SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 14, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7424 In re Joel Diaz, Index 105924/10
Petitioner-Respondent,

-against-

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

Michael A. Cardozo, Corporation Counsel, New York (Inga Van Eysden of counsel), for appellants.

Law Offices of Chet Lukaszewski, P.C., Lake Success (Chet Lukaszewski of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered January 13, 2011, which granted the petition to annul respondents' determination denying petitioner's request to amend his application for accidental disability retirement (ADR) benefits, and remanded the matter with the direction that petitioner be allowed to amend his application to include a heart-related disability, unanimously affirmed, without costs.

The Board's determination was arbitrary and capricious and an abuse of discretion (*see* CPLR 7803[3]). At the time respondent Board denied petitioner's application for ADR benefits

based on an orthopedic condition, petitioner had suffered a heart attack, and was incapacitated. Although the parties contest whether petitioner specifically notified a member of the Board of this incapacity, there is evidence in the record that petitioner's heart condition predated his retirement, but was not diagnosed until after he retired. Given these circumstances, petitioner's heart condition warranted consideration by the Medical Board *(see Matter of Mulheren v Board of Trustees of Police Pension Fund, Art. II*, 307 AD2d 129 [2003], *lv denied* 100 NY2d 515 [2003]).

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

The Decision and Order of this Court entered herein on April 19, 2012 is hereby recalled and vacated (*see* M—2468 decided simultaneously herewith).

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

ENTERED: AUGUST 14, 2012

CLERK

CORRECTED ORDER - SEPTEMBER 12, 2012

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4661 Minerva Vega, Index 13154/04
Plaintiff-Respondent,

-against-

Restani Construction Corp., et al.,
Defendants-Appellants,

General Fence Corporation,
Defendant.

Furey, Kerley, Walsh, Matera & Cinquemani, P.C., Seaford (Lauren B. Bristol of counsel), for appellants.

Pollack Pollack Isaac & De Cicco, New York (Jillian Rosen of counsel), for respondent.

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered December 31, 2009, which, to the extent appealed from as limited by the briefs, upon renewal, denied defendants Restani Construction Corp. and Excellent Asphalt Paving's motion for summary judgment, unanimously affirmed, without costs.

In this action for personal injuries allegedly sustained when plaintiff, a maintenance worker for the New York City Parks Department, attempted to move a garbage can containing improperly discarded concrete blocks, this Court previously affirmed an order denying summary judgment to General Fence, a codefendant-subcontractor (73 AD3d 641 [2010], *affd* 18 NY3d 499 [2012]).

Co-defendants here are the general contractor, Restani Corporation, and subcontractor Excellent Asphalt Paving. They seek review of the denial of their motion for leave to renew an order denying their motion for summary judgment and/or leave to reargue that motion, as well as the denial of their motion for summary judgment.

Although defendants failed to comply with the requirements of CPLR 2221(e)(3) by not providing a reasonable justification for their failure to present the alleged new facts on the prior motion, under the circumstances, these failures do not require denial of the motion to renew (*Mejia v Nanni*, 307 AD2d 870, 871 [2003]).

Defendants motion for summary judgment, which, upon renewal, presents for this Court's consideration substantially the same issues based upon substantially the same record evidence as the prior appeal, is denied for the reasons set forth by the Court of

Appeals in the companion case (18 NY3d 499, 504 [2012]).

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: AUGUST 14, 2012

CLERK

Saxe, J.P., Catterson, Acosta, DeGrasse, Richter, JJ.

7895 & M-2369 — Index 114101/10

Martha L. Siegel, etc.,
Plaintiff–Respondent-Appellant,

-against-

Lloyd M. Siegel, etc.,
Defendant–Appellant-Respondent.

Herman Kaufman, Rye, for appellant-respondent.

Evans & Fox LLP, Rochester (Richard J. Evans of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 15, 2011, which denied defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7) or, in the alternative, pursuant to CPLR 3211(c), and denied plaintiff's cross motion for summary judgment pursuant to CPLR 3211(c), unanimously affirmed, without costs.

The complaint alleges that defendant interfered with the estate's possessory interest in the Ardsley Tenants Corporation stock, thereby stating a cause of action for conversion (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49–50 [2006]). The allegations in the complaint raise the inference that in return for defendant's placing the Ardsley stock in his name alone, to allow the apartment to remain in the family, the decedent agreed to refrain from asserting his claim to the stock.

Since this implicit agreement, if found to exist, would constitute valid consideration, the complaint states a cause of action for breach of contract (*see Halliwell v Gordon*, 61 AD3d 932, 934 [2009]; *In re All Star Feature Corp.*, 232 F 1004, 1009 [SD NY 1916]). The complaint alleges that defendant wrongfully refused to surrender stock in which the decedent had a lawful interest, and there is evidence that the two had, at least at one time, a relationship of trust and confidence. Thus, the complaint states a cause of action for constructive trust (*see Sharp v Kosmalski*, 40 NY2d 119, 120 [1976]); *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473-474 [2010]). Liberally construed, the complaint alleges that defendant wrongly withheld property belonging to the estate, thereby stating a cause of action for unjust enrichment (*Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 481 [2009]).

Since the record presents certain material issues of fact, such as the nature of the relationship between the decedent and defendant, neither party is entitled to summary judgment.

M-2369 - *Siegel v Siegel*

Motion to dismiss cross appeal and strike reply brief granted to the extent of directing plaintiff to pay $1,013.25, representing half the cost of the originally filed joint record.

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

ENTERED: AUGUST 14, 2012

CLERK

Saxe, J.P., Catterson, Acosta, DeGrasse, Richter, JJ.

7901-
7901A The People of the State of New York,
Respondent,

-against-

Andre Villegas,
Defendant-Appellant.

Ind. 2094/09

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

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

Order, Supreme Court, New York County (Carol Berkman, J.), entered on or about September 16, 2011, which denied defendant's CPL 440.10 motion to vacate judgment, unanimously reversed, on the law and the motion granted to the extent of remanding the matter to Supreme Court for a new suppression hearing. Appeal from judgment, same court and Justice, rendered October 21, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of eight years, held in abeyance pending the outcome of the remand ordered herein.

Defendant did not receive effective assistance of counsel at his suppression hearing. Counsel failed to make use of available

evidence that would have been dispositive (*see generally People v Turner*, 5 NY3d 476, 481 [2005]).

At the hearing, two police officers testified that an unnamed 911 caller gave a description and location for a man with a firearm, and stated that she was calling on a cell phone belonging to someone else. The officers testified that the 911 dispatcher had successfully recontacted, and received additional information from, the caller. The police went to the reported location, observed that defendant met the reported description, and conducted a stop and frisk that yielded a firearm. Relying on testimony about a callback, the suppression court found that the caller was not "totally anonymous."

However, the police testimony about a successful callback to the anonymous informant was entirely inaccurate. Tape recordings and a Sprint report established that the attempted callback went directly to voicemail, and they completely contradicted the officers' testimony on this point. Defense counsel had been provided with this material, but failed to use it in any way at the hearing. Although the court denied the 440 motion without a hearing, we find that there is no reasonable strategy that would have justified counsel's failure to challenge the officers' testimony in this regard (*see People v Rivera*, 71 NY2d 705, 709 [1988]).

It is arguable that in the absence of a successful callback, the 911 call might simply have been an uncorroborated anonymous tip unsupported by any indicia of reliability that would have established reasonable suspicion and justified the seizure (*see Florida v J.L.*, 529 US 266 [2000]; *compare People v Herold*, 282 AD2d 1, 6-7 [2001], *lv denied* 97 NY2d 682 [2001]). Without the benefit of an affirmation by defense counsel, the motion court concluded that "counsel might well have chosen to forgo introducing the recording showing that the callback did not result in further information to avoid having the court assess the full flavor of the caller's interaction with the 911 operator." The court's reasoning defies logic and is simply unsupported by the record. We decline to dismiss the indictment on the ground that the People should have known that the police officers testified falsely about the callback (*see* CPL 440.10[1][c]). As noted, the People had provided defense counsel with tape recordings and a Sprint report that showed that the callback to the unidentified caller had gone to voicemail. On this record, we conclude that the People's failure to timely

bring the inaccuracy of the officers' testimony to the court's attention was due to inadvertence rather than fraudulent conduct. We have considered and rejected the People's argument that there were other indicia of reliability.

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

ENTERED: AUGUST 14, 2012

CLERK

Saxe, J.P., Catterson, Acosta, DeGrasse, Richter, JJ.

7907 PMJ Capital Corp., Index 650047/11
Plaintiff-Appellant,

-against-

PAF Capital, LLC,
Defendant-Respondent.

Robinowitz Cohlan Dubow & Doherty, LLP, White Plains (Bruce Minkoff of counsel), for appellant.

Smith, Gambrell & Russell, LLP, New York (John G. McCarthy of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 25, 2011, which granted defendant's motion to dismiss the complaint for failure to state a cause of action, reversed, on the law, and the motion denied, without costs.

