

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**AUGUST 4, 2016**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Manzanet-Daniels, Gische, Kahn, JJ.

456- Ind. 53125C/05  
457 The People of the State of New York, SCI 2607C/05  
Respondent,

-against-

Rafael Perez,  
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

Rafael Perez, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered November 29, 2006, convicting defendant, after a jury trial, of robbery in the first degree and violation of probation, and sentencing him, on the robbery conviction, as a second felony offender, to a term of 15 years, and on the violation of probation, to a concurrent term of 5 years, affirmed. Judgment,

Supreme Court, Bronx County (John N. Byrne, J.), rendered March 7, 2005, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to a term of six months, concurrent with five years' probation, modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

Defendant was apprehended by police officers who were investigating a pattern of robberies inside a New York City Housing Authority (NYCHA) building by performing a "vertical patrol." The police had made prior arrests for narcotics and trespass at the building, and considered it a high-crime area. The officers were in plain clothes, with their shields displayed around their necks. As part of the investigation, the officers were knocking on residents' doors and conducting interviews.

While the officers were on the seventh floor, the elevator door opened. Several individuals exited the elevator, followed by defendant, who was wearing a black T-shirt over a yellowish-tan hooded sweatshirt with the hood up. Defendant took one step out of the elevator, but, apparently upon noticing the officers, went back into the elevator. When one of the officers said to him, "Can you hold the door, police, hold the door," defendant "kept pressing" the elevator button to close the door. The door

closed and the elevator went up. According to the officer, defendant's behavior, coupled with the fact that the building entertained heavy narcotics traffic, motivated him and his colleagues to go up the stairs to verify that defendant belonged in the building. When the elevator did not stop on the eighth floor, the officers walked to the ninth floor and saw defendant in the hallway. One of the officers approached defendant, again identified himself as a police officer, and asked him if he lived in the building. Defendant did not respond, and turned and faced the wall with his head down and his hood up. Upon approaching defendant, the officer observed a bulge in the sleeve covering defendant's right arm, which defendant was holding stiffly "straight down" from his body with his hands hidden under his sleeves. He again asked defendant if he lived in the building, and again defendant did not respond. The officer then asked defendant if he had any weapons, and, when defendant remained silent, he directed him to show his hands. When defendant refused to comply, the officer repeated his direction "several times," but defendant would not cooperate. Concerned for his safety, the officer grabbed defendant's wrist area, where he felt a metal object. He then raised defendant's arm, pulled back his sweater, and observed the silver tip of a machete. Defendant was

ordered to drop the machete, and again refused to comply. The officers removed the two-foot machete from his sleeve. Defendant was arrested, and \$175 was recovered from him.

Around the same time, a police sergeant received a radio transmission describing a robbery that had occurred earlier that evening near the building where defendant had been arrested. The sergeant was informed that the complainant reported that he was robbed at the point of a machete by two males, one with a red jacket and the other with a black shirt over a yellow mustard hooded sweatshirt. While canvassing for suspects, the sergeant received a phone call from the officer who had arrested defendant in which the officer reported the arrest and defendant's possession of a machete. Upon hearing the description of defendant's clothing, which matched the description of the robbery suspect, the sergeant instructed the arresting officer to hold defendant at the scene until he arrived. He then picked up the complainant and transported him to outside the building where defendant had been arrested and was being held in the lobby. From within a police vehicle, and not having been informed that a machete was recovered or told that the person he would view matched the description he gave to police, the complainant, upon seeing the handcuffed defendant through the window of the

building lobby, immediately identified defendant as the person who had robbed him.

Defendant, still handcuffed, was then placed in a police van and met by another officer, who asked him how he was doing. Defendant replied by saying that he knew he was "going up north" and that he would "tell you what you want" if he was given a sandwich. The officer transported defendant to the precinct, placed him in the debriefing room, and instructed two officers to get defendant a sandwich. When they returned with the sandwich 15 to 20 minutes later, the officer gave it to defendant. Immediately, defendant stated that "[t]he other guy [you are] looking for" was in his apartment. The officer never questioned defendant and did not advise him of his *Miranda* rights.

Supreme Court denied defendant's motion to suppress. With regard to the stop and search of defendant, the court found that "all of the police actions were justified from their inception." The court concluded that defendant caused the officers to become suspicious when he stepped back into the elevator after observing them with their shields displayed and failed to comply with the direction to hold the elevator door. This, the court held, gave the officers the necessary predicate to follow defendant to the ninth floor and ask him if he lived in the building. The court

further concluded that the arresting officer had a legitimate concern for his safety and a credible reason to believe defendant had a weapon, based on defendant's refusal to answer his questions, the manner in which he was holding his arm, and the bulge under his sleeve. The court found that once defendant refused to comply with the officer's direction to show his hands, the officer was justified in taking the added step of pulling back defendant's sleeve, which revealed the presence of the machete.

The court ruled that the showup was not suggestive because the sergeant who brought the complainant to the building where defendant was arrested did not reveal to the complainant that defendant possessed a machete and that defendant matched the complainant's description of his assailant to police. It noted that the complainant's immediate identification of defendant, without any prompting, indicated that the identification was not tainted by suggestiveness and was not the fruit of any unlawful police conduct. Regarding defendant's statements, the court held that while the People conceded custody, defendant was not interrogated and that his statements were completely spontaneous.

Defendant argues on appeal that his arrest was wrongful because the entire series of events that precipitated it was

based on a misperception of behavior that was not inherently suspicious and that was consistent with his right to be left alone. The People maintain that the police officers had the right to question defendant based on his mere presence in the building, since it was a NYCHA building that was rife with trespassing and other illegal activity. In any event, the People contend that defendant's retreat into the elevator was sufficient to, at the very least, trigger their right to inquire, and that the actions by defendant that followed justified the officers' decisions to grab his arm and arrest him after discovering the machete.

In determining whether a police encounter with a member of the public is justified, we must consider all of the attendant circumstances (*see People v Benjamin*, 51 NY2d 267, 271 [1980]; *People v Stephens*, 47 AD3d 586, 588-589 [1st Dept 2008], *lv denied* 10 NY3d 940 [2008]). Here, one such circumstance was the fact that the building was owned by NYCHA and that the officers had a duty to keep it free of trespassers (*see People v Williams*, 16 AD3d 151 [1st Dept 2005], *lv denied* 5 NY3d 771 [2005]). It is unclear from *People v Barksdale* (26 NY3d 139 [2015]), recently decided by the Court of Appeals, whether defendant's mere presence in the building gave rise to a level one inquiry under

*People v De Bour* (40 NY2d 210 [1976]), since *Barksdale* specifically dealt with a private building registered in the trespass affidavit program. However, the officers did not testify that defendant's mere presence in the building caused them to suspect that he did not belong there; rather, it was that fact combined with his effort to prevent them from getting into the elevator with him. Even if the officers did not have an objective credible reason to question defendant based only on *Barksdale*, the building's trespass history, together with defendant's apparently panicked attempt to avoid contact with them upon their attempt to enter the elevator, gave the officers the right to inquire of defendant.

It is not insignificant that defendant actively evaded the officers' efforts to get into the elevator with him. Indeed, that is what distinguishes this case from *People v Johnson* (109 AD3d 449 [1st Dept 2013], *appeal dismissed* 23 NY3d 1001 [2014]). In *Johnson*, this Court reversed the denial of suppression of a gun recovered from the defendant. The sole predicate for the initial encounter there was, according to the officers in that case, the reputation of the building as "drug-prone" and the defendant's action of, while descending a staircase immediately upon seeing the officers in the lobby, freezing and jerking back

(109 AD3d at 449). Notably, the defendant in *Johnson* did not attempt to retreat from the officers (*id.*). Here, to the contrary, defendant not only retreated back into the elevator after initially stepping out of it, but also tried to bar the officers from following him into the elevator.

Further, in *Johnson*, there was no mention of a history of trespass in the building, whereas the officer who initially encountered defendant testified that he had made trespass arrests before in the subject building. While, again, the building may not have been a trespass affidavit building like the building in *Barksdale* (which, notably, was decided after *Johnson*), it is at the very least relevant that the officers were on alert for people who did not belong in the building (*see People v Holmes*, 81 NY2d 1056, 1058 [1993] ["Flight, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, could provide the predicate necessary to justify pursuit"]). Similarly distinguishable is *Matter of Michael F.* (84 AD3d 468 [1st Dept 2011]), on which defendant relies, since the stop in that case did not take place in a building with a history of trespassers. Considering, again as we must, the totality of the circumstances (*see People v Benjamin*, 51 NY2d at 271), we find that the police had an objective,

credible reason under *De Bour* to follow defendant to the ninth floor and ask him if he lived in the building.

The police action that followed was also proper. Defendant's refusal to respond to the officer's repeated inquiries, first into whether he lived in the building and next whether he was armed, and the direction to show his hands, was, while perhaps not determinative, still a significant factor escalating the encounter beyond the level one intrusion warranted by the earlier behavior (see *People v Fabian*, 56 AD3d 334 [1st Dept 2008], *lv denied* 12 NY3d 783 [2009]). Moreover, the officer testified that he was concerned for his safety, which was justifiable based on the bulge he observed in defendant's sleeve, the awkward manner in which he was holding his arm, and his recalcitrance upon being asked if he had a weapon and directed to display his hands (see *People v Chin*, 192 AD2d 413 [1st Dept 1993], *lv denied* 81 NY2d 1071 [1993]). The situation encountered by the police in this case differs significantly from cases cited by defendant, such as *People v Crawford* (89 AD3d 422 [1st Dept 2011]) and *People v Powell* (246 AD2d 366 [1st Dept 1998], *appeal dismissed* 92 NY2d 886 [1998]), insofar as those cases involved defendants whom the police initially stopped having no reason to believe that criminal activity was afoot and whom the police

searched with no justification for thinking that the defendant was carrying a weapon. Considering the totality of the circumstances, we reject defendant's challenge to the specific manner in which the officer searched him for the presence of a weapon.

