff obtains an order in New York recognizing the foreign judgment, which can then be enforced if the defendant is found to have, or later brings, property into the State (*Lenchsyn* at 50).

Dismissal of the action under the doctrine of forum non conveniens was properly denied, because inconvenience is not one of the grounds for non-recognition specified in CPLR 5304 (*Watary Servs. v Law Kin Wah*, 247 AD2d 281 [1st Dept 1998]). As the motion court observed, defendant bears no hardship, since there is nothing to defend. The merits were decided in England, and plaintiff seeks no new relief. There are no witnesses to be inconvenienced or necessary evidence beyond the court's jurisdiction.

Contrary to defendant's contention, the award of postjudgment statutory interest was proper. Postjudgment interest is a procedural matter governed by the law of the forum. Thus, the court properly concluded that New York's statutory postjudgment interest rate should apply to the English judgment (*see Wells Fargo & Co. v Davis*, 105 NY 670, 672 [1887]; *De Nunez v Bartels*, 264 AD2d 565 [1st Dept 1999]).

Defendant's argument that plaintiff waived its right to postjudgment interest because it was not requested in the notice of motion and was raised for the first time in a reply affidavit is unavailing (*see Dietrick v Kemper Ins. Co. [American Motorists Ins. Co.]*, 76 NY2d 248, 254 [1990]). Defendant was given a full and fair opportunity to oppose the request before the court issued its ruling (*see Hanscom v Goldman*, 109 AD3d 964 [2d Dept 2013]), and plaintiff demonstrated that it was entitled to prejudgment interest as a matter of right.

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

ENTERED: MAY 27, 2014

CLERK

Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11819 Milton Guallpa, Index 301817/10
Plaintiff-Appellant-Respondent,

-against-

Leon D. DeMatteis Construction Corp., et al.,
Defendants-Respondents-Appellants.

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Asta & Associates, P.C., New York (Lawrence B. Goodman of counsel), for appellant-respondent.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered January 22, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment as to liability under Labor Law § 240(1) and under Labor Law § 241(6) as predicated on a violation of Industrial Code (12 NYCRR) § 23-2.1(a)(1), granted so much of defendants' cross motion for summary judgment as sought to dismiss the Labor Law §§ 240(1) and 241(6) claims, and denied so much of the cross motion as sought to dismiss the Labor Law § 200 and common-law negligence claims, unanimously affirmed, without costs.

Plaintiff, Milton Guallpa, an employee of nonparty New Town Corporation (New Town), allegedly suffered an injury to his right knee while working at a construction site. Defendant Leon D.

DeMatteis Construction Corporation (DeMatteis) was hired by defendant New York City School Construction Authority, a division of defendant New York City Department of Education, to act as the general contractor on the construction of a school. New Town was subcontracted by DeMatteis to complete the masonry work on the project.

During construction, New Town received concrete stones on wooden pallets. Each pallet measured about three- to four-feet high. Because the construction site was open to the elements, the pallets were covered with a plastic tarp to keep the stones dry. On the day of the accident, plaintiff was constructing a scaffold near an open area where several of these pallets were located. As plaintiff walked by one of the pallets, a stone block that was resting on top of it allegedly fell and struck him on the right knee. The block weighed approximately 25 pounds. The record contains no evidence as to how the block could have come off the pallet.

Plaintiff commenced this action, asserting Labor Law §§ 200, 240(1), 241(6) and common-law negligence causes of action. Plaintiff then moved for partial summary judgment on liability on his §§ 240(1) and 241(6) claims. Defendants cross-moved for summary judgment dismissing the entire complaint. The motion court denied plaintiff's motion for summary judgment and granted

defendants' cross motion to the extent of dismissing the §§ 240(1) and 241(6) claims. The court declined to address defendants' cross motion on the § 200 and negligence claims, finding that this aspect of the cross motion was untimely.

The motion court properly granted defendants' cross motion to dismiss plaintiff's Labor Law § 240(1) claim. Section 240(1) does not apply automatically every time a worker is injured by a falling object (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *see also DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 654 [1st Dept 2012]). Rather, the "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" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). The worker must establish that the object fell because of the inadequacy or absence of a safety device of the kind contemplated by the statute (*Fabrizi* at 662-663; *see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9-10 [2011]). In order for something to be deemed a safety device under the statute, it must have been put in place "as to give proper protection" for the worker (§ 240[1]).

Here, we conclude that plaintiff's injury was not caused by the absence or inadequacy of the kind of safety device enumerated in the statute (*see Fabrizi* at 663). Plaintiff does not contend that the block itself was inadequately secured. Instead, plaintiff argues that § 240(1) is applicable because his injuries were caused by defendants' failure to provide an adequate safety device to hold the plastic tarp in place. Specifically, plaintiff maintains that the plastic tarp was inadequately secured because, if it had been properly secured, such as with ropes and stakes, plaintiff's injury would not have occurred.

Plaintiff's argument is unconvincing. The plastic tarp was not an object that needed to be secured for the purposes of § 240(1) (*see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]), nor is there any indication that the tarp caused plaintiff's injuries. The tarp was in place to keep the stone blocks dry, not to secure the stones stacked on the pallet underneath it. The purpose of the tarp was to keep possible rain off the object, not to protect the workers from an elevation-related risk (*see Fabrizi* at 663; *Runner*, 13 NY3d at 603; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449-450 [1st Dept 2013]).

Wilinski and *Runner*, upon which plaintiff relies, are distinguishable. *Wilinski* primarily concerns the issue of what

constitutes an elevation-related hazard under § 240(1). As we find that plaintiff's injury was not the result of an inadequate safety device, we need not address the issue of elevation. We also note that *Wilinski* observes that, although an injury may have been caused by an elevation-related risk, it is still necessary that there be a "causal nexus between the worker's injury and a lack or failure" of a safety device as contemplated by the statute (18 NY3d at 9). Here, no such causal nexus was established.[1]

Nor does *Runner* require a different result. In *Runner*, the plaintiff sustained injuries to his hands when the pulley system that he was using to lower an 800-pound reel of wire failed to regulate the reel's descent. The Court found that § 240(1) applied because the plaintiff's injuries were directly caused by the failure of a safety device to protect him from harm "flowing from the application of the force of gravity to an object" (*Runner*, 13 NY3d at 604 [internal quotation marks and emphasis omitted]). There the plaintiff was provided with an inadequate device, the pulley system, to complete a task that required him to lower a large amount of weight down several stairs and his injuries were caused by the failure of the defendants to provide

[1] Indeed, we do not understand how the 25-pound concrete block moved and the record contains no evidence to explain this.

him with a sufficient device to complete the undertaking. As the Court of Appeals observed, the purpose of § 240(1) "is to protect construction workers[,] not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials" (*id.* at 603). Here, in contrast to *Runner*, the block that allegedly struck plaintiff was not intended to protect him while he engaged in work that involved an elevation-related risk. Rather, the block, the only purpose of which was to hold down the plastic tarp, allegedly fell as plaintiff walked by the pallet. Therefore, § 240(1) is inapplicable.