Plaintiff commenced this breach of contract action in connection with its purchase of two mortgage loans from defendant, asserting causes of action for specific performance, damages and attorneys' fees. On December 15, 2010 plaintiff submitted a bid to purchase mortgage loans from defendant in the amount of $2,200,000. The bid form provided that the parties would have no contractual obligations with respect to the proposed purchase of the loans unless and until a loan sale agreement, prepared by the lender, was executed and delivered by both parties. Defendant notified plaintiff by e-mail that the

bid had been accepted. Thereafter, defendant's attorney prepared a loan sale agreement for review by plaintiff's attorney. After a series of negotiations, communications and revisions regarding the sale agreement, one of defendant's attorneys advised plaintiff's attorney, by e-mail on December 21, 2010, that the revisions had been finalized and that the agreement was ready for execution. Specifically, the e-mail stated that the revised agreement was attached and that if the revisions met plaintiff's approval, then plaintiff need only execute three originals and return them to defendant to countersign. Plaintiff was also instructed to wire a down payment in the amount of $220,000.

Plaintiff's president, Peter Joseph, signed three copies of the loan sale agreement and sent them, as instructed, to defendant's attorney. Joseph also sent a signed copy, via e-mail, to Elliot Neumann, defendant's president, notifying him that the agreement had been signed and the down payment would be sent via wire transfer. Neumann, within 10 minutes, responded to Joseph via e-mail stating, "Terrific. Thanks! I will counter sign upon receipt. Here's to a smooth and successful completion of this transaction." The following day, December 22, one of defendant's attorneys acknowledged receipt of the wire transfer of the down payment. However, plaintiff never received the countersigned loan sale agreement. Approximately two weeks

later, on January 5, 2011, defendant informed plaintiff that it would not be proceeding with the sale of the loans. After plaintiff commenced this action, it learned that defendant had sold the loans to another entity.

Defendant, by a pre-answer motion, moved to dismiss the complaint, arguing that the bid form submitted by plaintiff conclusively established that no binding contract was formed, and that the parties did not intend to be bound until a loan agreement had been signed and delivered by both parties. The motion court granted defendant's motion, finding that the clear intent of the parties was not to be bound by the contractual obligations until the loan agreement had been executed and delivered by both parties. We disagree with this conclusion.

Affording the complaint a liberal construction and according plaintiff the benefit of every possible inference, as we must on a motion to dismiss (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), plaintiff sufficiently pleaded causes of action for specific performance and damages. It cannot be said that plaintiff's factual allegations have been "flatly contradicted" by the documentary evidence (*Franklin v Winard*, 199 AD2d 220, 220 [1993]). "In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the

parties as gathered by their expressed words and deeds" (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977]). "In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain" (*id.* at 399-400). Here, the totality of the circumstances raises a question of fact as to the intent of the parties, preventing dismissal at this early stage. Attorneys for both parties negotiated the terms of the loan sale agreement to the point where all of the terms were agreed upon. Defendant's attorney e-mailed the agreement to plaintiff, stating that as long as the revisions met plaintiff's approval, the document would be executed. Plaintiff, through its president, executed the requisite number of copies and returned the signed documents to defendant. Defendant's president responded immediately, indicating that he would also sign the documents upon receipt and that he was looking forward to a "smooth and successful completion" of the transaction. Further, as instructed, plaintiff wired the down payment and defendant acknowledged receipt thereof. Defendant retained the down payment for over two weeks, and it did not communicate with or contact plaintiff during this time.

There would have been no reason for defendant to retain the down payment, instead of immediately rejecting it and informing plaintiff that there was no agreement, if defendant did not intend to be bound by the agreement. "Under these circumstances, triable issues of fact exist as to the viability of plaintiff's claim for specific performance, despite the lack of a fully executed contract" (*Aristone Realty Capital, LLC v 9 E. 16th St. LLC*, 94 AD3d 519, 519 [2012]).

The dissent relies on *Jordan Panel Sys. Corp. v Turner Constr. Co* (45 AD3d 165 [2007]) to support its contention that the parties are not bound absent a signed writing. However, *Jordan* is distinguishable. The plaintiff in *Jordan* did not allege the type of words or conduct by the defendant that would have been inconsistent with the exercise of the defendant's expressly reserved right to withdraw plaintiff's designation as the subcontractor by a certain date (*id.* at 166-167). Moreover, the bid form in *Jordan* specifically excluded the type of behavior that the plaintiff complained of (*id.* at 170-171).

Although the *Jordan* Court found that the parties, in that case, did not intend to be bound absent a writing signed by both parties, the Court acknowledged another principle of law, which recognizes that "when a party gives forthright, reasonable signals that it means to be bound only by a written agreement,

courts should not frustrate that intent" (*Jordan*, 45 AD3d at 169 [internal quotation marks omitted]). Here, based on the negotiation process that resulted in a written document containing all the agreed-upon terms, e-mail communications between the parties, and payment and retention of the down payment, it cannot be said, on a pre-answer motion to dismiss, that defendant gave forthright, reasonable signals that it intended only to be bound by a written agreement signed by both parties. Rather, defendant's words and deeds raise an issue of fact as to its intent, preventing dismissal of the complaint at this stage (*see Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977]; *Aristone Realty Capital, LLC v 9 E. 16th St. LLC*, 94 AD3d 519 [2012]; *Options Group, Inc. v Vyas*, 91 AD3d 446 [2012]).

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

SAXE, J.P. (dissenting)

I would affirm the dismissal of the complaint for failure to state a cause of action.

Plaintiff attempted to purchase two mortgage loans from defendant. However, the bid it submitted expressly stated that there would be no binding obligation until a written agreement was executed and delivered. Specifically, it reads as follows:

> "Proposed Purchaser hereby agrees that neither this bid/proposal, nor any letters, communication, nor correspondence is intended to, nor shall it create, any binding obligation between Lender/Seller and Proposed Purchaser. Lender/Seller and Proposed Purchaser shall have no contractual or other obligations with respect to the proposed purchase of the Loans unless and until a Loan Sale Agreement prepared by Lender's legal counsel has been executed and delivered by both parties."

This language could not be clearer, and its condition to the existence of a binding contract was not satisfied. Although plaintiff executed the agreement drafted by defendant and returned it, and deposited the required funds into defendant's escrow account pursuant to the terms of the drafted agreement, defendant never executed the agreement.

More specifically, the interchange occurred as follows. Plaintiff's president e-mailed a message to one of defendant's attorneys, saying, "Attached find a copy of the executed agreement. I am sending by Fedex to Elliot [defendant's

president] three original's [*sic*] for his signature. The wire has been sent by Richard Cohlan [plaintiff's attorney]."

Later that same day, by e-mail dated December 21, 2010, defendant's president responded, "Terrific. Thanks! I will counter sign upon receipt. Here's to a smooth and successful completion of this transaction." The next day, by e-mail defendant's attorney acknowledged that the wired funds had been received. However, while the wired funds were held in escrow, defendant never countersigned the agreement. Two weeks later defendant sold the loans to another buyer.

As the motion court correctly observed, while plaintiff's execution of the draft agreement, the e-mail from defendant indicating that the agreement would be countersigned upon receipt, and defendant's retention of the deposit for a period of time might well be sufficient to satisfy the statute of frauds, they are not sufficient to satisfy the definitive condition created by the bid sheet.

"It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed" (*Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 166 [2007] [internal quotation marks omitted]). This clear, "well-

settled" rule recited in the *Jordan Panel* case does not apply only to fact patterns exactly parallel to those presented in that case. It applies whenever the parties to an agreement defined the terms of their negotiations *at the outset* by establishing that nothing in their exchanges of documents or oral statements will be binding until a writing is signed by both parties. That rule is exactly on point here.

Defendant did not need to give "signals" that it intended not to be bound except by a written agreement signed by both sides; that proviso was the premise set by plaintiff at the start of the parties' discussions. Because that condition was established at the very beginning of their discussions, defendant's retention of the wired down payment funds for two weeks does not create an issue of fact as to an intent to enter into a binding agreement even in the absence of a fully executed writing.

The cases cited by the majority for the proposition that a question of fact is presented, despite the lack of a fully executed contract, do not involve a clearly-stated intent not to

be bound "unless and until a Loan Sale Agreement prepared by Lender's legal counsel has been executed and delivered by both parties." In these circumstances, no enforceable contract was created, and plaintiff's claim was correctly dismissed.

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

ENTERED: AUGUST 14, 2012

CLERK

Tom, J.P., Andrias, Friedman, Moskowitz, Renwick, JJ.

7996 New World Consulting Group Immobiliere Sarl, Plaintiff-Respondent, Index 601590/08

—against—

Societe Nouvelle D. Porthault Inc., Defendant-Appellant.

_____

Chaffetz Lindsey LLP, New York (Andreas A. Frischknecht of counsel), for appellant.

Jaffe Ross & Light LLP, New York (Jeremy B. Honig of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered September 30, 2011, which, in this action to recover amounts due under a settlement agreement resolving a construction contract dispute, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment, unanimously modified, on the law, to grant defendant's motion to the extent of limiting plaintiff's recovery under paragraph 2 of the settlement agreement to €23,000 (plus VAT), and plaintiff's claim for recovery under paragraph 3 of the settlement agreement is remanded for a hearing, and otherwise affirmed, without costs.

The plain language of the settlement agreement manifests the parties' intent to be bound by its terms *(see Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977]; *Henri*

Assoc. v Saxony Carpet Co., 249 AD2d 63, 66 [1998]). It does not contain an express reservation of the right by either party not to be bound in any respect. It clearly sets forth the price, scope of work to be performed, and time for performance *(see T. Moriarty & Son v Case Contr.*, 287 AD2d 390 [2001]).

