SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 29, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6858 The People of the State of New York, Respondent, Ind. 1225/16

-against-

Deyvone C., Defendant-Appellant.

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New York County Defender Services, New York (Jessica Horani of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered March 9, 2017, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him to a term of 3½ years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the conviction, adjudicating defendant a youthful offender, and reducing the sentence to a term of 1 to 3½ years, and otherwise affirmed.

Under the circumstances of this case, including defendant's limited role in a crime where his older cousin displayed what

appeared to be a firearm, defendant's lack of a criminal history, and the fact that both the prosecutor and the presentence report recommended youthful offender treatment, we find the sentence excessive to the extent indicated.

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

ENTERED: MAY 29, 2018

CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5357N Patricia Curran, Index 101673/13
Plaintiff-Respondent,

-against-

New York City Transit Authority,
et al.,
Defendants-Appellants.

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Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

Law Office of Robert A. Horn, New York (Robert A. Horn of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered November 15, 2016, which denied defendants' motion for a protective order, unanimously modified, on the facts, to grant the motion to the extent of limiting discovery to documents concerning the rear stairs of the bus on which plaintiff fell, and the absence of warning signs, stanchions, and handrails in the rear of the bus, for a period of five years preceding the date of the accident, and records relating to any modifications or changes to the interior stairs, stanchions, handrails, or warning signs in the rear of the bus from the day of the accident to the day of the inspection, and the production of the bus for inspection and photographing by plaintiff in the presence of defendants' representatives, and, as so modified, affirmed,

without costs.

Predecessor models of the bus on which plaintiff fell and buses with front-facing rear seating are not relevant to whether the bus on which plaintiff fell was defectively designed (CPLR 3101[a]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Similarly, while material concerning the rear stairs, stanchions, handrails, and warning signs in the rear of the subject bus, i.e., the alleged dangerous conditions, is relevant, material concerning other sections of the bus or other defects is not relevant. The production of 15 years' worth of records is burdensome (*see* CPLR 3103[a]).

Plaintiff failed to demonstrate that she would be prejudiced by defendants' representatives observing and recording her inspection and photographing of the subject bus. Defendants' representatives may be present during the inspection, provided they do not interfere with the examination.

Defendants are not required to create a document, such as a certification of no changes, if none exists, but plaintiff is entitled to discovery regarding any changes to the subject bus from the date of the accident to the date of the inspection.

The Decision and Order of this Court entered herein on January 2, 2018 is hereby recalled and vacated (*see* M-2058 decided simultaneously herewith).

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5976 Franklin Santos, et al., Index 110582/10
Plaintiffs-Respondents-Appellants,

-against-

Condo 124 LLC, et al.,
Defendants-Respondents,

Construction & Realty Safety Group, Inc.,
Defendant-Appellant-Respondent.

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Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Barry Jacobs of counsel), for appellant-respondent.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondents-appellants.

Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., New York (Anthony Broccolo of counsel), for respondents.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered November 28, 2016, which, insofar as appealed from as limited by the briefs, denied defendant Construction & Realty Safety Group, Inc.'s (CRSG) motion for summary judgment dismissing the Labor Law § 240(1) and § 241(6) claims as against it on the grounds that it was not a statutory agent under the statutes, denied plaintiffs' cross motion for partial summary judgment on the Labor Law § 240(1) claim, and granted defendants' motions for summary judgment dismissing the Labor Law § 200 and common-law negligence claims and the Labor Law § 241(6) claim

predicated on Industrial Code (12 NYCRR) §§ 23-1.7(b)(1)(ii), (iii), 23-5.1(j), and 23-5.3(e), affirmed, without costs.

Plaintiff Franklin Santos alleges that on July 28, 2010, he was injured when he fell from a scaffold at a construction site. Under construction was a mixed hotel and condominium building. Defendants Condo 124 LLC, 124 Longview Owners, LLC, and Ramius, LLC were the owners of the building being constructed (the owners). Defendant Ross & Associates, LLC (Ross) was the construction manager on the project, which retained CRSG as site safety consultant. Santos worked as a mason's helper for nonparty subcontractor Bayport Construction (Bayport). Bayport erected the scaffolds in order to perform its masonry work.

By amended verified complaint, plaintiffs asserted causes of action for common-law negligence, violations of Labor Law §§ 200, 240(1), and 241(6), and a derivative claim on behalf of Santos's wife. Plaintiffs alleged that Santos's injuries were the result of defendants' failure to maintain a safe work site, particularly the failure to provide him with adequate scaffolding. They alleged that defendants violated, inter alia, Industrial Code §§ 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-5.1, and 23-5.3.

During his deposition, Santos testified that he was responsible for carrying materials such as "[c]ement, blocks, [and] marble." On the date of the accident, Santos carried

marble down to the cellar, before bringing it upstairs. The marble was brought to the cellar at first because the scaffolding had not yet been set up.

Santos carried the marble up the metal staircase inside a tower scaffold on site. The marble weighed 400 to 500 pounds. The scaffold's steps were three feet wide, and reached a height of eight or nine feet. The scaffold was 9 to 10 feet off the ground. The accident occurred when Santos and a coworker known only as Giovanni carried a block of marble up the scaffolding. Santos was walking backwards. Giovanni faced him. Santos states that once he got "upstairs" he "step[ped] back" and went "completely downwards." Santos alleges that he fell 10 to 12 feet onto the pipes of the scaffold's lower level. At the time of the accident, Santos was holding the marble from underneath. He did not recall what happened to the marble after he fell. Santos did not have a back brace, harness, or other safety equipment at the time.

The scaffold floor was made out of wooden planks. When Santos fell, he alleges that the floor was missing some of the planks, which caused the accident. According to Santos, it was evident that Bayport's employees, who erected the scaffold that morning, did not install all the necessary planking. It is undisputed that Santos only received instructions from other

Bayport employees.

Sanjeev Kumar worked for Bayport as a supervisor at the time of the accident. Bayport employees were required to inspect all scaffolds daily. The scaffold platform was comprised of about six wooden planks. Kumar knew Carmine DeSimone as a safety inspector, but did not know for whom he worked. DeSimone never talked with Kumar about the scaffolding. Kumar did not receive any reports about defects on the scaffold prior to the accident. Kumar was told by a Bayport employee "Franklin [Santos] fell from [the] scaffold." Kumar found Santos at the crossbars that are on the side of the platform. After the accident, Kumar inspected the scaffold and saw six planks on the platform from which plaintiff fell. There was no space between the stairs and the platform and he found nothing wrong with the scaffold. Santos and Giovanni were not wearing safety harnesses when the accident happened.

Dirk McRae was a project manager for Ross and was responsible for safety at the site. CRSG was the site's safety manager. McRae talked with DeSimone most days at the work site. Bayport was the entity on site responsible for scaffolds. McRae observed the scaffold on the day of the accident, saw no net under it, and no safety lines above it. There was no general contractor on the site distinct from Ross. If McRae saw an

unsafe condition he had the authority to stop work.

DeSimone, CRSG's safety consultant at the site, testified that Ross hired CRSG to "look over the men to make sure everybody is working safe . . . [and ensure the] safety of the job site." After the accident, DeSimone observed the scaffold from which Santos fell. It was in good condition, "normal scaffolding, planks were right." None of the planks were splintered, broken, or appeared out of order.

DeSimone, as safety manager, could only stop work at the site if there was an immediate danger. If he saw unsafe practices he would alert the worker to desist. "If [he] s[aw] somebody in immediate danger, [he] would stop them from working and tell their supervisor," but could not simply "stop the project or workers from working." DeSimone could not alter the "means or methods" of the worker's employer. If he was not happy with a supervisor's response, DeSimone would file a report with Ross. In his safety manager log, DeSimone noted, on July 7, 2010, that there was an "[i]nadequate scaffold" at the site. DeSimone noted that the scaffold did not have "toe boards" or "cross bars".

CRSG moved for summary judgment arguing that it was not a "statutory agent" for purposes of the Labor Law. Ross and the owners moved for summary judgment dismissing the complaint

arguing that the section 240(1) claim should be dismissed because there was no evidence that Santos fell due to a defect in the scaffold in that the claim that he fell due to missing planks was belied by the record. Ross argued that the complaint should be dismissed as against it because it was not a general contractor, and it did not provide safety equipment to or control the means and methods of Santos's work.

Ross and the owners also moved for summary judgment on the section 241(6) claim arguing that plaintiffs did not specify in the bill of particulars which sections of the Industrial Code were violated. Finally, Ross and the owners moved for summary judgment on the common-law negligence and Labor Law § 200 claims arguing that Ross and the owners did not supervise Santos's work and did not have notice of any defect that caused Santos's fall. Plaintiffs' cross-moved for partial summary judgment on their Labor Law § 240(1) claim.

Supreme Court denied CRSG's motion for summary judgment and plaintiffs' cross motion for partial summary judgment. Supreme Court granted Ross's and the owners' motion for summary judgment on the section 241(6) claims predicated on Industrial Code §§ 23-1.7(b)(1)(ii) and (iii) and Industrial Code §§ 23-5.1(j), and 23-5.3(e) as inapplicable to the facts of the case. The court also dismissed the common-law negligence and section 200 claims

because defendants did not have the requisite level of supervision or control over Santos's work, and did not have notice of the condition that caused the accident.

