SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**OCTOBER 21, 2014**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11041 The People of the State of New York, Ind. 4676/96
Respondent,

-against-

Dimas Ramirez,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Martin Marcus, J.), entered on or about March 30, 2012, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered March 20, 1997, unanimously affirmed.

Defendant's claim under *Padilla v Kentucky* (559 US 356 [2010]) is unavailing, because that decision has no retroactive application to defendant's case (*People v Baret*, 22 NY3d 777 [2014]).

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

ENTERED: OCTOBER 21, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11599 Bank Hapoalim B.M., et al., Index 603458/09
Plaintiffs-Appellants,

Arab Banking Corporation B.S.C.,
et al.,
Plaintiffs,

-against-

Westlb AG, etc., et al.,
Defendants-Respondents.

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Brown Rudnick LLP, New York (Marek P. Krzyzowski of counsel), for Justinian Capital SPC, appellant.

Hughes Hubbard & Reed LLP, New York (Christopher M. Paparella of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 24, 2012, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs, investors in a structured investment vehicle (SIV), are the holders of "income notes" issued by two SIVs, Harrier Finance Limited and Harrier Finance (US) Limited (collectively, Harrier) and Kestrel Funding p.l.c. and Kestrel Funding (US) LLC (collectively, Kestrel).[1] Defendant WestLB AG,

[1] Plaintiff Bank Hapoalim B.M. has not filed a brief in connection with this appeal; it has advise the court that it adopts the arguments set forth in the brief of plaintiff Justinian Capital SPC, for and on behalf of Harrier Segregated

New York Branch (WestLB AG) is incorporated under the laws of Germany.[2] WestLB Asset Management (US) LLC (West AM), organized under the laws of Delaware, is a wholly-owned subsidiary of WestLB AG. Defendant Brightwater Capital Management (Brightwater) (together with WestLB AG and West LM, WestLB) is a wholly-owned subsidiary of WestLB AG, and a division of WestAM.

An SIV is a special purpose entity that raises short-term funds and invests them in longer-term assets. It borrows money by issuing short- and medium-term debt, and then uses that money to finance the purchase of longer-term assets, including mortgage bonds and other asset-backed securities. The SIV then seeks to earn a profit or "spread" between the interest rate at which it borrows and the interest rate it generates on the assets.

The SIVs here at issue were Harrier and Kestrel. For their long-term investments, Harrier and Kestrel bought mainly residential mortgage-backed securities (RMBS) backed by United States residential mortgages, including a substantial percentage of subprime mortgages. Harrier and Kestrel borrowed money by

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Portfolio, Harrier II Segregated Portfolio, Harrier III Segregated Portfolio, Harrier IV Segregated Portfolio, and the Harrier V Segregated Portfolio.

[2] WestLB AG New York Branch is actually a wholly-owned subsidiary of WestLB AG, but for United States law purposes, it is treated as an office of WestLB AG.

selling short term commercial paper (CP), and using this money from those sales to buy illiquid, long term assets – mainly RMBS backed by United States residential mortgages, including a substantial percentage of subprime mortgages.

The SIVs' funding model carries with it two corollaries. First, because the money borrowed from the initial wave of CP buyers is wrapped up in illiquid long term assets – that is, the RMBS – the only liquid source of funds to repay the maturing CP (short-term) is new CP investment. Thus, as the CP matures each month or every few months, the SIVs must sell new CP. The SIV then uses the proceeds of the new CP to pay back the principal of the prior CP – a process called "rolling" the CP. This process renders an SIV vulnerable to disruption in the CP market. If the CP market substantially slows, the SIV cannot roll the CP and it must liquidate its assets to pay back the outstanding CP. That liquidation would bring about the SIV's collapse.

Second, to maximize the spread between the long and short term interest rates, the SIV must pay a relatively low interest rate on the CP. In order to do that, the CP must be low risk – that is, it must have a very high credit rating from the rating agencies. Accordingly, the SIV is usually required to have a cushion of capital that is subordinated to the CP. To create this capital, an SIV typically has various classes of notes that it issues. These subordinated notes receive a higher return than CP; in exchange, it is agreed that any proceeds from the SIV's assets go first to repay the CP, and only when the obligations to the CP holders are fully satisfied does the cash flow down to the subordinated notes. These notes create "subordination," a cushion of capital, that protects the CP from initial losses in the SIV. Because of this subordination, the CP is able to obtain top credit ratings. In contrast, the subordinated notes have either low ratings, or often are unrated. An offshore corporation (the issuer) issues the CP and the subordinated notes, and a United States affiliate (the co-issuer) issues the CP and subordinated notes for United States sales. The offshore corporation then holds the assets. As long as the CP rolls, and returns on the RMBS are higher than the interest rate on the highly rated CP, everyone should make a return, and the CP investors should timely be repaid upon maturity.

Unlike a bond trust or a regular corporation, an SIV is run largely by its asset manager. The investors' rights, in turn, are typically laid out in a Sale and Purchase Agreement (SPA), which functions much like the indenture in a bond. The SPA and related documents generally provide for various "triggers" that will bring about "enforcement" or "receivership" – that is, if certain conditions occur, a receiver, generally appointed and contracted with at the launch of the SIV, takes control. While they are not generally required to liquidate the assets of the SIV, the receivers have this power.

These triggers and the receivership structure they commence protect investors by taking the assets out of the control of the manager, on whose watch the heavy losses tipping the triggers were sustained. Often, the receivers liquidate the holdings, capturing whatever value remains for distribution to the investors.

In the Harrier and Kestrel SIVs, WestLB AG was the sponsor, and originally, it was also the asset manager. It assigned its role as manager to West AM, and in turn, West AM delegated the role to Brightwater. Under the terms of the asset management agreement, however, WestLB AG remained liable for all acts of the new manager.

The SPA included various triggers, including a minimum capital test. This test was based on the net asset value (NAV) of the SIV's portfolio. As the assets of the SIV decreased in value, those losses hit the subordinated notes first. Thus, as the losses wiped out the subordinated notes, there was less and less subordination insulating the CP from losses. As a result, the CP would lose its top rating, and the SIV could collapse. Failure to redeem the CP as it matured constituted another trigger in Harrier and Kestrel; the failure to redeem it indicated that the CP could not be rolled, and therefore, that the SIV was in serious danger of collapse. If either of these events took place, the receivership would begin.

