CORRECTED ORDER - APRIL 26, 2016

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 26, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, **Richter**, Manzanet-Daniels, Gische, JJ.

16521N- Index 653715/14
16521NA-
16521NB Garthon Business Inc., et al.,
Plaintiffs-Appellants,

-against-

Kirill Ace Stein, et al.,
Defendants-Respondents.

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Hogan Lovells US LLP, New York (Pieter Van Tol of counsel), for appellants.

Turek Roth Grossman LLP, New York (Jason A. Grossman of counsel), for Kirill Aace Stein, respondent.

SIRI & Glimstad LLP, New York (Aaron Siri of counsel), for Aurdeley Enterprises Limited, respondent.

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Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 1, 2015, which granted the separate motions of defendants Kirill Ace Stein and Aurdeley Enterprises Limited to compel arbitration and stay discovery, and dismissed the action subject to certain conditions, reversed, on the law, with costs, the motions denied, and the complaint reinstated.

Order, same court and Justice, entered April 1, 2015, which denied plaintiffs' motion for limited discovery on the issues of, inter alia, personal jurisdiction and alter ego, modified, on the law, to permit discovery on those issues, and otherwise affirmed, with costs.

Plaintiffs are entities controlled by Patokh Chodiev, a Kazakh businessman. Defendant Kirill Ace Stein, individually and through an entity controlled by him called Aurdeley Enterprises Limited, provided financial consulting advice to plaintiffs and other companies affiliated with Chodiev and his family. Initially, the terms of the arrangement between the Chodiev entities and Stein/Aurdeley were set forth in two separate agreements, both of which became effective on January 1, 2000. The first agreement, between an entity called Quennington Investments Limited on the one hand, and Stein on the other (Quennington Agreement), was for an indefinite term, although each party had the right to terminate on notice. The Quennington Agreement also provided that it was to be governed by the law of the United States, and that "the Courts of the United States of America shall have exclusive jurisdiction to settle any claim, dispute, or matter of difference, which may arise out of or in connection with this Agreement . . . or the legal relationship

established by this Agreement." The second agreement was between Chodiev and Aurdeley (First Aurdeley Agreement). It was essentially identical to the Quennington Agreement, except that it was to be governed by the law of England and Wales, and the courts of England were to have exclusive jurisdiction over any disputes arising out of it.

By agreement dated September 30, 2009, Aurdeley and Chodiev entered into a second consulting agreement (Second Aurdeley Agreement), which was intended to have an effective date of July 1, 2009. The preamble to that agreement referenced both the Quennington Agreement and the First Aurdeley Agreement, and recited that the new agreement arose out of Chodiev's desire to reduce the fee Stein was to receive for the consulting services that were the subject of the Quennington Agreement and the First Aurdeley Agreement. The Second Aurdeley Agreement expressly terminated the First Aurdeley Agreement, and stated that neither party was to "have any further liability to [the] other of whatsoever nature pursuant to or in respect of [the First Aurdeley Agreement] and (for the avoidance of doubt) [Chodiev] shall have no further liability to make any payment of whatsoever nature to [Aurdeley] pursuant to or in respect of [the First Aurdeley Agreement]." It also had a standard merger clause,

providing that it "supersedes all prior arrangements, agreements or understandings (both oral and written) relating to the subject matter of this Agreement." Finally, the Second Aurdeley Agreement stated that "[a]ny dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration Rules."

A separate agreement between Stein and Quennington, also entered into on September 30, 2009 (Quennington Termination Agreement), expressly terminated the Quennington Agreement, using the same language employed by the Second Aurdeley Agreement to terminate the First Aurdeley Agreement. The Quennington Termination Agreement also provided for arbitration of any disputes, utilizing the same language as in the Second Aurdeley Agreement.[1]

Plaintiffs commenced this action in or about December 2014.

[1] Also on September 30, 2009, Aurdeley entered into a consulting services agreement, effective from July 1, 2009 through March 1, 2010, with Mounissa Chodiev, Patokh Chodiev's daughter, in which Aurdeley agreed to provide the same financial advisory services for a conditional one-time fee of $386,664. This agreement contained the same limitation of liability provision and arbitration clause as the Second Aurdeley Agreement.

The plaintiffs were alleged to be entities controlled by Chodiev. Plaintiff Crestguard Limited was alleged to be a wholly-owned subsidiary of plaintiff Garthon Business Inc., and it allegedly owned 100% of nonparty SBS Steel, a Kazakh company. According to the complaint, beginning in the spring of 2009, Stein, acting under the various consulting agreements discussed above, advised Chodiev (through Garthon and Crestguard) in connection with SBS Steel's decision to retain nonparty Hares Engineering, a company owned by an individual named Youssef Hares, to construct a steel plant in Kazakhstan. Plaintiffs claim that Stein recommended that, in order to ensure that Hares Engineering could complete the steel plant, they make personal, unsecured loans to Youssef Hares. Chodiev accepted this advice, and by an agreement dated June 7, 2009, Crestguard extended an interest-free loan to Youssef Hares in the amount of $7 million, repayable in December 2009. Two similar loans were extended by Crestguard to Hares, one pursuant to an agreement dated December 30, 2009 in the amount of $3 million, and another pursuant to an agreement dated August 10, 2010 in the amount of $6 million. Youssef Hares never repaid the loans, and plaintiff asserted causes of action against defendants for, among other things, breach of fiduciary duty and breach of the "Consulting Services Agreements." "Consulting

Services Agreements" was a defined term in the complaint, relating back to all of the agreements between Chodiev/Quennington and Stein/Aurdeley, including those that were ultimately terminated. The complaint specifically alleged that Stein and Aurdeley are alter egos of each other, that Aurdeley is a sham entity, and that Stein is a New York domiciliary. Defendants moved for a stay of the action and an order compelling arbitration of all the claims in London, arguing that all of the claims were governed by the Second Aurdeley Agreement and the Quennington Termination Agreement, which provided for arbitration as an exclusive dispute resolution mechanism. Alternatively, they argued that only an arbitration tribunal could determine whether the forum selection clause in the Quennington Agreement, which provided for litigation in United States courts, controlled. In opposition, plaintiffs argued that the broad forum selection clause in the Quennington Agreement continued to apply to the claims accruing between January 1 and June 30, 2009, notwithstanding the subsequent agreements. Plaintiffs moved separately to compel discovery in the action, claiming that the parties' intent concerning forum selection, as well as Stein's relationship to Aurdeley and his amenability to jurisdiction in New York courts, could not necessarily be ascertained without it.

The court granted defendants' motion to the extent of dismissing the action "on [the] condition that defendants not object to arbitration in the London court . . . and agree to the arbitration action relating back to the filing of this case on December 3, 2014." The court also denied plaintiffs' motion to compel discovery.

On appeal, plaintiffs argue that the claims alleged in the complaint relate to consulting services provided by Stein under the Quennington Agreement. Since that agreement unquestionably provided that disputes arising under it are to be litigated in the United States courts, they maintain that the court erred in dismissing the complaint. Plaintiffs acknowledge the arbitration clauses in the Second Aurdeley Agreement and in the Quennington Termination Agreement, but deny that they nullified the forum selection clause in the Quennington Agreement, since they did not explicitly disavow it. They further posit that, to the extent their claims relate to loans made to Hares, on Stein's advice, after July 1, 2009, the effective date of the Second Aurdeley Agreement, they are still entitled to litigate those claims in court, since they are inextricably intertwined with claims that arose earlier. Defendants counter that, taken together, the release of liability and merger clause in the Second Aurdeley

Agreement, the termination of the Quennington Agreement and the First Aurdeley Agreement, and the arbitration provisions in the Second Aurdeley Agreement and the Quennington Termination Agreement, all dictate that the sole dispute resolution mechanism available to plaintiffs is arbitration.

"Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes, particularly those involving international business agreements" (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). The mere termination of a contract containing such a clause does not mean that the clause is not still effective (*see Getty Props. Corp. v Getty Petroleum Mktg., Inc.*, 106 AD3d 429, 430 [1st Dept 2013]). Rather, a "clear manifestation of [the parties'] intent" to terminate the clause is necessary if a party is to disregard such a clause upon termination of the contract in which it is found (*Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 602 [1997]). Defendants find such clear manifestation in the arbitration clauses themselves, which they argue reflect a conscious decision by the parties to arbitrate any disputes arising out of the agreements. However, the best evidence of what the parties intended is the plain meaning of the contract (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

Here, the arbitration clauses at issue each confine arbitration to "[a]ny dispute arising out of or in connection with *this* Agreement, including any question regarding its existence, validity or termination . . ." (emphasis added). At best, this language indicates that the parties intended only to arbitrate disputes that arose after July 1, 2009, the effective date of those agreements. It does not indicate a clear manifestation that the forum selection clause in the Quennington Agreement had been abandoned.

Indeed, the arbitration clauses are of much narrower scope than the forum selection provision in the Quennington Agreement. In addition to disputes related to the Quennington Agreement itself, the forum selection clause in the Quennington Agreement applied to the "legal relationship established by" the agreement. That relationship survived the Quennington Agreement. Since the complaint asserts that Stein breached the fiduciary duty born out of that relationship, the forum selection clause should apply to the complaint.

