SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 20, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5768 The People of the State of New York, Respondent, Ind. 5329/02

-against-

Elias McFarland,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about October 25, 2010, which denied defendant's CPL 440.20 motion to set aside a sentence of the same court (James A. Yates, J.), imposed February 21, 2003, unanimously affirmed.

Instead of postrelease supervision, the sentencing court used the phrase "supervised parole for five years" and stated that this was "part of the sentence too." While the court misspoke, the nomenclature it used was sufficiently similar to the correct term that there could not have been any ambiguity or

misunderstanding (*cf. People v Carter*, 67 AD3d 603, 604 [2009], *lv denied* 14 NY3d 886 [2010] [plea not rendered involuntary by misuse of parole to mean PRS]). Accordingly, there was no violation of defendant's "right to hear the court's pronouncement as to what the entire sentence encompasses, directly from the court" (*People v Sparber*, 10 NY3d 457, 470 [2008]).

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5769 The People of the State of New York, Ind. 6599/01
Respondent,

-against-

Synell Sims,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered May 26, 2009, resentencing defendant to an aggregate of 25 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We have no

authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5770 In re Salvatore D.,
Petitioner-Respondent,

-against-

Shyou H.,
Respondent-Appellant.

_____

Barton R. Resnicoff, Great Neck, for appellant.

Fersch Petitti LLC, New York (Danielle R. Petitti of counsel), for respondent.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 13, 2010, which denied respondent mother's objections to an order of support, same court (Support Magistrate Ann Marie Loughlin), entered on or about May 19, 2010, directing respondent to, among other things, pay $950 a month for the support of the parties' child, unanimously affirmed, without costs.

The Support Magistrate properly ordered child support based on the needs of the child, since respondent presented insufficient evidence to determine her gross income (*see* Family Court Act § 413[1][k]; *see Matter of Childress v Samuel*, 27 AD3d 295, 296 [2006]). Respondent's stated expenses were more than twice the income reflected on her tax return. The Support Magistrate found

incredible respondent's testimony regarding her employment, her living situation and loans from her employer and brother. There is no basis to disturb those findings (*Childress*, 27 AD3d at 296).

The Support Magistrate properly declined to consider the factors set forth in Family Court Act § 413(1)(f), including the child's receipt of Social Security disability benefits. Such factors should be considered only where, unlike here, the court is able to calculate the basic child support obligation pursuant to Family Court Act § 413(1)(c) (*see Matter of Graby v Graby*, 87 NY2d 605 [1996]).

Respondent's testimony, including that she was a well-known esthetician with celebrity clients and 22 years of experience, supports the Support Magistrate's determination that she is able to pay the child support obligation. The Support Magistrate was not required to rely on respondent's account of her finances (*see Matter of Culhane v Holt*, 28 AD3d 251, 252 [2006]).

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

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5771 Karlo Morato-Rodriguez, Index 303634/09
Plaintiff-Appellant,

-against-

Riva Construction Group, Inc.,
Defendant-Respondent,

1412 Broadway, LLC,
Defendant-Appellant,

Admit One, LLC, Corp.,
Defendant.

_____

Kagan & Gertel, Esqs., Brooklyn (Irving Gertel of counsel), for Karlo Morato-Rodriguez, appellant.

McGaw, Alventosa & Zajac, Jericho (Dawn C. DeSimone of counsel), for 1412 Broadway, LLC, appellant.

Karl Clerkin Redmond Ryan Perry & Van Etten, LLP, Melville (James V. Derenze of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered February 14, 2011, which granted defendant Riva Construction Group's motion for summary judgment dismissing the complaint against it, unanimously affirmed, without costs.

The motion court correctly determined that plaintiff's claims against defendant Riva are barred by Workers' Compensation Law § 11. Riva demonstrated that it and nonparty WTS Contracting Corp. are alter egos by establishing that they share a president and chief executive, an office manager and an office address, and

were insured by the same liability and Workers' Compensation policies (*see Carty v East 175th St. Hous. Dev. Fund Corp.*, 83 AD3d 529 [2011]). Although plaintiff was paid with a WTS check and WTS was identified as his employer in the report regarding his accident as well as in the Workers' Compensation notice of award, these facts are consistent with the averment by the president of both Riva and WTS that WTS was merely the payroll entity for all Riva employees (*cf. Vera v NYC Partnership Hous. Dev. Fund Co., Inc.*, 40 AD3d 472 [2007]). Additionally, plaintiff testified that his supervisor, a Riva employee, was the only person who instructed him regarding the work.

In view of the foregoing, the claimed need for further discovery in the form of depositions from defendant Riva is unavailing.

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5772 The People of the State of New York, Respondent, Ind. 4809/08

-against-

James Charleston, 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 (David C. Bornstein of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at suppression hearing; Renee A. White, J. at plea and sentencing), rendered June 23, 2009, convicting defendant of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to a term of 8 years, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). At sentencing, defense counsel simply announced that defendant wished to withdraw his plea. Although defendant and his counsel received a suitable opportunity to speak, neither provided any ground for the motion. Defendant asserts that he also made a written plea withdrawal motion. Although the record on appeal

contains a copy of such a motion, there is no evidence that the motion was ever filed, or that the sentencing court knew of its existence. In any event, the contents of the written motion did not require withdrawal of the plea. The plea allocution establishes that the plea was knowing, intelligent and voluntary, and it refutes defendant's claim of innocence.

Defendant's claim regarding an alleged violation of *People v Rosario* (9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]) was forfeited by his guilty plea (*see People v Delgado*, 4 AD3d 310, 311 [2004], *lv denied* 2 NY3d 798 [2004]), as well as being both unpreserved and without merit.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5773-
5774 Diana Pacheco, Index 14933/07
Plaintiff-Respondent,

-against-

Kushner Companies, et al.,
Defendants.

- - - - -

Kushner Companies, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Toys "R" Us-Delaware, Inc.,
Third-Party Defendant-Appellant.

_____

McAndrew, Conboy & Prisco, Melville (Yasmin D. Soto of counsel), for appellant.

Siler & Ingber, LLP, Mineola (Subrata Sengupta of counsel), for Diana Pacheco, respondent.

Smith Valliere PLLC, New York (Gregory Zimmer of counsel), for Kushner Companies, Kushner Seiden Madison Avenue Properties, L.P., Kushner Seiden Madison/64th Properties, L.P., Madison/64th Properties, Inc., Bruckner Plaza Shopping Center, LLC, Bruckner Plaza Associates and Bruckner Plaza Associates, L.P., respondents.

_____

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered December 20, 2010, which, upon reargument, denied third-party defendant's motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant the motion to the extent of dismissing the contractual indemnification claims of all third-party plaintiffs, except

Bruckner Plaza Associates, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered May 20, 2010, unanimously dismissed, without costs, as academic.

The court correctly denied the motion of tenant Toys "R" Us for summary judgment insofar as it sought dismissal of the third-party complaint in its entirety, since tenant failed to eliminate all triable issues of fact with respect to whether it was responsible for maintaining the sidewalk where plaintiff's accident occurred. Toys "R" Us established which lease controlled, but the lease provision regarding its responsibility for repairs and maintenance to the subject sidewalk is ambiguous since it is susceptible to more than one interpretation as to what constituted the demised premises, and as to which sidewalks Toys "R" Us was responsible for maintaining (*see Feldman v National Westminster Bank*, 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]). Further, the parties' reliance upon parol evidence did not clarify the ambiguous terms of the lease, but presented a triable issue of fact (*see Omath Holding Co. v City of New York*, 149 AD2d 179, 186 [1989]).

However, the court erred in failing to grant the motion insofar as it sought dismissal of the contractual indemnification claims of entities not covered by the indemnification provision

of the lease (*see Thomas Indus. v Sackren*, 37 AD2d 601 [1971]). The record establishes that only Bruckner Plaza Associates was a signatory to the lease at issue.

We have considered the remaining contentions of Toys "R" Us and find them unavailing.

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5775 The People of the State of New York, Respondent, Ind. 56692C/05

-against-

Tyrone Brown, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Lawrence Bernstein, J.), rendered on or about October 10, 2007, 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 [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: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5777 The People of the State of New York, Ind. 6960/04
Respondent,

-against-

Vito Genzale,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Renee A. White, J.), rendered April 13, 2010, resentencing defendant to a term of 4½ years, with 3 years' postrelease supervision, unanimously affirmed.

