

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

-----X  
BORIS KAGAN,

Index No.: 106905/03

Plaintiff – Appellant,

-against-

BFP ONE LIBERTY PLAZA, et al.,

NOTICE OF MOTION FOR  
REARGUMENT, RENEWAL,  
RECONSIDERATION AND/OR  
LEAVE TO APPEAL TO THE  
COURT OF APPEALS

Defendant – Respondent.  
-----X

PLEASE TAKE NOTICE that upon the annexed Affirmation in Support of Denise A. Rubin dated June 18, 2009, the Exhibits annexed to that Affirmation and the Memorandum Of Law served and filed herewith, the undersigned, counsel for the Plaintiff-Appellant BORIS KAGAN, will move this Court at the Courthouse thereof located at 27 Madison Avenue, New York, New York 10010 on Monday, July 13, 2009, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, for an Order:

- a. Pursuant to CPLR 5015 and CPLR 3211(a)(2), vacating this Court's Order of May 19, 2009 and the IA Court's order therein appealed **as this Court did not have subject matter jurisdiction over the plaintiff's claims that should have been brought in the United States District Court for the Southern District of New York** under its Master Docket number 21 MC 102 (AKH) pursuant to the Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA) 49 USC § 40101 ("ATSSSA"), which requires, *inter alia*, that the claims brought under the statute be litigated solely and exclusively before the United States District Court for the Southern District of New York;
- b. Pursuant to CPLR 2221, granting reargument and reconsideration of the issues raised in the parties' briefs on the above-captioned appeal to this Court from the Order of the Honorable Jane S. Solomon, and upon such reargument and reconsideration, vacating Justice Solomon's Order and this Court's Order of May 19, 2009 as nullities, **because the Supreme Court of the State of New York did not and does not have subject matter jurisdiction over the plaintiff's claims** or

- c. Pursuant to CPLR 2221, granting renewal and reconsideration of the issues raised below and in the parties' briefs based on authority and argument offered here for the first time relating to subject matter jurisdiction raised herein and
- d. Upon reargument or renewal and reconsideration, vacating the prior orders of this Court and the IA Court as nullities and transferring the reinstated action to the United States District Court for the Southern District of New York to be litigated and tried before that Court under its Master Docket number 21 MC 102 (AKH) pursuant to the Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA) 49 USC § 40101 ("ATSSSA"), which requires, *inter alia*, that the claims brought under the statute be litigated solely and exclusively before the United States District Court for the Southern District of New York; or, in the alternative,
- e. Pursuant to CPLR 5602(a), granting leave for Plaintiff-Appellant to appeal from this Court's May 19, 2009 Order to the Court of Appeals;
- f. Pursuant to CPLR 5519(c), entering a stay of enforcement of this Court's Order dated May 19, 2009 pending consideration and resolution of the instant motion and any subsequent applications/appeals to the Court of Appeals;
- g. Along with such other and additional relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that this demand and no less than 21 days' notice being provided pursuant to CPLR 2214(b) as amended in July 2007, answering papers, if any, shall be served upon the undersigned no later than seven (7) days prior to the return date hereof.

Dated: New York, New York  
June 18, 2009

Yours, etc.,

WORBY GRONER & NAPOLI BERN, LLP  
*Attorneys for Plaintiff-Appellant*

  
Denise A. Rubin

350 Fifth Avenue, Suite 7413  
New York, New York 10118  
(212) 267-3700

To:

Robert J. Brown, Esq.  
Mendes & Mount, LLP  
*Attorneys for Defendants and Third Party Plaintiffs*  
*Brookfield Financial Properties, L.P. and*  
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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

-----X  
BORIS KAGAN,

Index No.: 106905/03

Plaintiff – Appellant,

-against-

AFFIRMATION IN SUPPORT OF  
THE MOTION

BFP ONE LIBERTY PLAZA, et al.,

Defendant – Respondent.

-----X

DENISE A. RUBIN, an attorney duly licensed to practice before the Courts of the State of New York, hereby affirms the following to be true under penalty of perjury, or, if stated upon information and belief, that I believe it to be true:

1. I am associated with the law firm Worby Groner Edelman & Napoli Bern, LLP, Plaintiffs' Co-Liaison Counsel in the matters styled *In re: World Trade Center Disaster Site Litigation* and pending before the Honorable Alvin K. Hellerstein, a Judge of the United States District Court for the Southern District of New York under Master Docket Number 21 MC 100 (AKH).