We take a broader view than the dissent, one authorized by *People v De Bour*, which recognized "that police-citizen encounters are dynamic situations during which the degree of belief possessed at the point of inception may blossom by virtue of responses or other matters which authorize and indeed require additional action as the scenario unfolds" (40 NY2d at 225). Here, defendant's active escape from the presence of the police, coupled with his utter refusal to face the officers or answer their questions, including whether he was armed, created a situation that was "fraught with tension" (*id.* at 226) and thus justified the police intrusion. Our view is also more broad than the dissent's with respect to whether the officers were authorized in searching defendant for a weapon. The dissent takes too narrow a view when it focuses only on the officers' inability to definitively ascribe the bulge in defendant's sleeve to the presence of a weapon. The focus should be on all of the attendant circumstances, including the manner in which defendant

was holding his arm and his refusal to state whether he was armed or to show his hands when asked.

The showup, in close geographic and temporal proximity to the robbery, was appropriate and was not rendered unduly suggestive by the fact that defendant was handcuffed and flanked by officers (see *People v Gilford*, 16 NY3d 864, 868 [2011]; *People v Gatling*, 38 AD3d 239 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). Further, the record supports the court's determination that defendant's statements were spontaneous and not the product of interrogation (see *People v Lynes*, 49 NY2d 286 [1980]). The objections to the prosecutor's remarks fell within the broad leeway afforded prosecutors to address defense arguments on summation (see *People v Galloway*, 54 NY2d 396 [1981]). In any event, any error was harmless in light of the overwhelming evidence of guilt (see *People v Crimmins*, 36 NY2d 230 [1975]).

The People concede, as they must, that defendant is entitled to vacatur of his sentence for the earlier assault conviction and to a resentencing that considers whether he qualifies for youthful offender status (*People v Rudolph*, 21 NY3d 497 [2013]). Nevertheless, defendant is not entitled to vacatur of the sentence for the robbery conviction. It is true that, for a

prior conviction to serve as a predicate violent felony conviction, “[s]entence upon such prior conviction must have been imposed before commission of the present felony” (Penal Law 70.04[1][b][ii]). However, we find that a remand for an adjudication of youthful offender status is, for purposes of determining such sequentiality, analogous to a remand for the imposition of postrelease supervision under *People v Sparber* (10 NY3d 457 [2008]). A *Sparber* resentencing has been held not to upset sequentiality for purposes of determining whether the conviction for which the remand was ordered can serve as a predicate for multiple felony offender status (see *People v Boyer*, 22 NY3d 15 [2013]; *People v Acevedo*, 17 NY3d 297 [2011]). To be sure, a remand for a youthful offender determination differs somewhat from a *Sparber* remand since the former can result in an actual change to the incarceration element of the sentence whereas as the latter “does not permit the resentencing court to alter the defendant’s prison term or otherwise change any aspect of his or her sentence” (*Boyer*, 22 NY3d at 24, citing *People v Lingle*, 16 NY3d 621, 634-635 [2011]). However, as stated in *Boyer*,

“Importantly, the rule that the original sentence date controls for purposes of a

conviction's qualification as a predicate felony conviction serves the public policy underlying the recidivist sentencing statutes. As we have previously observed, those laws are meant to enhance sentences for defendants who refuse to reform after receiving a valid conviction for a crime and hearing the court pronounce sentence (see *People v Morse*, 62 NY2d 205, 222 [1984]). Under this rationale, a defendant who was sentenced for a prior conviction and then commits a new crime plainly deserves enhanced punishment for the new crime because the defendant remains unchastened after the court's pronouncement of the sentence for the prior conviction, and the defendant's heightened culpability cannot be mitigated in any way by a subsequent *Sparber* resentencing. Under those circumstances, it would make no sense to set the date of sentence for the defendant's prior conviction to the date of the *Sparber* resentencing and thereby prevent the court from enhancing the defendant's sentence for the current crime" (22 NY3d at 26).

We see no reason why the same public policy behind *Boyer* does not apply in the context of remands for youthful offender determinations. Of course, to the extent that, upon remand, the court determines that defendant should receive youthful offender status on the earlier conviction, defendant will be entitled to challenge the sentence on the later conviction by moving pursuant to CPL 440.20.

We have considered and rejected defendant's remaining claims, including those set forth in his pro se supplemental briefs.

All concur except Manzanet-Daniels and Gische, JJ. who dissent in a memorandum by Gische, J. as follows:

GISCHE, J. (dissenting)

I respectfully dissent, because I believe that from the inception of his encounter with the police, defendant's conduct was consistent with his constitutional right to avoid contact with the police. In addition, the subsequent observation by the police of an otherwise undefined bulge under defendant's sleeve did not furnish the officers with the requisite reasonable suspicion or a basis for believing that the person subjected to the intrusion was armed and potentially dangerous. Under these circumstances, the police detention and frisk of defendant by grabbing his wrists, pulling up his sleeves, and removing a weapon from his body was not justified.

In evaluating the propriety of police conduct, the analysis is confined only to the information known to the officers at the time of the encounter (*People v Cruz*, 129 AD3d 119, 121 [1st Dept 2015]; *People v Coles*, 48 AD2d 345, 347 [1st Dept 1975]). Facts that come to light through the subsequent unraveling of events, or that are later established at trial, do not bear upon whether the initial stop was conducted in a constitutionally permissible manner.

The testimony at the suppression hearing revealed that on the evening of October 12, 2005, three police officers were

performing vertical patrols inside a NYCHA building in the Castle Hill Housing Development. The officers were dressed in plain clothes, but displayed their shields around their necks. Castle Hill Housing was known to be a high-crime area.

While on the seventh floor, the officers saw the elevator door open and several people exit, followed by defendant, who was wearing a black T-shirt over a mustard-yellow hoodie with the hood covering his head. Defendant took one step out of the elevator, but upon seeing the officers he "went back into the elevator." Officer Rodriguez thereupon asked him, "Can you hold the door, police, hold the door?" According to Officer Rodriguez, defendant "kept pressing the elevator button to close the door." The elevator doors closed, and the cab ascended. Officer Rodriguez testified that because there had been a lot of narcotics traffic in the building, the officers wanted to ascertain whether defendant lived in the building. The officers climbed the stairs and encountered defendant standing in the ninth-floor hallway. When Officer Rodriguez approached defendant, he identified himself as a police officer and asked defendant if he lived in the building. Defendant did not respond, and turned to face the wall with his head down looking towards the ground. Officer Rodriguez again asked defendant if

he lived in the building, and again defendant did not answer. Officer Rodriguez then noticed a bulge underneath the sleeve of defendant's right arm. Defendant's hands were hidden inside the sleeves of his sweatshirt, and he was holding them stiffly and in a "straight down" position. When Officer Rodriguez asked defendant if he had any weapons, defendant did not respond. Officer Rodriguez instructed defendant to show him his hands, and repeated the request several times. With defendant continuing to ignore his requests, Officer Rodriguez testified that he became concerned for his safety, causing him to grab defendant's wrist, at which point he felt a metal blade. Officer Rodriguez then rolled up defendant's sleeve and observed the silver tip of a machete, and ordered defendant to drop it. When defendant did not do as directed, Officer Rodriguez physically removed a machete from inside defendant's sleeve. Defendant was then placed under arrest.

Only after defendant was apprehended did Officer Rodriguez learn, through a phone call to Sergeant Charles Hyland, that a robbery had been reported as having occurred earlier in the day, within close proximity to the Castle Hill Houses. The report indicated that the complainant had been robbed by two males, one wearing a red jacket and the other wearing a black shirt over a

mustard-yellow hoodie sweatshirt and wielding a machete. Sergeant Hyland, upon learning from Officer Rodriguez that defendant matched the description of the assailant, directed that defendant be held at the scene. The complainant was then brought to the scene, and defendant was identified as one of his assailants.

“The touchstone of any analysis of a governmental invasion of a citizen’s person under the Fourth Amendment and the constitutional analogue of New York State is reasonableness” (*People v Batista*, 88 NY2d 650, 653 [1996] [internal quotation marks omitted]). Whether governmental action is reasonable will turn on the facts of each case and requires consideration of whether the police action at issue “was justified in its inception and whether ... it was reasonably related in scope to the circumstances which created the encounter” (*People v Powell*, 246 AD2d 366, 368 [1st Dept 1998], *appeal dismissed* 92 NY2d 886 [1998]). The lawfulness of police-initiated encounters with private citizens is governed by the graduated four-level test first outlined in *People v De Bour* (40 NY2d 210, 223 [1976]; see also *People v Hollman*, 79 NY2d 181 [1992]). The degree of restraint on an individual’s freedom of movement must correlate with the necessary level of suspicion to warrant the intrusion.

Under level one, a police officer may request information from a person provided that the request is supported by an objectively credible reason that need not be necessarily indicative of criminality. A level two encounter, also known as the common-law right of inquiry, permits a more invasive line of questioning of a person when the officer has a founded suspicion that criminal activity is afoot. A level three encounter allows the police to forcibly stop and detain a person if the officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime. Finally, under a level four encounter, an arrest is authorized when the police have probable cause to believe a person has committed a crime (*De Bour*, 40NY2d at 223).

Applying these oft-cited and well recognized principles, I believe that even if the police were justified at the inception of their contact with defendant in making a reasonable inquiry, the nature of the interaction thereafter did not raise the level of allowable intrusion to a level three. At level three, the facts supporting reasonable suspicion would have been required before the police could have detained defendant. Moreover, since the police physically grabbed defendant's wrists, patted down his arm, rolled up his sleeves and removed the machete, a particularized reasonable belief that defendant was armed and

dangerous would have been required (see *People v Russ*, 61 NY2d 693, 695 [1984]; *People v Gonzalez*, 295 AD2d 183, 184 [1st Dept 2002]).

“[R]easonable suspicion [to justify a seizure] has been aptly defined as the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe that criminal activity is at hand” (*Matter of Jaquan M.*, 97 AD3d 403, 406 [1st Dept 2012], *appeal dismissed* 19 NY3d 1041 [2012], quoting *People v Sobotker*, 43 NY2d 559, 564 [1978]). It is well settled that a private citizen has the constitutional right not to respond to police inquiries (*Illinois v Wardlow*, 528 US 119, 125 [2000]; *People v Major*, 115 AD3d 1, 5 [1st Dept 2014]). “[W]hile the police [have] the right to make the inquiry, defendant ha[s] a constitutional right not to respond” (*People v Howard*, 50 NY2d 583, 590 [1980], *cert denied* 449 US 1023 [1980]). The Court of Appeals has described the right to be left alone as the “distinguishing factor” between the lower levels of limited permissible police intrusion that authorize investigatory questioning and the right to forcibly detain, which requires a reasonable and articulable basis to suspect involvement in criminal activity (see *People v Major*, 115 AD3d, at 5; *People v Moore*, 6 NY3d 496, 500 [2006]).