Paragraph 2 of the parties' settlement agreement provides that defendant shall reimburse plaintiff "up to €86,000 (plus VAT) . . . [for] paid bills in the amounts of the allowances and to the parties described in the Revised Base Contract [between plaintiff and nonparty Porthault]." This phrase indicates on its face that plaintiff's recovery under this paragraph is limited to the amount of the allowances for each individual party described in the revised base contract, including the MEP engineer and the structural engineer. The record shows that, pursuant to the revised base contract, the total allowance for the two engineers was €23,000. We agree, however, with defendant that plaintiff's recovery under Paragraph 2 of the settlement agreement is limited to €23,000.

Contrary to defendant's contentions, with regard to Paragraph 3 of the settlement agreement, the fact that the parties agreed to negotiate in good faith a completion of a punch list and a rebate to defendant for any work included in the "revised base contract or the amendment, but not actually

completed," does not amount to an expression of a reservation of the right not to be bound. On the contrary, the parties recognized the possibility that negotiations on those issues might fail. The parties prepared for such contingency by providing a ceiling (€200,000 [plus VAT]) of the amount due under the agreement and for compliance with the punch list. Further, in Paragraph 4, the parties provided that New World's sole remedy for resolution of such dispute was a "suit under the settlement agreement," rather than one under the original and amended construction contract. Moreover, by making an initial payment under the settlement agreement and providing plaintiff a punch list, defendant manifested its intent to be bound by all terms of the settlement agreement (*see Bed Bath & Beyond Inc. v Ibex Constr., LLC*, 52 AD3d 413 [2008]; *T. Moriarty & Son v Case Contr.*, 287 AD2d 390 [2001]). Questions of fact exist as to the amount plaintiff is owed under Paragraph 3 of the settlement agreement.

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

ENTERED: AUGUST 14, 2012

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6424- Index 103046/06
6425 John Cappabianca,
Plaintiff-Appellant,

-against-

Skanska USA Building Inc., et al.,
Defendants-Respondents.

_____

Andrew H. Rosenbaum, New York, for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Robert M. Ortiz of counsel), for Skanska USA Building Inc., Skanska USA Inc., New York City School Construction Authority, Board of Trustees of the New York City School Construction Authority, The City of New York Board of Education, The New York City Department of Education, and The City of New York, respondents.

Law Offices of Safranek, Cohen & Krolian, White Plains (Joseph J. Rava of counsel), for Safety and Quality Plus, Inc., respondent.

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Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 25, 2010, dismissing the complaint and all cross claims, and bringing up fo review an order, same court and Justice, entered May 10, 2010, which granted defendants' motions for summary judgment dismissing the complaint and cross claims, and denied plaintiff's cross motion for partial summary judgment as to liability, modified, on the law, the judgment vacated as to the City defendants and Skanska, the motion of the City defendants and Skanska for summary judgment denied as to the Labor Law § 241(6) claim insofar as it is based on 12 NYCRR 23-1.7(d) and 23-9.2(a), and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered May 10, 2010, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Freedman, J. All concur except Mazzarelli, J.P. and Catterson, J. who dissent in part in an Opinion by Catterson, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
James M. Catterson
Dianne T. Renwick
Helen E. Freedman, JJ.

6424-6425
Index 103046/06

_____x

John Cappabianca,
Plaintiff-Appellant,

-against-

Skanska USA Building Inc., et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the judgment of the Supreme Court, New York County (Saliann Scarpulla, J.), entered June 25, 2010, dismissing the complaint and all cross claims, and from the order, same court and Justice, entered May 10, 2010, which granted defendants' motions for summary judgment dismissing the complaint and cross claims, and denied plaintiff's cross motion for summary judgment as to liability.

Andrew H. Rosenbaum, New York, for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Robert M. Ortiz, Christopher Simone and Gerard S. Rath of counsel), for Skanska USA Building Inc., Skanska USA Inc., New York City School Construction Authority, Board of Trustees of the New York City School Construction Authority, The City of New York Board of Education, The New York City Department of Education, and The City of New York, respondents.

Law Offices of Safranek, Cohen & Krolian, White Plains (Joseph J. Rava of counsel), for Safety and Quality Plus, Inc., respondent.

FREEDMAN, J.

Plaintiff John Cappabianca seeks to recover for injuries he sustained in July 2005 when his foot became stuck, causing him to fall off the pallet on which he was standing while cutting bricks with an electric saw at the construction site for a New York City school. He asserted claims against all defendants under Labor Law §§ 200(1), 240(1), and § 241(6), as well as a claim sounding in common-law negligence. Plaintiff now appeals from the May 2010 order of the motion court which, among other things, granted defendants' motions for summary judgment on his claims and denied his cross motion for partial summary judgment as to liability with respect to his causes of action. He also appeals from the resulting June 2010 judgment dismissing the complaint.

For the reasons set forth below, we affirm the motion court's dismissal of the Labor Law § 200 claim, the related negligence claim, and the Labor Law § 240(1) claim. We reinstate plaintiff's Labor Law § 241(6) claim as against some defendants, insofar as the claim is based on certain provisions of the Industrial Code (12 NYCRR 23-1.1 *et seq.*), but affirm the court's denial of plaintiff's motion for partial summary judgment on liability.

The following summarizes the record in the light most favorable to plaintiff. Defendant New York City School

Construction Authority owned the work site and defendant Skanska USA Building Inc. acted as the project's general contractor. Skanska USA Building subcontracted with plaintiff's employer, nonparty Job Opportunities for Women (Job Opportunities), to perform masonry work, and engaged defendant Safety and Quality Plus, Inc. (Safety) as a consultant to inspect the project, report safety deficiencies to the general contractor, and conduct safety meetings.

Cappabianca worked at the job site from March 2005 through the date of his accident on July 29, 2005. He was supervised by and reported directly to Job Opportunities foremen; none of the defendants supervised him or otherwise controlled his work, and none had the authority to do so. Job Opportunities furnished Cappabianca with the tools and equipment he used on the job.

Cappabianca's work consisted of cutting bricks with Job Opportunities' stationary wet saw. Located on the school's unfinished third floor, the saw and its stand sat on a wooden pallet that lay on the concrete floor. The pallet was anywhere from 4 to 12 inches high. While operating the saw, Cappabianca stood on an adjacent pallet of the same height to enable him to operate its foot pedal, arm lever, and cut-off switch. The pallets' surfaces were composed of slats positioned about three to six inches apart. A Skanska manager who observed the

arrangement of the saw and the pallets testified that it was the Job Opportunities's "construction standard."

While in use, a wet saw sprays water on bricks being cut to cool and lubricate the bricks and the cutting blade and reduce dust and flying particles. According to Cappabianca, the saw malfunctioned in that its hood area sprayed water "all over," including onto the floor, instead of directing the water into an attached tray as it was designed to do. The water from the saw accumulated on the floor underneath his pallet and made it slippery, and the pallet shifted horizontally in a circular arc of about six inches when he picked up bricks or put them down. Cappabianca states that he complained about the water to Job Opportunities and Skanska personnel. Contrary to the dissent's contention, Cappabianca singled out the defective saw as the source of the water on the floor, and there is no evidence that the water, which accumulated directly around the saw, had any other source. The rainwater to which the dissent refers is mentioned in a witness's records from one month before the accident. Those records do not specify where the water was, and they indicate that laborers were addressing the problem by sweeping up the rainwater. The same witness did not remember seeing any water at the location of the accident.

Cappabianca described his accident as follows: after he had

cut a brick, he turned to put it on an adjacent pallet. The pallet upon which he stood shifted on the slippery floor as he turned, causing him to lose his footing. His left foot got caught between pallet slats and he fell to the floor and injured his knee.

In March 2006, plaintiff commenced this action against School Construction Authority and four other governmental entities[1] (the City defendants), Skanska USA Building and its affiliate, Skanska USA Inc.(Skanska), and Safety. Safety cross-claimed against Skanska for contribution and indemnity, both common-law and contractual, and the City defendants and Skanska asserted similar cross claims against Safety. After discovery, the City defendants and Skanska, and, by separate motion, Safety, moved for summary judgment dismissing the complaint and the cross claims against them. Plaintiff opposed and cross-moved for partial summary judgment on liability. The motion court granted defendants' motions and dismissed the complaint and cross claims.

We first turn to plaintiff's Labor Law and negligence claims against the City defendants and Skanska and we will then address his claims against Safety. Section 200(1) of the Labor Law

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[1]These include The Board of Trustees of the New York City School Construction Authority, The City of New York Board of Education, The New York City Department of Education and The City of New York.

codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work (*Perrino v Entergy Nuclear Indian Point 3, LLC,* 48 AD3d 229, 230 [2008]). Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed (*see Cook v Orchard Park Estates, Inc.,* 73 AD3d 1263, 1264 [2010]). Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [2011]). Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work (*Foley v Consolidated Edison Co. of N.Y., Inc.,* 84 AD3d 476, 477 [2011]; *Dalanna v City of New York,* 308 AD2d 400 [2003]).

Here, all of the contributing causes of the accident directly arose from the manner and means in which Cappabianca was performing his work. He has consistently maintained that Job Opportunities, which exclusively supervised him, furnished him with a defective saw which continuously sprayed water onto the

floor and made it slippery. He further alleges that Job Opportunities directed him to operate the saw while standing on an unsecured pallet. Finally, Cappabianca alleges that the pallet Job Opportunities directed him to use was unsafe because of the gaps on its surface, and that his foot got caught in a gap and caused him to lose his footing.

