SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 18, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6012 Noel M. Wiederhorn, MD, etc., Index 601265/10
Petitioner-Respondent,

-against-

J. Ezra Merkin, et al.,
Respondents-Appellants.

Dechert LLP, New York (Kristina A. Moon of counsel), for appellants.

Brickman & Bamberger, New York (David E. Bamberger of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard B. Lowe, III, J.), entered February 9, 2011, awarding petitioner $1,758,744.01 as against respondent J. Ezra Merkin, and bringing up for review an order, same court and Justice, entered August 17, 2010, which, inter alia, granted the petition to confirm an arbitral award, denied respondents' cross petition to vacate the award as against Merkin and to confirm it as to respondent Gabriel Capital Corporation (Gabriel), and granted petitioner's motion to dismiss respondents' counterclaim, unanimously

modified, on the law, to the extent of confirming the award as to Gabriel, and otherwise affirmed, without costs.

The following facts are undisputed: Petitioner invested in nonparty Ascot Partners, L.P. (Ascot), a fund operated by respondent J. Ezra Merkin, who allegedly failed to disclose that the fund's monies were funneled to Bernard Madoff to invest. On March 18, 2003, petitioner subscribed for a $500,000 limited partnership interest in Ascot, on behalf of his individual retirement account (IRA). In the subscription agreement, petitioner represented that he was a "qualified purchaser." In order to reach the required $5 million in investments, petitioner included his house and office as real estate held for investment purposes. In 2004, petitioner invested an additional $962,040 in Ascot on behalf of his IRA. Merkin, Ascot's general partner, forwarded the funds to nonparty Bernard Madoff. In 2008, petitioner learned that the funds he had invested were misappropriated during Madoff's perpetration of a "Ponzi" scheme.

Pursuant to the Ascot limited partnership agreement's arbitration clause, petitioner commenced an arbitration against Merkin, Gabriel, and Ascot[1] on December 19, 2008. Gabriel

[1] Petitioner subsequently withdrew his claims against Ascot.

provided “accounting and back-office” services to Ascot, and Merkin is Gabriel’s sole shareholder. The arbitration clause requires that any dispute arising out of the agreement or breach of the agreement will be submitted to arbitration in New York.

At arbitration, petitioner asserted claims for violation of the New Jersey Uniform Securities Law (NJSA §§ 49:3-51, 49:3-71), breach of fiduciary duty, common-law fraud and deceit, and gross negligence. Following seven days of evidentiary hearings before a three-person panel, a two-to-one majority found in petitioner’s favor on his claims for breach of fiduciary duty and violation of the New Jersey Securities Act as against Merkin, and ordered him to pay petitioner restitution in the amount of $1,462,040, plus interest. The arbitral panel dismissed all claims against Gabriel.

Petitioner brought a special proceeding to confirm the arbitral award. Merkin and Gabriel answered jointly, cross-petitioned to vacate the award against Merkin and confirm the award to the extent it dismissed all claims against Gabriel, and counterclaimed for indemnification.

Respondents contended that the arbitral panel found that petitioner misrepresented his status as a qualified purchaser in the subscription agreement. They further argued that pursuant to

the indemnification clause in the parties' subscription agreement, they are entitled to recover $1,010,542 in attorneys' fees and $583,092 for expert witnesses, consultants, arbitrators, and transcripts. The indemnification clause of the subscription agreement states in pertinent part:

> "The Investor [petitioner and/or his IRA] agrees to indemnify and hold harmless ... [Ascot's] General Partner [respondent Merkin] ... [and his] affiliate[] ... against any and all loss, liability, claim, damage and expense whatsoever (including all expenses reasonably incurred in investigating, preparing or defending against any claim whatsoever) arising out of or based upon (i) any false representation or warranty made by the Investor ... in this Subscription Agreement ... or (ii) any action for securities law violations instituted by the Investor which is finally resolved by judgment against the Investor."

Respondents also contended that uncontradicted evidence established that petitioner was aware that Madoff had been delegated investment responsibility for substantially all of Ascot Partners' assets prior to petitioner's first investment in Ascot.

The court issued a decision and order dated August 6, 2010, granting petitioner's motion to confirm the award, and denying respondents' cross petition and counterclaim. The court then issued a judgment for petitioner dated January 28, 2011 ordering

recovery of $1,758,744 from J. Ezra Merkin. The judgment, however, did not reflect the dismissal of petitioner's claims against Gabriel.

On appeal, respondents Merkin and Gabriel argue that the court erred when it confirmed the award against Merkin but not in favor of Gabriel, and denied Gabriel's counterclaim for indemnification. Respondents argue, inter alia, that a confirmation of the award in favor of Gabriel constitutes a "judgment against the investor," entitling Gabriel to recover attorneys fees and other expenses under the terms of the indemnification clause.

For the reasons set forth below, we modify to confirm the entire award and amend the judgment accordingly, but affirm denial of respondents' counterclaim. Gabriel and Merkin, having charted their course in presenting and reaping the benefits of a joint defense, should not now be considered separately for the purposes of indemnification. Petitioner prevailed in the arbitration against the *joint representation of Merkin and Gabriel*. Thus, even though the judgment is modified in Gabriel's favor, neither respondent may recover the cost of their joint defense.

As a threshold matter, we note that an arbitration award

will not be overturned unless it is violative of a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitral panel's power (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]). Respondents have not established any of these bases for reversal.

Notably, the arbitration panel did not find that petitioner had misrepresented his status in the subscription agreement. To the contrary, the panel found that petitioner was unaware that he was not a qualified investor. We are bound by these factual findings made by the panel (*Silverman*, 61 NY2d at 308; *Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [2004]).

Respondents have similarly provided no basis for overturning the panel's determinations that New Jersey Securities Law applies in this case (*see e.g. Silverman*, 61 NY2d at 308; *Brown & Williamson*, 7 AD3d at 372). Moreover, as to any conflicting testimony about petitioner's awareness of Madoff's involvement with Ascot, a court may not second-guess a determination made by the arbitration panel based on inconsistent evidence (*see e.g. Brown & Williamson*, 7 AD3d at 373).

Respondents correctly assert, however, that they are entitled to confirmation of the entire award, including that part

of the award dismissing the claims against Gabriel. CPLR 7510 states that "[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511" (*see Matter of Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 1, 7 [2009] [CPLR 7510 confers a broad right to confirmation of an arbitral award]). The record in this case indicates that respondents moved to confirm within one year of the award, and petitioner does not contend that any of the grounds specified in CPLR 7511 applies.

Nonetheless, confirmation of the award and modification of the judgment do not mandate granting Gabriel's counterclaim for indemnification. A dismissal of the claims against Gabriel and some of the claims against Merkin cannot be characterized as a "judgment against" petitioner. To trigger the second prong of the indemnification clause, Gabriel and Merkin would have to demonstrate that they "prevailed" in the action by obtaining a judgment in their favor (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989] ["Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule"]). The

courts have generally held that the "prevailing" or "successful" party is the party in whose favor a "net judgment" was entered (Stein Treatise § 17:56 [3d ed]; *see McGrath v Toys "R" Us, Inc.*, 3 NY3d 421, 431 [2004] [a plaintiff who obtains a damages judgment, which forces the defendant to pay a sum to the plaintiff that the defendant would not otherwise be required to pay, is considered the prevailing party]). The party who prevails with respect to "the central relief sought" is considered the prevailing party (*Matter of Metropolitan Transp. Auth. v HRH Constr. Interiors, Inc.*, 18 Misc 3d 1133[A], 2008 NY Slip Op 50303[U] *3 [Sup Ct NY County 2008]; *see LGS Realty Partners LLC v Kyle*, 29 Misc 3d 44 [App Term, 1st Dept 2010]).

Here, although the arbitration panel found that Gabriel had no duty to petitioner and dismissed the claims against it, and dismissed some of the claims against Merkin, petitioner prevailed in the arbitration proceeding because he was awarded the full value of his investments in Ascot with interest, in "full satisfaction of all claims and counterclaims." The fact that petitioner did not prevail on all of his claims, including the ones against Gabriel, is irrelevant. It is not necessary for a party to prevail on all of his claims in order to be considered "prevailing" (*see Duane Reade v 405 Lexington, L.L.C.*, 19 AD3d

179 [2005] [partial success did not negate the fact that the landlord prevailed, thus entitling it to counsel fees]).

Gabriel's argument that it should be considered separately for the purpose of determining whether it prevailed against petitioner is without merit. Respondents mounted a joint defense, maintaining absolute identity in the arbitration, in their cross petition and counterclaims to Supreme Court, and on appeal to this Court.

The record reflects that respondents' submissions, including Respondents' Answer to Statement of Claim, Pre-Hearing Memorandum, Post-Hearing Brief, and Respondents' Post-Hearing Reply Brief, present arguments throughout on behalf of "respondents" jointly. Even after the arbitration panel found that Merkin was liable and Gabriel was not, both "respondents" continued to represent their interests, claims, etc. jointly before Supreme Court and on appeal to this Court.

Furthermore, the record indicates that the cost of that defense accrued to both parties jointly, making it impossible to allocate expenses between Merkin and Gabriel. In their Verified Answer, Cross-Petition and Counterclaim, respondents assert that they are entitled to recoup $1,593,632 in fees for their attorneys, expert witnesses, consultants, arbitrators, and

transcripts. The exhibits to the Verified Answer indicate that the invoices were for representation of both Merkin and Gabriel jointly, and paid primarily by Gabriel. Thus, there is no way that a court could identify attorney fee expenses that accrued to representation of only Gabriel that were not already being spent on Merkin's defense.

We have reviewed respondents' remaining arguments and find them unavailing.

> The Decision and Order of this Court entered herein on May 3, 2012 is hereby recalled and vacated (*see* M-2626 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 18, 2012

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6257 Richard Fabrizi,
Plaintiff-Respondent,

Index 108280/08
590291/09
590554/10

-against-

1095 Avenue of the Americas, L.L.C., et al.,
Defendants-Appellants,

Verizon New York, Inc., et al.,
Defendants.

[And Other Actions]

London Fischer, LLP, New York (Daniel Zemann, Jr. of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered June 9, 2011, which, to the extent appealed from, denied defendants 1095 Avenue of the Americas, L.L.C. and J.T. Magen Construction Company, Inc.'s motion for summary judgment dismissing the Labor Law § 240(1) claim as against them, and granted plaintiff's motion for summary judgment on the issue of said defendants and defendant Dechert LLP's liability under § 240(1), modified, on the law, to deny plaintiff's motion, and otherwise affirmed, without costs.

Plaintiff, an electrician employed by nonparty Forest

Electric Corp., was working at a job site where the general contractor was gutting and remodeling a commercial space. He was injured when he was struck in the hand by a piece of galvanized steel conduit pipe. The pipe had been attached to another piece of pipe by a compression coupling at the ceiling before it fell. At the time of the accident, plaintiff was engaged in moving a pool box (also called a pencil box), a device used to access telecommunication wires. The box was connected to a section of conduit piping running from the floor to the ceiling, as well as to a support system known as Kindorf supports. After cutting the conduit to remove the pencil box, plaintiff kneeled down to drill into the floor in order to reposition the conduit and the pencil box, when the piece of conduit that was secured to the other pipe came loose and fell upon him.

Contrary to defendants' argument, adopted by Justice Tom in his dissent (the dissent), the facts in this case are not outside the scope of Labor Law § 240(1). Plaintiff claims that he requested and should have been provided with a set screw coupling to secure the conduit pipe to the ceiling and that defendants' failure to provide this protective device was a proximate cause of his accident. Defendants assert that in light of the Kindorf support system and compression coupling that attached the conduit

to the ceiling, no protective devices were called for. However, neither of these positions was demonstrated as a matter of law. Thus, summary judgment is not warranted in favor of either side.