At bar, defendant's conduct in retreating into the elevator to go to another floor, his physically turning away from the police when they found him, and his refusal to respond to police commands or questions during this process all constitute permissible avoidance behavior. We do not agree with the majority that these facts justify a conclusion of "flight" or "active escape." In *People v Johnson* (109 AD3d 449 [1st Dept 2013], *appeal dismissed* 23 NY3d 1001 [2014]), this Court held that a person's desire to avoid contact with the police is not an objectively credible reason for making a level one inquiry. We also held that the fact that the avoidance behavior occurs in a high-crime neighborhood, including where trespassing and drug activity occur, does not elevate police avoidance conduct into a level one inquiry (*id. at 450; Matter of Michael F.*, 84 AD3d 468 [1st Dept 2011]). A fortiori, conduct that does not support a level one encounter cannot support the level three encounter that occurred in this case.

Even if the recent Court of Appeals decision in *People v Barksdale* (26 NY3d 139 [2015]) in any way limited our holding in *Johnson*, the result would still be the same in this case. In *Barksdale*, the Court of Appeals held that in a private building voluntarily participating in a police protection program, and

otherwise restricted by signage and a lock, a level one encounter was supported by the "coupling of defendant's presence in the subject building with the private and protected nature of that location" (*id.* at 143-144). In *Barksdale*, it was the defendant's answers to police inquiry that provided the probable cause necessary for arrest, and the weapon recovered was only incident to and after that arrest. At bar, even assuming that under *Barksdale*, defendant's conduct may have been sufficient to support a level one inquiry, the nonresponsive conduct by defendant did not raise the level of permitted police intrusion to level three. In fact, given that defendant actually lived in the building, if he had truthfully answered the police, questioning would have presumably stopped. If a defendant's resistance to answering the police could in itself be relied upon to justify the frisk, then the right to inquire "would be tantamount to the right to seize and there would, in fact, be no right 'to be left alone.'" That is not, nor should it be, the law" (*People v Holmes*, 81 NY2d 1056, 1058 [1993], *affg* 181 AD2d 27 [1st Dept 1992]). This is so because the *De Bour/Hollman* framework requires escalating measures of suspicion as necessary to justify each graduated level of intrusion (*People v Garcia*, 20 NY3d 317, 322 [2012]). We agree with the majority that

encounters between private citizens and police are dynamic, but the dynamics of every encounter do not necessarily escalate every encounter to the point of an authorized stop and frisk.

The further observation of an otherwise unidentifiable bulge on defendant's arm did not give the officers reason to believe that defendant had committed a crime or that he was in possession of a weapon justifying a frisk (*People v Crawford*, 89 AD3d 422 [1st Dept 2011]). Even at close range, the shape of the bulge was not readily discernable to the officers and "bore no obvious hallmarks of a weapon" (*Matter of Jacquam M.*, 97 AD3d at 408; see *People v Fernandez*, 87 AD3d 474 [1st Dept 2011]). Without any further indication that defendant was armed and posed a threat to the safety of others, such as seeing "the outline of a gun," the seizure was not authorized (*People v Blackman*, 61 AD2d 916, 916 [1st Dept 1978]). The officer's stated concern that defendant had a weapon was not supported by any corroborative observations, such as sudden movements or threatening gestures (see *People v Benjamin*, 51 NY2d 267, 271 [1980]; *People v Smith*, 267 AD2d 98 [1st Dept 1999], *lv denied* 95 NY3d 804 [2000]). The record is devoid of testimony that defendant moved or adjusted his arm where the bulge was observed, or that he even moved at all. Officer Rodriguez's expressed fear for his own safety, without

the supporting objective information, does not justify a required finding of a particularized reasonable suspicion (*see People v Oquendo*, 221 AD2d 223, 224 [1st Dept 1995], *appeal dismissed* 88 NY2d 1204 [1996]).

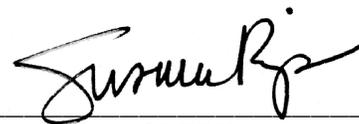
There were no other additional objective indicia of criminality present to justify the officer's actions in this case. From the moment the officers first saw defendant in the elevator up until the time of his arrest, the officers simply had no knowledge that there had been a robbery in the area or that defendant matched the complainant's description of one of his assailants. It was only after defendant had been arrested that Officer Rodriguez learned for the first time, through a telephone conversation with Sergeant Hyland, about defendant's potential involvement in the robbery (*compare People v Joyce*, 58 AD3d 476 [1st Dept 2009], *lv denied* 12 NY3d 818 [2009]; *People v Santiago*, 253 AD2d 673 [1st Dept 1998], *lv denied* 92 NY2d 985 [1998]). Clearly, a different circumstance regarding police intrusion would have been present had this information been known before defendant was actually arrested.

Accordingly, I would reverse the November 29, 2006 conviction of robbery in the first degree and grant defendant's motion to suppress physical evidence, the showup identification

and statements he made to the police, and remand this matter for a new trial, preceded by an independent source hearing.

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

ENTERED: AUGUST 4, 2016

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Tom, J.P., Andrias, Saxe, Kapnick, JJ.

475 Hermitage Insurance Company,  
Plaintiff-Respondent,

Index 155844/12

-against-

186-190 Lenox Road, LLC,  
Defendant,

Cynthia Smith,  
Defendant-Appellant.

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The Berkman Law Office, LLC, Brooklyn (Robert J. Tolchin of  
counsel), for appellant.

Carroll McNulty & Kull, LLC, New York (Joanna L. Young of  
counsel), for respondent.

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Appeal from order and judgment (one paper), Supreme Court,  
New York County (Manuel J. Mendez, J.), entered April 15, 2014,  
which, insofar as appealed from as limited by the briefs,  
declared that plaintiff insurance company has no duty to defend  
or indemnify defendant 186-190 Lenox Road, LLC in the underlying  
personal injury action brought against it by defendant Cynthia  
Smith, unanimously dismissed, without costs.

On or about January 30, 2009, defendant Smith was injured in  
a slip and fall on property owned by defendant 186-190 Lenox  
Road, LLC (Lenox). Lenox had obtained a liability policy from  
plaintiff Hermitage Insurance Company (Hermitage) which provided

coverage for the period of April 6, 2008 to April 6, 2009.

In January 2012, Smith commenced a personal injury action against Lenox. Heritage received its first notice of the accident by email dated June 11, 2012. By letter dated June 20, 2012, it informed Lenox that it was disclaiming coverage. On August 8, 2012, Hermitage commenced this declaratory judgment action, naming both Lenox and Smith as defendants.

Hermitage moved for a default judgment against Lenox and Smith. Smith opposed, arguing that (i) she was not properly served, and (ii) even if she was, the action as against her should be dismissed as abandoned, since Hermitage did not move for a default judgment within one year of her failure to answer. Smith did not oppose Hermitage's request for a default judgment against Lenox. Lenox did not oppose the motion.

Supreme Court granted the motion for a default judgment against Lenox. As to Smith, "the motion was denied and the complaint [was] severed and dismissed as abandoned." The court then: "ORDERED, ADJUDGED and DECLARED, that Plaintiff HERMITAGE ... has no duty to defend or indemnify ... LENOX ... against the claims being made by Cynthia Smith ...."

Smith lacks standing to appeal from an order granting a default judgment against Lenox, which failed to appear or answer

the complaint and failed to oppose the motion for a default judgment (see *Greenspan v Rodman*, 45 AD2d 682 [1st Dept 1974]). Although Smith, as a named party, could have opposed Hermitage's position on coverage (see *Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 471 n [2005]), she elected to seek dismissal on procedural grounds. Thus, having been granted the relief she sought on her own behalf, and having failed to offer any substantive opposition to Heritage's claim of untimely notice or to oppose Heritage's request for a default judgment against Lenox, Smith was not aggrieved by that portion of the order that declared that Heritage was not obligated to defend and indemnify Lenox in the underlying action (see *Moore v Federated Dept. Stores, Inc.*, 94 AD3d 638, 639 [1st Dept 2012], *appeal dismissed* 19 NY3d 1065 [2012]).

Furthermore, because this action was dismissed against Smith as abandoned, whether or not the declaration will have a preclusive effect will only become an issue if Smith obtains a judgment against Lenox that remains unsatisfied and then seeks to enforce it in a direct action against Hermitage under Insurance Law § 3420(a)(2). Accordingly, as the order and judgment appealed from does not impact any existing right of Smith, she is not an "aggrieved party" under CPLR 5511, because any effect the

court's declaration may have on her possible future interests is too remote and contingent to give her standing in this appeal (see *State of New York v Philip Morris Inc.*, 61 AD3d 575, 578 [1st Dept 2009], *appeal dismissed* 15 NY3d 898 [2010]; *Blake Realty v Shiller*, 87 AD2d 729, 729 [3d Dept 1982]).

THIS CONSTITUTES THE DECISION AND ORDER  
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equipment from an online purveyor of zip line parts and accessories, and he learned how to install the equipment by printing out various instruction manuals and guides from the websites of that purveyor and other online resources and by watching web videos. Skoler used those resources to learn the specific slope and grade to be employed in setting up the zip line, although he could not recall at his deposition the recommended specifications.

The zip line cable Skoler installed was 220 feet long. He installed it between two trees, and attached a seat to the cable, using a rope and "trolley mechanism" that ran along the cable. Skoler intended at some point to introduce a safety harness instead of a seat, which would prevent riders from falling off. The cable was affixed so that a rider would be 3 feet off the ground at its midsection, but 12 feet off the ground at each end. The system employed what Skoler described as the "best" brake mechanism available, which consisted of a "black box" positioned on the cable between the midpoint and the end point. A bungee cord was linked from the black box to a third tree, so that when a rider's support line (tethered to the main cable) made contact with the black box, the black box would begin to slow the rider down as the bungee cord became stretched and taut.