The motion court properly dismissed plaintiff's § 241(6) claim predicated on a violation of Industrial Code § 23-2.1(a)(1). As plaintiff's injury occurred in an open work area, not in a passageway or a walkway, § 23-2.1(a)(1) is not applicable (*see Ghany v BC Tile Contrs., Inc.*, 95 AD3d 768, 769 [1st Dept 2012]; *Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260 [1st Dept 2008]).

The motion court properly denied as untimely the portion of defendants' cross motion seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims. Although a court may decide an untimely cross motion, it is limited in its search of the record to those issues or causes of action "nearly identical"

to those raised by the opposing party's timely motion (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007] [internal quotation marks omitted]; *see Alonzo*, 104 AD3d at 448-449). Here, defendants' cross motion as to plaintiff's § 200 and common-law negligence claims does not raise issues sufficiently related to the §§ 240(1) and 241(6) claims raised by plaintiff's timely motion and therefore consideration on the merits is not warranted (*see Filannino*, 34 AD3d at 281 [the plaintiff's untimely cross motion for summary judgment on his Labor Law § 240(1) claim was properly denied as the defendants' timely motion addressed only Labor Law §§ 200 and 241(6)]).

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

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

ENTERED: MAY 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12086 Candida Disla, etc., Index 22450/06
Plaintiff-Appellant,

-against-

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

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Emery Celli Brinckerhoff & Abady LLP, New York (Ilann M. Maazel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Patrick Mantione of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Alexander W. Hunter, J.), entered April 15, 2013, upon a jury verdict in defendants' favor, unanimously reversed, on the law, without costs, and the matter remanded for a new trial.

During its initial charge, the trial court correctly instructed the jury on the law concerning both excessive force and battery in the performance of a public duty. With respect to the federal excessive force claim, the trial court charged the jury:

> "In this case, it is not disputed that Sergeant Barnett shot Leonel Disla, ultimately killing him. If Sergeant Barnett used unreasonable force when he shot Leonel Disla, then Sergeant Barnett will be liable for this claim.... It is unreasonable for an officer to use deadly force against a civilian unless the officer has probable cause to believe that the civilian poses a

> significant threat of death or serious physical injury to the officer or to others."

With respect to battery in the performance of a public duty, the trial court charged:

> "It is undisputed that Sergeant Barnett intended to shoot Leonel Disla without Mr. Disla's consent, and that a shooting is an offensive bodily contact. An officer who uses deadly physical force against another is permitted to use such force only if it is necessary to defend himself or another from serious injury or death.... If by these standards Sergeant Barnett used excessive force to accomplish his purpose, Sergeant Barnett committed a battery and is liable for damages resulting from the shooting."

On May 31, 2012, the jury sent a note (note #8) asking the court to clarify the third question on the verdict form, concerning the claim of battery in the performance of a public duty. Specifically, the jury asked:

> "Has [plaintiff] proven by a preponderance of the evidence that Sergeant Barnett and therefore also the New York City NYPD used unjustified battery when he shot Leonel Disla? Does this mean it was too much force used? Please explain the term battery."

In response, the court re-read its original instruction.

The next day, June 1, 2012, the jury sent two notes expressing continued confusion regarding the definition of battery in the performance of a public duty (notes #10 and #11):

> "We, the jury, would like the Judge to read us the definition of battery as it pertains to question [#]3. Does this mean excessive force?
>
> "We would like to have a written transcript of the Judge's instructions, specifically the instruction regarding question [#]3."

In response to note #10, the court stated: "I'm going to answer that question now in the simplest way I can. The answer to that question is no. 'Does this mean excessive force?' It does not." The court declined to re-read the charge, or to provide the jury with a transcript of the instruction.

Plaintiff's counsel objected to the court's response to note #10, observing that a simple "no" in response to the jury's question did not "fully capture[] the charge," and stating "I think there may be a little bit of confusion about what a battery is." The court overruled the objection, and counsel noted his exception. Shortly thereafter, the jury sent a note indicating it had reached a verdict. The jury found for defendants on all claims.

We now reverse, and remand for a new trial. A new trial is required when an erroneous jury instruction "precluded the jury's fair interpretation of the evidence" (*Altamirano v Door Automation Corp.*, 76 AD3d 401, 402 [1st Dept 2010]). The trial court incorrectly told the jury that a battery committed in the

performance of a public duty does not require excessive force when the law is clear – as the trial court initially instructed the jury – that it does (*see Marrero v City of New York*, 33 AD3d 556 [1st Dept 2006] [dismissing assault and battery claims against police officers where the record was devoid of evidence that the force used to effectuate the arrests was "excessive"]).

The court compounded the error by refusing to re-read the charge. It is apparent from notes #8, #10, and #11 that the jury was confused regarding the definition of "battery" in this context. Rather than clearing up the evident confusion, the court worsened it by contradicting its own charge. Faced with two diametrically opposed definitions, the jury was left to speculate. Under the circumstances, a new trial is required (*see Altamirano*, 76 AD3d at 402 [remanding for new trial where charge was "misleading and confusing"]; *Coon v Board of Educ. of City of N.Y.*, 160 AD2d 403, 403 [1st Dept 1990] [remanding for a new trial where charge was "an incorrect statement of the law"]).

We also find that the court's incorrect definition of battery tainted the jury's understanding of, and ability to fairly deliberate on, the federal civil rights claim. Here, there is more than a "reasonable possibility" that the trial court's erroneous instruction on the state battery claim influenced "in a meaningful way" the jury's ability to deliberate

fairly on the federal excessive force claim (*People v Doshi*, 99 NY2d 499, 505 [1999] [internal quotation marks omitted]), given that both claims arose out of the same set of facts, and were legally interrelated.

In light of our disposition reversing and remanding for a new trial, it is unnecessary to reach plaintiff's further claims.