Plaintiffs are banks that are the holders of hundreds of millions of dollars in subordinated notes. These notes were called “Income Notes,” because in addition to a fixed coupon, they also had a feature that allowed them to participate in the gains and losses of the SIV.[3]

According to the amended complaint, Harrier and Kestrel began hitting triggers for receivership in or about May 2007. However, plaintiffs allege, some or all of the WestLB entities, worried about the bank’s reputation, concealed the de facto collapse of the SIVs through a series of frauds.[4]

The first fraud alleged is that the drop in NAV in May 2007 breached the minimum capital test and therefore required WestLB to notify the security trustee and begin receivership. However, WestLB allegedly concealed this drop in NAV and did not notify

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[3] While not relevant on this appeal, plaintiff Justinian Capital SPC obtained a number of its Income Notes after the fact, by assignment. For purposes of this appeal (and the decision below) it is assumed that both plaintiffs had standing to assert whatever tort claims the original purchasers of the notes had.

[4] Plaintiffs never state exactly which entity was allegedly responsible.

the trustee. In October 2007, the NAV again allegedly dropped, causing a breach of the minimum capital test. WestLB allegedly once again concealed this event and did not notify the trustee. Plaintiffs further allege that WestLB purported to amend the SPA to eliminate the minimum capital test, but did so without 100 percent consent of the note holders.

Finally, plaintiffs allege, WestLB AG, which was a substantial holder of CP of the two SIVs, transferred its CP and other notes in the SIVs to an entity it created - defendant Phoenix Light SF Limited. After the transfer to Phoenix, WestLB allegedly caused Phoenix to enter into an agreement that would allow the SIVs to pay off any maturing paper not with cash, but with a "pro rata" percentage of the SIVs' assets equal to the percentage of outstanding CP held by Phoenix. Plaintiffs state that the purpose of the Phoenix transaction was to conceal the fact that the SIVs could not redeem the maturing CP held by WestLB AG. Because the failure to redeem maturing CP was another trigger for receivership, the Phoenix transaction, plaintiffs allege, further forestalled receivership.

According to the allegations in the complaint, the effect of these actions was to fraudulently prop up the SIVs until 2009. Plaintiffs allege that, absent the fraud, the SIVs would have been placed into receivership in May 2007, when the receiver could have liquidated their asset for a reasonable price that would have provided a recovery for Income Note holders. Instead, plaintiffs assert, by repeatedly delaying enforcement, defendants pushed the liquidation to a point where the assets yielded no recovery for the Income Notes, which were low down in the capital structure.

On their motion to dismiss, defendants asserted that the action was derivative, not direct. Thus, they concluded, plaintiffs lacked standing and had failed to comply with making a demand on the board of the SIVs before bringing suit. Defendants also attacked the fraud claims, contending, among other things, that damages were merely speculative.

To begin, on this appeal, plaintiffs are judicially estopped from asserting their position on choice of law, as they consistently argued to the motion court that New York law governed the case and that their arguments relied on New York law (*Dennis' Natural Mini-Meals v 91 Fifth Ave. Corp.*, 209 AD2d 262, 262-263 [1st Dept 1994]). A party may not adopt a position on appeal at odds with its arguments to the trial court (*see id.*; *see also Nestor v Britt*, 270 AD2d 192, 193 [1st Dept 2000]), and plaintiffs cite no law to the contrary.

Similarly, plaintiffs are judicially estopped from arguing that the Income Notes should be treated as debt, since they argued repeatedly to the motion court that the Income Notes should be treated as equity. Indeed, plaintiffs concede that they previously argued in favor of the proposition that the notes were equity, but now assert that they may argue that the Income Notes are equity for some purposes and debt for others (*Nestor*, 270 AD2d at 193).

With respect to the fraud-based claims, the complaint does, in fact, plead the reliance element of the fraud claims with the requisite particularity (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]). However, the motion court nonetheless properly dismissed the fraud-based claims because the complaint is fatally defective as to the damages and causation elements (*see Starr Found. v American Intl. Group, Inc.*, 76 AD3d 25, 27-28 [1st Dept 2010]). This case is essentially a "holder" fraud case – that is, the alleged fraud is that the structured investment vehicles held their assets instead of liquidating them. As a result, plaintiffs suffered no out-of-pocket loss (*see id.* at 28). Moreover, since plaintiffs' case depends on an attenuated chain of events and series of hypothetical transactions, they have not pleaded the causation element with sufficient particularity (*see id.* at 29-30).

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

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

ENTERED: OCTOBER 21, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13219 U.S. Bank National Association, etc., Index 650369/13
Plaintiff-Respondent,

-against-

DLJ Mortgage Capital, Inc.,
Defendant-Appellant.

Orrick, Herrington & Sutcliffe LLP, New York (Barry S. Levin of counsel), for appellant.

Kasowitz Benson Torres & Friedman LLP, New York (Hector Torres of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 16, 2014, which, inter alia, denied that portion of defendant's motion to dismiss plaintiff's breach of contractual warranty claims on the grounds that they were time barred, unanimously affirmed, without costs.

If a contractual representation or warranty is false when made, a claim for its breach accrues at the time of the execution of the contract (*ACE Sec. Corp. v DB Structured Prods., Inc.*, 112 AD3d 522, 523 [1st Dept 2013], *lv granted* __ NY3d __, 2014 NY Slip Op 76202 [2014]). This is true even where the contract states that its "effective date" is earlier. The claim cannot accrue earlier, because until there is a binding contract, there can be no claim for breach of warranty (*see Home Equity Mtge. Trust Series 2006-5 v DLJ Mtge. Capital, Inc.*, 2014 NY Slip Op 30263[U], **10 [Sup Ct, NY County 2014]). Additionally, in the residential mortgage-backed securities (RMBS) context, it should be noted that the claim cannot generally accrue before the contract, because the trust that is the recipient of the representations and warranties typically does not come into existence prior to the closing of the transaction (*see U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc.*, 42 Misc 3d 1213[A], 2014 NY Slip Op 50029[U], *3 [Sup Ct 2014]). Furthermore, the representations and warranties were made as of the closing date, and the contract, which did not explicitly address the statute of limitations, does not indicate a clear intent to alter the accrual date relating to claims for a breach thereof. As such, the IAS court correctly held that the representation and warranty claims accrued on February 7, 2007, the date the pooling and service agreement, the agreement sued upon, was executed.

