SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**OCTOBER 31, 2013**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10815 Ira Russack, Index 653031/12
Plaintiff-Appellant,

-against-

Harvey Russack, et al.,
Defendants-Respondents,

Sterling Real Estate Holding
Company, Inc.,
Defendant.

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Certilman Balin Adler & Hyman, LLP, East Meadow (Paul B. Sweeney of counsel), for appellant.

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 15, 2013, which denied plaintiff's motion for recusal, unanimously modified, on the law and in the exercise of discretion, and the matter remanded for further proceedings before a different Justice, and otherwise affirmed, without costs.

We reject plaintiff's contention that the Supreme Court

Justice abused his discretion in refusing to recuse himself (*Matter of Murphy*, 82 NY2d 491, 495 [1993]). While it is our view that the motion for recusal was properly denied, it is also our view, under the unique circumstances presented, that the matter would be better served by remand to a different Justice (*see Platt v Parklex Assoc.*, 234 AD2d 115, 116 [1st Dept 1996]).

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

ENTERED: OCTOBER 31, 2013

CLERK

Tom, J.P., Friedman, Freedman, Feinman, JJ.

10354 Raul Barreto, Index 108233/05
Plaintiff-Appellant, 591045/06
59044/07

Derlim Barreto,
Plaintiff,

-against-

Metropolitan Transportation
Authority, et al.,
Defendants-Respondents.

[And Other Third-Party Actions]

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Gorayeb & Associates, P.C., New York (Mark H. Edwards of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Metropolitan Transportation Authority and New York City Transit Authority, respondents.

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

Jones Morrison, LLP, Scarsdale (Clifford I. Bass of counsel), for IMS Safety Corp., respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered April 5, 2012, which denied plaintiff's cross motion for partial summary judgment on his common-law negligence and Labor Law §§ 200, 240(1) and 241(6) claims against defendant IMS Safety Corp., denied plaintiff's cross motion for partial summary judgment on his § 240(1) claim against defendants Metropolitan

Transportation Authority (MTA), New York City Transit Authority (NYCTA), and the City of New York, granted IMS's motion for summary judgment dismissing the complaint and any cross claims against it, and granted the motions of defendants MTA, NYCTA and the City for summary judgment dismissing the §§ 240(1), 241(6) and 200 claims as against them, affirmed, without costs.

Plaintiff brought this personal injury action after he fell into an uncovered manhole in front of 60 Lafayette Street in Manhattan in January 2005, while performing asbestos removal work below city streets as part of a City environmental project. Plaintiff was employed by third-party defendant P.A.L. Environmental Safety Corp. (PAL), the general contractor at the work site. PAL was hired by NYCTA on behalf of MTA, which leased the area of the street surrounding the manhole from the City, the site owner. By subcontract, PAL retained IMS as a safety consultant at the site. The City, MTA, and NYCTA did not contract with IMS or any other party to ensure site safety, and neither supervised nor provided any equipment for the project. A PAL supervisor directed plaintiff's work.

PAL removed asbestos during night shifts that started at about 8:00 p.m. The standard procedure for the asbestos removal work was as follows: At the beginning of each shift, PAL workers

constructed a wooden enclosure covered with a plastic sheeting around the manhole to protect the surroundings from asbestos contamination. An opening in the enclosure provided access to the manhole. After the PAL workers erected the enclosure, MTA inspectors checked to see that electricity had been turned off in the manhole, and IMS monitored the below-ground air quality before workers descended. Once given permission, at least two PAL workers -- required because of the manhole cover's weight -- removed the cover and placed it outside the enclosure. They then sealed the enclosure opening and descended through the manhole.

At the end of the shift, the PAL workers were directed to remove their equipment from below ground, exit the manhole, replace its cover, and dismantle the containment enclosure surrounding the manhole.

Plaintiff's accident occurred at the end of a shift, after he and two coworkers had finished working below ground and climbed out of the manhole. Instead of covering the manhole as they had been directed, plaintiff and coworkers began dismantling the containment enclosure. Plaintiff then fell into the uncovered manhole. In his deposition testimony, plaintiff acknowledged that his PAL supervisor had told him that same day to cover the manhole before breaking down the enclosure, but that

he neither checked nor asked whether the manhole was open before starting work "because the supervisor is supposed to do that." The only people present at the site when the accident occurred were plaintiff, his two coworkers, and a PAL shop steward.

In June 2005, plaintiff brought this action, asserting claims against defendants for common-law negligence and violation of Labor Law §§ 200, 240(1) and 241(6). Thereafter, plaintiff discontinued his negligence and Labor Law § 200 claims against the City and plaintiff's wife discontinued her derivative claims. After discovery, the City, MTA and NYCTA, and IMS separately moved for summary judgment dismissing the complaint against them and plaintiff cross-moved for partial summary judgment against defendants as to liability for his claims.

The motion court denied plaintiff's motion for partial summary judgment and granted defendants' motions dismissing the complaint finding that plaintiff was the sole proximate cause of the accident because he did not cover the manhole before beginning to dismantle the containment enclosure.

We note at the outset that IMS, the site safety consultant, cannot be liable for the accident under plaintiff's theories because it was a subcontractor with no supervisory authority over

plaintiff or his work (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 148 [1st Dept 2012]).

As to Labor Law § 240(1), which imposes a non-delegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks, liability would attach where a violation of that duty proximately caused injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). Conversely, where a plaintiff's own actions are the sole proximate cause of the accident or injury, no liability attaches under the statute (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). Where a plaintiff has an adequate safety device readily available that would have prevented the accident, and for no good reason chooses not to use it, Labor Law § 240(1) does not apply (*id.* at 40).

Here, plaintiff was provided with the perfect safety device, namely, the manhole cover, which was nearby and readily available. He disregarded his supervisor's explicit instruction given that day to replace the cover before dismantling the enclosure. Plaintiff has not afforded any good reason why he started taking apart the enclosure before ascertaining whether the cover was in place. Having just emerged from it, plaintiff should have known that the manhole was still open, and covering

it at that time would have avoided the accident.