The dissent misconstrues plaintiff's claim when it asserts that plaintiff's theory of recovery is flawed because Labor Law § 240(1) has no application to the type of component part that plaintiff claims his employer should have used to *assemble* the conduit system. Plaintiff does not maintain that the conduit system was assembled in an unsafe manner. Rather, plaintiff's testimony is that when directed to move the pool box, he requested a set screw coupling to secure the pipe to prevent the pipe from falling during the disassembly, and that the failure of defendants to provide this device was a proximate cause of his accident. As to the dissent's observation that it is unclear whether we adopt plaintiff's position, we find an issue of fact as to whether defendants failed to provide a protective device (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 11 [2011] ["whether plaintiff's injuries were proximately caused by the lack of a safety device of the kind required by statute is an issue for a trier of fact to determine"]).[1]

[1]Although, in concurring in the denial of plaintiff's motion for summary judgment, Justice Román focuses on the issue of

The dissent cites *Narducci v Manhasset Bay Assoc.* (96 NY2d 259, 268 [2001]), which states that "for section 240(1) to apply, ". . . [a] plaintiff must show that the object fell [ ] while being hoisted or secured." However, it is clear from another portion of that decision, as well as from subsequent case law, that section 240(1) is not limited to that situation. The *Narducci* Court observed that "the glass that fell on plaintiff was not a material being hoisted *or a load that required securing for the purposes of the undertaking at the time it fell"* (emphasis added). In *Quattrocchi v F.J. Sciame Constr. Corp*. (11 NY3d 757, 758 [2008]), a case where plaintiff was struck by falling planks that had been placed over open doors, the Court stated outright that "'falling object' liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured." In *Wilinski* (18 NY3d at 10), citing *Quattrocchi*, the Court held that the plaintiff was not precluded from recovery under section 240(1) "simply because he and the pipes that struck him were on the same level."

Furthermore, the dissent's analogy to *Narducci* is inapt. In

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forseeability, we note that defendants did not raise that issue.

that case, the plaintiff was injured when glass fell from a window that was not being worked on during the renovation but was part of the preexisting building structure. In contrast, here, plaintiff's employer had been engaged in overhauling the building's electrical system, and at the time of the accident, plaintiff had been doing conduit work and installation of pool boxes. Following the completion of the work, the general contractor issued a change order, directing the relocation of the pool box. Thus, plaintiff was not injured by a part of the preexisting structure unrelated to the work he was performing but was injured by the apparatus that had been installed by his employer and was being relocated.

The dissent also posits two different methods by which plaintiff could have performed the work that would have eliminated any possibility that the hanging conduit would fall.

However, “no evidence, expert or lay, was submitted that either of these options were appropriate” (*Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 905 [2011]).[2]

All concur except Román, J. who concurs in part and dissents in part in a memorandum, and Tom, J.P. who dissents in a memorandum as follows:

[2]Notably, defendants did not argue below that plaintiff’s actions were the sole proximate cause of the accident.

ROMÁN, J. (concurring in part and dissenting in part)

While I agree with the majority's position that the accident here falls within the ambit of Labor Law § 240(1) and that questions of fact preclude summary judgment in favor of any of the parties on plaintiff's Labor Law § 240(1) claim, I write separately in order to address foreseeability as an element in all Labor Law § 240(1) cases, an issue whose discussion, at least in my view, is long overdue.

In cases pursuant to Labor Law § 240(1), whether an accident falls within the ambit of the statute depends on whether the task being performed at the time of an accident exposes a worker to a gravity-related risk against which an owner or contractor must guard. Consequently, an accident falls within the ambit of Labor Law § 240(1) only if it is reasonably foreseeable that in performing the task giving rise to the accident, a worker will be exposed to a gravity-related hazard so that he/she should be provided, at the outset, with safety devices adequate to prevent the accident.

On March 20, 2008, plaintiff, an electrician employed by nonparty Forest Electric Corp. (Forest), was injured while working within premises owned by defendant 1095 Avenue of the Americas, LLC (1095). 1095 leased a portion of its building to

defendant Dechert, LLP (Dechert), which thereafter hired defendant Magen Construction Company, Inc. (Magen) to build out the leased space for its intended use. The build-out involved a gut and remodel of Dechert's space, and Forest was hired by Magen to overhaul the electrical system. Plaintiff's work, termed "telephone riser, conduit work," involved running galvanized steel conduit up through the building's floors. Once in place, the conduit housed telecommunication wires that emanated from the building's sub-cellar. The conduit traveled up through the building, through designated data shaftways or closets and through core cuts on each floor. As it rose through the building in separate pieces, the conduit on each floor met and abutted the conduit from the preceding and subsequent floors. Separate pieces of conduit were held together by compression couplings. The compression couplings held the conduits together by the force created by an inner ring when the couplings were tightened. On each floor, the conduit rose from the ground several feet, where it then met a "pencil box" and was attached thereto by a compression connector. The pencil box contained no conduit, thereby allowing access to the wires that would ultimately travel within the conduit. The pencil box was affixed and screwed to a vertical metal support called a Kindorf. The Kindorf resembled a

giant bracket and was affixed to the concrete walls within the closet. Another piece of conduit, approximately 10 feet in length and approximately 60-80 pounds, then emanated from the top of the pencil box, was affixed thereto by another compression connector, and rose through the ceiling, through core cuts, where it then joined the conduit on the subsequent floor.

On the date of his accident, plaintiff was tasked with repositioning an already installed pencil box within a telecommunications closet on the 11th floor. Plaintiff intended to move the pencil box, which was already affixed to a conduit running from the floor below to the floor above. He unscrewed the pencil box from the Kindorf and then used a saw to make cuts in the conduit, which enabled him to unscrew and remove the pencil box. Plaintiff removed the pencil box and proceeded to drill the new holes necessary for the pencil box's relocation. As he drilled, the conduit above where the pencil box had been was still affixed to the compression coupling above. Suddenly, the conduit fell, coming loose from its compression coupling, falling on top of plaintiff's hand, and causing him injury. Before the accident, plaintiff had requested screw couplings for purposes of performing the telephone riser, conduit work, averring that such a coupling was "safer when dealing with any

kind of heavy loads." Screw couplings were never provided.

Plaintiff commenced this action, alleging a cause of action for common-law negligence and causes of action pursuant to Labor Law §§ 200, 240(1), and 241(6). Defendants 1095 and Magen moved for summary judgment arguing, inter alia, that plaintiff's accident did not trigger the protections of Labor Law § 240(1) because it did not involve a gravity related-risk or hazard. Plaintiff opposed and cross-moved for partial summary judgment as against 1095, Magan and Dechert on his claim pursuant to Labor Law § 240(1). The motion court granted defendants' motion to the extent of dismissing all but plaintiff's cause of action pursuant to Labor Law § 240(1). As to that cause of action, the court granted plaintiff's cross motion, deciding the issue of liability in his favor.

Defendants appeal, seeking reversal of the motion court's order to the extent it granted plaintiff's motion for partial summary judgment and denied their motion to dismiss plaintiff's cause of action pursuant to Labor Law § 240(1). Dechert, not having moved for summary judgment before the motion court, nevertheless seeks dismissal of plaintiff's claims as against it for the same reasons proffered by the other defendants. For the reasons that follow hereinafter, I, like the majority, would

modify the motion court's decision to deny partial summary judgment in plaintiff's favor.

Labor Law § 240(1) applies where the work being performed subjects those involved to risks related to elevation differentials (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Specifically, the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level" (*Gordon* at 561 [internal quotation marks omitted]). Since Labor Law § 240(1) is intended to prevent accidents where ladders, scaffolds, or other safety devices provided to a worker prove inadequate to prevent an injury related to the forces of gravity (*id.*), it applies equally to injuries caused by falling objects and falling workers (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]). However, not every fall either of a worker from a scaffold or ladder or of an object constitutes a violation of Labor Law § 240(1) (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003]; *Narducci* at 267). Thus, a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240(1)

and those caused by the general hazards of a workplace *(id.* at 268-269); the former constitutes a violation of Labor Law § 240(1), while the latter does not (*Thompson v St. Charles Condominiums*, 303 AD2d 152, 153 [2003], *lv dismissed* 100 NY2d 556 [2003]).

Since not every injury caused by the effects of gravity falls within the ambit of Labor Law § 240(1) (*Narducci* at 267), it is clear that liability turns on the nature of the activity being performed, and more specifically, on whether the activity requires the use of the safety devices enumerated in the statute. Whether an activity requires the use of the safety devices enumerated within Labor Law § 240(1) turns on whether "the risk of some injury from defendants' conduct [i.e., the failure to provide the requisite safety devices, is] foreseeable" (*Gordon* at 562). More specifically, an accident falls within the purview of Labor Law § 240(1) when, given the nature of the injury-producing task, a worker is exposed to a gravity-related hazard, meaning, a risk of a fall from an elevation or the risk of injury as a result of a falling object, so that the worker should be provided with adequate safety devices to prevent the gravity-related

accident. Absent a foreseeability requirement,[1] then, we leave owners and contractors with no reasonable way to determine when the statute applies and therefore when they are required to provide the safety devices enumerated therein. After all, an accident cannot trigger the extraordinary protections of Labor Law § 240(1) merely because it is gravity-related (*Narducci* at 267). Otherwise, virtually every accident would fall within the purview of Labor Law § 240(1), and defendants would never be able to forecast when safety devices are required. For example, while a trip and fall, at ground level, over a defect or negligently placed object is, in large measure, caused by gravity, the Court of Appeals has held that such an accident does not give rise to liability under Labor Law § 240(1) (*Melber v 6333 Main St.*, 91 NY2d 759, 763 [1998] [Labor Law § 240(1) not implicated when plaintiff trips and falls over conduit protruding through unfinished floor]).

Appreciable risk of a particular harm, or, more particularly, foreseeability, as an element of any Labor Law § 240(1) claim is of course not novel. It has in fact been

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[1] I concede that the statute (Labor Law § 240[1]) does not impose a foreseeability requirement. However, as will be discussed in detail, such an element logically is, and has always been, an element in many cases analyzing Labor Law § 240(1).

expressly or implicitly discussed in the relevant case law for decades. However, despite the use of the term in *Gordon*, our line of cases making this an essential element in cases involving the collapse of a permanent structure (*see Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493 [2010]; *Jones v 414 Equities LLC*, 57 AD3d 65 [2008]; *Espinosa v Azure Holdings II, LP*, 58 AD3d 287 [2008]), and our holding in *Buckley v Columbia Grammar & Preparatory* (44 AD3d 263 [2007]; *lv denied* 10 NY3d 710 [2008]), where we held that foreseeability was in fact an essential element of any Labor Law § 240(1) claim, foreseeability, in the context of Labor Law § 240(1) jurisprudence, is a term we seldom see expressly mentioned in the relevant case law. Moreover, whether foreseeability is an element in any Labor Law § 240(1) analysis remains a point of contention in our very own department (*see Ortega v City of New York*, 95 AD3d 125, 126 [2012] ["We hold that a plaintiff is not required to demonstrate that the injury was foreseeable, except in the context of a collapse of a permanent structure"]; *Vasquez* at 497 [Acosta, J., dissenting] ["the statute imposes no requirement that a particular accident be foreseeable"]). Nevertheless, even when not specifically mentioned, in a great number of cases, in particular those cases that premise liability under Labor Law § 240(1) on the existence

of a gravity-related risk or hazard, foreseeability has been dispositive and has been necessarily implied.

Recently, in *Runner v New York Stock Exch., Inc*. (13 NY3d 599 [2009]), the Court of Appeals reiterated that while the applicability of Labor Law § 240(1) hinges on "whether the harm flows directly from the application of the force of gravity to the object" (*id*. at 604), it also dispositively hinges on "whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a *risk arising from a physically significant elevation differential*" (*id*. at 603 [emphasis added]). Since a foreseeable risk is "[t]he risk reasonably to be perceived . . . [or] it is risk to another or to others within the range of apprehension" (*Palsgraf v Long Is. R.R. Co*. 248 NY 339, 344 [1928]), it is clear, that the *risk* referenced by the Court of Appeals in *Runner* is a direct reference to the element of foreseeability. Indeed, if a particular hazard is not foreseeable, then it cannot be reasonably guarded against. *Runner*, of course, is only a recent example of the Court of Appeals implicit reference to foreseeability as an element in cases involving Labor Law § 240(1).