Supreme Court properly denied CRSG's motion for summary judgment. Labor Law §§ 240(1) and 241(6) impose absolute liability on "contractors and owners and their agents" for worker injuries on construction sites (*see Russin v Louis N. Picciano & Scahill, P.C., Bethpage (of counsel), for & Son*, 54 NY2d 311, 317 [1981]). CRSG, as site safety consultant, was neither an owner nor general contractor on the project. Thus, whether CRSG is subject to the Labor Law is dependant on whether it was an "agent" of the owners or Ross at the site.

To hold a defendant liable under the Labor Law as a "statutory agent" of either the owner or the general contractor, it must be shown that the defendant had the "'authority to supervise and control'" the injury-producing work *(Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005], *quoting Russin* at 318; *see Oliveri v City of New York*, 146 AD3d 522, 522 [1st Dept 2017]). The determinative factor is whether the defendant had the right to exercise control over the work, not whether it actually exercised that right (*see Bart v Universal Pictures*, 277 AD2d 4, 6 [1st Dept 2000]). Where the owner or general contractor delegates to a third party the duty to conform to the

requirements of the Labor Law, that third party becomes the statutory agent (*see Walls*, 4 NY3d at 863-864).

The authority of DeSimone, as an employee of CRSG, to stop work in the event of unsafe practices raises an issue of fact as to whether CRSG is a "statutory agent" for purposes of the Labor Law (*compare Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 434 [2015] [defendant was "statutory agent" where, inter alia, it "had the authority to stop plaintiff from working in the area near" a dangerous condition]; *with Lamar v Hill Intl., Inc.*, 153 AD3d 685, 686 [2d Dept 2017] [defendants not "statutory agents" where, inter alia, they could only make recommendations for corrective actions to unsafe practice and "stop work only in the event of an emergency"]).

Supreme Court correctly denied summary judgment in favor of plaintiff on the Labor Law § 240(1) claim. Labor Law § 240(1) imposes absolute liability on building owners, contractors, and their agents whose failure to provide adequate protection to workers employed on a construction site proximately causes injury to a worker *(see Wilinski v 334 E. 92nd Hous. Devl. Fund Corp.*, 18 NY3d 1, 7 [2011]). To establish liability under section 240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of the injury (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004];

Blake v Neighborhood Hous. Serv. of N.Y. City, 1 NY3d 280, 287-288 [2003]). Of course, "the fact that a worker falls at a construction side, in itself, does not establish a violation of Labor Law § 240(1)" (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017]).

Santos's testimony that he was not provided with any safety devices that would have prevented him from falling through a hole in the scaffolding platform that was created by a missing wooden plank sufficiently shows that section 240(1) was violated (*see e.g. Susko v 337 Greenwich LLC*, 103 AD3d 434 [1st Dept 2013]; *Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412 [1st Dept 2008]; *Magee v 438 E. 117th St. LLC*, 56 AD3d 376 [1st Dept 2008]).

However, defendants raised an issue of fact in opposition to plaintiffs' cross motion through testimony that directly contradicted Santos's account of the accident. Kumar and DeSimone testified that immediately following the accident, there was nothing about the wooden planking that appeared out of the ordinary. Kumar noted that all six planks were present on the platform floor and that there was no gap between the scaffold's stairs and the platform. DeSimone testified that, after the accident, the scaffold was in good condition, the "planks were [al]right" and did not appear broken or otherwise out of order.

We disagree with the dissent's conclusion that the record

establishes that Santos fell from a significant elevation differential after he stepped from the stairs to the scaffold platform. Building upon this erroneous premise, the dissent concludes that plaintiffs are entitled to summary judgment because the safety devices provided to Santos were inadequate for the task of hauling the heavy marble up the scaffold.

However, the record does not support the dissent's conclusions. Kumar testified that after the accident he found Santos against the crossbars on the side of the scaffolding. Additionally, McRae testified that he was told by DeSimone that Santos fell on the scaffold and that he tripped and landed on the crossbracing. As the dissent notes, DeSimone testified that Santos fell on the planks of the scaffold and hurt his back. DeSimone also testified that he was told by Giovanni that Santos "fell on top of the stairs."

These depositions sufficiently raise an issue of fact in opposition to plaintiffs' cross motion by raising conflicting versions of the accident (see *Perez v Folio House, Inc.*, 123 AD3d 519 [1st Dept 2014]; *Piazza v CRP/RAR III Parcel J, LP*, 103 AD3d 580, 581 [1st Dept 2013]). Insofar as McRae's and DeSimone's testimony is hearsay, it may be considered in opposition to plaintiffs' cross motion for summary judgment because it is not the only evidence submitted in opposition *(City of New York v*

Catlin Specialty Ins. Co., 158 AD3d 586, 587 [1st Dept 2018]; *Fountain v Ferrara*, 118 AD3d 416 [1st Dept 2010]). Both Kumar and DeSimone maintain that their inspection of the scaffold after the accident did not reveal any defects in the wooden planks that formed the platform floor.

We also note that there appear to be inconsistencies within Santos's own deposition and affidavit submitted in support of his cross motion for summary judgment. First, Santos testified in his deposition that as he was carrying the marble up the stairs, he stepped back on to the platform and he fell completely downwards due to two missing plank boards closest to the staircase. Later he testified that he fell backwards and hit his back against the pipes of the scaffold and then fell 10-12 feet. This inconsistency also exists in his affidavit where Santos states that he fell through an opening along the sides of the platform and, alternatively, that he fell immediately after stepping on to the platform due to the missing wooden planks. The inconsistency in Santos's own testimony raises an issue of fact as to how the accident occurred. When viewed in conjunction with the testimony of McRae, DeSimone and Kumar, defendants have sufficiently raised an issue of fact as to the claim that Santos fell 10-12 feet off of the scaffolding.

As there is an issue of fact, both the motion and cross

motion for summary judgment on the Labor Law § 240(1) claim were properly denied (*see Perez*, 123 AD3d at 519; *Piazza*, 103 AD3d at 581).

The motion court also properly dismissed the section 241(6) claims predicated on 12 NYCRR 23-1.7(b) as inapplicable to the facts of the case because the hole into which Santos fell was not required by the work being performed, and nothing about Santos's work required him to be near the edge of an opening (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450-451 [1st Dept 2013]; *Harris v Hueber-Breuer Constr. Co., Inc.*, 67 AD3d 1351, 1353 [4th Dept 2009]).

The court also properly dismissed the section 241(6) claim predicated on 12 NYCRR 23-5.1(j) and 23-5.3(e) as inapplicable to the facts of this case because at no time did Santos claim that he was caused to fall due to inadequate railings. The dissent's conclusion to the contrary is not persuasive. Plaintiffs do not proffer any evidence, and Santos did not testify that the lack of railings caused the accident. Accordingly, violation of this provision could not have been a proximate cause of the accident (*see Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 550 [1st Dept 2013]; *Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 801 [2d Dept 2013]).

The motion court also properly dismissed the common-law

negligence and Labor Law § 200 claims. To the extent these claims are predicated on a dangerous or hazardous condition (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]), defendants did not create the hole into which Santos fell, nor did they have actual or constructive knowledge of its existence. The uncontroverted testimony established that the scaffold from which Santos fell was inspected every day, and at no time was a hole in the wooden platform discovered (*Vazquez v Takara Condominium*, 145 AD3d 627, 628 [1st Dept 2016]). To the extent these claims are predicated on the means and methods of the work, there is no evidence that defendants exercised any control over the choices made by Santos's employer.

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

MOULTON, J. (dissenting in part)

In my view, Supreme Court should have granted summary judgment to plaintiffs under Labor Law § 240(1) against defendants-respondents Condo 124 LLC, 124 Longview Owners, LLC and Ramius, LLC (owners) and Ross & Associates, LLC (construction manager). Additionally, Supreme Court should not have dismissed plaintiffs' Labor Law § 241(6) claim predicated on 12 NYCRR 23-5.1(j) and 23-5.3(e), pertaining to scaffold safety railings.

It is undisputed that plaintiff Franklin Santos was instructed by his supervisor, Sanjeev Kumar, to manually carry a piece of cast stone weighing several hundred pounds up a tower scaffold with his coworker. Santos walked backwards up the scaffold stairs, holding the stone with both hands, while facing his coworker, Giovanni, who was below him walking forwards. The record establishes that Santos fell from a significant elevation differential. Santos testified that he fell 10-12 feet after he stepped backwards from the top of the stairs onto the scaffold platform and "just went completely downwards." Santos testified that the distance between the top of the stairs to the bottom was approximately 9-10 feet, but he fell approximately 12 feet from where Giovanni stood because he fell lower than ground level, near the basement. After hearing that Santos "fell from the scaffold . . . taking the stones up" Kumar found Santos hanging

off the cross bars on the first floor level. Kumar testified that the first floor platform was six feet above the first floor level. Giovanni (the sole witness to the accident other than Santos), who did not speak English very well, only told Kumar that Santos "fell." Owners and construction manager did not submit an affidavit from Giovanni in opposition to plaintiffs' cross motion for summary judgment under Labor Law § 240(1). Carmine DeSimone, the site safety manager for CRSG, estimated that the first platform was about six feet above ground level.