Plaintiff asks this Court to overturn its prior decision in *ACE Sec. Corp.*, and to hold that a mortgage seller's failure to cure or replace a nonconforming loan is a separate breach of the agreement that triggers the limitations period anew. This is an incorrect reading of the so-called "sole remedy" provision typical of RMBS transaction documents. As we point out in *ACE*, the demand to cure is a precondition to suit, and the cure period must have passed before suit can be brought. Thus, the demand to cure may render a claim untimely, but cannot make it timely. (*see id.*).

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

ENTERED: OCTOBER 21, 2014

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CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13250 The People of the State of New York, Ind. 4293/10
Respondent,

-against-

Shana Spalding,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Denise Fabiano of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered February 1, 2012, convicting defendant, after a jury trial, of robbery in the second degree and attempted robbery in the second degree, and sentencing her to an aggregate term of 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the second-degree robbery conviction to 7 years, resulting in a new aggregate term of 7 years, and otherwise affirmed.

The court properly denied defendant's motion to sever the counts relating to the two incidents. There was no basis for a severance, because the counts were properly joined as a matter of law pursuant to CPL 200.20(2)(b), in that evidence of each crime was admissible as to the other. While not identical, the two crimes were highly similar and involved a distinctive modus operandi (*see e.g. People v Robinson*, 300 AD2d 65 [1st Dept 2002], *lv denied* 99 NY2d 619 [2003]). Additionally, the evidence establishing the two incidents overlapped for reasons independent of modus operandi. When defendant was arrested for the second crime, the police recovered items that circumstantially linked her to the first crime. Furthermore, defendant made interrelated confessions to the two crimes.

In any event, the counts were also properly joined as legally similar pursuant to CPL 200.20(2)(c), and defendant failed to make a sufficient showing to warrant a discretionary severance under CPL 200.20(3).

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

ENTERED: OCTOBER 21, 2014

CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13251 In re Trenny Brown, Index 401604/12
Petitioner-Appellant,

-against-

John B. Rhea, etc., et al.,
Respondents-Respondents.

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The Bronx Defenders, Bronx (Steven T. Hasty of counsel), for appellant.

David I. Farber, New York (Kimberly W. Wong of counsel), for respondents.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered July 16, 2013, denying the petition to annul the determination of respondent New York City Housing Authority (NYCHA), which terminated petitioner's tenancy, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

This proceeding is barred by the statute of limitations. Irrespective of whether NYCHA properly sent the notice of its January 25, 2012 final determination to terminate petitioner's tenancy or whether petitioner actually received the mailing, the evidence indicates that petitioner knew or should have known that she was aggrieved by the determination on February 2, 2012, when she was personally served with NYCHA's 30-day notice to vacate, which explicitly stated that it was based on the final determination issued the month before (*see 90-92 Wadsworth Ave. Tenants Assn. v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 227 AD2d 331 [1st Dept 1996]). However, petitioner did not initiate this proceeding until July 18, 2012, more than four months after she received the notice to vacate (*see* CPLR 217[1]).

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

ENTERED: OCTOBER 21, 2014

CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13252 In re John S.,
Petitioner-Appellant,

-against-

Imari W.,
Respondent,

Kwamel B.,
Respondent-Respondent.

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Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Jo Ann Douglas, New York, for respondent.

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

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Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about August 5, 2013, which granted the motion of respondent Kwamel B. to dismiss the petition of John S. for a declaration of paternity of the subject child, unanimously affirmed, without costs.

The court properly determined that it was in the best interests of the child to equitably estop petitioner from asserting paternity (*see Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). The evidence shows that petitioner has failed to establish any kind of meaningful bond during the child’s life, that the child recognizes respondent Kwamel B. as his father, that Kwamel has been the child's primary caregiver, and that it would be "detrimental to the child's interests to disrupt [his] close relationship" with Kwamel (*Matter of Fidel A. v Sharon N.*, 71 AD3d 437, 437 [1st Dept 2010]). Petitioner's claim that he promptly asserted his paternity rights is without merit, given his unexplained delay in bringing the petition for over two years after he met the child and was told that he was the child's father (*see Matter of Rudman v Rubenfeld*, 300 AD2d 79 [1st Dept 2002]).

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

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

ENTERED: OCTOBER 21, 2014

CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13253 Suzanne Cavaluzzo, Index 76117/09
Plaintiff-Respondent,

-against-

Raymond Cavaluzzo,
Defendant-Appellant.

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Michael D. Karnes, Bronx, for appellant.

Anthony M. Wilger, New York, for respondent.

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Judgment of divorce, Supreme Court, Bronx County (Diane Kiesel, J.), entered November 18, 2013, to the extent appealed from as limited by the briefs, awarding plaintiff $93,322 as her interest in an investment property and entitling her to claim all three of the parties' children as dependents for income tax purposes, unanimously affirmed, without costs.

Upon consideration of the tax consequences to each party of the disposition of the investment property (*see* Domestic Relations Law § 236[B][5][d][11]), Supreme Court properly found that it would be inequitable to saddle plaintiff with any capital gains tax liability that defendant might incur upon a sale of the property at some point in the future (*see Wacholder v Wacholder*, 188 AD2d 130, 137-138 [3rd Dept 1993]). While defendant will incur no taxes upon the transfer to him of plaintiff's interest in the property, he will enjoy any increase in the value of the property.

Defendant’s reliance on *Wechsler v Wechsler* (58 AD3d 62 [1st Dept 2008], *appeal dismissed* 12 NY3d 883 [2009]) is misplaced. In that case, the assets were securities of a holding company, which the husband “necessarily” had to sell every year to meet his distributive award obligations. Thus, the sale to third parties was considered imminent, and the embedded capital gains tax was deducted from the value of the securities. There is no imminent sale here. Nor did the parties’ stipulation require the court to deduct embedded capital gains from the investment property. It vested the court with discretion to determine the amount due to plaintiff for her interest in the property if defendant purchased it in a buyout.