In *Rocovich*, the Court, in addressing what kinds of tasks

fell within the purview of the statute, held that given the types of devices called for by Labor Law § 240(1), it applied when "elevation poses a *risk*" (78 NY2d at 514 [emphasis added]). Furthermore, in rejecting the plaintiff's contention that the mere happening of his accident, where he stepped into a 12-inch-deep trough, in close proximity to where he was required to work, triggered the protections of the statute, the Court held that such assertion was at odds with the thrust of the statute, which is "the protection against *risks* due in some way to relative differences in elevation" (*id*. at 515 [emphasis added]). In *Melber*, the Court of Appeals, again implying that foreseeability was crucial, dismissed the plaintiff's cause of action pursuant to Labor Law § 240(1), citing its own precedent, stating that liability under the statute was confined "to [the] failure to protect against *elevation-related risks* (91 NY2d at 763 [emphasis added]). In *Narducci*, the Court of Appeals once again found that Labor Law § 240(1) was inapplicable to the plaintiff's accident for want of foreseeability, albeit without ever expressly using the term. In *Narducci*, one of the plaintiffs was injured by a piece of glass that fell from a window frame while he worked on an adjacent window (96 NY2d at 266). The plaintiff had not been assigned to work at the window from which the glass fell, nor was

there evidence that anyone had worked at that particular window before the plaintiff's accident (*id*. at 268). Noting that not every injury caused by a falling object falls under the penumbra of Labor Law § 240(1), the Court granted the defendants' motion for summary judgment, holding that "[t]his was not a situation where a hoisting or securing device of the kind enumerated in the statute *would have been necessary or even expected*" (*id*. [emphasis added]). Thus, it is clear that in *Narducci*, the Court granted the defendants' motion for summary judgment because it was not reasonably foreseeable that the plaintiff's assigned task would expose him to the particular gravity-related hazard that caused his accident. Accordingly, the Court held that the defendants could not have *expected* the plaintiff's accident so as to require that he be provided with any safety devices as mandated by the statute.

In *Outar v City of New York* (5 NY3d 731 [2005]), the Court of Appeals again implied that foreseeability was dispositive in determining the applicability of Labor Law § 240(1) to an accident that seemed far beyond the statute's purview. In *Outar*, the plaintiff was injured by a dolly that fell inside his work area from 5.5 feet above. While the dolly had essentially been parked and was being neither secured nor hoisted (*see* 286 AD2d

671, 672 [2001]), the Court nevertheless held that the accident fell within the ambit of the statute since "the dolly was an object that required securing for the purposes of the undertaking" (5 NY3d at 731). The Court's ruling in *Outar* necessarily implied that foreseeability was decisive to the statute's applicability since the defendant could not have been required to secure the dolly had it not been reasonably foreseeable that the work the plaintiff was performing, the "undertaking," exposed him to the gravity-related hazard posed by the dolly, namely that it would fall and strike him.

Following Court of Appeals precedent, in *Buckley,* we expressly held that the dispositive issue with respect to the statute's applicability is "the foreseeable risks of harm presented by the nature of the work being performed" (44 AD3d 268 at 268). Thereafter, in *Jones*, *Espinosa*, and most recently in *Vasquez*, we continued to hold that foreseeability is an essential prerequisite to liability under Labor Law § 240(1) (*Jones*, 57 AD3d at 79-80; *Espinoza*, 58 AD3d at 291; *Vasquez*, 79 AD3d at 495). Although these last three cases involved the collapse of permanent structures, and our holdings were limited to those facts, I see no reason to limit foreseeability, as a requirement, to only those kinds of cases. After all, as evinced by the

foregoing discussion, in holding that foreseeability is an essential element I simply articulate what has in fact been the law for over two decades.

Based on the foregoing, it is beyond cavil that in cases pursuant to Labor Law § 240(1) and, more particularly, as is the case here, cases involving injury by virtue of a falling object, the dispositive issue for purposes of the statute's applicability is not, as argued by defendants, whether an object falls from a permanent structure or whether at the time of injury the object was being hoisted or secured. Instead, the pertinent and indeed dispositive inquiry is whether it was reasonably foreseeable at the outset that the task assigned to a worker exposed him/her to a gravity-related hazard, so that he/she should have been provided with one or more of the safety devices required by the statute.

Defendants' contention that plaintiff's accident does not come within the ambit of Labor Law § 240(1)'s protection is unavailing.[2] A review of the record evinces that the task

[2] It is certainly true, as argued by defendants, that our case law in this area has been less than consistent. For example, in *Doucoure v Atlantic Dev. Group, LLC* (18 AD3d 337, 338-339 [2005]), we held that "for section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell,

assigned to plaintiff, namely the repositioning of the pencil box, presented a foreseeable gravity-related risk, such that his task and indeed his resulting accident fall squarely within the ambit of Labor Law § 240(1). Specifically, it was reasonably foreseeable that when plaintiff moved the pencil box, the conduit on top of the pencil box, since it was suspended from above, could fall and strike plaintiff. Presented with a foreseeable risk, defendants thus had a duty to provide him with an adequate safety device to prevent the conduit from falling and striking him.

Here, however, the conduit that ultimately fell was in fact secured and held in place by a compression coupling that had attached the falling conduit to the conduit on the floor above.

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while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute [emphasis deleted]." In *Dias v Stahl* (256 AD2d 235, 236 [1998]), we held that plaintiff's accident, where he was hit by a falling section of air conditioning duct, did not come under the purview of Labor Law § 240(1) because the duct was "an integral part of the [building's] structure." While the holdings in those cases are seemingly inconsistent, in that they premise liability on issues unrelated to foreseeability, a review of those cases evince a complete lack of foreseeable risk of the particular harm befalling the plaintiffs therein. In both of those cases, plaintiffs were not exposed to a gravity related-hazard at the outset, such that the accident and more particularly, the gravity-related hazards that caused them injury, were not foreseeable. Therefore, the defendants therein were not required to provide any safety devices.

The conduit was also held in place by a compression connector attaching the conduit to the pencil box. The pencil box, in turn, was held in place by its attachment to the Kindorf, a brace-like piece of metal attached to the walls. Thus, defendants did in fact provide plaintiff with a host of safety devices that served to secure the conduit and prevent its fall. I therefore turn to whether the compression coupling failed to properly secure the conduit so that plaintiff is entitled to have liability resolved in his favor, or, as argued by defendants, that this accident is solely the result of plaintiff's misuse of the compression coupling, so that dismissal of his claim is warranted.

Liability under Labor Law § 240(1) is established when it is proven both that the statute has been violated and that the violation proximately caused the plaintiff's accident (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003], *supra*). When safety devices were required and the defendant failed to provide them, the statute was violated as a matter of law (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 523 [1985]). When, however, a defendant provides safety devices and an accident nevertheless occurs, the adequacy, functionality, and placement of said devices must be assessed in order to

determine whether there has been a violation of the Labor Law (*Felker v Corning Inc.*, 90 NY2d 219, 224, 225 [1997]; *Buckley*, 44 AD3d at 268-269). A defendant who proves both that it did not violate the Labor Law and that the sole proximate cause of the plaintiff's accident was instead his/her own negligence will not be liable under Labor Law § 240(1) (*Blake*, 1 NY3d at 290). Further, a plaintiff who chooses not to use or misuses adequate and available safety devices is, as a matter of law, the sole proximate cause of his accident (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010] ["Liability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site . . . and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident"]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

Defendants argue that the safety device - the compression coupling - failed because plaintiff misused it, and that this misuse was the sole proximate cause of his accident. Specifically, defendants aver that the compression coupling adequately supported the weight of the upper conduit when it was used in conjunction with the Kindorf that secured the pencil box

and to which the conduit was affixed. Thus, defendants argue that plaintiff's decision to remove the pencil box, part of the conduit's support, thereby leaving the conduit to hang solely from the compression coupling, overstressed the coupling, causing it to fail. Conversely, plaintiff argues that since the conduit fell, the compression coupling was thus inadequate to protect him from the gravity-related hazard posed by the conduit and that, accordingly, defendants violated Labor Law § 240(1).

Having provided a safety device, defendants are only liable if the compression coupling failed because it was inadequate to secure the conduit, thereby causing this accident. While the compression coupling failed, the record supports defendants' contention that such failure was attributable to plaintiff's misuse of the coupling, namely, the method by which plaintiff performed his work. Therefore, there exists a sharp question of fact with respect to whether the compression coupling holding the conduit in place failed because it was inadequate or because plaintiff misused the coupling by removing supports designed to be used in conjunction therewith; the former constituting a violation of Labor Law § 240(1), the latter precluding any liability thereunder. Thus, in granting partial summary judgment in plaintiff's favor, the motion court erred.

While not addressed by the majority, upon a search of the record, I find, for the very same reasons asserted by the motion court, that Dechert, while not having moved for summary judgment below, is nevertheless entitled to summary judgment dismissing plaintiff's causes of action for common law negligence and pursuant to Labor Law §§ 200 and 241(6) (CPLR 3212[b]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110 [1984]; *Whitehead v Reithoffer Shows*, 304 AD2d 754, 753 [2003]; *Grimaldi v Pagan*, 135 AD2d 496, 697 [1987]).

Accordingly, I would not only modify the motion court's order to deny plaintiff summary judgment, but would also grant Dechert summary judgment on plaintiff's claims of common law negligence and pursuant to Labor Law §§ 200 and 241(6).

TOM, J.P. (dissenting)

Plaintiff's employer, nonparty Forest Electric, was retained to overhaul the wiring in the building known as 1095 Avenue of the Americas in Manhattan. After the company completed the installation of a four-inch wide "riser" (a vertical run of conduit) in the 11th-floor telecommunications closet, it received a change order to relocate the riser because a rectangular pull box, or "pencil box," was obstructing conduit being installed parallel to it by another company. As plaintiff explained, a pull box is installed in a riser to allow wiring to be pulled through the pipe from above or below. The work required plaintiff to remove the pull box, which was secured to a steel strut channel (Kindorf support) affixed to the floor and, at the top of the strut channel by means of a perpendicular extension, to the wall located a few feet away. The section of conduit below the pull box was secured at floor level with a clamp. The conduit above the pull box was held in place with a strap attached to the top of the Kindorf support and was joined at its top to another section of vertical conduit by a compression coupling, a ring-shaped device that tightens around the ends of the adjoining sections of conduit to hold the pipes in alignment and help secure them in place.

In the process of relocating the pull box, plaintiff had to drill new holes in the concrete floor directly underneath the new location to affix the lower bracket of the strut channel to the floor. Before drilling the holes, plaintiff cut through the conduit above the pull box with a Sawzall (a reciprocating demolition saw) and removed the box from the lower conduit and the Kindorf support. At this point, the upper section of conduit was secured only by the compression coupling holding it to the conduit above it. As plaintiff knelt on the floor drilling the holes for the support bracket, the upper section of conduit fell onto his right hand, breaking his thumb.

Plaintiff alleges that defendants violated Labor Law § 240(1) by permitting the conduit to be improperly and inadequately secured, allowing it to fall and injure him. "Where a plaintiff's actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law § 240(1) [does] not attach" (*Robinson v East Med. Ctr., L.P.*, 6 NY3d 550, 554 [2006] [internal quotation marks omitted]; *Montgomery v Federal Express Corp.*, 4 NY3d 805 [2005]). Here, plaintiff's injuries were the direct consequence of his action in disengaging and removing the devices that secured the conduit pipe in place, to wit, the metal strap or clamp that secured the pipe to the Kindorf support and

the pencil box upon which the conduit pipe was also attached. It is undisputed that the conduit was firmly secured in place with these devices before the work began. Plaintiff's injuries were not caused by a lack of protective equipment but, rather, by plaintiff's act of removing the supporting devices before drilling, which caused the section of conduit above the box (now attached to the overhead conduit pipe with only a compression coupling) to fall. Plaintiff offered no rational explanation for disengaging the two securing devices before starting to drill the hole in the floor, rather than leaving the devices in place until he completed the drilling or removing the overhanging piece of conduit pipe before drilling. To permit this action to go forward would require a departure from the well settled rule that the protection of Labor Law § 240(1) is unavailable where no breach of the statutory duty to provide a worker with a protective device of the kind listed in the statute has been demonstrated (*see Robinson v East Med. Ctr., L.P.*, 6 NY3d at 554).

Here, there was no violation of Labor Law § 240(1), nor does the majority identify any safety device that defendants failed to provide plaintiff for performing the work. The majority merely states, "Plaintiff claims that he requested and should have been

provided with a set screw coupling to secure the conduit pipe to the ceiling and that defendants' failure to provide this protective device was a proximate cause of his accident." It is not clear that the majority adopts plaintiff's position. In any event, the coupling is not a statutory safety device. Rather, it is a component part of an already built conduit system, whose purpose is to connect two sections of conduit pipes in alignment, using either a ring or a screw to apply pressure to the adjoining pipes.