2. I have reviewed this Court's May 19, 2009 Order, as well as the order of the IA Court addressed therein; I am sufficiently familiar with the Orders and the issues raised therein and in the *In Re: WTC* litigations as necessary for the instant motion.

3. In addition to being Plaintiffs' Co-Liaison Counsel for approximately 10,000 plaintiffs included in the District Court's 21 MC 100 Master Docket, this office represents more than 95 percent of the plaintiffs in a companion litigation before Judge Hellerstein with the Master Docket number 21 MC 102 (AKH).

4. This office did not represent Mr. Kagan at the time his action was commenced in the Supreme Court and we did not represent him on appeal from the IA Court's decision granting the defendants summary judgment. Mr. Kagan contacted our office after this Court's decision affirming the IA Court and upon reviewing the decision and his claims, we determined that the instant motion should be made.

5. Accordingly, Mr. Kagen executed a retainer with this office and we represent him for the purposes of the instant motion for vacatur, reargument, renewal, reconsideration and the alternative relief of permission to appeal to the Court of Appeals.

6. No prior application for vacatur, reargument, renewal and reconsideration and vacatur of this Court's May 19, 2009 Order has been made and no prior application has been made for permission to appeal this Court's May 19, 2009 Order to the Court of Appeals.

**THIS MOTION FOR REARGUMENT, RENEWAL AND  
RECONSIDERATION IS TIMELY-MADE**

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7. Upon information and belief, defendants-respondents' counsel served this Court's May 19, 2009 Order with Notice of Entry by first class mail on May 20, 2009. *See* Notice of Entry, annexed to these papers at Exhibit "A."

8. Pursuant to this Court's local rule 600.14(a), Mr. Kagan's 30 days to move for reargument is counted from the date of the order and "*shall be made within 30 days after the appeal has been decided.*" *See* 22 NYCRR §600.14(a). The thirtieth day after the May 19, 2009 Order is June 18, 2009.

**THAT PORTION OF THIS MOTION SEEKING THE  
ALTERNATIVE RELIEF OF PERMISSION TO APPEAL  
TO THE COURT OF APPEALS IS ALSO TIMELY**

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9. That portion of the instant motion that seeks this Court's permission to appeal to the Court of Appeals is governed by this Court's Local Rule 600.14(b), providing that a motion "for

permission to appeal to the Court of Appeals shall be made in the manner and within the time prescribed by CPLR 5513(b) and 5516.”

10. Section 5513(b) requires that the motion seeking leave “shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry... within 30 days of service.” Service of Notice of Entry (as noted *supra*) was effected on May 20, 2009 by mail, making Mr. Kagan’s last day to timely serve his motion for permission to appeal to the Court of Appeals thirty-five days from May 20, 2009, *i.e.*, June 24, 2009. *See* CPLR 5513(b) and CPLR 2103(b)(2).

**REARGUMENT AND RENEWAL ARE APPROPRIATE  
WHERE, AS HERE, THIS COURT FAILED TO  
APPREHEND THAT IT LACKED SUBJECT MATTER  
JURISDICTION OVER THE PLAINTIFF’S CLAIMS**

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11. It is, of course, well settled that a motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v. Roche*, 68 A.D.2d 558, 567 (1<sup>st</sup> Dep’t 1979).

12. As contrasted with the standard applicable to reargument, set forth *supra*, a motion seeking renewal is based on information or evidence not submitted to the Court on the prior motion. Although the motion generally occurs when that information was unavailable or unknown to the movant at the time of the original motion, that showing is not an ironclad requirement. Leave to renew may be granted in the court's discretion even where the additional facts were known to the party seeking renewal at the time of the original motion. *Pinto v. Pinto*, 120 A.D.2d 337, 338 (1<sup>st</sup> Dep’t 1986); *Daniel Perla Assocs. v. Ginsberg*, 256 A.D.2d 303 (2d Dep’t 1998); *Oremland v. Miller Minutemen Constr. Corp.*, 133 A.D.2d 816 (2d Dep’t 1987).

13. The question of ATSSSA jurisdiction over the plaintiff’s claims here was never raised by the parties in the IA Court; as a result, the issues were not briefed or argued on appeal. It

is notable, moreover, that this Court has already recognized the Federal Courts' subject matter jurisdiction over ATSSSA claims:

... the Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA, P.L. 107-42, § 408[b][1] ), created "a federal cause of action as the exclusive judicial remedy for damages arising out of [the 9/11 aircraft] crashes" at the World Trade Center providing exclusive jurisdiction over such lawsuits in the Southern District of New York ( *In re: WTC Disaster Site*, 414 F.3d 352, 373 [2d Cir.2005] ), ...