As for the effect of the merger clauses in the Second Aurdeley Agreement and the Quennington Termination Agreement, *Primex Intl. Corp.* (89 NY2d 594), is instructive. There, the plaintiff and the defendant entered into three successive,

identical agreements. The first two contained an arbitration clause, but the third did not (*id*. at 596-597). The third agreement also contained a merger clause that was substantially similar to the one contained in the Second Aurdeley Agreement and the Quennington Termination Agreement (*id*. at 597.[2] During the term of the third agreement, a dispute arose, and the defendant commenced an action for, inter alia, breach of all three agreements (*id*. at 597). The plaintiff sought to compel arbitration, asserting that the merger clause in the third agreement did not negate the arbitration clause in the first two agreements (*id*. at 598). The Court of Appeals agreed, finding that "the language of the merger clause was insufficient to establish any intent of the parties to revoke retroactively their contractual obligations to submit disputes arising thereunder to arbitration" (*id*. at 599). The Court explained that the purpose of a merger clause is to give full effect to the parol evidence rule, which bars extrinsic evidence tending to vary the terms of

[2] The merger clause in *Primex* read as follows: "This Agreement may not be amended, changed, modified, or altered except by a writing signed by both parties. All prior discussions, agreements, understandings or arrangements, whether oral or written, are merged herein and this document represents the entire understanding between the parties" (89 NY2d at 596-597).

the agreement in which the merger clause is included (*id.* at 599-600). Thus, an antecedent agreement that does not modify the terms of the agreement with the merger clause continues to stand on its own (*id.*).

Here, the forum selection clause in the Quennington Agreement did not alter the arbitration clause in the Second Aurdeley Agreement or the Quennington Termination Agreement. Accordingly, the merger clause in the latter agreements does not serve to negate the forum selection clause in the Quennington aggrement or plaintiffs' right to pursue their claims in court. Further, to the extent that the Second Aurdeley Agreement and the Quennington Termination Agreement contained language releasing the parties from liability arising out of their predecessor agreements, that language only served to alter the substantive rights of the parties; absent express language to the contrary, it cannot be interpreted as having altered the forum selection provisions contained in the Quennington Agreement (*see Matter of Schlaifer v Sedlow*, 51 NY2d 181, 185 [1980]).

Plaintiffs argue that, notwithstanding the clear choice of the parties to arbitrate disputes arising out of the Second Aurdeley Agreement and the Quennington Termination Agreement, all of the allegations in the complaint should be litigated in court,

notwithstanding that two of the loans extended to Hares were made after those agreements were executed. Although this Court does not appear to have directly addressed the issue, the other Departments have held that, where some of a group of claims are covered by an arbitration agreement, it is appropriate to litigate the entire group in court if all of the claims were already asserted in court and the claims not subject to arbitration would be "inextricably bound together" with the claims that are subject to arbitration (*Steigerwald v Dean Witter Reynolds*, 84 AD2d 905, 906 [4th Dept 1981, *affd* 56 NY2d 621 [1982] [even if the plaintiff's dispute with current employer was governed by arbitration agreement with former employer, it was not "suitable . . . that there be two forums to resolve what is in reality one lawsuit"]; *Brennan v A.G. Becker, Inc.*, 127 AD2d 951 [3d Dept 1987] [where the plaintiff held business and personal investment accounts with the defendant and the only agreement governing the personal account contained an arbitration clause, a dispute involving all of the accounts would be litigated in court, where an action had already been commenced]; *see also Young v Jaffe*, 282 AD2d 450 [2d Dept 2001]).

Here, one could argue that all of the claims in the complaint arose under the Quennington Agreement, since,

notwithstanding that two of the loan agreements with Hares were executed after the termination of that agreement, plaintiffs allege that Stein first advised them to loan money to Hares personally in spring 2009, when that agreement was unquestionably in effect. In any case, even if some of the claims could be said to arise out of the Quennington Agreement, and others out of the Second Aurdeley Agreement, they are cut from the same cloth, and are, unquestionably, inextricably bound together and therefore should be litigated in court.

We disagree with the dissent's position that the London Court of International Arbitration (LCIA) should decide the issue of arbitrability. As the dissent acknowledges, the general rule is that the question of arbitrability is an issue for the courts (*see Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 45 [1997]). The case on which the dissent relies, *Zachariou v Manios* (68 AD3d 539 [1st Dept 2009]), recognizes that it is appropriate for arbitrators to decide the issue of arbitrability where the agreement to arbitrate incorporated the arbitral body's rules reserving arbitrability to itself.[3] However, the *Zachariou* court declined to hold that the arbitrators should decide the

[3] We assume that the dissent takes judicial notice of the rules of the LCIA, since they are not found in the record.

issue in that case, since the arbitration agreement there was a narrow one. Because it was narrow, this Court held, "the reference to the [arbitration] rules [did] not constitute clear and unmistakable evidence that [the parties] intended to have an arbitrator decide arbitrability" (68 AD3d at 539).

Here, as discussed above, the Quennington Agreement designated the courts as the sole forum for dispute resolution, and the subsequent agreements, notwithstanding their arbitration clauses, did not nullify that designation. Since that is the case, we cannot state with any degree of certainty that the parties clearly and unmistakably intended for the chosen arbitral body to decide the particular issue presented to us. To hold otherwise would be to completely ignore the existence of the forum selection clause in the Quennington Agreement, which the parties never abrogated. The Court of Appeals recently reaffirmed that the issue of arbitrability is for the arbitrators only where the parties clearly and unmistakably agreed that the arbitrators should decide that issue (*Matter of Monarch Consulting, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, __ NY3d __, 2016 NY Slip Op 01209 [2016]). However, *Monarch Consulting* has no application here since the agreements containing the arbitration clauses in that case did not, like

here, directly clash with an enforceable forum selection clause in a separate agreement relevant to the parties' dispute.

Moreover, the arbitration clauses, in relation to the forum selection clause contained in the Quennington Agreement, are far narrower, since, as mentioned earlier, they apply to the agreements themselves, whereas the forum selection clause applies to disputes arising not only out of the Quennington Agreement, but also "the legal relationship established by" the agreement. Of course, if plaintiffs had presented claims that unquestionably and wholly originated *after* the termination of the Quennington Agreement, the issue of arbitrability would have been for the arbitrators, who most likely would have found that the claims were subject to arbitration. That, however, is not the case. Finally, to the extent factual issues exist concerning, inter alia, whether Stein and/or Aurdeley are alter egos of each other, such that Aurdeley is a proper defendant here notwithstanding its not being a party to the Quennington/Stein agreements, and whether Stein and Aurdeley are subject to personal jurisdiction in New York, the parties are entitled to conduct discovery.

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

Gische J. (dissenting)

Because I believe that under the parties' Termination agreement, the gateway issue of arbitrability belongs to the arbitrators and not the court, I respectfully dissent and would affirm the motion court's decision to compel arbitration at this juncture. I neither agree nor disagree with the majority's conclusion that the later agreements at issue did not negate the effectiveness of the forum selection clause in the earlier Quennington agreement. I only conclude that, under established precedent in our Court, the determination of that issue belongs to the arbitrators (*Zachariou v Manios*, 68 AD3d 539 [1st Dept 2009]; *Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495 [1st Dept 2009], *affd* 14 NY3d 850 [2010], *cert denied* 562 US 962 [2010]).

Plaintiffs commenced this action alleging breach of contract, breach of fiduciary duty, constructive fraud and negligent misrepresentation in connection with certain consulting agreements in which defendants Kirill Ace Stein and/or Aurdeley Enterprises Limited agreed to provide financial advice to companies owned or controlled by the Chodiev family. Patokh Chodiev is the beneficial owner of plaintiffs and patriarch of the Chodiev family. Stein is an associate of Aurdeley and

apparently its sole employee.

Plaintiffs' claims relate to three loans it made, beginning in June 2009 and totaling $16 million, on defendants' advice and urging, in connection with a steel plant located in Kazakhstan. Plaintiffs allege that defendants advised them to make personal loans to an individual who is the principal of a company to which the plaintiffs owed money. According to plaintiffs, had they paid that money directly to the company, instead of structuring the transaction as a loan to the company's owner, they would have partially satisfied their debt to the company. Ultimately, the individual defaulted on the loans, plaintiffs were unable to recover the money that they had lent to him because the loans were unsecured, and the company to whom they were indebted would not reduce plaintiffs' debt to the company by the amount of the personal loans.

Various interrelated agreements are involved. The first agreement (Quennington agreement), effective January 1, 2009, is between Stein and Quennington Investments Limited, another company owned by Patokh Chodiev and affiliated with plaintiffs. The Quennington agreement, which was to have continued indefinitely unless terminated by one of the parties upon three months' notice, contains a forum selection clause stating that

"[t]he courts in the United States of America shall have exclusive jurisdiction to settle any claim, dispute, or matter of difference, which may arise out of or in connection with this Agreement (including without limitation, claims for set-off or counterclaim) or the legal relationship established by this Agreement."

A second agreement for consulting services, effective January 1, 2009, between Patokh Chodiev, individually, and Aurdeley (Agreement 2), also contains a forum selection clause, but it specifies that "[t]he courts of the [sic] England shall have exclusive jurisdiction to settle any claim, dispute, or matter of difference, which may arise out of or in connection with this Agreement (including without limitation, claims for set-off or counterclaim) or the legal relationship established by this Agreement." The Quennington agreement and Agreement 2 each provide for payment of compensation for consulting services, but in the Quennington agreement, payment is directly to Stein, whereas in Agreement 2, payment is to Aurdeley.