The court provided a sufficient reduction of sentence pursuant to CPL 440.46, and we perceive no basis for a further reduction.

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5778-	The People of the State of New York,	Ind. 5886/03
5778A-	Respondent,	3917/03
5778B		6372/04

-against-

Jamel McRae,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (John Vang of counsel), and Benjamin A. Heiss, Sunnyside, for appellant.

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

_____

Appeals from order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about March 2, 2010, and order, same court (Renee A. White, J.), entered on or about April 19, 2010, each of which denied defendant's CPL 440.46 motion for resentencing, unanimously dismissed, as moot. Order, same court (Maxwell Wiley, J.), entered on or about May 5, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

In the May 5 order (indictment 6372/04), the court denied the motion on the merits. We conclude that the court providently exercised its discretion when it determined that substantial justice dictated denial of the application in light of the seriousness of defendant's criminal history, which outweighed the

mitigating factors he cited (*see e.g. People v Gumbs*, 66 AD3d 558 [2009], *lv dismissed* 14 NY3d 771 [2010]). The underlying facts of several of defendant's convictions indicate an involvement in large-scale drug distribution.

The appeals from the other two orders are moot because Supreme Court has granted defendant's renewed motions for resentencing as to those matters.

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5780 The People of the State of New York, Ind. 4926/06
Respondent,

-against-

Ricardo Rodriguez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about March 5, 2008, 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 [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: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5781 The People of the State of New York, Ind. 4039/06
Respondent,

-against-

David Soto,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (James M. Kindler, J.), rendered on November 5, 2008, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and unlawful possession of marijuana, and sentencing him to a term of 1 year and a $100 fine, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established that

an officer had a sufficient opportunity to observe defendant making a drug sale. We have considered and rejected defendant's remaining credibility arguments.

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5782 John P. Bostany, Index 602627/08
Plaintiff-Respondent,

-against-

Trump Organization LLC, et al.,
Defendants-Appellants.

_____

Newman Ferrara LLP, New York (Glenn H. Spiegel of counsel), for appellants.

Profeta & Eisenstein, New York (Fred R. Profeta, Jr. of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 18, 2010, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint and granting a money judgment against plaintiff, and denied defendants' motion to amend the petition in the nonpayment proceeding to add subsequently accruing rent and to request a hearing on attorneys' fees and costs without prejudice to renewal at the proper juncture, unanimously modified, on the law, to grant summary judgment dismissing the third (unjust enrichment), eighth (partial actual eviction), tenth (loss of business), eleventh (negligence - mold), thirteenth (tortious interference with business), and fourteenth (declaratory judgment) causes of action, and otherwise affirmed, without costs.

Where the record evidence showed that the subject building was known as the Trump Building, that plaintiff was induced to sign the lease by an executive vice president of Trump Organization, that the lease was actually signed by Donald Trump (albeit on behalf of 40 Wall), that employees of Trump Organization dealt directly with plaintiff and contractors regarding the leaks and repairs, and plaintiff's testimony that certain rent payments were made to Trump Organization, summary judgment was properly denied, based on issues of fact as to the relationship between Trump Organization and 40 Wall (*Fogel v Hertz Intl.*, 141 AD2d 375, 376 [1988]).

Summary judgment was properly denied as to the seventh cause of action for partial constructive eviction, as plaintiff has established issues of fact as to whether defendants' allegedly wrongful acts "substantially and materially deprive[d] [him] of the beneficial use and enjoyment of the premises" *(Pacific Coast Silks, LLC v 247 Realty, LLC*, 76 AD3d 167, 172 [2010] [citation and internal quotation marks omitted]). Although in cases of partial eviction the tenant's refusal to pay rent constitutes an election of remedies, and the tenant has no claim for damages, a tenant who elects to remain in possession and pay the rent after a partial eviction may claim damages from his lessor which include consequential damages (*see Frame v Horizons Wine &*

Cheese, 95 AD2d 514, 519 [1983]). Thus, plaintiff has not foreclosed all other remedies in this case, and the issue becomes one of proof (*see P.W.B. Enters. v Moklam Enters.*, 243 AD2d 350 [1997]).

Plaintiff's proof, which included a subtenant loss report, subtenant affirmations, and letters of complaint sent by plaintiff to an executive of Trump Organization, has established issues of fact that defendants may have repaired, but failed to rectify, the subject problem, in accordance with Article 66.01 of the Lease Rider, even after the July 5, 2005 and April 2, 2007 settlement agreements. Thus, summary judgment was properly denied with respect to the fifth (breach of the lease), sixth (restitution), ninth (breach of the covenant of quiet enjoyment), and twelfth (indemnification) causes of action. Based on the foregoing, defendants' request to dismiss the counterclaims in the non-payment proceeding, which duplicate the causes of action for breach of the lease, breach of quiet enjoyment and indemnification, was also properly denied.

We find, however, that the following claims are subject to dismissal. The third cause of action for unjust enrichment is barred by the breach of contract claim (*see Adelaide Prods., Inc. v BKN Intl. AG*, 38 AD3d 221, 225-226 [2007]). The eighth cause of action for partial actual eviction fails, as defendants did

not physically expel or exclude plaintiff from the premises (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]). Plaintiff has not established a sufficient factual basis for the tenth (loss of business) and eleventh (negligence - mold) causes of action. The thirteenth cause of action (tortious interference with business) fails as plaintiff does not show that defendants' alleged interference with a subtenant was motivated solely by malice, or effected by unlawful means (*see Matter of Pamilla v Hospital for Special Surgery*, 223 AD2d 508, 509 [1996]). The fourteenth cause of action for a declaratory judgment as to recission of the subject lease is dismissed as academic, as it is undisputed that the lease had expired and plaintiff vacated the subject premises.

There is no need at this juncture to conduct a hearing to determine attorneys' fees and costs, or to permit defendants' motion to amend the petition to include subsequently accruing rent (*see 501 Seventh Ave. Assoc. v 501 Seventh Ave. Bake Corp.*, 2002 NY Slip Op 50362U [Civ Ct, NY County 2002]).

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

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5783 The People of the State of New York, Ind. 8414/99
Respondent,

-against-

Lashawn Mackey,
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 (Alan Gadlin of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Arlene Goldberg, J.), rendered March 26, 2009, resentencing defendant to a term of 23 years, plus 5 years of post-release supervision, unanimously affirmed.

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

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5784 The People of the State of New York, Ind. 980/03
Respondent,

-against-

Willie Cochran,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered January 21, 2009, resentencing defendant to a term of 7 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We have no

authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5785-
5786 Leon Casper, Index 600419/06
Plaintiff-Appellant,

-against-

Cushman & Wakefield,
Defendant-Respondent.

_____

Nesenoff & Miltenberg, LLP, New York (Philip A. Byler of counsel), for appellant.

Clifton Budd & DeMaria, LLP, New York (Robert J. Tracy of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Marilyn B. Dershowitz, Special Referee), entered June 2, 2010, awarding defendant Cushman & Wakefield attorneys' fees, expenses and interest in the amount of $811,350.52 pursuant to an order, same court and Special Referee, entered May 17, 2010, unanimously affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, as subsumed in the appeal from the judgment.

In this action alleging breach of contract, unjust enrichment and quantum meruit with respect to certain real estate commissions, summary judgment dismissing the complaint was granted to defendant Cushman & Wakefield, pursuant to the order

and judgment of the Supreme Court, New York County (Louis B. York, J.), (*see* 74 AD3d 669 [2010], *lv dismissed* 16 NY3d 766 [2011]), and the issue of reasonable legal fees to be paid by plaintiff, for the benefit of defendant, was referred to the Office of Special Referee for hearing and determination.

We find the court considered the relevant factors in determining reasonable attorneys' fees, and there was no abuse of discretion (*see 542 E. 14th St. LLC v Lee*, 66 AD3d 18, 24 [2009]). The record shows that, under the circumstances, defendant's attorneys performed appropriate and necessary work in light of plaintiff's claims and the substantial damages sought, generally defended the action in a manner which was reasonable, and obtained a successful result (*see Matter of Karp [Cooper]*, 145 AD2d 208 [1989]; *compare Hinman v Jay's Vil. Chevrolet*, 239 AD2d 748 [1997]).

