

defendant does challenge the ensuing warrantless search of the car that yielded the narcotics evidence providing the basis for the criminal possession charge to which he pleaded guilty.¹ Supreme Court denied defendant's motion to suppress this evidence based on its finding that the People established at the suppression hearing that the evidence was recovered in the course of a valid inventory search. We now reverse.

An inventory search is "a search designed to properly catalogue the contents of the item searched" (*People v Johnson*, 1 NY3d 252, 256 [2003]). "The specific objectives of an inventory search, particularly in the context of a vehicle, are to protect the property of the defendant, to protect the police against any claim of lost property, and to protect police personnel and others from any dangerous instruments" (*id.*, citing *Florida v Wells*, 495 US 1, 4 [1990]). To establish that evidence was recovered in the course of a valid inventory search of a vehicle, the People are required to offer proof that the search was "conducted pursuant to 'an established procedure clearly limiting the conduct of individual officers that assures that the searches

¹Such evidence included the following items found in the car's trunk at the scene of the arrest: a "Banana Republic" bag containing a clear plastic bag apparently filled with cocaine powder, an electric scale, and an empty, clear plastic bag apparently coated with cocaine residue, and (outside the "Banana Republic" bag) a brown manila envelope containing several red pills. In addition, after the car was driven to the precinct, 45 empty plastic "baggies" were found inside the panel of the driver's door.

are carried out consistently and reasonably' " (*Johnson*, 1 NY3d at 256, quoting *People v Galak*, 80 NY2d 715, 719 [1993]). In addition, the People are required to establish that the search actually produced "a meaningful inventory list" (*Johnson*, 1 NY3d at 256; see also *Galak*, 80 NY2d at 720 [an inventory search must "create a usable inventory"]).

In this case, the People failed to meet their initial burden of coming forward with evidence that the search of defendant's car was conducted in accordance with a standardized procedure established by the Police Department that was "rationally designed to meet the objectives that justify the search in the first place" and "limit[ed] the discretion of the officer in the field" so as to "assure[] that the searches are carried out consistently and reasonably and do not become little more than an excuse for general rummaging to discover incriminating evidence" (*Galak*, 80 NY2d at 719). While it was not necessarily fatal to the People's case that they did not place in evidence the Patrol Guide's written guidelines for conducting an inventory search, the People also failed to elicit from the police witness the relevant content of those guidelines. The only testimony the People elicited about the content of the Patrol Guide's inventory search procedure was that it permits such a search to be conducted either at the scene or at the precinct and that it provides that such a search should be conducted "of a vehicle

that is going to be vouchered." No additional relevant details of the procedure for inventory searches were adduced. In particular, although the drugs in this case were found in the trunk of defendant's car, and other evidence was found inside a door panel, the People did not establish the circumstances that would justify opening a closed trunk or a door panel under the Patrol Guide procedure (see *People v Colon*, 202 AD2d 708 [1994], *lv denied* 84 NY2d 824 [1994] [drugs found during inventory of vehicle "in a paper bag located in the trunk and hidden behind some of the vehicle's interior paneling" were suppressed due to failure to establish that trooper was "acting pursuant to any standardized procedure in conducting the inventory"]; cf. *People v Lesane*, 284 AD2d 249, 250 [2001] [locked metal compartment in vehicle was opened during inventory search in accordance with applicable procedure]; *People v Watson*, 213 AD2d 996, 997 [1995], *lv denied* 86 NY2d 804 [1995] [vehicle's door panel was opened during inventory search in accordance with applicable procedure]; *People v Walker*, 194 AD2d 92, 94 [1993], *lv denied* 83 NY2d 811 [1994] [vehicle's trunk was opened during inventory search in accordance with applicable procedure]).²

²The police witness testified that the search of defendant's car was motivated in part by the officer's recollection that, during an encounter he had with defendant in an apartment the night before the arrest, defendant had claimed to have a gun. However, the officer never explained how defendant's claim the night before (which had not prompted any search at the time) affected the manner in which the inventory search of defendant's

Since the People failed to establish the content of any standardized procedure for inventory searches promulgated by the New York City Police Department, it necessarily follows that the People also failed to come forward with evidence that the search of defendant's car was conducted in accordance with any such standardized procedure. Further, even if the People had established that the search was otherwise conducted in accordance with a reasonable standardized procedure for conducting inventory searches, suppression would still be required on the ground that the People completely failed to establish that the police created any actual inventory list of the items found in the car, such a list being "the hallmark of an inventory search" (*Johnson*, 1 NY3d at 256). While the police witness testified that a voucher and forfeiture papers were prepared for the car itself, there is no indication that such paperwork included any itemization of the car's contents. As to the officer's testimony that he prepared vouchers for the various items found in the car that were to be held for use as evidence, such disparate and selective documentation of the car's contents could not substitute for a single "meaningful inventory list" (*id.*; see also *Galak*, 80 NY2d at 720 [the requirement of "a detailed and carefully recorded

car could properly be conducted under the Patrol Guide's standards. The People have not argued that defendant's prior statement that he had a gun created probable cause for searching his car when he was arrested on an unrelated charge the next day.

inventory" was not satisfied where, inter alia, "no record was kept of what property, if any, was left in the car or returned to defendant"). The People did not place in evidence any comprehensive inventory list "catalogu[ing] the contents of the [vehicle] searched" (*Johnson*, 1 NY3d at 256) and noting the disposition of each item found therein, whether or not that item was retained by the police. Further, not only did the police witness not testify that any such list had been created, he affirmatively testified that he believed that no official form for inventory lists had been promulgated:

Q. But there is a special form when you do an inventory search of what was in the vehicle, what was recovered from the vehicle, if it was brought somewhere for safekeeping, correct?

A. No, there is not.

Q. There's no form at all?

A. No.³

We observe that, if vouchers for items held as evidence were deemed to constitute, collectively, an inventory list of the contents of the vehicle from which those items were recovered,

³In their brief, the People concede that, contrary to the officer's testimony, "[p]olice officers operating under the Patrol Guide are directed to voucher valuables recovered in an inventory search on a Property Clerk's Invoice (Document Number PD521-141)," as set forth in Patrol Guide Procedure No. 218-13 ("Inventory Searches of Automobiles and Other Property"). The People do not argue that the voucher that was filled out for the evidence found in defendant's car constituted the functional equivalent of PD521-141, the inventory form prescribed by the Procedure No. 218-13.

the requirement that an inventory search produce an inventory list would be eviscerated, since the police create vouchers, as a matter of course, for items being retained for use as evidence. Moreover, to the extent the police document only those contents of a vehicle that have potential evidentiary value (as appears to have been the case here), it tends to show that the purpose of the search of the vehicle was "a general rummaging in order to discover incriminating evidence" (*Johnson*, 1 NY3d at 256, quoting *Florida v Wells*, 495 US at 4), which is not an appropriate aim of an inventory search. "While incriminating evidence may be a consequence of an inventory search, it should not be its purpose" (*Johnson*, 1 NY3d at 256).⁴

Contrary to the view of the dissent, defendant preserved both the issue of the People's failure to establish that the search of the vehicle was conducted in accordance with an established procedure for inventory searches and the issue of the failure of any meaningful inventory list to result from the search of the vehicle. Indeed, the People -- who are not

⁴The dissent's remark that the People showed "that all of the items of *contraband* were recorded in the voucher" (emphasis added) underscores the point that the purpose of the search of defendant's car was to discover incriminating evidence, not to produce a general inventory of all of the vehicle's contents. Moreover, we do not share the dissent's view that it is "a more reasonable inference" from the officer's testimony that he "recorded all of the items found in the vehicle." In this regard, we reiterate that it was the People's initial burden to come forward with affirmative evidence that an inventory list was, in fact, created.

reticent to argue that arguments have not been preserved for appellate review -- do not argue that defendant failed to preserve the arguments he makes on this appeal. The following excerpts from defense counsel's argument at the *Mapp* hearing demonstrate the preservation of these issues:

"[The cases] all say, if there is going to be an inventory search, certain safeguards and certain procedures have to be followed. There needs to be a form that's filled out. And although the officer denied there is a form, there actually is one, and I have the form number here, somewhere. I have it listed somewhere. But there is a form that has to be filled out. This officer said he never filled out an inventory search form.

"And the reason they have to have procedures is, the cases say this can't be some sort of rouse [sic] to search a vehicle, if you have no other reason to search the vehicle. This officer testified that on an arrest for driving with a suspended license, with the car double-parked, with one car, one door unable to be opened, where he couldn't even do an entire inventory search, he had to bring the car to the precinct to open up the [panel of the] door, where the glassine envelopes [sic] were allegedly found, with two other police officers there. It was unknown whether cars could pass, because he said he didn't remember.

"You are going to stop everything at 1 o'clock in the morning, and stop [sic] doing an inventory search, and you don't have a form writing down what you are taking, why you are taking it, what you are keeping for safekeeping? The Courts are very clear, and the Court of Appeals, I believe, unanimously in [*People v Johnson, supra*] said that -- I am going to quote from the Court of Appeals, Judge.

"They [the Court of Appeals] said [counsel here read from *Johnson*, 1 NY3d at 256] that 'an inventory search must not be a rouse [sic; Court of Appeals wrote "ruse"] for general rummaging in order to discover incriminating evidence. To guard against this danger [an] inventory search [sh]ould be conducted pursuant to [an] established procedure, clearly limiting the conduct of individual officers. That assures that the searches are carried out consistently and reasonably. The procedure must be

standardized, so as to limit the discretion of the officer in the field. While inventory [sic; Court of Appeals wrote "incriminating"] evidence may be [a] consequence of [an] inventory search, it should not be its purpose, and the prosecution has the initial burden of establishing a valid inventory search.' [Here the inexact reading from *Johnson* ends.]

"It is the prosecution's burden to prove that this was a valid inventory search. I think the officer's testimony after arresting someone for driving with a suspended license, that he was going to just start an inventory search, without having the form to fill out, right in the middle of the street, at 1 o'clock in the morning, is ludicrous.

"I submit to the Court that what this officer was doing was attempting to search the car, perhaps because the defendant, the day before, was taken to a hospital, maybe suspected there may have drugs in the car. He was trying to find a reason to search that car, and that is what he was doing. Whether or not he thought of that reason afterwards, because he realized that you can't search a car when you stop somebody and arrest someone for driving with a suspended license unless you have probable cause to believe there is contraband, I don't know when he decided that. But at some point, he thought up this rouse [sic].

"Well, this was [not] an inventory search. It is obvious what this is. This is very similar to the *Johnson* case, where the officer went into a glove compartment to look, and he said, to inventory the car at the scene, and gun was recovered. And the Court of Appeals unanimously held that you can't do that. An inventory search has to be a standardized procedure.

"If this vehicle had been brought back and if they had a search of the vehicle, and if they have a form listing what they were taking out, it would be a different story. That is not what happened here, Judge. So based upon the evidence, and based upon the leading cases in this state, I am going to ask the Court to suppress all of the evidence that was removed from the vehicle. There was absolutely no probable cause to search this vehicle, and this was obviously not an inventory search, it was just rouse [sic]

by the officer to justify searching the vehicle.”⁵

In sum, because the People failed to establish that the Police Department’s inventory search procedure was reasonable and that the search of defendant’s car was conducted in accordance with that procedure and produced a legitimate inventory list, defendant was entitled to have the evidence produced by that search suppressed. We note that the People did not raise an argument of inevitable discovery in opposition to the suppression motion, and we therefore have no occasion to consider such a theory.

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

⁵Even if we were to accept (which we do not) the dissent’s position that defendant did not preserve the issue of the People’s failure to show that the arresting officer followed an established procedure for inventory searches (although, to reiterate, the People have made no such argument), the above-quoted portions of the hearing transcript establish to our satisfaction that, contrary to the dissent’s view, defendant preserved the issue of the People’s failure to produce any actual inventory list that resulted from the search of the vehicle. The latter issue, by itself, suffices to require a reversal.

McGUIRE, J. (dissenting)

I respectfully dissent. All of the claims advanced by defendant on appeal in support of his contention that the motion to suppress should have been granted are unpreserved. The interest of justice does not support reviewing these claims; it requires, to the contrary, that we not review them and affirm the judgment in all respects.

The sole witness at the suppression hearing was Police Officer Vetell. With respect to the inventory search of defendant's car that followed his arrest for driving with a suspended license, Officer Vetell testified that the car had to be "vouchered for safekeeping" and that he vouchered the car because it had to be inventoried according to the standard procedures for the New York City Police Department. Vetell also testified that the Patrol Guide "la[id] out procedures for an inventory search" and that he was familiar with those procedures.

As Vetell explained, the car was vouchered for safekeeping "[b]ecause it was in an illegal parking space, defendant was, obviously, not allowed to drive it, and I was not going to take responsibility and park it in the street. Procedurally, we were going to bring it back to the precinct and safeguard the vehicle until the defendant got out." One purpose of the inventory search was to make sure there were no valuables in the car. As Vetell also testified, a police officer was going to have to

drive the car to the precinct and the officers "were going to make sure there was no weapon in the vehicle." The officers were going to make sure there was no weapon because defendant had threatened Vetell the day before, stating that he had a gun and was going to kill him. Thus, there were two reasons for the search of the vehicle: because it was being taken to the precinct and vouchered and because of the threat.

The inventory search began at the scene of arrest, but was hampered because one of the doors was blocked due to the way the car was double parked. At the scene, however, one of Officer Vetell's fellow officers removed a white bag from the trunk. Inside the bag was a clear plastic bag of powdered cocaine, an electric scale and another clear plastic bag containing cocaine residue. A brown manila envelope with several red pills inside also was found in and removed from the trunk.

After the drugs were found in the trunk, a group of people was gathering on the sidewalk and Vetell's sergeant directed that the inventory search be completed at the precinct. Under the Patrol Guide, an officer may perform an inventory search either at the scene of arrest or at the precinct. The search was completed at the precinct. The sergeant at some point discovered "45 empty baggies" in the door panel of the driver's door. Officer Vetell prepared both a voucher form relating to the car and "forfeiture paper[work]." Asked on direct examination what

he did with the 45 plastic baggies, Officer Vetell answered: "[t]hey were vouchered." When he was next asked what he did with the white bag containing the cocaine, the scale, the empty bag with the residue and the red pills, Officer Vetell stated: "[t]hose were vouchered, as well." Asked by defense counsel on cross-examination if he "fill[ed] out any form about doing an inventory search on what was found in the vehicle," Officer Vetell answered: "[t]he voucher." When counsel went on to ask if there was a "special form when you do an inventory search of what was ... recovered from the car," Vetell responded: "[n]o, there is not."

None of the foregoing testimony from Officer Vetell was contradicted at the hearing. The suppression court found Officer Vetell to be credible, made findings of fact that were consistent with the testimony in every relevant respect and upheld the reasonableness of the inventory search.

The majority reverses, grants the motion to suppress and dismisses the indictment because: (1) "the People ... failed to elicit from the police witness the relevant content of [the Patrol Guide's written guidelines for conducting an inventory search]," (2) "the People did not establish the circumstances that would justify opening a closed trunk or a door panel under the Patrol Guide procedure" and (3) "the People completely failed to establish that the police created any actual inventory list of

the items found in the car.”

Not a single one of these grounds for suppression was raised at the hearing. As discussed below, defendant placed his eggs in a very different basket. Rather than advance specific arguments that the People could meet with additional evidence, defendant attacked the veracity of Officer Vetell, arguing that the asserted basis for searching the vehicle, an inventory search, was just a pretext. Accordingly, all of these grounds (and each of the arguments defendant raises on appeal) are unpreserved and, as is also discussed below, should not be relied upon now for the first time when the People are unable to counter them with evidence.

Before focusing on the arguments advanced by defendant at the hearing, another flaw in the majority’s position should be noted. With respect to the last of the three grounds for reversal it posits, the majority elaborates on it in three respects. The first two are: (a) although Officer Vetell “testified that a voucher and forfeiture papers were prepared for the car itself, there is no indication that such paperwork included any itemization of the car’s contents”; and (b) “[t]he People did not place in evidence any comprehensive inventory list cataloguing the contents of the vehicle searched and noting the disposition of each item found therein, whether or not that item was retained by the police” (internal quotation marks, citation

and brackets omitted). The third elaboration is less easily stated. In essence, however, the majority appears to be of the view that the "voucher" that Officer Vetell testified he prepared was defective because incomplete. Thus, the majority first notes that "the police create vouchers, as a matter of course, for items being retained for use as evidence." The majority then goes on to argue that "to the extent the police document only those contents of a vehicle that have potential evidentiary value (*as appears to have been the case here*), it tends to show" that the search was conducted for an improper purpose (emphasis added).