Skoler tested the zip line the day he installed it by using a big log as a dummy. He considered the test successful. Skoler and plaintiff then each took a turn riding the zip line, starting 13 to 15 feet away from where the cable was attached to the first tree. It was plaintiff's first time ever riding on a zip line. Neither Skoler nor plaintiff experienced any problems with it. Skoler and plaintiff visited the site of the zip line again approximately one month later. In the interim, a handyman hired by Skoler had built a 12-foot-high access platform at the start of the zip line. Skoler took the first ride that day. As he jumped off the platform, plaintiff held a cord that was attached to the seat for the first 20 to 30 feet of Skoler's ride, and then let go. Skoler had a smooth, problem-free ride. Skoler admitted at his deposition that he had reviewed material in preparing to install the zip line that called for multiple speed test runs, whereby someone would run alongside a zip line rider and, using a rope attached to the trolley on the zip line cable, control the rider's speed until it was determined that the bungee cord on the black box would not stretch more than 175% of its resting length. However, he admitted that he had never conducted any such test runs.

After Skoler finished his ride, plaintiff took a turn on the

zip line, although Skoler did not hold him back for the first 30 feet as he had done for Skoler. Plaintiff jumped from the platform when Skoler directed him to do so, and believed he was possibly going faster than he should have been. When he reached the point where the braking mechanism was situated, however, he began to get nervous, because he felt he was not slowing down the way Skoler had, or the way he had during the first test ride one month earlier. Fearing that he might strike his head against a tree, plaintiff put his feet out in front of him. He did not release the rope connecting the seat to the zip line, but rather held onto it until he hit the tree. When his feet made contact with the tree, plaintiff was thrown backwards, off the seat and onto a boulder on the ground, injuring his back. He commenced this negligence action against Skoler and the property owner.

Skoler moved for summary judgment dismissing the complaint as against him on the ground that plaintiff had knowingly assumed the risks of the zip line activity, and that, rather than the zip line having been negligently constructed, plaintiff panicked and let go of the rope connecting the seat to the cable before the brake could engage. Plaintiff argued in opposition that Skoler had negligently installed and adjusted the zip line, inter alia, ignoring the need to consider the appropriate slope of the cable.

In support, he submitted an affidavit by Michael Reddish, a self-styled "expert in the zip line, ropes course, and adventure parks industry." Reddish averred that two years after the accident, he inspected the zip line, which was still intact. He found "a number of defects, deficiencies and violations of accepted standards and principles that govern the design and construction of ziplines." For instance, the 12% slope was not at a grade consistent with "[a]pplicable standards" or by the installation documents used by Skoler. Rather, it should have been a 6% to 8% grade. Reddish stated that the first rides taken by the men after they installed the zip line were uneventful because they started at a point on the cable line where the cable slope was an acceptable 7.8%, rather than at the tree, because the platform had not yet been built. He further opined that Skoler failed to properly install and test the brake system, inasmuch as he did not abide by the written instructions calling for several test runs with only incremental increases in a rider's speed, to make sure that the bungee cord was not stretched to more than 175% of its original length.

The court granted Skoler's motion. It found that Skoler established prima facie his entitlement to summary judgment based on a lack of evidence that the zip line was negligently

constructed, and by demonstrating that plaintiff assumed the risk by voluntarily riding the zip line, notwithstanding that he knew it was not professionally erected. The court emphasized Skoler's testimony that he had researched zip line companies, felt competent to erect the zip line system, and successfully tested the system with a log as a dummy rider. It further found that plaintiff failed to raise an issue of fact, since Reddish's expert opinion offered "no more than suggested recommendations," rather than identifying mandatory guidelines or standards that were violated. The court found that the expert was too vague in asserting that the cable's slope "greatly exceeded the maximum recommended." Additionally, the court found that the expert's opinion was conclusory in asserting that the brake system was improperly installed and tested. The court acknowledged a discrepancy in the testimony that made it difficult to tell whether plaintiff fell because he panicked or because the brake did not fully engage. Nevertheless, it found that the discrepancy was immaterial, because the assumption of risk doctrine applies as long as the plaintiff was aware of the potential for injury.

A participant in an athletic or recreational activity assumes known risks and relieves the defendant of any duty to

safeguard him from those risks (see *Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 395 [2010]). However, a participant only consents to “those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation” (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). Whether the plaintiff was aware of the risk is key to determining if he assumed it, and this can only be “assessed against the background of the skill and experience of the particular plaintiff” (*Maddox v City of New York*, 66 NY2d 270, 278 [1985]). Further, sporting participants “will not be deemed to have assumed ... concealed or unreasonably increased risks” (*Morgan*, 90 NY2d at 485).

Plaintiff concedes that, had he merely lost his grip and fallen off the seat while riding the zip line, he would be barred from recovery because that is an inherent risk of zip-lining. However, his claim is not that he fell victim to such a common hazard. Rather, it is that the zip line was negligently constructed by defendant and that he had no way of knowing that. A person cannot be said to have assumed the risk of being injured by faulty equipment when he was unaware that the equipment was faulty (see *Weinberger v Solomon Schechter Sch. of Westchester*, 102 AD3d 675, 678-679 [2d Dept 2013] [high school pitcher did not

assume risk of being hit in the face while pitching behind a screen that fell down because of a defect]; *Furnari v City of New York*, 89 AD3d 605, 606-607 [1st Dept 2011] [finding issues of fact as to assumption of risk where softball player was not injured running after a ball but rather by a defective condition in the surface of the asphalt]; *Harting v Community Refm. Church of Colonie*, 198 AD2d 621, 622 [3d Dept 1993] [finding factual question whether plaintiff assumed risk that a worn batting "doughnut" would fly off the bat of an on-deck batter and strike him and noting that "[g]enerally, a sports participant does not assume the risk of faulty equipment unless he or she knows of the defective condition and uses the equipment anyway" ]).

The record is replete with facts that prevent us from determining, as a matter of law, that any risk encountered by plaintiff was inherent in zip-lining and not enhanced by Skoler's negligence, or that it was, or should have been, obvious to plaintiff. Even in granting the motion, the motion court conceded that there was evidence that the brake malfunctioned. Indeed, plaintiff testified that he failed to slow down as Skoler had done only moments before, even though his ride was not otherwise any different from Skoler's. Thus, we can assume for purposes of this motion that the brake failed, regardless of the

probative value of the Reddish affidavit (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] ["On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party"] [internal quotation marks omitted]). We can further infer that the brake was negligently installed by Skoler because he failed to test it in the manner that had been recommended to him. Moreover, the malfunctioning brake clearly enhanced the danger of the zip line. Any argument that plaintiff assumed the risk of a non-working brake is undermined by the facts that the first time he rode the zip line one month earlier he traveled with far less momentum, since the platform, which launched riders at a greater pitch, had not yet been built, and he began approximately 15 feet away from where the platform was later situated. In addition, Skoler's ride on the day of the accident was controlled by plaintiff's having held onto the rope. There is no evidence that plaintiff, who had no experience with zip-lining, should have taken these circumstances into consideration before deciding to ride on the zip line.

The cases cited by the dissent in support of its position that summary judgment was correctly awarded to Skoler are readily distinguishable. In *Sajkowski v Young Men's Christian Assn. of Greater N.Y.* (269 AD2d 105, 106 [1st Dept 2000]), this Court

explicitly noted that there was no claim that the rope from which the plaintiff swung "broke or was otherwise defective."

Similarly, in *Rosenblatt v St. George Health and Racquetball Assoc., LLC* (119 AD3d 45 [2d Dept 2014]), there was no claim that the exercise ball from which the plaintiff fell malfunctioned.

In addition, the dissent's statement that "part of the allure of riding a zip line is the enhanced height, speed and potential danger" carries the assumption of risk doctrine past its reasonable limits. The doctrine applies only to known dangers; there is nothing in the record to suggest that plaintiff welcomed all dangers presented by the zip line, known or unknown, or that the zip line was designed only to attract daredevils. To the contrary, plaintiff knew there was a brake, and, notwithstanding the dissent's implication, there is no evidence that he suspected it was "imprecise" or accepted that it might not have been precise. Further, there is no evidence to support the dissent's suggestion that plaintiff had no reasonable basis for relying on Skoler's ability to erect a safe zip line. Skoler testified that he did extensive research on how to properly build a zip line and plaintiff, in mounting the zip line, was entitled to rely on Skoler's relative expertise.

Because there are issues of fact whether the risk plaintiff

encountered was enhanced by a malfunctioning brake and whether plaintiff should have been aware of that enhanced risk, the motion court erred in granting defendant summary judgment.

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

ANDRIAS, J. (dissenting)

Because I believe that the motion court correctly granted summary judgment to defendant Joseph Skoler under the assumption of risk doctrine, I respectfully dissent.

In March 2011, Skoler, with the help of plaintiff Alan Zelkowitz, his 43 year-old cousin, built a zip line in the woods behind the two bungalows he leased from defendant Country Group, Inc., of which he was a 50% owner. The zip line was intended for private recreational use, and traversed a 220-foot span between two trees.

The zip line was equipped with a seat that was attached by a rope to its "trolley mechanism," but no safety harness. The zip line also had a braking system, which consisted of a black box placed on the line between the halfway point and the end point, and a bungee cord that ran from the box to an anchor tree. When the rope attaching the seat to the trolley mechanism hit the black box, the bungee cord would stretch and become taut, slowing down the rider.

Skoler purchased the zip line and other materials on the Internet; he had no formal training in physics or engineering. Plaintiff was present for the entire installation, and assisted Skoler in the construction by carrying materials, handing him

tools, and holding the work ladder. Plaintiff was aware that Skoler was not an engineer or a professional mechanic or zip line installer or instructor and that he had purchased the materials online. Although plaintiff professes to know little about zip-lines and claims that he was only a "schlepper," at his deposition he was able to describe the zip line's components and how they were installed, including the braking mechanism. He was also able to describe how the braking mechanism worked.

Skoler first tested the zip line with a big log, then successfully rode it himself. Plaintiff, who had never used a zip line before, then took a turn, and completed a "slow and smooth" ride without incident, observing the "[b]oulders, leaves, dirt[,] [b]ranches [and] forest debris" under the zip line.

On April 26, 2011, plaintiff visited Skoler again. After Skoler successfully tested the zip line by riding it himself, plaintiff took his turn. However, this time it seemed faster and three-quarters of the way through, as the ending tree was coming closer, plaintiff began getting a "little nervous." When he hit the brake box, which, according to plaintiff, Skoler had just adjusted by moving the black bungee line forward towards the end tree, the brake box slowed him down a little, but not as much as it had Skoler. Fearing that he was going to crash head first

into the tree at the end of the line, plaintiff put his feet out in front of him, and they slammed into the tree, throwing plaintiff backwards off the seat and onto the ground, where he struck a boulder. Skoler testified that he did not recall making any adjustments to the brakes after his ride.