The court properly permitted plaintiff to declare all the children as exemptions for income tax purposes. The children live with plaintiff, who earns half what defendant earns, and in the past few years defendant declared the children as dependents on his own tax returns. The fact that defendant was meeting part of the children’s financial needs did not require the court to permit him to declare any of the children as dependents on his tax return.

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

ENTERED: OCTOBER 21, 2014

CLERK

Tom, J.P., Renwick, Moskowitz, Kapnick, JJ.

13258 The People of the State of New York, Ind. 8235/99
Respondent,

-against-

Michael Rivera,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Judgment of resentence, Supreme Court, New York County (Maxwell Wiley, J.), rendered July 25, 2012, resentencing defendant to an aggregate term of 25 years to life, and imposing an aggregate term of 5 years' postrelease supervision as to certain convictions, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

We perceive no basis for reducing the terms of postrelease supervision. In any event, defendant has not identified any useful purpose to be served by such a reduction, given that his lifetime parole on his murder conviction would remain in place.

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

ENTERED: OCTOBER 21, 2014

CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13259 Flora Gorham, as Administratrix of the Estate of Carissa St. Victor, Plaintiff-Respondent, Index 800064/10

-against-

David Markenson, et al., Defendants,

Matthew Weissman, Defendant-Appellant.

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Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for appellant.

Cascione, Purcigliotti & Galluzzi, P.C., New York (Thomas G. Cascione of counsel), for respondent.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered December 19, 2013, which denied defendant Matthew Weissman's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Defendant failed to establish prima facie that he did not depart from good and accepted medical practice in his treatment of plaintiff's decedent, a child who suffered physical abuse that resulted in her death at one year of age. Plaintiff contends that defendant failed to diagnose, treat and report the physical abuse; defendant argues that he had no reasonable cause to suspect physical abuse. Defendant's expert opinion that there was no departure from good and accepted medical practice is insufficient to establish defendant’s defense, because, although the record contains sharply conflicting accounts of the child’s mother’s reports to defendant and of the conditions that the child presented with when defendant saw her, the expert based her opinion on only one version of facts reflecting what defendant knew about the abuse (*see generally Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]).

For the foregoing reason, defendant also failed to establish prima facie that he did not breach his duty to report his suspicion that the child was abused (*see* Social Services Law § 413[1][a]).

We have considered defendant’s remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 21, 2014

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CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13262 In re Rashi-Malik Olatunji G., etc.,

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

Quashi G., etc.,
Respondent-Appellant,

-against-

Children's Village,
Petitioner-Respondent.

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Larry S. Bachner, Jamaica, 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 (John A. Newbery of counsel), attorney for the child.

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Appeal from order, Family Court, New York County (Clark V. Richardson, J.), entered on or about September 30, 2013, which, upon a finding that respondent father's consent was not required for the adoption of the subject child, and upon the mother's execution of a judicial surrender with respect to the subject child, ordered that petitioner, the Children's Village, and the Commissioner of Social Services of the City of New York are empowered to consent to the adoption of the child without further notice to, or consent of, the father, unanimously dismissed, without costs, as untimely.

The father's appeal is untimely, as his notice of appeal was filed beyond the time limit required by Family Court Act § 1113. Accordingly, it must be dismissed (*Matter of Brenner v Brenner*, 57 AD2d 813, 814 [1st Dept 1977], *lv dismissed* 51 NY2d 766 [1980]; *Matter of Catherine C. v Billy D.*, 100 AD3d 1292 [3d Dept 2012]).

Were we to reach the merits, we would conclude that the Family Court properly determined that the father's admission, made through his counsel, that he had not provided any financial support for the child statutorily precluded any finding that his consent was required prior to the child's adoption by his foster parent (Domestic Relations Law § 111[1][d]; *see also People v McGraw*, 40 AD3d 302, 302 [1st Dept 2007], *lv denied* 9 NY3d 878 [2007]; *DiCamillo v City of New York*, 245 AD2d 332, 333 [2d Dept 1997]). Furthermore, he may not now seek a hearing on the issue, as he did not seek one before the Family Court, and instead, in light of the determination that he was a notice-only father, sought only a best interests hearing (*see Matter of Jamize G.*, 40 AD3d 543, 544 [1st Dept 2007], *lv denied* 9 NY3d 808 [2007]).

Finally, the father's testimony that he was incarcerated, that he was unemployed and relied on his mother for five years, that he had virtually no contact with the child, and his lack of any plan to care for the child other than a speculative desire to find employment after his release, supports the Family Court's determination that it was in the best interests of the child to be freed for adoption.  The record reveals that the child would be adopted by his foster parent, with whom the nearly four year-old child has resided his entire life, and who, unlike the father, is in a position to support and care for the child (*see e.g. Matter of Shatavia Jeffeysha J. [Jeffrey J.])*, 100 AD3d 501 [1st Dept 2012]).

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

ENTERED:  OCTOBER 21, 2014

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CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13263 The People of the State of New York, Ind. 6179/03
Respondent,

-against-

Lamink Martin,
Defendant-Appellant.

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Scott A. Rosenberg, The Legal Aid Society, New York (Elon Harpaz of counsel), for appellant.

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

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Judgment of resentence, Supreme Court, New York County (Thomas A. Farber, J.), rendered June 26, 2012, resentencing defendant, as a second violent felony offender, to an aggregate term of 25 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: OCTOBER 21, 2014

CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13264 Malcolm Katt, Index 651699/12
Plaintiff-Appellant,

-against-

Dmitry Markov,
Defendant-Respondent.

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Law Office of Richard A. Altman, New York (Richard A. Altman of counsel), for appellant.

Michael C. Barrows, New York, for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 3, 2013, which, after a nonjury trial, directed that judgment be entered in favor of defendant, unanimously affirmed, with costs.

By entering into an agreement for the purchase of plaintiff's goods by defendant, the parties terminated their fiduciary relationship of auctioneer and consignor (*Dubbs v Stribling & Assoc.*, 274 AD2d 32 [1st Dept 2000], *affd* 96 NY2d 337 [2001]). Thus, plaintiff's agreement not to sue defendant in exchange for $100,000, which he acknowledged was paid, was correctly analyzed as a transaction at arm's length. Moreover, as a fiduciary, defendant could have obtained a release (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 278-279 [2011]). Even if defendant were found to be a fiduciary, plaintiff’s constructive fraud claim would fail for lack of evidence that the stated risks of auction (nonpayment, challenges to the bona fides of the sale items) were not true risks (*see generally Brown v Lockwood*, 76 AD2d 721, 733 [2d Dept 1980]).