Santos attributed the accident to "missing wood" despite testifying that he did not see what caused him to fall.[1] He asserted at his deposition that "I was looking in front of me. I couldn't look backwards. I couldn't because as I'm walking backwards, I couldn't look backwards." In his affidavit in support of his cross motion for summary judgment, Santos explained, "Because I was directed to walk up the scaffold steps

[1]Santos testified through an interpreter that "[t]he scaffold was wood. Yes, and because of that, well, when I stepped back, it didn't have the wood. It just had one wood. When I stepped back with the piece of marble, that's why I went backward." He further explained that "it looks like they forgot to put that wood." At his deposition, Santos was shown a photograph of a scaffold for identification. The scaffold platform in the photograph does not show any gaps in the planks. Santos stated, "The difference is that what you see there, there are three pieces of wood that are across there. But back then there was only one piece of wood."

backwards manually carrying this 400-500 pound load, I did not know that there was an opening/gap along the area of the platform immediately next to the top of the steps that I climbed up to. No one warned me or told me that there was this opening/gap."

Seizing on Santos's testimony concerning "missing wood" owners and construction manager assert that Supreme Court correctly found issues of fact for trial because Kumar and DeSimone testified that they inspected the scaffold and saw no missing wood on the platform. Kumar testified that he observed "six planks" and "no space" between "the end of the step and the beginning of the planks." DeSimone testified that both before and after the accident he walked the entire scaffold, the planks were not splintered or broken, and nothing seemed out of order.

Plaintiffs were entitled to summary judgment under Labor Law § 240 (1) because the safety device that Santos used (the tower scaffold) was inadequate for the task that he was instructed to perform (*see e.g. Gericitano v Brookfield Props. OLP Co. LLC*, 157 AD3d 622 [1st Dept 2018]; *Cronin v New York City Tr. Auth.*, 143 AD3d 419 [1st Dept 2016]; *Harris v 170 E. End Ave., LLC*, 71 AD3d 408 [1st Dept 2010], *lv dismissed* 15 NY3d 911 [2003]).

Even if the tower scaffold was not "missing wood," summary judgment should have been granted to plaintiffs because "there is no view of the evidence at trial to support a finding that the

absence of safety devices was not a proximate cause of the injuries" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]; *see also Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005] ["It does not matter whether plaintiff's fall was the result of the scaffold falling over, or its tipping, or was due to plaintiff mis-stepping off its side"]; *John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001] [while the plaintiff was not sure whether the makeshift scaffold "wooden plank broke or moved, it is undisputed that there were no safety devices or belts on either the plank or the pallet"]).[2]

The Labor Law imposes a nondelegable duty upon owners and general contractors, and their agents, to provide safety devices necessary to protect workers from the risks inherent in elevated work sites (*id.* at 117-118). The availability of a particular safety device will not preclude liability "if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [internal quotation

[2]Both DeSimone and Kumar testified that everyone who worked on the scaffold had to wear a harness. Kumar testified that neither Santos nor Giovanni was wearing a safety harness when the accident happened. Santos also testified that he did not complain about site safety (e.g., the lack of a harness) because he did not think he had a right to do so, and was afraid that he would be fired.

marks omitted]). Here, even if there was no gap in the planking of the scaffold platform, plaintiffs have established their entitlement to judgment under Labor Law § 240(1) because Santos's injuries were "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]), and the safety device provided was not adequate for the task that he was instructed to perform (see *e.g. Gericitano*, 157 AD3d at 622; *Cronin* 143 AD3d at 419; *Harris*, 71 AD3d at 408-409).

The determination of the type of protective device required for a particular job turns on the foreseeable risks of harm presented by the nature of the work being performed (*see Harris* at 408-409 [Labor Law §240(1) violation established where an additional safety device was needed in order to prevent a foreseeable accident]). Here, there was a foreseeable risk of Santos falling due to the weight of the heavy object that he was instructed to hand-carry backwards up the scaffold stairs. Further, Santos's hands were not free to steady himself and he could not see where he was walking. Where the safety device provided is not adequate for the task assigned, summary judgment is not defeated by arguing that there is no defect in the device that was actually provided (*see Arnaud v 140 Edgecomb LLC*, 83

AD3d 507, 508 [1st Dept 2011] ["[n]or does the fact that plaintiff did not point to any particular defect in the pulley defeat his entitlement to summary judgment . . . Thus, it is not necessary that plaintiff establish that the pulley was defective, only that he was not given proper protection"]). Owners and construction manager do not provide any explanation of how Santos could have fallen from a significant elevation differential which would be unrelated to a Labor Law § 240(1) violation (e.g., they do not argue that Santos was the sole proximate cause of his accident).

This case is distinguishable from *Perez v Folio House, Inc.*, 123 AD3d 519 [1st Dept 2014] and *Piazza v CRP/RAR III Parcel J, LP*, 103 AD3d 580 [1st Dept 2013]), cited by both Supreme Court and the majority. In those cases, issues of fact were raised in light of the conflicting versions of the accident, with the defendant's version demonstrating that the plaintiff tripped and fell on either the same level of a scaffold platform (*Perez*, 123 AD3d at 519-520) or, on the ground level (*Piazza*, 103 AD3d at 581). Here, the only competent evidence shows that Santos fell from a significant elevation differential.[3]

[3]Citing the hearsay testimony of DeSimone, owners and construction manager appear to suggest that Santos fell on the platform. DeSimone testified that Giovanni told him that he and Santos "were carrying up the stone and as they got to the top of

The majority implies, based on DeSimone's hearsay statements, that Santos may have not have fallen from a significant elevation differential (i.e., Santos fell on the same level of the platform). However, I would not consider DeSimone's testimony because defendants failed to proffer a reasonable excuse for their failure to tender an affidavit from Giovanni, the purported source of the information that Santos fell on the same level (see *Oddo v Edo Mar. Air*, 34 AD3d 774, 775 [2d Dept 2006][hearsay statement made by the injured plaintiff's coworker could not be used to raise a triable issue of fact where the plaintiffs failed to proffer a reasonable excuse for their failure to tender the evidence in admissible form]). In any event the hearsay testimony was unreliable as Santos, Kumar and McRae all testified that Santos landed on the cross bars - - not

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the stairs on the scaffold he lost his grip somehow, and he dropped the stone and he went back and fell on his butt, his rear end . . .[o]n the platform of the scaffold." DeSimone's accident report states the accident happened when Santos was "carrying stone up the ladder to the Scaffold with his partner Giovanni when he let the stone go because it was too heavy and he fell on the planks of the scaffold and hurt his back." Even if this hearsay evidence could be considered, DeSimone conceded that Giovanni did not tell him "where the plaintiff's rear end hit." Thus, Giovanni's statement that Santos "fell on his butt" is not inconsistent with a fall from the scaffold platform to the cross bars below.

on the platform, as DeSimone maintained.[4]

Accordingly, I would modify Supreme Court's order and grant plaintiffs summary judgment under Labor Law § 240(1) against owners and construction manager.

I would also reinstate plaintiffs' Labor Law § 241(6) claim predicated on 12 NYCRR 23-5.1(j) and 23-5.3(e) because owners and construction manager failed to present affirmative evidence demonstrating that the lack of safety railings was not the proximate cause of the accident, and merely pointed to the equivocal evidence and the gaps in plaintiffs' proof (*see Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575 [1st Dept 2016]). At his deposition Santos did not testify that lack of railings caused his accident. However, he did submit an affidavit in support of his cross motion for summary judgment which attributed his accident to the lack of railings, among other things.[5] In any event, it was defendants' burden, on summary

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[4]Any inconsistency within Santos's own deposition and affidavit as to precisely how the accident occurred is of no import where the record establishes that he fell from a significant elevation differential after stepping backwards and falling into thin air and where the safety device that Santos was provided (the tower scaffold) was inadequate for the task that he was instructed to perform.

[5]In that affidavit, Santos attached a photograph of a scaffold that clearly did not have any safety railings. He stated that the photograph was a fair and accurate picture of the scaffold from which he fell, except for the planking.

judgment, to proffer evidence that the lack of railings did not contribute to Santos's accident (e.g., by providing testimony that the scaffold in question had the requisite railings). In both *Mouta v Essex Mkt. Dev. LLC* (106 AD3d 549 [1st Dept 2013]) and *Ramirez v Metropolitan Transp*. Auth. (106 AD3d 799 [2d Dept 2013]), cited by the majority, the safety railings regulations were irrelevant because the cause of both accidents was known (a fall through planking) and the plaintiffs were entitled to summary judgment under Labor Law § 240(1). Here, the precise cause of Santos's fall is unknown. If Santos is not entitled to summary judgment under Labor Law § 240(1), then, at a minimum, he

should be entitled to prove at trial that the lack of railings caused his injuries, where defendants have submitted no evidence to the contrary.

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

ENTERED: MAY 29, 2018

CLERK

Sweeny, J.P., Richter, Webber, Gesmer, Moulton, JJ.

6350-
6350A-
6350B Index 653549/14

MFB Realty LLC, etc., et al.,
Plaintiffs-Appellants,

-against-

Ian Bruce Eichner, et al.,
Defendants-Respondents.

_____

Sinnreich Kosakoff & Messina LLP, Central Islip (Jarrett M. Behar of counsel), for appellants.

Perkins Coie LLP, New York (Gary F. Eisenberg of counsel), for respondents.

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Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 19, 2016, insofar as appealed from as limited by the briefs, dismissing the first through eighth and tenth causes of action without prejudice, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 29, 2016, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered on or about September 8, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiff MFB Realty LLC's motion for leave to amend the complaint and vacated the judgemnt, unanimously affirmed, without costs.