Plaintiff's claim that the statute required defendants to furnish a guardrail around the manhole, or safety netting or a harness, is not applicable here where the manhole cover was the adequate device for protecting the workers. There is no reason that other devices were necessary after the workers exited the manhole or that the manhole cover was inadequate. Moreover, neither a guardrail, netting nor a harness would have prevented the accident as they would have been opened or removed to allow the workers to exit the manhole and to deconstruct the enclosure.

Since none of the remaining named defendants supervised the work, nor were they on notice of any premises defect, there is no basis for liability under Labor Law § 200 or under any theory of common-law negligence (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554-555 [2006]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]); *Serrano v Popovic*, 91 AD3d 626, 627-628 [2d Dept 2012]. The Industrial Code violations cited by plaintiff that would give rise to any claim under Labor Law § 241(6) did not proximately cause the accident.

All concur except Feinman, J. who dissents in part in a memorandum as follows:

FEINMAN, J. (dissenting in part)

I agree with the majority that defendant IMS Safety Corp. was not a statutory agent subject to liability under Labor Law § 240(1) or § 241(6). However, I dissent in part, because I believe the motion court should have granted plaintiff's motion for summary judgment on his Labor Law § 240(1) claim as against the other defendants. Plaintiff's work in close proximity to an open, 10-foot hole posed an elevation-related risk covered by Labor Law § 240(1) as a matter of law (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449-450 [1st Dept 2013]).

The Court of Appeals has clearly stated that § 240(1) "was designed to place the responsibility for a worker's safety squarely upon the owner and contractor rather than on the worker" and that the statute "is to be liberally construed to achieve its objectives" (*Felker v Corning Inc.*, 90 NY2d 219, 224 [1997]). Plaintiff established his entitlement to judgment as a matter of law by showing that defendants failed to provide safety devices adequately protecting him from falling through the hole (*see Burke v Hilton Resorts Corp.*, 85 AD3d 419, 419-420 [1st Dept 2011]). The president of defendant IMS at the time of the accident admitted in his deposition that on projects similar to

this one, a metal guardrail system would typically be placed around a manhole while it was uncovered to provide protection to workers under the applicable OSHA regulations. He further stated that responsibility for providing this guardrail was shared by IMS, the MTA supervisor, and the superintendent from plaintiff's employer, third-party defendant P.A.L. Environmental Safety Corp. I do not find sufficient support in the record for the majority's statement that, had this guardrail been provided, it would have been opened or removed from the manhole before the accident occurred and therefore would not have prevented plaintiff's injuries. At the time of the accident, the cover was not on the manhole, and no guardrail or other adequate safety device was constructed, placed, or operated as to give proper protection to plaintiff.

The majority opinion concludes that plaintiff's failure to ensure that the manhole was covered before he began dismantling the surrounding enclosure of wood and plastic sheeting was the sole proximate cause of his fall through the hole. It is true that "if the plaintiff is *solely* to blame for the injury, it necessarily means that there has been no statutory violation" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003] [emphasis added]). Under the "sole proximate cause"

doctrine, a defendant can avoid liability by showing that the "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). A plaintiff "is expected, as a normal and logical response, to obtain a safety device himself" only when the plaintiff "knows exactly" where it is located, and "there is a practice of obtaining the safety device himself because it is easily done" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10-11 [1st Dept 2011] [internal quotation marks omitted]; *see Cherry v Time Warner, Inc.*, 66 AD3d 233, 238 [1st Dept 2009]). Furthermore, the "general availability of safety equipment at a work site does not relieve the defendants of liability" (*Auriemma* at 11).

Here, the majority is of the opinion that "plaintiff was provided with the perfect safety device, namely, the manhole cover" and holds that plaintiff was the sole proximate cause of his accident because he disregarded his supervisor's instruction to replace the manhole cover before dismantling the enclosure for asbestos containment. In my view, the majority misconstrues the record. Plaintiff could not have physically replaced the manhole

cover by himself, as it was too heavy for one person to move. Plaintiff's supervisor stated only that, at the beginning of the project, he directed plaintiff to not perform work around the manhole area while it was uncovered; there is no indication that he directed plaintiff to personally cover the manhole. The supervisor further stated that ensuring the manhole was covered was the responsibility of the IMS representative, who was sitting in his car a few feet from the area at the time of the accident. Plaintiff had not personally removed the manhole cover at the beginning of the shift. There is evidence that the electrical lights in the work area had been turned off before the deconstruction work began. At the very least, these facts raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his accident.

Furthermore, while the manhole cover would have prevented this particular accident, it was *not* an adequate precaution against the danger of falling from a height, as contemplated by Labor Law § 240(1), throughout the duration of the work shift. The risk of falling through the manhole existed for the entire time the cover was off, not only while the surrounding enclosure was being deconstructed. Had a safety device like the guardrail discussed above been provided, plaintiff would have been

protected from this accident, whether it occurred during the deconstruction or at any earlier point of his shift. As already noted, I do not read the record to support the majority's statement that the railing would have been opened or removed prior to deconstruction of the enclosure. Even if plaintiff's failure to ensure that the manhole was covered was a contributing cause of his accident, defendants' violation of Labor Law § 240(1) in failing to provide a railing or other adequate safety device while the cover was off the manhole was also a proximate cause. Therefore, any negligence on the part of plaintiff was not the sole proximate cause of the accident. His actions merely amount to comparative negligence, and do not provide a defense to his Labor Law § 240(1) claim (*see Stolt v General Foods Corp.*, 81 NY2d 918 [1993]).

Contrary to the City's contention, it is subject to liability under Labor Law § 240(1) as an owner of the premises. The City had a sufficient nexus to plaintiff, since it leased the premises to the Transit Authority, which retained plaintiff's employer to remove asbestos from the premises (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 341-342 [2008]).

Accordingly, I would modify the order to grant plaintiff's motion for partial summary judgment on his § 240(1) claim against defendants MTA, NYCTA, and the City.