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

ENTERED: OCTOBER 21, 2014

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Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13265 Christopher Stecko, et al., Index 100059/11
Plaintiffs-Respondents,

-against-

RLI Insurance Company,
Defendant-Appellant,

Three Generations Contracting, Inc.,
etc., et al.,
Defendants.

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Dreifuss, Bonacci & Parker PC, Florham Park, NJ (David C. Dreifuss of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for appellant.

Virginia & Ambinder, LLP, New York (James E. Murphy of counsel), for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about July 12, 2013, which granted plaintiffs' motion for class certification, unanimously affirmed, without costs.

The motion court did not improvidently exercise its discretion in holding that plaintiffs satisfied the prerequisites for class certification (*see* CPLR 901[a]). Plaintiffs' affidavits stating that they recalled working with at least fifty other workers established that the class is so numerous that joinder of all members is impracticable (CPLR 901[a][1]; *see* *Galdamez v Biordi Constr. Corp.*, 50 AD3d 357 [1st Dept 2008]).

The commonality prerequisite is met since all members of the class allege that defendant Three Generations Contracting, Inc. failed to pay the required prevailing wage and supplemental benefits owed to them (*Orgill v Ingersoll-Rand Co.*, 110 AD3d 573, 574 [1st Dept 2013]). We reject defendant RLI Insurance Company's contention that the wages owed to the different trades would be too highly individualized (*see Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 421-422 [1st Dept 2010]). The fact that "different trades are paid on a different wage scale and thus have different levels of damages does not defeat certification" (*Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 482 [1st Dept 2009]; *see Dabrowski v Abax Inc.*, 84 AD3d 633, 634 [1st Dept 2011], *Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept 2011]).

Similarly, plaintiffs' claims are typical of the claims of all class members since they each arise from Three Generations' alleged failure to pay prevailing wages and supplemental benefits (*see* CPLR 901[a][3]; *see Friar v Vanguard Holding Corp.*, 78 AD2d 83, 99 [2d Dept 1980]).

The record supports a finding that plaintiffs and their counsel can adequately represent the class (*see* CPLR 901[a][4]; *Dabrowski*, 84 AD3d at 634). We find no merit to RLI's contention that plaintiffs have not demonstrated that they have sufficient knowledge of the claims to serve as class representatives, since the named plaintiffs possess more than the required "general awareness of the claims" at issue (*see Brandon v Chefetz*, 106 AD2d 162, 170 [1st Dept 1985]).

We note that, as we have previously held, a class action is the "superior vehicle" for resolving wage disputes "since the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court" (*Nawrocki*, 82 AD3d at 536; *see also Dabrowski*, 84 AD3d at 635).

Plaintiffs have also satisfied the additional factors set forth in CPLR 902 for class certification.

We note that the motion court was not required to apply the "rigorous analysis" standard utilized by the federal courts in addressing class certification motions under Rule 23(b) of the Federal Rules of Civil Procedure, given this Court's recognition that CPLR 901(a) "should be broadly construed" and that "the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it” (*City of New York v Maul*, 14 NY3d 499, 509 [2010]).

We have considered RLI’s remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 21, 2014

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Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13266 The People of the State of New York, Ind. 2469/10
Respondent,

-against-

Richard Black,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Cassandra Mullen, J.), rendered January 26, 2011, as amended, February 14, 2011 and May 20, 2011, convicting defendant, after a nonjury trial, of two counts of attempted robbery in the second degree, and sentencing him, as a second felony offender, to concurrent terms of four years, unanimously affirmed.

Defendant, who was convicted of attempted second-degree robbery under the theories of being aided by another person actually present (Penal Law § 160.10[1]), and displaying what appeared to be a firearm (Penal Law § 160.10[2][b]), only challenges his conviction under the aided-by-another-person theory. Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established that defendant was aided by two persons who positioned themselves so as to "intimidate the victim and be ready to render immediate assistance" to defendant (*Matter of Fabian J.*, 103 AD3d 564 [1st Dept 2013]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 21, 2014

CLERK

Tom, J.P., Renwick, Moskowitz, Richter, JJ.

13267 PSKW, LLC, etc., Index 602921/07
Plaintiff-Appellant,

-against-

McKesson Specialty Arizona, Inc.,
Defendant-Respondent.

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Hodgson Russ LLP, Buffalo (Robert J. Lane, Jr. of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (Nagendra Setty of the bar of the State of Georgia, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 24, 2013, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing the cause of action alleging misappropriation of ideas, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiff developed a system, employing the pharmacy adjudication computer network, whereby a pharmacy could process an insurance claim for a prescription product and submit a secondary claim to the pharmaceutical manufacturer for the consumer's copayment obligation, which would afford the consumer an offset of all or part of his or her copayment at the time of the purchase. Plaintiff maintains that this system was unique because, unlike other pharmaceutical rewards products offered in the marketplace at the time, it provided the consumer with a co-pay offset for a specific product, thereby building brand loyalty to the product for the manufacturer. Plaintiff contends that in around 2004 it approached defendant, which provides pharmacy adjudication services, about implementing the system, and defendant misappropriated the system after signing a nondisclosure agreement.

The record raises issues of fact as to whether plaintiff's system was novel (*see Nadel v Play-By-Play Toys & Novelties, Inc.*, 208 F3d 368, 378 [2d Cir 2000]). Defendant asserts that in 1999 the National Council for Prescription Drug Programs (NCPDP), the organization that sets standards for the pharmacy adjudication system, issued standard 5.1, which allowed pharmacists submitting claims through the pharmacy adjudication network to submit claims for a single prescription to multiple payers. Defendant contends that NCPDP 5.1 made plaintiff's system obvious and therefore not novel.

However, defendant's expert erroneously asserted that plaintiff did not claim in its interrogatory answers that a pharmaceutical manufacturer's ability to limit use of the reward to a specific product was an element of its idea. Thus, the expert only opined that linking a reward card to the pharmacy adjudication network, to split a claim between an insurer and the pharmaceutical manufacturer so that the claim submitted to the latter could be adjudicated in real time and the reward realized at the pharmacy counter, was not novel. He did not opine that the pharmaceutical manufacturer's ability to restrict use of the reward to the specific product for which the claim was submitted – an integral element of plaintiff's system for building brand loyalty – was not novel.