Again, however, defendant did not make a single one of these arguments in urging that the motion to suppress should be granted. That is, defendant never objected on any of the following grounds: the paperwork did not "include[] any itemization of the car's contents"; "[t]he People did not place in evidence any comprehensive inventory list"; the voucher or other paperwork "document[ed] only those contents ... that ha[d] potential evidentiary value." The majority's assertion that it "appears to have been the case here" that Officer Vetell documented only items found in the car with "potential evidentiary value" is unexplained and appears to rest on an unwarranted inference. Officer Vetell testified in response to specific questions about specific items found in the car (the

drugs, the scale and the baggies) that he vouchered them. From this, the majority apparently but illogically concludes that Officer Vetell noted *only* these items on the voucher relating to the case, even though he certainly never testified that he included only these items on the voucher.¹ The opposite and more reasonable inference is suggested by the only other testimony on point. As noted, defense counsel asked the officer if he "fill[ed] out any form about doing an inventory search on *what was found in the vehicle*" and if there was "a special form when you do an inventory search of what was ... *recovered from the vehicle*" (emphasis added). The italicized language in both these questions is unqualified and neither the questions nor the answers (which were, respectively, "[t]he voucher" and "[n]o, there is not") suggest that the voucher Officer Vetell filled out was limited to items of potential evidentiary value.

Indeed, defendant never offered any argument that the motion to suppress should be granted on account of the contents of the voucher.² Rather, the only protest counsel registered that bears

¹The majority makes precisely this logical error in the first sentence of its footnote 4. To reiterate: from the indisputable fact that at the very least the voucher recorded all the items of contraband, it cannot sensibly be maintained that the voucher recorded only the items of contraband.

²At the hearing, the People of course were obligated to provide the defense with the paperwork prepared by Officer Vetell (CPL 240.44[1]). Defense counsel never protested that he had not been provided with the voucher.

at all on this subject was that Officer Vetell should have filled out some particular form other than the voucher. Apart from the fact that this protest does not entail or suggest any objection to the content of the voucher, it is beside the point for another reason. There was *no* testimony at the hearing that supported counsel's unsworn assertion during oral argument that such a form exists and that it must be filled out.³

Although the majority quotes at some length from defense counsel's arguments in support of the motion to suppress, those arguments should be quoted in full. Counsel argued as follows:

"The People are going to argue, or I assume they are going to argue because the officer has stated the three basic reasons for searching the vehicle and recovering the contraband in this case. The first one was a search, incident to a lawful arrest. But I would submit to the Court that the cases are very clear, the leading cases being *People v.*

³Defendant's appellate counsel unsuccessfully attempts to support trial counsel's claim by expanding the record. Counsel asserts that "the New York City Police Department Patrol Guide states that when conducting an inventory search of an automobile, the officers should 'remove all valuables from the vehicle and voucher on a separate PROPERTY CLERK'S INVOICE (PD521-141).' Barry Kamins, *New York Police Department Patrol Guide*, 1175 (2005)." Thus, appellate counsel simply assumes that the voucher described by Officer Vetell is not such an invoice. Ironically, moreover, the very procedure from which counsel quotes (Procedure No. 218-13), articulates the guidelines for conducting an inventory search and sets forth the circumstances relating to opening and searching a trunk, container and other areas within a vehicle. Suffice it to say, Procedure No. 218-13 is fully consistent with Officer Vetell's testimony and with the manner in which the search was conducted. It cannot be that this Court can take judicial notice only of language in the procedure that counsel regards as helpful to defendant.

Belton and *People v. Langen*, Court of Appeals cases, that there has to be a nexus between the search and arrest, probable cause for the contraband in the vehicle.

"In this case there was merely an arrest for a VTL misdemeanor, driver's suspended license. There was absolutely no reason at all for this officer to believe there was contraband in the vehicle.

"He gave a second reason for the search that is tied with this, and that is, the day before when the defendant, who obviously was having some psychiatric problems, was taken to the hospital and threatened to hurt himself and threatened to kill the officer. So the officer testified that, well, I wanted to see if there was a gun in the vehicle.

"The Court heard the condition that the defendant was in. He had no shirt on, he locked himself in a room. Obviously, this was somebody who was having a lot of problems. He never said 'I have a gun, I am going to shoot you.'⁴ The officer never asked the mother if he had a gun, never had a search warrant to search the house, or any of that.

"All of a sudden he gives that as a reason as to why he wanted to search the car. I ask the Court to reach the conclusion that that is just ludicrous. The officer is just trying to find any reason to justify the search. There is no reason to believe this defendant ever had a gun.

Just because he was taken to the hospital and screamed out 'I am going to kill you,' and 'I am going to hurt myself,' that is ridiculous. He never said 'I have a gun

⁴Counsel was wrong. Although the validity of the search hardly turns on it, Officer Vetell unequivocally testified that defendant had stated the previous day that he, defendant, had a gun and was going to kill the officer.

in the car' or 'I have a gun in the trunk.'

"So I submit to the Court, knowing that those two justifications for searching the car aren't going to work, the officer tried using the rouse [sic] of, well, this is an inventory search.

"I submit to the Court, it was just a rouse [sic], and the cases are clear. I have a number of them. I don't know if the Court has the same as I do. *People versus Johnson*, which is the leading case. Actually, Mr. Arnold Levine is sitting right here, and he was the one who argued that case in front of Judge Atlas.

"*People versus Atlas*, which is a second department case, that cites *Johnson*. *People versus Russell*, which is another second department case. *People versus Galak*, another Court of Appeals case.

"They all say, if there is going to be an inventory search, certain safeguards and certain procedures have to be followed. There needs to be a form that's filled out. And although the officer denied there is a form, there actually is one, and I have the form number here, somewhere. But there is a form that has to be filled out.⁵ This officer said he never filled out an inventory search form.

"And the reason they have to have procedures is, the cases say this can't be some sort of rouse [sic] to search a vehicle, if you have no other reason to search the vehicle. This officer testified that on an arrest for driving with a suspended license,

⁵As noted, there was no evidentiary support for this assertion by counsel that some form other than a voucher had to be filled out. In any event, as also noted, this protest cannot be equated with any objection relating to the contents of or any other inadequacy regarding the voucher that the officer unquestionably did fill out.

with the car double-parked, with one car, one door unable to be opened, where he couldn't even do an entire inventory search, he had to bring the car to the precinct to open up the door, where the glassine envelopes were allegedly found, with two other police officers there. It was unknown whether cars could pass, because he said he didn't remember.

"You are going to stop everything at 1 o'clock in the morning, and stop doing an inventory search, and you don't have a form writing down what you are taking, why you are taking it, what you are keeping for safekeeping? The Courts are very clear, and the Court of Appeals, I believe, unanimously in *Johnson* said that -- I am going to quote from the Court of Appeals, Judge.

"They said that an 'inventory search must not be a rouse [sic] for general rummaging in order to discover incriminating evidence. To guard against this danger [an] inventory search [sh]ould be conducted pursuant to [an] established procedure, clearly limiting the conduct of individual officers. That assures that the searches are carried out consistently and reasonably. The procedure must be standardized, so as to limit the discretion of the officer in the field. While inventory [sic] evidence may be [a] consequence of [an] inventory search, it should not be its purpose, and the prosecution has the initial burden of establishing a valid inventory search.'

"It is the prosecution's burden to prove that this was a valid inventory search.⁶ I think the officer's testimony after arresting someone for driving with a suspended license,

⁶Of course, as the quotation from *Johnson* indicates, the People bore only the initial burden of going forward with evidence that the inventory search was lawful. The ultimate burden of persuasion was on defendant to show that the search was unlawful (*People v Di Stefano*, 38 NY2d 640, 652 [1976]).

that he was going to just start an inventory search, without having the form to fill out, right in the middle of the street, at 1 o'clock in the morning, is ludicrous.

"I submit to the Court that what this officer was doing was attempting to search the car, perhaps because the defendant, the day before, was taken to a hospital, maybe suspected there may have been drugs in the car. He was trying to find a reason to search that car, and that is what he was doing. Whether or not he thought of that reason afterwards, because he realized that you can't search a car when you stop somebody and arrest someone for driving with a suspended license unless you have probable cause to believe there is contraband, I don't know when he decided that. But at some point, he thought up this rouse [sic].

"Well, this was [not] an inventory search. It is obvious what this is. This is very similar to the *Johnson* case, where the officer went into a glove compartment to look, and he said, to inventory the car at the scene, and a gun was recovered. And the Court of Appeals unanimously held that you can't do that. An inventory search has to be standardized procedure.

"If this vehicle had been brought back, and if they had a search of the vehicle, and if they have a form listing what they were taking out, it would be a different story. That is not what happened here, Judge. So based upon the evidence, and based upon the leading cases in this state, I am going to ask this Court to suppress all of the evidence that was removed from the vehicle. There was absolutely no probable cause to search this vehicle, and this was obviously not an inventory search, it was just a rouse [sic] by the officer to justify searching the vehicle."

After the prosecutor argued in opposition to the motion to

suppress, counsel offered the following in reply:

"Your Honor, may I briefly, very briefly, talk about the Prosecutions [sic] cases that she mentioned?

"*Dickens, Middleton, Solo, Cammick*, all involve a car that was going to be towed by private towing companies, so the officer had to inventory the car first, because some private company was going to have it.

"As far as *Salazar*, the Court makes a point to say that the inventory form was filled out, which was not done here. And *Gonzales* involves a brown bag, suspended from a wire from under the dashboard that the defendant was trying to secrete, and the Court held that because of the unusual location, the manner in which it was affixed, and the effort to conceal it, the police reasonably concluded that the bag, requiring items of discovery, of inventory, that there might be a danger there. It was so unusual.

"Nothing like that happened here. There was nothing unusual in this vehicle until there was a full blown search of the vehicle at the scene."

As is evident, in urging suppression, counsel attacked the credibility and motivations of Officer Vetell, characterizing his testimony that the search at 1:00 a.m. was an inventory search as "ludicrous." Counsel's constant and unvarying contention was that the officer's testimony that the search was an inventory search was a ruse. Although counsel expressed some uncertainty about whether the testimony that the search was an inventory search was an after-the-fact or before-the-fact invention, he expressly argued no less than three times that this testimony was

a ruse and twice argued in the same vein that the officer was "just trying to find any reason to justify the search" and he "was trying to find a reason to search that car."

The linchpin in counsel's argument was the specific form that counsel insisted, without any support in the evidence, was required to be filled out. Thus, counsel asserted that such a form "has to be filled out" and misleadingly argued that the officer "said he never filled out an inventory search form." Counsel went on to scoff at "the officer's testimony ... that he was going to just start an inventory search, without having the form to fill out, right in the middle of the street, at 1 o'clock in the morning," deriding that testimony as "ludicrous." To reiterate, moreover, counsel never argued either that Officer Vetell had failed to record on the voucher all of the items found in the car or that the motion to suppress should be granted because the People did not introduce the voucher into evidence. Rather, counsel was arguing that if the search had been an inventory search, the officer would have filled out the particular form the existence of which counsel insisted upon.

The specific grounds upon which the majority relies are glaringly absent from counsel's argument. But another specific aspect of counsel's argument, one based on both the ostensible existence of the form and the location of the search, should be underscored, for it makes clear beyond any doubt that counsel's

argument had nothing remotely to do with two of the three specific grounds upon which the majority relies. That is, as counsel was summarizing his argument, he stated: "If this vehicle had been brought back, and if they had a search of the vehicle, and if they had a form listing what they were taking out,⁷ *it would be a different story*" (emphasis added). If counsel had been arguing that the motion to suppress should be granted either because the relevant content of the Patrol Guide's written guidelines had not been elicited at all or in sufficient detail or because the procedures under the Patrol Guide relating to opening a closed trunk or a door panel were not elicited, counsel could not have made this concession.

Because defendant "did not raise th[e]se specific arguments before the hearing court" they are unpreserved (*People v Cherry*, 302 AD2d 472 [2003], *lv denied* 100 NY2d 537 [2003]; see CPL

⁷Only the article "a" rather than "the" in this clause provides superficial support for the majority's contention that "defendant preserved the issue of the People's failure to produce any actual inventory list that resulted from the search of the vehicle." In context, however, it is clear that counsel was once again stressing the absence of *the* particular form that he asserted was required. Indeed, in his reply to the prosecutor's arguments, counsel once again referred to "the inventory form" that supposedly existed. Moreover, during her argument, the prosecutor contended that forfeiture paperwork for the car was prepared and that "paperwork, as well as the voucher for the vehicle, as well as all property recovered was, in fact, documented and vouchered as evidence in this case." For these reasons, this lone reference to "a" form hardly was sufficient to alert the hearing court to defendant's current claim that Officer Vetell did not fill out a "meaningful inventory list" (see *People v Goode* 87 NY2d 1045, 1047 [1996]).

470.05[2])). Moreover, they are unpreserved for a reason going to the heart of the requirement of a timely and specific objection. By not raising these arguments at the hearing, defendant deprived the People of an opportunity to meet them with evidence (see *People v Luperon*, 85 NY2d 71, 78 [1995] [preservation rules “require, at the very least, that any matter which a party wishes the appellate court to decide have been brought to the attention of the trial court at a time and in a way that gave the latter the opportunity to remedy the problem and thereby avert reversible error”]; *People v Tutt*, 38 NY2d 1011, 1013 [1976] [“[w]here ... the defendant fails at the suppression hearing to challenge a narrow aspect of the sufficiency of the admonitions given him, at a time when the People would have an evidentiary opportunity to counter his assertion, he may not then be heard to complain on appeal”]). As the majority correctly notes, the People do not contend in their brief that defendant failed to preserve for review the arguments he raises on appeal. That failure is startling but irrelevant. After all, even if the People had conceded that the arguments were preserved, that concession would not be binding on us (*cf. People v Berrios*, 28 NY2d 361, 366-367 [1971]) and would not “relieve us from the performance of our judicial function” (*id.* at 366) of determining whether defendant has preserved an issue of law for review.

Even if defendant had preserved for review the contention

that the People did not fill out a "meaningful inventory list," we should affirm the conviction just the same. To be sure, in the course of holding in *People v Johnson* (1 NY3d 252, 256 [2003]) that the evidence was insufficient "to satisfy the prosecutor's initial burden of establishing a valid inventory search," the Court of Appeals stated that the officer "did not fill out the hallmark of an inventory search: a meaningful inventory list." But here the evidence established beyond cavil that all of the items of contraband were recorded in the voucher. In addition, as argued above, the more reasonable inference from the testimony on cross-examination is that the voucher prepared by Officer Vetell recorded all of the items found in the vehicle. Accordingly, the People met their initial burden and defendant failed to meet his ultimate burden of persuasion on the issue of whether a "meaningful inventory list" was prepared (see *People v DiStefano*, 38 NY2d at 652 ["it is the accused, not the People, who must shoulder the burden of persuasion on a motion to suppress evidence"]).

The majority correctly notes that in their brief the People state that "[p]olice officers operating under the Patrol Guide are directed to voucher valuables recovered in an inventory search on a Property Clerk's Invoice (Document Number PD521-141)." In finding the People thus to have made a "conce[ssion]," however, the majority fails to quote the preceding sentence:

"Vetell testified that no 'special form' is used in an inventory search." The majority simply assumes without any support whatsoever in the hearing evidence that there is some difference between the voucher that Officer Vetell filled out and "Document Number PD521-141." The majority immediately goes on to state that "[t]he People do not argue that the voucher that was filled out for the evidence found in defendant's car constituted the functional equivalent of PD521-141, the inventory form prescribed by the Procedure No. 218-13." This statement is sheer sophistry as it is true only in the sense that the People do not use the phrase "functional equivalent" in their brief. The People's argument is that all of the items found in the vehicle were listed in the voucher. Even assuming that Officer Vetell blundered with regard to the number or title of the form he was required to fill out, it surely would be absurd to invalidate the search in this case if the voucher did record all of the items found in the vehicle.