In light of the numerous factual allegations, theories of liability, and alleged contracts set forth in plaintiff's complaint, we reject plaintiff's contention that the court abused its discretion by failing to find that defendant should have moved to dismiss the action at the outset based on arbitrability grounds, notwithstanding that such procedural defense was

ultimately the basis for the grant of summary judgment (*see generally Leon v Martinez*, 84 NY2d 83, 87 [1994).

We find plaintiff's remaining arguments unavailing.

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5787 The People of the State of New York, Ind. 405/02
Respondent,

-against-

Vincent Rodriguez,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered June 2, 2010, as amended July 22, 2010, resentencing defendant to an aggregate term of 10 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We have no authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5788 The People of the State of New York, Ind. 463/03
Respondent,

-against-

Michael Watson,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (Joshua A. Kobrin of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered July 6, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded to Supreme Court for further proceedings on the motion.

Defendant is eligible for consideration for resentencing even though he had been released from custody on his drug

conviction but reincarcerated for a parole violation (*see People v Paulin*, 17 NY3d 238 [2011]).

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

ENTERED: OCTOBER 20, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Abdus-Salaam, Román, JJ.

5789N Northe Group, Inc., Index 600068/10
Plaintiff-Appellant,

-against-

Spread NYC, LLC,
Defendant-Respondent,

Wah Kok Realty Corp., et al.,
Defendants.

_____

George Sitaras, New York, for appellant.

Sanders, Ortoli, Vaughn-Flam, Rosenstadt LLP, New York (Jeremy B. Kaplan of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered July 9, 2010, inter alia, declaring plaintiff's mechanic's lien void, unanimously affirmed, with costs.

In accordance with the standards for summary judgment, a claim under Lien Law § 39 is subject to summary disposition where, as here, the evidence that the amount of the lien was wilfully exaggerated is conclusive (*see Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392, 393 [2006]). The documentary evidence, including plaintiff's invoices (which identify plaintiff as the "construction manager") and the parties' written agreement, demonstrates conclusively that plaintiff was acting under the written agreement as a

construction manager (and therefore prohibited from marking up contractor services), not, as it argues, overseeing work under an alleged, contemporaneous oral agreement as a general contractor (with the unrestricted right to impose markups).

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

ENTERED: OCTOBER 20, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3526 21st Century Diamond, LLC, Index 650331/09
Plaintiff-Respondent,

-against-

Allfield Trading, LLC, et al.,
Defendants-Appellants.

- - - - -

Allfield Trading, LLC,
Third-Party Plaintiff-Appellant,

-against-

Exelco Group, etc., et al.,
Third-Party Defendants-Respondents.

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Mound Cotton Wollan & Greengrass, New York (Arthur M. Handler of counsel), for appellants.

Jones Day, New York (Stephen J. Pearson of counsel), for respondents.

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Order, Supreme Court, New York County (James A. Yates, J.), entered May 24, 2010, which, to the extent appealed from as limited by the briefs, on a motion for reargument, adhered to a prior order, same court and Justice, entered January 22, 2010, granting plaintiff's and third-party defendants' motions to dismiss, respectively, defendants' first, second and third counterclaims and the third-party complaint, unanimously modified, on the law, to deny third-party defendants' motion as to the second, third and fourth causes of action of the third-party complaint, and otherwise affirmed, without costs.

Plaintiff 21st Century Diamond, LLC (21st Century), a Delaware limited liability company, was organized to engage in the business of diamond wholesaling. 21st Century's members are defendant and third-party plaintiff Allfield Trading, LLC (Allfield), which holds an 18 percent interest, and third-party defendant Exelco Group d/b/a Exelco North America, Inc. (Exelco), which holds an 82 % interest. Although Allfield is the minority member, its principals, defendants Joshua Allen and Robert Cornfield, were formerly designated 21st Century's managers. After the relationship between Allfield and Exelco deteriorated, Exelco, as holder of the majority interest, removed Allen and Cornfield as managers and caused 21st Century to commence this action against Allfield, Allen and Cornfield. In response, defendants asserted counterclaims against 21st Century and Allfield, directly and derivatively on behalf of 21st Century, and brought a third-party action against Exelco and Exelco's owner and manager (respectively, third-party defendants Jean-Paul Tolkowsky and Fazal Chaudhri) and a diamond brokerage firm and its principal (third-party defendants Isidor Inc. and Ori Levy). At issue on this appeal is the motion court's dismissal of Allfield's first three counterclaims and of the third-party

complaint in its entirety.[1]

The motion court erred in dismissing the third-party complaint's second, third and fourth causes of action, which allege, respectively, breach of the implied covenant of good faith and fair dealing and breach of fiduciary duty (against Exelco) and aiding and abetting breach of fiduciary duty (against Tolkowsky, Chaudhri, Isidor and Levy). Accepting the factual allegations of the third-party complaint as true, and drawing all reasonable inferences in the pleader's favor, Allfield has made out a claim that Exelco breached its fiduciary duty as majority member of 21st Century and the covenant of good faith and fair dealing implied in 21st Century's operating agreement. Specifically, the third-party complaint alleges that Exelco usurped for itself a prospective supply deal with a major diamond retailer (Sterling Jewelers, Inc.) that Allen and Cornfield were in the process of negotiating on 21st Century's behalf when they were removed from management. While 21st Century's operating agreement permits each member to engage in outside activities

[1]Although the order appealed from purportedly denied a motion to reargue, it is appealable because the court, in adhering to its prior decision, addressed the parties' arguments on the merits (*see Premier Capital v Damon Realty Corp.*, 299 AD2d 158 [2002]). We note that the fourth and fifth counterclaims, which the motion court sustained, are not at issue on this appeal.

"compet[ing] with the business of the Company," that provision did not entitle Exelco to use 21st Century's proprietary information to appropriate for itself a business opportunity that 21st Century had been pursuing (*cf. Kahn v Icahn*, 1998 WL 832629, *4, 1998 Del Ch LEXIS 223, *15 [Del Ch 1998], *affd* 746 A2d 276 [Del 2000] [in dismissing a usurpation claim where the partnership agreement permitted competition with the entity, the court noted that the plaintiffs did not "plead specific facts by which [the court] might reasonably infer that there was misappropriation of information, unlawful redirection or personal use of partnership resources or some sort of misappropriation of proprietary investment research"]). In addition, the third-party complaint, construed liberally, states a cognizable claim against Exelco, as majority member of 21st Century, for oppression of Allfield, as minority member, by freezing the latter out of the business and depriving it of the benefit of its interest. Determining whether these claims have merit must await the development of a factual record.

Defendants' first three counterclaims against 21st Century, as well as the third-party complaint's first cause of action against Exelco, were correctly dismissed. These claims are all based on the contention that certain actions and resolutions that Exelco caused 21st Century to take in May and June of 2009

(principally, the commencement of this action and the removal of Allen and Cornfield from management) were breaches of the operating agreement in that they were taken without adherence to the usual procedures set forth in the operating agreement (such as giving Allfield notice of a meeting of the members). This claim is unavailing because § 5.8 of the operating agreement (entitled "Action Without Meeting") provides in pertinent part: "Any action required or permitted to be taken at any meeting of the Members may be taken without a meeting, without prior notice and without a vote, if Members holding voting interests sufficient to authorize such action at a meeting at which all of the Members entitled to vote thereon were present and voted consent thereto in writing." This provision is enforceable under Delaware law (*see* 6 Del Code Ann § 18-404[d]). Accordingly, the operating agreement permitted Exelco, as majority member, to cause 21st Century to take the challenged actions (commencement of this action and removal of Allen and Cornfield from management) by voting for those actions in writing, which it did.

We reject defendants' argument that unanimity was required for the actions in question. While the operating agreement requires the members' unanimous approval for dissolution, commencing this lawsuit and removing certain managers did not amount to a "de facto dissolution" of the company. Nor is a

different result required by § 5.2 of the operating agreement, which provides that the company's affairs "shall be managed by the Members" and that "[t]he Members shall . . . vote on all . . . decisions of the Company." Section 5.2 is a general provision prescribing how the company's business is to be conducted under ordinary circumstances. Section 5.8, on the other hand, permits action to be taken without a meeting of the members in the event their relationship has broken down, as occurred in this case (*cf. Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 176 [2011]).