On September 30, 2009, Mounissa Chodieva (Patokh's daughter) and Aurdeley entered into another agreement (Agreement 3) effective July 1, 2009. Agreement 3 specifies that it continues in effect until March 1, 2010 or until the "Other Agreement" made

between Patokh Chodiev and Aurdeley "shall terminate." Agreement 3 contains multiple references to the Quennington agreement and amends the terms of Stein's and Aurdeley's compensation under their respective agreements. Agreement 3's forum selection clause provides that "[a]ny dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration Rules, which Rules are deemed to be incorporated by reference . . ."

A fourth agreement, also dated September 30, 2009, between Patokh Chodiev and Aurdeley, refers to the Quennington agreement and Agreements 2 and 3. The fourth agreement, which provides for a reduction in the total annual amount of compensation to be paid for Stein/Aurdeley's financial services, includes the following merger clause: "[t]his Agreement contains the entire agreement and understanding of the parties and supersedes all prior arrangements, agreements or understandings (both oral and written) relating to the subject matter of this Agreement." The fourth agreement also provides that the Quennington agreement "shall be terminated by mutual consent of the parties to it" and that "neither the Client nor the Consultant shall have any

further liability to [the] other of whatsoever nature pursuant to or in respect of [the Quennington agreement]. . .” With respect to the governing law and jurisdiction, the fourth agreement states that “[a]ny dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration [LCIA] Rules, which Rules are deemed to be incorporated by reference into this Clause . . .”

Yet another agreement, also dated September 30, 2009, but between Quennington and Stein, effective July 1, 2009 (Termination agreement), purports to terminate the Quennington agreement, providing that “neither of them shall have any further liability to [the] other of whatsoever nature pursuant to or in respect of the [Quennington] Agreement and (for the avoidance of doubt) Quennington Investments Limited shall have no further liability to make any payments of whatsoever nature to . . . Stein pursuant to or in respect of the Agreement.” The Termination agreement contains an arbitration clause identical to the fourth agreement.

Former Article 23.1 of the LCIA rules, in effect at the time the Termination agreement, Agreement 3, and the fourth agreement

were executed, provide that the "Arbital Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity of effectiveness of the Arbitration Agreement" (LCIA Arbitration Rules [effective 1 January 1998], http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article 23 [accessed Mar. 10, 2016]).

The core dispute on this appeal concerns forum selection. Defendants contend that the arbitration clause in the Termination agreement supersedes all other forum selection clauses in the earlier agreements. Plaintiffs argue that the forum for this dispute, which arises out of the Quennington agreement, is the courts of the United States. Before we reach the parties' forum dispute, however, the gateway issue is who gets to decide the issue about the proper forum, or arbitrability.

Whether a dispute is arbitrable is generally an issue for the court to decide (*Hawkeye Funding, Ltd. Partnership v Duke/Fluor Daniel*, 307 AD2d 828, 828 [1st Dept 2003], *lv denied* 1 NY3d 538 [2003]). The general rule, however, does not apply where the parties have clearly and unmistakably provided that this jurisdictional issue is to be decided by an arbitrator

(*Matter of Monarch Consulting Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, __ *NY3d* __, 2016 NY Slip Op 01209 [2016]; *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 45-46 [1997]). The recent Court of Appeals case in *Monarch* directly supports application of the exception to the general rule when a valid arbitration clause reserves to itself gateway issues of arbitrability. In *Monarch*, the Court of Appeals held that the issue of whether the parties' underlying dispute, regarding the validity of workers' compensation payment contracts and their arbitration clauses should be decided by the courts or in arbitration belonged, in the first instance, to the arbitrators (2016 NY Slip Op 01209, *10). In so holding, the Court recognized that the parties had agreed that the arbitrators had exclusive jurisdiction over the entire matter in dispute, including any question as to arbitrability (*id*. at *9-10). Relatedly, this Court has previously held that where there is a broad arbitration clause and the parties' agreement specifically incorporates by reference the American Arbitration Asssociation rules providing that the arbitration panel shall have the power to rule on its own jurisdiction, the gateway issue of

arbitrability belongs to the arbitrators (*Zachariou v Manios*, 68 AD3d 539, 539 [1st Dept 2000]; *see Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 495-496 [1st Dept 2009], *affd* 14 NY3d 850 [2010], *cert denied* 562 US 962 [2010]). At bar, the arbitration clause in the Termination agreement includes broad language referring to "any dispute arising out of" the Termination agreement (*State of New York v Phillip Morris Inc.*, 30 AD3d 26, 31 [1st Dept 2006], *affd* 8 NY3d 574 [2007]). In addition, it incorporates the rules of the LCIA, which like the rules of the AAA, provide that the arbitrators shall rule on the issue of their own jurisdiction. This contractual language and the reference to LCIA rules is sufficiently broad to have the arbitrator decide in the first instance whether the parties' dispute falls within its jurisdiction. This Court need not go any further at this time. Only if the arbitrator decides that LCIA has no jurisdiction over the merits of the parties' dispute will this Court be in a position to make substantive rulings in this case.

My disagreement with the majority is only that it goes too far. In deciding that the provisions of the later agreements, which contain broad arbitration clauses, do not apply to disputes arising out of the Quennington Agreement, it necessarily

interprets the meaning of the provisions in those later agreements, which supersede, terminate and release liability under the Quennington Agreement, as being prospective only. In doing so, it decides the issue of jurisdiction under the arbitration provisions, even though the arbitration clauses reserved to the arbitrator the right to determine the issue of arbitrability.

I would also affirm the motion court's denial of discovery, but instead of dismissing the complaint, I would have stayed the litigation pending arbitration.

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

ENTERED: APRIL 26, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Richter, JJ.

265 Fletcher Bennett, et al., Index 152686/14
Plaintiffs-Respondents,

-against-

Time Warner Cable, Inc.,
Defendant-Appellant.

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Kauff McGuire & Margolis LLP, New York (Marjorie B. Kulak of counsel), for appellant.

Archer, Byington, Glennon & Levine LLP, Melville (Robert T. McGovern of counsel), for respondents.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered November 26, 2014, which, insofar as appealed from as limited by the briefs, denied defendant's motion to dismiss plaintiffs' claims under the New York State and New York City Human Rights Laws for age-based discrimination based on a theory of disparate impact, unanimously affirmed, without costs.

Plaintiffs allege, among other things, that they were general foremen in their 50's and 60's, and that defendant's decision to eliminate the general foreman position disproportionately affected them in comparison to younger workers. Crediting their allegations for purposes of this motion to dismiss (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Askin v Department of Educ. of the*

City of N.Y., 110 AD3d 621, 622 [1st Dept 2013]), plaintiffs have adequately pleaded claims for age discrimination based on a disparate impact theory under the State and City Human Rights Laws (Executive Law § 296; Administrative Code of City of NY §8-107; *see Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 296-297 [1st Dept 2005]; *see also Teasdale v City of New York*, 2013 WL 5300699, *8, *12, 2013 US Dist LEXIS 133764, *21-22, *34-35 [ED NY, Sept. 18, 2013, No. 08-CV-1684 (KAM)], *affd sub nom. Teasdale v New York City Fire Dept.*, 574 Fed Appx 50 [2d Cir 2014]).

Defendant incorrectly argues that the Supreme Court was bound by the decision in *Bohlke v General Elec. Co.* (293 AD2d 198 [3d Dept 2002], *lv dismissed* 98 NY2d 693 [2002]). This Court has previously recognized that disparate impact claims alleging age discrimination are cognizable under the State Human Rights Law (*see Mete* at 296-297), and we choose to follow our own precedent. Furthermore, this Court has held that provisions of the City Human Rights Law must be construed broadly in favor of plaintiffs alleging discrimination and assessed under more liberal standards, going beyond the counterpart state or federal civil rights laws (*see e.g. Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). We

note the decision in *Bohlke* did not involve a claim under the City Human Rights Law, and therefore would not be dispositive of plaintiffs' city law claim.

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

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

ENTERED: APRIL 26, 2016

CLERK

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

476 Stanley Moretta Diaz, Index 308547/11
Plaintiff-Respondent,

-against-

313-315 West 125th Street, et al.,
Defendants-Appellants,

"John Doe" Contractor, et al.,
Defendants,

Katselnik & Katselnik Group, Inc.,
Defendant-Respondent.

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Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for appellants.

Shapiro Law Offices, PLLC, Bronx (Jason Shapiro of counsel), for Stanley Moretta Diaz, respondent.

Connell Foley LLP, New York (Brian P. Morrissey of counsel), for Katselnik & Katselnik Group, Inc., respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered April 1, 2015, which denied the motion of defendants-appellants 313-315 West 125th Street LLC (313 West) and the Estate of Lillian Goldman (Goldman Estate) (collectively, appellants) for summary judgment reforming a contract, for summary judgment on 313 West's common-law and contractual indemnification cross claims against defendant Katselnik & Katselnik Group, Inc. (K&K), and for summary judgment dismissing

K&K's cross claims for common-law indemnification and contribution against appellants, unanimously modified, on the law, to grant appellants' motion for summary judgment reforming a contract and dismissing K&K's cross claims against them, and otherwise affirmed, without costs.