Any opinion that the integral element of plaintiff's system was not novel would conflict with plaintiff's expert opinion that the system was novel. Moreover, plaintiff submitted testimony by defendant's executives characterizing the system as novel and a patent application by three of defendant's employees for an invention incorporating the system.

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

ENTERED: OCTOBER 21, 2014

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Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13268 The People of the State of New York, Ind. 624/11
Respondent,

-against-

Vladimir Matos,
Defendant-Appellant.

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Hughes Hubbard & Reed LLP, New York (Quan Trinh of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered May 11, 2012, convicting defendant, after a jury trial, of assault in the first degree (two counts), assault in the second degree (two counts) and criminal possession of a weapon in the third degree, and sentencing him to an aggregate term of 12 years, 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]). The element of serious physical injury was satisfied by evidence supporting the conclusion that the wounds inflicted by defendant caused serious disfigurement to both victims' faces under the standard set forth in *People v McKinnon* (15 NY3d 311, 315-316 [2010]). Photographs depicting the victims' scars, medical testimony, testimony from the victims, and the reasonable inferences to be drawn from the evidence as to each victim warranted the conclusion that the elements of Penal Law § 120.10(2) were established (*see People v Gumbs*, 107 AD3d 548 [1st Dept 2013] *lv denied* 22 NY3d 1156 [2014]).

We have considered and rejected defendant's remaining claims concerning the sufficiency and weight of the evidence.

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

ENTERED: OCTOBER 21, 2014

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Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13269 Peter Riemenschneider, Index 318688/02
Plaintiff-Appellant,

-against-

Christine Barton,
Defendant-Respondent.

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Peter Riemenschneider, appellant pro se.

Law Offices of Steven K. Meier, New York (Steven K. Meier of counsel), for respondent.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered February 28, 2014, which to the extent appealed from as limited by the briefs, granted defendant's motion to compel payment of child support owed pursuant to the parties' stipulation of settlement and support obligations and attorneys' fees to the extent of awarding $112,657 for unpaid educational costs and $20,000 attorneys' fees, and denied plaintiff's cross motion seeking child support and his motion for modification of the child support order, unanimously affirmed, without costs.

Pursuant to the parties' agreements, plaintiff was expressly responsible for the subject college expenses for the parties' older daughter. The court properly determined that his obligation should not be reduced by the amount of any loans for which the daughter is responsible and which were taken out to offset the amount due and owing (*see Matter of Rashidi v Rashidi*, 102 AD3d 972, 973 [2d Dept 2013]).

With respect to plaintiff's child support obligations for the parties' younger daughter, plaintiff failed to seek modification of the parties' agreement that established basic child support to be paid at the time of the child's alleged relocation. The court, therefore, was precluded from recalculating accrued child support arrears, or otherwise modifying the father's support obligations (DRL § 236B [9][b][2][iii]; *see e.g. Wheeler v Wheeler*, 261 AD2d 398, 399 [2d Dept 1999]). Moreover, that child had since moved out of plaintiff's residence, into her own apartment, and was continuing to receive assistance from the mother to subsist (*see Matter of Thomas B. v Lydia D.*, 69 AD3d 24, 28 [1st Dept 2009]).

Contrary to the father's arguments, the child support provisions of the parties' agreements are not void, as such sufficiently set forth compliance with the requirements of the Child Support Standards Act.

Finally, the direction that the father pay the amounts owed in a lump sum was not an abuse of discretion, given the record, including his net worth statement, indicating he has the ability to meet his obligations through sale of his real property in upstate New York or otherwise (*see Iarocci v Iarocci*, 98 AD3d 999, 1000 [2d Dept 2012]).

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

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

ENTERED: OCTOBER 21, 2014

CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13270 The People of the State of New York, Respondent, Ind. 3687N/05

-against-

Carlos Duran De La Rosa, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Molly Booth of counsel), for appellant.

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered on or about February 17, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the 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: OCTOBER 21, 2014

CLERK

Tom, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

13271N In re Richard Strohmeier, et al., Index 157598/12
Petitioners-Respondents,

-against-

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

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Fabiani Cohen & Hall, LLP, New York (Antonino Lugara of counsel), for appellants.

Diamond and Diamond, LLC, New York (Stuart Diamond of counsel), for respondents.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 16, 2013, which, to the extent appealed from as limited by the briefs, granted petitioners' motion for leave to serve a late notice of claim, unanimously reversed, on the law and the facts, without costs, and the motion denied. The Clerk is directed to enter judgment dismissing the complaint.

The court improvidently exercised its discretion in granting petitioners' motion. While petitioners' failure to proffer any excuse for the delay in serving a notice of claim is not alone fatal to their motion (*see Matter of Semyonova v New York City Hous. Auth.*, 15 AD3d 181, 182 [1st Dept 2005]), they also failed to demonstrate the absence of prejudice, or that respondents or respondents' insurance carrier acquired actual notice of the essential facts constituting the claim within 90 days after the claim arose (*see id.*). Petitioners' workers' compensation documents did not give respondents' insurance carrier actual knowledge of the claim, as the documents do not set forth essential facts constituting the claim, such as the correct borough, the location and cause of the accident (*see Matter of Brennan v Metropolitan Transp. Auth.*, 110 AD3d 437, 437 [1st Dept 2013]; *Alexander v City of New York*, 2 AD3d 332 [1st Dept 2003]; *and see Matter of Casale v City of New York*, 95 AD3d 744, 745 [1st Dept 2012]). Since there is no reasonable excuse for the delay, and respondents did not acquire actual knowledge of the essential facts within the 90-day period, or a reasonable time thereafter, the alleged transitory nature of the defective condition weighs against granting petitioners' application (*see McClatchie v City of New York*, 105 AD3d 467, 468 [1st Dept 2013]). Further, the delay prejudiced respondents' ability to search for witnesses to the accident and related circumstances (*see Harris v City of New York*, 297 AD2d 473, 474 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]).