We have considered Allfield's arguments that the motion court erred in dismissing its remaining third-party claims and find them unavailing.

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

ENTERED: OCTOBER 20, 2011

CLERK

Tom, J.P., Sweeny, Freedman, Richter, Abdus-Salaam, JJ.

4050-4051 The People of the State of New York, Appellant,

-against-

Anthony Caldwell, Defendant-Respondent.

Ind. 5645/06

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole of counsel), for appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), for respondent.

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about April 2, 2009, which granted defendant's CPL 440.20 motion to set aside his sentence on the ground that he was improperly adjudicated a second felony drug offender whose prior felony conviction was a violent felony, unanimously reversed, on the law, and the original sentence reinstated. Appeal from order, same court and Justice, entered on or about June 3, 2010, which denied the People's CPL 440.40 motion to set aside a judgment of resentence of the same court and Justice, rendered May 7, 2009, resentencing defendant, as a second felony drug offender in accordance with its decision and order of April 2, 2009, to a term of 3 years, unanimously dismissed, as academic.

Defendant is similarly situated to the defendants in *People*

v Acevedo (17 NY3d 297[2011]). Accordingly, his violent felony conviction qualifies as a predicate conviction for sentencing purposes in this case.

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

ENTERED: OCTOBER 20, 2011

CLERK

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

4991-
4992 Walter Reavely, et al., Plaintiffs-Respondents, Index 114023/07

-against-

Yonkers Raceway Programs, Inc., et al., Defendants-Appellants.

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Cozen O'Connor, New York (Vincent P. Pozzuto of counsel), for appellants.

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

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 30, 2010, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the Labor Law § 240(1) cause of action and the Labor Law § 241(6) cause of action predicated upon a violation of Industrial Code (12 NYCRR) § 23-1.7(b), and granted plaintiffs' motion for summary judgment on liability under Labor Law § 240(1), affirmed, without costs.

Plaintiff Walter Reavely, a carpenter, was injured while assisting in the installation of a hang wall at the edge of a building foundation. Plaintiff's primary responsibility was to cut sheets of plywood into the smaller pieces that would be used for the wall. To do this, he used a type of circular saw with which he was highly experienced. He then fastened the plywood

strips onto the foundation. At the time of the accident, plaintiff was cutting a piece of the hang wall that had already been fastened onto the foundation. To make the cut, plaintiff had to lean over the portion of the wall he was cutting and approach it from the back side. This was because a shallow gully was between him and the wall and he could not stand in the gully while making the cut. Further, close to the back side of the hang wall was an uncovered, unguarded trench, which plaintiff contends was 10 feet deep at the area closest to the hang wall.

Approximately 10 minutes before plaintiff approached the wall to make the cut, another contractor had finished installing waterproofing on the surface of the foundation where plaintiff would be doing the work. Plaintiff knew that it ordinarily takes at least 20 minutes for the waterproofing, which is a tar-like, viscous material, to dry. However, he was directed to make the cut immediately and did not want to defy his supervisor by waiting until he could be certain that the surface was safe. Plaintiff tested the material, and it appeared dry enough to stand on, so he commenced his work. As he was completing the cut, he attempted to replant his right foot and slipped on the viscous waterproofing. According to plaintiff's affidavit submitted in connection with the subject summary judgment

motions, "When I slipped I lost my balance. My body was pulled forward and I hovered over the uncovered 10 feet trench edge without fall protection. It was 10 feet deep there because that particular section had not been backfilled. I felt that I was about to go over the edge. [¶]I reacted immediately and instinctively to teetering by trying to stand up. I also desperately tried to counter the momentum pulling me over the edge by arching back. I knew that I was holding a potentially lethal saw which I was about to go over with, or even worse, on. [¶] Worried about hitting my leg as well and in the process of teetering and desperately trying to prevent myself from going fully over the trench edge, my right hand came off the operating saw and it struck my right hand, thumb and forefinger before it dropped." Thus, according to plaintiff's uncontested version of events, he did not actually sustain his injury by falling into the trench, but rather by attempting to prevent himself from falling.

Plaintiffs commenced this action against the site owner and the general contractor, alleging violations of Labor Law §§ 200, 240(1), and 241(6). In support of their Labor Law § 241(6) claim, plaintiffs alleged, inter alia, that defendants violated Industrial Code (12 NYCRR) §§ 23-1.7(b) (requiring that every hazardous opening be covered or have a safety railing) and 23-

1.7(d) (prohibiting the existence of slippery conditions at work sites). Defendants moved for summary judgment dismissing the entire complaint. They argued that plaintiffs' Labor Law § 240(1) claim should be dismissed because plaintiff did not fall from a height, and no object fell upon him from above. As for the claims pursuant to § 241(6), defendants asserted that the cited Industrial Code provisions were inapplicable. Finally, defendants maintained that the Labor Law § 200 claim must be dismissed because they did not exercise supervisory control over plaintiff's work. Plaintiffs cross-moved for partial summary judgment on the Labor Law § 240(1) cause of action, arguing that the absence of protection from a fall into the open trench was an elevation-related hazard that proximately caused plaintiff's injury. They did not oppose that part of defendants' motion seeking dismissal of the Labor Law § 200 claim.

The motion court granted plaintiffs summary judgment as to liability on the Labor Law § 240(1) claim. It concluded that plaintiffs had made a prima facie showing that plaintiff's injuries flowed directly from the absence of a cover on the trench or other safety device to prevent him from falling into the trench. The court noted that plaintiff did not need to completely fall from one elevation level to another to recover under the statute. However, the court dismissed the portion of

the Labor Law § 241(6) based upon Industrial Code § 23-1.7(d), holding that the tar was necessary for proper installation of the waterproofing. To the extent the claim was based on defendants' alleged violation of Industrial Code § 23-1.7(b), the court denied summary judgment, finding that plaintiff had demonstrated that the absence of a cover or other safety device to prevent plaintiff's fall into the trench was a proximate cause of his injuries.

In *Runner v New York Stock Exch., Inc.* (13 NY3d 599, 604 [2009]), the Court of Appeals confirmed that the touchstone of any case under Labor Law § 240(1) is "whether the harm flows directly from the application of the force of gravity." Consistent with that concept, a long line of cases makes clear that a worker may recover pursuant to Labor Law § 240(1) if he is injured by a gravity-related accident, even if he did not actually fall (*see e.g. Pesca v City of New York*, 298 AD2d 292 [2002]; *Carroll v Metropolitan Life Ins. Co.*, 264 AD2d 336 [1999]; *Dominguez v Lafayette-Boynton Hous. Corp.*, 240 AD2d 310 [1997]). This Court has consistently held that the statute applies where a worker was injured in the process of preventing himself from falling (*see e.g. Pesca*, 298 AD2d at 292; *Suwareh v State of New York*, 24 AD3d 380 [2005]), or preventing himself from being struck by a falling object (*see e.g. Lopez v Boston*

Prop. Inc., 41 AD3d 259 [2007]; *Skow v Jones, Lang & Wooten Corp.*, 240 AD2d 194 [1997], *lv denied* 94 NY2d 758 [1999]). Indeed, *Suwareh* (24 AD3d at 380) presents facts strikingly similar to this case. There, the claimant, who was standing on a roof, was hauling a bucket of hot tar up to the roof by pulling a rope. The bucket got stuck on a ledge of the building, and, while attempting to free it, the claimant lost his balance. He leaned back so as not to fall off the roof, and as he did so, he lost control of the bucket, whose contents spilled on to his feet. This Court held that "the risk of injury was the direct result of the application of gravity to either claimant himself or the materials being hoisted" (24 AD3d at 381).