The court dismissed the first through eighth and tenth causes of action of the original complaint on the grounds that

they were derivative and MFB lacked standing to bring derivative claims because it was not a member of derivative plaintiff T. Park Central, LLC (T Park).

On appeal, plaintiffs contend that the documentary evidence does not definitively show that MFB was merely an assignee. This argument is unavailing. T Park's operating agreement clearly distinguishes between an assignee or transferee and a member. The document dated as of December 19, 2005 shows that defendants the Eichners merely consented to a transfer of former plaintiff Jay Furman's and nonparty Richard Birdoff's interests to MFB; they did not also consent to MFB's becoming a member of T Park. T Park's operating agreement provides: "Notwithstanding anything contained in this Agreement to the contrary, no . . . transferee shall become a Member without the written consent of Members owning ninety-five percent . . . of the Membership Interests." There is no such written consent in the record.

The motion court providently exercised its discretion in denying MFB leave to amend (*see Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). The proposed amended complaint is based on the same wrongs as the original complaint; it merely recasts derivative claims as direct ones. However, in reality, the claims in the proposed amended complaint are derivative, not direct (*see e.g. Glenn v Hoteltron Sys.*, 74 NY2d

386, 392 [1989] [claim of diversion of corporate assets is derivative, not direct]).

Moreover, since MFB is not a member of T Park, defendant Park Central LLC (T Park's managing member) does not owe MFB a fiduciary duty (*see Estate of Calderwood v ACE Group Intl. LLC*, 157 AD3d 190, 196-197 [1st Dept 2017]). Even if, arguendo, defendants (the majority members of T Park) owed a fiduciary duty to MFB (the assignee of the minority members), the harm suffered by MFB is "embedded in the harm to [T Park] . . . [and] cannot separately stand" (*Serino v Lipper*, 123 AD3d 34, 40 [1st Dept 2014]).

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

ENTERED: MAY 29, 2018

CLERK

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6438 In re Brookelyn M.,
Petitioner-Appellant,

-against-

Christopher M.,
Respondent-Respondent.

- - - - -

Christopher M.,
Petitioner-Respondent,

-against-

Brookelyn M.,
Respondent-Appellant.

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Schoeman Updike Kaufman & Gerber LLP, New York (Beth L. Kaufman of counsel), for appellant.

Law Office of Michelle F.P. Roberts, New York (Michelle F.P. Roberts of counsel), for respondent.

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Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about February 9, 2017, which, to the extent appealed from as limited by the briefs, dismissed appellant mother's motion for fees in the amount of $174,000, unanimously reversed, on the law and the facts, without costs, the motion granted to the extent of remanding the matter for a hearing to determine the amount of counsel fees to be awarded.

Appellant mother and respondent father have a child together, and in 2014, the father filed a custody petition. The

mother cross-moved for custody and sought interim counsel fees. The father cross-moved for counsel fees and filed an affirmation in opposition to the mother's application for interim counsel fees. The parties arrived at a settlement that resolved the issues in the custody matter, but left counsel fees to the court's determination. The mother sought counsel fees of $174,000, which the mother claims are attributable to the custody matter.[1]

The court denied the mother's request for counsel fees because, among other reasons, she retained private counsel although she was unemployed at the onset of the litigation. Further, at the time the decision was rendered, she earned an annual gross income of $44,000, and the father was unemployed. The court also held that the conduct of the parties throughout the custody matter did not support an award of counsel fees because it found no evidence that the father unnecessarily prolonged the litigation or that he caused undue fees to accrue in the litigation.

On appeal, the father contends that the court's ruling is correct because he did not unduly prolong the litigation or unnecessarily cause legal fees to accrue, and the employment

[1] The mother made several interim counsel fee applications, but they were not decided while the custody issue was pending.

statuses of the parties did not make the mother the less monied spouse. Further, the father contends he should not be obligated to pay rates of private counsel when the mother did not attempt to mitigate her legal expenses by retaining more affordable counsel based on her financial circumstances. However, if this court finds that the mother is entitled to an amount of counsel fees, he contends he is entitled to a hearing to determine the amount.

The purpose of awarding counsel fees is to further the objectives of "litigational parity" and prevent a more affluent spouse from considerably wearing down the opposition (*O'Shea v O'Shea*, 93 NY2d 187, 193 [1999]; *see Gottlieb v Gottlieb*, 138 AD3d 30 [1st Dept 2016], *lv dismissed* 27 NY3d 1125 [2016]). In its dismissal of the mother's motion for counsel fees, the court unduly relied upon the financial circumstances of the parties at the time it rendered its decision rather than weighing the historical and future earning capacities of both parties (*see Saunders v Guberman*, 130 AD3d 510, 511 [1st Dept 2015]). Here, although the father was unemployed at the time the court's decision was rendered, and the mother had secured employment, the father earned considerably more than the mother during the course of their relationship and has significantly more expected

earning capacity than the mother. Indeed, the financial and tax documents in the record support such a conclusion.

The father, however, is entitled to a hearing so that the relative financial positions of the parties and the value and extent of the counsel fees requested can be examined (*see Olsan v Olsan*, 100 AD2d 776 [1st Dept 1984], *appeal dismissed* 63 NY2d 649 [1984]; *see also Charpie v Charpie*, 271 AD2d 169 [1st Dept 2000]). While an evidentiary hearing is not required prior to making an interim award, it is required here since the mother is seeking fees following the final resolution of the case (*see Meyer v Meyer*, 229 AD2d 354 [1st Dept 1996]). Though the father did not formally request, by motion, a hearing on counsel fees, he did contest the mother's application for counsel fees in an affirmation in opposition to her application, and thus did not waive his right to a hearing (*see Mazin v Mazin*, 93 AD2d 881 [2d Dept 1983]). The fees here are significant and the father has raised questions about the bills. Moreover, in assessing the father's contentions that the mother overlitigated this matter,

we would need to consider what the father spent on legal fees. That information cannot be ascertained on this record.

Accordingly, we remand this proceeding.

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6689 The People of the State of New York, Ind. 4586/03
Respondent,

-against-

Hernando Ruiz,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Eleanor J. Ostrow of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about September 21, 2006, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when, despite defendant's point score of 135, it granted a downward departure to level two but declined to grant defendant a further departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The court sufficiently took into consideration the circumstances

surrounding defendant's sexual relationship with an underage girl, including his claim of being initially mistaken about her age, as well as all other mitigating and aggravating factors.

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6690 Dillon K., etc., et al., Plaintiffs-Appellants, Index 156625/12

-against-

Northern Blvd. 4818, LLC, et al., Defendants-Respondents.

Mark L. Lubelsky & Associates, New York (Josef K. Mensah of counsel), for appellants.

Richard Freiman & Associates, PLLC, New York (Gray L. Oxford of counsel), for respondents.

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered May 1, 2017, which, insofar as appealed from as limited by the briefs, granted the motion of defendants FC Northern Associates II, LLC and First New York Partners Management, LLC (collectively, defendants) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law in this action where infant plaintiff was injured when a door leading to a rooftop parking garage in defendants' building closed on his finger. Defendants submitted evidence showing that the subject door was regularly inspected and that there were no prior complaints, accidents, or other indication that the door was defective (*see Choudhury v City of New York*,

106 AD3d 523 [1st Dept 2013]; *Rodriguez v 105 E. Clarke Assoc. & LLC*, 26 AD3d 204 [1st Dept 2006]).

In opposition, plaintiffs failed to raise an issue of fact. Plaintiffs' argument that the doctrine of res ipsa loquitur applies to this case is unpersuasive, since plaintiff's version of the incident does not rule out the possibility that the injury was caused by infant plaintiff's own voluntary actions (*see Graham v Wohl*, 283 AD2d 261 [1st Dept 2001]).

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6691 In re Elijah Manuel V.,

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

Ismanuel V.,
Respondent-Appellant,

Jewish Child Care Association,
Petitioner-Respondent.

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Andrew J. Baer, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (James M. Abramson of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child.

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Order of disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about January 5, 2017, which, inter alia, found that respondent was a notice only father and, in the alternative, that he abandoned the subject child, unanimously affirmed, without costs.

Respondent challenges the constitutionality of the financial support requirement of Domestic Relations Law (DRL) § 111(1)(d). As an initial matter, we cannot, on this record, determine the adequacy of the notice he provided the Attorney General (*see* Executive Law § 71; CPLR 1012[b]). In any event, we find that respondent furnishes no grounds to find the statute

unconstitutional. He contends it violates equal protection guarantees by imposing a threshold requirement on unwed fathers, not imposed on unwed mothers, to make payment toward the support of a child born out-of-wedlock, but the Supreme Court has generally upheld such "gender-based distinction[s]" against an equal protection claim *(Lehr v Robertson*, 463 US 248, 266 [1983]). Moreover, as applied here, we find the statute is not unconstitutional, as the record amply establishes that respondent failed to maintain substantial and continuing contact with the child since the child entered foster care in 2012, and took no steps to manifest or establish his parental responsibility with respect to his son (*see Matter of Raquel Marie X.*, 76 NY2d 387, 398 [1990], *cert denied* 498 US 984 [1990]; *Matter of Jonathan Logan P.*, 309 AD2d 576 [1st Dept 2003]).