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12570 The People of the State of New York, Respondent, Ind. 5081/10

-against-

Hashim Kernahan, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered June 2, 2011, convicting defendant, after a jury trial, of attempted robbery in the second degree, tampering with physical evidence, menacing in the second degree and possession of an imitation pistol, and sentencing him, as a second violent felony offender, to an aggregate term of seven years, unanimously affirmed.

The verdict 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 court properly declined to preclude the People from calling a witness who first came to their attention on the third day of trial. Discovery in a criminal case is governed by the Criminal Procedure Law (*People v Copicotto*, 50 NY2d 222, 225

[1980]), and, with exceptions not relevant here, there is no provision for disclosure of the identities of witnesses (*see* CPL art 240). Furthermore, the People themselves had no advance notice of the witness's existence, and they made all disclosures required by CPL 240.45 as soon as possible (*see* CPL 240.60). Defendant, who only sought preclusion, did not request any additional time for preparation, and his claim of prejudice is unsubstantiated. To the extent that defendant is raising a constitutional claim, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it to be without merit (*see Weatherford v Bursey*, 429 US 545, 559 [1977]).

Defendant's challenges to the content of this witness's testimony are also without merit. Evidence showing defendant's planning, preparation and motive for the attempted robbery was highly probative. To the extent any of this testimony was unduly prejudicial, the court took appropriate curative actions, and offered a further curative action that defendant declined.

The court also properly exercised its discretion in denying defendant's request for a missing witness charge regarding the victim's girlfriend (*see generally People v Gonzalez*, 68 NY2d 424, 427-28 [1986]). The record supports the court's conclusion

that the testimony of the uncalled witness would have been cumulative.

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12571 Skender Nikqi, Index 301344/11
Plaintiff-Respondent,

-against-

Dedona Contracting Corporation, et al.,
Defendants-Appellants.

_____

Wright & Wolf, LLC, New York (Tara L. Wolf of counsel), for appellants.

Susan M. Karten & Associates, LLP, New York (Craig H. Snyder of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered August 12, 2013, which, inter alia, denied defendants' motion to vacate the note of issue, to direct a further IME of plaintiff by a traumatic brain injury specialist, and to direct plaintiff to provide further authorizations for the release of his medical treatment records, unanimously affirmed, without costs.

Defendants failed to demonstrate unusual or unanticipated circumstances that would warrant vacating the note of issue (*see* 22 NYCRR 202.21[d], [e]). Rather, the record shows a lack of diligence on defendants' part in seeking discovery (*see Colon v Yen Ru Jin*, 45 AD3d 359, 360 [1st Dept 2007]; *Grant v Wainer*, 179 AD2d 364 [1st Dept 1992]).

The court also properly concluded that defendants failed to demonstrate that any special or unusual circumstances existed for seeking plaintiff's medical authorizations, after the filing of the note of issue. Defendants were aware of plaintiff's alleged injuries and had ample time to request the authorizations, but failed to do so. Similarly, defendants failed to show that a post-note of issue IME was warranted where plaintiff did not claim any new or additional injuries (*see DiMare v Mace Assoc.*, 178 AD2d 196 [1st Dept 1991]).

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12572-
12573 In re Imani W.,

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

Hilrett S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about June 7, 2013, which, upon a fact-finding determination that respondent mother neglected the subject child, released the child to the custody of her father with six months' supervision by petitioner agency, unanimously affirmed, without costs.

The finding that respondent neglected her infant daughter is supported by a preponderance of the evidence, which established that respondent engaged in acts of violence against the child's father in his apartment in the child's presence and that she left the child alone in her room in a shelter while she engaged in a

verbal altercation with another shelter resident, resulting in her arrest (*see Matter of Nia J. [Janet Jordan P.]*, 107 AD3d 566, 567 [1st Dept 2013]; *Matter of Rosemary V. [Jorge V.]*, 103 AD3d 484 [1st Dept 2013]).

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12574 Michael Chia Hock Meng, Index 106291/10
Plaintiff-Appellant,

-against-

Julie Lynn Allen,
Defendant-Respondent.

_____

Willkie Farr & Gallagher LLP, New York (Mary J. Eaton of counsel), for appellant.

Dobrish Michaels Gross LLP, New York (David Elbaum of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Laura Drager, J.), entered May 28, 2013, which sua sponte reinstated an order entered December 20, 2011 granting defendant's motion to dismiss the complaint on the ground of forum non conveniens, unanimously dismissed, without costs, as taken from a nonappealable paper.

A sua sponte order is not appealable as of right (*Unanue v Rennert*, 39 AD3d 289, 290 [1st Dept 2007]), and this Court denied

plaintiff's motion for leave to appeal. Plaintiff could move before the trial court to vacate the sua sponte order, and possibly appeal as of right from any subsequent denial of that motion (CPLR 5701[a][2] and [3]), but he has not done so.

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12575 Ursulina Reyes, Index 23310/00
Plaintiff-Respondent,

-against-

Jose R. Sanchez-Pena, M.D., et al.,
Defendants-Appellants,

Jose R. Sanchez-Pena, M.D., P.C., et al.,
Defendants.

_____

Schiavetti, Corgan, DiEdwards, Weinberg and Nicholson, LLP, New York (Frank Dumont of counsel), for Jose R. Sanchez-Pena, M.D. and Comprehensive Medical Evaluation, P.C., appellants.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for Ladislav Habina, M.D., appellant.

Bruce G. Clark & Associates, P.C., Port Washington (Diane C. Cooper of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucy Billings, J.), entered on or about March 10, 2009, which, to the extent appealed from as limited by the briefs, denied defendant Ladislav Habina, M.D.'s and defendants Jose R. Sanchez-Pena, M.D. and Comprehensive Medical Evaluations, P.C.'s respective motions for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

The motion court erred in denying defendants' motions on the ground that they failed to annex complete copies of the

pleadings, including those of the non-movants, to their motion papers (*see* CPLR 3212[b]). Since each moving party provided copies of the pleadings pertaining to the claims against that party, the record was complete for purposes of deciding the motions (*see Chan v Garcia*, 24 AD3d 197 [1st Dept 2005]). The court also erred in finding the motions untimely, since Habina's motion was made within the statutory time periods (CPLR 3212 [a]), and Sanchez-Pena and Comprehensive Medical Evaluations's motion was timely pursuant to a stipulation accepted by the court on an earlier return date.