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10921 The People of the State of New York, Ind. 3889/10
Respondent,

-against-

Samuel Blunt,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Samuel Blunt, appellant pro se.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 26, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the first and third degrees, and sentencing him to an aggregate term of 13 years, unanimously affirmed.

The court properly denied defendant's request for an instruction on the affirmative defense of entrapment. There was no reasonable view of the evidence, viewed most favorably to defendant, that the police actively induced or encouraged him commit the crime, or that any police conduct, including their use of a confidential informant who was defendant's childhood friend,

created a substantial risk that defendant would commit the crime although not otherwise disposed to do so (*see* Penal Law § 40.05; *People v Brown*, 82 NY2d 869, 871-872 [1993]; *People v Butts*, 72 NY2d 746, 750 [1988]). The record demonstrates that the police merely afforded defendant the opportunity to commit the crime, that he was disposed to commit it, and that he engaged in salesman-like behavior. Defendant's own testimony tended to negate the elements of the entrapment defense.

We have considered and rejected defendant's pro se claims.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10922 Sergio Franco, Index 103991/12
Plaintiff-Respondent,

-against-

172 E Holdings LLC, et al.,
Defendants-Appellants.

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Law Offices of Allison M. Furman, P.C., New York (Allison M. Furman of counsel), for appellants.

Pedowitz & Meister, LLP, New York (Marisa Warren of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered February 1, 2013, which granted plaintiff's motion for a preliminary injunction, and set an undertaking in the nominal amount of $100, unanimously affirmed, without costs.

Plaintiff demonstrated a likelihood of success on the merits, irreparable harm if the relief were not granted, and that

the equities weigh in his favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]). The amount of the required undertaking is appropriate (*see Pouncy v Dudley*, 27 AD3d 633, 635 [2d Dept 2006]).

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10923 In re Victoria H.,
Petitioner-Appellant,

-against-

Tetsuhito A.,
Respondent-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Timothy J. Horgan, New York, for respondent.

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

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Order, Family Court, New York County (Jody Adams, J.), entered on or about November 27, 2012, which, after a hearing, awarded joint legal custody of the child to the parties, with primary physical custody to petitioner mother, and with liberal visitation to respondent father, including overnight visits every other weekend, unanimously affirmed, without costs.

A sound and substantial basis in the record supports the determination that the child's best interests are met by the award of joint legal custody (*see Eschbach v Eschbach*, 56 NY2d 167, 171-172 [1982]). The court considered the appropriate factors, and determined that the parties had conducted themselves with civility toward one another, reached compromises regarding

visitation schedules, and generally set aside personal feelings for the sake of the child (*see Juneau v Juneau*, 206 AD2d 647 [3d Dept 1994]). Moreover, the record does not reflect that there had been any disputes between the parties over any major issue concerning the child, nor that the parties' relationship was marked by such acrimony or mistrust that joint custody would not be a viable option (*compare Lubit v Lubit*, 65 AD3d 954 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010], *cert denied* __ US __, 130 SCt 3362 [2010]).

Furthermore, the record does not support the mother's argument that the court's award of overnight visitation to the father was not in the best interests of the child.

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

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10924 Yuk Ping Cheng Chan, Index 100690/10
Plaintiff-Respondent,

-against-

Young T. Lee & Son Realty Corp.,
Defendant-Respondent-Appellant,

Great NY Noodletown, Inc.,
Defendant-Appellant-Respondent.

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Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant-respondent.

Law Offices of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for respondent-appellant.

Dansker & Aspromonte Associates, New York (Douglas E. Hoffer of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered February 14, 2013, which denied defendants' motions for summary judgment dismissing the complaint and all cross claims, unanimously affirmed, without costs.

Plaintiff alleges that she slipped and fell on a large patch of grease on the public sidewalk abutting the premises owned by Young T. Lee & Son Realty Corp. (Lee Realty) and subleased by Great NY Noodletown, Inc. (Noodletown), which operated a restaurant in the space.

Lee Realty, which has a nondelegable duty to maintain the

sidewalk abutting its premises pursuant to Administrative Code of City of NY § 7-210, failed to meet its prima facie burden to eliminate the issue of constructive notice since it submitted no evidence establishing when the sidewalk was last cleaned or inspected prior to plaintiff's fall (*see Sabalza v Salgado*, 85 AD3d 436, 437-438 [1st Dept 2011]).

Noodletown also failed to establish its entitlement to judgment as a matter of law. The record presents triable issues as to whether Noodletown created the greasy condition on the sidewalk by disposing of waste from its restaurant on the sidewalk. There is evidence that Noodletown placed garbage bags on the sidewalk near the area where plaintiff fell (*see Kesselman v Lever House Rest.*, 29 AD3d 302, 304-305 [1st Dept 2006]; *Healy v ARP Cable*, 299 AD2d 152, 154 [1st Dept 2002]).

Defendants' argument that plaintiff did not sufficiently identify the cause of her fall is unavailing. While she admitted to some uncertainty because she did not see when her foot slipped on the grease patch, plaintiff stated that following her fall, she found herself lying on top of the grease patch, her clothing and shoes had grease on them, and her shoe had left a groove in the patch. Moreover, photographs taken at the scene appear to match plaintiff's description of the sidewalk condition. Such

evidence establishes a sufficient nexus between the hazardous condition and the circumstances of the fall, so as to establish causation (*see Cherry v Daytop Vil., Inc.*, 41 AD3d 130 [1st Dept 2007]).

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

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10925 The Najjar Group, LLC, etc., Index 111004/11
Plaintiff-Appellant,

-against-

West 56th Hotel LLC, doing business as Chambers Hotel, et al.,
Defendants-Respondents.

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Buckley Law Group, P.A., New York (Michael B. Buckley of counsel), for appellant.

Levy Sonet & Siegel, LLP, New York (Steven G. Sonet of counsel), for respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered on or about June 25, 2012, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff seeks to vindicate its personal rights under Article VII of the Operating Agreement of BDC 56, LLC, which specified that if any surplus revenue remained, those funds would be available for distribution pro rata to the members, including plaintiff, in accordance with their equity interests in the limited liability company. Plaintiff is therefore unable to bring a derivative action because the interests at issue are

personal to it, not corporate (belonging to BDC 56) (*see Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]).