The motion court erred in denying appellants' motion as untimely. The October 2013 so-ordered stipulation stated that "[a]ll parties' time to move for summary judgment is extended to 120 days after completion of [defendants'] EBTs as set forth above." The phrase "as set forth above" referred to an earlier sentence in the stipulation stating that 313 West and K&K were "to be produce [sic] for depositions on or before Jan[.] 10, 2014."

K&K's deposition was conducted in January 2014, and thereafter both plaintiff and K&K moved for summary judgment. After the motion court decided those motions in July 2014, appellants deposed a witness on August 18, 2014, and they filed their summary judgment motion less than 120 days later, on October 9, 2014. The motion court found their motion untimely since it was filed more than 120 days after January 10, 2014 — the date 313 West and K&K were to be produced for depositions. However, appellants assert that they interpreted the stipulation

to permit summary judgment motions filed within 120 days after the actual completion of the depositions listed in the stipulation, and that the depositions were not complete until they deposed their witness on August 18, 2014. K&K initially shared appellants' interpretation, since it argued, in support of its own motion for summary judgment in March 2014, that its motion was timely because the discovery listed in the stipulation had not been completed. We find that appellants' interpretation is just as reasonable as the motion court's, and that the stipulation is ambiguous (*see Vila v Cablevision of NYC*, 28 AD3d 248, 248 [1st Dept 2006]). Accordingly, even if appellants' motion is considered untimely, the ambiguity in the stipulation constituted good cause for the late filing (*id.* at 248-249; *see* CPLR 3212[a]).

For the reasons stated in *313-315 W. 125th St v Arch Specialty Ins. Co.* (__ AD3d __, Appeal No. 634 [1st Dept 2016] [decided simultaneously herewith]), the contract between nonparty Solil Management LLC (Solil) and K&K should be reformed to name 313 West, rather than Solil, as "the Owner"; appellants clearly and convincingly established that there was a mutual mistake in naming Solil, rather than 313 West, as the "Owner" in the contract (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]).

313 West has not established its entitlement to judgment as a matter of law on its contractual indemnification cross claim against K&K, the general contractor, because it did not show that K&K or any of its subcontractors were negligent. In addition, 313 West is not entitled to summary judgment on its common-law indemnification cross claim against K&K, since 313 West failed to make a prima facie showing of K&K's negligence (*see Burgos v 213 W. 23rd St. Group LLC*, 48 AD3d 283, 284 [1st Dept 2008]).

K&K's common-law indemnification and contribution cross claims against appellants should be dismissed. 313 West made a prima facie showing of its lack of actual fault (*see id.*), by presenting evidence that it did not provide any construction work, materials, equipment or supervision at the work site. Further, the action against the Goldman Estate has been discontinued with prejudice, and it showed, among other things,

that Goldman sold her interest in the property to 313 West more than a decade before plaintiff's accident. In opposition, K&K failed to raise a triable issue of fact.

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

ENTERED: APRIL 26, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

634 313-315 West 125th Street L.L.C., et al., Plaintiffs-Appellants, Index 155684/12

-against-

Arch Specialty Insurance Company, Defendant-Respondent,

Katselnik & Katselnik Group, Inc., Defendant.

- - - - -

[And a Third-Party Action]

_____

Rubin, Fiorella & Friedman LLP, New York (Paul Kovner of counsel), for appellants.

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered March 27, 2015, which, to the extent appealed from as limited by the briefs, granted defendant-respondent's (Arch) motion for summary judgment declaring that plaintiffs 313-315 West 125th Street L.L.C. (313 West) and Plaza Circle Enterprises, LLC have no coverage under the Arch insurance policy at issue, that plaintiffs are precluded from reforming the underlying construction contract to name 313 West, rather than nonparty Solil Management LLC (Solil), as "Owner," and that plaintiffs are not third-party beneficiaries of

that contract, granted Arch's motion for summary judgment dismissing defendant Katselnik & Katselnik Group, Inc.'s (K&K) cross claim against Arch for a declaration that plaintiffs are additional insureds under the Arch policy, and denied plaintiffs' motion for summary judgment on their contractual reformation claim and for summary judgment declaring that Arch must defend and indemnify them in the underlying action, unanimously reversed, on the law, without costs, Arch's motions denied, and plaintiffs' motion granted.

Plaintiff 313 West is the owner of the building where the plaintiff in the underlying Labor Law action was injured while working on a construction project. Solil, 313 West's managing agent, hired K&K as the general contractor for the project pursuant to a written form agreement that referred to Solil as "the Owner." The General Conditions of that agreement provided, inter alia, that K&K would indemnify and hold harmless "the Owner" and its agents to the fullest extent permitted by law against claims arising out of or resulting from performance of the work.

Arch issued a commercial general liability policy of insurance to K&K. When plaintiffs tendered their defense in the underlying action, Arch denied the tender on the ground that the

underlying construction contract named Solil as the Owner and did not reference plaintiffs. As a result, plaintiffs commenced this declaratory judgment action seeking coverage. To the extent the agreement between Solil and K&K incorrectly identified Solil as the Owner, plaintiffs sought reformation of the contract.

Contrary to the motion court's conclusion, plaintiffs' contention that the agreement between Solil and K&K should be reformed to name 313 West rather than Solil as the "Owner" has merit.

"A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake" (*Greater N. Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007]). To succeed, the party asserting mutual mistake must establish by "clear, positive and convincing evidence" that the agreement does not accurately express the parties' intentions or previous oral agreement (*Amend v Hurley*, 293 NY 587, 595 [1944][emphasis deleted]; *see also Nash v Kornblum*, 12 NY2d 42, 46 [1962]). Parol evidence may be used (*see VNB N.Y. Corp. v Chatham Partners, LLC*, 125 AD3d 517, 518 [1st Dept 2015], *lv denied* 25 NY3d 910 [2015]), and reformation is an appropriate remedy where

the wrong party was named in the contract (*see e.g. EGW Temporaries, Inc. v RLI Ins. Co.*, 83 AD3d 1481 [4th Dept 2011]). On the record before us, plaintiffs clearly and convincingly established that K&K intended to indemnify the true owner, 313 West, and that, as a result of mutual mistake, the agreement misidentified Solil, the managing agent, rather than 313 West itself, as the "Owner" of the property where the work was to be performed.

The agreement was signed by Solil's director of commercial management, Joseph Grabowski, "As Agent." At his deposition, Grabowski testified that he "negotiated the price and . . . signed the contract for the owner," by which he meant 313 West. Louisa Little, who had been "the Manager of Solil" since 2008, stated in an affidavit that Grabowski executed the contract "as agent for the Owner . . ., 313-315 [313 West]," but that "[i]n reducing the parties' agreement to writing, Solil . . . was erroneously inserted in the provision for 'Owner' . . . through the mutual mistake of both parties." Numerous provisions in the agreement were structured around the true property owner, 313 West, as the real party in interest, for whose benefit the work was performed.

K&K's vice president, Arkadi Katselnik, confirmed that he

agreed and intended to indemnify and procure additional insured coverage for 313 West. He stated in an affidavit that "[i]n accordance with" the agreement, K&K "procured all insurance policies required thereunder, as well as provided Solil with executed certificates of insurance which designated Solil and the 313-315 [313 West] Parties as additional insureds with respect to said insurance policies, to the extent permitted by applicable law." Numerous certificates of insurance naming 313 West as an additional insured on K&K's policies were offered to show the intent of the parties, i.e., that 313 West was to be protected by the indemnity clause in the agreement as the real party in interest.

Accordingly, the construction contract's provision requiring K&K to procure insurance covering "the Owner" as an additional insured referred to 313 West, rather than Solil, and the

amendment of the insurance policy "to include as an additional insured those persons or organizations who are required under a written contract with [K&K] to be named as an additional insured" effectively names plaintiffs as additional insureds.

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

ENTERED: APRIL 26, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

766-
766A The People of the State of New York, Respondent,

Ind. 2868/11
SCI 5805/11

-against-

Michael Reilly,
Defendant-Appellant.

_____

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

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

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Judgments, Supreme Court, New York County (Eduardo Padro, J.), rendered April 2, 2014, as amended June 6, 2014, convicting defendant, upon his plea of guilty, of three counts of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to three consecutive terms of two to four years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentences on the two convictions under SCI 5805/11 to 1½-3 years, resulting in three consecutive sentences of 1½-3, 1½-3, and 2-4, for an aggregate term of 5-10 years, and otherwise affirmed.

The court properly denied defendant's motion to withdraw his guilty plea. At the time of the plea, the court clearly

explained to defendant that if he violated the plea conditions he would receive consecutive sentences resulting in an aggregate term of 6 to 12 years. Defendant's argument that this warning was ambiguous rests on a single word in the transcript. The record, including the context in which that word appeared and all surrounding circumstances, support the sentencing court's finding that the transcript is incorrect in this regard. Even assuming that the court reporter accurately transcribed her original notes, the inference is inescapable that those notes are incorrect because the reporter simply misheard a word in the court's plea colloquy (*see e.g. People v Valdes*, 283 AD2d 187 [1st Dept 2001], *lv denied* 97 NY2d 688 [2001]). Defendant's other challenges to his plea, alleging that its voluntariness was impaired by mental illness and drugs, are unsubstantiated and contradicted by the plea allocution record.

We find the sentences excessive to the extent indicated. This determination renders defendant's remaining contention academic.