Defendants established prima facie that the injury and symptomatology of which plaintiff complained was not a result of the procedure they performed, a series of cervical facet and epidural steroid injections. In opposition, plaintiff failed to raise an issue of fact. Her expert opined that an unspecified nerve root or axon was somehow injured at some point during the procedure. Although photographs taken during the procedure show no such occurrence, and the post-procedure MRI depicted no such injury, plaintiff's expert stated that EMG testing and plaintiff's symptoms provided evidence of the occurrence. This opinion amounts to conjecture, which is insufficient to defeat a motion for summary judgment (*see Foster-Sturrup v Long*, 95 AD3d 726 [1st Dept 2012]).

Nor did plaintiff establish that the doctrine of res ipsa loquitur is applicable to this case (*see Jacobs v Madison Plastic Surgery, P.C.*, 106 AD3d 530 [1st Dept 2013]; *Johnson v St. Barnabas Hosp.*, 52 AD3d 286 [1st Dept 2008], *lv denied* 11 NY3d 705 [2008]). Plaintiff had been diagnosed with cervical radiculopathy before the procedure performed by defendants, and her MRIs revealed significant progressive spinal and disc disease both before and after the procedure. Plaintiff's expert provided insufficient evidentiary support for his conclusion that plaintiff's post-procedure radicular complaints were a result of the procedure, rather than the progression of her disease.

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12576 Sarwar Naseer, et al., Index 303008/09
Plaintiffs-Appellants,

-against-

Dynasty Home Improvement, et al.,
Defendants-Respondents.

_____

Friedman, Levy, Goldfarb & Green, P.C., New York (Ira H. Goldfarb of counsel), for appellants.

Rivkin Radler LLP, Uniondale (Henry Mascia of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 1, 2013, dismissing the complaint after a jury trial and the denial of plaintiffs' motion to set aside the verdict, unanimously affirmed, without costs.

The jury's verdict was based on a fair interpretation of the evidence (*see Manne v Museum of Modern Art*, 39 AD3d 368 [1st Dept 2007]). Defendant driver testified that he was driving slower than usual (i.e., 25 miles per hour) due to hazardous road conditions, and that his vehicle skidded into plaintiff Sarwar Naseer's vehicle as he attempted to stop. Based on this testimony, the jury could have reasonably concluded that defendant driver did not violate Vehicle and Traffic Law § 1180(a), and there is no basis to disturb the jury's resolution

of the issue of defendants' negligence (*see Vadala v Carroll*, 91 AD2d 865 [4th Dept 1982], *affd* 59 NY2d 751 [1983]; *see also Ebanks v Triboro Coach Corp.*, 304 AD2d 406 [1st Dept 2003]). The record does not demonstrate that the jury failed to properly follow and apply the court's instructions.

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: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12577 In re CPG Construction & Development Corp., et al., Petitioners-Respondents,

-against-

415 Greenwich Fee Owner, LLC, Respondent-Appellant.

- - - - -

415 Greenwich Mezzanine Owner, LLC, et al., Plaintiffs-Appellants,

-against-

KBS 415 Greenwich, LLC, et al., Defendants-Respondents.

Index 102055/10
651176/10

_____

Stuart Perry PC, New York (Stuart Perry of counsel), for appellants.

Canfield Madden & Ruggiero LLP, Garden City (John P. Ruggiero of counsel), for CPG Construction & Development Corp., respondent.

Wolff & Samson PC, New York (Steven S. Katz of counsel), for Safeco Insurance Company of America, respondent.

Greenberg Traurig, LLP, New York (Steven Sinatra of counsel), for KBS 415 Greenwich, LLC, KBS Tribeca Summit, LLC, 415 Greenwich Senior Mazzanine Owner, LLC and 415 Greenwich Fee Owner, LLC, respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 12, 2012, which, to the extent appealed from as limited by the briefs, denied proposed intervenors 415 Greenwich Mezzanine Owner, LLC, Heritage Partners, LLC, 415 Greenwich, LLC, Ethan Eldon, and Joel Silver's

motion to renew petitioners' motion to confirm an arbitration award, and, in the companion action, granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

This arbitration proceeding and related action concern a real estate development project whose delayed completion allegedly caused damages. The property's former owners and their affiliates properly were denied leave to intervene in the arbitration proceeding brought by the construction manager and performance surety against the present owner. The proposed intervenors, who sought leave after the award was confirmed without opposition, have no ownership interest in the parties to the arbitration and accordingly lack standing. In any event, the complained-of connections between the arbitrator and the owner are too remote to constitute the appearance of partiality that would support vacating the award (CPLR 7511[b][1][ii]; *see Provenzano v Motor Veh. Acc. Indem. Corp.*, 28 AD2d 528, 528 [1st Dept 1967]) and, contrary to the proposed intervenors' claim, the arbitrator did not show bias or make an irrational determination (*see Transparent Value, L.L.C. v Johnson*, 93 AD3d 599, 601 [1st Dept 2012]).

In the related action, plaintiff 415 Greenwich Mezzanine Owner failed to state a claim because when it defaulted on its loan obligations, its creditor, defendant KBS Tribeca Summit,

acted within its rights under the loan documents by designating defendant KBS 415 Greenwich to accept the debtor's interest in defendant 415 Greenwich Senior Mezzanine, which had been pledged as collateral for the loan.

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12578 James Long, Index 107736/11
Plaintiff-Appellant,

-against-

Taida Orchids, Inc., et al.,
Defendants-Respondents.

_____

Levine & Gilbert, New York (Harvey A. Levine of counsel), for appellant.

Adams, Hanson, Rego, Carlin, Kaplan & Fishbein, Yonkers (Won J. Sohng of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered September 24, 2013, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied to the extent plaintiff alleges "permanent consequential" and "significant" limitations of use of his cervical spine, and otherwise affirmed, without costs.

Defendants met their initial burden of establishing that plaintiff did not sustain serious injuries as a result of the accident (*Perez v Rodriguez*, 25 AD3d 506, 507-508 [1st Dept 2006]). Defendants' expert's report reflected that plaintiff's range of motion testing was normal, and that he revealed no functional disability at the time of examination.