Finally, as to the merits generally, the People -- in addition to relying on Officer Vetell's testimony relating to the voucher -- note that Vetell testified that the Patrol Guide lays out procedures for an inventory search, that he was familiar with those procedures and that the Patrol Guide permits an inventory search either at the scene or at the precinct, and explained the reasons why the vehicle was being held for safekeeping and an

inventory search was conducted. Moreover, he was asked the following compound question: "Is it standard procedure for the New York City Police Department to inventory a vehicle that is going to be ultimately, be vouchered for safekeeping, at the scene, or at the precinct, or both?" In responding, "[y]ou can do either/or," Officer Vetell did not expressly state that it was standard procedure to conduct an inventory search of a vehicle that was vouchered for safekeeping. But that is a fair inference from all of his testimony. The People also correctly argue that the existence of a valid inventory search procedure can be proven by testimony and that they were not required to introduce into evidence the actual provisions of the Patrol Guide (see *United States v Thompson*, 29 F3d 62, 65 [2d Cir 1994]; cf. *People v Di Stefano*, 38 NY2d at 652 ["no reason is offered, as indeed there cannot be, why testimonial evidence alone is inadequate to sustain the prosecution burden [of going forward]"]). My point is that it is far from obvious that the People did not meet their initial burden of going forward and that defendant did meet his ultimate burden of establishing the

invalidity of the search. Given my view that defendant's appellate challenges to the inventory search are unpreserved, I need not and do not decide these issues.

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

ENTERED: APRIL 10, 2008

CLERK

Tom, J.P., Mazzarelli, Saxe, Nardelli, Kavanagh, JJ.

2096-

2097

Miliha Ferluckaj,
Plaintiff-Respondent-Appellant,

Index 120760/04

-against-

Goldman Sachs & Co.,
Defendant-Appellant-Respondent,

Henegan Construction Co., Inc.,
Defendant.

- - - - -

Goldman Sachs & Co.,
Third-party Plaintiff-Appellant,

-against-

American Building Maintenance Co.,
Third-Party Defendant-Respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York
(Christine Bernstock of counsel), for appellant-
respondent/appellant.

Michael J. Gaffney, Staten Island, for respondent-appellant.

Jeffrey Samel & Partners, New York (David Samel of counsel), for
respondent.

Order, Supreme Court, New York County (Rolando T. Acosta,
J.), entered March 20, 2007, which, upon reargument, granted the
motion of defendant Goldman Sachs (Goldman) for summary judgment
to the extent of dismissing plaintiff's Labor Law § 240(1) claim
as against it, and granted third-party defendant American
Building Maintenance Co.'s motion to dismiss Goldman's third-
party claim against it for indemnification, modified, on the law,
to deny Goldman summary judgment dismissing plaintiff's Labor Law

§ 240(1) claim as against it, and otherwise affirmed, without costs. Order, same court and Justice, entered August 24, 2006, to the extent not superseded by the March 20, 2007 order, which, to the extent appealed from, denied Goldman summary judgment dismissing the complaint as against it, modified, on the law, to grant Goldman summary judgment only to the extent of dismissing the claims pursuant to Labor Law § 200 and § 241(6) as against it, and otherwise affirmed, without costs.

Defendant Goldman leased several floors in the building at 32 Old Slip Road in Manhattan, including the 29th floor. Its lease provided that the building's owner, which is not a party to this action, would furnish cleaning services, including window washing. The owner contracted with plaintiff's employer, third-party defendant American Building Maintenance Co. (ABM), to provide those cleaning services. The agreement between the owner and ABM required ABM to clean the exterior and interior of the building's windows every three months. It further provided for ABM, at the owner's request, to perform the initial cleaning of all interior windows at no extra charge "prior to tenant occupancy." From time to time, Goldman purchased cleaning services not covered by its lease directly from ABM. The services Goldman states it purchased directly from ABM were pantry maintenance and carpet care. Goldman maintains that it never purchased any exterior window cleaning (including cleaning

of the interiors of such windows) directly from ABM.

It is unclear from the record when Goldman's lease commenced or when Goldman initially took occupancy of the 29th floor. It is undisputed, however, that between January and March 2001, defendant Henegan Construction Co. performed a complete build-out of several floors leased by Goldman in the building. This was pursuant to an agreement with Goldman and included the 29th floor. Plaintiff's accident occurred on March 22, 2001. By that date, Henegan had completed its construction work on the 29th floor, although some minor punch-list work may have been outstanding. Indeed, on the morning of the accident, plaintiff noticed some "construction material" and tools on the 29th floor and observed that it was "dusty."

On March 22, 2001, plaintiff was directed to go to the 29th floor to assist in cleaning the window interiors. The windows in the offices on the 29th floor rose from a point three feet above the floor and extended upward an additional six feet. Plaintiff was equipped with nothing other than a hand cloth to clean the windows. She stated in an affidavit submitted in support of her motion for summary judgment on her Labor Law § 240(1) claims that she was "cleaning dust off the windows that was from the construction." Plaintiff took instructions related to the window cleaning exclusively from her ABM supervisor.

To clean the top of a window in one of the offices,

plaintiff climbed on top of a desk adjacent to the windows. As she was moving along the width of the window, she fell off the desk to the floor, injuring herself. Plaintiff testified at her deposition that she knew at the time of the accident that there was a step stool with two steps in a supply closet maintained by ABM in the building but that she never asked for it. Plaintiff was not asked at her deposition, nor does the record otherwise reveal, how high the step stool was. Plaintiff further testified that her supervisor was aware that the cleaning staff stood on office desks to reach the tops of the windows.

Supreme Court initially denied plaintiff's motion for summary judgment on her Labor Law § 240(1) claim and Goldman's cross motion for summary judgment dismissing the complaint in its entirety as against Goldman. The court found that the window cleaning could only be protected activity under the Labor Law if it was incidental to the construction work performed by Henegan, but found that an issue of fact existed regarding the nature of the work. Upon ABM's motion for reargument, however, the court dismissed plaintiff's § 240(1) claim. The court did not revisit the issue of whether Goldman and Henegan were, respectively, an owner and contractor for purposes of Labor Law liability. Rather, the court found that, because she did not avail herself of the step stool, plaintiff was the sole proximate cause of her accident. The court also dismissed Goldman's claim against ABM

for indemnification. Goldman had argued that ABM had a duty to indemnify it in accordance with ABM's agreement with the owner that ABM would indemnify the owner in connection with actions arising out of, inter alia, "any sub-contracted operations."

We modify Supreme Court's orders to reinstate plaintiff's claim against Goldman pursuant to Labor Law § 240(1) and to dismiss plaintiff's claims against Goldman pursuant to Labor Law § 200 and § 241(6). In its initial order, the court stated that plaintiff could only recover under Labor Law § 240(1) upon a showing that the window cleaning was incidental to construction work. Since that finding, however, the Court of Appeals has clarified the law, holding that "'cleaning' is expressly afforded protection under § 240(1) whether or not incidental to any other enumerated activity" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 680 [2007]). Moreover, it was error to dismiss the complaint on the basis that plaintiff was the sole proximate cause of her accident. On their own motions, defendants did not establish as a matter of law that the step stool would have been sufficient to permit plaintiff to avoid the accident (*see Balbuena v New York Stock Exch., Inc.*, 45 AD3d 279 [2007]).

Indeed, on plaintiff's motion, defendants failed to even raise a triable issue of fact regarding sole proximate cause (*see id*). It is "unclear," as the concurrence concedes, whether a

step stool would have been provided to plaintiff had she asked for one. This lack of clarity is not the result of conflicting factual allegations; rather, it is because defendants failed to set forth any evidence regarding the availability of the step stool. Furthermore, even if it were clear that a step stool would have been provided had plaintiff requested one, defendants, again, failed to present any evidence as to whether it would have constituted an adequate safety device.

The statement in the concurrence that an issue of fact exists as to whether plaintiff's inattentiveness was the sole proximate cause of her accident is similarly unavailing. The sole proximate cause defense does not apply where plaintiff was not provided with an adequate safety device as required by the Labor Law (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). Here, the desk that plaintiff was working on at the time of her accident did not constitute an adequate safety device.

Nevertheless, we decline to award summary judgment to either party at this juncture. A question exists as to whether Goldman, as a lessee, is liable here pursuant to Labor Law § 240(1). That provision enumerates only contractors, owners and their agents as persons charged with providing protective devices to workers. However, a lessee may have liability as an "owner" under the Labor Law when it had the right or authority to control the work

site (see *Bart v Universal Pictures*, 277 AD2d 4, 5 [2000]). Goldman argues that it had no authority over plaintiff's window cleaning because the work was being performed strictly pursuant to ABM's agreement with the owner. The dissent agrees, submitting that the contract between ABM and the building owner is prima facie evidence that Goldman did not request the work. However, the contract is not dispositive on its face. Accordingly, Goldman did not meet its prima facie burden merely by placing it in the record.

For the contract to have had any probative value for purposes of summary judgment, Goldman would have had to establish that the work that plaintiff was performing at the time of her accident was pursuant to one of two provisions in the contract: the provision requiring quarterly window cleaning or the provision requiring ABM, at the owner's request, to perform a one-time window cleaning prior to a tenant's occupancy. Goldman's own witness eliminated the first possibility (at least for summary judgment purposes) by testifying that the quarterly cleanings were only for in-possession tenants and that he did not know when Goldman occupied the space. Moreover, plaintiff presented some evidence that her accident occurred pre-occupancy, by stating that construction tools and construction-related materials and dust were still present. As for the second provision, the dissent criticizes as "oblique" plaintiff's

statement that "[t]here has been no testimony that [the building owner] requested the cleaning of the interior windows"; however, that statement, when one is cognizant of the fact that the burden was on Goldman, is entirely appropriate and correct. We further note that Goldman's witness was not even aware of the provision, and that, moreover, Goldman did not offer the testimony or affidavit of anybody with personal knowledge regarding whether plaintiff's work was being performed pursuant to it.

Regardless of Goldman's status, plaintiff's Labor Law § 241(6) claim against it should have been dismissed. The two Industrial Code sections cited by plaintiff in her brief - 12 NYCRR 23-1.15 and 23-1.16 - apply only where a worker was provided with safety railings and safety belts (23-1.17) in the first instance (see *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337-338 [2006]). Plaintiff's Labor Law § 200 claim should also have been dismissed, since Goldman did not supervise plaintiff's work and any dangerous condition resulted from her employer's methods (see *Lombardi v Stout*, 80 NY2d 290, 294-295 [1992]). We decline, however, to dismiss plaintiff's claim pursuant to Labor Law § 202, which requires owners, lessees, agents and managers of buildings and contractors to provide "safe means for the cleaning of the windows and of exterior surfaces." Contrary to Goldman's argument, that section does apply to the cleaning of interior

windows (see *Bauer v Female Academy of Sacred Heart*, 250 AD2d 298, 301 n * [1998]).

Goldman's claim against ABM for indemnification was properly dismissed as precluded by Workers' Compensation Law § 11, since Goldman did not have a written indemnification agreement with ABM and there are no allegations of grave injury (see *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). The provision in the contract between ABM and the owner relied on by Goldman cannot be read to cover work performed by ABM pursuant to a direct contract with Goldman.

All concur except Nardelli, J. who concurs and Tom, J.P. who dissents in part in separate memoranda as follows:

NARDELLI, J. (concurring)

I concur with the result reached by the majority, but I also find that issues of fact exist as to whether plaintiff's own acts or omissions were the sole proximate cause of the accident, thereby precluding summary judgment in her favor.

Labor Law § 240(1), which is commonly referred to as the scaffold law, provides, in pertinent part, that:

"[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, *cleaning* or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders ... which shall be so constructed, placed and operated as to give proper protection to a person so employed" (emphasis added).

The Court of Appeals has often observed that the purpose of the statute is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owners and general contractors, instead of on the individual workers, who are not in a position to protect themselves (*Martinez v City of New York*, 93 NY2d 322, 325-326 [1999]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985]; *Koenig v Patrick Constr. Corp.*, 298 NY 313, 318 [1948]). Consistent with this objective, the Court of Appeals has stated that the statute places absolute liability upon owners,

contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly, it is to be construed as liberally as necessary to accomplish the purpose for which it was framed (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]).

The application of "absolute liability" in section 240(1) cases has, apparently, generated some confusion. Accordingly, in *Blake v Neighborhood Hous. Servs. of N.Y. City* (1 NY3d 280, 286-287 [2003]), the Court of Appeals clarified the use of the words strict or absolute liability in conjunction with the statute, noting that those terms do not appear in the current, or any former variation of the statute but, rather, were first used by the Court of Appeals in 1923 to describe an employer's duty under that section. The Court in *Blake* went on to caution that:

"[i]t is imperative ... to recognize that the phrase 'strict (or absolute) liability' in the Labor Law § 240(1) context is different from the use of the term elsewhere. Often, the term means 'liability without fault' (see generally 3 Harper, James and Gray, Torts § 14.1 et seq. [2d ed 1986]), as where a person is held automatically liable for causing injury even though the activity violates no law and is carried out with the utmost care" (*id.* at 287-288).

The Court of Appeals further commented that:

"[g]iven the varying meanings of strict (or absolute) liability in these different settings, it is not surprising that the concept has generated a good deal of

litigation under Labor Law § 240(1). The terms may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party. That is not the law, and we have never held or suggested otherwise" (*id.* at 288).

In sum, to prevail on a § 240(1) cause of action, the plaintiff must demonstrate that the statute was violated and that such violation was a proximate cause of the injuries sustained (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Delahaye v Saint Anns School*, 40 AD3d 679, 682 [2007]).

Initially, I agree with the majority's conclusion that, in view of the recent Court of Appeals decision in *Broggy v Rockefeller Group, Inc.* (8 NY3d 675, 680 [2007]), the interior window cleaning being performed by plaintiff on the 29th floor of a 40-story office building is expressly afforded protection under section 240(1), regardless of whether it is incidental to any of the other activities delineated in the statute.

The Court in *Broggy*, however, went on to state that:

"liability turns on whether a particular window washing task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against.

"The burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices falls upon the plaintiff" (emphasis added) (*id.* at 681).

In this matter, I find that there is a plausible view of the

evidence, sufficient to raise issues of fact, that no statutory violation occurred, and/or that plaintiff's own acts or omissions were the sole cause of the accident. Plaintiff testified that she was aware of the availability of step stools but neglected to request one, and it is unclear if one would have been provided had she so requested. It is also unclear if the section of the desk on which plaintiff was standing, which was located directly in front of the window, could have been removed, or was left in place because it was a convenient platform from which plaintiff could perform her task. What is clear is that the desk did not move, shift or wobble, but remained stable. Moreover, plaintiff testified that at the time of her fall off the desk, she was not looking where she was going or how far it was to the end of the desk, and that a fellow worker called her name immediately prior to her fall, possibly distracting her as she simply stepped off the end of the desk.

I disagree with the majority's conclusion that "even if it were clear that a step stool would have been provided had plaintiff requested one, defendants, again, failed to present any evidence as to whether it would have constituted an adequate safety device," for, as the Court of Appeals in *Broggy* made clear, "[t]he burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices falls upon the plaintiff" (*Broggy*, 8 NY3d at 681).

Moreover, while the majority succinctly states that a desk does not constitute an adequate safety device, a point with which I agree, the use of a desk to wash windows, depending on the facts presented, also does not, in and of itself, preclude summary judgment in defendants' favor (see generally *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675 [2007], *supra*).

I also find this Court's recent decision in *Miro v Plaza Constr. Corp.* (38 AD3d 454 [2007]), and the Court of Appeals' subsequent modification of that decision (9 NY3d 948 [2007]), to be instructive. In *Miro*, the plaintiff was allegedly injured when he slipped and fell from a ladder that was partially covered with sprayed-on fireproofing material, which purportedly caused him to lose his footing. Plaintiff was aware of the undesirability of the ladder, but failed to request a clean replacement, although it was clear that there was no replacement on the job site and that one would have to have been delivered from an off-site storage area. The three-Justice majority, in dismissing plaintiff's section 240(1) claim, concluded that "a plaintiff who knowingly chooses to use defective or inadequate equipment, notwithstanding being aware that he or she could request or obtain proper equipment, has no claim under Labor Law § 240(1)" (38 AD3d at 455). The two dissenting Justices would have granted plaintiff partial summary judgment on the issue of liability under section 240(1), finding, *inter alia*, that there

was no replacement ladder on site and that plaintiff had testified that he complained to a superintendent about the condition of the ladder, but the superintendent simply shrugged.

The Court of Appeals modified, reinstated the section 240(1) claim, and held, in its entirety, that “[a]ssuming that the ladder was unsafe, it is not clear from the record how easily a replacement ladder could have been procured” (9 NY3d at 949). Here, assuming the desk was unsafe, plaintiff was aware of the availability of a step stool and failed to request one, although it is unclear if one would have been provided had she done so.

Accordingly, I find that a jury could conclude that either plaintiff’s admitted inattentiveness, which caused her to step into midair, or her failure to request a step stool, was the sole proximate cause of the accident. Summary judgment, therefore, in either plaintiff’s or defendant’s favor, is not warranted.