*Felder v. City of New York*, 53 A.D. 3d 401, 402 (1st Dep't 2008).

14. This Court's May 19, 2009 decision set forth all of the facts relevant to determination of the proper jurisdiction for Mr. Kagan's claim:

The dust and debris that accumulated in the office building in which plaintiff performed fine cleaning resulted ... from the terrorist attacks that caused the Twin Towers of the World Trade Center to collapse.

*Kagan v. BFP One Liberty Plaza*, 62 A.D.3d 531 (1<sup>st</sup> Dep't 2009).

15. As this Court recognized in *Felder*, section 408 (b)(3) of the ATSSSA provides that "[t]he United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related crashes of September 11, 2001." Thus, by federal law and the express intent of the Congress, only the District Court has subject matter jurisdiction over ATSSSA claims.

16. The Second Circuit held in *WTC Disaster Site* that the ATSSSA preempts state law damages remedies (*In re: WTC Disaster Site*, 414 F.3d at 380), over which the IA Court would otherwise have subject matter jurisdiction, as a court of original, unlimited jurisdiction. *See Kagen v Kagen*, 21 N.Y.2d 532 (1968).

17. In an order addressing subject matter jurisdiction over an insurance coverage matter inextricably intertwined with ATSSSA claims, Judge Hellerstein wrote:

I held, in *September 11th Liability Insurance Coverage Cases*, 333 F.Supp.2d 111 (S.D.N.Y.2004), a case concerning the allocation and sequence of insurance coverage among the insurance carriers covering the owner and lessees of the Twin Towers of the World Trade Center, that the unique statutory framework of the ATSSSA made “the scope and extent of the defendants' liability coverage, whom the policies cover, ... crucial to the dispositions of the Underlying Cases”[footnote omitted]. 333 F.Supp.2d at 117. *I also noted the risk of inconsistent or inefficient judgments if the insurance dispute was litigated in various State courts while the underlying litigation remained before me, and observed that such a result would defeat “Congress' desire for uniformity and expertise in dealing with these cases”*. *Id.* at 117.

The instant dispute presents me with nearly identical legal issues. Whether the issues are raised by third and fourth party pleadings in each of the 10,000 cases, or by a single declaratory judgment relating to those cases, is not important. Supplemental jurisdiction is fundamentally needed to promote judicial economy and efficiency, *and to avoid delays and inconsistencies of proceedings in the state courts.*

*See WTC Captive Ins. Co., Inc. v. Liberty Mut. Fire Ins. Co.*, 537 F.Supp.2d 619, 627 (S.D.N.Y., 2008) (emphasis added).

18. The same reasoning applies here – indeed even more so in this action arising from precisely the type of personal injuries suffered by the other 21 MC 102 plaintiffs while working as office cleaners in the buildings surrounding the WTC Site after September 11, 2001. This Court’s holding that Mr. Kagan’s work did not fall within the Labor Law is *precisely* the type of inconsistent decision in a state court that Judge Hellerstein wrote about and the jurisdiction section of the ATSSSA was intended to prevent.

19. Jurisdiction is power to declare the law, and when it does not exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. *Steel Co. v Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) *quoting Ex parte McCardle*, 7 Wall [74 US] 506, 514 (1868).

20. The *In re: WTC* litigation described in paragraph 1, *supra*, arises from the claims of persons suffering physical injuries due to exposure to the toxic dust, smoke and particulate matter in and around the site of the World Trade Center in the weeks and months following the terrorist attacks of September 11, 2001. The District Court's 21 MC 100 Master Docket covers the cases of persons alleging primarily respiratory injuries suffered in the rescue, recovery and debris removal efforts at the WTC site ("Ground Zero" or "the pile").

21. In addition, the District Court also maintains a Master Docket numbered 21 MC 102 (AKH) for those matters, like Mr. Kagan's, arising from the claims of persons suffering primarily respiratory injuries due to exposure to the toxic dust, smoke and particulate matter while engaged in recovery, *debris removal and clean-up activities* at the Fresh Kills landfill in Staten Island *and in the offices and other buildings surrounding the site of the World Trade Center* following the terrorist attacks of September 11, 2001. *See* Order Denying Motions To Remand, December 4, 2006, 21 MC 100 (AKH) and 21 MC 102 (AKH), Hellerstein, J., at p. 2 (a copy of that Order is annexed to these papers at Exhibit "B").