Since the City defendants and Skanska did not control the work that caused the accident, the section 200 and related negligence claims were properly dismissed. In *Dalanna v City of New York* (308 AD2d 400 [2003], *supra*), this Court affirmed the dismissal of a Labor Law § 200 claim brought by a plumber who, while installing pipes on a tank, tripped over a bolt that protruded from a concrete slab. Months before, a number of bolts had been used to temporarily anchor the tank to the slab before its permanent installation elsewhere. After the tank was removed from the slab, the plaintiff's employer was supposed to have cut all the bolts level with the surrounding surface, but it missed the bolt on which the plaintiff tripped. We found that the protruding bolt was not "a defect inherent in the property," but instead resulted from "the manner in which plaintiff's employer performed its work" (308 AD2d at 400). Thus, even if the owner and general contractor in *Dalanna* had constructive notice of the bolt, they could only be held liable under section 200 if they

had exercised supervisory control over the employer's work (*id.*; *see also McCormick v 257 W. Genesee, LLC,* 78 AD3d 1581, 1582 [2010]).

We disagree with the dissent's contention that *Dalanna* should not control here or that it conflicts with the cases that the dissent cites. None of those cases involve an allegedly dangerous condition on the premises that directly arose from the manner and means of the plaintiff's work (*see Caspersen v La Sala Bros.*, 253 NY 491, 493 [1930] [elevator installer struck by brick dropped by masons working 10 or 11 stories higher]; *Mortensen v Magoba Constr. Co.*, 248 NY 577 [1928] [subcontractor's employee injured when the concrete flooring that another subcontractor had installed collapsed]; *Seaman A.B. Chance Co.*, 197 AD2d 612, 613 [1993], *appeal dismissed* 83 NYS2d 847 [1994] [worker removing tree electrocuted by live power wire running through premises]; *Bass v Standard Brands*, 65 AD2d 689, 689 [1978] [worker dismantling tank was injured by lid that "from long disuse" had become unsafe before work commenced]; *Wohlfron v Brooklyn Edison Co., Inc.*, 238 App Div 463 [1933] [contractor's employee passing along concrete slab stepped into hole that another contractor had cut two weeks before], *affd* 263 NY 547 [1933]).

The dissent believes that defendants' lack of supervisory control is irrelevant because the accident was entirely caused by

a dangerous condition existing on the premises, namely, the water from the wet saw that accumulated on the floor. In response, we first point out that requiring Cappabianca to stand on an unsecured pallet with a gapped surface while he worked undoubtedly played a significant role in causing his accident. Also, the record does not support the dissent's related claim that Cappabianca stood on the pallet to avoid the water; rather, Cappabianca testified that he had to stand on the pallet to operate the saw properly. While the dissent asserts that the only possible reason for Job Opportunities' use of the pallets was to avoid the water, that theory is purely conjectural.

In characterizing the water as a dangerous condition on the premises, the dissent does not take into account that the water would not have been present but for the manner and means of plaintiff's injury-producing work. Since the water was directly caused by work over which the City defendants and Skanska had no control, holding them liable for it under section 200 would make them responsible for Job Opportunities' negligence. However, section 200 does not impose vicarious liability on owners and general contractors (*see generally Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502, 506 [1993] [comparing Labor Law § 241(6), a vicarious liability statute, with section 200]). Liability under section 200 only attaches where the owner or

contractor had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Since defendants could not control the activity that continuously produced the water, namely, the operation of the wet saw, they lacked any ability to correct the unsafe condition and thus were not liable under section 200 or for negligence (*see Biafora v City of New York*, 27 AD3d 506, 507-508 [2006]).

As for the claims against the City defendants and Skanska under Labor Law § 240(1), often called the scaffold law, Cappabianca's accident could not give rise to liability under that statute because he was at most 12 inches above the floor and was not exposed to an elevation-related risk requiring protective safety equipment (*see e.g. Toefer v Long Is. R.R.*, 4 NY3d 399 [2005] [fall from floor of a flatbed truck to ground four-to-five feet below did not trigger scaffold law coverage because the use of statute's enumerated safety devices are normally associated with more dangerous activity]; *Lombardo v Park Tower Mgt. Ltd.*, 76 AD3d 497, 498 [2010] [no scaffold law claim where a staircase step, raised 18 inches above the floor, broke and caused the plaintiff to fall]; *Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [2009] [ramp whose bottom rested on the street and whose top rested on the adjacent sidewalk curb, with height differential of

at most 12 to 18 inches, did not expose the plaintiff to type of hazard that the scaffold law contemplates]; *Skudlarek v Bethlehem Steel Corp.*, 251 AD2d 974, 975 [1998] [dismissing scaffold law claim by a plaintiff who fell from 10- to 12-inch high pallet onto floor]).

However, plaintiff's claim under Labor Law § 241(6) is reinstated insofar as it is based upon the City defendants' and Skanska's violation of Industrial Code sections 23-1.7(d) and 23-9.2(a). Section 241(6) imposes a non-delegable duty on premises owners and contractors at construction sites to provide reasonable and adequate safety to workers (*see Ross*, 81 NY2d at 501-502). To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury (*id.*).

Plaintiff sets forth a claim based on section 23-1.7(d) of the Industrial Code, which prohibits owners and employers from letting workers use "a floor, . . . scaffold, platform or other elevated working surface which is in a slippery condition" and requires that water and other "foreign substance[s]" which may cause slippery footing be removed or covered. That regulation applies because the record presents a triable issue whether, as Cappabianca alleges, the saw sprayed water onto the floor because

it was malfunctioning or whether, as defendants claim, the water was not a foreign substance within the meaning of the regulation because wet saws always spray water onto the floor (*compare Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789 [2008], *lv denied* 12 NY3d 709 [2009] [dismissing Labor Law § 241(6) claim based on Industrial Code section 23-1.7(d) because the wet plastic on which the plaintiff slipped was integral part of asbestos removal project and not a "foreign substance"]). In addition, the record raises an issue whether the water on the floor caused Cappabianca to slip and fall.

The other applicable regulation, Industrial Code section 23-9.2(a), requires that "any structural defect or unsafe condition in [power-operated] equipment shall be corrected by necessary repairs or replacement." At issue is whether the saw was defective and whether its defect contributed to the accident.

We agree with the motion court's dismissal of the Labor Law § 241(6) claims against the City defendants and Skanska based on sections 23-1.7(b)(1)(i) and (e)(2), 23-1.8(c)(2), 23-5.1(b), (c)(2), (e)(1), (f), and (h), 23-1.22(c)(1), and 23-5.2 of the Industrial Code. Section 23-1.7(b)(1)(i), which requires that "hazardous openings" be guarded to prevent someone from stepping or falling into them, does not apply because the 3- to 6-inch openings between the slats of the pallet were not large enough

for a person to fit through (*see e.g. Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 480 [2007]). Section 23-1.7(e)(2), which requires work areas to be kept free of tripping hazards, is inapplicable because Cappabianca does not allege that he tripped on an accumulation of dirt or debris. Section 23-1.8(c)(2), requiring workers on "wet footing" to be provided with waterproof boots or similar protective footwear, is inapplicable because Cappabianca testified that he wore rubber-soled work boots that adequately protected him. Sections 23-5.1(b), (c)(2), (e)(1), (f), and (h), and 23-5.2 regulate scaffolds, but none were involved here. Finally, section 23-1.22(c)(1) sets safety standards for platforms used to transport vehicular and pedestrian traffic and is inapplicable to the pallet on which Cappabianca stood (*see Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 338 [2006]).

Contrary to plaintiff's contention, he is not entitled to summary judgment as to liability on his reinstated Labor Law § 241(6) claim because, as indicated, the City defendants and Skanska have raised triable issues about whether the Industrial Code regulations were violated and, if so, whether the violations caused the accident *(see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-351 [1998]).

Finally, all of plaintiff’s claims against Safety were

properly dismissed because, in its limited role as a safety consultant for the construction project, the company could not be held liable as the owner's or general contractor's agent. Safety's contract limited its responsibilities and did not confer any authority to supervise and control Cappabianca's work (*see Smith v McClier Corp.*, 22 AD3d 369, 371 [2005] [an agent's general contractual obligation to ensure compliance with safety regulations at a work site does not constitute a sufficient basis for liability under the Labor Law or a theory of negligence]).