TOM, J.P. (dissenting in part)

The issue dividing this Court is whether there is any basis under Labor Law § 240(1) for imposing liability on a tenant because an employee of a cleaning service company, engaged by the building's owner, sustained injury while performing work specified in the contract between the owner and the cleaning company. The tenant, defendant Goldman Sachs & Co., is a stranger to the contract, and the injured plaintiff has failed to provide any proof to establish that Goldman either contracted for, or exercised control over, the window cleaning work. Thus, there is no basis upon which liability may be imposed on Goldman, and its cross motion to dismiss plaintiff's Labor Law § 240(1) claim was properly granted.

Defendant Goldman was the tenant of the 29th floor of a building owned by non-party Paramount Group, Inc. Paramount engaged third-party defendant American Building Maintenance Co. (ABM), plaintiff's employer, to perform cleaning services for the building. The 29th floor had been undergoing renovation work by defendant Henegan Construction Co., hired by Goldman. On March 22, 2001, plaintiff was assigned to work overtime by an ABM supervisor. She was directed to proceed to the 29th floor of the building, located at 32 Old Slip Road in Manhattan, to clean interior office windows. Plaintiff was supplied with only a rag to clean the windows, and she found it necessary to climb onto

office desks "to reach the top of the windows." She sustained injury while "she was cleaning the window in front of her and was moving to the left and fell off the desk on to the floor."

Plaintiff sought summary judgment as to liability against Goldman and Henegan on her Labor Law § 240(1) claim. Goldman cross-moved to dismiss the claims asserted by plaintiff against it under the Labor Law. Henegan also moved for summary judgment dismissing the complaint, adopting the arguments advanced by Goldman. Henegan additionally sought dismissal of Goldman's cross claims against it.

To recover under Labor Law § 200, § 240 and § 241 as a member of the special class for whose protection these provisions were enacted, it must be established that the plaintiff was hired by the owner, general contractor or an agent of the owner or general contractor (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]; *Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]). Liability will not be imposed under Labor Law § 240 merely because injury was sustained in the vicinity of an ongoing construction project, even if the injured party was performing a function related to that project (see *Martinez v City of New York*, 93 NY2d 322 [1999] [entity for which plaintiff acted not engaged to perform statutorily protected activity]; *Gibson v Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108, 1109 [1991] [same]). As this Court has noted, "A lessee is

liable under the statute only where it can be shown that it was in control of the work site, and one test of such control is where the lessee actually hires the general contractor" (*Guzman v L.M.P. Realty Corp.*, 262 AD2d 99 [1999], citing *Frierson v Concourse Plaza Assoc.*, 189 AD2d 609, 611 [1993]).

In support of its motion, Goldman submitted the service contract executed by ABM and Paramount. The contract provides that ABM, as contractor, will perform all window cleaning, encompassing the cleaning of "all interior and exterior windows and frames," to be performed "every three (3) months." The contract further states:

"Prior to tenant occupancy, contractor shall provide the initial cleaning o[f] all interior windows for which there will be no charge to Paramount Group, Inc. or tenant. Work to be performed upon request of Paramount Group Inc."

The cleaning service contract unambiguously provides that, at Paramount's request, ABM will clean all interior windows prior to tenant occupancy. Plaintiff has conceded that, as of the date of her injury, March 22, 2001, Goldman had not yet taken occupancy of the 29th floor. Her supporting affidavit states that Goldman's employees "moved in their personal items to the 29th floor on March 23 and 24, 2001." She further restated in her opposition to the cross motion that Goldman's "employees had not moved into the 29th floor." Thus, on the motion, plaintiff did not raise any factual issue as to whether the work in which

she was engaged at the time of her accident was performed pursuant to ABM's contract with Paramount requiring a one-time cleaning of the interior windows prior to tenant occupancy.

On its cross motion, Goldman also submitted the transcript of deposition testimony given by Robert Barriero, its vice president for corporate services, to demonstrate that it did not independently order window cleaning services from ABM. Barriero stated that Goldman received "base building cleaning services from Paramount as part of our lease," which services were provided by Paramount's vendor, ABM. He noted that Goldman was required to use the base building cleaning services contractor, and he acknowledged that Goldman's agent, Hines Interests, Ltd., contracted directly with ABM for cleaning work that was not included in the base cleaning services provided under the lease. The supplemental cleaning services he described were limited to "[p]antry maintenance, some carpet care, shampooing."

In her opposition to the cross motion, plaintiff did not address the significance of the contract between Paramount and ABM except to concede that ABM "had been hired by Paramount Group, the owner . . . to do cleaning for the tenants in the building." Plaintiff also acknowledged that Goldman had directly contracted with ABM for "extra services . . . such as cleaning pantries, stripping and waxing floors and shampooing carpets." She cited the deposition testimony of Al Hoti, an ABM employee,

who stated that the cleaning ABM performed directly for Goldman consisted of the activities plaintiff described as well as "cleaning refrigerators [and] providing plastic liners," presumably for trash receptacles. Thus, the record is clear that any extra cleaning services provided to Goldman by ABM did not include the cleaning of windows.

The dispositive evidence in this matter consists of the testimony of Robert Barrierero, Goldman's vice president for corporate services, the testimony of Al Hoti, ABM's employee, and the contract between ABM and Paramount. Thus, Goldman provided evidence from persons with personal knowledge of the facts to establish that plaintiff was hired by ABM, as agent for the building's owner, Paramount Group. No proof was offered by plaintiff, in rebuttal, to support the intimation that she might have been hired by Goldman or its agent, Henegan. Thus, there is no basis for imposing vicarious liability on Goldman on the ground that plaintiff was hired either by it or by its general contractor.

It should be emphasized that the sole theory of recovery against Goldman advanced by plaintiff before the motion court was that Goldman is an "owner," as defined under the Labor Law, because it hired Henegan to perform renovation work at the leased premises. Because she was performing cleaning that was "incidental" to Henegan's construction work, plaintiff reasoned

that she is therefore covered by the Labor Law, irrespective of who hired her, and that Goldman is vicariously liable under Labor Law § 240(1). Significantly, plaintiff did not contend that Goldman hired ABM to perform the *window* cleaning in which she was engaged at the time of her fall. In fact, she failed to identify any cleaning work that she, as an employee of ABM, performed for Goldman, either directly or at the behest of Goldman's agent, Hines.

Throughout this litigation, plaintiff has never claimed that Goldman is subject to liability under Labor Law § 240(1) because it exercised, or had authority to exercise, control over the work she was performing at the time she sustained injury or because Goldman contracted, either directly or through its agent, with ABM for the window cleaning work in which she was engaged. On appeal, plaintiff continues to assert that Goldman's liability under Labor Law § 240(1) is vicarious, contending that Henegan's duties as construction manager "determine its status as a contractor or agent of Goldman"; that Goldman and Henegan failed in their statutory duty to provide any safety devices to plaintiff, "a cleaner at a construction site"; that her activities were related to the construction work and therefore covered under Labor Law § 240(1); and that Goldman is liable for her injuries, which were proximately caused by its breach of the statute. The defect in plaintiff's position is that Henegan did

not hire or request plaintiff to clean the subject windows, and therefore Goldman cannot be held vicariously liable to plaintiff for her injuries. Furthermore, plaintiff's Labor Law § 240(1) claim against Henegan has since been dismissed, and this avenue of recovery is unavailing as against either party to the renovation contract.

Plaintiff now obliquely asserts, for the first time on appeal, that "[t]here has been no testimony that Paramount requested the cleaning of the interior windows." She adds, "Goldman has just made the assumption that Paramount requested the cleaning of the interior windows." She goes on to state that "Henegan had laborers on site at 32 Old Slip through March 28, 2001," six days after her accident. Plaintiff intimates that Henegan or Goldman might have requested ABM to assist in cleaning up the 29th floor, but she points to no evidence to support such a theory.

In view of plaintiff's concession that she was employed by ABM and that window cleaning was undertaken just prior to Goldman's occupancy of the 29th floor, the only explanation for her work on the date of the accident is ABM's performance of its contract with Paramount providing for the preoccupancy cleaning of interior windows at the building owner's request. Goldman therefore demonstrated its prima facie entitlement to summary judgment, placing the burden upon plaintiff to come forward with

evidence in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Although Goldman squarely raised the issue in its opposing papers, plaintiff failed to come forward with any evidence in rebuttal to demonstrate that either Goldman or Henegan had entered into a contract for window cleaning services with ABM. This omission is notable in view of Barrierero's testimony that both Goldman and its agent, Hines, maintained a record of any funding request made in connection with ABM's provision of services outside those provided under the lease in accordance with ABM's contract with Paramount.

This Court has consistently observed the rule that a party may not "argue on appeal a theory never presented to the court of original jurisdiction" (*Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1988], citing *Huston v County of Chenango*, 253 App Div 56, 60-61 [1937], *affd* 278 NY 646 [1938]; see e.g. *Sean M. v City of New York*, 20 AD3d 146, 149-150 [2005]). As stated in *Cohn v Goldman* (76 NY 284, 287 [1879]), "It is, indeed, a rule, that questions not raised at the trial court, which might have been obviated by the action of the court then, or by that of the other party, will not be heard on appeal as ground of error." Plaintiff should not be heard to argue, for the first time, that Goldman is liable for her injuries because it might have had the

authority to exercise control over the work site, and, indeed, plaintiff makes no such argument.

This is precisely the theory of recovery postulated by the majority on plaintiff's behalf, relying on this Court's decision in *Bart v Universal Pictures* (277 AD2d 4 [2000]). It should be noted, however, that the lessee in *Bart* was *contractually* obligated to control the work site and to ensure that the work was safely performed (*id.* at 5-6; *see also Shun Jian Ke v Hsu & Assoc., Inc.*, 300 AD2d 140 [2002]). There is no proof that Goldman had a contract with ABM for window cleaning services, let alone that Goldman was under a contractual obligation to ensure the safety of the work site. Moreover, the majority has cited no case in which liability under Labor Law § 240 has been predicated on a tenant's mere right to reenter the premises rather than on the basis of its actual control over the work being performed (cf. *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565-566 [1987] [owner with right of reentry and inspection liable for injury due to defect on premises under Multiple Dwelling Law § 78]).¹

The majority takes the position that the evidence is insufficient to entitle Goldman to summary judgment dismissing plaintiff's Labor Law 240(1) claim against it because it failed

¹ It is clear that the majority finds no liability based on Goldman's actual control over the premises because it agrees that there is no basis for common-law liability under Labor Law § 200.

to offer evidence by someone with personal knowledge of the facts that plaintiff's window cleaning work was performed pursuant to the contract between ABM and Paramount. Quite apart from ignoring substantial evidence, this supposition presumes that Goldman was capable of contracting directly with ABM for the window cleaning work, a proposition that is simply untenable. As a matter of fact, it defies credulity that Goldman would contract with ABM for the same window cleaning services ABM was obligated to provide for Goldman's benefit under its agreement with Paramount. More significantly, as a matter of law, Goldman could not contract with ABM for window cleaning services ABM was already obligated to provide under its existing contract with Paramount (*Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 212-213 [1991] ["one cannot be induced to tender a performance which is required as a part of a preexisting contractual obligation"]). As the Court of Appeals has succinctly observed, "A covenant to do what one is already under a legal obligation to do is not sufficient consideration for another contract" (*Ripley v International Rys. of Cent. Am.*, 8 NY2d 430, 441 [1960]).

That the window cleaning work was performed pursuant to the agreement between ABM and Paramount is confirmed by explicit contract language. It is further supported by Barrierero's testimony that Goldman was obligated under its lease to use ABM's services. Barrierero and Hoti both stated that supplemental

cleaning services provided directly to Goldman by ABM did not include window cleaning. Thus, there is both documentary and testimonial evidence supporting Goldman's contention that plaintiff's presence at the work site was due to ABM's obligation to provide initial cleaning of interior windows under its contract with the building owner.

While the opponent of a summary judgment motion may normally offer an excuse for the failure to present opposing proof in admissible form (*Zuckerman*, 49 NY2d at 562), where the opposing party has likewise moved for summary judgment, this option is unavailable. By moving for an accelerated disposition, plaintiff represented that the record proof was sufficient to warrant judgment in her favor. As this Court observed in *News Am. Mktg., Inc. v Lepage Bakeries, Inc.* (16 AD3d 146, 149 [2005]):

"By moving for accelerated judgment, a party submits the case for disposition on the record evidence, and the propriety of the court's decision will be reviewed on the basis of that same evidence. It is settled that an appellate court is bound by the record (*Block v Nelson*, 71 AD2d 509 [1979]), and, absent matter that is subject to judicial notice, review is limited to the evidence before the motion court (*Broida v Bancroft*, 103 AD2d 88, 93 [1984]; see also *Becker v City of New York*, 249 AD2d 96, 98 [1998]). As we stated in *Ritt v Lenox Hill Hosp.* (182 AD2d 560, 562 [1992]), 'If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply not be

submitted.'" "

Having moved for judgment on the record, plaintiff cannot now assert, contrariwise, that the record does not support the motion court's disposition on the evidence before it.

Finally, plaintiff has not proffered any excuse for her failure to submit admissible opposing evidence in opposition to the cross motion to warrant trial of an issue of fact. Thus, she has offered neither proof to controvert Goldman's evidence demonstrating that she performed window cleaning in accordance with Paramount's contract with her employer nor an excuse for her failure to do so, and her opposition fails to meet the requirements to defeat a motion for summary judgment (*Zuckerman*, 49 NY2d at 562). The intimation that Goldman might have directly hired ABM to do unspecified cleaning work, for reasons not even suggested, is speculative and does not suffice to meet her obligation "to submit evidentiary facts or materials, by affidavit or otherwise, rebutting the prima facie showing . . . and demonstrating the existence of a triable issue of ultimate fact" (*Indig v Finkelstein*, 23 NY2d 728, 729 [1968]). It is settled that "mere conclusions, expressions or hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562).

Accordingly, plaintiff failed to rebut Goldman's prima facie

showing that it did not hire her employer to perform window cleaning work, and her Labor Law § 240(1) claim against said defendant was properly dismissed.

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

ENTERED: APRIL 10, 2008

CLERK

Lippman, P.J., Mazzarelli, Catterson, Kavanagh, JJ.

2164 Reynolds Brown, Index 107423/01
Plaintiff-Appellant-Respondent, 590618/01
590764/02

-against-

VJB Construction Corp., et al.,
Defendants-Respondents.

- - - - -

[And a Third-Party Action]

- - - - -

VJB Construction, Corp.,
Second Third-Party
Plaintiff-Respondent-Respondent,

-against-

Skylift Corporation,
Second Third-Party
Defendant-Respondent-Appellant.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellant-respondent.

Nicoletti, Gonson, Spinner & Owen, LLP, New York (Edward S. Benson of counsel), for VJB Construction, respondent.

Melito & Adolfsen P.C., New York (Steven I. Lewbel of counsel), for 400 East 66th Street Co., L.L.C., respondent, and respondent-appellant.

Order, Supreme Court, New York County (Leland DeGrasse, J.), entered May 16, 2006, which, in an action for personal injuries sustained by a worker on a construction site, insofar as appealed from, granted motions by defendant site owner (400 East), defendant construction manager (VJB) and third-party defendant contractor and plaintiff's employer (Skylift) for summary judgment dismissing the complaint, denied plaintiff's cross

motion for partial summary judgment on the issue of defendants' liability under Labor Law § 240(1), and granted VJB's motion for summary judgment on its third-party cause of action against Skylift for contractual indemnification, unanimously modified, on the law, to the extent of granting plaintiff's motion for partial summary judgment on his Labor Law 240(1) claim against VJB and 400 East, and otherwise affirmed, without costs.

Plaintiff, a stone erector and welder for Skylift, working under the supervision of another Skylift employee, was placing 1000-pound granite slabs against the side of 400 East's building at ground-floor level. Directions for placement of the stone slabs were given by plaintiff's foreman. The slabs were moved to the installation location by a forklift known as a Hi-Lo. Each stone was lifted about three feet from the ground when secured to the forklift by a steel U-shaped "stone clamp." The slabs were thus suspended from the forklift during transport. One Skylift employee drove the Hi-Lo and the other walked alongside, steadying the slab by hand until they reached plaintiff who guided it into place at the building wall.

The accident occurred when one of the 1000-pound slabs fell from the Hi-Lo as it approached the wall, struck the ground and tilted over, pinning plaintiff's right wrist between the stone panel and the wall.

Plaintiff commenced this action alleging violations of Labor

Law § 200, § 240(1) and § 241(6) against VJB and 400 East.