22. The Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA) 49 USC § 40101 ("ATSSSA"), at § 408(b), requires, *inter alia*, that any claim arising from the crashes of the airliners that hit the two World Trade Center towers on September 11, 2001 be litigated before the United States District Court for the Southern District of New York:

**408 (b) Federal cause of action.—**

(1) **Availability of action.** There shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of title 49, United States Code [49 U.S.C.A. § 40120(c)], this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.

(2) ...

**(3) Jurisdiction.** The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction *over all actions* brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

ATSSSA, §408(b) (emphasis added).

23. As is demonstrated by the District Court’s December 4, 2006 Order at Exhibit “B,” and by the existence of the District Court’s 21 MC 102 Master Docket, the District Court has determined that the claims of persons – like Boris Kagan – who were injured during the debris-removal and clean up activities in the buildings surrounding the World Trade Center disaster site, “arise from” the WTC attacks sufficient to be included in that Court’s jurisdiction under the ATSSSA. *See* District Court’s December 4, 2006 Order at Exhibit “B.”

24. The statute requires that the *substantive* law of the state where the planes crashed on September 11, 2001 be applied by the United States District Court:

**408 (b) Federal cause of action.--**

... **(2) Substantive law.** The substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.

ATSSSA, §408(b) (emphasis added).

25. Congress is empowered to pre-empt state law by so stating in express terms, and Congress expressly stated its intent that the ATSSSA preempt State Law as demonstrated, *supra*. U.S. CONST., ART. VI, CL. 2; *In re WTC Disaster Site*, 414 F.3d 352, 371-372 (2d Cir. (N.Y.) 2005) *citing Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

26. **For the reasons set forth here, this Court (and the IA Court before it) had no subject matter jurisdiction over the plaintiff’s claims in this action.**

27. Without jurisdiction, the Court should not have proceeded at all in Boris Kagan’s case.

28. The order or judgment of a court lacking subject matter jurisdiction is void, and objection to the court's jurisdiction in such a case may be taken at any stage of the action, including on appeal. *Robinson v. Oceanic Steam Navigation Co.*, 112 N.Y. 315, 324 (1889); *Matter of Stoddard v. Town Bd. of Town of Marilla*, 52 A.D.2d 1091 (4<sup>th</sup> Dep't 1976). A defect in subject matter jurisdiction cannot be waived. *Robinson*, 112 N.Y. at 324.

29. More to the point, the orders issued by the IA Court and by this Court affirming the IA Court in the *Kagen* case are nullities, including those orders dismissing -- and affirming the dismissal of -- Mr. Kagan's complaint.

30. *For that reason, this Court should vacate all of those orders*, reinstating Mr. Kagan's complaint and transferring that matter to the United States District Court for the Southern District of New York to be litigated and tried before Judge Hellerstein on the 21 MC 102 docket.

**ALTERNATIVELY, THE QUESTION OF SUBJECT  
MATTER JURISDICTION PRECLUDING THIS COURT  
RESOLVING ANY ISSUE IN KAGEN SHOULD BE  
ADDRESSED BY THE COURT OF APPEALS.**

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31. Finally, if this Court is unwilling to consider reargument, renewal and reconsideration of the *Kagen* case on subject matter jurisdiction grounds, we respectfully ask for this Court's permission to take the issue to the Court of Appeals, pursuant to CPLR 5602(a)(1)(i) from this Court's May 19, 2009 Order.

32. This Court's May 19, 2009 Order affirmed the IA Court's order granting summary judgment and dismissing plaintiff's complaint and was thus a final determination of all issues. Hence this Court has jurisdiction to consider this application pursuant to CPLR 5602(a)(1)(i).

33. Upon such permission, this Court should certify the following question for the Court of Appeals' consideration:

Where the Congress expressly stated its intent that the United States District Court for the Southern District of New York shall have original and exclusive jurisdiction *over all actions* brought

for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001, and where the District Court and the Court of Appeals for the Second Circuit have found such jurisdiction to include claims like the plaintiff's, *i.e.*, that he has been rendered ill as a result of his exposure to toxic dust, smoke or particulate matter while working in the debris-removal and clean up activities surrounding the World Trade Center site after September 11, 2001, should the Supreme Court and the Appellate Division – having had no subject matter jurisdiction over the *Kagen* matter -- have vacated their orders granting (and affirming) summary judgment and transferred the *Kagen* action to the United States District Court for the Southern District of New York?