In opposition, plaintiff raised an issue of material fact with respect to injuries he claims were sustained to his cervical spine (*Perl v Meher*, 18 NY3d 208 [2011]). The affirmed report of an orthopedist who examined plaintiff on behalf of the no-fault carrier six months after the accident confirmed that plaintiff had cervical radiculopathy and limitations in range of motion, for which the doctor recommended further treatment, and the affirmed report of plaintiff's radiologist found that the MRI of plaintiff's cervical spine showed two herniations, as well as mild degenerative changes. Plaintiff also submitted the affirmed report of chiropractor Dr. Ilya Simakovsky, who found significant, continuing limitations in range of motion over two years after the accident, and opined, after review of the MRI films, that plaintiff's cervical herniations were traumatic in origin and caused by the accident, although the degenerative changes were not (*see Pindo v Lenis*, 99 AD3d 586 [1st Dept 2012]; *Silverman v MTA Bus Co.*, 101 AD3d 515 [1st Dept 2012]). The range-of-motion limitations found by the orthopedist and by Dr. Simakovsky at their examinations were not "minor" as a matter of law, but raise an issue of fact (*see Pindo v Lenis*, 99 AD3d at 586-587; *Garner v Tong*, 27 AD3d 401 [1st Dept 2006]).

The motion court rejected the chiropractor's report because it was not in proper form (*see Gibbs v Reid*, 94 AD3d 636, 637 [1st Dept 2012]), but defendants did not raise any objection to the form of the chiropractor's report based on the absence of notarization, thereby waiving the technical objection to admissibility (*see Shinn v Catanzaro*, 1 AD3d 195 [1st Dept 2003]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 351 n 3 [2002]). Further, the court may consider the inadmissible evidence insofar as it is not the sole basis for plaintiff's opposition to summary judgment (*see Pietropinto v Benjamin*, 104 AD3d 617, 618 [1st Dept 2013]; *Silverman v MTA Bus Co.*, 101 AD3d at 516)

However, plaintiff did not plead a 90/180-day claim in his complaint or in the verified bill of particulars, and thus the claim need not be considered by the court (*see Perez v Vasquez*, 71 AD3d 531, 532 [1st Dept 2010]). Even if the court were to

consider this claim, plaintiff has not shown that any medical provider advised him not to engage in work or other activities following the accident (*see Pinkhasov v Weaver*, 57 AD3d 334 [1st Dept 2008]).

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Andrias, Freedman, JJ.

12579 The People of the State of New York, Respondent, Ind. 3973/09

-against-

Rashaad Webb, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered July 23, 2012, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of six years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of his right to appeal, we perceive no basis for reducing the sentence or for directing a new sentencing proceeding. The record fails to support defendant's contention that the court

based its enhanced sentence on inaccurate information. Instead, it shows that the court relied primarily on the fact that defendant committed a first-degree robbery in New York County only two weeks after pleading guilty in this case.

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Andrias, Freedman, JJ.

12580 The People of the State of New York, Ind. 1471/12
Respondent,

-against-

Rashaad Webb,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered November 29, 2012, convicting defendant, upon his plea of guilty, of robbery in the first degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of six years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12582 Yadier A. C., infant by Mother and Natural Guardian, Jennifer C. Rosario, et al., Plaintiffs-Respondents,

-against-

Jerome W. 169th Associates, LLC, et al., Defendants-Appellants,

G. Bauer, Inc., Defendant.

- - - - -

[And A Third-Party Action]

Index 350248/09
84134/09

_____

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about February 25, 2013,

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 May 14, 2014,

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12583 The People of the State of New York, Respondent, Ind. 6380N/09

-against-

Joan Polanco, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered on or about August 20, 2014, as amended, April 8, 2011, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12584 Carole Seborovski, Index 304958/10
Plaintiff-Respondent,

-against-

Jorge Kirschtein,
Defendant-Appellant.

_____

Jorge Kirschtein, appellant pro se.

Phillips Nizer, LLP, New York (Elliot Wiener of counsel), for respondent.

_____

Partial judgment, Supreme Court, New York County (Matthew F. Cooper, J.), entered on or about September 24, 2012, inter alia, after trial, granting plaintiff mother's application for custody of the parties' minor child with visitation to defendant father, unanimously affirmed, without costs.

There is a sound and substantial basis in the record for the court's determination that the child's best interests are served by awarding custody to the mother (*see generally Eschbach v Eschbach*, 56 NY2d 167 [1982]). Despite the history of animosity between the parties, the mother has demonstrated that she has no unbridled anger towards the father that would render her incapable of nurturing a relationship between the child and her father (*see Bliss v Ach*, 56 NY2d 995, 998 [1982]; *see e.g. Matter of Feliccia v Spahn*, 108 AD3d 702 [2d Dept 2013]). Since their

separation, the mother has kept the father informed of various aspects of the child's life, including her toilet training efforts and progress, summaries of the child's pediatric appointments, progress of the child's health during a period of illness, and schools and summer camps she had been considering.

The father's disagreement with the trial court based on his view of the evidence does not warrant disturbing the court's factual determinations (*see Anonymous v Anonymous*, 287 AD2d 306 [1st Dept 2001], *lv denied* 97 NY2d 611 [2002]). The father's allegations of judicial bias are also unfounded, since the record fails to substantiate an alleged bias or prejudice stemming from an extrajudicial source (*see Hinckley v Resciniti*, 159 AD2d 276 [1st Dept 1990]), and he has failed to "point to an actual ruling which demonstrates bias" (*Yannitelli v Yannitelli & Sons Constr. Corp.*, 247 AD2d 271, 271 [1st Dept 1998], *lv denied* 92 NY2d 875 [1998] [internal quotation marks omitted]).

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

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12585 Ronald Clindinin, Index 109954/10
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph III of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 30, 2013, which denied defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

NYCHA met its initial burden of establishing entitlement to judgment as a matter of law in this action where plaintiff sustained second- and third-degree burns to 13% of his body due to hot water emanating from the showerhead in the bathroom of his apartment in a building owned by NYCHA. NYCHA showed that it did not violate any duty owed to plaintiff by submitting evidence that its hot-water system and water temperature were regularly inspected, and that the temperature readings were at 120-130 degrees on the evening prior to and 30 minutes after the incident, in compliance with Administrative Code of City of NY §

27-2031 (*see Williams v Jeffmar Mgt. Corp.*, 31 AD3d 344, 346-347 [1st Dept 2006], *lv denied* 7 NY3d 718 [2006]). NYCHA also established the absence of notice by submitting the affidavit of its superintendent stating that he found no work tickets concerning complaints of erratic or excessively hot water in the building during the year before the accident.

In opposition, plaintiff raised triable issues of fact as to whether NYCHA breached its duty of care. Plaintiff's testimony, as well as the testimony and written statement of two other tenants, showed that the water temperature would rise on its own and that the water would become excessively hot. Plaintiff testified that he had measured the hot water temperature approximately one year before the incident, and found it to be 140 or 150 degrees. Moreover, triable issues as to notice were raised by the statements of other tenants that they had complained to NYCHA and its employees about the hot water and erratic temperature conditions before the incident (*see Carlos v 395 E. 151st St., LLC*, 41 AD3d 193, 196 [1st Dept 2007]; *Shkolnik v Longo*, 63 AD3d 819, 820 [2d Dept 2009]).