The Second Department has followed the same reasoning. In *Ienco v RFD Second Ave., LLC* (41 AD3d 537 [2007]), the plaintiff and his partner, while standing on a plank, were directed to remove a beam and pass it to coworkers six feet below them. When the plaintiff moved his end of the beam, it struck him in the arm. This caused him to lose his balance and "almost" fall. He was able to avoid falling by bracing his foot against a piece of metal. In doing so, however, he hit his head against a metal column and injured himself. The court rejected the plaintiff's claim to the extent it alleged that the beam that struck him in the arm was a "falling object" (41 AD3d at 539). However, to the

extent the plaintiff alleged that he was a "falling worker," the court found that the defendants did not establish prima facie their entitlement to summary judgment, since "'it is of no consequence that plaintiff allegedly sustained injuries as he prevented himself from falling further'" (*id.*, quoting *Ortiz v Turner Constr. Co.*, 28 AD3d 627, 628 [2006]).

In this case, defendants argue that the effects of gravity did not proximately cause plaintiff's injuries because he would have taken the same course of action and sustained the same injury even if there had been no trench in his immediate vicinity. They attempt to create a distinction between plaintiff's slip on the waterproofing and his sensation of falling. They do this by seizing on plaintiff's statement in his affidavit, and elsewhere, that he "reacted immediately and instinctively" as proof that he was merely attempting to recover from the sensation of slipping on the waterproofing, as opposed to the sensation of falling. However, the record demonstrates that plaintiff's slip on the surface cannot be separated, temporally or otherwise, from the act of his beginning to fall into the open trench.

Indeed, defendants ignore the balance of plaintiff's affidavit, in which he clearly stated that he was injured while responding to the sensation of actually falling into the trench.

Plaintiff stated that he "was *pulled forward* and . . . *hovered over* the uncovered 10 feet trench edge" (emphasis added). He "felt that [he] was *about to go over* the edge," and stated that he was "teetering" and that there was "*momentum* pulling [him] over the edge" (emphasis added). Defendants do not contest these facts, which clearly show that plaintiff was not experiencing just the sensation of slipping when he took the course of action that led to his injury. Rather, it was the absence of a safety device such as a cover on the trench or a safety harness, that caused plaintiff to do what he did and was the proximate cause of his injuries.

The lack of a safety device was a violation of Labor Law § 240(1), and was the proximate cause of plaintiff's injuries. In concluding otherwise, the dissent is simply wrong. There is no evidence here by which a rational trier of fact could find that the presence of the trench did not play a substantial role in causing plaintiff to react the way he did. Indeed, the dissent can only take the position it does by ignoring the undisputed facts in the record and the well established case law, discussed above, that permits recovery under the statute where a worker is injured while successfully fighting the force of gravity. Further, because Industrial Code § 23-1.7(b) requires that every hazardous opening be covered or have a safety railing, we also

disagree with the dissent's view that defendants did not violate Labor Law § 241(6). The lack of such a safety device clearly was the proximate cause of plaintiff's injuries.

All concur except Tom, J.P. and DeGrasse, J. who dissent in a memorandum by Tom, J.P. as follows:

TOM, J.P. (dissenting)

At his examination before trial, plaintiff Walter Reavely testified that he was working at the edge of a foundation concrete slab on which waterproofing material had been laid down using hot tar to adhere the sheets to the concrete. He was assigned the task of cutting and placing plywood boards to create a hang wall at the leading edge of the construction project's foundation. When initially installed, the top edge of the plywood rose about 14 inches above the top of the footing of the concrete slab. Plaintiff then cut each section of plywood from left to right using a Skil circular saw so as to leave the top of the plywood extended about four or five inches above the top of the footing. He stated on two occasions that he was "holding the saw in a squatted position," but when asked directly if he was squatting, replied, "No. It's just like me bent so I'm in a comfortable position." At the end of the cement slab, there was an open trench that was 10 to 12 feet deep. As plaintiff was cutting a section of plywood there, his right foot slipped away from him because the tar had not completely hardened. Plaintiff testified that when he tried to prevent himself from falling into the trench below, the circular saw, while it was still in the wood, cut his right thumb and index finger.

The protection of Labor Law § 240(1) has been construed to

apply only to special hazards "related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *see Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]). Plaintiffs have failed to specify facts from which it can be deduced that plaintiff's injury was either the result of a significant height differential or the proximate result of the effect of gravity (*cf. Suwareh v State of New York*, 24 AD3d 380 [2005] [claimant working at elevated height was injured when he nearly fell while attempting to free a bucket that was being hoisted and hot tar spilled on his foot]; *Lopez v Boston Props.* Inc., 41 AD3d 259 [claimant injured when his fall was abruptly halted by safety harness]; *Skow v Jones, Lang & Wooten Corp.*, 240 AD2d 194 [1997], *lv denied* 94NY2d 758 [1999] [worker injured while helping carry 200-pound pump down ship's ladder]).

Here, plaintiff was working on a level concrete slab at the time of the accident. He was injured when a small section of waterproofing slipped out from under him and caused him to lose his footing, and the circular saw he was using cut into his hand.

Plaintiff's injury resulted from his loss of balance on a slippery level surface, which is not related to the effect of gravity and would have occurred regardless of whether a trench was nearby. He did not fall into the trench. Therefore, any failure to cover the trench or to equip plaintiff with a harness was not the proximate cause of his injury. The record fails to provide any explanation sufficient to relate the injury sustained to the operation of the force of gravity (*see Runner v New York Stock Exchange, Inc.*, 13 NY3d 599 [2009], *supra*). Rather, plaintiff's injury resulted from "the type of peril a construction worker normally encounters on the job site" (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]). The effect of gravity here was at best tangential (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

The cases cited by the majority in support of recovery under Labor Law § 240(1) are either distinguishable or do not state the circumstances under which injury was sustained (see *e.g. Pesca v City of New York*, 298 AD2d 292 [2002]; *Carroll v Metropolitan Life Ins. Co.*, 264 AD2d 336 [1999]). *Dominguez v Lafayette-Boynton Hous. Corp.* (240 AD2d 310 [1997]) is distinguishable in that the force of gravity acted on a motorized scaffold, five stories above the ground, causing it to swing back toward the face of the building and resulting in injury to the plaintiff's

wrist. In *Suwareh v State* (24 AD3d 380 [2005]), the plaintiff was hoisting a bucket of hot tar when it got stuck and the tar spilled onto his feet. The facts in *Suwareh* clearly implicate a gravity-related risk under Labor Law § 240(1) and are distinguishable from the facts of this case.

Moreover, the injury sustained by plaintiff was not proximately caused by the absence of a safety device such as a hoist, sling, hanger, rope, harness or barrier, or a cover for the trench, so as to state a viable cause of action under Labor Law § 240(1) (*see Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999] [no § 240(1) liability where injury results "from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance"]; *cf. Suwareh*, 24 AD3d at 381 [absence of hoist and proper brace]; *Pesca*, 298 AD2d at 293 [railing]; *Carroll*, 264 AD2d at 336 [unspecified safety device]; *Dominguez*, 240 AD2d at 312 [proper protection compromised by obstruction]; *Skow*, 240 AD2d at 194 ["the ship's ladder proved inadequate"]). Under the circumstances of this case, summary judgment should have been granted in favor of defendants dismissing plaintiffs' Labor Law § 240(1) claim.

For the same reason, there is no viable cause of action under Labor Law § 241(6) predicated upon a violation of 12 NYCRR

23-1.7(b), which requires every hazardous opening to be guarded by a cover or a safety railing. While defendants did not appeal from the part of the order that denied their motion as to that cause of action, upon review of a motion for summary judgment, this Court may search the record and, where appropriate, grant summary judgment even to the nonmoving party and even in the absence of a cross appeal (*Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-112 [1984]). Thus, upon a search of the record, I find that there is no showing that the failure to cover the trench or provide planking below the opening, or safety nets, harnesses or guard rails was the proximate cause of plaintiff's injuries, nor has any violation of 12 NYCRR 23-1.7(b)(1)(iii), which specifically governs work performed close to the edge of an opening, been made out (*cf. Luckern v Lyonsdale Energy Ltd. Partnership*, 281 AD2d 884, 886-887 [2001]).

Accordingly, the order should be reversed and the complaint dismissed.

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

ENTERED: OCTOBER 20, 2011

CLERK

Mazzarelli, J.P., Catterson, Manzanet-Daniels, Román, JJ.