Plaintiff alleges that Skoler negligently installed and adjusted the zip line, causing the brake system to fail when he used it. Skoler moved for summary judgment on the ground that plaintiff assumed the risk when he voluntarily rode the self-constructed zip line without a harness, including the risk of trying out an imprecise braking system.

Under the doctrine of assumption of the risk, “[a] person who voluntarily participates in a sporting or recreational event generally is held to have consented to those commonly-appreciated risks that are inherent in, and arise out of, participation in the sport” (*Valverde v Great Expectations, LLC*, 131 AD3d 425, 426 [1st Dept 2015]). “If a participant makes an informed estimate of the risks involved in the activity and willingly undertakes them, then there can be no liability if he is injured as a result of those risks” (*Turcotte v Fell*, 68 NY2d 432, 437 [1986]).

“Whether it can be concluded that a plaintiff made an informed estimate of the risks involved in an activity before

deciding to participate depends on the openness and obviousness of the risk, plaintiff's background, skill, and experience, plaintiff's own conduct under the circumstances, and the nature of defendant's conduct" (*Lamey v Foley*, 188 AD2d 157, 164 [4th Dept 1993][footnote omitted]). A plaintiff is deemed to have assumed those risks that are known and fully comprehended, open and obvious, inherent in the activity, and reasonably foreseeable consequences of the activity (*Turcotte*, 68 NY2d at 439).

Applying these principles, Supreme Court correctly granted Skoler's motion for summary judgment dismissing the complaint as against him. Skoler established prima facie that plaintiff, a middle-aged adult, not an immature teenager, who was 6'4" tall and weighed approximately 215 pounds, assumed the risks of riding a zip line, an inherently dangerous activity, which include traveling at high speeds and crashing and/or falling off. Plaintiff voluntarily rode the homemade zip line, which he helped build, fully aware that Skoler was not an engineer or zip line expert, that the zip line was not equipped with a safety harness, and that there were rocks, tree stumps and other debris on the ground beneath the zip line (see *Marcano v City of New York*, 99 NY2d 548, 549 [2002] [plaintiff assumed the risk of injury when he swung on and subsequently fell off parallel exercise bars over

a concrete floor])). Furthermore, under these circumstances, "where the risk is open and obvious, the mere fact that a defendant could have provided safer conditions is irrelevant" (*Sajkowski v Young Men's Christian Assn. of Greater N.Y.*, 269 AD2d 105, 106 [1st Dept 2000]).

The fact that this was only the second time that plaintiff had used the zip line does not mandate a different result (see *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 56 [2d Dept 2014] [plaintiff, who voluntarily sat on an exercise ball during a body sculpting class, assumed the inherent risk that the ball would roll or rotate and cause her to fall, despite her claim that she had never used an exercise ball before])). Nor does the fact that plaintiff may not have anticipated the exact way in which he could be injured warrant the denial of summary judgment. "It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (*Maddox v City of New York*, 66 NY2d 270, 278 [1985]).

Plaintiff failed to raise a triable issue of fact as to whether the injury-causing event resulted from Skoler's

negligence, which plaintiff contends created unique and dangerous conditions beyond those inherent in the sport. The affidavit by plaintiff's expert was conclusory and speculative (see *Schwartz v Kings Third Ave. Pharmacy, Inc.*, 116 AD3d 474, 475 [1st Dept 2014]). Among other things, the expert's statement that the slope was too steep based on alleged "[a]pplicable standards," rather than mandatory guidelines, is insufficient to raise an issue of fact (see e.g. *Merson v Syosset Cent. School Dist.*, 286 AD2d 668, 670 [2d Dept 2001]).

While plaintiff asserts that he held Skoler back with a restraining rope for the first 30 feet of his ride to reduce his momentum, and that Skoler did not do the same for him, plaintiff did not ask Skoler to do so, and there is no evidence that the absence of the rope in any way caused plaintiff to collide with the tree at the end of the 220-foot span. Nor did plaintiff establish that any risks were unreasonably increased or concealed.

The majority disagrees, assuming for the purposes of the motion that the braking mechanism malfunctioned, because plaintiff testified that he failed to slow down to the same extent that Skoler had done only moments before, which enhanced the danger of riding the zip line. However, the majority fails

to give due consideration to the facts that plaintiff's physical characteristics were not identical to Skoler's and that part of the allure of riding a zip line is the enhanced height, speed and potential danger. Plaintiff, who knew that Skoler's knowledge of zip line construction was limited at best, and that Skoler was not a professional zip line instructor, and who helped build the zip line with materials purchased from the Internet, should have appreciated that crashing and falling are inherent risks of riding a homemade zip line that was not equipped with a safety harness and that had an imprecise braking mechanism that was subject to adjustment by trial and error.

Accordingly, I would affirm the grant of summary judgment in Skoler's favor.

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

ENTERED: AUGUST 4, 2016

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

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dismissing the proceeding, unanimously affirmed, without costs.

We find that the motion court was correct in its conclusion that DHCR properly apportioned respondent Margaret Friedman's adjusted gross income as reported in joint tax returns for purposes of petitioner's application for high rent deregulation.

The Rent Regulation Reform Act of 1993 (RRRA-93) § 5 (McKinney's Uncons Laws of NY § 26-403.1 [L 1993, ch 253, § 5, as amended]) provides for the deregulation of housing accommodations subject to the New York City Rent Control Law (RCL) when, in pertinent part, the monthly rent on such accommodation exceeds \$2000 and when the total annual income of the occupants of the housing accommodation exceeds \$175,000 in each of the two years immediately preceding the year in which the landlord files a petition for deregulation (that is, 2006 in this case).

RCL (Administrative Code of the City of New York) § 26-403.1(a)(1) states in pertinent part as follows:

"For purposes of this section, annual income shall mean the federal adjusted gross income as reported on the New York state income tax return. Total annual income means the sum of the annual incomes of all persons who occupy the housing accommodation as their primary residence other than on a temporary basis, excluding bona fide employees of such occupants residing therein in connection with such employment and excluding bona fide subtenants in occupancy pursuant to the provisions of section two

hundred twenty-six-b of the real property law. In the case where a housing accommodation is sublet, the annual income of the sublessor shall be considered."

Petitioner owns the building located at 315 Central Park West. Si Friedman first occupied the subject rent controlled apartment - Apartment 9S - in 1955. He moved to an assisted living facility in March 2005 and died there on November 3, 2006. His wife, respondent Margaret Friedman, succeeded to the apartment upon his death. In 2004 and 2005, the Friedmans filed joint federal and state tax returns indicating adjusted gross incomes of \$200,831 in 2004 and \$228,823 in 2005. On April 27, 2006, petitioner served upon the Friedmans an Income Certification Form (ICF).

As noted, under RCL (Administrative Code) § 26-403.1(a)(1) total annual income is defined as the "sum of the annual incomes of all persons who occupy the housing accommodation as their primary residence." The record is clear that respondent's husband was not an occupant of the apartment at the time the ICF was served. The husband entered the assisted living facility in March 2005, more than one year prior to service of the ICF, and died there on November 2006, without returning to the premises.

DHCR, as per the statute, properly excluded the income of respondent's husband from the total annual calculation income for

2004 and 2005, the two years immediately preceding the year petitioner filed the deregulation petition. Income of spouses who vacate the premises prior to the ICF service date may not be included in the total annual income calculations (see e.g. *Matter of 315 E. 72nd St. Owners, Inc. v New York State Div. of Hous. & Community Renewal*, 101 AD3d 647 [1st Dept 2012]; *Matter of 103 E. 86th St. Realty Corp. v New York State Div. of Hous. & Community Renewal*, 12 AD3d 289 [1st Dept 2004]; *Matter of A.J. Clarke Real Estate Corp. v New York State Div. of Hous. & Community Renewal*, 307 AD2d 841 [1st Dept 2003]).

DHCR's determination as to the apportionment of income was rationally based upon the information and documents provided by the parties. As respondent and her husband filed a joint tax return, a calculation had to have been made as to the income of the sole occupant of the apartment. Pursuant to RRRRA-93, DHCR and the Department of Taxation and Finance entered into a Memorandum of Understanding that provides procedures for determining income. This Memorandum of Understanding was properly used in determining that respondent's adjusted gross income, as reported, was less than the statutory threshold for high rent deregulation.

This decision is not inapposite to this Court's decision in

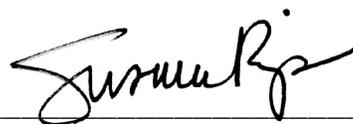
*Matter of Nestor v New York State Div. of Hous. & Community Renewal* (257 AD2d 395 [1st Dept 1999], *lv dismissed and denied* 93 NY2d 982 [1999]). There, the Court declined the petitioner landlord's application to include the income of the respondent tenant's corporation, stating that the statutes at issue there unambiguously prohibited the inclusion of such income (*id.* at 396). Here, as in *Nestor*, we find that the operative statute unambiguously provides that only the income of the occupants of the housing accommodation shall be included in calculating the total annual income.

Finally, *Matter of Ansonia Assoc. L.P. v Unwin* (130 AD3d 453 [1st Dept 2015]) which is relied upon by petitioner is inapplicable. The petitioner in *Ansonia* established that the apartment at issue was not the respondent's primary residence under the rent stabilization laws, by submitting the respondent's federal tax returns (*id.* at 454). On those returns, the respondent received a substantial financial benefit by deducting the entire rent for the apartment as an expense of her S corporation (*id.*). The instructions for the returns specifically disallowed the deduction of rent for dwellings occupied by any shareholder for personal use (*id.*). This Court found that the respondent's claim of primary residency was "logically

incompatible" with the position asserted on her tax returns (*id.*  
[internal quotation marks omitted]). Here, respondent is not  
asserting a position contrary to prior declarations.

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

ENTERED: AUGUST 4, 2016

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

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Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1070-

Index 103847/09

1071-

1072 Kevin Chang,  
Plaintiff-Appellant,

-against-

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

Robert Gomez,  
Defendant.

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Frank J. Laine, P.C., Plainview (Frank Braunstein of counsel),  
for appellant.