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

917 The People of the State of New York, Ind. 2957/13
Respondent,

-against-

Michael McKinney,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered December 18, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

The motion court properly denied defendant's request for a *Mapp/Dunaway* hearing. Defendant received specific information about the basis for his arrest, including that a police officer observed him holding what appeared to be a bag of marijuana in public view. Accordingly, defendant's general assertion that the arresting officers did not see him commit a crime was not a sworn allegation of fact sufficient to support a ground for

suppression, nor did it create any factual issue warranting a hearing (*see e.g. People v France*, 12 NY3d 790 [2009]).

The indictment was not jurisdictionally defective, because it charged defendant with a particular crime, and alleged that he committed acts constituting every material element of the crime (*see People v Iannone*, 45 NY2d 589, 600 [1978]). Although the original indictment alleged that defendant possessed cocaine, and it is undisputed that the drug involved was actually heroin, this did not create a jurisdictional defect. Had the case proceeded to trial on a factually incorrect, unamended indictment, that may have raised issues such as variance between the indictment and the proof (*see e.g. People v Rodriguez*, 190 AD2d 566 [1st Dept 1993], *lv denied* 81 NY2d 1019 [1993]), but no such issues arise in the present procedural posture.

To the extent defendant challenges any nonjurisdictional defects in the indictment, they are waived by his guilty plea (*see People v Hansen*, 95 NY2d 227, 230-231 [2000]). In any event, the trial court properly permitted the People to amend the indictment to accurately allege that defendant possessed heroin, rather than cocaine, after reviewing the grand jury minutes and confirming that the error was clerical and that the proof before

the grand jury dealt with heroin. Defendant, who had no objection to the amendment, was not prejudiced or surprised (*see* CPL 200.70[1]; *People v Acevedo*, 215 AD2d 115, 116 [1st Dept 1995], *lv denied* 85 NY2d 969 [1995]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

918 Manuel Siguencia, Index 160680/13
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

4101 Austin Boulevard Corp.,
et al.,
Defendants.

_____

Bisogno & Meyerson, LLP, Brooklyn (Theresa A. Ficchi of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered on or about December 5, 2014, which, to the extent appealed from as limited by the briefs, granted the City's motion for summary judgment dismissing plaintiff's Labor Law §§ 240 and 241 claims, unanimously reversed, on the law, without costs, and the motion denied.

The City concedes that the court improperly dismissed the Labor Law §§ 240 and 241 claims on the ground that the City was

an out-of-possession landlord, since the statutes impose liability on property owners without regard to the owner's degree of supervision or control over the premises (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]; *Celestine v City of New York*, 86 AD2d 592 [2d Dept 1982], *affd* 59 NY2d 938 [1983]).

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

919 In re Ronnie B.,
Petitioner-Respondent,

-against-

Charlene G.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Andrew J. Baer, New York, for respondent.

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Order, Family Court, New York County (Tamara Schwartz, Referee), entered on or about April 30, 2015, which denied respondent's motion to dismiss the family offense petition for failure to state a cause of action, unanimously modified, on the law, to grant the motion as to the allegation that respondent telephoned and sent threatening text messages to the paternal grandmother, and otherwise affirmed, without costs.

The referee correctly denied respondent's motion to dismiss the petition to the extent it alleges that, on a specified date, respondent telephoned repeatedly, making threats of physical harm to petitioner and his family, since that allegation states a cause of action for harassment in the first or second degree (*see* Penal Law §§ 240.25; 240.26; *Matter of Pamela N. v Neil N.*, 93 AD3d 1107 [3d Dept 2012]; *see also Matter of Little v Renz*, 90

AD3d 757 [2d Dept 2011]). However, the allegation that respondent telephoned and sent threatening text messages to the paternal grandmother fails to state a cause of action for a family offense because those alleged actions were not directed at petitioner or the children (*see Matter of Janet GG. v Robert GG.*, 88 AD3d 1204 [3d Dept 2011], *lv denied* 18 NY3d 803 [2012]).

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

920 The People of the State of New York, Ind. 2536/12
Respondent,

-against-

Mitchell Taebel,
Defendant-Appellant.

_____

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

Mitchell Taebel, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered May 10, 2013, as amended May 15, 2013, convicting defendant, after a jury trial, of attempted assault in the second degree and assault in the third degree, and sentencing him to an aggregate term of six months, with five years' probation, unanimously affirmed.

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

jury's determinations concerning credibility. The evidence refuted defendant's justification defense, and established his intent to cause serious physical injury.

We have considered and rejected defendant's pro se arguments.

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

921 Stacey Levine, et al., Index 150845/13
Plaintiffs-Appellants,

-against-

425 Madison Associates, et al.,
Defendants-Respondents.

_____

Ressler & Ressler, New York (Ellen R. Werther of counsel), for appellants.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered December 24, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Stacey Levine alleges that she slipped and fell while descending a marble staircase in a residential building owned and managed by defendants. On appeal, she does not challenge the dismissal of her common-law negligence claim based on the inherently slippery condition of the floor, which is not an actionable defect under the common law (*Waiters v Northern Trust Co. of N.Y.*, 29 AD3d 325, 326-327 [1st Dept 2006]; *Sarmiento v C & E Assoc.*, 40 AD3d 524, 527 [1st Dept 2007]). Rather, she asserts that the motion court erred in dismissing her

statutory claims.

The motion court correctly dismissed the statutory claims. Although defendants failed to submit competent evidence showing the year the building was erected (*see Powers v 31 E 31 LLC*, 24 NY3d 84, 92-93 [2014]), no version of the Building Code is implicated. Defendants have not violated any sections of the Building Code or Fire Code alleged by plaintiffs, since the staircase upon which the injured plaintiff allegedly fell was neither an "interior stair" within the meaning of the 1968 Building Code of the City of New York or predecessor Building Codes (Administrative Code §§ 27-232, 27-375[h]; *see Cusumano v City of New York*, 15 NY3d 319, 324 [2010]; *see also Maksuti v Best Italian Pizza*, 27 AD3d 300 [1st Dept 2006], *lv denied* 7 NY3d 715 [2006]), nor a "means of egress" within the meaning of the

New York City Building Code and the New York City Fire Code (NY City Building Code [Administrative Code of City of NY tit 28, ch 7] §§ BC 1002.1, 1003.4; NY City Fire Code [Administrative Code of City of NY tit 29, ch 2, ch 10] §§ FC 1001.1, 1001.2, 1002.1, 1027.1).

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

923 EVUNP Holdings LLC, et al., Index 650841/14
Plaintiffs-Respondents,

-against-

Jacob Frydman, et al.,
Defendants-Appellants.

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Daniel C. Edelman, New York, for appellants.

Reed Smith LLP, New York (Steven Cooper of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 15, 2014, which, to the extent appealed from as limited by the briefs, awarded plaintiffs costs and attorneys' fees, unanimously affirmed, with costs.

The motion court providently exercised its discretion in awarding plaintiffs fees (CPLR 2001) and costs (CPLR 8202) incurred in responding to and moving to strike defendants' multiple, defective motions to dismiss the complaint. Contrary to defendants' contention, they were provided with a sufficient opportunity to be heard on the issue of fees and costs, imposed as a condition for being allowed to refile their motion to dismiss. Whether the sum the court awarded was proper is not

before us on this appeal.

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

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

924 The People of the State of New York, Respondent, Dkt. 42503C/07 48878C/07

-against-

Craig Heywood, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Lawrence T. Hausman of counsel), for appellant.

Darcel D. Clark, District Attoroney, Bronx (Marianne Stracquadanio of counsel), for respondent.

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Order, Supreme Court, Bronx County (Eugene Oliver, Jr., J.), entered on or about February 4, 2015, which denied defendant's CPL 440.10 motion to vacate two judgments of conviction rendered July 17 and August 14, 2007, unanimously affirmed.

The court properly exercised its discretion under CPL 440.10(3)(b) in summarily denying what was essentially a renewal motion. On a prior motion, defendant had alleged that the attorney who represented him at the time of his 2007 pleas to misdemeanors involving the sale of marijuana gave him affirmative misadvice that these convictions would have no immigration consequences (*see generally People v McDonald*, 1 NY3d 109 [2003]). After a hearing, at which defendant, the sole witness, testified that his lawyer told him these convictions would come

"off [defendant's] record" in 6 to 12 months if he stayed out of trouble and would have no adverse immigration affect, the court (Patricia Anne Williams, J.), denied the motion on the ground that defendant failed to meet his burden of proving the existence of the alleged misadvice.

The present motion asserted the same ground, but stated that defendant now intended to call plea counsel as a witness. Regardless of the validity of defendant's excuse for not doing so at the original hearing, he did not show that a new hearing was warranted. Plea counsel's affidavit stated that he had "no specific recollection of providing [defendant] with any advice as to Immigration consequences," and that his files for defendant's cases could not be located. Defendant's assertion that, if called at a hearing, counsel might nevertheless provide corroborating testimony is speculative. At most, defendant would be able to establish a lack-of-advice claim, which would be barred by the nonretroactivity of *Padilla v Kentucky* (559 US 356 [2010]).

Defendant also failed to satisfy the requirement of prejudice. Defendant had only been in the United States for a few months, on an overstayed visa, at the time that he pleaded guilty, and his written submissions and his testimony at the

hearing on his first 440.10 motion established that he wanted to avoid incarceration. Thus, it was unlikely that he would have rejected a plea offer and risked a conviction after trial even had he known about the immigration consequences of his plea. While defendant asserts that he would have held out for a plea offer without immigration consequences had his plea counsel properly advised him, there is no reason to believe that his counsel, who negotiated a favorable plea bargain with no jail time, would have been able to obtain a plea to a violation rather than a misdemeanor.