Plaintiff stated the accident was caused because the clamp was originally too small for the slabs being moved that day. The clamp was then modified by being cut and stretched in order to fit around the slab. In his affidavit, plaintiff's supervisor agreed that the clamp failed, but attributed the failure to difficult surface conditions at the site, particularly construction debris, which compelled the use of a forklift. A hand truck was ordinarily the preferred method of moving slabs. Plaintiff's supervisor further stated that he had repeatedly complained of these conditions to VJB, but nothing was done, and that Skylift had no duty or authority to police the site. Skylift could not remove the debris of other contractors and fill in or patch holes in the ground or rearrange the wood planking on the ground.

400 East and VJB answered and cross-claimed against each other. 400 East and VJB also commenced third-party actions against Skylift. Skylift answered, cross-claimed and asserted a counterclaim against 400 East for indemnification.

After completion of discovery, VJB moved, inter alia, for summary judgment dismissing plaintiff's complaint and against Skylift for contractual indemnity and attorneys' fees. 400 East and Skylift cross-moved for summary judgment dismissing, inter alia, all Labor Law claims. Plaintiff cross-moved for partial

summary judgment on his Labor Law § 240 (1) claim.

The motion court denied plaintiff's cross motion and granted defendants' motion and cross motions for summary judgment and dismissed all plaintiff's Labor Law and common law negligence claims. The court held that, to trigger Labor Law § 240 in a falling object accident, the worksite must be elevated above or positioned below the area where the object was being hoisted or secured, citing numerous First Department cases, and that Labor Law § 240 did not apply here because the granite slab and worksite were both at ground level.

The court also dismissed plaintiff's Labor Law § 200 and common-law negligence claims because VJB and 400 East did not exercise supervisory control over Skylift's operations. The Labor Law § 241(6) claim was dismissed because the Industrial Code section invoked excluded forklifts from its application. The court further held that VJB was entitled to contractual indemnification by Skylift pursuant to the indemnification provision in the rider to Skylift's contract.

On appeal, plaintiff argues that the court erred in dismissing his Labor Law § 240(1) claim since the accident was caused by the inadequacy of the hoisting apparatus, and that the court erred in dismissing the Labor Law § 200 claim because of the existence of questions of fact as to whether the accident was due to a defective condition on the premises for which VJB had

actual or constructive notice.

400 East and Skylift argue that the court erred in granting contractual indemnification against Skylift because material issues of fact exist as to whether VJB was negligent in carrying out its duties which proximately contributed to the accident.

For the reasons set forth below, we modify to the extent of granting plaintiff summary judgment on his Labor Law § 240(1) claim as against VJB and 400 East. It is well settled that Labor Law § 240(1) is implicated where protective devices prove "inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In the seminal case of *Ross*, the Court of Appeals made clear that § 240(1) is not implicated in all gravity-related accidents but is limited to such specific gravity-related accidents as being struck by a falling object that was improperly hoisted or inadequately secured (*id.*; see also *Tavarez v Sea-Cargoes*, 278 AD2d 94, 95 [2000][the purpose of section 240(1) is to safeguard a worker from injury caused by an inadequate scaffold, hoist, stay ladder or other protective device designed to shield him from the fall of an object or person]).

There is no dispute in this case that, due to the failure of the clamp, the 1000-pound slab of granite fell a distance of about three feet as it was being hoisted from one location on the

construction site to the wall of the building.

Defendants argue that Labor Law § 240(1) requires a “substantial” elevation differential. They further argue that there was no such differential in this case since the forklift that hoisted the slab was positioned at the same level as plaintiff. Defendants are incorrect as to the requirement of a *substantial* differential. While it is true that section 240(1) liability requires an elevation differential between the worker and the object being hoisted (*Daley v City of New York Metro. Transp. Auth.*, 277 AD2d 88, 89-90 [2000]), the extent of the elevation differential is not necessarily determinative of whether an accident falls within the ambit of Labor Law § 240(1) (see *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514-515 [1991]; see also *Outar v City of New York*, 5 NY3d 731 [2005] [5 ½ feet height differential was sufficient]; *Cammon v City of New York*, 21 AD3d 196 [2005]; *Casabianca v Port Auth. of N.Y. & N.J.*, 237 AD2d 112 [1997] [a rolling scaffold elevated just two feet off the ground brought injured worker within section 240(1) protection]). Indeed, a more recent determination by this Court in a case evincing similar circumstances requires that we grant this plaintiff summary judgment on his Labor Law § 240(1) claim. In *Gonzalez v Glenwood Mason Supply Co. Inc.*, (41 AD3d 338 [2007]), the plaintiff was hit with a load of cinder blocks that became loose and fell on him as it was being hoisted by a

fork boom from a flatbed truck and lowered onto a pallet near where he was standing. This Court found that this elevation risk fell within the ambit of Labor Law § 240 (*id.* at 339).

Similarly, in this case, it is of no consequence that the ultimate destination of the slab was the same level where the forklift was positioned, or where plaintiff was standing. The relevant facts are that a slab of granite measuring four by three feet and weighing 1000 pounds had to be hoisted three feet above grade in order to transport it, and that the accident occurred while it was hoisted in the air due to the effects of gravity and the defective clamp (see *Rocovich*, 78 NY2d at 514). Undisputed evidence demonstrates that the clamp clearly failed in its core objective of preventing the object from falling because the slab, in fact, fell, injuring plaintiff.

Plaintiff's Labor Law § 200 and common-law claims as against VJB and 400 East were correctly dismissed because Skylift provided and operated the forklift and clamp and alone controlled the method of transporting the slabs and installing them (see *Reilly v Newireen Assoc.*, 303 AD2d 214, 219-221, *lv denied* 100 NY2d 508 [2003]). If the surface conditions necessitated a different clamp or a different method of moving the slabs, such failures to alter their own operating procedures were Skylift's. Further, VJB was correctly awarded indemnification against Skylift based on the latter's contract with 400 East and the

absence of evidence that any negligence by VJB proximately caused the accident. The affidavit of plaintiff's supervisor, opining that the slab fell because of rough ground conditions over which the forklift traveled and for which VJB was responsible, fails to show the supervisor's qualifications to so opine, makes no reference to the allegedly undersized clamp, and is otherwise speculative and lacking in evidentiary value.

We have considered the parties' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: APRIL 10, 2008

CLERK

Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

3329 Crystal Brown,
Plaintiff-Appellant,

Index 122328/00

-against-

New York City Transit Authority,
Defendant-Respondent.

Thomas Torto, New York, for appellant.

Wallace Gossett, Brooklyn (Lawrence Heisler of counsel), for
respondent.

Judgment, Supreme Court, New York County (Faviola Soto, J.),
entered October 13, 2006, after a jury trial, in defendant's
favor, unanimously affirmed, without costs.

Plaintiff's argument that the verdict was irreconcilably
inconsistent is unpreserved, since this issue was not raised
prior to discharge of the jury (see *Martinez v New York City Tr.
Auth.*, 41 AD3d 174 [2007]). Moreover, this matter does not
present a situation where the questions of negligence and
proximate cause are inextricably interwoven (see *Dwight v New
York City Tr. Auth.*, 30 AD3d 270 [2006], *lv denied* 7 NY3d 711
[2006]). The jury's determination that defendant's negligence
was not a substantial factor in causing plaintiff's injury was
not inconsistent or against the weight of the evidence (see *id.*).
Finally, the trial court properly rejected plaintiff's attempt to

impeach the jury's verdict by the posttrial submission of affidavits from two of its members (see *Sharrow v Dick Corp.*, 86 NY2d 54, 60-61 [1995]).

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

ENTERED: APRIL 10, 2008

CLERK

Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

3330 In re Saraphina Ameila S.,

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

Rosa Mary W.,
 Respondent-Appellant,

New Alternatives For Children, Inc.,
 Petitioner-Respondent.

Nancy Botwinik, New York, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Amy
Hausknecht of counsel), Law Guardian.

Order, Family Court, New York County (Susan K. Knipps, J.),
entered on or about January 22, 2007, which, after a hearing,
determined that respondent mother had permanently neglected the
subject child, terminated her parental rights, and awarded
custody and guardianship to petitioner for the purpose of
adoption, unanimously affirmed, without costs.

Respondent's argument that her admission of neglect was
invalid lacks merit, since the record reflects she was informed
by the court of the consequences of her admission, and of the
fact that she did not have to make an admission and could proceed
to a hearing where she could present and cross-examine witnesses.
She admitted that she was not forced or threatened to make the

admission, and she had ample time to discuss the matter with her attorney. Furthermore, in addition to admitting, through her counsel, her alcohol abuse, she admitted having neglected the child by failing to comply with the rehabilitation referrals made by petitioner during the year-long period when petitioner was trying to help her. Based on this record, the admission was valid (see *Matter of Victoria B.*, 185 AD2d 811 [1992]; *Matter of William D.*, 178 AD2d 475 [1991], *appeal dismissed* 79 NY2d 1040 [1992], *cert denied sub nom. Dorothy W. v Commissioner of Social Servs. of City of N.Y.*, 506 US 1038 [1992]).

Respondent failed to object to the date of termination of the suspended judgment stated in the order of disposition, and did not move to vacate that order. She also failed to raise the argument that the violation petition was untimely. Accordingly, she failed to preserve this issue for appellate review.

The finding that termination of respondent's parental rights is in the child's best interest is supported by a preponderance of the evidence showing that the child, now eight years old, has been well cared for and has bonded with the foster family, with whom she has lived since infancy, and which includes her biological brother who has been adopted by the same foster mother. Respondent's recent commendable effort in overcoming her alcohol abuse is belated. For more than six years, she failed to complete a drug and alcohol program. The evidence shows the

child would be adversely affected by removal at this point from the only home she has ever known (*Matter of Rochon Lela D.*, 37 AD3d 311 [2007], *lv denied* 8 NY3d 815 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
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to the warnings requirement (see *Pennsylvania v Muniz*, 496 US 582, 601-602 [1990]; *People v Rodney*, 85 NY2d 289, 292-293 [1995]; *People v Velazquez*, 33 AD3d 352, 353 [2006], *lv denied* 7 NY3d 929 [2006]). Since asking for the true name of an arrestee is the quintessential routine booking question, without which it is impossible to process an arrest properly, it is irrelevant whether the answer is reasonably likely to be incriminating (*People v Alleyne*, 34 AD3d 367 [2006], *lv denied* 8 NY3d 918 [2007], *cert denied* __US__, 128 S Ct 192 [2007]). Furthermore, the court was not required to submit to the jury the issue of the voluntariness of defendant's statements as to his name. Since, as noted, *Miranda* warnings were not required, that was not a proper issue for the jury, and there was no other factual issue raised at trial concerning voluntariness (see *People v Cefaro*, 23 NY2d 283, 288-289 [1968]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence, viewed in light of the court's charge (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). The trial testimony showed that defendant attempted to make a purchase with a stolen credit card (Penal Law § 165.45[2]). It is immaterial whether the credit card either had expired or been cancelled or revoked when the defendant attempted

to use it (see e.g. *People v Peterson*, 216 AD2d 10 [1995] lv denied 86 NY2d 800 [1995]; *People v Johnson*, 214 AD2d 478 [1995], lv denied 86 NY2d 733 [1995]). An expired or otherwise inactive credit card may be used to make a purchase on credit, within the meaning of General Business Law § 511(1), if a merchant accepts it, albeit improvidently, thus extending credit to the purchaser. We have considered and rejected defendant's remaining arguments on this issue.

The motion court properly denied the *Mapp/Dunaway* portion of defendant's suppression motion, without granting a hearing. Although the court incorrectly denied a hearing on the basis of defendant's failure to allege standing (see *People v Burton*, 6 NY3d 584 [2006]), the court was correct in its additional ruling that defendant's motion papers were insufficient to raise a factual issue warranting a hearing. Defendant was on notice that the People were alleging he gave the credit card at issue to an officer acting in an undercover capacity, under circumstances presenting no Fourth Amendment issue whatsoever (see *Hoffa v United States*, 385 US 293 [1966]; *Lewis v United States*, 385 US 206 [1966]), and his allegations failed to set forth an alternative scenario or assert any basis for suppression (*cf. People v Kolon*, 37 AD3d 340, 341 [2007], lv denied 8 NY3d 947 [2007]).

The court properly denied defendant's application made

pursuant to *Batson v Kentucky* (476 US 79 [1986]). Regardless of whether hybrid groups are cognizable under *Batson*, the People's peremptory challenge to the only African-American male panelist did not, by itself, raise an inference of discrimination (see *Johnson v California*, 545 US 162, 170 [2005]). While a prima facie showing of discrimination "may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination" (*People v Smocum*, 99 NY2d 418, 422 [2003]), here there was no evidence that could raise such an inference, and defendant's assertion that the panelist appeared favorable to the prosecution is without merit. We reject defendant's argument that a challenge to the sole member of a cognizable class automatically creates a prima facie case of discrimination, without any supporting circumstances (see *People v Henderson*, 305 AD2d 940, 940-941 [2003], *lv denied* 100 NY2d 582 [2003]).

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

ENTERED: APRIL 10, 2008

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permanently or for an indefinite period (see *Lundgren*, 145 AD2d at 793). The record shows that when Jenkins moved to New York in March 2004, his daughter hoped he would get better and go back to his home in South Carolina, and on June 11, 2004, he indicated an intent to return to South Carolina upon his release from petitioner nursing home. Although petitioner's Benefits Coordinator testified that Jenkins' intent later changed, courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 444 [1987]; see also *Lundgren*, 145 AD2d at 793-794). Regarding 42 CFR 435.403(i)(3), there was no evidence that Jenkins was incapable of indicating intent as of the date of his Medicaid application, and as for 42 CFR 435.403(m), respondent could reasonably find that petitioner had not proven that New York and South Carolina could not resolve which was the state of residence (see *Bethesda Lutheran Homes & Servs., Inc. v Born*, 238 F3d 853, 859 [2001]).

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

ENTERED: APRIL 10, 2008

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chance of survival or hasten her death (*see Schaub v Cooper*, 34 AD3d 268 [2006]). Issues of fact also exist as to Dr. Leong's treatment of the decedent arising from the opinion of the hospital's expert that Dr. Leong should have examined the decedent's breasts and evidence that by doing so he could have discovered the cancer and pursued a more aggressive plan of treatment (*see Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357, 358 [2006]).

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

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

ENTERED: APRIL 10, 2008

CLERK

Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

3334 In re Tyrell L.,

 A Person Alleged to be
 a Juvenile Delinquent,
 Appellant.

 - - - - -

 Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for presentment agency.

 Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about April 2, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crime of assault in the third degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

 The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility.

The evidence established the element of physical injury (see *People v Chiddick*, 8 NY3d 445 [2007]; *People v Haith*, 44 AD3d 369 [2007], *lv denied* 9 NY3d 1034 [2008]), and disproved appellant's justification defense.

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

ENTERED: APRIL 10, 2008

CLERK

Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

3336-

3336A Letter Grade, Inc.,
Plaintiff-Appellant,

Index 603412/06

-against-

Jasmine Technologies, Inc.,
Defendant-Respondent.

Martin S. Rapaport, New York (Karen F. Neuwirth of counsel), for
appellant.

Judgment, Supreme Court, New York County (Charles E. Ramos,
J.), entered February 21, 2007, in plaintiff's favor in the sum
of \$500,000, unanimously modified, on the law and the facts, to
increase the sum to \$1,000,000, plus 15,043.09 in attorneys' fees
and expenses, and otherwise affirmed, without costs. The Clerk
is directed to enter an amended judgment accordingly. Appeal
from order, same court and Justice, entered on or about February
13, 2007, which denied plaintiff's motion to correct the
judgment, unanimously dismissed, without costs, as superseded by
the appeal from the judgment.

Under the terms of the promissory note, plaintiff was
entitled to accelerate the entire debt upon defendant's failure
to make the first principal payment (*see Fifty States Mgt. Corp.
v Pioneer Auto Parks*, 46 NY2d 573, 577 [1979]). The affirmation
of plaintiff's counsel sufficiently detailed the work performed
and the expenses incurred by plaintiff in connection with this

matter to establish that the amount of fees and expenses was fair and reasonable (see *Bankers Fed. Sav. Bank v Off W. Broadway Devs.*, 224 AD2d 376, 377-378 [1996]).