The agency bore and met its initial burden of going forward with evidence to show respondent's consent to adoption was not required under DRL 111(1), but respondent did not meet his ultimate burden of showing that his consent was required (*see Matter of Dominique P.*, 24 AD3d 335 [1st Dept 2005], *lv denied* 6 NY3d 712 [2006]). Respondent's incarceration alone was no excuse for his failure to maintain contact (*see Matter of Baby Boy C.*, 13 AD3d 619 [2d Dept 2004]). He did not rebut the testimony that he failed to contribute to his son's support according to his

means, and his efforts to shift blame to the agency for his failures are unavailing (*see* DRL 111[1][d]). Furthermore, since he did not testify at the hearing, the court properly drew a negative inference against him (*see Matter of Chad Nasir S. [Charity Simone S.]*, 157 AD3d 425 [1st Dept 2018]).

There exists no basis to disturb the court's alternative finding of abandonment. Respondent did not rebut the testimony that, for at least six months before the petition was filed, he did not visit with the child or communicate with him or the agency, and thus evinced an intent to forego his parental rights and obligations (*see* Social Services Law §§ 384-b[4][b]; 384-b[5][b]). He offers no reason to disturb the court's determination that his mother's testimony about his visits with the child in her home and while he was incarcerated was not credible (*see Matter of Weinberg v Weinberg*, 52 AD3d 616 [2d Dept 2008]), and, in any case, the testimony mainly revealed her own interest in being involved in her grandchild's life, an interest that cannot be imputed to the father (*see Matter of Karin R. [Delinda R.]*, 146 AD3d 526 [1st Dept 2017], *lv denied* 29 NY3d 903

[2017]).

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

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6692 Robert Jackson, et al., Index 114083/11
Plaintiffs-Respondents,

-against-

Hunter Roberts Construction Group, LLC, et al.,
Defendants-Appellants.

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Cullen and Dykman LLP, New York (David A. Beatty of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 15, 2017, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiff's complaint alleging violation of Labor Law §§ 200, 240(1), and 241(6) and common law negligence, unanimously modified, on the law, the motion granted to the extent of dismissing the Labor Law §§ 240(1) and 241(6) claims, and otherwise affirmed, without costs.

Plaintiff claims that he and a coworker were carrying a water main pipe when he lost his balance upon stepping on a makeshift ramp that "bowed." The weight of the pipe caused them to fall and, as plaintiff was trying to push or eject the pipe from his shoulder to prevent it from landing on him, the pipe

struck either a cart or a column, retracted back, and struck him in the leg.

The motion court properly denied defendants' motion for summary judgment dismissing the Labor Law § 200 and common law negligence claims as premature. Regardless of whether the court misinterpreted defendants' October 11, 2016 letter as seeking further discovery, the record indicates that "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212[f]). As no representatives from defendants have been deposed, and the record suggests that crucial facts may be within defendants' knowledge, additional discovery is necessary (*see Baghban v City of New York*, 140 AD3d 586 [1st Dept 2016]; *Figueroa v City of New York*, 126 AD3d 438, 439 [1st Dept 2015]).

However, defendants are entitled to dismissal of the Labor Law § 240(1) claim. Plaintiff's testimony established that he was not exposed to the type of elevation-related hazard contemplated by the statute. The height differential of 6 to 10 inches mediated by the ramp did not constitute a physically significant elevation differential covered by the statute (*see Sawczyszyn v New York Univ.*, 158 AD3d 510, 511 [1st Dept 2018]; *Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009]). Also, as the ramp was serving as a passageway, as opposed to the "functional equivalent" of a safety device enumerated under the

statute, it did not fall within the purview of the statute (*see Gomez v City of New York*, 63 AD3d 511 [1st Dept 2009]; *Paul v Ryan Homes*, 5 AD3d 58, 60-61 [4th Dept 2004]; *cf. Foutfana v City of New York*, 211 AD2d 550 [1st Dept 1995]). Further, the impetus for the pipe's descent was plaintiff's loss of balance, rather than the direct consequence of the force of gravity (*see Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585, 585 [1st Dept 2014]; *Ghany v BC Tile Contrs., Inc.*, 95 AD3d 768 [1st Dept 2012]).

Defendants are also entitled to dismissal of the Labor Law § 241(6) claim. Plaintiff relies on only 12 NYCRR § 23-1.5(c). Although 12 NYCRR § 23-1.5(c)(1) and (2) are too general to serve as Labor Law § 241(6) predicates, 12 NYCRR § 23-1.5(c)(3) is sufficiently specific to support a claim (*see Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558 [1st Dept 2015]). However, 12 NYCRR § 23-1.5(c)(3) is inapplicable, as the ramp does not

constitute a "safety device," "safeguard," or "equipment" as used in the provision.

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, J.J.

6693 Erick L. Veloz, Index 303235/12
Plaintiff-Appellant,

-against-

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

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Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about July 8, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the claims alleging false arrest, false imprisonment, and malicious prosecution, unanimously affirmed, without costs.

Defendants made a prima facie showing of probable cause supporting the issuance of the search warrant for the apartment where plaintiff was arrested, and plaintiff failed to raise a triable issue of fact. The search warrant was issued as a result of an investigation during which a confidential informant made three controlled buys in the apartment from two different individuals a few days before the issuance of the warrant. When the police officers arrived, plaintiff, who fit the description

of one of the drug dealers, was alone and had been sleeping in his shorts in the apartment. The officer recovered plaintiff's pay stub from the apartment, and they also retrieved narcotics and firearms. This showing of probable cause is a complete defense to plaintiff's claims of false arrest and false imprisonment (*see Nadal v City of New York*, 105 AD3d 598 [1st Dept 2013], *lv denied* 21 NY3d 861 [2013]). Furthermore, plaintiff had constructive possession of the contraband, because he had dominion and control over the apartment (*see Boyd v City of New York*, 143 AD3d 609, 610 [1st Dept 2016]).

The existence of probable cause is also fatal to plaintiff's claim for malicious prosecution (*see Rivera v City of New York*, 40 AD3d 334, 337 [1st Dept 2007], *lv dismissed* 16 NY3d 782 [2011]). Plaintiff also failed to show that the criminal proceeding against him was brought out of actual malice (*Nadal* at 599).

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6694 The People of the State of New York, Ind. 6021/11
Respondent,

-against-

Kelly Steeliy,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Charles Solomon, J.), rendered February 19, 2013,

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.

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

ENTERED: MAY 29, 2018

CLERK

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

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6696 Concourse Rehabilitation & Nursing Center, Inc., Plaintiff-Appellant, Index 305755/12

-against-

Nirav R. Shah, etc., et al., Defendants-Respondents.

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Neiman & Mairanz, P.C., New York (Marvin Neiman of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Scott A. Eisman of counsel), for respondents.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about September 21, 2016, which granted defendants' motion for summary judgment, converted the action to an article 78 proceeding and, upon conversion, dismissed the proceeding, and denied plaintiff's cross motion for summary judgment, unanimously affirmed, without costs.

Plaintiff Concourse Rehabilitation & Nursing Center, Inc. operates a 240-bed residential health care facility in the Bronx, which derives over 80% of its income from services rendered to Medicaid-eligible patients. In July 2012, plaintiff commenced this action seeking a declaratory judgment and asserting a 42 USC § 1983 claim to annul an audit performed by defendant the Office of the Medicaid Inspector General (OMIG), an independent office

of defendant New York State Department of Health (DOH). At issue in the action is plaintiff's ability to write-off bad debts related to a Medicaid recipient's "net available monthly income" (NAMI) (*see Sai Kwan Wong v Doar*, 571 F3d 247, 251–252 [2d Cir 2009]), which income must be applied toward the costs of care in a residential health care facility (*see* 18 NYCRR § 360-4.9; *see also* 18 NYCRR §§ 360-4.8[c][1] & 360-4.1[b][1]).

The proper vehicle for challenging a governmental agency's determination or action is via an article 78 proceeding (*see Rosenthal v City of New York*, 283 AD2d 156, 158 [1st Dept 2001]; *Butler v Wing*, 275 AD2d 273, 276 [1st Dept 2000], *lv denied* 95 NY2d 770 [2000]). Plaintiff's challenge to defendants' treatment of its allegedly uncollectible NAMI debt and the relief sought, to wit, the annulment of defendants' determination, fall within the purview of an article 78 proceeding. As such, conversion to an article 78 proceeding was proper (*see* CPLR 103[c]).

Upon conversion, dismissal for failure to exhaust administrative remedies was proper (*see* CPLR 7801[1]; *see also Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). Plaintiff commenced the action prior to OMIG's issuance of its draft and final audit reports for the subject years and did not avail itself of the administrative remedies available after issuance of the report, including by issuing a statement

detailing items of objection to the draft report and requesting a hearing (*see* 18 NYCRR §§ 517.5[c]; 519.7[a]). Plaintiff failed to demonstrate the futility of pursuing such remedies or any other exception to the exhaustion doctrine (*see Watergate II Apts.*, 46 NY2d at 57). Moreover, as the issue involves defendants' interpretation of its regulations, it must be first raised via administrative review (*see Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375–376 [1975]; *see also Matter of Sabino v DiNapoli*, 90 AD3d 1392, 1393-1394 [3d Dept 2011]).

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6697 Gwendolyn Snipes, Index 303681/10
Plaintiff-Appellant,

-against-

Kevin Schmidt, et al.,
Defendants-Respondents.

_____

Silbowitz Garafola Silbowitz Schatz & Frederick, LLP, New York (Jill Savedoff of counsel), for appellant.