WHEREFORE this Court should grant reargument, renewal and reconsideration of the *Kagen* matter, and upon such reconsideration, should vacate its May 19, 2009 Order, replacing that order with an order:

- (1) Vacating the IA Court's Order granting summary judgment and dismissing plaintiff's complaint;
- (2) Reinstating Boris Kagen's complaint and
- (3) Transferring the *Kagen* matter to the United States District Court for the Southern District of New York to be litigated and tried on the District Court's 21 MC 102 docket,

or, in the alternative,

- (4) This Court should grant its permission to allow Mr. Kagen to appeal on the foregoing grounds to the Court of Appeals pursuant to CPLR 5601(a)(1)(i), on the certified question herein proposed; and
- (5) All of the foregoing along with such other and additional relief as this Court deems appropriate.

Dated: New York, New York  
June 18, 2009

  
\_\_\_\_\_  
Denise A. Rubin

# EXHIBIT A

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

-----X  
BORIS KAGAN and YELITZAVETA KAGAN,

Plaintiffs-Appellants,

-against-

BFP ONE LIBERTY PLAZA CO., LLC and  
BROOKFIELD FINANCIAL PROPERTIES, L.P.,

Defendants-Respondents.  
-----X

BFP ONE LIBERTY PLAZA CO. LLC,

Third-Party Plaintiff-Respondent,

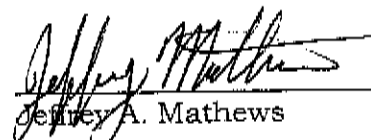
-against-

TRIANGLE SERVICES, INC.,

Third-Party Defendant.  
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**PLEASE TAKE NOTICE**, that a DECISION AND ORDER dated May 19, 2009, a true copy of which is attached hereto as "Exhibit A", has been entered in the Appellate Division of the Supreme Court, First Judicial Department, in the County of New York, on May 19, 2009.

Dated: New York, New York  
May 20, 2009

  
\_\_\_\_\_  
Jeffrey A. Mathews

Attorneys for Defendants/Responde  
BFP ONE LIBERTY P LAZA CO. LLF  
And BROOKFIELD FINANCIAL  
PROPERTIES, L.P.  
750 Seventh Avenue  
New York, New York 10019  
Tel: (212) 261-8000  
File No. 382,771

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Rivkin Radler, LLP  
Attorneys for Third-Party Defendant  
926 Reckson Plaza  
Uniondale, New York 11556

Andrias, J.P., Saxe, Nardelli, Freedman, JJ.

586 Boris Kagan, et al.,  
Plaintiffs-Appellants,

Index 106905/03

-against-

BFP One Liberty Plaza, et al.,  
Defendants-Respondents.

[And a Third-Party Action]

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Arnold E. DiJoseph, III, New York, for appellants.

Mendes & Mount, LLP, New York (Robert J. Brown of counsel), for  
respondents.

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Judgment, Supreme Court, New York County (Jane S. Solomon,  
J.), entered April 14, 2008, inter alia, dismissing the  
complaint, unanimously affirmed, without costs.

Plaintiffs failed to raise an issue of fact whether  
defendants either created or caused the condition complained of  
or exercised supervision or control over the work performed by  
the injured plaintiff and had actual or constructive notice of  
the condition so as to sustain the Labor Law § 200 and common-law  
negligence claims (see *Buckley v Columbia Grammar & Preparatory*,  
44 AD3d 263, 272 [2007], lv denied 10 NY3d 710 [2008]). The dust  
and debris that accumulated in the office building in which  
plaintiff performed fine cleaning resulted not from any act or  
omission of defendants but from the terrorist attacks that caused  
the Twin Towers of the World Trade Center to collapse. Nor, by

submitting an affidavit by plaintiff that contradicts his prior sworn testimony, did plaintiffs raise a genuine issue of fact whether defendants, rather than plaintiff's employer, third-party defendant Triangle Services, Inc., supervised or controlled his work (see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Lupinsky v Windham Constr. Corp.*, 293 AD2d 317, 318 [2002]). In any event, the fact that representatives of defendants gave general instructions as to what needed to be done and performed monitoring and oversight of the timing and quality of the work is insufficient to support these claims (see *Dalanna v City of New York*, 308 AD2d 400, 400 [2003]). As to the issue of notice, defendants' duty to reasonably inspect the air quality in the building was satisfied by their consultant's report that the samples analyzed for airborne toxins were all within acceptable levels. Plaintiffs' expert's conclusory opinion that the consultant's monitoring and testing were inadequate and that the indoor environment of the building was hazardous and unsafe is of no probative value since it is based entirely on his review of documents and fails to indicate that he conducted any testing during the relevant time period (see *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Machado v Clinton Hous. Dev. Co., Inc.*, 20 AD3d 307, 307-308 [2005]).