Plaintiff also failed to allege that a pre-suit demand would have been futile. A shareholder may not institute a derivative action unless the complaint "set[s] forth with particularity," the shareholder's efforts to secure the initiation of that action by the board of directors, or sets forth sufficient and particular reasons for not making such efforts (*see* Business Corporation Law § 626[c]). A pre-suit demand is similarly required in a derivative action involving a limited liability company (*see Segal v Cooper*, 49 AD3d 467, 468 [1st Dept 2008]). Although plaintiff alleged that individual defendant Born controlled certain entities that owned and operated another hotel to which BDC 56 funds were allegedly diverted, and through these entities engaged in the alleged misconduct at issue, plaintiff failed to specify how the other individual defendants were involved. Thus, plaintiff failed to allege that the majority of the individuals controlling the managing member, defendant West 56th Hotel LLC, were interested in the challenged transaction.

We further observe that in addition to lacking standing to bring this derivative action, plaintiff's claims, including, inter alia, for breach of contract, breach of fiduciary duty and conversion, have been insufficiently pled.

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10926 Luis R. Angeles, Index 305452/10
Plaintiff-Respondent,

-against-

American United Transportation, Inc., et al.,
Defendants-Appellants.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for appellants.

Mallilo & Grossman, Flushing (F. Jason Kajoshaj of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 17, 2013, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury under the "permanent consequential" and "significant" limitation of use categories of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing of entitlement to summary judgment as to plaintiff's claims of permanent consequential, or significant, limitation of use of his cervical spine, lumbar spine and shoulders by submitting expert medical reports of a neurologist and orthopedist who found full range of

motion in those parts upon examination, and of a radiologist who found that the MRIs of plaintiff's cervical and lumbar spine taken shortly after the accident showed no evidence of disc bulges or herniations (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350, 353 [2002]; *Santos v Perez*, 107 AD3d 572, 573 [1st Dept 2013]; *Robinson v Joseph*, 99 AD3d 568 [1st Dept 2012]). To the extent the radiologist opined, without any elaboration, that any discogenic changes were either age-related or a co-morbidity of "increased body habitus/obesity," the opinion is insufficient, in light of the fact that plaintiff was 29 years old at the time of the accident, to shift the burden on the issue of causation of the spinal injuries (*see De La Cruz v Hernandez*, 84 AD3d 652 [1st Dept 2011]).

In opposition, plaintiff raised a triable issue of fact with respect to whether he sustained serious injuries in his cervical and lumbar spine by submitting affirmed reports of a radiologist and physician who found bulging and/or herniated discs shown in the MRIs taken shortly after the accident, and continuing range-of-motion deficits of those body parts (*see Duran v Kabir*, 93 AD3d 566 [1st Dept 2012]; *Seck v Balla*, 92 AD3d 543 [1st Dept 2012]). Although the report of the osteopath who treated plaintiff after the accident is unaffirmed, plaintiff is not

required to present contemporaneous range of motion findings in order to establish serious injury, and his testimony, together with the osteopath's report and the MRIs taken shortly after the accident, was sufficient to demonstrate a causal link between his claimed spinal injuries and the accident (*see Perl v Meher*, 18 NY3d 208 [2011]; *Biascochea v Boves*, 93 AD3d 548, 549 [1st Dept 2012]. Further, his expert treating physician opined, after examination, that his injuries were causally related to the accident (*see June v Akhtar,* 62 AD3d 427 [1st Dept 2009]).

Accordingly, we need not reach the other claimed injuries. If the trier of fact determines that plaintiff sustained a serious injury, it may award damages for all injuries causally related to the accident, even those that do not meet the threshold (*Linton v Nawaz*, 14 NY3d 821 [2010], *Rubin v SMS Taxi Corp*. 71 AD3d 548, 549 [1st Dept 2012]); *Singer v Gae Limo Corp*. 91 AD3d 526 [1st Dept 2012]).

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

ENTERED: OCTOBER 31, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Gische, JJ.

10927-
10927A In re Lakshmi G.,

A Child Under Eighteen
Years of Age, etc.,

Jose V., etc.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about May 29, 2012, which, upon a fact-finding determination of neglect, placed the subject child in the custody of petitioner until the next permanency hearing, unanimously affirmed, insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed as moot, without costs. Appeal from the fact-finding order, same court and Judge, entered on or about March 5, 2012, unanimously dismissed, without costs, as subsumed in the appeal

from the order of disposition.

The court properly found that petitioner proved by a preponderance of the evidence that the father neglected the child by leaving her in the care of the mother, who admitted to him that she was experiencing hallucinations and hearing voices for more than a year, and who later threw the seven-week old child to the pavement, after asserting that she saw a light in the sky and a chariot with a figure, which were signs from God, and that the child was "possessed." A reasonably prudent parent would not have left the child in the care of the mother, given her mental state (*see Matter of Joseph Benjamin P. [Allen P.]*, 81 AD3d 415, 416 [1st Dept 2011], *lv denied* 16 NY3d 710 [2011]).

The appeal from the dispositional portion of the order is moot since the placement terms of the order have expired (*see Matter of Isaiah M. [Antoya M.]*, 96 AD3d 516 [1st Dept 2012]).

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10928 The People of the State of New York, Ind. 4768/10
Respondent,

-against-

Adnan Mohammad,
Defendant-Appellant.

_____

Greenberg Law Office, Brooklyn (Jason W. Eldridge of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Cassandra Mullen, J.), rendered January 27, 2012, convicting defendant, after a jury trial, of grand larceny in the third degree, and sentencing him to a term of five years' probation, 50 hours' community service and $23,700 in restitution, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of inconsistencies. To the extent that defendant is arguing that the verdict did not comport with the court's charge, that claim is without merit.