Corporation Counsel, New York (Zachary W. Carter of counsel), and  
Kaye Scholer LLP, New York (Danelco Moxey of counsel), for the  
City of New York, respondent.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for  
Fund for Park Avenue (New York), Inc., respondent.

Gorton & Gorton, LLP, Mineola (John T. Gorton of counsel), for  
City-Scape Landscaping, respondent.

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Order, Supreme Court, New York County (Margaret A. Chan,  
J.), entered September 9, 2014, which, upon reargument, adhered  
to its original decision granting defendant City of New York's  
motion for summary judgment dismissing the complaint as against  
it, modified on the law, to deny the City's motion for summary  
judgment and to reinstate the complaint as against it, and  
otherwise affirmed, without costs. Orders, same court (Arlene P.

Bluth, J.), entered March 24, 2015, which granted defendants Fund for Park Avenue (New York), Inc.'s and City-Scape Landscaping's motions for summary judgment dismissing the complaint as against them, affirmed, without costs.

In this case arising from a motor vehicle accident, plaintiff alleges that defendant City is liable for his injuries because the intersection at Park Avenue and East 65th Street lacked a "stop here on red sign" and a stop bar. Plaintiff also alleges that the City and defendants Fund For Park Avenue (New York), Inc., and City-Scape Landscaping are liable for his injuries, because they were responsible for maintenance of the foliage in the center median at the subject intersection and that he was prevented from seeing oncoming traffic because the foliage was overgrown.

In 1996, the City had determined that "stop here on red" signs, with a stop bar, should be placed at the Park Avenue intersection where plaintiff was involved in a 2008 motor vehicle accident that also resulted in his girlfriend's death. It is undisputed that although those signs were present at the intersection less than two months prior to the accident, they were not present on the date of the accident and a stop bar was never installed.

The state has a nondelegable duty to maintain the roadway in safe condition (see *Friedman v State of N.Y.*, 67 NY2d 271, 283 [1986]; *Deringer v Rossi*, 260 AD2d 305 [1st Dept 1999]). The installation of a traffic control signal, where it had not previously existed, is a discretionary governmental function that does not give rise to state liability (*Cimino v City of New York*, 54 AD2d 843 [1st Dept 1976], *affd* 43 NY2d 996 [1978]). However, liability is imposed where there is a "failure properly to maintain an already established [traffic] control" and where that failure was a proximate cause of the accident (*Cimino*, 54 AD2d at 844). In *Eastman v State of New York* (303 NY 691 [1951]), the State had maintained a stop sign but then ordered the sign to be removed pursuant to a survey by the State Traffic Commission four years prior to the accident. The Court of Appeals held that the State's failure "to maintain adequate signs or other proper traffic control" resulted in a breach of duty and was a proximate cause of the accident (*id.* at 692; compare *Weiss v Fote*, 7 NY2d 579 [1960][distinguished on different facts]). The Court clarified that, had the traffic control sign been present in *Eastman*, "the driver would have obeyed it and avoided the accident" (*Applebee v State of New York*, 308 NY 502, 507 [1955]).

The dissent opines that the City is not liable because plaintiff's own action eliminated any alleged negligence by the City as a proximate cause of his accident. However, the Court of Appeals, in *Applebee*, stated that the State can be held liable where it failed to repair or replace a missing traffic control sign, particularly where the driver had never been at the intersection and therefore lacked the notice of danger that a stop sign would have provided. Although the Court in that case held that the State's failure to replace a missing stop sign, which had been knocked down as a result of an accident that occurred seven weeks before, was not the proximate cause of the accident, *Applebee* is distinguishable on its facts. In *Applebee*, the driver, who was on her way home after visiting a friend on a Sunday afternoon, was familiar with the road and route and "was fully aware of the dangerous intersection and of the need to stop" (*id.* at 507). Specifically, the driver was returning by the same route by which she had come and "knew that it was heavily traveled by automobiles at high speeds" (*id.* at 506 [internal quotation marks omitted]). The Court found that because the driver had "all the warning[] [and] all the notice of danger, that a stop sign would have afforded," the State's failure to replace the sign did not proximately cause the

accident (*id.* at 508).

The Court of Appeals distinguished *Applebee* from cases in which the drivers had never been at the intersections before the accident and therefore had no familiarity with the dangerous conditions and of the need to stop. In *Murphy v De Revere* (304 NY 922 [1953]) and *Nuss v State of New York* (301 NY 768 [1950]), “two cases involving night collisions at unfamiliar crossings[,] it was the very absence of the stop sign which rendered the drivers unaware of the need to stop before proceeding across the intersection” and proximately caused the accidents (*Applebee* at 507). Similarly, the Court in *Rose v State of New York* (19 AD3d 680 [2d Dept 2005]) held that the driver’s “familiarity with the ramp, coupled with his excessive speed” eliminated any negligence by the State as a proximate cause of the accident (*id.* at 680). Thus, in determining whether a driver had full notice of danger that a traffic control would have provided, New York courts have considered a driver’s familiarity with the road and route as a relevant factor.

Here, in failing to reinstall a previously established traffic control, the City breached its nondelegable duty to maintain the roadway in safe condition (see *Friedman* at 283; *Deringer*, 260 AD2d at 306 [1999]). Plaintiff testified that he

had never been to the intersection before the accident.

Plaintiff also testified that, when he started to turn across the Park Avenue median at the intersection, he was "confused" as to whether or not the lights facing eastward traffic on East 65th Street controlled plaintiff's movements. The dissent argues that the familiarity of the intersection of the *Applebee* driver has no import in the instant matter. According to the dissent, plaintiff had all the notice of danger that a "stop here on red" sign and stop bar would have afforded him, because plaintiff had stopped before entering the intersection but continued to proceed knowing that he needed to yield to oncoming traffic. The dissent cites the *Applebee* Court's reasoning that "the physical conditions and the operator's own awareness of them, and of what was required of [him] in making a left-hand turn, prescribed the same course of action as a stop sign would have" (*Applebee*, 308 NY at 508). However, the presence of a "stop here on red" sign would have likely prescribed a different course of action. A "stop here on red" goes beyond what a stop sign commands and prescribes that a driver remain fully stopped until the controlling traffic light turns green. It also indicates to a driver that oncoming traffic must stop before the intersection, and that the driver is protected from oncoming traffic. Thus, it

was foreseeable that, absent a sign directing drivers to stop in the median area "on red," motorists would proceed across northbound traffic, rather than wait at the median for the red light controlling the cross street to change to green (see *Heffler v State*, 96 AD2d 926 [2d Dept 1983]).

In light of plaintiff's testimony that he was confused by which lights controlled his movements, a question of fact exists as to whether plaintiff had all the notice of danger that a stop sign would have afforded and as to whether the City's failure to install the required "stop here on red" signs at the intersection was a proximate cause of the accident, even if plaintiff's conduct was also negligent and a proximate cause of the accident (*Alexander v Eldred*, 63 NY2d 460, 463-464 [1984]; *Bailey v County of Tioga*, 77 AD3d 1251 [3d Dept 2010]).

Plaintiff's testimony demonstrates that he was able to see one block down Park Avenue before he entered the intersection. As such, defendants Fund for Park Avenue (New York), Inc. and City-Scape Landscaping did not proximately cause the accident.

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

SWEENEY, J. (dissenting)

Because plaintiff's own actions were the proximate cause of the motor vehicle accident herein, I would affirm the motion court's dismissal of the complaint in its entirety.

At approximately 3:30 a.m. on June 29, 2008, plaintiff, a New Jersey resident who had never driven through the intersection in question, was driving southbound on Park Avenue. When he reached the intersection of Park Avenue and East 65th Street, he initiated a left hand turn, intending to proceed eastbound on East 65th Street. At this intersection, Park Avenue's northbound and southbound lanes are separated by a median island and both Park Avenue and East 65th Street are controlled by traffic lights. Each island was lined, behind the pedestrian crossing area and there is an area of planted flowers and shrubs, which were planted and managed by defendant the Fund for Park Avenue (the Fund) and maintained by defendant City-Scape Landscaping (City-Scape). The islands are approximately 20 feet wide.

Plaintiff testified that when he turned into the median area separating the northbound and southbound lanes of Park Avenue, he stopped about five feet short of the northbound lanes to see if there was any oncoming traffic in the northbound lanes on Park Avenue, which was on his right side, but the shrubbery on the

median island obstructed his view. He stated that he remained stopped in the median area for approximately 10-15 seconds as he looked to his right but could not get a clear view of traffic on the northbound lanes of Park Avenue. Plaintiff then "inched" forward three to four feet toward the northbound lane of travel, trying to get a better view, before stopping his vehicle again, short of entering the intersection. Although he could "barely" see the oncoming traffic, he decided to proceed. He stated he could clearly see for approximately one block down Park Avenue as he was proceeding and there were no bushes obstructing his view as he made the turn and continued toward East 65th Street. He was in the intersection about five seconds and approximately halfway across Park Avenue when his vehicle was struck by a pickup truck traveling northbound on Park Avenue. Plaintiff alleges that he did not see the truck until "a split second" before the collision. The driver of the truck that struck plaintiff's vehicle, who was intoxicated at the time of the accident, testified that he was traveling northbound on Park Avenue in favor of a green light. He saw plaintiff's vehicle about five seconds before the collision and that it "just turned" onto Park Avenue and did not slow down or stop when it entered the median. He believed plaintiff's vehicle was going to stop

because it had a red light.

Plaintiff testified that he believed the two traffic lights facing traffic crossing 65th Street did not control his movement, since he "thought it pertained to the traffic coming on 65th Street, going across 65th Street," and not the traffic on Park Avenue. He stated that "there were no signs to alert [him] to stop or go on to the street" and that the lack of signs "confused [him] if [he] should go or stop at the light." He acknowledged that he had an unobstructed view of the red traffic light governing traffic on East 65th Street and that, as a result, he also knew that northbound traffic on Park Avenue had a green light and therefore, the right of way. He further stated that he was looking straight ahead and did not look to his right as he entered the northbound lanes.

Plaintiff alleges that defendant City is liable for his injuries because the intersection at Park Avenue and East 65th Street lacked a "stop here on red sign" and a stop bar. Plaintiff also alleges that the City and defendants Fund and City-Scape are similarly liable because their failure to properly maintain the foliage in the center median at the subject intersection caused it to become overgrown and obscured his vision of oncoming traffic.