Any discrepancies between plaintiff's 50-h and deposition testimony, and his deposition testimony and errata sheet, merely raise credibility issues for the jury to decide (*see Binh v Bagland USA*, 286 AD2d 613 [1st Dept 2001]). Similarly, the

conflict between one of the tenant's written statement and her subsequent affidavit recanting that statement also raises a credibility issue for the jury (*see Romero v Twin Parks Southeast Houses, Inc.*, 70 AD3d 484, 485 [1st Dept 2010]).

Furthermore, the record presents a triable issue as to whether plaintiff's loss of consciousness while showering was a superseding cause of his injuries (*see e.g. Eaderesto v 22 Leroy Owners Corp.*, 101 AD3d 450 [1st Dept 2012]; *Delaney v First Concourse Mgt. Co.*, 275 AD2d 233 [1st Dept 2000]).

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Andrias, Freedman, JJ.

12586 In re The State of New York, Index 250763/08
Petitioner-Respondent,

-against-

Bernard D.,
Respondent-Appellant.

_____

Bernard D., appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Colleen D. Duffy, J.), entered August 23, 2012, which denied respondent's motion to dismiss the proceeding brought pursuant to the Sex Offender Management and Treatment Act (SOMTA) (Mental Hygiene Law article 10), unanimously affirmed, without costs.

Contrary to respondent's argument, SOMTA is applicable to him based on his status as a detained sex offender when the proceeding was commenced, regardless of the legality of his detention at the time (*see People ex rel. Joseph II. v Superintendent of Southport Correctional Facility*, 15 NY3d 126, 133 [2010]).

Respondent's challenges to the accuracy of a psychiatric report and his argument that he was not afforded the effective assistance of counsel are unpreserved, and we decline to review them in the interest of justice.

Were we to review them, we would find them unavailing.

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

ENTERED: MAY 27, 2014

CLERK

Sweeny, J.P., Acosta, Renwick, Andrias, Freedman, JJ.

12589- Index 653381/11
12590N Smile Train, Inc.,
Plaintiff-Appellant,

-against-

Ferris Consulting Corp., et al.,
Defendants-Respondents.

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Smile Train, Inc.,
Plaintiff-Appellant,

-against-

Ferris Consulting Corp., et al.,
Defendants.

- - - - -

Brian Mullaney,
Nonparty Respondent.

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Kaye Scholer LLP, New York (Vincent A. Sama of counsel), for appellant.

Peter Brown and Associates, New York (Peter Brown of counsel), for Ferris Consulting Corp. and Gregory Shaheen, respondents.

Kravet & Vogel, LLP, New York (Joseph A. Vogel of counsel), for Brian Mullaney, respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered February 25, 2013, which, to the extent appealed from, granted defendants' motion to dismiss the amended complaint pursuant to CPLR 3211(a)(1), unanimously affirmed, without costs. Order, same court and Justice, entered September 16, 2013, which granted the motion of nonparty Brian Mullaney to quash

plaintiff's subpoena, unanimously modified, on the law and in the exercise of discretion, to deny that motion but to grant his motion, in the alternative, for a protective order, to the extent of limiting discovery to defendants' allegedly poor performance of their contract with plaintiff prior to Mullaney's resignation as plaintiff's president in late October 2010, and as so modified, affirmed, without costs.

"[A]n agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable provided it is in writing" (*John J. Kassner & Co. v City of New York*, 46 NY2d 544, 551 [1979] [internal citations omitted]). In addition, it must not be "so vague and ambiguous that it is unenforcible" (*Matter of Brown & Guenther [North Queensview Homes]*, 18 AD2d 327, 330 [1st Dept 1963]). Contrary to plaintiff's claim, section 18 of the contract between it and defendant Ferris Consulting Corp. is not so vague and ambiguous as to be unenforcible.

We also disagree with plaintiff's contention that section 18 does not apply to its claim for breach of the implied covenant of good faith and fair dealing. It is true that *I.C.C. Metals v Municipal Warehouse Co.* (50 NY2d 657 [1980]) says that a party may not limit its liability for an intentional tort (*see id.* at 663). However, breach of the implied covenant of good faith and

fair dealing is not a tort; rather, it "is a contract claim" (*Deloitte [Cayman] Corporate Recovery Servs., Ltd. v Sandalwood Debt Fund A, LP,* 31 Misc 3d 1225[A], *3 [Sup Ct, NY County]; *see also Canstar v Jones Constr. Co.,* 212 AD2d 452, 453 [1st Dept 1995] ["a breach of an implied covenant of good faith and fair dealing is intrinsically tied to the damages allegedly resulting from a breach of the contract"]). A claim for "breach of the implied covenant of good faith and fair dealing . . . may not be used as a substitute for a nonviable claim of breach of contract" (*Sheth v New York Life Ins. Co.,* 273 AD2d 72, 73 [1st Dept 2000]). It would be anomalous if plaintiff's contract claim were subject to a three-month statute of limitations but its claim for breach of the implied covenant were not.

Plaintiff does not contend that the shortened statute of limitations is inapplicable to its claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty. In any event, its aiding and abetting claim is inadequately pled (*see Bullmore v Ernst & Young Cayman Is.,* 45 AD3d 461, 464 [1st Dept 2007]; *Brasseur v Speranza,* 21 AD3d 297, 299 [1st Dept 2005]).

The motion court did not have the benefit of *Matter of Kapon v Koch* (__ NY3d __, 2014 NY Slip Op 2327 [Apr. 3, 2014]) when it decided Mullaney's motion to quash plaintiff's subpoena or, in the alternative, for a protective order. The Court of Appeals

has rejected the argument "that CPLR 3101(a) contains distinctions between disclosure required of parties and nonparties" (*id.* at *3) and has said that CPLR "3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source" (*id.* at *5).

Even under *Kapon*, plaintiff is not entitled to discovery from Mullaney about its allegedly converted donor list: its conversion claim is limited to its network credentials and back-up tapes, and the donor list relates to its dismissed claims. However, in light of *Kapon*, plaintiff is entitled to discovery from Mullaney about defendants' allegedly poor performance of their contract with plaintiff prior to Mullaney's resignation as plaintiff's president in late October 2010.