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

ENTERED: OCTOBER 21, 2014

CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12945 DMF Gramercy Enterprises, Inc., Index 652260/12
Plaintiff-Respondent,

-against-

The Lillian Troy 1999
Trust, etc., et al.,
Defendants-Appellants,

The New York City Department
of Consumer Affairs,
Defendant.

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Law Offices of Jeffrey H. Roth, New York (Jeffrey H. Roth of counsel), for appellants.

Jaffe Ross & Light LLP, New York (Burton Ross of counsel), for respondent.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 9, 2013, modified, on the law, to declare that the lease permits plaintiff to use the sidewalk for the operation of a sidewalk café and requires defendants to consent to that use, and otherwise affirmed, with costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Rolando Acosta
Leland G. DeGrasse
Helen E. Freedman
Rosalyn H. Richter, JJ.

12945
Index 652260/12

________________________________________x

DMF Gramercy Enterprises, Inc.,
Plaintiff-Respondent,

-against-

The Lillian Troy 1999
Trust, etc., et al.,
Defendants-Appellants,

The New York City Department
of Consumer Affairs,
Defendant.

________________________________________x

Defendants the Lillian Troy 199 Trust and Richard Troy appeal from the judgment of the Supreme Court, New York County (O. Peter Sherwood, J.), entered December 9, 2013, upon stipulated facts, permanently enjoining them from revoking their consent to plaintiff's operation of a sidewalk café.

Law Offices of Jeffrey H. Roth, New York (Jeffrey H. Roth of counsel), for appellants.

Jaffe Ross & Light LLP, New York (Burton Ross and Bill S. Light of counsel), for respondent.

ACOSTA, J.

The question presented on appeal is whether a landlord has an unfettered right to withhold or terminate its consent to a tenant's operation of a sidewalk café, where the café has existed for at least 50 years and the lease contemplates the use of the sidewalk for that purpose. We hold that defendants may not withhold or terminate their consent, irrespective of whether they have a good-faith basis for doing so, because the lease expressly and unequivocally requires them to consent to plaintiff's operation of the sidewalk café. In any event, we find that the implied covenant of good faith and fair dealing would otherwise restrict defendants' ability to deny consent, and that they have failed to make a satisfactory showing of good faith in this case.

Plaintiff, the net lessee and current tenant assignee of defendants-appellants' premises, operates a restaurant and adjoining sidewalk café under the business name Pete's Tavern. Defendants-appellants (hereinafter referred to as defendants) are the trust that presently owns the building and an individual trustee. In order to operate a sidewalk café in New York City, a tenant must have a license issued by the New York City Department of Consumer Affairs (DCA), which requires the building owner's consent. Over the years, defendants or their predecessor in interest completed several consent forms. However, by letter to the DCA dated March 7, 2012, defendants purported to terminate their consent to operate the sidewalk café and refused to consent to a new license.

Plaintiff commenced the instant action in Supreme Court, seeking declarations that it is permitted to operate the sidewalk café pursuant to the lease and that defendants are required to provide their consent, and a permanent injunction barring defendants from revoking their consent. The parties stipulated to several facts, including that the sidewalk café has been in existence since at least 1964 and existed when the lease was executed that year.[1] In addition, the parties stipulated that "[t]he words 'sidewalk café' are not used, stated or referenced in the Lease, the Deeds and/or the Net Lease."[2]

After reviewing the stipulated facts and the lease, the trial court determined that "[n]othing in the lease or other

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[1] The parties further stipulated that, according to the DCA's records, "the sidewalk café may have even existed as early as 1938."

[2] Although the quoted language refers to three or more documents ("the Lease, the Deeds and/or the Net Lease"), earlier paragraphs in the parties' stipulation of facts refer only to one "Lease." Paragraph 2 of the stipulation of facts states, "Plaintiff is the net lessee of the Premises by assignment of the written agreement of net lease dated November 30, 1964 of the Premises ('Lease') made between landlord, Lillian Troy and [plaintiff's assignors]." There is no other mention of a "Net Lease" as distinguished from the "Lease."

evidence in this case indicates any reservation of rights in the landlord to withhold consent in its sole discretion," and permanently enjoined defendants from revoking their consent to plaintiff's operation of the sidewalk café.

First, the lease contains a provision that is dispositive of this appeal. Paragraph 82 reads, in pertinent part,

> "*Landlord shall, at any time, as often as required, promptl[y] execute applications and any other required documents to enable Tenants* or the subtenants operating the restaurant in the Demised Premises *to obtain and maintain a sidewalk café [on] the public sidewalks adjoining said premises*, and for any other legal purposes required in the operation or use of sai[d] premises by Tenants or subtenants therein" [emphasis added].

This clause unequivocally requires defendants to consent to plaintiff's operation of the sidewalk café and to execute the necessary documents (including consent forms); it does not even allow defendants to withhold their consent upon a showing of good faith. We cannot ignore the fact that the record thus belies the parties' stipulation that the term "sidewalk café" does not appear in the lease.[3] While *litigants* are ordinarily bound by their stipulations of fact (*see e.g. Christian Legal Soc'y Chapter of the Univ. of Cal. v Martinez*, 561 US 661 [2010]), the

[3] There is no indication that the subsequent lease modifications in 1987 and 1990 had any effect on paragraph 82 of the 1964 lease.

Court cannot be bound by a stipulation of fact that is contrary to the very evidence submitted by the parties (*see Universal Camera Corp. v NLRB*, 340 US 474, 497 [1951]; *Donovan v Hamm's Dr. Inn*, 661 F2d 316, 317 [5th Cir 1981] [appellate court would reverse stipulation of fact "if the evidence contrary to the stipulation were substantial"]). Moreover, the Court has its own fact-finding authority and, "[i]n this nonjury case, it is within the province of this court to grant the judgment which, upon the evidence should have been granted by the trial court" (*De Mayo v Yates Realty Corp.*, 35 AD2d 700, 701 [1st Dept 1970], *affd* 28 NY2d 894 [1971]; *Socy. of New York Hosp. v Burstein*, 22 AD2d 768 [1st Dept 1964]; *accord Cappadona v State of New York*, 154 AD2d 498, 500-501 [2d Dept 1989]).

In any event, we will address defendants' argument – based on the stipulated absence of the term "sidewalk café" from the lease – that they may terminate their consent absent a showing of good faith, to ensure that the parties have been sufficiently heard.