Plaintiff's theory of recovery under Labor Law § 240(1) is flawed. Labor Law § 240(1) provides for safety devices to protect workers against gravity-related hazards while performing construction work, and has no application to the type of component part that plaintiff claims his employer should have used to assemble an already built conduit system. In fact, the type of coupling used to build the system is irrelevant since it was the metal strap and pencil box that held and secured the conduit pipe in place, not the coupling.

Further, there is no testimony, expert or otherwise, that such couplings are meant to suspend a substantial weight, and the manner in which the box and conduit assembly was installed – utilizing steel brackets, pipe straps, securing screws and floor

clamps to build a rigid, self-supporting unit – amply demonstrates that the designer did not rely on pipe couplings for vertical support.

The majority misreads plaintiff's deposition testimony in stating that "when directed to move the pool [*sic*] box, he requested a set screw coupling to secure the pipe." Plaintiff merely testified that compression couplings had been exclusively used by Forest Electric in performing the electrical work.

> "Q. At any time after your accident, did you ever learn as to why compression screw coupling was used as opposed to set screw coupling?
>
> "A. No. It's basic. They are both basic couplings.
>
> "Q. Did you ever learn why one was used as opposed to the other?
>
> "A. No."

Moreover, the majority's presumption that if only a set screw coupling had been made available to plaintiff his injury would have been prevented reveals its misunderstanding of the makeup of conduit pipe system and the operation in which he was engaged. Even if plaintiff had specifically requested a set screw coupling to use in his assigned task of moving the pull box, which he did not, he would have been required to first remove the existing

compression coupling since at the time of the accident, that was the only thing holding the section of conduit that fell on him to the pipe above it, as reflected in plaintiff's testimony.

> "Q. Is it possible at the time of the accident that the bottom of the conduit was still supported by the compression coupling? Is it possible at the time of the accident that the bottom of the conduit was still being locked in and was being supported by the compression connector?
>
> "A. The top piece of conduit was being supported by the top compression coupling.
>
> . . .
>
> "Q. So the conduit was supported by the compression coupling at the time only?
>
> "A. Yes."

As indicated above, the removal of the existing compression coupling in order to be replaced by a set screw coupling would have meant removing or releasing the section of conduit pipe that fell. Had plaintiff done so, there would have been no need to secure the pipe with a new set screw coupling; the conduit's removal would have eliminated the hazard it presented.

In marked similarity to *Narducci v Manhasset Bay Assoc.* (96 NY2d 259 [2001]), plaintiff's injury was the consequence of his own actions. There, the worker's act of sawing a window frame in

the course of dismantling it caused a pane of glass from an adjacent window frame to fall and injure his arm. Here, plaintiff's removal of the devices securing the conduit in place and drilling a hole in the concrete floor caused the conduit to fall and injure his hand. Plaintiff's injury was not caused by the absence of a safety device of the kind enumerated in Labor Law § 240(1). Succinctly stated, "That is not the type of risk that Labor Law § 240(1) was intended to address" (*Narducci*, 96 NY2d at 268).

Unlike *Quattrocchi v F.J. Sciame Constr. Corp.* (11 NY3d 757 [2008], citing *Outar v City of New York*, 5 NY3d 731 [2005]), on which plaintiff relies, there is no allegation in this case that the falling object was unsecured before the work commenced (*id.* at 672 [falling dolly]; *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 5 [2011] [falling pipes not secured when work commenced]). Rather, the conduit became unsecured as the direct consequence of plaintiff's own actions, which were the sole proximate cause of his injuries.

In contrast to the plaintiff in *Narducci*, who had no choice but to work beneath the window glass that fell on him, plaintiff herein could have taken basic precautions to prevent injury. To recapitulate, when plaintiff began work, the section of conduit

that ultimately fell was supported by a clamp positioned about two feet above the pencil box and affixed to a supporting steel strut channel structure attached to the wall. The conduit was further supported by the box itself, on which the pipe rested and which was likewise affixed to the Kindorf support. Thus, plaintiff had the option of leaving in place both the clamp and the box while he drilled a hole in the floor beneath. In the alternative, having removed both the clamp and box, the logical and prudent course would have been to loosen the single compression coupling suspending the remaining section of the top conduit and remove that length of pipe, thereby eliminating any possibility that the hanging conduit would fall and injure him. Once again, the section of conduit pipe in issue was properly secured in place by supporting devices when the work began.

Accordingly, the order should be reversed, to the extent

appealed from, and plaintiff's Labor Law § 240(1) claim dismissed.

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

ENTERED: SEPTEMBER 18, 2012

CLERK

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

7086 Executive Risk Indemnity, Inc., Index 601693/07
Plaintiff-Appellant,

-against-

Starwood Hotels & Resorts Worldwide, Inc., et al.,
Defendants-Respondents.

Kaufman Borgeest & Ryan LLP, New York (Joan M. Gilbride of counsel), and Hogan Lovells US LLP, Washington, DC (Christopher T. Handman of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellant.

Bickel & Brewer, New York (William A. Brewer III of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 1, 2011, which, insofar as appealed from as limited by the briefs denied a motion by plaintiff, Executive Risk Indemnity, Inc. (Executive Risk), for summary judgment and granted a cross motion by defendants Starwood Hotels & Resorts Worldwide, Inc. and Sheraton Operating Corporation (jointly "Starwood") for partial summary judgment, unanimously reversed, on the law, with costs, Executive Risk's motion granted, Starwood's cross motion denied, and it is declared that Executive Risk has no duty to defend or indemnify Starwood in the underlying action that was brought against it by nonparty

Castillo Grand, LLC (Castillo).

This appeal involves disputed claims for coverage under two successive professional liability policies issued by Executive Risk to Starwood. The period of the initial policy (the 05-06 policy) ran from April 10, 2005 to June 10, 2006. The period of the subsequent policy (the 06-07 policy) ran from June 10, 2006 to June 10, 2007. Each policy was a "claims made" or "claims made and reported" policy under which coverage was available only with respect to claims first made and reported in writing during the applicable policy period or extended reporting period, if any.

In 2001, Starwood and Castillo entered into a contract for the construction and management of a luxury hotel. The contract required Starwood to, among other things, provide Castillo with a design guide, and review and approve plans for the hotel and for the selection of its interior designer. On October 25, 2005, Castillo wrote Starwood, complaining that Starwood had caused delays and cost overruns by failing to meet its responsibilities in implementing the hotel's design. Castillo demanded $18,294,500 in damages, stating that it was prepared to resort to arbitration, mediation or litigation if its differences with Starwood could not be resolved.

On July 21, 2006, Castillo brought the underlying action against Starwood in federal court. Like the October 25, 2005 letter, Castillo's complaint set forth allegations of Starwood's failure to discharge its duty to implement the hotel's design. By letter dated August 16, 2006, Starwood gave Executive Risk notice of the Castillo litigation and requested a defense invoking the 05-06 policy "or any other applicable policies." Claiming that the notice was untimely, Executive Risk denied coverage with respect to the 05-06 policy citing one policy provision that required the reporting of claims during the policy period and another that required the insured to report claims as soon as practicable. Executive Risk also denied coverage with respect to the 06-07 policy on the ground that Castillo's October 2005 letter and the July 2006 litigation were to be treated as a single claim made at the time of the October 2005 letter, eight months before the 06-07 policy period commenced. Executive Risk made the same assertions in the instant amended complaint for declaratory judgment. The motion court denied Executive Risk's motion for summary judgment and granted Starwood's cross motion to the relevant extent of finding that Castillo's October 2005 letter did not constitute a claim within the meaning of the 05-06 policy and that Castillo's July 2006 litigation was a claim that

was made and reported during the 06-07 policy period. The court therefore declared that Executive Risk was obligated to defend and indemnify Starwood under the 06-07 policy in connection with "the various litigations commenced by Castillo." We reverse.

It is undisputed that Castillo's October 25, 2005 letter and its July 16, 2006 federal court complaint involved the same allegations of Starwood's defaults in designing the hotel. As noted above, coverage under a "claims made" policy applies to claims made and reported during a given policy period. Executive Risk therefore argues that Castillo's October 2005 letter and its July 2006 lawsuit represented a single claim that was made but not reported during the 05-06 policy period. This argument is refuted by the 05-06 policy itself.

The 05-06 policy defines a "claim" as "any civil action, suit, proceeding or demand by any person or entity seeking to hold the Insured responsible for monetary damages as a result of a Wrongful Act actually or allegedly committed by the Insured or by any other person for whose Wrongful Acts the Insured is legally responsible." A "wrongful act" is, in turn, defined as "any actual or alleged act, error or omission committed solely in the performance of, or failure to perform Professional Services." Under the 05-06 policy, "'Professional Services' means only

services performed for others for a fee and which are listed in ITEM 6 of the Declarations." The only professional services listed in Item 6 were "[f]ranchiser, hotel and property manager, mortgage banker, mortgage broker, travel agent, title agent, real estate agent and real estate broker as well as incidental and related computer and print publishing services."

A court interpreting an insurance policy must give its words their plain and ordinary meaning (*Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]). Therefore, based on the policy's language elaborating on what was meant by the term "Professional Services," we reject Executive Risk's argument that the professional services set forth under Item 6 encompassed the design work Castillo complained about in its October 2005 letter. Because Starwood's design work was not a professional service under the 05-06 policy declarations, Castillo's October 2005 letter did not set forth a wrongful act. No claim was therefore made under the 05-06 policy.

Similar to the 05-06 policy, the 06-07 policy defined a claim as a written demand or civil proceeding against an insured for a "Wrongful Act." The two policies differed to the extent that the 06-07 policy defined a "wrongful act" as an act, error or omission committed or allegedly committed or attempted "solely

in the performance of or failure to perform Insured Services." Unlike the definition of "professional services" under the 05-06 policy, the definition of "insured services" under the 06-07 policy included "interior and exterior design and decorating consulting services." Such services were the subject of Castillo's federal court complaint. Accordingly, we find that the Castillo litigation constituted a claim that was made and reported to Executive Risk during the 06-07 policy period. For reasons that follow, the motion court should have nevertheless found the claim fell within an exclusion of the 06-07 policy.

The 06-07 policy had a "prior pending" exclusion by which no coverage under the policy was available "based upon, arising from, or in consequence of any written demand, suit, or other proceeding pending, or order, decree or judgment entered for or against any insured on or prior to [the June 10, 2006 inception date], or the same or substantially similar fact, circumstance or situation underlying or alleged therein." The motion court concluded that the prior pending exclusion did not apply to Castillo's October 2005 demand letter. Here, Starwood argued that Castillo's demand could not have been "pending" within the meaning of the exclusion because a demand is not generally understood to be something that is undecided or awaiting decision

in the same sense as a judicial proceeding. Starwood's interpretation of the exclusion is erroneous for two reasons. First, it renders meaningless the exclusion's use of the word "demand." It is settled that "[a]n insurance contract should not be read so that some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.,* 83 NY2d 618, 628 [1994]). Moreover, the adjective "pending" can, in fact, describe a demand insofar as it means, among other things, "in question," "open to discussion," "under consideration" and "still in debate" (Burton's Legal Thesaurus 448 [4th ed 2006]). Without doubt, these synonyms all describe the status of Castillo's demand when the 06-07 policy commenced on June 10, 2006. Accordingly, the prior pending exclusion of the 06-07 policy precluded coverage for the Castillo litigation.

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

ENTERED: SEPTEMBER 18, 2012

CLERK

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

7800 Steve Dwyer, Index 115086/06
Plaintiff-Appellant-Respondent, 590503/07
590895/07

-against-

Central Park Studios, Inc., et al.,
Defendants-Respondents,

Michael Slosberg, et al.,
Defendants-Respondents-Appellants.

- - - - -

Central Park Studios, Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

DSA Builders,
Third-Party Defendant-Respondent-Appellant,

American Home Assurance Company,
Intervenor-Respondent-Appellant.

- - - - -

Michael Slosberg, et al.,
Second Third-Party Plaintiffs-
Respondents-Appellants,

-against-

DSA Builders,
Second Third-Party Defendant-
Respondent-Appellant.

_____

Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for appellant-respondent.

Mischel & Horn, PC, New York (Scott T. Horn of counsel), for Slosberg respondents-appellants.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Mark J. Volpi of counsel), for DSA Builders, respondent-appellant.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for American Home Assurance Company, respondent-appellant.