Plaintiffs' Labor Law § 241(6) claim fails because the injured plaintiff was not "engaged in duties connected to the

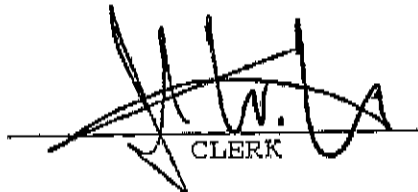
inherently hazardous work of construction, excavation or demolition" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 101 [2002]). Plaintiffs also failed to raise an issue of fact whether the injuries were proximately caused by a violation of an applicable Industrial Code or other regulation that sets forth a specific standard of conduct rather than a general statement of common-law principles (see *Padilla v Frances Schervier Hous. Dev. Fund Corp.*, 303 AD2d 194, 196 [2003]). Plaintiffs have conceded that the regulations they relied on in the motion court are either nonexistent or inapplicable. To the extent that they allege violations of arguably applicable Industrial Code violations for the first time on appeal, these provisions have no basis in the record and cannot be considered as predicates for the Labor Law § 241(6) cause of action (compare *Padilla*, 303 AD2d at 196 n 1 [considering violations first raised by plaintiff in opposition to motion to dismiss]). In any event, these provisions do not avail plaintiffs. Industrial Code (12 NYCRR) § 23-1.7(g) is inapplicable to the facts of this case since it expressly applies to work in any "unventilated confined area" (emphasis added), such as a sewer, pit, tank, or chimney, "where dangerous air contaminants may be present or where there may not be sufficient oxygen to support life," and the provisions of 12 NYCRR part 12, standing alone, are not sufficiently specific to support a cause

of action under Labor Law § 241(6) (*Nostrom v A.W. Chesterton Co.*, 59 AD3d 159 [2009]).

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

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

ENTERED: MAY 19, 2009

  
CLERK

**AFFIRMATION OF SERVICE**

The undersigned affirms the truth of the following, under penalty of perjury: that he is duly admitted to practice law in the courts of the State of New York, is over the age of 18, is not a party to the present action and is associated with the law firm of MENDES & MOUNT, LLP, attorneys for defendant/third-party plaintiff, BFP ONE LIBERTY PLAZA CO. LLP and BROOKFIELD FINANCIAL PROPERTIES, L.P.; that on May 20, 2009, he served the within NOTICE OF ENTRY:

- Service By Mail** By depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name (*see service list below*).
- Overnight Delivery Service** By depositing a true copy thereof enclosed in a wrapper addressed as shown below into the custody of FEDERAL EXPRESS, VIA COURIER, OVERNIGHT MAIL for overnight delivery (*see service list below*).
- Electronic Mail Service** By transmitting the papers by electronic means to the designated facsimile number listed on the service list below. Transmission was received. I also deposited a true copy of the papers enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name (*see service list below*).
- Personal Service on Individual** By delivering a true copy thereof personally to each person named below at the address. I knew each person served to be the person mentioned and described in said papers as a party therein (*see service list below*).

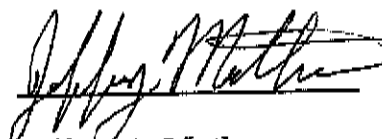
**Service List**

Emil Sanchez, Esq.  
Friedman, Khafif & Sanchez, LLP  
Attorneys for Plaintiffs-Appellants  
16 Court Street – Suite 2600  
Brooklyn, New York 11241

Arnold E. DiJoseph, P.C.  
Appellate Counsel for  
Plaintiffs/Appellants  
50 Broadway – Suite 1601  
New York, New York 10004

Frank Giliberti, Esq.  
Rivkin Radler, LLP  
Attorneys for Third-Party Defendant  
926 Reckson Plaza  
Uniondale, New York 11556

Dated: New York, New York  
May 20, 2009

  
Jeffrey A. Mathews

NOTICE OF ENTRY

Sir: Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 20

Dated,

Yours, etc.,

**MENDES & MOUNT, LLP**

Attorneys for

Office and Post Office Address  
**750 SEVENTH AVENUE**  
NEW YORK, N.Y. 10019-6829

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir: Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on

M.

20

Dated,

Yours, etc.,

**MENDES & MOUNT, LLP**

Attorneys for

Office and Post Office Address  
**750 SEVENTH AVENUE**  
NEW YORK, N.Y. 10019-6829

To

Attorney(s) for

Index No.