Accordingly, the judgment of the Supreme Court, New York County (Saliann Scarpulla, J.), entered June 25, 2010, dismissing the complaint and all cross claims, and bringing up fo review an order, same court and Justice, entered May 10, 2010, which granted defendants' motions for summary judgment dismissing the complaint and cross claims, and denied plaintiff's cross motion for partial summary judgment as to liability, should be modified, on the law, the judgment vacated as to the City defendants and Skanska, the motion of the City defendants and Skanska for summary judgment denied as to the Labor Law § 241(6) claim insofar as it is based on 12 NYCRR 23-1.7(d) and 23-9.2(a), and

otherwise affirmed, without costs. The appeal from the order, same court and Justice, entered May 10, 2010, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Mazzarelli, J.P. and Catterson, J. who dissent in part in an Opinion by Catterson, J.:

CATTERSON, J. (dissenting in part)

I must respectfully dissent to the extent that I would reinstate the plaintiff's Labor Law § 200 and common-law negligence claims against all of the defendants, except Safety, insofar as they are based on a dangerous premises condition, and there is an issue of fact as to whether the defendant owner and/or general contractor had actual or constructive notice of the condition. The plaintiff's uncontroverted testimony, as set forth more fully below, establishes that he was injured because he fell off a pallet when it "turned" in water and "muck" which had been allowed to accumulate over a period of weeks on the concrete floor of the construction site where the plaintiff was working. Moreover, the majority incorrectly posits that the accumulation of water and debris on the floor resulted "only" from the plaintiff's leaking wet-saw tray, and that "there is no evidence that the water, which accumulated directly around the saw, had any other source." However, the deposition testimony of a nonparty's safety specialist, set out infra, indicates that water also accumulated on every floor of the construction site after rain. In any event, as set forth more fully below, the majority's holding ignores long-settled precedent espousing basic common-law principles that establish that at some point over time the "means and methods," or the manner in which work is performed

by a subcontractor over whom an owner or general contractor has no supervisory control may result in a dangerous premises condition implicating the owner or general contractor. See Employers Mut. Liab. Ins. Co. of Wis. v. Di Cesare & Monaco Concrete Constr. Corp, 9 A.D.2d 379, 383, 194 N.Y.S.2d 103, 108 (1959); Wohlfron v. Brooklyn Edison Co., Inc., 238 App. Div. 463, 265 N.Y.S. 18 (2d Dept. 1933), aff'd, 263 N.Y.547, 189 N.E. 691 (1933).

The relevant portion of Labor Law § 200 states as follows:

> "All *places* to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein [...] All *machinery, equipment and devices* in such places shall be so placed, *operated,* guarded and lighted as to provide reasonable and adequate protection to all such persons" (emphasis added).

It is well established that Labor Law § 200 is a codification of the common-law duty imposed on an owner or general contractor to maintain a safe construction site. Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 352, 670 N.Y.S.2d 816, 821, 693 N.E.2d 1068, 1073 (1998). In other words, a claim arising pursuant to the provision is "tantamount to a common-law negligence claim in a workplace context." Mendoza v. Highpoint Assoc., IX, LLC, 83 A.D.3d 1, 9, 919 N.Y.S.2d 129, 135 (1st Dept. 2011).

The plain language of the statute indicates there are two distinct prongs or categories to the provision: one pertains to the work premises and the requirement that they be maintained in a safe condition; the second pertains to work performance and the requirement of using material and tools in a safe manner and providing equipment and tools which are safe to use. The latter category is that part of the common-law duty to maintain a safe work site which was extended by statute to "include tools and appliances without which the place to work would be incomplete." Hess v. Bernheimer & Schwartz Pilsener Brewing Co., 219 N.Y. 415, 418, 114 N.E. 808, 808 (1916). Over time, this category has been characterized as "means and methods" or "tools and methods" (see Persichilli v. Triborough Bridge & Tunnel Auth., 16 N.Y.2d 136, 145, 262 N.Y.S.2d 476, 480, 209 N.E.2d 802, 805 (1965)), or "methods or materials." Ortega v. Puccia, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323, 330 (2d Dept. 2008) (where claims arise out of alleged defects and dangers in the "methods or materials of the work").

It is generally accepted that claims fall within one of the two categories. Persichilli, 16 N.Y.2d at 146, 262 N.Y.S.2d at 481 (defective scaffold was a device involving methods and means of work supervised by subcontractor; not breach of duty to provide safe place to work). Ortega, 57 A.D.3d at 61, 866

N.Y.S.2d at 329 (two categories "should be viewed in the disjunctive").

Unlike Labor Law § 240 and § 241 where absolute liability attaches to an owner or general contractor, a plaintiff seeking recovery under § 200 must satisfy the liability standards of common-law negligence. In other words, where the plaintiff's injuries arise out a dangerous premises condition, the plaintiff must show that the owner or general contractor either created the condition, or had actual or constructive notice of it sufficient for corrective action to be taken. See Mitchell v. New York University, 12 A.D.3d 200, 784 N.Y.S.2d 104 (1st Dept. 2004), citing Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 501 N.Y.S.2d 646, 492 N.E.2d 774 (1986). Where a plaintiff's injuries arise because of an alleged defect or danger in the methods or material of the work, recovery against an owner or general contractor cannot be had "unless it is shown that the party to be charged exercised some supervisory control" over the methods of work or materials supplied. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 55, 618 N.E.2d 82, 88 (1993).[1] The starting point of any analysis of

[1] Although not an issue here, it should be noted that the Court of Appeals has rejected the idea of any sort of crossover between liability standards such as liability attaching when an owner or general contractor has "notice of the unsafe manner in

Labor Law § 200 claims therefore should be to ascertain what caused the plaintiff's injury: whether it was caused by a dangerous premises condition, or whether the plaintiff was injured because of the manner in which the work was being performed, or as a result of defective tools and equipment.

Therefore, for the purposes of apportioning liability, determination that a plaintiff's injury arises from "means and methods" or "manner in which work was performed" does not end the inquiry. The additional question to be answered is who had supervisory control because an owner or general contractor is not obliged to protect the employees of his subcontractors against the negligence of another "occurring as a detail of the work." Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 609 N.Y.S.2d 168, 631 N.E.2d 110 (1993) (plaintiff's injury while lifting a steel beam was caused by the manner in which the plaintiff lifted the beam unassisted at direction of his employer); Wright v. Belt Assoc., 14 N.Y.2d 129, 134, 249

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which the work [is being] performed." Comes v. New York State Electric & Gas Corp., 82 N.Y.2d 876, 878, 609 N.Y.S.2d 168, 169, 631 N.E.2d 110, 111 (1993). Conversely, liability under Labor Law § 200 may be predicated solely on notice of a dangerous condition without any proof of supervision over the work involved. Shipkoski v. Watch Case Factory Assoc., 292 A.D.2d 589, 590, 741 N.Y.S.2d 57, 58 (2d Dept. 2002); see also Kerins v. Vassar Coll., 15 A.D.3d 623, 625, 790 N.Y.S.2d 697, 699 (2d Dept. 2005).

N.Y.S.2d 416, 418, 198 N.E.2d 590, 592 (1964)(negligent act of subcontractor occurring as "detail of the work"); Zuchelli v. City Constr. Co., 4 N.Y.2d 52, 55, 172 N.Y.S.2d 139, 142, 149 N.E.2d 72, 74 (1958) (place of accident was part of subcontractor's "work in progress" when floor of building under construction collapsed because of his negligent removal of shoring a few days before); Hess, 219 N.Y. at 418-4194, 114 N.E. at 808-809 (1916) (place owner must make safe does not include subcontractor's plant, equipment or "the very work" he is doing). Thus, the duty of the owner or general contractor to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools, methods or through the negligent acts of another occurring as a detail of the work. Ortega v. Puccia, 57 A.D.3d 54, 866 N.Y.S.2d 323 (2d Dept. 2008), supra.

This is an "outgrowth of the basic common-law principle that an owner or general contractor should not be held responsible for the negligent acts of others over whom [the owner or general contractor] has no direction or control." Ross, 81 N.Y.2d at 505, 601 N.Y.S.2d at 55 (internal quotation marks omitted).

Nevertheless, long-settled precedent establishes that at some point over time the "negligent acts of others" may become a dangerous premises condition implicating the owner or general

contractor. Di Cesare, 9 A.D.2d at 383, 194 N.Y.S.2d at 107 ("the duty of providing a safe place to work is a two-fold duty [....] The premises are made safe by the discovery of dangers ascertainable through reasonable diligence and remedying them [....] They are kept safe by forbearance from creating new conditions of danger").

In circumstances where the negligent act or manner in which work was performed under another's supervision results in a condition which "exist[s] for such a length of time that the [owner] as a question of fact was bound to have knowledge of [its] presence ... [and] being for a long time completed, [it] must be held to be within the control of the owner." Wohlfron, 238 App. Div. at 466, 265 N.Y.S. at 21. Alternatively, where a negligent act or manner in which work is performed by another impacts the "commonly used portions of the work premises" (Cangiano v. Charles LoBosco & Son, Inc., 23 A.D.2d 860, 259 N.Y.S.2d 197 (1965)), or the "ways and approaches to the worksite," an owner/general contractor has the duty of making it safe. Di Cesare, 9 A.D.2d at 383, 194 N.Y.S.2d at 108; see also Caspersen v. La Sala Bros., 253 N.Y. 491, 171 N.E. 754 (1930) (Cardozo, Ch. J.).

In Caspersen, the Court decided an owner's liability based on the following facts: The plaintiff was injured while

installing an elevator on the ground floor; the elevator was next to a stairway shaft above the plaintiff and not visible to the plaintiff. Further up the shaft, masons were using tiles and bricks and one of the bricks fell down the shaft striking the plaintiff on the head. The Court held, "The defendant is not chargeable with the negligence of the masons [working for a subcontractor] [but] [i]t is chargeable with its own negligence in failing to guard *the ways* against perils unknown to the worker." 253 N.Y. at 494-495 (emphasis added). The Court determined that the owner was liable because at common law it was his duty to use reasonable care in maintaining the *approaches* to the elevator (plaintiff's worksite) in a condition of reasonable safety. Id., citing Mortensen v. Magoba Constr. Co., 248 N.Y. 577, 162 N.E. 531 (1928) (defendant general contractor liable for the plaintiff worker's injury when concrete floor newly installed by a subcontractor and on which bags of cement were placed collapsed while the plaintiff was walking across it).