5230N- 5231N JetBlue Airways Corporation, Petitioner-Appellant-Respondent, Index 650691/10

-against-

Robert M. Stephenson, et al., Respondents-Respondents-Appellants.

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Holland & Knight LLP, New York (Marisa A. Marinelli of counsel), for appellant-respondent.

Locke Lord Bissell & Liddell LLP, New York (Robert M. Stephenson, of the Bar of the State of Illinois, admitted pro hac vice, and Gregory T. Casamento of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 24, 2010, which, to the extent appealed from as limited by the briefs, denied petitioner JetBlue Airways Corporation's petition to stay arbitration as demanded and compel JetBlue pilots to individually arbitrate their claims regarding the alleged breach of their employment agreements with JetBlue, determined that the Federal Arbitration Act (FAA) applies to the employment agreements, and remanded the matter to an American Arbitration Association (AAA) arbitrator to determine whether, consistent with the AAA rules, New York law and the FAA, the employment agreements permit collective arbitration, unanimously affirmed, with costs.

Respondents are counsel to 728 unnamed current JetBlue

pilots and 18 named former JetBlue pilots. All of the pilots are either captains or first officers. Each of the pilots entered into his or her own employment agreement with JetBlue. Each agreement is standardized and there is no dispute that the relevant provisions at issue are identical in each pilot's respective agreement. As is relevant to this dispute, each agreement contained a section 3A, entitled "Base Salary," which provided, in pertinent part:

> "If at any time during the life of this Agreement the Airline increases the base salary it pays to newly-hired pilots performing duties either as Captains or First Officers, the Pilot's base salary shall be adjusted by the same percentage as the increase in base salary."

The agreements also contained an arbitration clause, which provided, in pertinent part:

> "[I]n the event of any difference of opinion or dispute between the Pilot and the Airline with respect to the construction or interpretation of this Agreement or the alleged breach thereof which cannot be settled amicably by agreement of the parties . . ., such dispute shall be submitted to and determined by arbitration by a single arbitrator in the city where the Pilot's base of operation is located in accordance with the rules of the American Arbitration Association."

The pilots contend that JetBlue breached section 3A of their employment agreements. Respondents (hereinafater referred to as

"the pilots") filed a single demand for arbitration with the AAA on behalf of all of the pilots.[1] On June 22, 2010, JetBlue commenced this proceeding seeking: (1) to compel individual arbitration pursuant to the FAA (9 USC § 1 *et seq*.) or, alternatively, pursuant to CPLR 7503; (2) a preliminary injunction pursuant to CPLR 6301 and 7502(c); (3) a stay of arbitration pursuant to CPLR 7503; and (4) an order sealing all filings and court records in connection with the proceedings before the court. JetBlue argued that each pilot had entered into an individualized employment agreement with JetBlue, which by its plain language limited arbitration to the signatory pilot only, before a single arbitrator to be chosen by the parties in the locale where the pilot resided.

The pilots moved to dismiss the petition. They argued that the employment agreements could not be read to prohibit collective arbitration. They asserted that a single breach of contract issue applied identically to all, and that it would be wasteful to require hundreds of separate arbitration proceedings to resolve an issue that could be disposed of in just one proceeding. The pilots also argued that the FAA did not apply,

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[1] Respondents asserted in the arbitration demand that they were not naming pilots still working for the company because those pilots had reason to fear that JetBlue would intimidate them and retaliate against them because of their claims.

as their job description fell under an exemption in section 1 of the act for "any other class of workers engaged in foreign or interstate commerce."

The IAS court held that the FAA governed the dispute, and remanded the matter to the AAA to determine whether the employment agreements permitted collective arbitration under the AAA rules, New York law and the FAA. The IAS court found the FAA applied because, while JetBlue transported both passengers and cargo, the facts demonstrated that JetBlue "primarily" moved passengers. The court noted that various courts had interpreted the act to exempt only workers primarily engaged in the transportation of goods. The court further found that the FAA governed the employment agreements as to procedure, and that New York law was the substantive law to be applied. The court denied JetBlue's petition for a preliminary injunction and a stay of collective arbitration, as well as to compel individual arbitrations, based on its finding that the availability of collective arbitration was a procedural issue for the arbitrator to determine, not an issue of arbitratibility for the court to decide.

It must first be determined whether the FAA applies here. That statute expressly exempts from its purview the "contracts of employment of seamen, railroad employees, or any other class of

workers engaged in foreign or interstate commerce" (9 USC § 1). Although the United States Supreme Court has not directly interpreted the meaning of this provision, it has noted that several courts of appeal have defined "workers engaged in foreign or interstate commerce" as "transportation workers" who are "actually engaged in the movement of goods in interstate commerce" (*Circuit City Stores, Inc. v Adams*, 532 US 105, 112 [2001], quoting *Cole v Burns Intl. Sec. Serv.*, 105 F3d 1465, 1471 [DC Cir 1997]). Indeed, the Supreme Court in *Circuit City* explained that the exemption of certain transportation workers demonstrated Congress' concern with those workers who played a "necessary role in the free flow of *goods*" (*id.* at 121 [emphasis added]).

In arguing that the FAA does not apply, the pilots rely on *Lepera v ITT Corp.* (1997 WL 535165, 1997 US Dist LEXIS 12328 [ED PA 1997]). In that case, the district court found that a pilot whose primary responsibility was to transport corporate executives in a private jet was not subject to the act. The court stated that "[i]t is simply nonsensical to exclude from coverage those workers engaged in the direct transportation of goods, but not those engaged in the direct transportation of persons" (1997 WL 535165, *7, 1997 US Dist LEXIS 12328, *20). However, in *Kowalewski v Samandarov* (590 F Supp 2d 477 [SD NY

2008], a case decided later, after the Supreme Court's holding in *Circuit City*, car service drivers were not deemed to be exempt from the FAA. In that case, the drivers argued that they were exempt because they transported passengers only. The district court noted the *Circuit City* Court's emphasis on goods in determining what types of workers are exempt from the act, and found that the focus should be placed on the primary purpose of the industry in which the worker toils. Since the primary purpose of the car service industry did not involve the movement of goods, the court found that such drivers were not exempt from the act (590 F Supp 2d at 483-485).

We agree with the IAS court that *Kowalewski* is much more persuasive authority than *Lepera*. Although the latter case expressly found that the exemption applied to pilots who, like the JetBlue pilots here, primarily carried passengers, it was decided before *Circuit City*. Accordingly, the *Lepera* court did not, as the *Kowalewski* court did, have the benefit of the Supreme Court's teaching that the exemption applied to employees involved primarily in the transportation of goods. Since the pilots in this case are engaged in an industry which is primarily concerned with the transportation of passengers, we find that the FAA applies to this dispute.

Next we must consider whether the court or the arbitrators

will decide if the arbitrations must be individual or may be held jointly. New York State courts have long held that all issues surrounding a dispute are generally reserved for the arbitrators. Only three threshold questions may be decided by a court. Those are (1) whether the agreement to arbitrate is valid; (2) whether the parties have complied with the agreement; and (3) whether the claim is timely (*see Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 NY2d 193, 201-202 [1995]; *Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 6 [1980]; *Matter of Bunzl [Battanta]*, 224 AD2d 245 [1996]). Similarly, the United States Supreme Court recently reiterated that "[i]n certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement. Thus . . . procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide" (*Stolt-Nielsen S.A. v AnimalFeeds Int'l Corp.*, 559 US __, 130 S Ct 1758, 1776 [2010] [internal quotation marks omitted]).

Who should decide whether the employment agreements permitted collective, or joint, arbitration, depends on whether it is a procedural or "gateway" issue. If it is a procedural issue, the arbitrator should decide. On the other hand, if it is

a "gateway" question, going to arbitrability, a court should decide (*see Howsam v Dean Witter Reynolds, Inc.*, 537 US 79, 83-84 [2002]). In Green Tree Financial Corp. v Bazzle (539 US 444 [2003]), a four-justice plurality of the United States Supreme Court held that where the question is whether collective arbitration is permissible, it is a procedural matter and thus for the arbitrators. In *Bazzle*, the respondents secured a large arbitration award in a proceeding that had been certified by the court as a class arbitration. The petitioner contended that the arbitration agreement expressly prohibited class arbitrations (539 US at 449). The Supreme Court plurality rejected the petitioner's construction of the arbitration clause, but remanded the question to the arbitrator to determine whether the parties' agreement permitted class arbitration (*id.* at 451-452). The plurality noted that the agreement broadly called for "all disputes" relating to the contract to be arbitrated (*id.* at 451), and further stated:

> "In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of clear and unmistakable evidence to the contrary). These limited instances typically involve matters of a kind that contracting parties would likely have expected a court to decide. They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether

> a concededly binding arbitration clause applies to a certain type of controversy . . . The question here - whether the contracts forbid class arbitration - does not fall into this narrow exception. It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties . . . Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to. That question . . . concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question" (*id. at* 452-453, [internal quotation marks and citations omitted]).