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

Order, Supreme Court, New York County (Judith J. Gische, J.), entered December 8, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiff Steve Dwyer's cross motion for partial summary judgment on the issue of liability on his Labor Law §§ 240(1) and 241(6) claims, denied defendants/second third-party plaintiffs Michael Slosberg and Janet Cohn Slosberg's cross motion for summary judgment dismissing the cross claim for contractual indemnification brought by Central Park Studios and granted Central Park Studios's motion for summary judgment on that claim, denied third-party defendant/second third-party defendant DSA Builders's cross motion for summary judgment dismissing Central Park Studios's contractual indemnification claim, and denied intervenor American Home Assurance Company's motion for summary judgment dismissing the contribution and common-law indemnification claims asserted against DSA Builders, unanimously modified, on the law, to grant plaintiff's cross motion for partial summary judgment on the issue of liability on the Labor

Law § 240(1) claim, and, upon a search of the record, to grant that part of Central Park Studios's motion for summary judgment dismissing the Labor Law § 241(6) claim predicated on a violation of 12 NYCRR 23-1.21(b)(4)(i), and otherwise affirmed, without costs.

Plaintiff Steve Dwyer was employed by third-party defendant DSA Builders (DSA), a general contractor. Defendants Michael Slosberg and Janet Cohn Slosberg retained DSA to renovate and combine their two adjoining cooperative apartment units. Defendant/third-party plaintiff Central Park Studios, Inc. (CPS) owns the apartment building. Intervenor American Home Assurance Company (AHAC) is DSA's workers' compensation and liability insurer.

On the day of the accident, plaintiff was standing on a ladder, unassisted, attempting to install a large piece of Sheetrock in the ceiling of the Slosberg's apartment. Plaintiff was holding the Sheetrock, which was several feet wide, against the ceiling with his left hand. As he reached with his right hand for the screw gun strapped to his side, the ladder collapsed, plaintiff fell backwards onto the floor, and the Sheetrock slab fell on top of him. As a result, plaintiff sustained injuries to his right hand, wrist and arm. During

discovery, DSA produced a ladder in excellent condition that was purportedly used by plaintiff on the day of the accident. However, the ladder's manufacturer, in an affidavit, stated that, based on markings on the ladder, it was manufactured several years after plaintiff's accident.

Plaintiff commenced this action against the Slosbergs and CPS, alleging common-law negligence and violation of Labor Law §§ 200, 240(1), and 241(6). CPS asserted a cross claim for contractual indemnification against the Slosbergs, and commenced a third-party action against DSA, seeking contribution and common-law and contractual indemnification. The Slosbergs similarly commenced a second third-party action against DSA, seeking common-law and contractual indemnification. AHAC intervened in the first third-party action.

The court should have granted plaintiff's cross motion for partial summary judgment on the issue of liability under Labor Law § 240(1) because plaintiff's injuries were proximately caused, at least in part, by the failure to provide proper protection as required by the statute (*see Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 548 [2010]; *Fontaine v Juniper Assoc.*, 67 AD3d 608, 609 [2009]). The undisputed evidence established that plaintiff was injured when he fell from an

unsecured ladder that collapsed, which is sufficient to make out a prima facie case on the § 240(1) claim (*see Demaj v Pelham Realty, LLC*, 82 AD3d 531, 532 [2011]). In opposition, CPS and DSA failed to raise an issue of fact. Whether or not the ladder was in good condition, as CPS and DSA claim it was, plaintiff still is entitled to summary judgment on this claim because he was not required to show that the ladder was defective in some manner (*see Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [2002]).

The testimony of DSA's principal that, after the accident, plaintiff stated that he lost his balance raises, at most, an issue of comparative negligence, which would not bar recovery under § 240(1) (*see id*. at 291). Furthermore, this alleged statement is consistent with plaintiff's claim that he fell when the ladder collapsed. There is no view of the evidence that plaintiff was the sole proximate cause of his injuries. Even if other ladders were available at the job site, there was no showing that plaintiff was expected, or instructed, to use those ladders and for no good reason chose not to do so (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]; *Torres v Our Townhouse, LLC*, 91 AD3d 549 [2012]). Nor is there any evidence that plaintiff was told not to use the ladder he used.

In view of the conflicting evidence about the condition of the ladder, the court properly denied plaintiff's motion for summary judgment as to that part of the Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.21(b)(4)(ii) (requiring all ladder footings to be firm). Although not addressed by the motion court, we find that issues of fact also exist as to whether there was a violation of 12 NYCRR 23-1.21(b)(3) (requiring ladders to be maintained in good condition). However, that part of the § 241(6) claim based on 12 NYCRR 23-1.21(b)(4)(i) should be dismissed, because the ladder here was not "used as a regular means of access between floors or other levels" in the building (*id.*).

CPS is entitled to summary judgment on its cross claim for contractual indemnification against the Slosbergs. CPS and the Slosbergs entered into an Alteration Agreement for the renovation project in which the Slosbergs agreed to indemnify CPS against "claims for damage to persons or property suffered as a result of the alterations." Since there is no question that plaintiff's injuries arose out of the alterations, CPS is entitled to be indemnified. There is no merit to the Slosberg's argument that General Obligations Law § 5-321 renders the indemnification provision unenforceable. Although the indemnification clause

purports to indemnify CPS for its own negligence, it is nevertheless enforceable because there is no view of the evidence that CPS was actually negligent. The motion court dismissed the Labor Law § 200 and common-law negligence claims against CPS, and no party has appealed from that part of the court's decision. Thus, because CPS's liability is purely vicarious under Labor Law § 240(1), and potentially § 241(6), enforcement of the indemnification provision does not run afoul of General Obligations Law § 5-321 (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 n 5 [1997]; *Correa v 100 W. 32nd St. Realty Corp.*, 290 AD2d 306, 306 [2002]).

The motion court properly denied DSA's cross motion for summary judgment dismissing CPS's contractual indemnification claim. In view of the fact that DSA signed the Alteration Agreement, and evidence showing that it procured insurance coverage naming CPS as an additional insured in order to commence the alteration work, DSA failed to establish, as a matter of law, that it did not agree to indemnify CPS under the agreement. Thus, DSA is not entitled to summary judgment at this point.

The motion court was correct in denying AHAC's motion for summary judgment dismissing the contribution and common-law indemnification claims asserted against DSA. AHAC's motion was

premature, given that plaintiff was still scheduled to undergo three additional surgeries, an additional deposition of the plaintiff was still pending following the three surgeries, and plaintiff has not yet been examined by any physicians at the request of the defendants (*see* CPLR 3212[f]).

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

ENTERED: SEPTEMBER 18, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdul-Salaam, JJ.

7740-
7741-
7741A Paula N. Frye, etc.,
Plaintiff-Appellant,

-against-

Montefiore Medical Center, et al.,
Defendants-Respondents.

Index 49939/02

Meagher & Meagher, P.C., White Plains (Christopher B. Meagher of counsel), for appellant.

Heidell Pittoni Murphy & Bach LLP, New York (Daniel S. Ratner of counsel), for Montefiore Medical Center and Barbara Girz, D.O., respondents.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for Paige Long, M.D., respondent.

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for New York Medical Group, P.C. and Leslie Harris, M.D., respondents.

Leahey & Johnson, P.C., New York (Joanne Filiberti of counsel), for Norbert Berger, M.D., respondent.

Rende Ryan & Downes LLP, White Plains (Roland T. Koke of counsel), for Cathy Jarosz, M.D., respondent.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for Reynol Suarez, M.D., respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered June 10, 2011, and orders, same court and Justice,

entered on or about June 10, 2011, and on or about September 14, 2011, affirmed, without costs.

Opinion by Freedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Dianne T. Renwick
Helen E. Freedman
Sheila Abdus-Salaam, JJ.

7740-7741
Index 49939/02

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Paula N. Frye, etc.,
Plaintiff-Appellant,

-against-

Montefiore Medical Center, et al.,
Defendants-Respondents.

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Plaintiff appeals from the order of the Supreme Court, Bronx County (Stanley Green, J.), entered June 10, 2011, which granted defendants' motion pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]) to preclude plaintiff from offering evidence that a neural tube defect develops gradually over the first 10 to 12 weeks of gestation, that infant-plaintiff's encephalocele is a cause of his neurological damage, and that rupture/trauma of an encephalocele during a vaginal delivery caused or exacerbated the infant plaintiff's neurological damage, and thereupon dismissed the case; from the order same court and Justice, entered on or about June 10, 2011, which granted defendants' motion to strike plaintiff's supplemental bill of particulars; and from the order, same court and Justice, entered on or about September 14, 2011, which, inter alia, denied plaintiff's motion to renew defendants' *Frye* motion.

Meagher & Meagher, P.C., White Plains (Christopher B. Meagher of counsel), for appellant.

Heidell Pittoni Murphy & Bach LLP, New York (Daniel S. Ratner of counsel), for Montefiore Medical Center, and Barbara Girz, D.O., respondents.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina and Andrea M. Alonso of counsel), for Paige Long, M.D., respondent.

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for New York Medical Group, P.C. and Leslie Harris, M.D., respondents.

Leahey & Johnson, P.C., New York (Joanne Filiberti, Peter James Johnson, Peter James Johnson, Jr. and James P. Tenney of counsel), for Norbert Berger, M.D., respondent.

Rende Ryan & Downes LLP, White Plains (Roland T. Koke of counsel), for Cathy Jarosz, M.D., respondent.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for Reynol Suarez, M.D., respondent.

FREEDMAN, J.

In this obstetrical medical malpractice action, we are called upon to decide, inter alia, whether the denial of defendants' summary judgment motion(s) (70 AD3d 15 [1st Dept. 2009]) prevents our considering defendants' motion in limine to preclude plaintiff's expert, Dr. Chone Ken Chen, from offering evidence specifically related to the cause of the infant plaintiff's neurological impairments. We find that it does not because the summary judgment motion focused on different issues from those in the evidentiary motion before us now and because the posture of the case differed when each motion was presented. We further find that motion court properly granted the motion to preclude, finding that Dr. Chen's theories were not generally accepted in either the obstetrical or neurological community (*see Frye v United States*, 293 F 1013 [DC Cir 1923]), and accordingly, properly dismissed the case as plaintiff would not be able to make out a prima facie case. We also find that defendants' motion to strike plaintiff's supplemental bill of particulars advancing a new theory of causation was properly granted, and that plaintiff's motion for leave to renew and reargue was properly denied.

Plaintiff's son, Sherkell RichardLee Frye-Samuels, now 12 years old, was born with an 2.5-centimeter occipital

encephalocele, which is a skin-covered, sac-like protrusion of brain tissue and related membranes through an opening in the back of the skull. An encephalocele originates from the failure of a neural tube to close, as it should, during the early days of fetal development.

Plaintiff claims that the moving defendants, who provided her obstetrical care, deviated from good and accepted medical practice by failing to properly treat her diabetes with insulin following her discharge from their facility in December 1999, by failing to diagnose the encephalocele during her pregnancy, and by not performing a cesarean section, and that all those departures contributed to the infant's neurological damage.

By their motion in limine, defendants now seek to preclude testimony by plaintiff's expert, Dr. Chen, that a neural tube defect develops gradually over the first 10 to 12 weeks of gestation (by which time plaintiff was under defendants' care), that the encephalocele rather than or in addition to the neural tube defect is a cause of his neurological damage, and that trauma to or rupture of an encephalocele during a vaginal delivery can or did cause additional neurological damage.

Defendants argue that the neural tube failure was the sole cause of the infant's impairment and that the failure occurred before plaintiff came under their care. Accordingly, defendants

contend, the alleged departures could not have been a proximate cause of the infant's injuries.

Although the motion court offered both parties an opportunity to present witnesses in a *Frye* evidentiary hearing, defendants opted to rely on their papers, and plaintiff rejected the opportunity either for a hearing or to submit further papers on the ground that the there was no basis to consider the reliability of her expert before trial. However, plaintiff did submit unredacted versions of previously submitted opposition affidavits, and further responsive papers but waived her right to submit further papers or to a hearing (*see Matter of York v Zullich,* 89 AD3d 1447 [4th Dept. 2011]).

Although we previously affirmed the denial of defendants' summary judgment motions (70 AD3d 15 [1st Dept. 2009]), at which time some of the same issues were raised, defendants now seek a specifically focused evidentiary ruling and furnish evidence that challenges the entire basis of Dr. Chen's causation theories. The very experts whose work Dr. Chen cited in support of his causation theories have submitted affidavits that directly controvert those theories and explain how Dr. Chen has misinterpreted their works. While the summary judgment motions concerned both liability and damages, further examination of the underlying basis of plaintiff's expert's theories as to the cause

of the infant's impairments demonstrates that they are neither reliable nor generally accepted in the medical community (*see Frye v United States*, 293 F 1013 [DC Cir 1923]; *People v Wesley*, 83 NY2d 417 [1994]). Moreover to the extent that some aspects of plaintiff's theories may be generally accepted in other contexts, they do not apply to the facts of this case (*see Parker v Mobil Oil Corp.*, 7 NY3d 434 [2006]).