Year 20

**SUPREME COURT OF THE STATE OF NEW YORK**  
**APPELLATE DIVISION: FIRST DEPARTMENT**

**BORIS KAGAN and YELITZAVETA KAGAN,**

Plaintiffs-Appellants,

-against-

**BRP ONE LIBERTY PLAZA and**

**BROOKFIELD FINANCIAL PROPERTIES,**

Defendants-Respondents,

**BRP ONE LIBERTY PLAZA,**

Third-Party Plaintiff,

-against-

**TRANGLE SERVICES, INC.,**

Third-Party Defendant.

NOTICE OF ENTRY

**MENDES & MOUNT, LLP**

Attorneys for

Office and Post Office Address, Telephone

**750 SEVENTH AVENUE**  
NEW YORK, N.Y. 10019-6829  
TEL. (212) 261-8000

To

Attorney(s) for

Service of a copy of the within

Dated,

is hereby admitted.

# EXHIBIT B



Plaintiffs filed their complaints in the Supreme Court of the State of New York for New York County. Their cases were removed from state court and classified as related to 21 MC 100 (master docket for complaints alleging respiratory injuries suffered at WTC site) or 21 MC 102 (master docket for complaints alleging respiratory injuries suffered at Fresh Kills Landfill and other locations near WTC site). Plaintiffs subsequently filed motions to remand, and these motions are currently pending before me. I deferred ruling on these motions until after I decided motions by the City of New York and other defendants to dismiss the claims of respiratory injury against them on the basis of statutory immunity. See In re Sept. 11 Litig., Nos. 21 MC 97, 21 MC 101, 21 MC 102, 2006 WL 1650679 (S.D.N.Y. June 14, 2006). Having ruled on defendants' motions, see In re World Trade Ctr. Disaster Site Litig., \_\_ F. Supp. 2d \_\_, 2006 WL 2948819 (S.D.N.Y. Oct. 17, 2006), plaintiffs' remand motions are ready for decision. For the reasons that follow, I hold that this Court has original and exclusive jurisdiction to hear plaintiffs' claims under the ATSSSA, and plaintiffs' motions to remand are denied.

### **Discussion**

#### **I. Applicable Law**

##### **A. Removal and Remand**

A party may remove "any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1441(b). If the removal action is challenged on motion by a party or by the district court sua sponte, the removing party bears the burden of showing that removal was properly based on federal jurisdiction. See Grimo v. Blue Cross/Blue Shield, 34 F.3d 148, 151 (2d Cir. 1994). If at any time before final judgment it appears that the district court lacks

subject matter jurisdiction over a case removed to it from a state court, the district court must remand the case to the state court from which it was removed. 28 U.S.C. 1447(c).

B. Scope of Federal Jurisdiction under the Air Transportation Safety and System Stabilization Act

The scope of this Court's jurisdiction under the ATSSSA has been an issue of contention in a variety of cases where plaintiffs suffered injuries at the WTC site after September 11, 2001. See McNally, supra (plaintiffs suffered respiratory injuries after exposure to toxins during debris removal at WTC site); Graybill, supra (plaintiff injured by falling steel beam during debris removal at WTC site); Spagnuolo, supra (plaintiff injured by falling oxygen tank during debris removal at WTC site); Milling v. City of New York, 21 MC 100, 05 Civ. 7189, 2006 WL 1652706 (S.D.N.Y. 2006) (plaintiff injured as result of trip and fall at WTC site).

Section 408(b)(3) of the ATSSSA states that the "United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim ... resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001." In McNally, the Court of Appeals, in dictum, criticized my rulings in Hickey v. City of New York, 270 F. Supp. 2d 357 (S.D.N.Y. 2003), and favored an approach that emphasized the benefits of litigating common issues of law and fact in a single court. See 414 F.3d at 371–81. The McNally court stated that its approach was consistent with Congressional intent to promote consistency of awards to those who seek redress in the courts, and ensures that statutory limits on liability for the airlines and other entities will be observed. See id. at 377–78.

**II. Federal Jurisdiction over Claims Alleging Non-Respiratory Personal Injuries Suffered at the World Trade Center Site**

Plaintiffs alleging non-respiratory injuries, like those suffering respiratory injuries, raise common issues of law or fact concerning the events of September 11, 2001.