Dwyer & Taglia, New York (Gary J. Dwyer of counsel), for Kevin Schmidt and Ramakrishna Transportation, Inc., respondents.

Caitlin Robin & Associates, New York (Kevin Volkommer of counsel), for Regency Extended Care Center, Inc., respondent.

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Appeal from order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about September 29, 2017, which granted defendants Kevin Schmidt and Ramakrishna Transportation, Inc.'s motion to dismiss the complaint on the ground of the unreasonable delay in substitution pursuant to CPLR 1021, unanimously dismissed, without costs, without prejudice to renewal on papers demonstrating the late plaintiff's counsel's authority to act.

The plaintiff in this personal injury action died after discovery was complete, leaving no surviving relatives and a will naming four beneficiaries. Although a petition was filed in Surrogate's Court seeking the appointment of an executor and the

issuance of letters testamentary, four years later, no appointment had been made. Defendants moved by order to show cause, on notice to the four persons potentially interested in the estate, to dismiss the complaint on the ground of the delay in seeking substitution. None of the interested persons appeared, and the motion was granted (*see Thomas v Benedictine Hosp.*, 8 AD3d 781 [3rd Dept 2004]).

Although the decedent's former counsel appeared in opposition to the motion, his power to act on the decedent's behalf had terminated upon her death, and he did not state the basis of his or his law firm's authority to act in the matter (*see Silvagnoli v Consolidated Edison Empls. Mut. Aid Socy.*, 112 AD2d 819, 820 [1st Dept 1985]). Counsel indicated in his opposing papers that the firm had been retained in connection with the probate proceedings, but he did not state who had retained the firm and did not purport to appear on behalf of the

estate or the interested persons. Accordingly, he has no standing to appeal from the order that dismissed the complaint pursuant to CPLR 1021 (see *Thomas v Benedictine Hosp.*, 8 AD3d at 782).

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6698 The People of the State of New York, Respondent, Ind. 3751/14

-against-

Cacique Cabassa, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and White & Case LLP, New York (Andrei A. Popovici of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered August 3, 2016, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of five years, unanimously modified, on the law, to extent of reducing defendant's conviction to robbery in the third degree and remanding for resentencing, and otherwise affirmed.

There was a reasonable view of the evidence supporting defendant's request for submission of third-degree robbery as a lesser included offense, and we have considered and rejected the People's argument that the issue is unpreserved. The appropriate remedy for this type of error would normally be a new trial. However, the People's concession that, if we reach this error, the conviction should be reduced to third-degree robbery renders

a new trial unnecessary because the modification provides defendant with a greater remedy than he would have received had the trial court submitted that charge to the jury (*see* CPL 470.20; *People v Gilliard*, 134 AD2d 178, 180 [1st Dept 1987], *affd on other grounds* 72 NY2d 877 [1988]).

The court properly denied defendant's severance motions. "[S]everance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt" (*People v Mahboubian*, 74 NY2d 174, 184 [1989]). Defendant's defense was that although he was with the victim, no robbery had occurred and the victim had fabricated his account of the incident. This defense was not irreconcilable with the codefendant's defense that the victim's account was not credible and that, even if there had been a robbery, it occurred after the codefendant was no longer present (*see People v Dillon*, 201 AD2d 265 [1st Dept 1994], *lv denied* 83 NY2d 871 [1994]). The record does not support defendant's assertion that the codefendant's counsel acted as a second prosecutor, and there was no significant danger of the alleged conflict in defenses leading the jury to infer defendant's guilt.

The court properly admitted evidence that a police sergeant

knew defendant from his work in the Community Affairs Bureau, as there was no implication that the sergeant had contact with defendant from a prior arrest or bad act (*see People v Warren*, 2 AD3d 186 [1st Dept 2003], *lv denied* 2 NY3d 747 [2004]). In any event, any potential for prejudice was outweighed by the probative value of this background information under the circumstances of the case.

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6699 The People of the State of New York, Respondent, Ind. 2500N/13 167N/13

-against-

Reginald Herbin, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at calendar proceedings; Bruce Allen, J. at jury trial and sentencing), rendered April 23, 2015, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of two years, unanimously reversed, on the law, and the matter remanded for a new trial.

The knowing, voluntary, and intelligent waiver of the right to counsel by a defendant who seeks to proceed pro se requires a "searching inquiry" in which the court must communicate to the defendant both the "risks inherent in proceeding pro se" and "the singular importance of the lawyer in the adversarial system of adjudication" (*People v Crampe*, 17 NY3d 469, 481-82 [2011], *cert denied sub nom. New York v Wingate*, 565 US 1261 [2012]; *see*

People v Cole, 120 AD3d 72 [1st Dept 2014], *lv denied* 24 NY3d 1082 [2014]). Neither a defendant's expression of a strong desire to proceed pro se, nor elicitation of information demonstrating the defendant might be relatively capable of doing so, is a substitute for the two above-cited essential components of a searching inquiry, which were all but completely absent here. The relevant portion of the trial court's colloquy with defendant on this subject was essentially limited to warning him that self-representation was a "big mistake" and that the court had seen many pro se defendants convicted after trial.

Even when the record is viewed as a whole, the required inquiry does not appear. Defendant had made several requests for self-representation before a calendar court. However, in each instance the court denied the request on the basis of its initial inquiry about defendant's understanding of the charges, without reaching the stage of the required pro se inquiry at issue on appeal.

Accordingly, defendant is entitled to a new trial. However,

the fact that he has served his sentence does not warrant dismissal of the indictment. Since we are ordering a new trial, we find it unnecessary to reach defendant's remaining contention.

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6700 Hanson Cuthbert, Index 301108/13
Plaintiff-Appellant,

-against-

Foreign Development Service, Ltd.,
et al.,
Defendants-Respondents.

_____

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

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about May 12, 2017, which granted defendants' motion to renew and reargue their prior motion for summary judgment dismissing the complaint and, upon reargument, granted the motion for summary judgment, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries he sustained when one of the cellar doors he had opened to take garbage up to the sidewalk from the restaurant where he was employed snapped back and struck him on the back of the head.

The court providently exercised its discretion in granting defendants' motion for renewal and reargument of their prior motion for summary judgment so that they could submit a lease extension to which they had referred in their initial moving

papers but which they had inadvertently failed to attach to the papers (*see* CPLR 2001). The lease extension demonstrated that the lease was in effect on the date of plaintiff's accident and that plaintiff had received it before defendants brought their motion; thus, its consideration caused no prejudice to plaintiff.

Although defendant Foreign Development Service, Ltd. was an out-of-possession landlord with the right to reenter the leased premises to inspect or repair, the alleged defect in the cellar doors, i.e., rusty hinges and no device, such as a bar, to hold the doors open, was not a structural defect contrary to a specific statutory safety provision (*see Almanzar v Picasso's Clothing*, 281 AD2d 341 [1st Dept 2001]; *Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413, 414 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]; *Baez v Barnard Coll.*, 71 AD3d 585 [1st Dept 2010]). Defendant Nelson Management Group, Ltd., the managing agent, managed only the floors of residential apartments above the

restaurant and had no control over the restaurant's space.

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: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6701 Kathleen Mimikos, Index 160295/14
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Kerner & Kerner, P.C., New York (Kenneth T. Kerner of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered January 23, 2017, which granted defendant City of New York's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The City established its entitlement to judgment as a matter of law in this action where plaintiff was injured when she slipped and fell on snow and ice while crossing the street within the crosswalk. The City submitted, inter alia, climatological data showing that there was a storm in progress when the accident happened, which plaintiff does not dispute (*see Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618 [1st Dept 2013]; *Rusin v City of New York*, 133 AD3d 648 [2d Dept 2015]).

In opposition, plaintiff failed to raise a triable issue of fact. The certified expert report she submitted does not address

how the City created or exacerbated the icy condition of the crosswalk and only states that it was created during the heavy snow falling when the accident happened (*see Sevilla v Calhoun Sch., Inc.*, 127 AD3d 446 [1st Dept 2015]; *Sing Ping Cheung v City of New York*, 234 AD2d 91 [1st Dept 1996]). Plaintiff's claim that the City may be held liable for failing to adhere to its snow removal protocols is unpersuasive, because liability "cannot be based on the violation of an internal rule imposing a higher standard of care than the law, at least where there is no showing of detrimental reliance by the plaintiff" (*Prince v New York City Hous. Auth.*, 302 AD2d 285, 286 [1st Dept 2003]). Nor can the City be held liable for failing to salt the roadway before the storm, because such alleged inaction does not constitute an affirmative act of negligence that caused, created or exacerbated the icy condition (*see Schlausky v City of New York*, 41 AD2d 156, 158 [1st Dept 1973]).

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6702 David Braunstein, as Administrator of the Estate of Pauline Braunstein, Deceased,
Plaintiff-Appellant,

-against-

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

Mt. Sinai Medical Center, et al.,
Defendants.

Index 308997/09

The Altman Law Firm, PLLC, Woodmere (Michael T. Altman of counsel), for appellant.

McAloon & Friedman, P.C., New York (Gina Bernardi DiFolco of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered January 19, 2017, dismissing the complaint and all cross claims as against defendants Maimonides Medical Center and Victor Sasson, M.D., unanimously affirmed, without costs.