The determination by the Wohlfron Court is particularly instructive: in that case, the plaintiff was injured while proceeding along a concrete slab "to the place where his work was to be performed." However, a subcontractor had bored holes on the outside of the slab. The holes were left unguarded and were not visible to the plaintiff, and nothing warned him of their

presence. The plaintiff stepped into one of them and fell 26 feet. The Court held that the "duty rests on the owner or general contractor to [...] see to it that the workmen have reasonable protection against the consequences of hidden dangers known to the owner or general contractor, or which ought to have been known by him." 238 App. Div. at 465, 265 N.Y.S. at 20-21. The Court added: "This obligation is clearly distinguishable from that arising through negligent acts of a subcontractor occurring as a detail of the work." Id. It is interesting to note that the time which elapsed between the subcontractor boring the holes and the plaintiff falling into one, was just two weeks.

Further, this Court relying on Caspersen, held in Bass v. Standards Brands, (65 A.D.2d 689, 409 N.Y.S.2d 724 (1978)), that an owner was liable for a dangerous premises condition even though the plaintiff was injured by a lid falling on him *as he was removing* the agitator shaft inside the tank covered by the lid. Nevertheless, based on evidence that as a result of *long* disuse the lid had become unsafe and had sunk in upon the agitator shaft, this Court found that the lid fell on the plaintiff and injured him because of a dangerous premises condition, rather than because of the manner in which the plaintiff performed the work.

The majority observes that none of these cases involves a

dangerous premises condition arising directly out of manner and means of a plaintiff's work. The majority, in my opinion, misses the point. While not arising from the plaintiff's manner of work, the dangerous premises conditions in three of the four cases that caused the plaintiffs' injuries nevertheless arose from the negligent acts or the manner in which work was performed by others over which the owner had no supervision. However, in each case the court determined that such "manner of work" had become a dangerous premises condition either through the passage of time, or because it affected an area which an owner always has a duty to keep safe.

In this case, in my opinion, the record supports the view that the plaintiff was injured as a result of a dangerous premises condition: namely the 10-foot swath of water and debris which accumulated over a period of many weeks in the area where he was working. Moreover, even if "means and methods" namely the plaintiff's use of a leaking wet-saw tray contributed to the water accumulation, the accumulation of water and debris was allowed to stand for a sufficiently long time for it to become a dangerous premises condition which the defendants owner and general contractor were obliged to remedy.

The plaintiff was cutting bricks with a wet-saw. The saw sat on a wooden pallet raised 8 to 10 inches above a concrete floor.

The pallet's slats were about six inches apart. The plaintiff stood on an adjoining pallet to operate the saw, which sprays water onto the bricks while they are being cut.

The plaintiff's undisputed testimony is that there was an accumulation of water and "muck"(debris) under the pallet. The plaintiff also testified that some of the water came from his wet-saw, which leaked because it had a defective tray. He further testified that he was injured after he turned to place a brick on an adjoining pallet, and that, as he was turning, the pallet moved, his foot slipped between the slats, and he fell onto the concrete floor. The plaintiff's testimony in relevant part was as follows:[2]

"Q: Why did [standing on the pallet] concern you?

"A: Because the surface that I had to stand on was not connected to anything

"Q: How was th[at] fact ... connected ... [to] your job safety?

"A: Because of the water problem

"Q: How did those two problems then in conjunction affect your safety?

"A: It caused the skid to turn on me while I was standing on

[2]In the testimony the pallet is sometimes referred to as a skid.

it.

"Q: ... [W]hat would cause the skid to turn ...?

"A: Accumulation of water."

Later, the plaintiff testified as follows:

"Q: I understand your foot was caught in the slats, is it your testimony that's what caused you to fall?

"A: No.

"Q: What caused you to fall?

"A: The motion of turning; the skid turned when I turned.

* * *

"Q: Do you know whether or not the water played any role in the way that the skid moved?

"A: Yes.

"Q: How do you know that?

"A: It was under the skid.

* * *

"Q: Did your foot become trapped before the skid moved or after the skid moved?

"A: At the same time.

"Q: So my question then is, did the skid move because of the motion of your foot while it was in the hole of the skid or before it became (sic) in the hole of the skid? Do you understand my question?

"A: Yes. Before."

Based on the foregoing excerpts from the plaintiff's testimony, the plaintiff was injured because he fell, and he fell for no other reason than because the pallet moved/turned in the *accumulated* water underneath. In other words, the import of the plaintiff's uncontroverted testimony was that his injury was not directly caused by the manner in which he performed his work, nor as a result of the methods and materials used to perform the task. He was not injured by the spraying water from the malfunctioning tray, or because the pallet was defective. He was injured because he fell, and he fell *only* because the pallet moved and he missed his footing and the pallet moved *only* because there was an accumulation of water and debris under the pallet that existed over a long period of time. Had water not accumulated under the skid causing it to turn, he could have continued performing his work with a leaking wet-saw tray standing on a pallet with slats without falling.

In my opinion, the majority's view that all the contributing causes of the plaintiff's injury resulted from the work done by the plaintiff, even if it was an accurate representation of facts in the record, does not alter the fact, as stated unequivocally by the plaintiff, that it was the accumulation of water and debris that precipitated the plaintiff's accident. However, the

majority misreads the facts of record.

First, it is not clear that all the water on the floor came from the defective wet-saw; Fabian Garzon, the safety specialist employed by nonparty Safety testified that during an inspection, he witnessed "laborers were sweeping water from the rain on every floor." Thus, the record contains unrebutted evidence that any rainstorm would cause water to pool on the floors of the open construction site. Nor was the plaintiff able to testify that the water on the floor was caused *only* by leaking from the wet-saw tray. Second, the majority's claim that the "arrangement of the saw and the pallets [was a] 'construction standard'" is wholly incorrect and based on a misreading of the record. Paul Deremer, Skanska's safety manager referred to a construction standard in testifying about the construction of the pallet itself and the gapped surface of the pallet; he also used the word "standard" in testifying about the custom of moving cut bricks on a pallet by forklift. He did not testify that the "arrangement of the saw and the pallets" was the custom of the industry. Indeed, the arrangement was unusual enough for the plaintiff to testify that he repeatedly complained about the wet-saw and its stand being positioned on a pallet. Finally, while the plaintiff did not testify that he was provided with the pallet *because* of the accumulated water, his testimony

nevertheless points to such a conclusion: There is no reason given in the testimony for providing the plaintiff with a pallet raised 8 to 10 inches off the ground in order for him to operate a wet-saw which is also placed on a pallet. The majority's observation that the plaintiff stood on the pallet because the wet-saw was on an adjoining pallet begs the question, of course, of why the saw and its stand were positioned on the pallet.

In any event, the relevant facts here are that water *was allowed to accumulate* along with other debris and muck over a period of weeks to create a dangerous premises condition. The plaintiff's testimony was that he had complained several times over a period of several weeks about the dangerous condition of water and "muck" accumulating on the floor until it was an inch deep and 10 feet wide on the floor. The plaintiff testified unequivocally that "[they] could have provided a safer workplace in terms of - first thing would be the floor, always having you know, collections of water, and it was very slippery."

Ultimately, in my opinion, the majority resorts to precedent of questionable value so that based on the foregoing facts it may still reach a conclusion that the plaintiff's injury was caused by "means and methods" rather than a dangerous premises condition implicating the owner and general contractor. In Dalanna v. City of New York, 308 A.D.2d 400, 764 N.Y.S.2d 429 (2003), the Court

held that a dangerous premises condition (a protruding bolt in the work area) did not constitute an unsafe place to work for purposes of Labor Law § 200 where the dangerous condition (the protruding bolt) resulted from the manner in which the plaintiff's *employer* performed its work in an unrelated activity months prior to the injury-producing activity engaged in by the plaintiff.

The decision in Dalanna does not comport with the body of caselaw pertaining to Labor Law § 200. First, it should be noted that in any Labor Law § 200 and common-law negligence claim where a plaintiff's injury allegedly results from "means and methods" or the manner in which the work is performed, the injury results from the manner in which *the plaintiff* performs the task, or the means and methods or tools used by *the plaintiff* during the injury-producing activity or by his employer/subcontractor's negligent acts occurring as a *detail of the work*. See Comes, 82 N.Y.2d at 877, 609 N.Y.S.2d at 169; Ferrero v. Best Modular Homes, Inc., 33 A.D.3d 847, 823 N.Y.S.2d 477 (2006), lv. dismissed, 8 N.Y.3d 841, 830 N.Y.S.2d 693, 862 N.E.2d 784 (2007) (plaintiff's injury occurred during tree removal as a result of the plaintiff performing the task in an unsafe manner by operating a chainsaw while standing at the top of a 20-foot ladder).

Where a plaintiff's injury occurs as a result of his employer's or a subcontractor's negligent act, that act must occur as a "detail of the work" in which the plaintiff is engaged more or less contemporaneously. The precedent on which Dalanna purports to rely (Wright v. Best Assoc.) does not stand for the proposition that the negligent act of a plaintiff's employer or subcontractor may take place *months prior* to the plaintiff's injury.