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

ENTERED: APRIL 10, 2008

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2003 to June 20, 2003 is unpreserved and we decline to review it in the interest of justice. The period from September 16, 2003 to December 7, 2005 was also properly excluded. During this time, defendant had been deported to Jamaica, a deportation that was ultimately rescinded. Although the People knew that defendant was in Jamaica, they did not know his whereabouts. Since defendant failed to appear for trial and there was an outstanding bench warrant for his arrest, the period is excludable regardless of whether or not the People used due diligence in attempting to locate defendant and return him for trial (see CPL 30.30[4][c][ii]). Furthermore, the People were also excused from making a showing of diligence because this period occurred after they had declared their readiness (see *People v Carter*, 91 NY2d 795, 799, n [1998]). We have considered and rejected defendant's procedural arguments regarding our review of these issues. In response to defendant's motions, the People established the necessary facts, including the fact that they had made a valid statement of readiness, and defendant was not deprived of an opportunity to litigate these matters (compare *People v Chavis*, 91 NY2d 500, 506 [1998]). Finally, to the extent that defendant is arguing that, through prompt action, the

People could have prevented the deportation from occurring in the first place, that argument rests on speculation.

THIS CONSTITUTES THE DECISION AND ORDER
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tenant accept the apartment in "as is" condition (*see generally* Rent Stabilization Code [9 NYCRR] § 2521.2). The term of the lease was from October 1, 1991 to September 30, 1993, with a right of renewal set forth as follows: "At the end of the term of this initial Preferential Lease, Tenant has the option to renew Preferential Lease. The new monthly preferential rent will be \$3,000.00 adjusted by the corresponding RSA rent guidelines." Tenant thereafter renewed the lease five times. All five renewal leases were for two-year terms, used \$3,000 as the basis for increases, and stated the legal rent amount in addition to the preferential rent amount. The fifth renewal lease commencing June 1, 2002 had a preferential rent of \$3,715.64 and recited a legal rent of \$7,118.57. In 2004, landlord offered a renewal lease at the legal rent amount of \$7,652.26, but with no preferential amount stated. Tenant refused to execute this renewal lease and filed a rent overcharge complaint with respondent DHCR; landlord responded by filing a holdover proceeding in Housing Court. Housing Court came down with a decision first, finding triable issues of fact as to whether the parties intended that the preferential rent continue for the duration of the tenancy; shortly thereafter, DHCR denied tenant's rent overcharge complaint without conducting a hearing. Tenant filed a PAR, arguing, *inter alia*, that, as found by Housing Court, issues of fact as to the parties' intent required a trial,

and that the Rent Administrator's denial of the rent overcharge complaint was premature since Housing Court had not yet held the trial it had ordered. The Deputy Commissioner denied the PAR without conducting a hearing, finding that the Rent Administrator's order was not prematurely issued since Housing Court, on landlord's motion to reargue, subsequently marked the case off its calendar, deferring to DHCR's jurisdiction. On the merits, DHCR ruled that the preferential lease could not be considered because it was entered into prior to the base date, namely, November 2000, more than four years prior to the filing of the rent overcharge complaint.

While DHCR was not bound by Housing Court's determination that issues of fact as to the parties' intent warranted a trial, under the circumstances it was irrational for DHCR to determine such issue without itself conducting an evidentiary hearing. Since both the Rent Administrator and the Deputy Commissioner had the discretion to grant a hearing (9 NYCRR 2527.5[h], 2529.7[f]), it was inconsequential that tenant did not initially request a hearing before the Rent Administrator. Nor was tenant, in first requesting a hearing in his PAR, seeking to present new materials or facts for the first time in a PAR. Tenant was simply requesting a hearing on the same facts presented to the Rent Administrator.

In concluding that any agreement entered into before the

November 2000 base date could not be considered, the Deputy Commissioner relied on 9 NYCRR 2521.2(c), prohibiting examination of rental history prior to the four-year period preceding the filing of the complaint. Here, however, the most recent renewal, like each prior renewal, expressly stated that it was based on the same terms and conditions as the expiring lease, and "further attached lawful provisions and attached written agreements, if any." Thus, the 1991 preferential lease rider was incorporated into the most recent lease renewal, and was not barred from consideration by the four-year limitation period (*compare Matter of Century Operating Corp. v Popilizio*, 60 NY2d 483 [1983]). Nor is a different result required by 9 NYCRR § 2521.2(a), which gives a landlord the option, once a preferential rent is charged, to renew based on either the preferential rent or the legal regulated rent. That provision was not intended to obviate the terms of a lease agreement where both the landlord and the tenant are aware that the rent charged could legally be higher, but agree, under a specific set of circumstances, to allow the tenant to pay less, either for a specified period of time or for the duration of the tenancy (*see Matter of Missionary Sisters of Sacred Heart, Ill. v New York State Div. of Hous. & Community Renewal*, 283 AD2d 284, 287 [2001]).

The terms of the preferential lease rider, expressly incorporated into all renewal leases, appear to be open-ended

concerning the duration of the preferential rent, and not clearly limited to a maximum of two lease terms, totaling four years, as landlord argues, an interpretation not entirely consistent with landlord's own actions in offering renewal leases at the preferential rent for 10 years. Accordingly, since the 1991 preferential lease agreement controls, and the parties' intent cannot be unequivocally ascertained from the four corners of that agreement, DHCR acted irrationally in disregarding the terms of that agreement (see *Century Operating Corp.*, 60 NY2d at 488), and in not holding an evidentiary hearing on the issue of the parties' intent concerning the duration of the preferential rent.

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

ENTERED: APRIL 10, 2008

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Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

3339 James Spiegel,
Plaintiff-Appellant,

Index 109258/01

-against-

Vanguard Construction and
Development Company, et al.,
Defendants-Respondents.

Law Offices of Barry E. Schulman, Brooklyn (Barry E. Schulman of
counsel), for appellant.

Law Offices of Charles J. Siegel, New York (Robert S. Cypher of
counsel), for Vanguard Construction and Development Company,
respondent.

Law Office of John P. Humphreys, New York (Scott M. Karpel of
counsel), for 500-512 Seventh Avenue Associates and Helmsley-
Spear, Inc., respondents.

Order, Supreme Court, New York County (Edward H. Lehner,
J.), entered November 9, 2006, which granted defendants' motions
for summary judgment dismissing the complaint, unanimously
affirmed, without costs.

The record establishes defendants' entitlement to summary
judgment by demonstrating that the height differential of one
inch between the carpeted area of the floor and the adjacent
cement floor did not have any of the characteristics of a trap or

snare, and was not actionable (see *Kwitny v Westchester Towers Owners Corp.*, 47 AD3d 495 [2008]; *Martin v Lafayette Morrison Hous. Corp.*, 31 AD3d 300 [2006]; *Morales v Riverbay Corp.*, 226 AD2d 271 [1996]). No specificity of detail beyond the one-inch differential is presented here. Plaintiff testified that he was looking at the subject area when he fell. However, the photographs do not evidence a trap such as an edge posing a tripping hazard, or a situation where a defect might have been masked from view. Moreover, plaintiff is unable to establish that defendants 500-512 Seventh Avenue Associates, an out-of-possession landlord, and Helmsley-Spear, its managing agent, had actual or constructive notice of the alleged defect (see *Morchik v Trinity School*, 257 AD2d 534, 536 [1999]).

THIS CONSTITUTES THE DECISION AND ORDER
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undercover officer.

Defendant did not preserve any objection to the court's ruling that the courtroom would be closed, except to defendant's family, during the undercover officer's testimony. At the conclusion of the *Hinton* hearing, the only relief requested by defense counsel was that a member of defendant's family be permitted to attend. Furthermore, although counsel later called the court's attention to a fact arguably relevant to the closure ruling, he did not ask the court to reconsider that ruling. We decline to review defendant's present arguments in the interest of justice. As an alternative holding, we conclude that the People established an overriding interest that warranted closure of the courtroom (see *Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], cert denied sub nom. *Ayala v New York*, 522 US 1002 [1997]; *People v Miller*, 190 AD2d 609 [1993], lv denied 81 NY2d 974 [1993]). Similarly, defendant's argument that the undercover officer should not have been permitted to testify anonymously under his shield number is both unpreserved and without merit.

To the extent there were improprieties in the prosecutor's elicitation of opinion testimony and in summation, the court's

curative actions were sufficient to prevent any prejudice to defendant.

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

ENTERED: APRIL 10, 2008

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Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

3341-

3341A One Beacon Insurance Company Index 113997/05
 as subrogee of Dooney Bourke, Inc.,
 Plaintiff-Appellant,

-against-

French Institute Alliance Francais NYC,
Defendant-Respondent,

Lehr Construction Corp., et al.,
Defendants.

Sheps Law Group, P.C., Melville (Robert C. Sheps of counsel), for appellant.

Hoey, King, Toker & Epstein, New York (Robert O. Pritchard, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered January 10, 2007, which granted the motion of defendant French Institute Alliance Francais NYC (FIAF) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated against FIAF. Appeal from order, same court and Justice, entered April 24, 2007, which denied so much of plaintiff's motion insofar as it sought to renew, and granted its motion insofar as it sought to reargue, and upon reargument, adhered to the prior determination, unanimously dismissed, without costs, as academic in view of the foregoing.

Dooney & Burke was a tenant in a building owned by FIAF,

which also occupied the upstairs premises, and its lease provided for a waiver of subrogation with respect to claims alleging damages to its premises. In January 2005 water was discharged from FIAF's premises into Dooney & Burke's, resulting in damage. Plaintiff, Dooney & Burke's insurer, reimbursed it for the loss, and commenced this subrogation action against FIAF, alleging that, as "an occupier" of the premises, it had been negligent in maintaining the heating and sprinkler systems and in supervising the contractors working in its space.

We disagree with the motion court's determination that the waiver of subrogation clause in the lease barred plaintiff's claim on the basis that the allegations of negligence emanated from the landlord-tenant relationship. Instead, we find that the record establishes that there are triable issues of fact with respect to whether the cause of Dooney and Burke's loss arose from a condition in FIAF's premises, or from a building-wide condition for which FIAF was responsible in its capacity as landlord (see *Interested Underwriters at Lloyds v Ducor's, Inc.*, 103 AD2d 76 [1984], *affd* 65 NY2d 647 [1985]). The motion court inappropriately determined the factual issue on the record then before it, i.e., that the source of the problem was the building-wide heating system, and not the thermostat in the premises occupied by FIAF. Furthermore, plaintiff had expeditiously sought discovery on the issue, and its claimed need for such

discovery to oppose the motion was genuine (*cf. Moran v Regency Sav. Bank, F.S.B.*, 20 AD3d 305, 306 [2005]).

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summary judgment are applicable to special proceedings generally” *Matter of Brusco v Braun*, 199 AD2d 27, 31 [1993], *affd* 84 NY2d 674 [1994]), and here, the record reveals significant questions of fact regarding whether Arts complied with the continuing directive of the prior court as to various obligations to its shareholders, which should be addressed on the merits.

The court’s directive to petitioner to refrain from communicating directly with her adversary was overly broad, since petitioner is a shareholder of Arts and has the right to certain materials independent of the litigation. Caution, however, should be taken that exercise of these rights not be used as an extra-judicial discovery device.

Furthermore, the court improperly dismissed, as moot, Arts’ motion to hold petitioner and her former counsel in contempt. However, denial of the motion on the merits is appropriate, where petitioner’s demand made pursuant to Business Corporation Law § 1315 was authorized by statute, and does not constitute an improper discovery demand.

We have considered Arts’ remaining contentions and find them unavailing.

M-1206 - Hancock v Arts4All Ltd

Motion seeking an order directing respondent to pay 50% of petitioner's printing costs and seeking to strike materials denied.

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

ENTERED: APRIL 10, 2008

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reason of the delay (see General Municipal Law § 50-e[1][a],[5];
Matter of Schifano v City of New York, 6 AD3d 259 [2004], *lv*
denied 4 NY3d 703 [2005]; *Harris v City of New York*, 297 AD2d 473
[2002], *lv denied* 99 NY2d 503 [2002]).

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

ENTERED: APRIL 10, 2008

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Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

3345N Thomas Bowman,
Plaintiff-Appellant,

Index 103824/03

-against-

Beach Concerts, Inc., et al.,
Defendants-Respondents.

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

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Jonathan A. Judd of counsel), for respondents.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered November 6, 2006, which denied plaintiff's motion to vacate an order of dismissal, unanimously modified, on the law and the facts, to reinstate the Labor Law § 200 and common-law negligence claims, and otherwise affirmed, without costs.

Plaintiff demonstrated a reasonable excuse for his default, i.e., law office failure (*see ICBC Broadcast Holdings-NY, Inc. v Prime Time Adv., Inc.*, 26 AD3d 239, 240 [2006]; *Mediavilla v Gurman*, 272 AD2d 146, 148 [2000]), and meritorious Labor Law § 200 and common-law negligence claims, based on evidence that the operation of a forklift by an untrained, self-designated coworker created an unsafe workplace (*see Griffin v New York City Tr. Auth.*, 16 AD3d 202 [2005]). As to his Labor Law § 241(6)

claim, however, plaintiff failed to demonstrate that his injury occurred in the context of construction, excavation or demolition work (see *Nagel v D & R Realty Corp.*, 99 NY2d 98, 103 [2002]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 10, 2008

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Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

3346N Marilou Ordillas,
Plaintiff-Appellant,

Index 110086/06

-against-

MTA New York City Transit,
Defendant-Respondent.

Budd Larner, P.C., New York (Averim Stavsky of counsel), for appellant.

Wallace D. Gossett, New York (Renee L. Cyr of counsel), and Steve S. Efron, New York, for respondent.

Order, Supreme Court, New York County (Robert D. Lippmann, J.), entered October 23, 2006, which denied plaintiff's motion for leave to file a late notice of claim, unanimously affirmed, without costs.

Plaintiff's proffered excuse of law office failure does not adequately excuse the year-long delay in filing a notice of claim (see *Seif v City of New York*, 218 AD2d 595 [1995]). She does not contend that defendant had actual knowledge of the facts and circumstances constituting her claim within the statutorily prescribed 90-day filing period or within a reasonable time thereafter (see General Municipal Law § 50-e[5]; *Quinn v Manhattan & Bronx Surface Tr. Operating Auth.*, 273 AD2d 144 [2000]). Her unsupported assertion that the condition of a staircase at a subway entrance in Grand Central Station remained unchanged a year after her accident is insufficient to refute

defendant's contention that its ability to meaningfully investigate her claim had been prejudiced by the passage of time (*Lefkowitz v City of New York*, 272 AD2d 56 [2000]), given the likelihood that the condition of the stairs would have changed during that time due to heavy traffic by the public, and the loss of opportunity to locate witnesses while memories were still fresh (see *Tavarez v City of New York*, 26 AD3d 297 [2006]).

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his client wore blue jeans, rather than blue sweat pants, at arraignment. Counsel neither stated, nor even suggested, that a new attorney, unfamiliar with the case, would be able to take over the trial in progress. Thus, as a practical matter, granting the application would have necessitated a mistrial. Furthermore, the proposed testimony had little probative value because the clothing discrepancy could either be explained by the possibility that defendant exchanged pants with another detainee during the lengthy period of prearraignment custody, or as a trivial mistake by the officers having little bearing on their credibility. Similarly, the court's ruling did not deprive defendant of his right to a fair trial and to present a defense (see *Crane v Kentucky*, 476 US 683, 689-690 [1986]). Defendant would have been able to introduce the evidence in question had the issue been raised in a timely fashion, and the evidence had minimal exculpatory value in any event.

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

ENTERED: APRIL 10, 2008

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Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

3348 In re Eric Josey, Index 105659/06
Petitioner-Respondent,

-against-

New York City Police Department, et al.,
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for appellants.

Michael T. Murray, New York (Christopher J. McGrath of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert D. Lippmann, J.), entered December 4, 2006, which annulled the determination of respondent Police Pension Fund Board of Trustees denying petitioner's application for accidental disability retirement (ADR) benefits, and directed respondent to grant petitioner ADR benefits, unanimously reversed, on the law, without costs, the petition denied and the proceeding dismissed.

Respondent's determination was based on "some credible evidence" and was not arbitrary or capricious (see *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760-761 [1996]). There is no evidence in the record that supports petitioner's belated claim that his injury occurred in the line of duty.

We note that, upon finding that there was no credible evidence to support respondent's determination, the court should

have remanded the proceeding for further consideration (*Matter of Perkins v Board of Trustees of N.Y. Fire Dept. Art. 1-B Pension Fund*, 86 AD2d 808 [1982]).