Defendant's challenge to the prosecutor's summation is

unpreserved, and we decline to review in the interest of justice. As an alternative holding, we find that the comment at issue does not warrant reversal.

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10929 Abdul Mutadir, Index 304966/10
Plaintiff-Appellant,

-against-

80-90 Maiden Lane Del LLC, et al.,
Defendants-Respondents.

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Kravet Hoefer & Maher, P.C., Bronx (John A. Maher of counsel), for appellant.

Office of Nicholas C. Katsoris, New York (Emily Pankow of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered June 28, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment on the issue of liability on his Labor Law § 240(1) and § 241(6) claims, unanimously modified, on the law, to deny defendant's motion as to the Labor Law § 240(1) claim, and to grant plaintiff's cross motion on such claim, and otherwise affirmed, without costs.

Plaintiff, a carpenter employed by nonparty Gristedes, injured his wrist when the milk crates upon which was standing to install "slot boards" that were to be used to support shelves on the interior walls of the property, shifted and caused him to

fall to the ground. Defendants were the owner and managing agent of the property and had entered into a lease with Gristedes, which required Gristedes to convert the premises into a supermarket. Plaintiff alleged that prior to performing his work he unsuccessfully looked for a ladder to use and was directed by the acting foreman to use the milk crates.

Under the circumstances, plaintiff established his entitlement to summary judgment on the issue of liability on his Labor Law § 240(1) claim. The record shows that plaintiff's accident involved an elevation-related risk and his injuries were proximately caused by the failure to provide him with proper protection as required by section 240(1) (*see Ross v 1510 Assoc. LLC*, 106 AD3d 471 [1st Dept 2013]). Defendants' claim that ladders were available on the site is conclusory and fails to raise an issue of fact (*see Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 550 [1st Dept 2013]). The sole evidentiary support for defendants' argument was an affidavit from an individual who claimed that he was working for Gristedes at the construction site and that there more than enough ladders available for plaintiff's work. Even if admissible, the affidavit failed to raise a triable issue as to whether plaintiff was the sole proximate cause of his injuries since it does not indicate that

plaintiff knew that there were ladders available at the site and that he was expected to use them (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Contrary to defendants' contention, their lack of notice or control over plaintiff's work is not dispositive of their liability under Labor Law § 240(1) (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 340 [2008]). The lease defendants entered into with Gristedes, which required Gristedes to perform substantial demolition and construction work on the leased premises, provides a sufficient "nexus" for imposing liability (*see Morton v State of New York*, 15 NY3d 50, 57 [2010]).

Furthermore, plaintiff's work at the time of his accident was protected by Labor Law § 240(1). The court below improperly "isolate[d] the moment of injury and ignore[d] the general context of the work" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). Even assuming, without deciding, that the installation of "slot boards" could not be considering "altering" within the meaning of section 240(1), a "confluence of factors" brings plaintiff's activity within the statute (*id.* at 883). Plaintiff was employed by a company that was contractually bound by its lease to undertake activity enumerated in section 240(1), including "demolition," "erection," and "altering." Furthermore,

plaintiff had worked as a carpenter at the same site for three months, during which time his team demolished and reconstructed the internal configuration of the building. There was no competent evidence in the record supporting defendants' contention that all enumerated activity had been completed at the time of the accident.

The court properly dismissed plaintiff's Labor Law § 241(6) claims predicated on Industrial Code (12 NYCRR) 23-1.22(c) and 12 NYCRR 23-5.1(c) and (d). Section 23-1.22(c) "sets safety standards for platforms used to transport vehicular and pedestrian traffic" (*Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139, 147 [1st Dept 2012]), and is inapplicable to the milk crates on which plaintiff stood. Furthermore, section 23-5.1(c) is insufficiently specific to support a Labor Law § 241(6) claim (*see Susko v 337 Greenwich LLC*, 103 AD3d 434, 436 [1st Dept 2013]) and, in any event, section 23-5.1(c) and (d) are inapplicable because plaintiff was not working on a scaffold at the time of his accident.

Dismissal of the common-law negligence and Labor Law § 200 claims was appropriate since defendants did not exercise supervision or control over plaintiff's work (*see Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592 [1st Dept 2013]). Although

defendants' representative visited the construction site on occasion, there is no evidence that he ever gave specific instructions to plaintiff or his employer on how to do the work (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]).

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10930-
10931 Christopher Peat,
Plaintiff-Respondent,

-against-

Fordham Hill Owners Corporation,
Defendant-Appellant,

Fordham Hill Cooperative Apartments,
et al.,
Defendants,

Fordham Hill Leasing Company,
Defendant-Respondent.

- - - - -

Fordham Hill Owners Corporation,
Third-Party Plaintiff-Appellant,

Fordham Hill Cooperative Apartments,
Third-Party Plaintiff,

-against-

A. Brantley Flooring Co.,
Third-Party Defendant-Respondent.

- - - - -

Fordham Hill Leasing Company,
Third-Party Plaintiff-Respondent,

Billy Lerner, et al.,
Third-Party Plaintiffs,

-against-

A. Brantley Flooring Co., et al.,
Third-Party Defendants-Respondents.

[And Another Third-Party Action]

Index 26245/04
85073/06
86150/07
83873/08

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Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Timothy R. Capowski of counsel), for appellant.

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

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for Fordham Hill Leasing Company, respondent.

Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP, New York (Elizabeth Gelfand Kastner of counsel), for A. Brantley Flooring Co. and Abe Brantley, respondents.

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Judgment, Supreme Court, Bronx County (Maryann Brigantti-Hughes, J.), entered June 5, 2012, upon a jury verdict finding defendant Fordham Hill Owners Corporation (Owners) 100% liable and awarding plaintiff the principal sum of $18,681,323.19, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 19, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff was injured while refinishing the floor in an apartment in the Fordham Hill complex. The complex was owned by Owners, and the individual apartment was owned by defendant Fordham Hill Leasing Corporation (Leasing). While lacquering the floor in the apartment, the pilot light on the kitchen stove ignited the highly flammable lacquer, engulfing plaintiff in flames and causing second and third-degree burns over 50% of his

body. The jury returned a verdict finding that the negligence of Owners proximately caused the accident, and that while Leasing was negligent, its negligence was not a proximate cause of the accident.