We set forth the history of plaintiff's treatment in detail in our prior decision affirming the denial of the summary judgment motions (70 AD3d at 16-20). To briefly recapitulate, plaintiff originally sued the New York Medical Group (NYMG), Montefiore Medical Center/Weiler Hospital of Albert Einstein College of Medicine (WHAECOM), and various physicians associated with her medical and obstetrical care at NYMG and WHAECOM from December 4, 1999 until Sherkell's birth on June 28, 2000. In late October 1999, before plaintiff knew she was pregnant, NYMG internist Franlina Umali, M.D., diagnosed her with diabetes. Dr. Umali prescribed Glucophage, an oral medication designed to lower blood sugar. On December 3, 1999, plaintiff went to Bronx Lebanon Hospital, where she was found to be about seven weeks, five days pregnant. Plaintiff came under the care of NYMG obstetrician Dr. Jung Ki Park who ordered her admission to WHAECOM. Plaintiff was taken off Glucophage and two units of

insulin were administered. Dr. Paige Long, the attending obstetrician at WHAECOM who examined plaintiff, and Dr. Cathy Jaroz, the WHAECOM obstetrician who discharged her before glucose test results showing elevated blood sugar levels were available, did not prescribe additional insulin.

On March 2, 2000, Dr. Park, who continued caring for plaintiff at NYMG, ordered a sonogram which he claims should have been a level 2 sonogram. Dr. Norbert Berger, a NYMG radiologist, performed a level 1 sonogram on March 16, 2000 and reported his findings as "unremarkable." Dr. Leslie Harris, a NYMG obstetrician who later monitored plaintiff's diabetes and referred her to WHAECOM's program for pregnant diabetics, ordered another sonogram, which NYMG perinatologist Barbara Girz, D.O., performed on June 20. Although Dr. Harris ordered a level 2 sonogram, Dr. Girz also performed a level 1 sonogram and reported no fetal abnormalities, but recommended another sonogram on June 27th. Dr. Girz testified that a level 2 sonogram would more likely show fetal abnormalities at 20 weeks, but if performed later, the fetus's weight and size could impair the ability to detect abnormalities.

At approximately 37 weeks, on June 28, 2000, Dr. Reynol Suarez performed a vaginal delivery. Dr. James Goodrich, a pediatric surgeon, surgically removed the 2.5 occipital

encephalocele and repaired the skull two days later.

Plaintiff, through Dr. Chen, a board-certified pediatric neurologist, claims the following departures occurred. First, defendants did not properly manage plaintiff's diabetes during the first trimester of her pregnancy by not continuing her on insulin; second, the radiology defendants did not identify the encephalocele to enable in utero treatment; and third, the delivery should have been performed by cesarean section in order to avoid what Dr. Chen contends was compression or rupture of the encephalocele. While Dr. Chen acknowledges that the failure of the neural tube to close is or results from a brain malformation or defect that occurs some time between the 28th and 33rd day of gestation, he opines that since the encephalocele continues to develop and grow gradually throughout the first 10 to 12 weeks of gestation its further growth and development was caused or exacerbated by the failure to treat plaintiff's diabetes properly, and is responsible for the extent of the infant's impairment. Dr. Chen further claims that the vaginal delivery caused the encephalocele to rupture, which in turn caused brain fluid to leak or unnecessary pressure to be put on the mass, resulting in additional neural damage.

Defendants agree that the child of a diabetic mother has an increased risk of a neural tube failure and consequently of

developing an encephalocele. However, defendants claim that plaintiff cannot establish under any generally accepted medical or scientific standard that either the growth of or the failure to identify or diagnose the encephalocele during the pregnancy caused any injury to the infant plaintiff. They claim that all of the infant's injuries and deficits were caused by the neural tube failure, which occurred at the latest on the 33rd day of gestation and before plaintiff came under their care. They assert as follows: first, plaintiff did not come under defendants' care related to her pregnancy until December 3, 1999, approximately 40 days into her pregnancy; second, the encephalocele's continued growth did not affect the outcome for the infant; and third, a vaginal delivery is not contraindicated by the presence of an encephalocele. Moreover, they contend that the encephalocele did not rupture and was not compressed during the delivery and, in any event, the alleged compression or rupture was of no moment because the growth contained no functional brain tissue. Defendants contend that, in claiming that Dr. Suarez should have performed a cesarean section, Dr. Chen confuses an encphalocele with a myelomeningocele, a different congenital disorder affecting the spine. In the latter case, a cesarean section is advised.

Doctors Umali and Park, the NYMG physicians who first cared

for plaintiff, have settled with plaintiff for $4,000,000, and NYMG has also settled for an undisclosed amount. The remaining defendants, WHAECOM and Doctors Girz, Jarosz, Berger, and Suarez, contend that their actions played no role in the encephalocele's development or growth, that the neural tube failure alone caused the infant's injury, that the encephalocele that resulted from the neural tube failure was not the cause of any injury, and that there were no departures in obstetrical care during the delivery. In sum, they claim that nothing they did affected plaintiff's well-being.

Dr. Chen opines that, after the neural tube failure, an encephalocele continues to develop over the first 10 to 12 weeks of gestation and that the growth of the encephalocele, in addition to the neural tube defect which caused it to develop, was a substantial factor in causing the infant's neurological injuries. In other words, he posits a "two-hit" causation theory: first the neural tube failure occurs and then the encephalocele develops, both of which contribute to neurological damage. As part of that two-hit hypothesis, Dr. Chen opines that the "trauma to the [i]nfant-[p]laintiff's encephalocele sustained during his vaginal birth was a competent producing cause of [some of] his subsequent injuries." Dr. Chen believes that the brain was exposed to various fluids (including amniotic fluid and

cerebrospinal fluid) as a result of an unclosed neural tube, which increased the infant's injuries. He further theorizes that intrauterine repair or removal of an encephalocele can reduce the exposure of a fetus to amniotic fluid. Dr. Chen refers to and appends abstracts of studies by pediatric neurosurgeons Noel Tulipan, M.D., and George Jallo, M.D., obstetrician Joseph Bruner, as well as those of pediatric neural-radiologist Ian Turnbull, M.D., to support these theories. In support of his general theory of progressive neurological deterioration caused by hydrocephalus or leaky fluid, Dr. Chen invokes works by pediatric neurosurgeon Richard G. Ellenbogen, M.D. Finally, Dr. Chen invokes a work by obstetrician D.A. Luthy to support his claim that infants with encephaloceles do better if delivered by cesarean section than if delivered vaginally. Dr. Chen bases his conclusion that the encephalocele was ruptured or compressed during birth on an observation of fluid leakage found in the neonatal chart. He also notes that the pathology report of the removed encephalocele showed the presence of still living neural tissue. He thus concludes that the vaginal delivery caused further damage.

In reply, the moving defendants submit affidavits by the authors of the articles and texts that Dr. Chen cites that pertain to causation. Dr. Tulipan, pediatric neurosurgeon at the

Children's Hospital at Vanderbilt Medical Center, states that "Dr. Chen cites to my article *Fetal Surgery for Myelomeningocele and the Incidence of Shunt-Dependent Hydrocephalus* for the proposition that secondary neurological damage occurs as a result of an encephalocele being exposed to amniotic fluid . . . This is a patently false assertion . . . not supported by my article, or any other medical literature . . ." He further states:

> "My article pertained to in-utero surgical repair of a myelomeningocele, and is entirely irrelevant in the context of an encephalocele . . . With [a myelomeningocele], the spinal cord is contained in the surface of the protruding sac, thus resulting in exposure of the spinal cord to amniotic fluid, as well as to direct trauma from contact with the uterine wall and birth canal. This is entirely different than an encephalocele, which consists of non-functioning brain tissue, meninges and cerebrospinal fluid contained in a covered sac . . . The purpose of my article was to address the hypothesis whether intrauterine repair of a myelomeningocele can improve an infant's outcome by decreasing spinal cord exposure to amniotic fluid . . . [T]he '[two]-hit' hypothesis is irrelevant to an encephalocele because, unlike a myelomeningocele, an encephalocele is not exposed to amniotic fluid."

Dr. Richard G. Ellenbogen, board certified in pediatric neurological surgery, Chair of Neurosurgery at the University of Washington School of Medicine, and Chief of Neurological Surgery at Seattle Children's Hospital, also rejects Dr. Chen's causation theories. He states that the development of the encephalocele, which occurs after the neural tube fails to close at 26 to 28 days of gestation, is irrelevant to an infant's neurological

outcome inasmuch as the encephalocele contains non-functioning brain tissue. Dr. Ellenbogen asserts that his discussion of the two-hit hypothesis in the cited article, *Neural Tube Defects in the Neonatal Period*, applies to anencephaly and myelomeningoceles but not to encephaloceles, which are covered by skin and not exposed to amniotic fluid. To the contrary, a myelomeningocele is an open defect located outside the spinal cord, and it can be exposed to amniotic fluid. Additionally, Dr. Ellenbogen states that an encephalocele is a manifestation of a preexisting malformed brain and that the malformation and not the encephalocele causes neurological dysfunction.

Similarly, Dr. George Jallo, Clinical Director of Pediatric Neurosurgery and Director of the Neurosurgical Residency Program at Johns Hopkins Hospital, and Professor of Neurological Surgery, Pediatrics and Oncology at Johns Hopkins School of Medicine, submits an affidavit in support of the motion in limine. He states that "Dr. Chen incorrectly cites my article *Neural Tube Defects* in the context of promulgating several false theories which are not medically or scientifically accepted or supported. My article in fact lends no support for any of Dr. Chen's false theories." He adds that neural tube defects occur no later than the first 26 to 33 days of gestation, and that the development of the encephalocele during pregnancy is irrelevant because it is

non-functioning brain tissue. According to Dr. Jallo, the "damage to the fetus is pre-determined by the 26 to 33 day period, and there is no further treatment, pre or post delivery that can alter the infant's neurological outcome." The claim that secondary neurological damage occurs after 33 days is a "patently false assertion." Dr. Jallo agrees with defendants' other experts that unlike a myelomeningocele, an encephalocele is not exposed to amniotic fluid because the protruding tissue is covered by skin.

Doctor Deborah Levine is the Director of Obstetric and Gynecological Ultrasound, and Co-Chief of Ultrasound at the Beth Israel Deaconess Medical Center, a teaching hospital of Harvard Medical Center. Dr. David A. Luthy is the Director of Perinatal Medicine and Medical Director of Obstetrics and Gynecology at the Swedish Hill Medical Center in Seattle, as well as Clinical Professor at the University of Washington School of Medicine. These doctors furnish affidavits attesting to the falsity of Dr. Chen's claims that delivery by cesarean section of infants with encephaloceles has been shown to result in better motor function than in those infants born vaginally or that the presence of an encephalocele mandates a cesarean section. Their articles advocating cesarean sections relate to myelomeningoceles and refer to decreased neural function in children with

myelomeningoceles, not those with encephaloceles.

Defendants submit a number of other expert affidavits, including those of Dr. Jeffrey Wisoff, pediatric neurologist at New York University, Dr. Mary Loeken, physiology/reproductive endocrinologist at the Harvard University Medical School, Dr. Adiel Fleischer, obstetrician at Long Island Jewish Medical Center, Dr. Ian Holzman, perinatologist at Mount Sinai Hospital, and Dr. Carol Benson, Director of Ultrasound and High Risk Obstetrical Ultrasound at Boston's Brigham and Women's Hospital. All of these experts opine that no aspect of the care given to plaintiff during her pregnancy caused or in any way exacerbated the infant's neurological condition.

With respect to the claim that the vaginal delivery caused neurological injury, Dr. James Goodrich, the board-certified neurological surgeon who removed the infant's encephalocele, affirmed that the growth consisted of non-functioning brain tissue with no neuron involvement and the mode of delivery had no impact on it. Moreover, Dr. Goodrich notes that the pathology report did not disclose the presence of spinal fluid, which was the basis for Dr. Chen's contention that a rupture had occurred. Dr. Goodrich stated that the encephalocele was not large enough to have been compressed during the vaginal delivery, but added that "even assuming there is pressure or trauma to the

encephalocele, it would not adversely impact the infant's neurological abilities."