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

925 Robbin Franklin-Hood, Index 152476/13
Plaintiff-Respondent,

-against-

80th Street, LLC,
Defendant-Respondent,

Juan Castro,
Defendant,

Weber Farhat Realty Management Inc.,
Defendant-Appellant.

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for appellant.

The Law Office of Judah Z. Cohen, PLLC, Woodmere (Judah Z. Cohen of counsel), for Robin Franklin-Hood, respondent.

Ropers Majeski Kohn Bentley P.C., New York (Elana T. Jacobs of counsel), for 80th Street I LLC, respondent.

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Order, Supreme Court, New York County (Peter H. Moulton, J.), entered April 2, 2015, which denied the motion of defendant Weber Farhat Realty Management Inc. to dismiss the claims against it pursuant to CPLR 3211 and, in effect, denied as moot the conditional cross motion of defendant 80th Street I LLC (sued herein as 80th Street, LLC) to convert its cross claims to third-party claims, unanimously reversed, on the law, without costs, and both the motion and conditional cross motion granted.

Plaintiff's claims against Weber are barred both by Executive Law § 297(9) (*see Horowitz v Aetna Life Ins.*, 148 AD2d 584, 585 [2d Dept 1989]) and res judicata (*see Zarcone v Perry*, 78 AD2d 70, 76, 78-79 [2d Dept 1980], *affd* 55 NY2d 782 [1981], *cert denied* 456 US 979 [1982]; *see also O'Brien v City of Syracuse*, 54 NY2d 353, 356-358 [1981]). With the dismissal of the complaint as against Weber, 80th Street's cross claims against Weber should be converted into a third-party action (*see e.g. Eddine v Federated Dept. Stores, Inc.*, 72 AD3d 487 [1st Dept 2010]).

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

926-
927-
928 Index 303275/12

Bridgette Belton,
Plaintiff-Respondent-Appellant,

-against-

Lal Chicken, Inc., et al.,
Defendants-Appellants-Respondents.

_____

Dandeneau & Lott, Melville (Gerald Dandeneau of counsel), for appellants-respondents.

Jones Morrison LLP, Scarsdale (Steven T. Sledzik of counsel), for respondent-appellant.

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Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered February 5, 2015, awarding plaintiff, inter alia, the principal sum of $300,000 for emotional distress, and $20,000 for compensatory damages for constructive discharge, unanimously affirmed, without costs. Amended judgment, same court and Justice, entered August 20, 2015, awarding plaintiff the principal sum of $100,000, unanimously reversed, on the facts, without costs, and the amended judgment vacated. Appeals from order, same court and Justice, entered June 30, 2015, which granted in part and denied in part defendants' motion to set aside the jury verdict, unanimously dismissed, without costs, as subsumed in the appeal from the amended judgment.

Plaintiff adduced sufficient evidence to support the jury's verdict on her hostile work environment claim under the New York City Human Rights Law (City HRL) (Administrative Code of the City of New York § 8-101 *et seq.*). She testified that she was subjected to unwanted touching and sexual advances for months by her supervisor, despite telling him that she was not interested. The jury credited her version of events and not the supervisor's claim of a consensual relationship. The videotape taken by plaintiff depicting the supervisor engaging in the complained-of behavior was properly admitted. Contrary to defendants' contentions, there is no requirement that a video recording have audio to be admissible (*see generally People v Patterson*, 93 NY2d 80, 84 [1999]; *People v Wemette*, 285 AD2d 729, 730-731 [3d Dept 2001], *lv denied* 97 NY2d 689 [2001]). There is also sufficient evidence to support plaintiff's claim of constructive termination as charged, and any claim of error in the charge is unpreserved (*see Barry v Manglass*, 55 NY2d 803 [1981]).

The trial court correctly declined to charge the jury on mitigation under the City HRL, since having an anti-harassment poster on the wall with managers' phone numbers, and mentioning the policy in management meetings, is insufficient evidence of a "meaningful" policy, as the statute requires (Administrative Code

§ 8-107[13[d][1][i]). Nor were defendants entitled to assert the "*Faragher-Ellerth*" affirmative defense (*see Faragher v City of Boca Raton*, 524 US 775 [1998]; *Burlington Indus., Inc. v Ellerth*, 524 US 742 [1998]), assuming that the issue is preserved, since that defense is unavailable in a City HRL claim (*Zakrzewska v New School*, 14 NY3d 469, 479-480 [2010]). Plaintiff did not assert a hostile work environment claim under any law other than the City HRL, nor was she required to do so.

Defendants failed to preserve their objection to the charges on loss of earnings and loss of enjoyment of life. In any event, sufficient evidence of plaintiff's damages was adduced to permit those claims to go to the jury. Plaintiff's counsel's arguments in closing concerning a time-unit measure of damages were improper. However, defendants failed to object, and in any event the comments do not warrant reversal of the jury verdict (*see Gregware v City of New York*, 132 AD3d 51, 61 [1st Dept 2015]). The jury was correctly charged on damages, and its verdict does not reflect counsel's suggestion.

The court correctly denied defendants Lal Chicken, Inc., Lal Chicken and Donuts Management, Inc., and Lalmir Sultanzada's motion to dismiss the action on the ground that only defendant 145th Street Ice Cream, Inc. was plaintiff's employer. All

defendants admitted being plaintiff's employer in their answer, and never moved to amend. In any event, amending the pleadings at the commencement of trial would be unduly prejudicial to plaintiff (*see De Fabio v Nadler Rental Serv.*, 27 AD2d 931, 931 [2d Dept 1967]).

We find, contrary to the trial court, that the jury verdict of $300,000 in damages for emotional distress was reasonable as was the award of $20,000 as compensatory damages for constructive discharge (*see* CPLR 5501[c]; *Salemi v Gloria's Tribeca Inc.*, 115 AD3d 569, 570 [1st Dept 2014]; *Albunio v City of New York*, 67 AD3d 407 [1st Dept 2009], *affd* 16 NY3d 472 [2011]; *McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 AD2d 269 [1st Dept 1998], *lv denied* 94 NY2d 753 [1999]; *Sogg v American Airlines*, 193 AD2d 153 [1st Dept 1993], *lv denied* 83 NY2d 754 [1994]).

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

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

929-
930 The People of the State of New York,
Respondent,

-against-

Wayne Newland,
Defendant-Appellant.

Ind. 3627/11

_____

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

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at speedy trial motion; Renee A. White, J. at hearing on admissibility of video; Jill Konviser, J. at jury trial and sentencing), rendered April 23, 2013, convicting defendant of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

Defendant's speedy trial arguments are unpreserved (*see People v Beasley*, 16 NY3d 289, 292-293 [2011]), and we decline to review them in the interest of justice. Although each of the three periods at issue on appeal was litigated on the speedy trial motion, defendant did not articulate the specific arguments

he now makes, and the court "did not expressly decide, in response to protest, the issues now raised on appeal" (*People v Miranda*, __ NY3d __, 2016 NY Slip Op 02120, *2 [2016]). As an alternative holding, we find no violation of defendant's right to a speedy trial. The April 10 adjournment was excludable as it resulted from a continuance granted at the request or with the consent of defendant (CPL 30.30[4][b]), defendant failed to overcome the presumption that the People's July 6 certificate of readiness was a truthful statement of present readiness (*see People v Sibblies*, 22 NY3d 1174, 1181 [2014] [Graffeo, J. concurring]; *People v Brown*, 126 AD3d 516, 517-518 [1st Dept 2015], *lv granted* 25 NY3d 1160 [2015]), and the November 15 adjournment was not a delay directly implicating the People's ability to proceed with trial (*see People v Anderson*, 66 NY2d 529, 535 [1985]).

We have considered and rejected defendant's arguments relating to a video recording that was admitted at trial.

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

931-
932-
933 Index 101932/07

Andrea Sheryll, et al.,
Plaintiffs-Appellants,

Kum Ja Choi, et al.,
Plaintiffs,

-against-

United General Construction, et al.,
Defendants-Appellants,

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

_____

The Altman Law Firm, PLLC, New York (Michael T. Altman of counsel), for Sheryll, appellants.

Lewis Johs Avallone Aviles, LLP, Islandia (Robert A. Lifson of counsel), for United General Construction and Afzal Choudry, Rashin Mostafizur, appellants.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for the City of New York, respondent.

Mischel & Horn, PC, New York (Scott T. Horn of counsel), for 34th Street Partnership, Inc., respondent.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered September 26, 2014, which granted defendants City of New York's and 34th Street Partnership, Inc.'s motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs. Appeal from order, same

court and Justice, entered December 4, 2013, to the extent it denied plaintiffs' motion to renew their motion to strike the City's answer for failure to provide discovery, unanimously dismissed, without costs, as academic.