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

ENTERED: MAY 27, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11959 Jordan DeRose, Index 104884/11
Plaintiff-Appellant, 590324/12

-against-

Bloomingdale's Inc.,
Defendant-Respondent.
- - - - -
[And A Third-Party Action]

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Lever & Stolzenberg LLP, White Plains (Terrence James Cortelli of counsel), for appellant.

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

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Order, Supreme Court, New York County (Debra A. James, J.), entered January 25, 2013, modified, on the law, to the extent of granting plaintiff's motion on the issue of liability pursuant to Labor Law § 240(1), and otherwise affirmed, without costs.

Opinion by Acosta, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
Paul G. Feinman
Darcel D. Clark, JJ.

11959
Index 104884/11
590324/12

_____x

Jordan DeRose,
Plaintiff-Appellant,

-against-

Bloomingdale's Inc.,
Defendant-Respondent.

- - - - -

[And A Third-Party Action]

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Debra A. James, J.), entered January 25, 2013, which denied his motion for partial summary judgment on the issue of liability on his Labor Law §§ 240(1) and 241(6) claims.

Lever & Stolzenberg LLP, White Plains (Terrence James Cortelli of counsel), for appellant.

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

ACOSTA, J.P.

This appeal underscores the importance of Labor Law § 240(1)'s protection of construction workers who are not provided with adequate safety devices. Because plaintiff's supervisor explicitly directed him not to use an otherwise available Baker scaffold, and defendant does not dispute that a Baker scaffold would have been the adequate device for plaintiff to engage in the required demolition work, plaintiff is entitled to partial summary judgment on defendant's liability where he used an inadequate A-frame ladder and was injured in a resulting fall.

Plaintiff is a carpenter who sustained injuries while working on a renovation project in defendant's Manhattan store. Defendant contracted with RP Brennan General Contractors (RP), a third-party defendant who employed plaintiff, to conduct renovation and demolition work. On the day of the accident, Gerry Cole, plaintiff's supervisor who was also employed by RP, instructed him to assist with demolition work in a different section of the store from where he had been working. Cole told plaintiff to dismantle a temporary wall that had been erected to block the demolition work from the view of defendant's customers.

Plaintiff began walking toward the back of the store to fetch a Baker scaffold, which he determined was the proper device

to stand upon while dismantling the wall.[1] However, Cole reprimanded plaintiff and directed him to use a ladder instead. Specifically, Cole told plaintiff that he could not "roll the f**** (expletive) scaffold through the store with customers" and commanded him to "[g]o work off the f**** (expletive) ladders" that were already in the section being demolished. Because he did not want to disobey his supervisor's orders or defendant's policy prohibiting workers from moving equipment around the store while customers were present, plaintiff did not obtain the Baker scaffold.

When plaintiff arrived in the demolition section of the store, he saw three ladders, two of which were fiberglass A-frame ladders that were already in use by other workers. The only other ladder available was a "rickety," old, wooden A-frame ladder. Nevertheless, because plaintiff had been instructed to complete the demolition work "ASAP," he used the wooden ladder. After working with that ladder for approximately one hour, plaintiff "began dismantling the top support beam of the wall." He attempted to place the ladder securely on the concrete floor,

[1] According to plaintiff's affidavit, a Baker scaffold is a scaffold with locking wheels and a height-adjustable platform that is approximately two feet in width and six feet in length. The maximum height to which the platform can be raised is six feet.

despite the fact that the floor was uneven because it had recently been jackhammered. While plaintiff stood on the ladder, with his feet approximately four feet from the ground, he swung his hammer. Unfortunately, after the hammer struck, the ladder "first shifted and wobbled, and then kicked out," causing plaintiff to fall to the ground. As a result of the fall, plaintiff suffered fractures to his face and wrist.

Plaintiff commenced this action in April 2011, alleging violations of Labor Law §§ 200, 240(1), and 241(6).[2] Defendant answered on June 2, 2011. On July 1, 2011, pursuant to defendant's discovery demands, plaintiff submitted medical records and authorizations to obtain other requested records. The preliminary conference order, dated August 30, 2011, specified that plaintiff would provide certain authorizations by October 14, 2011, and that depositions of all parties would be held on December 20, 2011. By letter dated September 19, 2011, defendant advised plaintiff that the authorizations for his Social Security Administration and Worker's Compensation Board files were not in proper form, and requested amended authorizations, which plaintiff provided on October 14, 2011.

[2] Plaintiff's Labor Law § 241(6) claim was predicated on 12 NYCRR 23-1.21(b)(1), (b)(3), (b)(4)(iv), and (e), which, taken together, plaintiff asserts, require that ladders be secured from slipping and falling.

On December 19, 2011, plaintiff's counsel called defendant's counsel to confirm that plaintiff's deposition would take place the following day in accordance with the preliminary conference order. Plaintiff argues that defendant refused, but defendant claims that it could not proceed with plaintiff's deposition because it was still awaiting documents pursuant to plaintiff's authorizations. Defendant further alleges that plaintiff's counsel verbally consented to adjourn the deposition until February 2, 2012. Plaintiff, however, denies consenting to the adjournment.[3] The parties did not reduce the alleged agreement to writing, and neither party moved to amend the preliminary conference order or adjourn the deposition.

In any event, plaintiff filed a motion on December 28, 2011, seeking partial summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6). Plaintiff argued in his affidavit supporting the motion that "[i]f [he] had been provided the Baker scaffold, [he] would not have fallen. The scaffold would have been proper because it would not have shifted as [he]

[3] The record on appeal contains an email and letter, both dated December 19, 2011, which plaintiff points to as evidence that it was prepared for the deposition and that defendant's counsel refused to proceed. In an affidavit, sworn to on December 28, 2011, plaintiff's counsel states that the email was sent to defendant, and only cites to the letter without claiming that it was ever mailed. The letter is not accompanied by proof of mailing.

hammered. And, because of its dimensions, it would have been able to better cope with the fact that the concrete floor was uneven."

Defendant responded that the motion should be denied as premature, because plaintiff's deposition had not yet been conducted. However, the parties conducted plaintiff's deposition on February 2, 2012, and each party submitted supplemental motion papers. Defendant argued that plaintiff's deposition testimony raised triable issues of fact as to whether he was the sole proximate cause of his injuries and as to the identification of the specific ladder that plaintiff used. Specifically, defendant noted plaintiff's testimony that the ladder he used had been destroyed by his coworker, Gary Moon, whereas photographs taken shortly after the accident by defendant's Fire Safety Director, Thomas LaPera, showed a wooden ladder that did not precisely match plaintiff's description of the ladder from which he fell.[4] Defendant further asserted that it wished to conduct depositions of LaPera, Moon, and Cole.