Plaintiff failed to raise an issue of fact in opposition to defendants' undisputed prima facie showing that they did not depart from the accepted standard of medical and nursing care for patients at risk for bed sores. Plaintiff's medical expert was qualified to render an opinion (*see Limmer v Rosenfeld*, 92 AD3d 609 [1st Dept 2012]). However, in detailing the skin care protocol for the prevention of decubitus ulcers, the expert

stated the same standard of care as that stated by defendants' experts, and effectively conceded that defendants' experts were correct that the protocol must be tailored to the individual patient's condition, by quoting federal Department of Health and Human Services guidelines advising that "individuals . . . at risk for developing pressure ulcers should be repositioned at least every two hours if consistent with overall patient goals" (*see Negron v St. Barnabas Nursing Home*, 105 AD3d 501 [1st Dept 2013]).

Nor was an issue of fact raised by the expert's opinion that defendants caused the decedent's ulcer by not documenting their records in greater detail or her finding that the failure to document was itself the proximate cause of the ulcers. A failure to document each element of the skin care protocol does not equate to a failure to perform each element or to a cause of the ulcer itself (*see Topel v Long Is. Jewish Med. Ctr.*, 55 NY2d 682,

684 [1981]; *Rivera v Jothianandan*, 100 AD3d 542, 543 [1st Dept 2012], *lv denied* 21 NY3d 861 [2013]).

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

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6703 & M-1977 In re Kimberly Austin, et al., Petitioners, Index 100918/16

Julius Dixson, Petitioner-Appellant,

-against-

Maria Milin, etc., Respondent-Respondent,

PS 157 Lofts LLC, et al., Landlords-Respondents-Respondents.

_____

Julius Dixson, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for Maria Milin, respondent.

Horing, Welikson & Rosen, P.C., Williston Park (Rene Digrugilliers of counsel), for P.S. 157 Lofts LLC, and 327 St. Nicolas LLC, respondents.

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Judgment (denominated an order), Supreme Court, New York County (Barbara A. Jaffe, J.), entered March 21, 2017, which denying the petition seeking, inter alia (1) a writ of prohibition against the enforcement of an order of Civil Court, New York County (Housing Part) (Maria Milin, J.), entered on or about February 18, 2016, which granted defendant landlords' motion for re-executing a warrant of eviction and (2) restraining landlords from executing the warrant of eviction, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously

affirmed, without costs.

Supreme Court providently exercised its discretion in denying the writ of prohibition (*see* Matter of Haggerty v Himelein, 89 NY2d 431, 435 [1997]; *Matter of Town of Huntington v New York State Div. of Human Rights*, 82 NY2d 783, 786 [1993]). Housing Court's February 2016 authorization of re-execution of the eviction warrant (following exhaustion of numerous attempts to appeal the December 2013 judgment awarding possession to landlord) was lawful and not in excess of its jurisdiction (*see* RPAPL 749[1]). Additionally, no writ of prohibition would lie even if Housing Court's February 2016 order were somehow defective, since petitioners could have obtained review of the order via ordinary direct appeal. Indeed, petitioners make clear that they consciously eschewed a direct appeal, in favor of a writ of prohibition, in order to avoid appealing the underlying order to the Appellate Term. We note that the ultimate issue of landlord's right to possession of the apartment was finally decided by Appellate Term in its December 2013 judgment and is

res judicata (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]). We have considered petitioners' remaining contentions, and find them unavailing.

M-1977 - *In re Kimberly Austin v Maria Milin*

Motion to expand appendix denied.

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6704- Index 305348/11
6705 Maria Hernandez,
Plaintiff-Appellant,

-against-

Trevor Marcano, et al.,
Defendants-Respondents.

_____

The Sullivan Law Firm, New York (James A. Domini of counsel), for appellant.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf LLP, Brooklyn (Thomas Torto of counsel), for Trevor Marcano and Crescent Cab Corp., respondents.

Richard T. Lau & Associates, Jericho (Kathleen E. Fioretti of counsel), for Daniel Alvarado and Michael Cook, respondents.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about June 23, 2017, which denied plaintiff's motion to renew defendants' motions for summary judgment dismissing the complaint as against them for lack of serious injury under Insurance Law § 5102(d), unanimously reversed, on the law and the facts, without costs, plaintiff's motion granted, and, upon renewal, defendants' motions denied as to the claims of serious injury to the cervical and lumbar spine and otherwise granted. Appeal from order, same court (Sharon A.M. Aarons, J.), entered May 5, 2016, unanimously dismissed, without costs, as academic.

The court improvidently exercised its discretion in denying plaintiff's motion to renew, which sought to submit an affirmation by her treating physician that, although referred to in her opposition papers, had been inadvertently omitted from the set of papers filed in court (*see* CPLR 2221[e]). Plaintiff demonstrated that the omission was the result of law office failure and that consideration of the affirmation would not prejudice defendants (*see Cruz v Castanos*, 10 AD3d 277 [1st Dept 2004]; *Cespedes v McNamee*, 308 AD2d 409 [1st Dept 2003]; *see also Telep v Republic El. Corp.*, 267 AD2d 57, 58 [1st Dept 1999]).

Defendants established prima facie that plaintiff did not suffer serious injury to her cervical or lumbar spine through the affirmed reports of their medical experts, who found normal ranges of motion and no objective evidence of injury in the subject body parts (*see Reyes v Se Park*, 127 AD3d 459 [1st Dept 2015]; *Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]; *Paduani v Rodriguez*, 101 AD3d 470 [1st Dept 2012]). Defendants did not have to address plaintiff's claim of serious injury to her left shoulder, because that injury was not pleaded in the bill of particulars and was raised for the first time in opposition to their motion (*see Santos v Traylor-Pagan*, 152 AD3d 406 [1st Dept 2017]; *Boone v Elizabeth Taxi, Inc.*, 120 AD3d 1143 [1st Dept 2014]). However, in any event, defendants Marcano and Crescent

Cab Corp.'s expert found full range of motion and absence of injury to the left shoulder, and defendants Alvarado and Cook submitted plaintiff's hospital records showing that plaintiff sought no treatment for her shoulder after the accident, indicating that any shoulder condition was not causally related to the accident (*see Lee v Rodriguez*, 150 AD3d 481 [1st Dept 2017]).

In opposition, plaintiff raised an issue of fact as to her cervical and lumbar spine through her physician's affirmed report, which found continuing range of motion limitations, positive results on objective tests for cervical and lumbar injury, and causally related these injuries to the accident (*Moreira v Mahabir*, 158 AD3d 518, 518-519 [1st Dept 2018]; *Encarnacion v Castillo*, 146 AD3d 600 [1st Dept 2017]; *Santana v Tic-Tak Limo Corp.*, 106 AD3d 572 [1st Dept 2013]). Plaintiff also submitted affirmed reports of MRIs of her spine performed shortly after the accident.

To the extent plaintiff asserts a left shoulder injury, as noted, it was not pleaded in her bill of particulars, and, in any event, she submitted no evidence of contemporaneous treatment of the shoulder in the period following the accident, indicating a lack of any causal connection (*see Rosa v Mejia*, 95 AD3d 402 [1st Dept 2012]).

Defendants satisfied their initial burden as to plaintiff's 90/180-day claim through plaintiff's own deposition testimony admitting that she was able to return to work during the first two to three weeks after the accident, and plaintiff failed to submit evidence in opposition sufficient to raise an issue of fact (*see Komina v Gil*, 107 AD3d 596, 597 [1st Dept 2013]).

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6706 In re Baychester Retail III LLC, Index 157091/16
Petitioner-Appellant,

-against-

Margery Perlmutter, et al.,
Respondents-Respondents.

_____

Akerman LLP, New York (Richard G. Leland of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered April 6, 2017, denying the petition to annul a determination of respondent Board of Standards and Appeals of the City of New York (BSA), dated May 3, 2016, which affirmed the New York City Department of Buildings' (DOB) denial of petitioner's applications to install certain advertising signs, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

BSA's determination that the New York City Department of Buildings properly denied petitioner's applications has a rational basis and is supported by substantial evidence (*see generally Matter of Fuhst v Foley*, 45 NY2d 441, 444 [1978]; *Matter of Chelsea Bus. & Prop. Owners' Assn., LLC v City of New York*, 107 AD3d 414 [1st Dept 2013]). Petitioner seeks to install

a structure consisting of 27 two-sided LED panels, with 12 inches of space between adjacent panels, affixed to a single pole. BSA rationally deemed an entire side of the proposed structure to be a single illuminated advertising sign for the purpose of calculating its "surface area," which is defined as "the entire area within a single continuous perimeter enclosing the extreme limits of writing, representation, emblem, or any figure of similar character, together with any material or color forming an integral part of the display or used to differentiate such sign from the background against which it is placed" (New York City Zoning Resolution § 12-10). It is undisputed that if the proposed structure constitutes one sign rather than 27 separate signs, it does not comply with the applicable zoning regulations.

Insofar as DOB's determination is inconsistent with any of its past decisions, the doctrine of judicial estoppel does not avail petitioner (*see Matter of Parkview Assoc. v City of New York*, 71 NY2d 274 [1988], *appeal dismissed, cert denied* 488 US 801 [1988]). Moreover, the record reflects BSA's reasons for accepting this departure from precedent, and therefore permits judicial review (*see Matter of Take Two Outdoor Media LLC v Board of Stds. & Appeals of the City of N.Y.*, 146 AD3d 715 [1st Dept 2017]; *cf. Matter of Charles A. Field Delivery Serv. [Roberts]*,

66 NY2d 516 [1985] [administrative agency decision that neither adheres to the agency's own precedent nor indicates reasoning for different result does not permit judicial review and must be reversed as arbitrary and capricious]).