There is no evidence that the accident in which plaintiff Andrea Sheryll was struck on the sidewalk by an automobile driven by defendant Rashin Mostafizur was caused by anything other than Mostafizur's loss of control of his vehicle when he pressed on the accelerator instead of the brake pedal, as he testified, and jumped the curb after swerving to avoid a pedestrian in the street (*see Margolin v Friedman*, 57 AD2d 763 [1st Dept 1977], *affd* 43 NY2d 982 [1978]; *Chowes v Aslam*, 58 AD3d 790, 791 [2d Dept 2009]; *Rivera v Goldstein*, 152 AD2d 556 [2d Dept 1989]). Contrary to plaintiffs' contention, the sidewalk extension onto which Mostafizur swerved, hitting a large decorative planter before ending up on the sidewalk, did not jut into the lane in which he was driving, and its design was not a proximate cause of the accident.

Notwithstanding the City's disregard of outstanding discovery orders, in light of the foregoing, plaintiffs' appeal

from the order denying their motion for renewal is academic.

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: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

934 The People of the State of New York, Ind. 6053/11N
Respondent,

-against-

Alba Lowry,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered May 3, 2012,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 26, 2016

CLERK

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

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

935 1380 Housing Development Fund, etc., Plaintiff-Respondent, Index 35346/13E

—against—

Barbara Carlin, Defendant-Appellant.

_____

Belowich & Walsh LLP, White Plains (Kerry E. Ford of counsel), for appellant.

Greenberg Traurig, LLP, New York (Daniel R. Milstein of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered October 22, 2014, declaring that defendant has no lien upon the subject premises and that the 2005 UCC-1 financing statement and the 2010 UCC-1 fixture filing were erroneously filed and are deemed extinguished, and bringing up for review an order, same court and Justice, entered August 5, 2014, which granted plaintiff's motion for summary judgment, and denied defendant's cross motion to dismiss the complaint and for leave to file an amended answer, unanimously affirmed, with costs.

Defendant failed to show that she had perfected a lien on the property by virtue of a 2005 UCC-1 financing statement and a 2010 UCC-1 "fixture filing." The 2005 UCC-1 financing statement

was not filed in the local real property records (UCC 9-334[e][1], Comment 6) but with the Secretary of State, in Albany. The 2010 UCC-1 fixture filing fails to satisfy any of the statutory criteria for a fixture filing (UCC 9-502[b]); it does not describe the collateral as including fixtures, does not indicate that it is intended to cover fixtures on the property, does not indicate that it is to be filed in the real property records, and does not provide a description of the property, including its location and specifying the block and lot.

In any event, defendant failed to show that the lien she purported to perfect had been created by a security agreement (UCC 9-102[73][A]). UCC 9-108 requires the security agreement creating a lien to reasonably identify the collateral that will be subject to the lien. The stipulation and pledge agreement submitted by defendant describe the collateral as 50% share certificates evidencing 50% of all of the borrower's capital stock. Neither certificate makes any reference to the real property at issue. While the borrower consented to defendant's filing a UCC-1 financing statement as against its assets "pursuant to" the stipulation, the corporate resolution whereby consent was given did not reasonably identify or describe the "assets" of the borrower.

We reject defendant's argument that she should be permitted further discovery as to the intent of the contracting parties concerning her security interest in the assets of the borrower. "[I]n the case of a security agreement, there must be a writing that objectively indicates the parties intended to create a security interest" (*Matter of Talco Contrs. v New York State Tax Commn.*, 140 AD2d 834, 835 [3d Dept 1988]). We perceive no basis for further discovery.

Nor does equity require that an equitable lien be imposed in defendant's favor, since there is no agreement between the contracting parties specifically granting defendant a lien on the property (*see Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996]). Moreover, the property was purchased by plaintiff in a judicially sanctioned foreclosure sale.

Defendant's proposed amendment to her answer is patently lacking in merit (*see BGC Partners, Inc. v Refco Sec., LLC*, 96 AD3d 601, 603 [1st Dept 2012]). The 2005 UCC-1 financing statement does not satisfy the UCC's requirements for a fixture

filing, and does not perfect a lien created by a security agreement reasonably identifying the property as the collateral.

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

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

937 The People of the State of New York, Ind. 3466/14
Respondent,

-against-

Corey Cintron,
Defendant-Appellant.

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered December 3, 2014,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 26, 2016

CLERK

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

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

938 The People of the State of New York, Ind. 1037/11
Respondent,

-against-

Kier Valentine,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered July 17, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 26, 2016

CLERK

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

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

940 Pablo Pareja, Index 158814/12
Plaintiff-Respondent,

-against-

Anthony Davis,
Defendant-Appellant.

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Rivkin Radler, LLP, Uniondale (Stuart M. Bodoff of counsel), for appellant.

Jaroslawicz & Jaros, LLC, New York (Norman Frowley and David Tolchin of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 2, 2015, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendant established prima facie that he was entitled to the exemption under the Labor Law for "owners of one and two-family dwellings who contract for but do not direct or control the work" (Labor Law §§ 240[1]; 241[6]). Neither he nor his agent directed or controlled the methods and means of plaintiff's work (*see Affri v Basch*, 13 NY3d 592 [2009]; *Marcano v Hailey Dev. Group, LLC*, 117 AD3d 518 [1st Dept 2014]; *Chambers*

v Tom, 95 AD3d 666 [1st Dept 2012]; *see also Fiorentine v Militello*, 275 AD2d 990 [4th Dept 2000]). Defendant was living in England during the renovations, and visited the site only occasionally. Plaintiff testified that the general contractor, his employer, provided the ladder from which he fell, and placed the cloth under its feet. Plaintiff further testified that he received his work instructions from the general contractor's foreman, not from defendant's agent, who was not at the site when he undertook the work leading to his accident and who never interacted with any of the workers.

Further, defendant's agent lacked the authority to direct or control the methods and means of plaintiff's work. The agency agreement expressly excludes from the agent's duties "[d]etermining, approving or disapproving construction means and methods," and nothing else in the agreement contradicts this express exclusion. Indeed, the agent's contractual powers are targeted to general management of the project schedule and budget. While the agent testified that he might raise safety or quality-of-work issues with the members of the renovation team if he happened to observe any, he was not authorized to do so by defendant, and, even if he were so authorized, he did not say that he would or could direct or control the specific methods and

means of plaintiff's work.

In opposition, plaintiff failed to raise an issue of fact as to defendant's entitlement to the homeowner's exemption. He offered merely unfounded speculation as to defendant's commercial use of the house (*see Farias v Simon*, 122 AD3d 466, 467 [1st Dept 2014]).

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

941 In re Elena Balyberdina, Index 101382/13
Petitioner-Appellant,

-against-

The National Institute for the Psychotherapies,
Respondent-Respondent.

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Stewart Lee Karlin Law Group, P.C., New York (Daniel E. Dugan of counsel), for appellant.

Putney, Twombly, Hall & Hirson LLP, New York (Mark A. Hernandez of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered April 14, 2015, denying the petition challenging respondent the National Institute for the Psychotherapies' determination, dated June 11, 2013, not to admit petitioner to its Adult Training Program (ATP), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination was rational and not arbitrary and capricious, made in bad faith, or contrary to its own policies and procedures (*see Matter of Susan M. v New York Law School*, 76 NY2d 241, 246 [1990]). The record establishes that while petitioner may have had difficulties with her initial

supervisor, she was assigned a new supervisor. Further, during her "preliminary year," petitioner received uniformly negative evaluations and no recommendations for admission to the ATP. Nevertheless, petitioner was given a chance to reapply to the ATP after an extension of her preliminary year, on a remedial basis, which was an exception respondent made for petitioner, in anticipation of her improved performance. Upon completion of the remedial preliminary year, and consideration of petitioner's evaluations from supervisors, advisors, instructors and other relevant personnel, respondent determined that petitioner's progress was insufficient to warrant a recommendation that she reapply or be admitted to the ATP. The evidence shows that petitioner was informed of her deficiencies and respondent's academic policy that it does not guarantee enrollment to the ATP to any student (*see Matter of Lipsky v Ferkauf Graduate Sch. of Psychology*, 127 AD3d 582, 582-583 [1st Dept 2015]).

To the extent petitioner argues that respondent violated Title IV of the Higher Education Act (HEA) of 1965, respondent's evidence shows that Title IV and its implementing regulations do not apply to respondent because it does not participate in any Title IV, HEA programs or any other federal student financial assistance programs (*see* 34 CFR 668.1), but is funded entirely

through private donations, tuition, and income generated through psychoanalytic treatment services provided to individuals in the community. Petitioner failed to contradict respondent's evidence.

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

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

942N JPMorgan Chase Bank, National Association,
Plaintiff-Respondent,

-against-

Sharay Hayes,
Defendant-Appellant,

New York City Environmental Control Board, et al.,
Defendants.

Index 109882/09

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Rozario & Associates, P.C., Brooklyn (Rovin R. Rozario and Daniel Park of counsel), for appellant.

Knuckles Komosinski & Elliott LLP, Elmsford (Robert T. Yusko of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered August 19, 2015, which denied defendant Sharay Hayes's motion to compel plaintiff to comply with the terms of a stipulation, and granted plaintiff's cross motion for an extension of time to oppose defendant's motion nunc pro tunc, unanimously affirmed, with costs.

The motion court properly considered plaintiff's late-served opposition to defendant's motion, because the 15-day delay was to accommodate new counsel, and there was no showing of

prejudice to defendant, who was able to submit reply papers (CPLR 2214[b], [c]; *see Traders Co. v AST Sportswear, Inc.*, 31 AD3d 276 [1st Dept 2006]; *Romeo v Ben-Soph Food Corp.*, 146 AD2d 688 [2d Dept 1989]).