THIS CONSTITUTES THE DECISION AND ORDER
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than \$2,500 (see *Stevanovic v T.U.C. Mgt. Co.*, 305 AD2d 133 [2003]), there is no evidence that -- under the terms of this agreement or in actual practice -- the management company's "duties included making periodic inspections and ensuring that the building was maintained in good repair" (cf. *Tushaj v 322 Elm Mgt. Assoc.*, 293 AD2d 44, 45 [2002]). Generally, "individual liability cannot be based upon an allegation that amounts to mere nonfeasance unless plaintiff establishes, as a matter of law, that the managing agent was in complete and exclusive control of the premises" (*Hakim v 65 Eighth Ave., LLC*, 42 AD3d 374, 375 [2007]). There is an exception for situations in which a promisor is subject to tort liability for failing to exercise due care in the execution of the contract if "the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). That exception is inapplicable here because Insignia "lacked the broad authority to make all necessary repairs or to resolve tenant complaints without a special arrangement with the owner, and the owner retained the primary duty to make repairs and safely maintain the premises" (*Clark v Kaplan*, 47 AD3d 462 [2008]). Another exception, for situations where the employee reasonably relies to his detriment on a defendant contractor's continuing performance of a contractual obligation to an owner (*Espinal*, 98 NY2d at 140), is also

inapplicable, since there is no evidence of any such reliance by the injured plaintiff on -- or even awareness of -- Insignia's limited involvement with maintaining the building's electrical system.

Furthermore, there is no evidence that Insignia had actual notice of the particular fuse block defect that caused the accident (*compare Tushaj v Elm Mg. Assoc.*, 293 AD2d 44, *supra*, with *DeVizio v Hobart Corp.*, 142 AD2d 508, 510 [1988]). Nor was there any evidence that the defect was visible or apparent, or that it existed for a sufficient length of time prior to the accident to have allowed Insignia's employees to discover and remedy it, such as would have afforded constructive notice (*id.* at 511).

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

ENTERED: APRIL 10, 2008

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Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

3350-

3351-

3352-

3353

In re Brandon A.,

A Child Freed for Adoption, etc.,

Jo Ann M.,

Movant-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Lansner & Kubitschek, New York (Carolyn A. Kubitschek of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), Law Guardian.

Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about June 6, 2006, which, to the extent appealed from as limited by the briefs, denied the motion of the subject child's former foster parent to intervene in the permanency hearings, unanimously affirmed, without costs. Order, same court and Judge, entered on or about October 17, 2006, which, after a hearing, determined that it was in the child's best interests not to be returned to the movant's care, unanimously affirmed, without costs. Order, same court and Judge, entered on or about November 14, 2006, which, to the extent appealed from as limited by the briefs, denied a further motion for visitation and to

adopt the child, unanimously affirmed, without costs.

Family Court providently exercised its discretion in denying the non-kinship former foster mother's motion to intervene in the permanency hearings (see *Matter of George "Joey" S.*, 194 AD2d 328 [1993]). Since the movant was not the child's foster parent at the time of the hearings and had not lived with him for a continuous period of more than 12 months, she was not entitled to intervene as of right in any of the custody proceedings pursuant to Social Services Law § 383(3) (see e.g. *Matter of Bessette v Saratoga County Commr. of Social Servs.*, 209 AD2d 838 [1994]; *Matter of Minella v Amhrein*, 131 AD2d 578 [1987]), nor was she entitled to be a party at the permanency hearing (see Family Court Act § 1089[b][2]). The movant was not entitled to intervene as of right pursuant to CPLR 1012(a)(2) because she was not legally bound by any judgment in the custody proceeding (see e.g. *Matter of Tyrone G. v Fifi N.*, 189 AD2d 8, 17 [1993]).

Family Court had jurisdiction to stay the child's return to the movant's care pending a best interests hearing regarding the changed circumstances and, after the hearing, to determine against such return, even in the face of the fair hearing decision of the New York State Office of Children and Family Services (see *Matter of Shinice H.*, 194 AD2d 444 [1993]).

The movant had no protected liberty interest in the foster-

parent-and-child relationship (see *Rodriguez v McLoughlin*, 214 F3d 328 [2d Cir 2000], cert denied 532 US 1051 [2001]; see also *Matter of Roxanne F.*, 79 AD2d 505 [1980], appeal dismissed 53 NY2d 674 [1981]), and was accorded all the process she was due, given her notice of the custody hearings and her opportunity to be heard. Her argument that the Family Court improperly found it not in the child's best interests to be returned to her care is not properly before this Court because it was raised for the first time in her reply brief (see *Matter of Deuel v Dalton*, 33 AD3d 1158, 1159 [2006]), and we decline to consider it.

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requires a showing of long-term effects, that argument is without merit (see e.g. *People v Jackson*, 296 AD2d 313 [2002], lv denied 98 NY2d 768 [2002]).

The court properly admitted evidence that, at the time of the incident, defendant was driving a taxi without a valid license to do so. Without this evidence, it would have been difficult for the jury to understand why defendant fled from the police and engaged in a course of unusual conduct rather than simply submitting to being stopped for a traffic violation (see *People v Till*, 87 NY2d 835, 837 [1995]). The court's thorough limiting instruction minimized any prejudice.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: APRIL 10, 2008

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Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

3357 16 East 96th Apartment Corp., Index 100034/06
 Plaintiff,

-against-

Lars Neubohn, et al.,
Defendants/Counterclaim
Plaintiffs-Appellants,

-against-

Kenneth Willig, et al.,
Additional Counterclaim
Defendants-Respondents.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Eric B. Levine of counsel), for appellants.

Rosen & Livingston, New York (Bruce A. Cholst of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 15, 2006, which, to the extent appealed from, granted plaintiff's motion to dismiss defendants' first counterclaim, and granted the counterclaim defendants' motion to dismiss the second counterclaim, unanimously affirmed, with costs.

The first counterclaim alleged that plaintiff's individual directors breached their fiduciary duties by singling defendants out for disparate treatment. The second counterclaim alleged that Rosette Willig assisted the individual directors in breaching their fiduciary duties.

"Individual directors" may not be subject to liability

without allegations of separate tortious acts (*DeCastro v Bhokari*, 201 AD2d 382 [1994]; see also *Konrad v 136 E. 64th St. Corp.*, 246 AD2d 324 [1998]). The proposed cause of action in the first counterclaim ascribes no independent tortious conduct to any individual director, and is thus deficient as a matter of law. Since defendants have failed to state a claim sufficiently for breach of fiduciary duty against the individual directors, their claim against Rosette Willig also fails.

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

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

ENTERED: APRIL 10, 2008

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Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

3358 ESBE Holdings, Inc., et al., Index 603862/05
Plaintiffs-Appellants,

-against-

Vanquish Acquisition Partners, LLC, et al.,
Defendants-Respondents.

Freeman Lewis LLP, New York (Jennifer Freeman of counsel), for appellants.

Budd Larner, P.C., New York (James B. Daniels of counsel), for respondents.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered November 24, 2006, which, to the extent appealed from as limited by the briefs, dismissed plaintiffs' fraud and negligent misrepresentation causes of action and dismissed all claims against defendant Michael H. Carstens individually, unanimously affirmed, without costs.

The court correctly found that plaintiffs' fraud claims related to the Phoenix LP investment and restructuring, the November 1997 subscriptions agreements, and Tech, Phoenix Cruise Lines, and Molifor were time-barred (CPLR 213[8]).

Plaintiffs' claims based on alleged misrepresentations concerning the successful completion of earlier transactions and the alleged failure to disclose the fact that defendants Carstens and Joseph Del Valle were sanctioned, censured, and banned by the National Association of Securities Dealers in 1992 were properly

dismissed, because such misrepresentations, even if they induced plaintiffs to invest in certain companies, did not relate to the financial condition of any of the companies and therefore did not directly cause the loss about which plaintiffs complain (see *Laub v Faessel*, 297 AD2d 28, 31 [2002]).

Dismissal was warranted also because the claims based on alleged misrepresentations lacked "the requisite particularity" (*Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 116 [1998]; *Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220 [1994]; CPLR 3016[b]). The complaint refers to "certain plaintiffs," "various plaintiffs," and "the Del Valle Defendants," which, as the court observed, makes it impossible to determine which plaintiffs relied on alleged misstatements and which defendants made the misstatements.

Claims based upon defendants' projections of returns on investment, such as the expected acquisition of the Orient Cruise Lines and the projected Southeast Cruise Holdings acquisitions, are not actionable because such projections are merely statements of prediction or expectation (see *Naturopathic Labs Intl., Inc. v SSL Ams., Inc.*, 18 AD3d 404, 404 [2005]).

The court also properly dismissed the fraud claims as duplicative of the breach of contract claims, since they arose directly from the written provisions of the various subscription

and other agreements (see e.g. *Meehan v Meehan*, 227 AD2d 268, 270 [1996]). Plaintiffs' contention that many of the alleged misrepresentations are extraneous to the contracts is unavailing, since none of these misrepresentations caused the actual investment losses. Moreover, that plaintiffs seek different remedies for the breaches of contract does not alter the nature of the underlying cause of action.

The court properly dismissed the claims against defendant Carstens individually, since the complaint alleges no specific representations or actions attributable to him. Any remark Carstens may have made to the effect that Southeast Cruise was a great project is a "nonactionable expression[] of opinion, mere puffing" (*Longo v Butler Equities II*, 278 AD2d 97, 97 [2000]).

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

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radiologist who found no abnormalities as a result of the accident (*see Lloyd v Green*, 45 AD3d 373 [2007]).

Plaintiff's opposition failed to raise a triable issue of fact as to whether she sustained a serious injury. Her deposition testimony revealed that she was involved in a second motor vehicle accident more than one year after the subject accident, in which she injured her neck, back and shoulder. The conclusion of plaintiff's treating orthopedist regarding the range of motion limitations found in plaintiff's neck, back and right shoulder two years after the subject accident, failed to adequately address the possibility that plaintiff's limitations were caused by the second accident (*see Lopez v Simpson*, 39 AD3d 420, 421 [2007]; *see also Montgomery v Pena*, 19 AD3d 288, 289-290 [2005]). Plaintiff also failed to raise a triable issue of fact in the form of competent objective evidence substantiating her 90/180-day claim (*see Nelson v Distant*, 308 AD2d 338, 340 [2003]).

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

THIS CONSTITUTES THE DECISION AND ORDER
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summary judgment and plaintiffs did not seek permission to file the statements nunc pro tunc. Nor did plaintiffs offer a reasonable excuse for their failure to timely file (*compare Matter of Abreu*, 168 Misc 2d 229, 234 [1996]).

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

M-1489 - Fishkin, et al., v Taras, et al.,

Motion seeking leave to enlarge the record and for such and any other further relief that the Court deem just and proper granted.

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

ENTERED: APRIL 10, 2008

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Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

3365 The People of the State of New York,
Respondent,

Ind. 37/05

-against-

Robert Barksdale,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert H. Straus, J.), rendered June 14, 2006, convicting defendant, after a jury trial, of robbery in the second degree, burglary in the third degree (two counts) and criminal possession of stolen property in the fifth degree, and sentencing him, as a second violent felony offender, to concurrent terms of 9½ years, 3 to 6 years, 3 to 6 years, and 1 year, respectively, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its evaluation of a witness's testimony regarding the degree of force defendant used against him.

Defendant and a codefendant entered two drugstores during the early morning hours. In each store, the codefendant,

seemingly intent on making a purchase, interacted with store personnel as defendant entered the pharmacy area, which in each case, was enclosed by a wall and counter and accessible only through a door, although the door was unlocked. In the first store, an employee directed defendant to leave the pharmacy area, and defendant departed without taking anything. In the second store, defendant stole boxes of expensive diabetic test strips from the pharmacy area, and when an employee tried to stop him, defendant pushed an employee out of the way with considerable force.

Defendant's act of forcibly pushing the employee out of the way as he attempted to leave the store with stolen merchandise established the crime of robbery (see Penal Law § 160.00[1]; *People v Green*, 277 AD2d 82 [2000], *lv denied* 96 NY2d 784 [2001]). The conduct of the codefendant in apparently casing each store, distracting employees while defendant entered the pharmacy area, and fleeing with him after the theft supported the conclusion that defendant was aided by another person actually present, thereby satisfying that element of second-degree robbery (see Penal Law § 160.10[1]; *People v Hazel*, 26 AD3d 191 [2006], *lv denied* 6 NY3d 848 [2006]). Each pharmacy area was unmistakably closed to the public notwithstanding the absence of any warning sign or additional security measures (see *People v Powell*, 58 NY2d 1009, 1010 [1983]), thus establishing the

trespass element of burglary. The evidence also supports the inference that defendant entered each pharmacy area with intent to commit a crime.

The court properly exercised its discretion in declining to declare a mistrial based on alleged juror misconduct, or to conduct a further investigation regarding the identity of the juror involved therein. After making a thorough individual inquiry of each juror, the court properly concluded that the initially unidentified juror who had engaged in the improper conduct in question was a juror whom the court had discharged for other reasons (see *People v Ortiz*, 45 AD3d 368 [2007]). The circumstances did not warrant any further efforts to identify the errant juror.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
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judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 10, 2008

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Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

3367 Nicholas Castro, a minor, Index 104826/05
by his mother and natural guardian,
Linda Vinueza, et al.,
Plaintiffs-Respondents,

-against-

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

Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP, Hauppauge
(Scott G. Christensen of counsel), for appellants.

Miller & Eisenman, LLP, New York (Michael P. Eisenman of
counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner
Kornreich, J.), entered April 13, 2007, which denied defendants'
motion for summary judgment, unanimously affirmed, without costs.

The infant plaintiff, a three-year-old "special needs"
student at defendant Birch's early childhood center, was
allegedly injured by another student at school on three occasions
in late 2002 and early 2003. The final injury was a broken
femur. Plaintiffs seek to hold defendants liable for negligent
supervision.

The school authorities were not entitled to summary judgment
on this record (see *Garcia v City of New York*, 222 AD2d 192, 195
[1996], *lv denied* 89 NY2d 808 [1997]). Plaintiffs introduced
sufficient evidence, in addition to the challenged alleged

hearsay (see *Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [2002]), to raise a triable issue of fact as to the school's awareness of prior injuries to this child while in its care and custody, and to raise factual issues as to the adequacy of defendants' supervision (see *Mirand v City of New York*, 84 NY2d 44 [1994]).

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

ENTERED: APRIL 10, 2008

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Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

3368 Norman Behagan,
Plaintiff-Respondent,

Index 18044/04

-against-

L&L Painting Co., Inc.,
Defendant-Appellant.

Fabiani Cohen & Hall, LLP, New York (Lisa A. Sokoloff of counsel), for appellant.

Pecoraro & Schiesel, New York (Steven G. Schiesel of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered March 23, 2007, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

A subcontractor may be held liable for injury to an employee of the general contractor under certain circumstances (see generally *Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]). There was ample evidence, in the form of plaintiff's deposition testimony and the L&L subcontract requirements, to raise an issue of fact whether defendant subcontractor had controlled, directed and supervised plaintiff's work in scraping steel as a "prep" to painting, and whether such work had been expressly delegated to defendant under the terms of the subcontract. The L&L subcontract required defendant to "clean" the steel, to provide all painting equipment and safety materials, and to be

responsible for any liability arising from its obligations thereunder. Based on this and other evidence, the court properly found issues of fact as to defendant's liability for plaintiff's injury under Labor Law § 240 and § 241.

There are also issues of fact as to whether defendant exercised control over the injury-producing activity, such as would sustain plaintiff's claims under Labor Law § 200 and for common law negligence. Plaintiff's deposition testimony and the terms of the subcontract indicate that defendant controlled the painting phase of the project, including the scraping and safety equipment requirements. Plaintiff, a painter by trade, testified that he received his work assignments from defendant, including his safety equipment, and that he was instructed by defendant to build a portion of the scaffold, which he was doing at the time he fell. The court properly concluded that plaintiff's testimony, based on personal knowledge, raised issues of fact as to defendant's control of the work, and that the factfinder should determine issues of credibility and the weight to be accorded such testimony.

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

ENTERED: APRIL 10, 2008

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actions taken arbitrarily or in bad faith will, of course, not be tolerated, but the petitioner in such circumstances bears a heavy burden of proof (see *Matter of Aladin v Schultz*, 176 AD2d 205, 206 [1991]), for which conclusory allegations and speculative assertions will not suffice (see *Matter of Knight v County of Nassau*, 27 AD3d 470 [2006], *lv denied* 7 NY3d 712 [2006]).

The failure to provide particular reasons for an appointing official's exercise of discretion in declining to appoint a specific candidate is not evidence of arbitrariness or capriciousness (*Matter of Delicati v Schechter*, 3 AD2d 19 [1956]; see also *Matter of Kaminsky v Leary*, 33 AD2d 552 [1969], *affd* 28 NY2d 959 [1971]). Even candidates such as petitioner, who has a very good service record, can be denied promotions provided appropriate discretion is used within the confines of the "one-of-three" rule in Civil Service Law § 61 (see *Matter of Archer v Riccio*, 201 AD2d 395 [1994]).