The City acknowledges that "stop here on red signs" were supposed to be present at the intersection in question pursuant to the sign order in effect at the time of the accident and that those signs were not present when the accident occurred. Although the City could not explain why they were not present on the date of the accident, it produced inspection records showing the signs were present some 53 days prior to the accident. The City, Fund and City-Scape defendants all stated that no complaints had been received regarding any visual obstructions resulting from the shrubbery at that location.

It is axiomatic that "[a] municipality has the nondelegable duty of maintaining its roads and highways in a reasonably safe condition" (*Stiuso v City of New York*, 87 NY2d 889, 890 [1995]) and that liability will flow for injuries that result from a breach of that duty (*Lopes v Rostad*, 45 NY2d 617, 623 [1978]). This duty extends to an obligation to "trim growth within the highway's right-of-way to assure visibility of stop signs and other traffic" (*Federoff v Camperlengo*, 215 AD2d 806, 807 [3d Dept 1995] [internal quotation marks omitted]). Inadequate sight distance caused by obstructing foliage will result in municipal liability for negligent roadway maintenance (see *Parada v City of New York*, 205 AD2d 427, 428 [1st Dept 1994]). This municipal

duty is not excused because the dangerous condition is attributable to the acts and/or omissions of the municipality's contractors (see *Levine v New York State Thruway Auth.*, 52 AD3d 975, 976-977 [3d Dept 2008]). However, "[a] government is not the insurer of the safety of its roads and no liability will attach unless the government's negligence in maintaining its roads in a reasonable condition is a proximate cause of the accident" (*Galligan v Long Is. R.R. Co.*, 198 AD2d 399, 400 [2d Dept 1993]; see *Stanford v State of New York*, 167 AD2d 381, 382 [2d Dept 1990], *lv denied* 78 NY2d 856 [1991]).

In this case, plaintiff's own testimony negates the visual obstruction of the shrubbery as the proximate cause of the accident. Although he testified that the shrubbery had initially blocked his view of the oncoming traffic, he also testified that he inched forward so he could see past the bushes before making the turn, that he was able to see one block down Park Avenue before he entered the intersection, and that the accident did not happen until he had determined that it was safe to enter the intersection. This is a different situation from that in *Prada* where the shrubbery prevented a clear view of the intersection, and where that plaintiff proceeded in an "unbroken turn to the point of impact" (*Prada*, 205 AD2d at 428). Furthermore, in

*Parada* there was a prior request from the Department of Transportation to the entity maintaining the median to prune the trees. Here, as noted, there were no complaints to any defendant about the shrubbery needing pruning or other attention.

The absence of "stop here on red" signs also was not a proximate cause of the accident.

The majority emphasizes plaintiff's testimony regarding his unfamiliarity with the intersection. Plaintiff stated he was confused as to whether to stop or to go as he entered the intersection due to the lack of traffic signs. The majority contends that as a result of this failure, the City breached its nondelegable duty to keep its roads in a safe condition. This misses the point.

As with the situation involving the shrubbery, plaintiff's own testimony establishes that there is a lack of a causal connection between the missing traffic control devices and the happening of the accident. Plaintiff's testimony established that he was not only fully aware of the need to stop at the intersection, but accepting his testimony at face value, he did in fact stop. Moreover, his testimony was clear that he knew he had to yield to oncoming traffic on the northbound side of Park Avenue because that traffic had a green light. Significantly, he

testified that despite knowing that oncoming traffic had a green light, he proceeded into the intersection when he deemed it safe to do so.

A municipality may be held liable where "it is shown that its failure to install a traffic control or warning device was negligent under the circumstances, that this omission was a contributing cause of the mishap, and that there was no reasonable basis for the municipality's inaction" (*Alexander v Eldred*, 63 NY2d 460, 463-464 [1984]). However, the municipality will not be held liable where a plaintiff's own actions in maneuvering his vehicle eliminates as a proximate cause of his accident any alleged negligence by the municipality (see *Rose v State of New York*, 19 AD3d 680 [2d Dept 2005]; *Parmeter v Bedard*, 295 AD2d 779, 780 [3d Dept 2002], *lv denied* 98 NY2d 614 [2002]). "Such proximate cause may be found only where it is shown that 'it was the very absence of the stop sign [or other traffic control device] which rendered the driver [] unaware of the need to stop before proceeding across the intersection'" (*Noller v Peralta*, 94 AD3d 830, 832 [2d Dept 2012], quoting *Applebee v State of New York*, 308 NY 502, 507 [1955]). "Where, however, the driver 'had all the warning, all the notice of danger, that a stop sign would have afforded,' there is no basis for finding

that the absence of a sign caused the driver 'to do anything other than [he or] she would have done had it been present'" (*id.*, quoting *Applebee* at 508).

Even assuming that a duty had been established on the part of the City for failing to have a "stop here on red" sign and a stop bar present at the intersection, the record shows that a proximate cause of the accident was not the absence of traffic control devices at the scene, but rather the manner in which plaintiff operated his vehicle (*see Owens v Campbell*, 16 AD3d 1000, 1001-1002 [3d Dept 2005], *lv denied* 5 NY3d 704 [2005]) as well as the actions of the driver of the truck that struck plaintiff's vehicle. Plaintiff's own testimony, as noted above, unequivocally demonstrates that he had all the notice of the danger that a "stop here on red" sign and a stop bar would have afforded him before he decided to enter the intersection. He knew that he did not have the right of way (*see Applebee*, 308 NY at 502), yet proceeded into the intersection despite that fact. The City's failure to properly install or maintain signage was therefore not the proximate cause of this accident.

The fact that the driver in *Applebee* was familiar with the intersection is of no import as it impacts this case. As the Court observed, "[T]he physical conditions and the operator's own

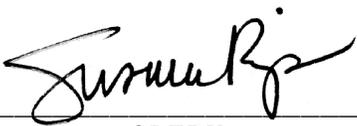
awareness of them, and of what was required of [him] in making a left-hand turn, prescribed the same course of action as a stop sign would have . . . The absence of a stop sign contributed not one whit to the collision" (*id.* at 508), and it was plaintiff's negligence combined with the truck driver's negligence that was the proximate cause of this accident.

It should also be noted that plaintiff testified that, as he entered the intersection, he did not look in the direction of oncoming traffic, but was looking straight ahead, thus exhibiting a lack of care. "A driver is negligent where an accident occurs because he or she fails to see that which through proper use of his or her senses he or she should have seen" (*Mohammad v Ning*, 72 AD3d 913, 915 [2d Dept 2010] [internal quotation marks and brackets omitted]). This testimony further highlights the lack of a causal connection between the missing traffic control device and the happening of the accident (*Owens*, 16 AD3d at 1001-1002; see *Cimino v City of New York*, 54 AD2d 843, 844 [1st Dept 1976]).

I would therefore affirm the motion court's dismissal of the complaint against these defendants.

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

ENTERED: AUGUST 4, 2016

  
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Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1160-

Index 190114/13

1161-

1162 In re New York City Asbestos  
Litigation

- - - - -

Charles D. North, as Executor of  
the Estate of Ralph P. North,  
Plaintiff-Respondent,

-against-

Air & Liquid Systems Corporation  
successor by merger to Buffalo Pumps,  
Inc., et al.,  
Defendants,

National Grid Generation, LLC,  
Defendant-Respondent-Appellant,

O'Connor Constructors, Inc.,  
Defendant-Appellant-Respondent.

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Coughlin Duffy LLP, New York (Kevin T. Coughlin of counsel), for  
appellant-respondent.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (John G.  
Nicolich of counsel), for respondent-appellant.

Levy Konigsberg LLP, New York (Jerome H. Block of counsel), for  
respondent.

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Judgment, Supreme Court, New York County (Martin Shulman,  
J.), entered January 28, 2015, after a jury trial, awarding  
plaintiff, inter alia, \$3,500,000,00 in damages for future pain  
and suffering as against defendant National Grid Generation, LLC,  
unanimously affirmed, without costs. Order, same court and

Justice, entered March 13, 2015, which granted National Grid's motion for summary judgment on its claim against defendant O'Connor Constructors, Inc. for indemnification, except for attorneys' fees, and denied O'Connor's motion for summary judgment dismissing National Grid's indemnification claim as against it, unanimously modified, on the law, to grant National Grid's motion as to attorneys' fees solely in connection with its defense against plaintiff's action, and otherwise affirmed, without costs.

The jury verdict is based on sufficient evidence and is not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). The evidence demonstrates that LILCO, defendant National Grid's predecessor in interest, issued detailed specifications directing contractors in the means and methods of mixing and applying asbestos-containing concrete and insulation at the power plant, thus supporting the jury's finding of a violation of Labor Law § 200 (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). It is of no consequence that LILCO ensured that its directives were followed by supervising the superintendents, rather than by supervising the workers directly. Further, LILCO was admittedly in charge of trade coordination, i.e., directing the trades as to where and

when to do their work, which resulted in plaintiff's working in close contact with the asbestos-dust-producing insulators (see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352-353 [1998]).

The jury's finding that O'Connor, which settled with plaintiff before trial, was negligent but that its negligence was not a proximate cause of plaintiff's injuries and that LILCO was 100% responsible was a fair interpretation of the evidence in light of LILCO's supervision and control of the injury-producing activity (see *Matter of New York Asbestos Litig. [Marshall]*, 28 AD3d 255 [1st Dept 2006]).

The award for future pain and suffering does not deviate materially from what would be reasonable compensation (CPLR 5501; see e.g. *Matter of New York City Asbestos Litig. [Konstantin & Dummit]*, 121 AD3d 230, 255 [1st Dept 2014], *motion to dismiss appeal denied* 24 NY3d 1216 [2015]; *Penn v Amchem Prods.*, 85 AD3d 475 [1st Dept 2011]).

While, as National Grid argues, it was error to permit the jury to deliberate on a theory of a defective condition of the premises under Labor Law § 200 and on the issue of LILCO's recklessness, these errors are harmless in light of the jury's other findings. Any error in the wording of the charge directing the jury not to find plaintiff's employers liable during the time

he was employed by them is unpreserved.

The trial court correctly granted National Grid summary judgment on its claim against O'Connor for contractual indemnification (see *Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374, 376 [1st Dept 2008], *lv denied* 14 NY3d 709 [2010]; *Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268 [1st Dept 2007]). The clause in the contract between LILCO and O'Connor (which predates the enactment of General Obligations Law § 5-322.1) provided for indemnification of LILCO by O'Connor for "all losses, damages, claims, liens and encumbrances, or any or all of them, arising out of or in any way connected with the work," whether or not LILCO was negligent. The clause was triggered by the trial evidence. O'Connor's contention that National Grid is not a successor in interest to LILCO on the contract is without merit.