In Wright, the negligent act of the plaintiff's employer in not shoring up the cheeks of a foundation was a "detail of the work" in which the plaintiff was engaged in uncovering a drainpipe for the construction of a cesspool. It therefore impinged on the "very work" that the plaintiff was doing. 14 N.Y.2d at 134, 249 N.Y.S.2d at 418. Although the majority reconfigures the timeline of events in Dalanna, in fact, the negligent act of the plaintiff's employer in leaving a protruding bolt was performed *months* prior to the accident when the plaintiff tripped over the bolt. Thus, under basic common-law principles, the bolt was sufficiently "long-established" for the condition to be in the "control" of the owner. See Wohlfron, 238 App. Div. At 466, 265 N.Y.S. at 21. Hence, to the extent that Dalanna holds that the owner/general contractor in that case were not liable *even if* they had constructive notice of the protruding

bolt, it essentially stands common-law negligence principles on their head.

It should be noted that the holding has been cited just once for the proposition that an unsafe premises condition created by a plaintiff's employer renders the plaintiff's Labor Law § 200 claim to be a claim based on the manner in which the employer's work was performed. See McCormick v. 257 W. Gennesee, LLC, 78 A.D.3d 1581, 913 N.Y.S.2d 435 (2010). Incomprehensibly, the majority relies on McCormick to establish Dalanna as *controlling* precedent.

Finally, while the majority tacitly acknowledges that a dangerous premises condition existed, its view that the plaintiff's means and methods *were* "*contributing causes* of the accident" should not preclude a finding that the defendant owner and general subcontractor were liable if they had actual or constructive notice of the accumulation of water and debris. See Seaman v. A.B. Chance, 197 A.D.2d 612, 602 N.Y.S.2d 693 (2d Dept. 1993), appeal dismissed, 83 N.Y.2d 847, 612 N.Y.S.2d 110, 634 N.E.2d 606 (1994) (manner in which work of cutting down a tree was performed by the plaintiff standing on uninsulated platform provided by his employer *contributed* to electrocution of the plaintiff when he hit a live electric transmission line running through a tree on land owned by the Town of Babylon; because

Babylon had actual notice of the live power line in the tree it had slated for removal, it had notice of the dangerous condition and was therefore liable). Similar to the circumstances of this case, it would not have mattered for the plaintiff to stand on an uninsulated platform, if there was no live power line running through the tree.

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

ENTERED: AUGUST 14, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7194 Wells Fargo Bank Northwest, N.A., etc.
Plaintiff-Respondent,

-against-

US Airways, Inc.,
Defendant-Appellant.

Index 650500/09

O'Melveny & Myers LLP, New York (Mark W. Robertson of counsel), for appellant.

Smith, Gambrell & Russell, LLP, New York (John J. Lee of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 23, 2011, reversed, on the law, without costs, and, upon a search of the record, summary judgment granted dismissing the complaint. The Clerk is directed to enter judgment accordingly.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick
Sallie Manzanet-Daniels, JJ.

7194
Index 650500/09

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Wells Fargo Bank Northwest, N.A., etc.
Plaintiff-Respondent,

-against-

US Airways, Inc.,
Defendant-Appellant.

Index 650500/09

_____x

Defendant appeals from the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered March 23, 2011, which granted plaintiff's motion for partial summary judgment as to liability on its breach of contract cause of action.

O'Melveny & Myers LLP, New York (Mark W. Robertson, Abby C. Johnston and Matthew F. Damm of counsel), for appellant.

Smith, Gambrell & Russell, LLP, New York (John J. Lee and Stacy E. Yeung of counsel), for respondent.

SAXE, J.P.

This dispute arises out of an arrangement by which defendant US Airways, while it was the owner or operator of the three aircraft at issue here, had acquired from the manufacturer the right to operate the aircraft at a maximum takeoff weight (MTOW) in excess of the MTOW assigned to them upon manufacture.

US Airways' predecessor company, America West Airlines, Inc., acquired the three 737-3G7 aircraft from Boeing in 1991. At that time, each aircraft had an MTOW of 124,000 pounds. Pursuant to a program offered by Boeing called the Flex Program, US Airways entered into an agreement with Boeing that permitted it to operate the three aircraft at an increased MTOW of 138,500. However, US Airways' right to do so was subject to annual reports and payments of fees to Boeing, and, according to US Airways, the right to operate the three aircraft at the increased MTOW under the Flex Program agreement was not transferable.

In 2005, plaintiff Wells Fargo Bank Northwest, N.A., as Trustee, purchased the three aircraft from US Airways, then leased them all back to US Airways for a three-year term. Each purchase agreement included a page entitled "aircraft technical data," which specified that the MTOW of its subject aircraft was 138,500 pounds, with a footnote stating, "Current as of 2 September 2005." Nothing in the purchase agreements mentioned US

Airways' arrangement with Boeing by which the aircraft's MTOW had been increased from 124,000 to 138,500.

The lease agreements provided, in section 19, for "Redelivery Conditions." Upon US Airways' turnover of the aircraft to Wells Fargo at the end of the lease term, Wells Fargo was permitted a final inspection, including a detailed "operations ground check," an "acceptance flight" demonstrating the airworthiness of the aircraft, and a full aircraft documentation review, to verify that the condition of the aircraft complied with the agreements. Section 19 provided further that, after the inspection, Wells Fargo would provide US Airways with a "Redelivery Certificate" acknowledging and confirming that US Airways had redelivered the aircraft to Wells Fargo in accordance with the agreement.

Schedule 11 to the lease agreements, entitled "Return Conditions," listed the terms pursuant to which each aircraft was to be redelivered to Wells Fargo. Notably, Section 1(q), under "General Condition," provided that the "[o]perating weights of the Aircraft will be *as at delivery* and will be freely transferable" (emphasis added). The term "Delivery" was defined as "delivery of the Aircraft on lease by Lessor to Lessee hereunder as evidenced by Lessee's execution and delivery of the Lease Supplement."

At the end of the lease terms, in accordance with the foregoing, Wells Fargo had a team of experts conduct the final inspections. These experts identified a number of discrepancies, all of which were resolved before the redelivery of the aircraft. However, the MTOW of the aircraft was not the subject of any inspection or discussion. Wells Fargo accepted redelivery of the aircraft, and the parties executed Redelivery Certificates as provided for in the lease agreements.

The Redelivery Certificates provided at Section 3:

> "By signing this Certificate, [Wells Fargo] accepts redelivery of the Aircraft under the Lease Agreement without prejudice to each party's rights and obligations under the Lease Agreement. All risks in the Aircraft shall pass from [US Airways] to [Wells Fargo] upon the effectiveness of this Certificate."

Section 4 of the Redelivery Certificates provided:

> "Except as listed on Appendix 2 hereof, [US Airways] has returned the Aircraft to [Wells Fargo] in the condition set forth in Schedule 11 of the Lease Agreement (each deviation from such requirement in the Lease Agreement, a "Discrepancy"). Set forth across from each Discrepancy listed on Appendix 2 is the action that the parties have agreed will be taken with respect to such Discrepancy."

Section 6 provided:

> "(a) The Aircraft . . . [is] hereby redelivered by [US Airways] and accepted by [Wells Fargo] in accordance with the Lease Agreement subject to (i) any provision of the Lease Agreement that by its own terms

> survives the termination of the Lease Agreement, (ii) any payments or actions to be taken pursuant to any Discrepancy set forth on Appendix 2 hereof and (iii) any rent and redelivery compensation as set forth on Appendix 4 hereof."

Finally, section 6(d) provided that "[t]he Lease Agreement is hereby terminated subject only to the provisions of paragraph 6(a) hereof."

It is not disputed that, at the time the aircraft were redelivered by US Airways and accepted by Wells Fargo, the MTOW of the aircraft was back down to 124,500 pounds, because the increased MTOW obtained by virtue of US Airways' Flex Program arrangement with Boeing was not transferred. It is also undisputed that Wells Fargo, unaware that the MTOW listed in the 2005 purchase agreements had previously been increased from the MTOW at the time of manufacture pursuant to the Flex Program, did not list aircraft MTOW as a discrepancy in Appendix 2 of the Redelivery Certificates.

Months after the redelivery of the aircraft and termination of the lease, Wells Fargo learned for the first time of the 124,500-pound MTOW and the arrangement US Airways had had with Boeing for the increased MTOW. US Airways refused Wells Fargo's requests to "resolve" the issue. Needing to proceed with its new leases, Wells Fargo paid Boeing $544,400 so that its new lessees

could operate the aircraft at the increased 138,500-pound MTOW. Wells Fargo then brought this action, seeking, essentially, rescission of the Redelivery Certificates and damages for breach of the leases; its fraudulent inducement and negligent misrepresentation claims were withdrawn and dismissed, respectively.

Wells Fargo moved for partial summary judgment on its breach of contract claim, based on the argument that as a matter of law US Airways had violated the lease agreements' requirement that at their redelivery "[o]perating weights of the Aircraft will be as at delivery and will be freely transferable," since the aircraft had an MTOW of 138,500 pounds at the time of "delivery" as that term was defined by the leases.

In opposing summary judgment, US Airways contended that the term "delivery" as used in the leases was susceptible to two distinct meanings: when the term was capitalized, it referred to delivery of the aircraft by Wells Fargo to US Airways, but when not capitalized, it referred to the delivery from Boeing to US Airways. Thus, when the lease agreements stated that the aircraft were to be redelivered to Wells Fargo with an MTOW "as at delivery," since a lower case "d" was used, they referred to an MTOW of 124,500 pounds. US Airways argued further that Wells Fargo had waived any right to claim noncompliance with the lease

agreements when it executed the Redelivery Certificates.