Plaintiff's experts, in addition to Dr. Chen, include an expert in diabetes, an obstetrician, a roentgenologist, and a neonatologist. These physicians opine as to defendants' alleged departures, but they do not set forth any basis for finding that these departures caused injury. In other words, even assuming all of those departures occurred, the very articles cited by Dr. Chen as well as the other medical evidence submitted by defendants demonstrate that the neural tube failure occurred before plaintiff came under their care, and it was the sole cause of the infant plaintiff's neurological deficits. Whether or not the alleged departures caused the continued growth of the encephalocele, there is no credible evidence demonstrating that the growth of the encephalocele in any way caused or exacerbated the brain damage.

Thus, we conclude, the denial of defendants' motions for summary judgment does not preclude consideration of the motion in limine. We note that in a summary judgment motion the defendant has the initial burden of proof that no issues of fact exist (*Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]). In a motion such as the one before us now, which seeks an evidentiary ruling concerning the reliability of specific proposed expert testimony,

the party offering expert testimony bears the burden of demonstrating its reliability where a credible challenge to the underpinning of the expert theory has been raised (*Saulpaugh v Krafte,* 5 AD3d 934 [3d Dept 2004], *lv denied* 3 NY3d 610 [2004]; *Lara v New York City Health & Hosps. Corp.,* 305 AD2d 106 [1st Dept. 2003]). Here, plaintiff successfully opposed the summary judgment motions by submitting an expert affidavit stating that defendants' medical treatment departed from good and accepted practice and by citing various treatises that allegedly supported his theories as to departures and tangentially to causation. Whether plaintiff's theories that the alleged departures could cause injury had any generally accepted scientific basis was not squarely before the motion court, and it was not in a position to evaluate the reliability of those theories.

Based on the above, the preclusion of plaintiff's expert testimony was a proper exercise of the motion court's discretion. Supreme Court correctly determined that none of plaintiff's theories of causation is generally accepted in the relevant medical or scientific community, correctly precluded plaintiff's experts from offering evidence concerning any injury occurring after the first 28 to 33 days of gestation, and properly dismissed the complaint.

In addition, the motion court properly granted defendants'

motion to strike plaintiff's supplemental bill of particulars and plaintiff's motion for leave to renew and reargue. Ten years after the events and seven or eight years into the litigation, plaintiff submitted a supplemental bill of particulars, which asserted a new theory, namely, that the infant, whose Apgar scores were 9/9, sustained a hypoxic event during delivery, which caused some of his impairment. The trial court properly denied leave to supplement the bill of particulars because it asserted a new theory of liability seven years after the action was commenced and after a summary judgment motion had been litigated focusing on the theories plaintiff had set forth in her original pleading and bills of particulars (*see Wolfer v 184 Fifth Ave. LLC*, 27 AD3d 280 [1st Dept. 2006]; *Licht v Trans Care N.Y.*, 3 AD3d 325 [1st Dept. 2004]). Contrary to plaintiff's contention, the supplement was not mere "amplification," but referred to injuries that were not mentioned in the previous bills of particulars or in any affidavit served on defendants before 2010, and defendants had therefore not addressed these injuries (*see Markarian v Hundert*, 262 AD2d 369 [2nd Dept. 1999]). Plaintiff's assertion that her medical expert only alerted her to the new theory of liability in 2008 does not excuse the untimely amendment (*id.*).

Finally, leave to renew and reargue was properly denied.

The additional affidavits that plaintiff submitted in connection with the motion fail to demonstrate that there is any scientific basis for plaintiff's theory of causation.

Accordingly, the order of the Supreme Court, Bronx County (Stanley Green, J.), entered June 10, 2011, which granted defendants' motion pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]) to preclude plaintiff from offering evidence that a neural tube defect develops gradually over the first 10 to 12 weeks of gestation, that infant-plaintiff's encephalocele is a cause of his neurological damage, and that rupture/trauma of an encephalocele during a vaginal delivery caused or exacerbated the infant plaintiff's neurological damage, and thereupon dismissed the case, should be affirmed, without costs. The order of the same court and Justice, entered on or about June 10, 2011, which granted defendants' motion to strike plaintiff's supplemental bill of particulars, should be affirmed, without costs. The order of the same court and Justice, entered on or about

September 14, 2011, which, inter alia, denied plaintiff's motion to renew defendants' *Frye* motion, should be affirmed, without costs.

All concur.

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

ENTERED: SEPTEMBER 18, 2012

CLERK

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

8005 Banco Espírito Santo, S.A., et al., Plaintiffs-Respondents, Index 652013/11

-against-

Concessionária Do Rodoanel Oeste S.A., Defendant-Appellant.

Quinn Emanuel Urquhart & Sullivan, New York (Philippe Z. Selendy of counsel), for appellant.

Pillsbury Winthrop Shaw Pittman LLP, New York (David M. Lindley of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about March 9, 2012, reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
David Friedman
Karla Moskowitz
Dianne T. Renwick, JJ.

8005
Index 652013/11

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Banco Espírito Santo, S.A., et al.,
Plaintiffs-Respondents,

-against-

Concessionária Do Rodoanel Oeste S.A.,
Defendant-Appellant.

_____x

Defendant appeals from the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about March 9, 2012, which denied its motion for summary judgment dismissing the complaint.

Quinn Emanuel Urquhart & Sullivan, New York (Philippe Z. Selendy of counsel), for appellant.

Pillsbury Winthrop Shaw Pittman LLP, New York (David M. Lindley and Jay D. Dealy of counsel), for respondents.

RENWICK, J.

Plaintiffs, multinational financial institutions and "hedge providers," commenced this breach of contract action when defendant decided to pay off $895 million in loans before their maturity, concomitantly triggering its right to prematurely terminate the interest rate swaps it had entered into with plaintiffs. An interest rate swap is a liquid financial derivative instrument in which two parties agree to exchange interest rate cash flows, based on a specified notional amount from a fixed rate to a floating rate or vice versa. The central dispute in this appeal is whether the interest rate swap agreements required defendant to pay plaintiffs an early termination fee, referred to in the interest swap agreements as a "Close Out Amount," for terminating the swaps prior to their maturity. Plaintiffs argue that the different punctuation of the term "Close Out Amount" in the swap agreements ("Close-out Amount" versus "Close Out Amount") creates an ambiguity as to the meaning of the term. We hold that the different punctuation of the term does not alter the manifest intention of the parties as gathered from the language employed in the agreement, which unambiguously provides that neither party owes any "Close Out Amount" upon voluntary prepayment of the loans.

Defendant Concessionaria Do Rodoanel Oeste S.A. (Rodoanel),

part of a large private infrastructure company, was upgrading and operating a toll road in Sao Paolo, Brazil. In 2009, Rodoanel entered into $895 million in loans and derivative interest-rate swaps to finance the project. Rodoanel was the "borrower" and non party banks Inter-American Development Bank and Japan Bank for International Cooperation were the "Senior Lenders." Plaintiffs Banco Espirito Santo, S.A., Caiza Banco de Investimento, S.A. and Credit Agricole Corporate Investment Bank (plaintiffs), the "hedge providers," entered into separate interest rate swaps agreements with Rodoanel.

The $895 million senior loans at issue here were governed by certain agreements between Rodoanel and the senior lenders, primarily the Common Terms Agreement (Senior Lender CTA) which is governed by New York law. The senior loans imposed a floating rate of interest. To protect the senior lenders and Rodoanel from the risk of the latter defaulting on loan payments caused by sudden spikes in interest rates, however, the Senior Lender CTA required Rodoanel to enter into derivative interest rate swap transactions.[1] On December 3, 2009, Rodoanel entered into three

[1] In addition, foreign currency swaps (which are not in dispute here) were required to protect against the diminished value of the Brazilian currency. This was because Rodoanel generated revenues from the toll roads in Brazilian Reais, while the senior loans were US dollar loans bearing interest at a variable rate.

such substantively identical transactions with plaintiff, which are all large and sophisticated multinational financial institutions and "hedge providers."[2] The practical effect of these derivative swap transactions was to convert Rodoanel's payment obligations under its loan with the senior lenders from a floating rate to a fixed rate.

These interest rate swap transactions were each governed by a 2002 Master Agreement published by the International Swaps and Derivatives Association (ISDA)[3], with one agreement between Rodoanel and each plaintiff bank. These forms are called ISDA Master Agreements, which are used in many thousands of interest rate swap transactions each year (*see Thrifty Oil Co. v Bank of America Nat. Trust & Sav. Assn*. 322 F3d 1039, 1042-1043 [9th Cir 2003]). Each ISDA Master Agreement is executed together with a schedule (ISDA Schedule,) which serves the purpose of customizing the parties' contractual arrangement by reflecting any deviations from the standard language of the Master Agreement, as well as

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[2] Banco Espirito Santo, S.A. and Caiza Banco de Investimento, S.A. are headquartered in Portugal, and Credit Agricole Corporate Investment Bank is headquartered in France.

[3] ISDA is a global trade association representing participants in the private-negotiated derivatives industry. ISDA was chartered in 1985, and currently has over 600 member institutions from 46 countries on six continents (*see* www.isda.org).

any specific terms that have been negotiated by the parties (*id.* at 1043).[4]

The ISDA Master Agreements at issue here are governed by New York law and provide for disputes to be resolved by New York courts. Each ISDA Master Agreement executed by Rodoanel and each plaintiff bank states in its introduction that "this 2002 Master Agreement . . . includes the schedule (ISDA Schedule) and the documents and other confirming evidence . . . exchanged between the parties or otherwise effective for the purpose of confirming or evidencing th[eir] Transactions."

It appears that after the swap agreements were executed, the pertinent floating interest rate dropped precipitously, making the interest rate swap agreements very favorable to plaintiffs. Accordingly, on February 11, 2011, Rodoanel gave notice of its intention to prepay the senior loans, and on May 16, 2011 prepaid them. Section 2 of the Senior Lender CTA sets forth Rodoanel's rights and obligations with respect to prepayment of the senior loans. In particular, Section 2.8 gives Rodoanel the right to prepay the senior loans, and provides that, in such case, "[n]o

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[4] *See* Bernadette Muscat, *OTC Derivatives: Salient Practices and Developments Relating To Standard Market Documentation*, Bank of Valletta Review, No. 39, at 37-38 [2009]; Ray I. Shirazi, Fundamentals of Swaps & Other Derivatives 2011, 1911 PLI/Corp 49; John Hull, Options, Futures, and Other Derivative Securities [4th ed 2000]).

prepayment penalties or premiums shall apply to any prepayments." In addition, as noted, prepayment of the senior loans caused the interest rate swaps to terminate automatically before maturity.

Upon this early termination, plaintiffs demanded that Rodoanel pay them the "Close-out Amounts." With regard to early terminated transactions, the ISDA Master Agreement defines "Close-out Amount" as having two components: (a) the cost of replacing the group of terminated transactions (including the costs of liquidating them and of obtaining new funding) and (b) the value of the remaining rights under the terminated transactions (the "market-to-market" or "MTM" amount, i.e., the net present value of expected future cash flows from the swap transaction).[5]

Rodoanel refused to pay any "Close-out Amounts," citing the ISDA Schedule's provision that "[i]f an Additional Termination Event [prepayment] occurs, *no Close Out Amount* shall be payable under this Agreement" (emphasis added). Subsequently, plaintiffs

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[5] These "Close-Out Amounts" are often referred to as market-to-market or "MTM" amounts because the ISDA Master Agreement states that "Close-Out Amounts" are to be determined using "commercially reasonable procedures" including information such as "market data" or "market quotations" from third parties. Thus, in the case of an interest rate swap, this is generally done by determining the value of the projected cash flow expected to be generated by the party under the swap until maturity (*i.e.*, the market-to-market value of the swap).

commenced this breach of contract action for Rodoanel's breach of the CTA and ISDA Agreements in refusing to pay the MTM amount (the second component of the Close-out Amount). In essence, plaintiffs claim that the "Close Out Amount" term in the ISDA Schedule was only meant to include liquidation cost (the first component of the Close-out Amount) and thus Rodoanel was only relieved of the obligation to pay liquidation cost, but still had to pay the MTM.