Plaintiffs name common defendants in their claims,<sup>2</sup> on common theories of negligence and recovery that require each plaintiff to establish the same or similar facts. In particular, like the respiratory-injury plaintiffs, non-respiratory-injury plaintiffs allege that parties responsible for maintaining a safe workplace negligently failed to do so. Thus each plaintiff must prove that defendants owed a duty of care; that they breached that duty; and that defendants' breach proximately caused his or her injuries. See e.g., Palsgraf v. Long Island R. Co., 248 N.Y. 339 (1928). Since some of these elements may be susceptible to multiple interpretations and varying adjudications if litigated in different courts, they present a risk that Congress sought to avoid by enacting the ATSSSA. See McNally, 414 F.3d at 378. Also, plaintiffs' successes must fall within the same liability cap as that applicable to the respiratory cases. See id. at 379.

Accordingly, I hold that plaintiffs' claims raise common issues of law or fact concerning the events of September 11, 2001, and therefore are "the type of claim[s] that Congress intended to preempt" with original and exclusive federal jurisdiction under the ATSSSA. McNally, 414 F.3d at 379.

### **Conclusion**

For all of the foregoing reasons, I hold that this Court has original and exclusive jurisdiction to hear plaintiffs' claims under the ATSSSA. Plaintiffs' motions to remand are denied. I note that plaintiffs in some of these cases fail to specify adequately where and when the injury occurred, particularly in 05 Civ. 2716; 05 Civ. 7166; 05 Civ. 7210; and 05 Civ. 7266. Plaintiffs in these four cases are ordered, by separate pleading on or before December 22, 2006, to identify the precise dates and locations, by World Trade Center quadrant or other specific

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<sup>2</sup> Many of plaintiffs' complaints name the City of New York and the Port Authority of New York and New Jersey as defendants.

location, of the injuries claimed to have been suffered, and a description of such injuries.

Plaintiffs who fail timely to file such pleadings shall have their complaints dismissed.

SO ORDERED.

Dated: December 4, 2006  
New York, New York



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ALVIN K. HELLERSTEIN  
United States District Judge

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

-----X  
BORIS KAGAN,

Index No.: 106905/03

Plaintiff – Appellant,  
-against-

AFFIRMATION OF SERVICE

BFP ONE LIBERTY PLAZA, et al.,


Defendants – Respondents.  
-----X

DENISE A. RUBIN, an attorney duly licensed to practice before the Courts of the State of New York, hereby affirms on penalty of perjury:

I am over the age of eighteen years, not a party to the within litigation and reside in New York County, State of New York. On June 18, 2009, I duly served a true copy of the within NOTICE OF MOTION TO VACATE ORDER FOR LACK OF SUBJECT MATTER JURISDICTION, AFFIRMATION IN SUPPORT AND EXHIBITS, and MEMORANDUM OF LAW IN SUPPORT on the persons listed below by first class mail by inserting same into a pre-addressed post paid wrapper and depositing same into a collection box maintained under the exclusive care and custody of the United States Postal Service in the State of New York.

Robert J. Brown, Esq.  
Mendes & Mount, LLP  
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Denise A. Rubin

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

-----X  
BORIS KAGAN,

Index No.: 106905/03

Plaintiff – Appellant,  
-against-

BFP ONE LIBERTY PLAZA, et al.,

Defendants – Respondents.  
-----X

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**NOTICE OF MOTION TO VACATE ORDER AND TO TRANSFER ACTION  
FOR SUPREME COURT’S LACK OF SUBJECT MATTER JURISDICTION**


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**WORBY GRONER EDELMAN & NAPOLI BERN , LLP**

*Counsel for :* Plaintiff-Appellant Boris Kagen  
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New York, New York 10118  
(212) 267-3700

=====

The undersigned attorney hereby certifies, pursuant to Fed. R. Civ. P. 11 and 22 NYCRR §130-1.1-a, that I have read the within papers and that to the best of my knowledge and belief they are not frivolous as that term is defined in 22 NYCRR § 130-1.1(c) and Fed. R. Civ. P. 11.

  
\_\_\_\_\_  
Attorney name: Denise A. Rubin

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PLEASE TAKE NOTICE:

NOTICE OF ENTRY

that the within is a (certified) true copy of an \_\_\_\_\_ duly entered in the \_\_\_\_\_ office  
of the clerk of the within named court on \_\_\_\_\_ 200\_\_.

NOTICE OF SETTLEMENT

that an order \_\_\_\_\_ of which the within is a true copy, will be  
presented for settlement to the HON. \_\_\_\_\_ one of the judges of the  
within named Court, at \_\_\_\_\_ on \_\_\_\_\_ 200\_\_ at \_\_\_\_\_ O'clock \_\_\_\_M.

Dated, \_\_\_\_\_

Yours, etc.

**WORBY GRONER EDELMAN & NAPOLI BERN, LLP**