The motion court granted Wells Fargo's motion for partial summary judgment, rejecting the argument that the term "delivery" in the lease always referred to the date on which the leases began, and therefore finding US Airways liable for breach of contract. Because the reference to the delivery of the aircraft related only to the date on which the leases began, at which time the MTOW of the planes was 138,500 pounds, the court reasoned that US Airways had, and breached, a contractual obligation to return the aircraft with MTOW of 138,500 pounds.

The court also rejected US Airways' argument that Wells Fargo's execution of the Redelivery Certificates constituted a waiver, on the ground that the agreements' provisions regarding the Redelivery Certificates state that the certificates do not prejudice the parties' rights under the agreements.

We now reverse.

Initially, we agree with the motion court that the leases required US Airways to turn over the aircraft with the MTOW of 138,500 that the aircraft had at the time the leases commenced. We reject US Airways' argument that the leases' use of the word "delivery" was ambiguous, or could be interpreted to mean the date that the manufacturer first delivered the aircraft. The lease agreements' use of the term "delivery" is not ambiguous

(*see Kolmar Ams., Inc. v Bioversel Inc.*, 89 AD3d 493 [2011]). Every use of the term "delivery," whether or not the "d" is capitalized, refers to the delivery of the aircraft from Wells Fargo to US Airways, except where the use of the word is specifically qualified to clarify its reference to a specific type of "delivery," for example "for *first* Aircraft delivery" and "at *new* delivery" (emphasis added).

In any event, it is simply unreasonable to suggest that a lease agreement between Wells Fargo and US Airways, having absolutely nothing to do with Boeing, would use the term "delivery" to refer to a transaction between Boeing and US Airways' predecessor that occurred 14 years before Wells Fargo ever purchased the aircraft (*see RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 436 [2009]). Since it is undisputed that the aircraft were "redelivered" to Wells Fargo at the end of the lease term with an MTOW different from the MTOW at the time of their "delivery," Wells Fargo has established a failure to comply with section 1(q) of the Return Conditions listed in Schedule 11 to the lease agreements.

However, we find that Wells Fargo's execution of the Redelivery Certificates without reference to the MTOW discrepancy precludes it from raising or seeking relief for that breach.

By executing the Redelivery Certificates, Wells Fargo

certified that US Airways had fully performed its obligations under the lease, and that the aircraft had been returned in compliance with the parties' agreements. Importantly, paragraph 6(d) of the certificates provided that upon execution of the certificates, the lease agreements were "terminated subject only to the provisions of paragraph 6(a) hereof." Paragraph 6(a) made the redelivery and acceptance

> "subject to (i) any provision of the Lease Agreement that by its own terms survives the termination of the Lease Agreement, (ii) any payments or actions to be taken pursuant to any Discrepancy set for on Appendix 2 hereof, and (iii) any rent and redelivery compensation as set forth on Appendix 4 hereof."

Except for those delineated circumstances, Wells Fargo's right to seek enforcement of the terms of the leases ceased upon its certification that the aircraft had been returned in compliance with the leases, at which time the leases were terminated.

The lease provision requiring that at redelivery, "[o]perating weights of the Aircraft will be as at delivery," does not fall into any category delineated in the above-quoted paragraph (6)(a) of the Redelivery Certificates. It does not by its terms survive the termination of the leases, unlike, for example, section 23.15 of the leases, the indemnity provision, which provides that all indemnities and other obligations of the lessee "shall survive, and remain in full force and effect,

notwithstanding the expiration or other termination of this Agreement." There is nothing about section 1(q) of the Return Conditions listed in Schedule 11 to the lease agreements that differentiates it from all the other return conditions listed in Schedule 11, which, under paragraph 4 of the Redelivery Certificates, are explicitly considered satisfied if not listed as discrepancies.

Nothing in lease section 19 allows for a belated claim of a violation of the leases' Return Conditions after execution of the Redelivery Certificates. Section 19.1(b) requires that upon their return, "the Aircraft shall be in compliance with the Return Conditions and the other requirements of the Lease," and sections 19.2 and 19.3 provide for complete review by Wells Fargo of the aircraft and their documentation, giving it the opportunity to discover any discrepancies. Even section 19.9, entitled "Rectification and Delay," which recognizes the possibility that the aircraft might be returned in a condition other than that required by the lease, merely focuses on the possibility that the lessee might dispute a discrepancy claimed by the lessor, prompting further procedures that would delay the return of the aircraft.

The "without prejudice" language of section 3 of the Redelivery Certificates does not allow Wells Fargo to assert a

breach of the lease's Return Conditions after the execution of the Redelivery Certificates and termination of the lease. Section 3 states, "By signing this Certificate, Lessor accepts redelivery of the Aircraft under the Lease Agreement without prejudice to each party's rights and obligations under the Lease Agreement." However, this provision cannot properly be understood to permit Wells Fargo to sue for a belatedly realized breach of the lease's Return Conditions after the lease has been terminated. Rather, when read in the context of both the lease agreements and the entirety of the Redelivery Certificates, section 3 merely preserves rights granted by the leases that do not conflict with the terms of the Redelivery Certificates, such as clauses that survive termination of the leases. Interpreting section 3 as broadly as Wells Fargo suggests would render meaningless the certification that the aircraft had been delivered "in the condition set forth in Schedule 11 of the Lease Agreement" except for noted discrepancies.

In *Jet Acceptance Corp. v Quest Mexicana S.A. de C.V.* (87 AD3d 850 [2011]), this Court considered circumstances in which the defendant entered into four agreements to lease four airplanes from the plaintiff. These agreements provided for a procedure by which the lessor would present the planes to the lessee for inspection, the lessee would verify that the planes

conformed to the lease specifications, and, after so doing, would execute an "Acceptance Certificate" confirming that the aircraft met all the lease requirements unless a notation of a reservation was made on the appropriate form. The lessee performed the inspection of the first airplane, then executed the Acceptance Certificate. However, a dispute about the type of insurance the lessee had obtained to cover the first airplane led the lessee to refuse to cooperate with the pre-lease inspections of the other three planes. The lessor sued for breach of the four contracts.

In affirming the award of summary judgment to the plaintiff in *Jet Acceptance*, this Court observed that "[o]nce Quest executed the acceptance certificate, it effectively waived any claim that the airplane was not in condition for delivery" (*id.* at 855). In rejecting Quest's assertion, in response to the summary judgment motion, that its aviation expert determined that the second and third aircraft were not in flying condition, we observed that

> "[t]he leases established a method for Quest to object to the condition of the aircraft, at the time they were presented, before accepting delivery. Quest chose not to assert its rights under those provisions. The time for Quest to identify deficiencies in the aircraft was the time that plaintiff presented them to it, not after plaintiff had moved for summary judgment" (*id.* at 856).

While the present matter may not stand in quite the same posture as *Jet Acceptance*, the gist of its ruling applies here.

The Redelivery Certificates and the lease agreements "established a method for [Wells Fargo] to object to the condition of the aircraft, at the time they were presented, before accepting [re]delivery," and "[t]he time for [Wells Fargo] to identify deficiencies in the aircraft was the time that [US Airways] presented them to it," not after it had executed the Redelivery Certificates confirming the aircraft's compliance (*id.* at 856). By executing the redelivery certificates, Wells Fargo "expressly confirmed that [US Airways] had fully performed all of its obligations up to that point, including the furnishing of ... aircraft that materially conformed to the lease" (*id.* at 855).

It is not important that Wells Fargo did not explicitly state that it was waiving its right to enforce the contract after its termination. It had no such continuing post-termination right with regard to any provision that did not explicitly survive. Nor is it important that the discrepancy was a matter that could only be discerned from documents rather than a tangible physical deviation apparent upon physical inspection; Wells Fargo's inspection was to cover both the craft and the documents. As in *Jet Acceptance Corp.*, by executing the Redelivery Certificates, Wells Fargo "effectively waived" any claim that the aircraft were not in compliance with the Return Conditions of the lease (87 AD3d at 855).

Wells Fargo's argument that it accepted redelivery in reliance on US Airways' representations in the Redelivery Certificates is specious at best. Any such purported reliance would have been unreasonable as a matter of law. If Wells Fargo had been entitled to accept redelivery in reliance on US Airways's assertions that the aircraft were compliant, then there would have been no need for the elaborate procedure by which its experts would inspect the aircraft and documentation, followed by its execution of the Redelivery Certificates. The listing of discrepancies was Wells Fargo's obligation, not US Airways'; the leases expressly provided that the purpose of the final inspection was to allow Wells Fargo to ensure, for itself, that the condition of the aircraft complied with the leases.

Finally, summary judgment should be awarded to US Airways, because Wells Fargo's execution of the Redelivery Certificates effectively precludes it from belatedly claiming a breach of the terminated leases based on noncompliance with the Return Conditions of the leases.

Accordingly, the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered March 23, 2011, which granted plaintiff's motion for partial summary judgment as to liability on its breach of contract cause of action, should be reversed, on the law, and, upon a search of the record, summary judgment

granted to defendant dismissing the complaint. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: AUGUST 14, 2012

CLERK