The jury's verdict finding Owners 100% liable was based upon a fair interpretation of the evidence (*see generally McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1s Dept 2004]). The record shows that it was Owners' responsibility to assure that the gas in the apartment was shut off prior to plaintiff undertaking his work of floor refinishing. Moreover, the jury's findings that Leasing was negligent but that its negligence was not a proximate cause of plaintiff's injuries, and that plaintiff was not comparatively negligent, were consistent and amply supported by the evidence. There exists no basis to disturb the credibility determinations made by the jury (*see Haiyan Lu v Spinelli*, 44 AD3d 546 [1st Dept 2007]).

Although the trial court failed to properly poll the jury prior to its discharge, the error is unpreserved in light of the failure of owners' counsel to timely object to the manner in which the court did poll the jury (*see Rokitka v Barrett*, 303 AD2d 983 [4th Dept 2003]).

The court properly denied Owners' request for a missing

witness charge based on plaintiff not calling his treating physicians to testify. The record shows that plaintiff did call his psychiatrist and also presented the testimony of a medical expert with respect to his future medical needs. Furthermore, plaintiff's complete medical records were submitted and discussed by plaintiff's expert and thus, the testimony of the treating physicians would have been cumulative (*see Cuevas v St. Luke's Roosevelt Hosp. Ctr.*, 95 AD3d 580 [1st Dept 2012]).

The damages awarded do not materially deviate from what would be reasonable compensation under the circumstances (CPLR 5501[c]). The record shows that plaintiff has undergone 15 surgeries, engaged in extensive physical and occupational therapies in an effort to be able to perform the most basic of life functions again, and still experiences significant depression and post-traumatic stress disorder (*see e.g. Man-Kit Lei v City Univ. of N.Y.*, 33 AD3d 467 [1st Dept 2006], *lv denied* 8 NY3d 806 [2007]; *Weigl v Quincy Specialties Co.*, 1 AD3d 132 [1st Dept 2003]). The award for future medical expenses was established with reasonable certainty (*see Beh v Jim Willis & Sons Bldrs., Inc.*, 28 AD3d 1227 [4th Dept 2006])

We have considered Owners' remaining arguments, including the challenges to certain evidentiary rulings made by the trial court and to comments made by plaintiff's counsel on summation, and find them unavailing.

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10932-
10932A Vladimir Kruglyak,
Plaintiff-Appellant,

-against-

New York University, et al.,
Defendants-Respondents.

Index 110147/10

Andrew L. Bluestone, New York, for appellant.

The Chartwell Law Offices LLP, New York (Andrew Furman of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered October 25, 2011, which granted defendant New York University's motion to dismiss the complaint as against it, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered November 29, 2012, which denied plaintiff's motion to renew, unanimously dismissed, without costs, as abandoned.

Plaintiff's present claims are barred by the doctrine of res judicata, since they could have been litigated in his prior action, which asserted claims against the same defendants arising out of the same events (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; CPLR 3211[a][5]).

We note that the first, third, and fourth causes of action

should have been asserted in a CPLR article 78 proceeding, which carries a four-month statute of limitations, because they raise challenges to an academic institution administrative determination (*see Mass v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *Quintas v Pace Univ.*, 23 AD3d 246 [1st Dept 2005]; CPLR 217[1]).

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10933 The People of the State of New York, Respondent, Ind. 5203/09 1336/10

-against-

Anthony Jefferies, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered November 18, 2010, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (four counts), criminal possession of a weapon in the third degree (seven counts), criminally using drug paraphernalia in the second degree (two counts) and criminal possession of marijuana in the fourth degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The People's

theory of constructive possession was not based on traditional "hallmarks" of dominion and control such as tenancy, but on the inference that defendant was a member of a criminal enterprise operating out of an apartment, and was thus a joint possessor of all the contraband in that apartment, regardless of whose residence the apartment might have been. This theory was related to, but separate from, the presumption found in Penal Law § 220.25(2) concerning drugs in open view in a room (*see People v Bianchini*, 309 AD2d 652 [1st Dept 2003]). Defendant's membership in the unlawful operation was the only reasonable explanation for his presence in the apartment, where loaded weapons and significant quantities of drugs were in plain view (*see People v Bundy*, 90 NY2d 918, 920 [1997]; *People v Collado*, 267 AD2d 122 [1st Dept 1999], *lv denied* 94 NY2d 917 [2000]). In addition, defendant flushed drugs down the toilet as the police entered, and his DNA was found on one of the firearms. The jury could have readily rejected defendant's claim that he was innocently visiting his drug-dealing girlfriend.

The court properly permitted the People to impeach a defense witness with a prior inconsistent statement. Defendant failed to preserve, or affirmatively waived (*see People v Lewis*, 5 NY3d 546, 551 [2005]), his claims that the court should have given a

limiting instruction during the cross-examination and that the charge given just prior to deliberations was improper, and we decline to review these claims in the interest of justice. As an alternative holding, we find that the court's charge, viewed as a whole, sufficiently instructed the jury on the proper use of a prior inconsistent statement, and that any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant also affirmatively waived, or failed to preserve, his challenges to portions of a detective's testimony, and to the absence of a circumstantial evidence charge, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: OCTOBER 31, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Gische, JJ.

10934- Index 402003/11
10935 In re City of New York, et al., 108718/11
Petitioners-Respondents,

-against-

Contract Dispute Resolution
Board of the City of New York,
Respondent-Respondent,

New York Health Care, Inc.,
Respondent-Appellant.

- - - - -

In re New York Health Care, Inc.,
Petitioner-Appellant,

-against-

New York City Human Resources
Administration Home Care Services
Program, et al.,
Respondents-Respondents.

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Wachtel Masyr & Missry LLP, New York (Sara Spiegelman of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for City of New York and New York City Human Resources Administration/Department of Social Services, respondents.