We note initially defendants' correct assertion that the sidewalk café is not part of the leased premises. Article 1 of the lease delineates only the physical footprint of the building as the area to be demised. Such a description necessarily excludes the adjacent sidewalk, which is beyond the bounds of the demised premises and, in any case, is undisputedly owned by the City and could not be demised by defendants. In arguing that the sidewalk constitutes part of the premises, plaintiff relies on paragraph 42 of the lease, which essentially states that the tenant will not allow the demised premises or any part thereof to be used for unlawful purposes, and adds that the paragraph "shall not be construed to prohibit the present use thereof." Plaintiff's contention is that because the sidewalk café was in operation when the lease was executed, it is covered by the "present use" clause. However, that clause refers only to the beginning of the paragraph, which uses the phrase "the Demised Premises or any part thereof." Because the sidewalk is not part of the demised premises, the "present use" clause can only apply to the building itself (where the main restaurant, excluding the sidewalk café, is located).

Nevertheless, the lease gives plaintiff the right to make use of the sidewalk space. Paragraph 61, which states that "areas . . . extending beyond the building line . . . are not included within the Demised Premises," also provides that plaintiff "may occupy and use the same during the term of th[e] lease, subject to such laws, permits, rules and regulations as may be imposed by appropriate governmental authorities with respect thereto." To the extent that the phrase "areas . . .

beyond the building line" is ambiguous – the lease does not define the term – we "look to the surrounding facts and circumstances to determine the intent of the parties" (*67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 248 [1975]; *see Bensons Plaza v Great Atl. & Pac. Tea Co.*, 44 NY2d 791 [1978]). In view of the circumstances surrounding the execution of the lease – in particular, the stipulated fact that the sidewalk café existed at the time the lease was executed – we conclude that the parties contemplated the tenant's continued use of the sidewalk to operate the café (*cf. Cookery Lafayette v Westerly Co.*, 2 AD2d 970, 970 [1st Dept 1956] [reversing determination that lease gave tenant right to use sidewalk for operation of café and remanding for new trial, where "[t]he true intent of the parties . . . cannot be determined solely from the lease and other documentary evidence and there was no testimony on this point at the trial"]).

Having determined that the lease allows plaintiff to use and occupy the sidewalk for the operation of a sidewalk café, it necessarily follows that defendants cannot withhold or revoke their consent to that use absent a good-faith basis. As the Court of Appeals has explained,

> "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that

> neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [internal citations and quotation marks omitted]).

Because the stipulated facts demonstrate that the sidewalk café existed at the time of the lease's execution, plaintiff (through its assignor) was justified in understanding that the landlord promised to refrain from unreasonably withholding its consent to operate the sidewalk café. It is of no moment that paragraph 1(d) of the lease refers to the "[r]evocable nature of the right, if any, to maintain . . . areas . . . beyond the building lines," because that language does not go so far as to give defendants the right to revoke their consent for any reason whatsoever. Furthermore, paragraph 1(d) can be viewed alternatively as affirming that the landlord cannot guarantee the right because it is revocable by the City, the entity that owns the sidewalk and has the authority to grant sidewalk café licenses.

To permit defendants to withhold or revoke their consent at will would destroy plaintiff's right to "receive the fruits of the contract" inasmuch as those fruits are gained by operating the sidewalk café (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153).[4] As discussed above, the lease permits plaintiff to use the sidewalk for the operation of a sidewalk café, provided, of course, that such use is lawful. Plaintiff's sidewalk café can only be lawful if it obtains the consent of the landlord (a prerequisite to the grant of a license by the City). Accordingly, the landlord cannot obstruct plaintiff's operation of the sidewalk café by refusing in bad faith to consent. As the trial court observed, defendants did not reserve the right to terminate consent in their sole discretion. Therefore, their right to deny consent must be bridled by the implied covenant of good faith and fair dealing.

Defendants base their contrary argument largely on a misguided characterization of the consent form, which accompanied plaintiff's application for the license to operate a sidewalk café, as a "license agreement." The most recent consent form, which defendants completed in 2002, is titled "Owner's Affidavit of Consent to Operate a Sidewalk Café" (owner's affidavit). Defendants rely heavily on language in the owner's affidavit stating that their consent would remain in effect "until said

[4] Plaintiff alleges in its complaint that it derives approximately 40% of its revenue from the sidewalk café, and that the sidewalk café provides substantial seating capacity and draws additional customers to the restaurant.

consent is terminated in writing," and they cite case law on the construction of contracts to show that the language is unambiguous and binding on the parties. However, the argument that the quoted language permits defendants to terminate their consent *at will* requires a rather formidable leap in logic. The phrase "until said consent is terminated in writing" is indeed unambiguous, but it does not state that defendants may terminate their consent in their sole discretion. Nor, in any event, do we agree that language is binding on the parties. The owner's affidavit is not a contract (or a "license agreement") (*see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584 [1999]); it is merely part of an application for a license. Thus, it does not modify the terms of the lease or abrogate plaintiff's right to use the sidewalk pursuant to the lease.

Finally, we find that defendants have not demonstrated a good-faith basis on which to revoke or withhold consent to plaintiff's continued operation of the sidewalk café. Defendants point to the findings of an administrative law judge of the DCA that plaintiff violated Rules of City of New York (55 RCNY) § 2-55(a).[5] However, the three relatively minor violations resulted

[5] The DCA found that the railings of the sidewalk café were "not removable," that the wait staff served customers "outside of

only in a total fine of $400, which plaintiff paid. In addition, the administrative law judge noted plaintiff's "prompt correction" of one of the violations before the fine was imposed. There is no evidence that defendants were harmed by the violations or that plaintiff's conduct has rendered defendants susceptible to increased insurance premiums or heightened liability.

Accordingly, the judgment of the Supreme Court, New York County (O. Peter Sherwood, J.), entered December 9, 2013, upon stipulated facts, permanently enjoining defendants from revoking their consent to plaintiff's operating a sidewalk café, should be modified, on the law, to declare that the lease permits plaintiff to use the sidewalk for the operation of a sidewalk café and requires defendants to consent to that use, and otherwise affirmed, with costs.

All concur.

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

ENTERED: OCTOBER 21, 2014

CLERK

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the area designated for the sidewalk café," and that the café's "service aisle measured less than 36 inches in width."