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6707 The People of the State of New York, Ind. 1515/15
Respondent,

-against-

Steven Perez,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Emma L. Shreefter of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Kristina D. Amundsen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Judith Lieb, J. at plea and sentencing), rendered February 23, 2016, unanimously affirmed.

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

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6708-
6709N Index 653118/14

Lukasz Gottwald, etc., et al.,
Plaintiffs-Respondents,

-against-

Kesha Rose Sebert, professionally known as Kesha,
Defendant-Appellant,

Pebe Sebert, et al.,
Defendants.

- - - - -

[And Another Action]

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O'Melveny & Myers LLP, New York (Leah Godesky and James Pearl of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Mitchell Silberg & Knupp LLP, New York (Christine Lepera of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 20, 2017, which denied defendant Kesha's (defendant) motion for leave to file second amended counterclaims, and order, entered November 8, 2017, which to the extent appealed from as limited by the briefs, granted, in part, plaintiffs' motion to compel production of documents and struck other documents from the record on the motion, unanimously affirmed, with costs.

Kesha's proposed amendments are palpably insufficient and devoid of merit (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74

AD3d 499 [1st Dept 2010]). Her counterclaim seeking declaratory relief terminating the agreements on the ground of impossibility and impracticability of performance was speculative, contradicted by her own allegations that she had continued performing under the agreements and, as to at least one of the agreements, the impossibility was not produced by an unanticipated event that could not have been foreseen or guarded against (*see Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]). The court also properly denied Kesha leave to assert a counterclaim for declaratory relief terminating the agreements on the ground that they violate California Labor Code § 2855, as the unambiguous New York choice-of-law provisions contained in the agreements preclude the application of that California statute (*see generally Ministers & Missionaries Benefit Bd. v Snow*, 26 NY3d 466, 470 [2015]). There was no basis to invalidate the choice of law clauses (*see Finucane v Interior Constr. Corp.*, 264 AD2d 618, 620-621 [1st Dept 1999]).

The court properly granted plaintiffs' motion to compel Kesha to produce documents. The communications between her counsel and press agents do not reflect a discussion of legal strategy relevant to the pending litigation but, rather, a discussion of a public relations strategy, and are not protected under the attorney-client privilege (*see WA Rte. 9, LLC v PAF*

Capital LLC, 136 AD3d 522 [1st Dept 2016]). Kesha also failed to satisfy her burden to establish that the documents sought were protected work product (*see Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [1st Dept 2005]).

We have considered Kesha's remaining arguments, including that the motion court should not have stricken documents from the record on the motion, and find them unavailing.

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

ENTERED: MAY 29, 2018

CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6710N Patrick McMahon, Index 156669/12
Plaintiff-Respondent,

-against-

New York Organ Donor Network,
Defendant-Appellant.

- - - - -

Center for Donation and Transplant, Upstate New York Transplant Services, Inc., NJ Sharing Network, Southwest Transplant Alliance, Inc., Donor Network West and Nebraska Organ Recovery,
Amici Curiae.

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Ganfer & Shore, LLP, New York (Mark A. Berman of counsel), for appellant.

Borrelli & Associates, P.L.L.C., Great Neck (Caitlin Duffy of counsel), for respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for amici curiae.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 7, 2017, which granted plaintiff's motion to compel defendant to produce documents in response to Demand No. 1 of his Fifth Demand for the Production of Documents (erroneously referred to as Demand No. 5 of Plaintiff's Sixth Demand)in accordance with the parties' confidentiality order, unanimously modified, on the law, to direct that all identifying patient information be redacted, and otherwise affirmed, without costs.

Plaintiff alleges that defendant, a federally designated organ procurement organization (OPO), fired him, in violation of Labor Law § 740(2), in retaliation for his complaining that defendant's employees procured organs without performing legally required tests and from individuals who still showed signs of life. In the complaint, plaintiff identified four individuals whose organs were allegedly improperly procured.

The records concerning these four individuals are material and necessary to plaintiff's claim (*see* CPLR 3101[a]). To prevail on a claim for retaliatory termination in violation of Labor Law § 740(2), plaintiff must prove that he was fired because he objected to or threatened to disclose a practice that was in violation of a law or regulation (Labor Law § 740[2]; *Webb-Weber v Community Action for Human Servs., Inc.*, 23 NY3d 448, 452-453 [2014]). The subject medical records will allegedly show that defendant pressured doctors to declare people dead in violation of regulations regarding the making of such determinations (*see* Department of Health Regulations [10 NYCRR] § 400.16).

Disclosure of these records is not prohibited by federal law. Although defendant is not a covered entity under the Health Insurance Portability and Accountability Act (HIPAA) (*see* 45 CFR 160.102; 160.103), it is authorized to receive medical

records from covered entities "for the purpose of facilitating organ, eye or tissue donation and transplantation" (45 CFR 164.512[h]). It is also required to abide by HIPAA's privacy protections pursuant to New York Public Health Law (PHL) § 4351(8), which provides, "Any employee or agent of a federally designated organ procurement organization, eye bank or tissue bank . . . shall be held to the same standard of confidentiality as that imposed on employees of the hospital." However, because the subject disclosure would be made in the course of a judicial proceeding and pursuant to a qualified protective order, it is authorized under HIPAA (*see* 45 CFR 164.512[e][1][ii][B], [iv], [v]).

Nevertheless, PHL § 4351(8) renders defendant's documents subject to the protections of the physician-patient privilege set forth at CPLR 4504. This privilege is personal to the patient and is not terminated by death (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 53 [2016]). It has not been expressly or implicitly waived in this case by the donors' next of kin (*see Perez v Fleischer*, 122 AD3d 1157, 1159 [3d Dept 2014], *lv dismissed* 25 NY3d 985 [2015]). However, plaintiff demonstrated that the information in the medical records is material and necessary to his claim and that "the circumstances warrant overcoming the privilege and permitting discovery of the records

with all identifying patient information appropriately redacted to protect patient confidentiality" (*see Seaman v Wyckoff Hgts. Med. Ctr., Inc.*, 25 AD3d 596, 597 [2d Dept 2006]; *accord Cole v Panos*, 128 AD3d 880, 883 [2d Dept 2015]). Allowing disclosure under these circumstances is consistent with the public policy underlying the whistleblower statute, i.e., to encourage employees to report hazards to supervisors and the public (*see Leibowitz v Bank Leumi Trust Co. of N.Y.*, 152 AD2d 169, 176 [2d Dept 1989]).

Liew v New York Univ. Med. Ctr. (55 AD3d 566 [2d Dept 2008]), on which defendant relies, is distinguishable, because, although it involved organ donation, it did not address whether the circumstances of that case warranted overcoming the privilege.

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

ENTERED: MAY 29, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Kahn, Moulton, JJ.

6741 Jamie W. Rodriguez, etc., Index 21640/06
Plaintiff-Respondent,

-against-

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

Kelly Pena, et al.,
Defendants.

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Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for the City of New York, appellant.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Richard C. Imbrogno of counsel), for Kinney Parking, Inc., Kinney Parking System Inc. and Kinney Parking of the Bronx, Inc., appellants.

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

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered March 23, 2016, which, to the extent appealed from as limited by the briefs, denied the motions of defendants City of New York and defendants Kinney Parking, Inc., Kinney Parking System, Inc. and Kinney Parking of the Bronx, Inc. (collectively Kinney) for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

The decedent, who trespassed onto a Yankee Stadium parking

lot in the off season together with other trespassers who similarly rode motorcycles, dirt bikes and all-terrain vehicles, suffered fatal injuries in a collision with an all-terrain vehicle operated by defendant Pena. The record shows that the nature of the trespass activity involved was commonplace for the parking lot in question, for at least two years, and that drag racing would sometimes be involved. Plaintiff alleged that the City (as lot owner) and Kinney (as lessee) were negligent for not repairing and/or securing the lot's perimeter fence, and in not employing proper security or supervision to keep trespassers off the premises.

Here, the subject property was physically conducive to the motorcycle activity taking place thereon, and was appropriate for public use in pursuing the activity as recreation (*see* General Obligations Law § 9-103). As such, the City is immune from liability for any ordinary negligence on its part that may have given rise to the cause of the decedent's accident, and plaintiff has not otherwise demonstrated that the City's challenged conduct was willful or malicious as might preclude the City's reliance on the defense afforded under General Obligations Law § 9-103 (*see Bragg v Genesee County Agric. Socy.*, 84 NY2d 544 [1994]; *Iannotti v Consolidated Rail Corp.*, 74 NY2d 39 [1989]; *Fenton v Consolidated Edison Co. of N.Y.*, 165 AD2d 121 [1st Dept 1991], *lv*

denied 78 NY2d 856 [1991]).

Furthermore, although Kinney has not relied upon General Obligation Law § 9-103 as a potential defense to the action against it, the statute's defense is available to lessees as well as property owners (§ 9-103[1][a]). Inasmuch as the issue appears on the face of the record, involves no new facts and could not have been avoided if it were timely raised (*see Blainey v Metro N. Commuter R.R.*, 99 AD3d 588, 590 [1st Dept 2012], *lv denied* 21 NY3d 859 [2013]), dismissal of the action is warranted as against Kinney as well.

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

ENTERED: MAY 29, 2018

CLERK