Peggy Kuo, New York, for Contract Dispute Resolution Board of the City of New York, respondent.

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Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered March 6, 2012, which, insofar as appealed from as limited by the briefs, granted in

part an article 78 petition filed by the City of New York and New York City Human Resources Administration/Department of Social Services (collectively, HRA), to the extent of remanding the matter to the Contract Dispute Resolution Board (CDRB) for a complete determination regarding HRA's authority to recoup unspent funds received by appellant pursuant to the Health Care Reform Act (HCRA), and denied a separate article 78 petition filed by appellant seeking, inter alia, to compel CDRB and the Office of the Comptroller of the City of New York (Comptroller) to review HRA's authority to recoup non-HCRA funds unspent by appellant, unanimously affirmed, without costs.

The court properly remanded the matter to CDRB to make a complete and final determination regarding HRA's authority to recoup unspent HCRA funds, on the ground that CDRB's failure to address whether there is any statutory basis for such authority rendered its determination arbitrary and capricious. The remand to review this statutory issue was appropriate notwithstanding that the court found no error in the aspect of CDRB's determination concluding that HRA has no contractual basis to recoup HCRA funds (*see Society of N.Y. Hosp. v Axelrod*, 163 AD2d 142 [1st Dept 1990]).

The court properly declined to compel the Comptroller to

review appellant's claims regarding non-HCRA funds, since the notice of claim appellant presented to the Comptroller simply stated that the issue in dispute concerned the HCRA funds, and noted that the amount in dispute is $1,538,578, which is the exact amount of HCRA funds in dispute (*see Bri-Den Constr. Co., Inc. v New York City School Constr. Auth.*, 55 AD3d 649 [2d Dept 2008]). It should be noted that CDRB properly declined to review this issue for the same reason, pursuant to 9 RCNY § 4-09(e).

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10936 In re Kingdon Capital Management, LLC, Petitioner-Respondent, Index 652682/12e

-against-

Marjorie Kaufman, Respondent-Appellant.

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Greenspan & Greenspan, White Plains (Leon J. Greenspan of counsel), for appellant.

Wilkie Farr & Gallagher LLP, New York (Michael S. Schachter of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered April 5, 2013, confirming an arbitration award dated June 28, 2012, and awarding respondent the sum and prejudgment interest set by the award, plus costs and disbursements, unanimously affirmed, without costs.

Respondent failed to show that the arbitrators exceeded their power (*see Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]; CPLR 7511[b]; 9 USC § 10[a][1]-[4]) or manifestly disregarded the law (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480-481, *cert dismissed* 548 US 940 [2006]; *Cantor Fitzgerald Sec. v Refco Sec., LLC*, 83 AD3d 592 [1st Dept

2011]).

Respondent lacks any basis for invoking the protections of Labor Law § 198(1-a), since there is no indication in the record before us that she timely asserted any Labor Law claim before the arbitrators (*see Matter of Obot [New York State Dept. of Correctional Servs.]*, 89 NY2d 883 [1996]). In any event, the arbitrators properly declined to award respondent incentive compensation beyond her termination date, particularly since they determined that her compensation agreement had been orally modified in 2009 without mention of continuing incentive compensation beyond termination (*see Mackie v La Salle Indus.*, 92 AD2d 821 [1st Dept], *appeal dismissed* 60 NY2d 612 [1983]).

There is no basis for disturbing the arbitrators' decision not to award respondent attorneys' fees or other costs pursuant to Labor Law § 198(1-a). Nor is there any basis for modifying the rate of prejudgment interest awarded (*see Matter of Gruberg [Cortell Group]*, 143 AD2d 39 [1st Dept 1988]; *Matter of Rothermel [Fidelity & Guar. Ins. Underwriters]*, 280 AD2d 862 [3d Dept 2001]).

We have considered appellant's remaining arguments and find them without merit.

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10937 The People of the State of New York, Respondent, Ind. 1810/10 3387/10

-against-

Germaine Kumnji, Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about October 21, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: OCTOBER 31, 2013

CLERK

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

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

10939 Charles W. Mulloy, Index 113532/11
Plaintiff-Appellant,

-against-

Lucie Benito-Berse,
Defendant-Respondent.

_____

Sanders, Ortoli, Vaughn-Flam & Rosenstadt LLC, New York (Marc S. Gottlieb of counsel), for appellant.

Parmet & Greenblatt, LLC, New York (Wendy J. Parmet of counsel), for respondent.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered July 5, 2012, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff alleges that, to induce him to enter the separation agreement, defendant represented to him that she would need maintenance to pay for an apartment for herself while she looked for full-time employment. He claims that this representation was false, and that defendant knew of its falsity at the time of the negotiations and execution of the agreement. He alleges that defendant was not required to pay rent, was supported financially, and had no need of maintenance.

The separation agreement does not set forth the reason plaintiff agreed to make a lump sum maintenance payment to

defendant, although it states that the payment "shall be made as part of, not in addition to, the distribution" of certain brokerage accounts held by the parties. We find, however, that plaintiff's allegation of fraud is belied by his own acknowledgment that the terms of the separation agreement, as communicated by his own independent legal counsel, were fair and reasonable, and his acknowledgment that no representation had been made by either party except as expressed in the agreement. Plaintiff waived his right to full financial disclosure, which included information about assets, income and expenses, which may have revealed whether defendant actually needed the money for an apartment. Having failed to make use of the means he possessed to discover whether defendant needed the lump sum payment for an apartment, plaintiff cannot claim that he justifiably relied on her alleged misrepresentations (*see Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1st Dept 1997]; *Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 589 [1st Dept 2011]).

We have considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 31, 2013

CLERK

Renwick, J.P., DeGrasse, Feinman, Gische, JJ.

10940 In re Richard Parenti, Index 111258/11
Petitioner-Appellant,

-against-

Hon. Ann Pfau, etc.,
Respondent-Respondent.

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David Zevin, Roslyn, for appellant.