Applying these standards, respondent's determination not to appoint petitioner permanently to the title of AJC was neither arbitrary, capricious, nor an abuse of discretion, and cannot be invalidated as contrary to the merit and fitness requirements of the State Constitution (*id.* at 397). Petitioner's challenge is, in essence, simply a statement of incredulity that despite his "very good" performance evaluations and being number 7 on the certified list, he was passed over for the permanent promotion.

A provisional appointment may ripen into a permanent appointment pursuant to Civil Service Law § 65(4) (see *Matter of Becker v New York State Civ. Serv. Commn.*, 61 NY2d 252 [1984]), but this petitioner was not entitled to a permanent position as an AJC by operation of law. His contention that the record was insufficient to determine whether the list was adequate to fill all the positions held on a probationary basis is belied by respondents' submissions demonstrating that all available positions had been filled, that the eligible list remained unexhausted, and that after the appointments were made from the list, no provisional appointees remained in the position of AJC.

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

ENTERED: APRIL 10, 2008

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Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

3370N Nicholas Divito,
Plaintiff-Appellant,

Index 600132/07

-against-

Dennis J. Farrell, et al.,
Defendants-Respondents.

Davidoff Malito & Hutcher LLP, New York (Martin H. Samson of counsel), for appellant.

Blank Rome LLP, New York (Laurie J. McPherson of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 13, 2007, which denied plaintiff's motion for a preliminary injunction, unanimously dismissed as moot, with costs in favor of defendants, payable by plaintiff.

Plaintiff sought a declaratory judgment to bar termination of his rights in a certain company. His application for a temporary restraining order and a preliminary injunction was granted only to the extent of temporarily enjoining the purchase of his shares in the company pending a hearing on the matter. At the conclusion of the hearing, the court denied preliminary injunctive relief and lifted the restraining order. Unable to obtain a stay of the court's decision, plaintiff was provided with written notice that pursuant to its rights and obligations under the 1990 shareholders' agreement, the company in which he

held shares intended to acquire his stock as soon as practicable. When he refused to cooperate in scheduling a closing of the transaction, a date for the closing was set. Plaintiff was again unable to procure a stay of the closing, and the transaction then took place.

Plaintiff now argues that the motion court erred in not granting injunctive relief, and that the subsequent closing was invalid because it purportedly violated the temporary restraining order, which, he maintains, was in effect until formally terminated by the entry of the court's written decision denying his motion for a preliminary injunction. He contends that he should have been granted the injunction because he satisfied all the requirements for such relief. However, the TRO was, by its terms, only in force pending the hearing of the motion, and further, the court announced its lifting of the restraint at the hearing. Plaintiff was unable to procure a stay of the impending acquisition of his shares, so defendants were not precluded from compelling their purchase (see *Da Silva v Musso*, 76 NY2d 436, 440 [1990]; *Sakow v 633 Seafood Rest., Inc.*, 1 AD3d 298 [2003]). Accordingly, the remedy plaintiff now seeks is a legal

impossibility (see *Local 798 Realty Corp. v 152 W. Condominium*, 37 AD3d 239 [2007]), thus rendering moot the challenge to the denial of his motion for a preliminary injunction.

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

ENTERED: APRIL 10, 2008

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settlement, and that the balance owed by defendant was \$47,116.59. Contrary to plaintiff's contention, pursuant to the stipulation of settlement, plaintiff's remedy for non-payment by defendant was to commence an action for the amount owed, and not for rescission of the agreement. Furthermore, given the repeated findings in prior orders that it was plaintiff that had failed to close, as required by the stipulation of settlement, the court properly declined to impose interest on the payment.

Plaintiff's conduct in bringing 2 proceedings in 12 years for a purported breach of the settlement agreement does not rise to the level sufficient to condition his access to the courts on prior court approval, or to impose sanctions and costs (*compare Matter of Sud v Sud*, 227 AD2d 319 [1996]).

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

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

ENTERED: APRIL 10, 2008

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Andrias, J.P., Catterson, McGuire, Malone, JJ.

1616 Freeford Limited,
M-5044& Plaintiff-Respondent,
5264

Index 603652/05

-against-

Lane P. Pendleton, et al.,
Defendants-Appellants,

John Does 1 through 10,
Defendants.

Hoguet Newman Regal & Kenney, LLP, New York (John J. Kenney of counsel), for Lane P. Pendleton, appellant.

Hangley Aronchick Segal & Pudlin, Philadelphia, PA (Zachary R. Davis of counsel), for Kirk Pendleton, Laird P. Pendleton, Cairwood Capital Management, LLC, Cairwood Capital Partners, LLC, Cairwood Capital International, Ltd., and Cairwood Group, LLC, appellants.

LeBoeuf, Lamb, Greene & MacRae, LLP, New York (John G. Nicolich of counsel), for respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered on or about July 10, 2006, modified, on the law, to the extent of granting the motion to dismiss as to defendants-appellants Kirk Pendleton, Laird Pendleton, and Cairwood Capital International for lack of personal jurisdiction, and otherwise affirmed, without costs. Motions seeking leave to file supplemental brief and leave to file responsive supplemental brief granted.

Opinion by Catterson, J. All concur.

Order filed.

Tom, J.P., Friedman, Gonzalez, Kavanagh, JJ.

1973 Bovis Lend Lease LMB, Inc., et al., Index 602739/03
 Plaintiffs-Respondents,

-against-

Great American Insurance Company, et al.,
Defendants-Respondents,

QBE Insurance Corporation,
Defendant.

- - - - -

United National Insurance Corp., Index 590088/05
Defendant-Appellant-Respondent,

-against-

Westchester Fire Insurance Company,
Defendant-Respondent-Appellant.

[And a Third-Party Action]

Nicoletti Gonson Spinner & Owen LLP, New York (Edward S. Benson of counsel), for appellant-respondent.

Lustig & Brown, LLP, New York (Sherri N. Pavloff of counsel), for respondent-appellant.

Newman Fitch Altheim Myers, P.C., New York (Olivia M. Gross and Howard B. Altman of counsel), for Bovis Lend Lease LMB Inc., Dormitory Authority of the State of New York, the City of New York and Illinois National Insurance Company, respondents.

Hoffman & Roth, LLP, New York (James A. Roth of counsel), for Great American Insurance Company, respondent.

Rivkin Radler, Uniondale (Merril Biscone of counsel), for Liberty Insurance Underwriters, Inc., respondent.

Order, Supreme Court, New York County (Carol Edmead, J.), entered April 6, 2006, modified, on the law, (a) to declare that, upon the exhaustion of QBE's coverage, the order of the obligation to defend and indemnify Bovis, DASNY and NYC in the underlying wrongful death action is (1) Liberty, up to the \$1 million limit of its coverage, (2) upon exhaustion of QBE's and

Liberty's coverage, Illinois, up to the \$1 million limit of its coverage, and (3) upon exhaustion of QBE's, Liberty's and Illinois' coverage, United and Westchester, sharing on a pro rata basis, up to the respective limits of their policies, and (b) to declare further that, upon exhaustion of QBE's coverage, the order of the obligation to defend and indemnify Stonewall in the underlying wrongful death action is (1) Liberty, up to the \$1 million limit of its coverage, (2) upon exhaustion of QBE's and Liberty's coverage, Illinois, up to the \$1 million limit of its coverage, and (3) upon exhaustion of QBE's, Liberty's and Illinois' coverage, Westchester, up to the \$10 million limit of its coverage, and otherwise affirmed, without costs.

Opinion by Friedman, J. All concur.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
APRIL 10, 2008

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-1687 People v Greene, Giander

Appeal withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-1416 People v Calderon, Ricardo

Motion deemed withdrawn.

Lippman, P.J., Tom, Williams, Acosta, JJ.

M-1678 People v Pineyro, George

Time to perfect appeal enlarged to the September 2008
Term.

Lippman, P.J., Mazzarelli, Gonzalez, Sweeny, JJ.

M-1327 JP Morgan Chase Bank, N.A. v Rocar Realty Northeast,
Inc.

Leave to appeal to the Court of Appeals denied.

Lippman, P.J., Andrias, Williams, McGuire, JJ.

M-773A People v Fuller, Demetrius

Leave to prosecute appeal as a poor person granted, as indicated. The order of this Court entered March 20, 2008 (M-773) recalled and vacated.

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

M-1281 People v Pugh, Jimmie

Leave to prosecute appeal as a poor person granted, as indicated.

Lippman, P.J., Friedman, Catterson, Moskowitz, JJ.

M-953 Mike v Riverbay Corporation

Stay of trial denied.

Tom, J.P., Andrias, Nardelli, Sweeny, JJ.

M-916 In the Matter of W., Aaliah - Harlem Dowling Westside Center for Children and Family Services

Appeal dismissed.

Tom, J.P., Andrias, Nardelli, Sweeny, JJ.

M-967 Belmore-Gaillard v Gaillard

Leave to prosecute appeal as a poor person granted to the extent indicated; stay denied.

Tom, J.P., Saxe, Friedman, Buckley, JJ.

M-1090 Trump Plaza Owners, Inc. v Weitzner
(And another action)

Reargument or other relief denied.

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

M-4482 Korpah v New York City Department of Education

Enlargement of time to file notice of appeal granted,
as indicated.

Tom, J.P., Saxe, Nardelli, Williams, JJ.

M-1109 People v Adoms, Jorge

Enlargement of time to file notice of appeal denied.

Tom, J.P., Saxe, Nardelli, Williams, JJ.

M-1227 In the Matter of Duffy v The City of New York
M-1463 Department of Housing Preservation and Development

Proceeding dismissed; enlargement of time to perfect
proceeding denied accordingly.

Tom, J.P., Saxe, Nardelli, Williams, JJ.

M-1019 Capogrosso v Metropolitan Dental Associates, D.D.S.

Enlargement of time to perfect appeals denied; appeals
dismissed.

Tom, J.P., Saxe, Buckley, Gonzalez, Catterson, JJ.

M-6723 Gomez v Sharon Baptist Board of Directors, Inc. - S.M.
Construction Co.
(And a third-party action)

Time to perfect appeal enlarged to the September 2008
Term.

Tom, J.P., Friedman, Nardelli, Catterson, JJ.

M-192 Breytman v Olinville Realty, LLC
(And another action)

Reargument or other relief denied.

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

M-1426 People v Johnson, Jerome

Leave to prosecute appeal as a poor person and related
relief granted; Clerk of the Supreme Court shall expeditiously
have made and filed with the criminal court two transcripts of
the SORA hearing and other proceedings, as indicated.

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

M-1650 People v Rosario, Jose

Time to perfect appeal enlarged to the September 2008
Term.

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

M-1344 Bonano v Coalition for the Homeless, L.P.

Stay denied; interim relief granted by order of a Justice of this Court, dated March 10, 2008, vacated. Leave to prosecute appeal as a poor person granted to the extent indicated.

Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

M-1527 Park v Wolf and Samson, P.C.

Time to perfect appeal enlarged to the September 2008 Term.

Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

M-1201 Cerrone v Drapkin

Appeal dismissed.

Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

M-1313 In the Matter of D., Grace v D., Ralph - DeMattio

Time to perfect appeal enlarged to the September 2008 Term, as indicated.

Mazzarelli, J.P., Andrias, Gonzalez, Acosta, JJ.

M-1177 In the Matter of Storman v New York City Department of Education

Appeal dismissed, as indicated.

Mazzarelli, J.P., Saxe, Buckley, McGuire, JJ.

M-360 People v Gonzalez, Gabriel

Writ of error coram nobis denied.

Mazzarelli, J.P., Friedman, Sweeny, Moskowitz, JJ.

M-1310 Gary v New York University

Reargument or other relief denied.

Mazzarelli, J.P., Williams, Catterson, Kavanagh, JJ.

M-4692A In the Matter of R., Faith; B., Karen; B., Shakkia

M-4693A Family Support Systems Unlimited, Inc.

M-4694A

Appeals consolidated; leave to prosecute consolidated appeals as a poor person granted; transcription of minutes directed, as indicated. The orders of this Court entered on November 20, 2007 (M-4692/M-4693) and March 6, 2008 (M-4694) recalled and vacated.

Andrias, J.P., Buckley, Catterson, Malone, Kavanagh, JJ.

M-6391 Peri v The City of New York - LSL Services, Inc.

Leave to appeal to the Court of Appeals granted, as indicated. (See M-6717 decided simultaneously herewith).

Andrias, J.P., Buckley, Catterson, Malone, Kavanagh, JJ.

M-6717 Peri v The City of New York - LSL Services, Inc.

Leave to appeal to the Court of Appeals denied.
(See M-6391 decided simultaneously herewith).

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

M-1611 3657 Realty Co., LLC v Jones

Stay granted on condition appellant pays use and occupancy and time to perfect appeal enlarged to the September 2008 Term, to which Term appeal adjourned, as indicated.

Saxe, J.P., Sweeny, McGuire, Acosta, JJ.

M-952 People v Aikens, Anthony

Enlargement of time to file notice of appeal denied.

Saxe, J.P., Sweeny, McGuire, Acosta, JJ.

M-1154 People v Mayo, Raheem

Time to perfect appeal enlarged to the September 2008 Term.

Gonzalez, J.P., Williams, Catterson, Moskowitz, JJ.

M-830 People v Kim, Steven

Appeal dismissed.

Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

M-1307 People v Morales, Edgar

Leave to prosecute appeal as a poor person granted to the extent indicated; assignment of counsel denied.

Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

M-1586 Gaskin v West Bourne Associates, L.P.

Leave to prosecute appeal as a poor person granted to the extent indicated.

Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

M-1495 Goldberg v Thelen Reid Brown Raysman & Steiner, LLP

Leave to have certain documents filed under seal granted.

Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

M-1417 In the Matter of G., Johnny, Jr. - MercyFirst

Leave to prosecute appeal as a poor person granted, as indicated.

Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

M-1379 In the Matter of S., Ladon

Time to perfect appeal enlarged to the September 2008 Term.

Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

M-1194 People v Walker, Sean, also known as Barker, Sean, also known as Barker, Seon

Notice of appeal deemed timely filed; leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Gonzalez, J.P., Nardelli, Williams, Catterson, JJ.

M-291 Mehlman v 592-600 Union Avenue Corp.

Reargument or other relief denied.

Gonzalez, J.P., Nardelli, Buckley, Catterson, JJ.

M-1336 People v Soto, Ruben

Moving papers deemed a timely filed notice of appeal.

Gonzalez, J.P., Williams, Catterson, Moskowitz, JJ.

M-1191 People v Brenman, Michael

Appeal deemed withdrawn.

Catterson, J.

M-936 People v Jenkins, James

Leave to appeal to this Court and other relief denied.

Mazzarelli, J.P., Saxe, Friedman, Nardelli, Williams, JJ.

In the Matter of Attorneys Who Are in Violation
of Judiciary Law Section 468-a:

M-1617 Rachel M. Heald, admitted on 2-2-1998,
at a Term of the Appellate Division,
First Department

Respondent reinstated as an attorney and counselor-at-law in the State of New York, effective the date hereof. No opinion. All concur.

Mazzarelli, J.P., Saxe, Friedman, Nardelli, Williams, JJ.

In the Matter of Attorneys Who Are in Violation
of Judiciary Law Section 468-a:

M-1723 William B. Doniger, admitted on 4-29-1992,
at a Term of the Appellate Division,
Second Department

Respondent reinstated as an attorney and counselor-at-law in the State of New York, effective the date hereof. No opinion. All concur.

Mazzarelli, J.P., Williams, Buckley, Catterson, Kavanagh, JJ.

M-4291 In the Matter of Hersy Jones, Jr.,
an attorney and counselor-at-law:

Respondent disbarred and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective the date hereof. Opinion Per Curiam. All concur.

The following orders were entered and filed on April 8, 2008:

Lippman, P.J., Saxe, Gonzalez, Nardelli, JJ.

M-1551 New York County Asbestos Litigation - Perdicaro v
 A.O. Smith Water Products - Treadwell Corporation

 Stay of trial denied.

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

M-1550 Jemrock Realty Co. LLC v Krugman

 Stay granted on condition appeal perfected for the
September 2008 Term and that appellant adheres to payment
schedule, as indicated.

Gonzalez, J.P., Williams, Catterson, Moskowitz, JJ.

M-1107 People v Darbasie, Steven

 Reargument granted; enlargement of time to file pro se
supplemental brief granted for the September 2008 Term, to which
Term appeal adjourned, as indicated.

*****REPUBLISHED*****

Lippman, P.J., Tom, Williams, Acosta, JJ.

M-1384 Viga Investments, Inc. v Mittal Steel, USA, Inc.

 Stay granted.