JetBlue asserts that because only a plurality of the Supreme Court decided *Bazzle*, it does not control. Rather, JetBlue relies on the Supreme Court's discussion in *Stolt-Nielsen* (559 US at __, 130 S Ct at 1758). In that case, the Supreme Court reviewed an arbitration panel's decision that an agreement to arbitrate between the parties contemplated class arbitration, even though the agreement was silent on that point. The Supreme Court, in discussing the propriety of the arbitrators' having considered the issue in the first place, called into question the extent to which both parties, in maintaining that the question was for the arbitrators, should rely on *Bazzle*. The *Stolt-Nielsen* Court emphasized that only a plurality of the Court in *Bazzle* supported the proposition that the question of whether an arbitration agreement permits class arbitration is for the arbitrator, and not the court, to decide. However, the Supreme

Court in *Stolt-Nielsen* ultimately avoided answering the question, noting that the parties had stipulated that the arbitrators should make that determination (559 US at __, 130 S Ct at 1770-1772).

The *Stolt-Nielsen* Court did, however, decide that the arbitrators in that case incorrectly construed the parties' agreement as permitting class arbitration. The Court stated that "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator" (559 US at __, 130 S Ct at 1775). The Supreme Court further stated that "fundamental changes [are] brought about by the shift from bilateral arbitration to class-action arbitration" (559 US at __, 130 S Ct at 1776). These include that the latter "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties," that the AAA's Class Rules expressly eliminate the presumption of privacy and confidentiality that normally applies in bilateral arbitration, and that the award in class-action arbitrations "no longer

purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well" (559 US at __, 130 S Ct at 1776).

While there is no binding precedent from the United States Supreme Court holding that an arbitrator should decide whether collective arbitration is permissible, there is likewise no authority requiring a court to decide the question as a "gateway" issue. As noted above, the category of gateway issues is a narrow one limited to questions that involve the enforceability of an arbitration agreement, its applicability to a particular dispute, the parties' compliance with the agreement and the timeliness of a claim (*Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 6 [1980], *supra*). No such threshold question is involved in this dispute. Instead, the issue here is a procedural one that has "grow[n] out of the dispute" (*Stolt-Nielsen*, 559 US at __, 130 S Ct at 1775 [internal quotation marks omitted]), since it concerns not whether the parties agreed to arbitrate the dispute in question, but the manner in which the arbitration should proceed.

JetBlue argues that, just as the Supreme Court in *Stolt-Nielsen* found that the agreement at issue there could not be construed by any reasonable arbitrator to permit class arbitration, here we should declare that the agreement does not

permit *collective* arbitration. The pilots counter by arguing that *Stolt-Nielsen* does not control this case because class arbitration, which they are not seeking, is unique. They characterize their demand as one for joint, or collective, arbitration, which they maintain is far different than class arbitration. Indeed, they claim that the procedural mechanism they seek contains none of the "fundamental changes" from bilateral arbitration identified by the Court in *Stolt-Nielsen*.

The pilots are correct. Class arbitration and the collective proceeding that the pilots have demanded here are so fundamentally different that *Stolt-Nielsen* does not dictate the result. In the collective arbitration sought here, unlike in a class arbitration, all of the affected pilots are actual parties. Further, in a class proceeding, common issues need only "predominate" over issues that are unique to individual members; identity of issues is not required (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98 [1980]). Here, there is only one straightforward question that needs to be answered by the arbitration panel, and its disposition will equally affect each and every pilot. Thus, because the type of proceeding demanded by the pilots is not, like a class proceeding, so fundamentally different from an ordinary arbitration, we cannot, unlike the Supreme Court in *Stolt-Nielsen*, definitively say that the parties

did not agree to it. Instead, the arbitrators should decide the issue, as well as whether the AAA Rules permit collective, or joint, arbitration, in the first place.

Finally, we do not agree with JetBlue that a court should decide whether the collective arbitration sought by the pilots violated the forum selection clause in their employment agreements. That provision requires that arbitration take place before "a single arbitrator in the city where the Pilot's base of operations is located." The pilots persuasively argue that they may unilaterally waive the forum clause because it was designed exclusively for their benefit. Indeed, the pilots assert that the clause was included in the agreements to conform with the law of the various states where JetBlue bases its operations. Certain of those states require employees to be given the option of arbitrating disputes in a local forum so as to balance the playing field with their employer. JetBlue does not deny that the forum clause was negotiated for this purpose only. Thus, we reject its position that it could not be unilaterally waived by

the pilots and that it is a gateway issue that the court should have considered.

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

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

ENTERED: OCTOBER 20, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5587N Randall I. Stempler, Index 100939/09
Plaintiff-Respondent,

-against-

Hedy Sloane Stempler, etc., et al.,
Defendants-Appellants,

J.P. Morgan Chase Bank, N.A.,
Defendant.

_____

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellants.

Gregory Danenberg, New York, for respondent.

_____

Appeal from order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 7, 2009, which denied the Stempler defendants' motion to strike the amended complaint and directed them to serve an answer within 60 days, unanimously dismissed, without costs.

The Stempler defendants' (defendants) appeal from an order that declined to require a more definitive statement in plaintiff's amended complaint was not appealable as of right (*see* CPLR 5701[b][2]). Defendants argued that the lengthy amended complaint was intended to harass, in that it was prolix, verbose, unnecessarily repetitious, and contained immaterial allegations. While the amended complaint arguably could have been more "plain and concise" in its terms, the causes of action were properly

asserted in consecutively numbered paragraphs, and a reading of the document belies defendants' conclusory claim that the causes of action were unclear (*see generally CPLR* 3014). The amended complaint, as drafted, did not prejudice defendants in answering. Thus, there is no basis to find that the challenged pleading affected a substantial right that would warrant the taking of an appeal as of right (*see e.g., Matter of Danzig*, 96 AD2d 803, 805 [1983]).

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

ENTERED: OCTOBER 20, 2011

CLERK

Mazzarelli, J.P., Sweeny, Abdus-Salaam, Román, JJ.

5776-
5776A

Kenneth E. Ramseur,
Plaintiff-Appellant,

-against-

Hudsonview Company, et al.,
Defendants-Respondents.

Index 106397/06

_____

Kip Lenoir, New York, for appellant.

Nixon Peabody LLP, New York (Adam B. Gilbert of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Steven E. Liebman, Special Referee), entered October 13, 2010, awarding defendants attorneys' fees of $167,993.77 pursuant to an order, same court and Special Referee, entered October 8, 2010, which determined that plaintiff had materially and substantially breached the terms of a Settlement Agreement with defendants, warranting the award of attorneys' fees to defendants, unanimously affirmed. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The credible evidence plainly supports the Referee's fact-finding determination that plaintiff materially and substantially breached the Settlement Agreement and his lease, by his underpayment and non-payment of rent without justification or judicial limitations, warranting the award of attorneys' fees to

defendants based on express provisions in both of those agreements (*see e.g. Mar Investors Corp. v Cerda*, 208 AD2d 355 [1994]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5790 The People of the State of New York, Respondent, Ind. 6395/99

-against-

Les Matthews,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about January 21, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Defendant is eligible to be considered for resentencing even though he was reincarcerated for a parole violation (*People v Paulin*, 17 NY3d 238 [2011]). However, the record supports the court's alternative holding in which it denied the motion on its merits. The court properly exercised its discretion in determining that substantial justice dictated denial of the

motion (*see generally People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]), given defendant's extremely poor prison disciplinary record and his extensive criminal history.