John W. McConnell, Office of Court Administration, Albany (John J. Sullivan of counsel), for respondent.

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 31, 2012, which denied the petition seeking, inter alia, to annul respondent's determination, dated June 1, 2011, terminating petitioner's employment with the New York State Unified Court System (UCS), granted respondent's cross motion to dismiss the petition, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner was terminated from his position of Senior Law Librarian at New York County Surrogate's Court as part of a workforce reduction in the UCS. Respondent's determination that petitioner did not qualify for the "legal and secretarial employees providing services directly to judges" exception to the reduction, was based upon an interpretation of its own guidelines

and was not arbitrary and capricious, or irrational (*see Matter of Saur v Director of Creedmoor Psychiatric Ctr.*, 41 NY2d 1023 [1977]). Petitioner's title of Senior Law Librarian did not place him in the category of personnel directly assigned to, and serving at the pleasure of, the judges (*compare* 22 NYCRR 25.11 and Judiciary Law § 36).

After determining that petitioner was not exempt from the workforce reduction, respondent calculated his seniority based solely upon his years of service for the UCS. The rule (22 NYCRR 25.30[a]) providing that personnel be reduced "in inverse order of original appointment on a permanent basis in the classified service of the [UCS]," was promulgated pursuant to the authority vested in the Chief Judge (Judiciary Law § 211[1][d]). Judiciary Law § 211(1)(d)'s directive that the administrative standards imposed by the Chief Judge "be consistent with the civil service law," requires only that they be guided, not governed, by it (*see Reynolds v Crosson*, 183 AD2d 482 [1st Dept 1992]; *Matter of Conigland v Rosenblatt*, 171 AD2d 864 [2d Dept 1991]; *Matter of Goldstein v Lang,* 23 AD2d 483, 485-486 [1st Dept 1965, Stevens and Steuer, JJ., dissenting], *revd on dissenting op* 16 NY2d 735 [1965]). Since 22 NYCRR 25.30's provision that personnel be reduced "in inverse order of original appointment on a permanent

basis in the classified service of the [UCS]," is consistent with Civil Service Law § 80(1)'s requirement that employees be given a preference based upon the length of their service, its enactment was within the judiciary's authority of self-governance in administrative matters (*see Matter of Bellacosa v Classification Review Bd. of Unified Ct. Sys. of State of N.Y.*, 72 NY2d 383, 388 [1988]; *Corkum v Bartlett*, 46 NY2d 424, 429 [1979]).

We have considered petitioner's remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10941N In re Christie's, Inc., Index 103584/12
Petitioner-Respondent,

-against-

William I. Koch,
Respondent-Appellant.

_____

Morvillo Abramowitz Grand Iason & Anello P.C., New York (Edward M. Spiro of counsel), for appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Maura Barry Grinalds of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about September 26, 2012, which granted petitioner Christie's Inc.'s motion for a protective order quashing respondent's subpoena, unanimously affirmed, with costs.

This matter concerns an out-of-state subpoena issued by respondent seeking documents for use in his California civil action against Rudy Kurniawan, alleging the fraudulent sale of counterfeit wine in 2005 and 2006 through another auction house, not Christie's.

The motion court correctly held, and respondent does not dispute, that the original subpoena was overbroad. Although the motion court failed to analyze the narrowed subpoena, which sought three rather than the nine original categories of

information, we find, in analyzing the subpoena even as narrowed, that the subpoena was properly quashed (*see Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]).

The first two categories in the narrowed subpoena sought information relating to wines sold at Christie's auctions in April 2007, and September, October, and November 2009. The requests relating to the 2009 auctions exceed the time limits imposed by the court overseeing the California action, which limited discovery from Kurniawan and a third party to documents generated between April 1, 2003 to December 31, 2008. Even assuming that the requested information regarding the April 2007 auction is relevant to the California action (*see e.g. Davis v Solondz*, 122 AD2d 401, 402 [3d Dept 1986]), that request is duplicative of respondent's request in a November 2009 subpoena served on Christie's. Christie's produced documents in connection with that request, and respondent did not raise any timely objections (*Matter of Smith v Smith*, 26 AD2d 922, 922-923 [1st Dept 1966]).

Contrary to respondent's contentions, the third category of documents, which seeks information relevant to specified paragraphs of the federal criminal complaint filed against

Kurniawan, does not relate to similar acts. Those paragraphs relate to Kurniawan's alleged fraudulent sale of encumbered wine, not counterfeit wine, as alleged in respondent's California action. As the motion court concluded, given that this request for information has no relevance to prosecution of the California action, it would appear to be an improper "fishing expedition to ascertain the existence of evidence" for use in an attempt to revive a dismissed federal claim against Christie's (*Law Firm of Ravi Batra, P.C. v Rabinowich*, 77 AD3d 532, 533 [1st Dept 2010]).

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

ENTERED: OCTOBER 31, 2013

CLERK

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

10942N Nathaniel Myers, Index 101341/11
Plaintiff-Appellant,

-against-

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

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Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 29, 2012, which denied plaintiff's motion for a default judgment against the City of New York, and granted the City's cross motion for an order deeming its answer to be timely served nunc pro tunc, unanimously affirmed, without costs.

The City's delay in answering on behalf of the individual defendants was reasonable in that it was due to its investigation of its obligation to defend them (*see Hirsch v New York City Dept. of Educ.*, 105 AD3d 522 [1st Dept 2013]; *Silverio v City of New York*, 266 AD2d 129 [1st Dept 1999]; General Municipal Law 50-k[2]). No prejudice to plaintiff has been shown (*see Cirillo v Macy's, Inc.*, 61 AD3d 538, 540 [2009]), and New York's public

policy strongly favors litigating matters on the merits (*see Silverio*, 266 AD2d 129). Thus, the motion court properly exercised its discretion in granting the cross motion to compel plaintiff to accept service of the late answer (*see* CPLR 3012[d]; *Lamar v City of New York*, 68 AD3d 449 [1st Dept 2009]).

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

ENTERED: OCTOBER 31, 2013

CLERK