The motion court denied plaintiff's motion without prejudice as premature under CPLR 3212(f) and CPLR 3214(b). This appeal

[4] Defendant submitted an unnotarized affidavit from LaPera stating that, shortly after plaintiff's fall, he photographed the only wooden ladder in the vicinity of the accident.

followed.

The Labor Law requires building owners and contractors who conduct construction or demolition projects to "furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, . . . ladders, . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed" (Labor Law § 240[1]). The duty to furnish adequate safety devices is nondelegable, and those who fail to furnish such devices are absolutely liable for injuries that proximately result from an employee's elevation-related accident (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]; *Haimes v New York Tel. Co.*, 46 NY2d 132, 137 [1978]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005]). A defendant who provides an adequate safety device may assert the defense that an injured worker – who neglected to use or misused the available device – was the sole proximate cause of his or her injuries (*see Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146, 147 [1st Dept 2004]). However, "[t]he sole proximate cause defense does not apply where [a] plaintiff was not provided with an adequate safety device as required by the Labor Law" (*Ferluckaj v Goldman Sachs & Co.*, 53 AD3d 422, 425 [1st Dept 2008], *revd on other grounds* 12 NY3d 316 [2009]).

Defendant does not dispute plaintiff's assertions that a

Baker scaffold would have been the adequate safety device for the demolition work and that plaintiff was not provided with one. When plaintiff attempted to fetch the Baker scaffold from the back of defendant's store, his supervisor stopped him and commanded him to use the ladders in the section of the store that was being demolished. Defendant makes much of the issues concerning which ladder plaintiff used and the care with which he used the ladder, but that argument obfuscates the real issue in this case: plaintiff was not provided with the single device that would have enabled him to perform the work safely. The relevant consideration is defendant's failure to provide plaintiff with the Baker scaffold, rather than which of the three inadequate A-frame ladders plaintiff ultimately used. As plaintiff was not provided with an adequate safety device, defendant cannot avail itself of the sole proximate cause defense (*Ferluckaj*, 53 AD3d at 425).

Furthermore, defendant's proposition that plaintiff should have fetched the Baker scaffold (despite his supervisor's contrary instruction) or waited for the fiberglass ladders to become available is unconvincing. For example, defendant cites *Montgomery v Federal Express Corp.* (4 NY3d 805 [2005]), where the plaintiff declined to fetch an available ladder, opted instead to stand on an overturned bucket in order to reach an elevator motor

room, and was injured while jumping the four feet down from the motor room (*see also Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [describing the facts of *Montgomery*]). However, unlike the plaintiff in *Montgomery*, plaintiff in this case initially exhibited the "normal and logical response . . . to go get" the adequate safety device when he attempted to fetch the Baker scaffold (*Montgomery*, 4 NY3d at 806 [internal quotation marks omitted]), but he was rebuffed by his supervisor. That plaintiff's supervisor explicitly directed him not to use the scaffold, citing defendant's policy against rolling equipment through the store while customers were present, rendered the scaffold essentially unavailable to plaintiff. There is no practical difference between what happened here – where a supervisor directs an employee to not use an otherwise available safety device – and a situation where a scaffold simply was not present at the worksite (*see Rice v West 37th Group, LLC*, 78 AD3d 492, 496 [1st Dept 2010]).

In addition, the *Robinson* Court noted the plaintiff's concession that although the necessary "eight-foot ladders may have been in use at the time of his accident," the plaintiff's "foreman had *not* directed him to finish [the task at that time]," and thus the plaintiff's decision to use a shorter ladder by "standing on the ladder's top cap" was "the sole proximate cause

of his injuries" (6 NY3d at 555 [emphasis added]). Here, by contrast, plaintiff's supervisor yelled and cursed at him to use the ladders, and plaintiff was told to do the work "ASAP." Therefore, even assuming that a sturdy A-frame ladder (instead of a Baker scaffold) would have been adequate for plaintiff to perform the demolition work, the fiberglass ladders that were in use by plaintiff's coworkers cannot be said to have been available.

The Labor Law, recognizing the realities of construction and demolition work, does not require a worker to demand an adequate safety device by challenging his or her supervisor's instructions and withstanding hostile behavior. To place that burden on employees would effectively eviscerate the protections that the legislature put in place. Indeed, workers would be placed in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work (*see Lombardi v Stout*, 80 NY2d 290, 296 [1992] [explaining that Labor Law § 240 "is intended to place the ultimate responsibility for building practices on the owner and general contractor in order to protect the workers who are required to be there but who are scarcely in a position to protect themselves from accidents"]; *see also Haimes*, 46 NY2d at 136, quoting NY Legis Ann, 1969, p 407). When faced with an

employer's instruction to use an inadequate device, many workers would be understandably reticent to object for fear of jeopardizing their employment and their livelihoods. Labor Law § 240(1) speaks for those workers and, through the statute, the legislature has made clear that the provision of adequate safety devices at worksites is imperative and that worker safety depends on absolute liability for contractors and owners who fail to furnish such devices (*see Lombardi*, 80 NY2d at 296).[5]

We reach the merits of this case notwithstanding defendant's argument that plaintiff's motion was premature. Although the parties proceeded with plaintiff's deposition after the filing of the motion, plaintiff's testimony was consistent with his affidavit. Therefore, defendant could not raise any issue of material fact that would preclude a grant of partial summary judgment concerning liability under Labor Law § 240(1).

Finally, insofar as defendant raises comparative negligence or other issues that might provide a defense to liability on plaintiff's Labor Law § 241(6) claim (*see Long v Forest-Fehlhaber*, 55 NY2d 154 [1982]), we need not reach those issues

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[5] It is of no moment that plaintiff was instructed not to use the Baker scaffold by Cole, an RP supervisor, rather than by defendant, since § 240 makes clear that "contractors *and owners*," with few exceptions that are inapplicable here, are liable for failure to furnish adequate safety devices (Labor Law § 240 [emphasis added]; *see also Haimes*, 46 NY2d at 136).

because of our finding of defendant's liability under § 240(1), which renders it absolutely liable for plaintiff's resulting injuries.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered January 25, 2013, which denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law §§ 240(1) and 241(6) claims, should be modified, on the law, to the extent of granting plaintiff's motion on the issue of liability pursuant to Labor Law § 240(1), and otherwise affirmed, without costs.

All concur.

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

ENTERED: MAY 27, 2014

CLERK