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

ENTERED: OCTOBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5791-
5791A

The People of the State of New York,
Respondent,

Ind. 6404/07
3209/08

-against-

Brice Carrow,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about July 23, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: OCTOBER 20, 2011

CLERK

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

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5792 The People of the State of New York, Ind. 2199/08
Respondent,

-against-

Dorcene Sims,
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 (Sheila L. Bautista 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 (Gregory Carro, J.), rendered on or about December 1, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: OCTOBER 20, 2011

CLERK

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

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5795 In re Chartasia H.,

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

Sandra H.H.,
Petitioner-Appellant,

Charlie L.H., et al.,
Respondents,

St. Dominic's Home,
Petitioner-Respondent.

_____

Randall S. Carmel, Syosset, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 14, 2010, which, to the extent appealed from as limited by the briefs, denied the paternal grandmother's petition for custody of the subject child, and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The evidence demonstrated that denial of the paternal grandmother's petition for custody in favor of freeing the subject child to be adopted by the foster mother was in the best

interests of the child (*see Matter of Luz Maria V.*, 23 AD3d 192, 193 [2005], *lv denied* 6 NY3d 710 [2006]). In the year prior to the dispositional hearing, the grandmother, who has no preemptive statutory or constitutional right to custody (*Matter of Alma R. v Ruth M.*, 237 AD2d 127 [1997], *lv dismissed* 90 NY2d 935 [1997]), lived several hundred miles away, had only seen the child two or three times and had not seen her for several months.

In contrast, the foster mother, who wishes to adopt the child, has provided the child with a loving and stable home for the past several years. The child has been fully integrated into the foster mother's immediate and extended family, has overcome her initial behavioral and medical problems, and has, by all accounts, thrived while in the foster mother's care.

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

ENTERED: OCTOBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5796 The People of the State of New York, Respondent, Ind. 1966/07

-against-

Tony Clanton, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 10, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of 11 years, unanimously affirmed.

The court properly denied defendant's original and renewed motions to controvert a search warrant. The information provided by a confidential informant and an identified informant established probable cause (*see Spinelli v United States*, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]). The affidavit contained a sufficiently detailed showing of the confidential informant's track record of providing information to

the police. Furthermore, the police independently corroborated detailed predictions provided by that informant, and his reliability was not undermined by his own involvement in criminal activity (*see People v Rodriguez*, 52 NY2d 483, 489-490 [1981]). Defendant also challenges the basis of each informant's knowledge. However, each informant was familiar with defendant and had extensive personal knowledge of defendant's criminal activity. Furthermore, neither informant provided stale information.

The court also properly denied defendant's application for a *Franks/Alfinito* hearing (*see Franks v Delaware*, 438 US 154 [1978]; *People v Alfinito*, 16 NY2d 181 [1965]). Defendant failed to make the necessary "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" (*Franks*, 438 US at 155-156). Defendant's claim was supported only by a document that the court properly rejected as unreliable. Under the circumstances, the court was entitled to resolve the issue on the papers before it without taking testimony.

In any event, no hearing was necessary because defendant only challenged the affidavit with respect to the identified

informant's statements. Putting that information aside, the confidential informant's statements still provided probable cause (*see id.* at 171-172).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5797 The People of the State of New York, Ind. 4532/00
Respondent,

-against-

Jemel McCaskill, etc.,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County, (Michael J. Obus, J.), rendered October 29, 2009, resentencing defendant to a term of 11 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: OCTOBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5799 The People of the State of New York, Respondent, Ind. 2540/08

-against-

William Dean, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered April 21, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the fifth degree and criminal possession of a controlled substance in the fifth and seventh degrees, and sentencing him to an aggregate term of 1 year and 3 months, 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.

Defendant was acquitted of more serious charges arising out of the same observation sale. In performing weight of evidence review, we may consider the jury's verdict on other counts (*see People v Rayam*, 94 NY2d 557, 563 n [2000]). Nevertheless, we find that the jury's mixed verdict does not warrant a different

result. "Where a jury verdict is not repugnant, it is imprudent to speculate concerning the factual determinations that underlay the verdict because what might appear to be an irrational verdict may actually constitute a jury's permissible exercise of mercy or leniency" (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]).

The People made a sufficiently particularized showing of an overriding interest justifying closure of the courtroom during an undercover officer's testimony (*see e.g. People v Ramos*, 90 NY2d 490 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]). Instead of a complete closure, the court permitted defendant's family members and other persons specified by defendant to attend, subject to appropriate screening measures. This satisfied the court's duty to consider reasonable alternatives to full closure (*see People Mickens*, 82 AD3d 430 [2011], *lv denied* 17 NY3d 798 [2011]; *People v Manning*, 78 AD3d 585, 586 [2010], *lv denied* 16 NY3d 861 [2011]).

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

ENTERED: OCTOBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5801 The People of the State of New York, Ind. 508/09
Respondent,

-against-

Miguel Caban,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered on or about September 25, 2009, 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 [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: OCTOBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5802 The People of the State of New York, Ind. 3187/09
Respondent,

-against-

David Torres,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about June 24, 2010, 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 [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: OCTOBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5803 The People of the State of New York, Respondent, Ind. 5116/07

-against-

Jackson Jordan, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 2, 2008, convicting defendant, after a jury trial, of stalking in the fourth degree and aggravated harassment in the second degree, and sentencing him to a term of 3 years' probation, unanimously affirmed.

The totality of the voir dire record demonstrates that defendant made a valid waiver of his right to be present at sidebar discussions with prospective jurors (*see People v Antommarchi*, 80 NY2d 247 [1992]).

In any event, defendant could not have been prejudiced by his absence from the four sidebar conferences at issue, because in each instance he could not have made a meaningful contribution (*see People v Roman*, 88 NY2d 18, 26-27 [1996]). Three of the panelists were effectively disqualified by the court for cause as

a result of their expressed concern that they could not be impartial (*see People v Garcia*, 265 AD2d 171 [1999], *lv denied* 94 NY2d 862 [1999]).

The remaining panelist became a sworn juror, but was replaced by an alternate prior to deliberations.

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

ENTERED: OCTOBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5804 The People of the State of New York, Ind. 1656/99
Respondent,

-against-

Gilbert Blow,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Maxwell Wiley, J.), rendered May 27, 2009, resentencing defendant to a term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We have no

authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: OCTOBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5805 Mamadou Sakho, etc., et al., Index 24262/04
Plaintiffs-Respondents,

-against-

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

Mary Feliciano,
Defendant-Appellant.

_____

Kay & Gray, P.C., Westbury (Katie A. Walsh of counsel), for appellant.

Adebola O. Asekun, New York, for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 16, 2010, which, in this action to recover for personal injuries sustained by the infant plaintiff when he was allegedly struck by a car driven by defendant Mary Feliciano, denied Feliciano's motion for summary judgment dismissing the complaint as against her, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against Feliciano.

There is no issue of fact as to whether Feliciano acted prudently under the circumstances. Feliciano testified that she was traveling 10 miles per hour when she saw plaintiff, 13 years old at the time, and another child playing on the sidewalk. Upon seeing the children and fearing that they would run onto the

street, Feliciano applied her brakes to slow down. However, plaintiff entered the street outside of the crosswalk and was pushed into Feliciano's car. Plaintiff testified that he did not remember what happened after he entered the street and heard his name being called. However, according to the police accident report, plaintiff stated that Feliciano's car hit him after he ran onto the street. Under either scenario, there is no evidence that Feliciano's car was moving at a faster rate of speed than what she claimed or that she was otherwise negligent. Furthermore, plaintiffs failed to introduce any evidence that the infant plaintiff's injuries were inconsistent with defendant's testimony of how the accident occurred. Accordingly, Feliciano was entitled to summary judgment dismissing the complaint as against her (*see DeJesus v Alba*, 63 AD3d 460 [2009], *affd* 14 NY3d 860 [2010]; *Jellal v Brown*, 37 AD3d 179 [2007]).

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

ENTERED: OCTOBER 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5806 The People of the State of New York, Ind. 5432/00
Respondent,

-against-

Elvis Winter,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered November 19, 2009, resentencing defendant to a term of 11 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: OCTOBER 20, 2011

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