Although National Grid is not entitled to attorneys' fees incurred in prosecuting the indemnification claim against O'Connor (see *Hooper Assoc. v AGS Computers*, 74 NY2d 487 [1989]), it is entitled to attorneys' fees incurred in defending against plaintiff's action (see *e.g. DiPerna v American Broadcasting*

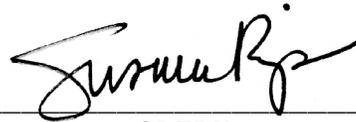
*Cos.*, 200 AD2d 267 [1st Dept 1994]; *Breed, Abbott & Morgan v Hulko*, 139 AD2d 71 [1st Dept 1988], *affd* 74 NY2d 686 [1989]).

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

The Decision and Order of this Court entered herein on June 28, 2016, as corrected on July 13, 2016, is hereby recalled and vacated (see M-3774 decided simultaneously herewith).

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

ENTERED: AUGUST 4, 2016

A handwritten signature in black ink, appearing to read "Susan R.", written over a horizontal line.

CLERK



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.  
Rolando T. Acosta  
David B. Saxe  
Barbara R. Kapnick  
Marcy L. Kahn, JJ.

1416  
Index 308500/11

x

Anonymous,  
Plaintiff-Respondent,

-against-

Anonymous,  
Defendant-Appellant.

x

Defendant appeals from the order of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered April 1, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for an upward modification of the temporary maintenance awarded in a preliminary conference order to the extent of ordering defendant to pay temporary maintenance in the sum of \$7,500 per month.

Raoul Felder and Partners, New York (Michael N. Klar of counsel), for appellant.

Gregory Rabinowitz, P.C., Jericho (Gregory Rabinowitz of counsel), for respondent.

ACOSTA, J.

At issue in this case is the validity of a preliminary conference (PC) order directing defendant to pay \$250 weekly in temporary maintenance that deviates from the presumptive award of temporary maintenance and does not specify the reasons for the deviation or the amount that the presumptive award of temporary maintenance would have been in accordance with Domestic Relations Law former § 236(B) (5-a) (in effect at the relevant time). For the reasons stated below, we find the PC order invalid. Accordingly, Supreme Court properly considered de novo plaintiff's application for an upward modification; the court also properly ordered defendant to pay plaintiff temporary maintenance in the sum of \$7,500 per month.

Plaintiff wife and defendant husband were married on August 19, 2006. They have one eight-year-old son. The marital residence is an apartment in Manhattan, which defendant purchased with an inheritance from his uncle. Plaintiff worked as a professional model before her son was born, earning between \$80,000 and \$100,000 annually; she has not worked outside of the home since the child was born. Defendant did not work during the marriage; he supported the family with the annual returns on his investments, which averaged about \$170,000 annually.

Plaintiff commenced this action for divorce and ancillary

relief in June 2011. On October 5, 2011, the parties met for a preliminary conference and signed a preliminary conference stipulation, which was so-ordered by the court. The PC order directed defendant to pay temporary maintenance of \$250 per week, plaintiff's cell phone expenses up to 1,000 minutes, all fixed and other household expenses, and all costs of the child, including but not limited to private nursery school tuition and health costs.

On August 28, 2014, the court entered an order of protection against defendant, directing him to stay away from plaintiff at all times. Defendant no longer lives in the marital residence with plaintiff and the child.

Plaintiff moved for an upward modification of pendente lite spousal maintenance. In her affidavit in support of the motion, plaintiff argued that a substantial change of circumstances had occurred, since the parties no longer lived together in the marital apartment, pursuant to the order of protection. She also asserted that her attorney had recently received a subpoena response from defendant's bank, and the bank records showed that defendant had received large deposits into his account totaling more than \$307,000 between January and August 2014. Defendant also had made several large cash withdrawals between February and July 2014, totaling about \$55,300, and had written numerous large

checks for as much as \$50,000 each. Plaintiff detailed defendant's considerable, almost daily expenditures at high-end restaurants, sometimes amounting to hundreds or thousands of dollars. She further noted that the bank records did not reflect the monthly maintenance that defendant paid on the marital apartment, which amounted to about \$50,000 annually, and urged that that income be imputed to defendant. Accordingly, plaintiff argued that the minimum annual income that could be imputed to defendant was \$510,500 per year (without even accounting for his expenditures when he was abroad). She asserted that applying the maintenance formula to this sum yielded a weekly maintenance obligation of \$2,945.19 and that applying the statutory formula for calculating child support to defendant's proposed imputed income of \$510,500 resulted in an adjusted child support obligation of \$1,168.25 per week. Plaintiff requested an immediate award, emphasizing that "[i]t is unfair that the Defendant can spend hundreds of thousands of dollars on lawyers, restaurants, travel and wine and I need to borrow money to take our son to the movies or even buy laundry detergent." She also stated that defendant paid her \$250 weekly maintenance late almost every week, and had allowed the cable, Internet, house phone and her cell phone to be shut off for nonpayment every few months.

As an exhibit to her affidavit, plaintiff attached an updated statement of her net worth showing total monthly expenses of \$22,452 and no income.

In opposition to the motion, defendant argued, among other things, that plaintiff had not identified any "substantial undisclosed funds" and that any perceived inequities in the pendente lite maintenance and child support could best be remedied by a speedy trial. He noted that plaintiff's updated statement of net worth was more than one year and nine months old and that he was paying many of the expenses cited. He also took issue with plaintiff's \$2,150 monthly expense for groceries, her \$2,500 monthly expense for dining out, her \$1,500 monthly expense for alcohol, and her \$1,000 monthly expense for clothing for herself. Defendant stated that this prolonged litigation had forced him to spend his savings and to borrow against a brokerage account and that the deposits into his bank account cited by plaintiff were transfers from his brokerage account, made for the payment of the parties' legal fees and living.

The motion court concluded that the PC order, which directed defendant to pay plaintiff \$250 weekly in temporary maintenance, was unenforceable, because it did not state that the parties were advised of the temporary maintenance calculations under Domestic Relations Law former § 236(B)(5-a), did not state the presumptive

amount pursuant to that calculation, and did not state the reason for deviating from that amount. Moreover, the court determined that the entire stipulation was invalid, because its remaining financial terms were intertwined with the temporary maintenance terms.

The court next calculated the appropriate temporary maintenance, applying the formula set forth in the DRL, which is based on the parties' gross income. It noted that neither party submitted tax returns in connection with this motion, but that in connection with one of the other motions under consideration, defendant submitted tax returns for 2009 through 2013, which report his adjusted gross income in each of those years as between \$50,000 and \$60,000. The court found these tax returns not to be credible, because defendant stated in an affidavit that in 2011 he had income from his investments of about \$150,000 to \$170,000 annually. Defendant had also submitted a letter from his accountant estimating his 2014 income at \$300,000. Accordingly, the court deemed defendant's income to be \$300,000 for the purposes of calculating temporary maintenance. With respect to plaintiff's income, plaintiff claimed to have none, and defendant did not dispute that assertion. Taking into account the 17 factors enumerated in Domestic Relations Law former § 236(B) (5-a) (e) (1), and noting that the parties enjoyed a

comfortable lifestyle and that neither party worked during the marriage, the court concluded that defendant must pay plaintiff temporary maintenance in the sum of \$7,500 per month, retroactive to the date of plaintiff's motion. The court clarified that that sum was intended to cover all of plaintiff's reasonable expenses, including housing; thus, the court did not order defendant to pay any expenses to third parties on plaintiff's behalf, such as the maintenance fees on the marital apartment, which he had been paying.

On appeal, defendant argues that the court erred as a matter of law when it found the entire PC order to be invalid and unenforceable, because the court incorrectly equated the PC order with a "validly executed agreement." We disagree.

The preliminary conference stipulation voluntarily entered into between the parties and so-ordered by the court on October 5, 2011, is invalid as a matter of law, because it fails to comply with the requirements of Domestic Relations Law former § 236(B)(5-a)(f). That statute required that, where, as here, a

"validly executed agreement or stipulation voluntarily entered into between the parties in an action commenced [on or after October 13, 2010] . . . deviates from the presumptive award of temporary maintenance, the agreement or stipulation must specify the amount that such presumptive award of temporary maintenance would have been and the reason or reasons that such agreement

or stipulation does not provide for payment of that amount" (former Domestic Relations Law § 236[B][5-a][f]).

This provision of the statute "may not be waived by either party or counsel" (*id.*).

Our holding is supported by cases interpreting the Child Support Standards Act (CSSA) (Domestic Relations Law § 240[1-b][h]), which contains a virtually identical recital requirement. Agreements opting out of the basic child support obligations under the CSSA but not containing the foregoing recitals have been found to be invalid (*David v Cruz*, 103 AD3d 494 [1st Dept 2013]; *Bushlow v Bushlow*, 89 AD3d 663 [2d Dept 2011]; *Cimons v Cimons*, 53 AD3d 125[2d Dept 2008]).

Because the temporary maintenance terms in the PC order deviated from the presumptive award of temporary maintenance without providing the statutorily required recitals, the terms are unenforceable (see *David v Cruz*, 103 AD3d 494; *Bushlow v Bushlow*, 89 AD3d 664). Moreover, because the remaining terms of the PC order are intertwined with the temporary maintenance terms, the entire order is invalid (see *David v Cruz*, 103 AD3d at 495; *Bushlow v Bushlow*, 89 AD3d at 664). Accordingly, the motion court correctly calculated the temporary maintenance award de novo, rather than considering plaintiff's application for upward modification based on the award set forth in the PC order. In

addition, the court properly calculated the award based on the procedure set forth in the Domestic Relations Law (see Domestic Relations Law former § 236[B][5-a]; *Khaira v Khaira*, 93 AD3d 194, 197-198 [1st Dept 2012]).

Accordingly, the order of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered April 1, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for an upward modification of the temporary maintenance awarded in a preliminary conference order to the extent of ordering defendant to pay plaintiff temporary maintenance in the sum of \$7,500 per month, should be affirmed, without costs.

All concur.

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

ENTERED: August 4, 2016

  
CLERK