Rodoanel answered and simultaneously moved for summary judgment dismissing the complaint, essentially relying on the four corners of the contract alone, namely the ISDA Schedule's "Close-out Amount" provision. In response, plaintiffs rely upon the unique punctuation of the term "Close Out Amount" in the ISDA Schedule, which differs from the punctuation of the same term "Close-out Amount" in the ISDA Master Agreement, where there is a hyphen and "out" is not capitalized." The differing punctuation of the same term, plaintiffs argue, creates an ambiguity of the meaning of the term, which can only be resolved by extrinsic evidence. Apparently agreeing with plaintiffs that the different punctuation creates an ambiguity, Supreme Court allowed parol evidence to aid in its interpretation and found that plaintiffs submitted sufficient evidence to raise an issue of fact as to whether the term "*Close Out Amount*" in the ISDA Schedule, differs

from the term "*Close-out Amount*" in the ISDA Master Agreement.[6]

The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent *(see e.g. Slatt v Slatt*, 64 NY2d 966 [1985]), and "[t]he best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous (*see e.g. W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

As indicated, the central dispute in this appeal is the meaning of the term "Close Out Amount." Where the parties dispute the meaning of particular contract terms, the task of the court is to determine whether such terms are ambiguous. The existence of ambiguity is determined by examining the "'entire contract and consider[ing] the relation of the parties and the

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[6] For example, plaintiffs assert that, during negotiations, Rodoanel said it would not pay the component of the Close-out Amount consisting of the costs for liquidating a terminated transaction (as opposed to the MTM component) if the senior loans were prepaid because, during the 2008-2009 troubled market, banks were seeking to pass on their added liquidation costs to borrowers. The parties therefore allegedly understood that the provision in the ISDA Schedules that no "Close Out Amount" would be payable if the swaps were terminated due to prepayment.

circumstances under which it was executed,'" with the wording viewed "'in the light of the obligation as a whole and the intention of the parties as manifested thereby'" (*Kass v Kass*, 91 NY2d 554, 566 [1998], quoting *Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524 [1927]) "read in the context of the entire agreement" (*W.W.W. Assoc.*, 77 NY2d at 163; see *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept. 2008], *affd* 13 NY3d 398 [2009]).

A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning" *(Greenfield v Philles Records*, 98 NY2d 562, 570 [2002]). Parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous (*Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368, 369 [1st Dept. 2007), *affd* 10 NY3d 25 [2008]).

Conversely, "[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings" *(New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177 [1st Dept. 2006] [internal quotation marks omitted]). Whether a contract is ambiguous presents a question of law for resolution by the court (*Kass*, 91 NY2d at 566).

In the instant case, the ordinary and natural meaning of the agreement's words are dispositive. Examination of the entire

interest rate swap agreement supports defendant's position that the term "Close-out Amount" in the ISDA Master Agreement and "Close Out Amount" in the ISDA Schedule have the same definition. The ISDA Master Agreement provides for "early termination events," which, as the term implies, enables a party to terminate the transaction early if a termination event occurs with respect to the other party. Upon an early termination, the ISDA Master Agreement sets out the procedure to calculate the "Close-out Amount." The early termination events subject to the "Close-out Amount" were as follows: 1) illegal act; 2) force majeure; 3) tax event; 4) tax event upon merger; and 5) credit event upon merger. The prepayment of the senior loans was not included as an early termination event.

The ISDA Master Agreement, however, contemplates that additional termination events may be added via the ISDA Schedule. This is because the ISDA Master Agreement includes the term "Additional Termination Event" as an early terminating event and then defines such term as "any Additional Termination Event [that] is specified in the schedule." The particular ISDA Schedules executed by the parties in this case similarly specified prepayment of the senior loan as an early termination event. But, the schedule further provides that if an early termination event, namely prepayment, "occurs, no Close Out

Amount will be payable under this Agreement." Thus, unlike the early termination events listed in the ISDA Master Agreement, which are subject to "Close out Amount" computation, the additional termination events added in the Schedule are explicitly excluded from the "Close-out Amount" computation. This clear and unambiguous language appears to deal a coup de grace to the breach of contract claims advanced by plaintiffs, particularly since any deviation from the ISDA Master Agreement in the ISDA Schedule serves the purpose of customizing the parties's contractual arrangements as negotiated by the parties (*see Finance One Pub. Co. Ltd. v Lehman Bros. Special Fin., Inc.*, 414 F3d 325, 340 [2 Cir 2005], *cert denied* 548 US 904 [2006]).

Nevertheless, plaintiffs argue that the different punctuation of the same term means that the terms have different meanings, i.e., that the "Close Out Amount" term in the ISDA Schedule was only meant to include liquidation cost (the first component of the Close-out Amount of the Master Agreement) and thus Rodoanel was only relieved of the obligation to pay liquidation cost, but still had to pay the MTM. Such construction seems unreasonable and even irrational considering that the purported alternative definition is neither defined in the Schedule nor anywhere else. Ambiguity in a written agreement only exists if there is more than one reasonable interpretation

of the language at issue (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Moreover, the ISDA Schedule explicitly states that a "[t]erm [] used but not defined [therein] shall have the same meaning set out in the [CTA]." Thus, since "Close Out Amount" is not defined in the Schedule," its definition in the Master Agreement controls.

Under the circumstances, it is evident that plaintiffs' strained interpretation of the term "Close Out Amount" is an attempt to rework that term's plain meaning in the ISDA Master Agreement. At the heart of plaintiffs' attempt to narrow the definition of the term "Close Out Amount," within the context of early termination due to prepayment of the senior loan, rests upon the undoubted fact that early termination provisions are, in the commercial sense, relevant to the value of interest rate swap transactions. After all, an interest rate swap is merely a transfer of interest rate exposure and, as such, it has market value exposure.[7]

Indeed, the reason the market-to-market value of the derivative interest rate swaps was in favor of plaintiffs at the

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[7] *See* Robert T. Daigler, *Managing Risk with Financial Futures: Hedging, Pricing, and Arbitrage* 52 [1993]; Bruce Tuckman, Fixed Income Securities 173 [1995] ["The final value of the position . . . depends on the evolution of interest rates over the life of the contract"].

time of termination was because they – not Rodoanel – had been benefitting from the difference between their obligation to make payments based on what turned out to be a lower floating interest rate, and their right to receive payments based on the higher fixed rate. In other words, due to the interest rate swaps, Rodoanel was paying interest at the higher fixed rate, even though floating rates were low.

If plaintiffs, who are commercially sophisticated "hedge providers," had intended that, in the event of an early termination, the party "in the money" was entitled to retain the benefits of this favorable market condition, they could easily have expressed this intent in the language of the interest rate swap agreement. For instance, the agreement could have been written in such a way that defendant's obligations under the swap agreement remained, even if the senior loan was fully satisfied, unless defendant paid the remaining market value for the swap transactions. However, because the interest rate swap agreements were "instrument[s] . . . negotiated between sophisticated, counseled business people negotiating at arm's length," *(see Vermont Teddy Bear Co. V 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]) [internal quotation marks omitted]), it is untenable that the parties would have intentionally left a key meaning of their agreements to such vagaries as placement and punctuation. This

is especially true given the obvious need for "commercial certainty" in these $895 million loan/hedge transactions (*id.*).

Ultimately, this case serves as a reminder that, in a contract containing punctuation marks, the words and not the punctuation guide us in its interpretation (*see* 17A CJS Contracts § 406; 12 AM Jur Contracts § 256). Punctuation is always subordinate to the text and is never allowed to control its meaning (*Sirvint v Fidelity & Deposit Co. of Md.*, 242 App Div 187, 189 [1st Dept. 1934), *affd*, 266 NY 482 [1934]; *see also* 17A Jur 2d Contracts § 366 [2011]; 68A NY Jur Insurance § 869). Of course, punctuation in a contract may serve as a guide to resolve an ambiguity that has not been created by punctuation or the absence therein, but it cannot, by itself, create ambiguity *(Wirth & Hamid Fair Booking, Inc. v Wirth*, 265 NY 214 [1934]; *see also Stoddart v Golden*, 179 Cal 663, 178 P. 797 [1919]; *Randolph v Fireman's Fund Ins. Co.,* 255 Iowa 943, 124 NW2d 528 [1963]). It is a cardinal principle of contract interpretation that mistakes in grammar, spelling or punctuation should not be permitted to alter, contravene or vitiate manifest intention of the parties as gathered from the language employed (*Sirvint*, 242 App Div at 189; *Wirth & Hamid Fair Booking*, 265 NY at 219).

Finally, we reject plaintiffs' argument that the Senior Lender CTA provides them a substantive right to receive a "Close

Out Amount" upon termination of the swaps due to prepayment of the senior loans. Plaintiffs argument that they were intended third-party beneficiaries of the Senior Lender CTA is refuted by the documentary evidence. For instance, Section 8.14 of the CTA agreement states, in a paragraph entitled "No Third Party Beneficiaries," that such agreement "is solely for the benefit of the Borrower and no other Person . . . shall have any rights hereunder against any Senior Lender with respect to the senior loans, the proceeds thereof or otherwise." Courts have relied upon similar language to dispose of claims of third-party beneficiary status (*see e.g. Greece Cent. School Dist. v Tetra Tech Engrs., Architects & Landscape Architects, PC*, 78 AD3d 1701, 1702 [4th Dept. 2010] [contractual provision stated that nothing therein "shall create a contractual relationship with or a cause of action in favor of a third party"]; *First Keystone Consultants, Inc. v DDR Constr. Servs*., 74 AD3d 1135, 1137 [2nd Dept. 2010] [contractual provision stated that the parties to the agreement "do not intend to confer any benefit under this Agreement on anyone other than the parties, and nothing contained in this Agreement will be deemed to confer any such benefit on any other person"]). Likewise, the Senior Lender CTA expressly provides in the section defining "Required Hedge Agreements, § 3.2.12, that plaintiffs banks' rights vis-a-vis Rodoanel and the

interest rate swaps would be governed by separate contracts, further negating any claim of third-party beneficiary status. Thus, even though the practical effect of the swap may have been to provide defendant with the financial equivalent of fixed-rate financing, the terms of the loan agreements make clear that defendant had distinct obligations under the senior loan agreements and under the interest rate swap agreements.

Even construing the loan and swap agreements as parts of a single transaction, nothing in the loan agreement conflicts with the plain language of the ISDA's Schedule that "[i]f an Additional Termination Event [prepayment] occurs, no Close Out Amount shall be payable under this Agreement." For instance, the Senior Lender CTA, as stated in Schedule 9, merely requires that "[t]erms of the Required Hedges shall be a Contrato Global de Derivativos . . . form or an ISDA form (2002)." In other words, Schedule 9, by its own terms, identifies two forms of acceptable derivative contracts, but says nothing about the parties' rights to negotiate the substance of those hedges – let alone whether "Close-out Amounts" would be payable upon termination of the swaps – so long as they otherwise complied with the requirements of the hedging program set forth in the Schedule.

Moreover, Section 2.10.1 of the Senior Lender CTA simply requires, in the event of a voluntary prepayment of the senior

loans, that Rodoanel comply with the terms of its ISDA Master Agreements and Schedules. Specifically, section 2.10.1 provides in relevant part:

> "On the date of any prepayment of the senior loans pursuant to Section 2.8 (Voluntary Prepayment) or Section 2.9 (*Mandatory Prepayment*,) the Borrower shall simultaneously pay . . . the amount required to cause a corresponding reduction in the notional amounts set forth in any Required Hedge Agreement relating to interest rates or foreign exchange rates and any Settlement Amounts incurred in connection therewith."

The term "Settlement Amounts" is defined to mean "the amount payable by [Rodoanel] *pursuant to the terms of any Required Hedge Agreement* in connection with an early termination, in whole or in part thereof. (emphasis added)." The term "Required Hedge Agreement" is defined to include the ISDA Master Agreements. As explained above, those agreements unambiguously provide that neither party owes any "Close Out Amount" upon voluntary prepayment of the senior loans.

In sum, we agree with defendant that it acted within the unambiguous terms of the ISDA Master Agreement and Schedule when it refused plaintiffs' demand of a "Close Out Amount" payment upon the earlier termination of the interest rate swap due to defendant's prepayment of the senior loans. Plaintiffs have therefore failed to state claims for breach of contract under

either the senior loans or interest rate swap transactions.

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about March 9, 2012, which denied defendant's motion for summary judgment dismissing the complaint, should be reversed, on the law, with costs, and the motion granted. 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: SEPTEMBER 18, 2012

CLERK