In any event, the email from plaintiff's counsel to defendant stating, "My client has advised me that based upon the BPO the minimum offer that could be submitted to the investor for consideration is $985,600," was not a contractually binding offer (*see Eustathopoulo v Gillespie*, 218 App Div 179, 186 [1st Dept 1926]).

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

ENTERED: APRIL 26, 2016

CLERK

Sweeny, J.P., Saxe, Moskowitz, Webber, JJ.

943N Tribeca Space Managers, Inc., Index 653292/13
Plaintiff-Appellant,

-against-

Tribeca Mews Ltd., et al,
Defendants-Respondents.

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Stroock & Stroock & Lavan LLP, New York (Melvin A. Brosterman of counsel), and Cyruli Shanks Hart & Zizmor, New York (James E. Schwartz of counsel), for appellant.

Braunstein Turkish LLP, Woodbury (William J. Turkish of counsel), for respondents.

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Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered August 6, 2015, which, to the extent appealed from, denied plaintiff's motion to strike defendants' answer, unanimously modified, on the law, the facts, and in the exercise of discretion, to impose a further sanction on defendants of $1000, and otherwise affirmed, without costs.

The motion court providently exercised its discretion in declining to strike defendants' answer (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 [2013]). Although defendants' conduct was dilatory and obstructive, the extreme sanction of striking the answer is not warranted, since plaintiff failed to show conclusively that

defendants' conduct was willful, contumacious, or in bad faith (*see Christian v City of New York*, 269 AD2d 135, 137 [1st Dept 2000]). Defendants ultimately complied with three discovery orders, paid a $2,000 discovery sanction, and provided an explanation for their failure to timely comply with the orders — namely, their difficulty in recovering data from their computer system.

A further monetary sanction, however, is warranted. Defendants did not pay the $2,000 sanction until almost four months after the court-ordered deadline for such payment. They also failed to explain why they asserted, in support of their motion to strike plaintiff's first note of issue, that "crucial" depositions were required, and then never noticed or took the depositions before seeking to strike plaintiff's second note of issue on the same basis.

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

ENTERED: APRIL 26, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

794 Patrick Quintavalle, Index 303665/14
Plaintiff-Appellant,

-against-

Nestor Perez, III, et al.,
Defendants-Respondents.

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Harris J. Zakarin, P.C., Melville (Harris J. Zakarin of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 4, 2015, reversed, on the law, without costs, and the motion granted.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny Jr.
David B. Saxe
Rosalyn H. Richter
Marcy L. Kahn, JJ.

794
Index 303665/14

_____x

Patrick Quintavalle,
Plaintiff-Appellant,

-against-

Nestor Perez, III, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 4, 2015, which denied his motion for partial summary judgment on the issue of liability.

Harris J. Zakarin, P.C., Melville (Harris J. Zakarin of counsel) and Robinson & Yablon, P.C., New York for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for respondents.

SAXE, J.

This appeal requires us to consider the application of case law holding that a pedestrian who crosses in the crosswalk with the right-of-way may still be held comparatively negligent, if he failed to notice an oncoming vehicle that could be seen by the use of ordinary attention. On the facts presented here, that case law is not determinative, and therefore, as a matter of law plaintiff is not comparatively negligent based on a failure to notice and avoid a vehicle that came up from behind him, striking him as the vehicle turned into the crosswalk. Indeed, the imposition of such an obligation on pedestrians in such circumstances would be unreasonable and unsafe.

On July 2, 2014, at about 9:30 p.m., plaintiff Patrick Quintavalle was heading east across Third Avenue in the north crosswalk of the intersection at 41st Street and Third Avenue in Manhattan. With the light in his favor, as he reached the middle of the crosswalk, an airport shuttle bus driven by defendant Nestor Perez, III, and owned by defendant Golden Touch Transportation of NY, Inc., which was traveling eastbound on 41st Street, turned left to go north on Third Avenue, running over plaintiff's left foot as he crossed. Plaintiff testified that he looked right and left before proceeding into the crosswalk, but did not see the bus until it made contact with him. Plaintiff

suffered fractures, a partial amputation of the first and second digits, and a de-gloving injury to his left foot.

Plaintiff appeals from the motion court's denial of his motion for summary judgment. The court rejected plaintiff's argument that because the bus approached from behind him and therefore was not within his field of vision until it was upon him, he did not have the opportunity to avoid it in time; instead, the court held that an issue of fact was presented as to whether plaintiff was comparatively negligent for failing to observe what was there to be seen, citing *Thoma v Ronai* (82 NY2d 736 [1993], *affg* 189 AD2d 635 [1st Dept 1993]).

Defendant's theory that plaintiff may be found comparatively negligent for his failure to notice the bus before it struck him, in effect imposes on the pedestrian an affirmative obligation to continually check for vehicles coming from every direction while in the process of crossing the street. In our view, defendant's theory of comparative negligence goes beyond that which the law requires -- or should require -- of a pedestrian crossing in a crosswalk with the right-of-way in such circumstances. While case law imposes a duty of care on a pedestrian, even when that pedestrian has the right-of-way in a crosswalk, it does not support the extent of the obligation defendant suggests.

The existence of a pedestrian's duty of due care, even when

crossing with the light and the right of way, is longstanding (*see e.g. Counihan v J.H. Werbelovsky's Sons*, 5 AD2d 80 [1st Dept 1957]). In *Counihan*, this Court held that although the plaintiff pedestrian who was struck by a vehicle while crossing the street was entitled to a jury charge that "once having started to cross with a green light in her favor, she had the right to continue to the other side of the street[, and] [t]o this right of way defendant had the duty to defer," nevertheless, "[p]laintiff would . . . have been obliged to exercise due care, in the light of all the circumstances, in the exercise of her right of way" (*id.* at 83).

The Third Department in *Schmidt v Flickinger Co.* (88 AD2d 1068 [3d Dept 1982]), elaborated on the rationale for treating as a question of fact the issue of whether the pedestrian was guilty of any negligence contributing to the accident; essentially, the pedestrian's duty is based on her obligation to "see[] what was there to be seen" (*id.* at 1068).

However, not all cases in which a pedestrian with the right-of-way is struck by a vehicle present fact issues regarding the pedestrian's comparative negligence (*see e.g. Perez-Hernandez v M. Marte Auto Corp.*, 104 AD3d 489 [1st Dept 2013]). To discern

the distinction, it is useful to begin discussion with *Thoma v Ronai* (82 NY2d 736 [1993], *affg* 189 AD2d 635 [1st Dept 1993]).

In *Thoma*, the plaintiff was crossing East 79th Street along the west side of First Avenue, with the walk signal in her favor, when she was hit while in the crosswalk by a van that had been driving northbound on First Avenue, which made a left turn onto East 79th Street heading westbound. This Court, in affirming the denial of the plaintiff's motion for summary judgment, observed that "[if] [the plaintiff] had looked to her left while crossing, she almost certainly would have seen defendant's van turning left on East 79th Street from First Avenue and might have avoided the accident" (189 AD3d at 636). The Court of Appeals, in affirming, similarly held that "[the plaintiff's] affidavit and the police accident report[] demonstrate that she may have been negligent in failing to look to her left while crossing the intersection" (82 NY2d at 737).

But, there is an important circumstance in *Thoma* that should be taken into account when considering how to apply its holding in other cases; indeed, that circumstance is highlighted by this Court's discussion of the record in *Thoma*. In its analysis in *Thoma*, the majority of this Court placed substantial emphasis on the pedestrian's position and direction when the van hit her (189 AD2d at 636). It acknowledged that according to the defendant,

the plaintiff had been walking northbound in the crosswalk as she crossed East 79th Street on the west side of First Avenue, when his van, driving northbound on First Avenue, approached the plaintiff from behind and hit her on her right side as he turned left onto East 79th Street. But, in order to hold that the plaintiff might be held comparatively negligent, the Court looked to the plaintiff's version of the events. In her affidavit, the plaintiff asserted that she was heading south, not north, as she crossed East 79th Street on the west side of First Avenue, and so was struck on her left, not her right side by defendant's northbound van when it turned left from First Avenue onto East 79th Street. This Court and the Court of Appeals both emphasized that the plaintiff's rendition of the circumstances was supported by the police report stating that her left side was injured, and they looked only to the plaintiff's version of events to reason that she might be found comparatively negligent.

The distinction between the defendant's version of the events and the plaintiff's version in *Thoma* is critical, because in the plaintiff's version, she was facing toward the defendant's oncoming van as it approached her in the crosswalk; in the defendant's version, the oncoming van would have come up from behind her. In order to allow for the possibility that the plaintiff might have been comparatively negligent in *Thoma*, the

Court needed to use the plaintiff's narrative, which supported its reasoning that the plaintiff could have seen the defendant's van in advance of the accident, merely by looking toward her left while crossing. Notably, the defendant's version of events did not allow for that same possibility, since noticing a vehicle coming up from behind would have required the plaintiff to not only maintain awareness of what was in her field of vision, but to turn in the opposition direction of where she was headed, a measure that common sense tells us may create more dangers than it avoids. Unlike glancing to the side within a person's field of vision while walking, looking behind while walking forward is actually *unsafe*. Given that obvious difficulty with imposing any possibility of liability on the plaintiff had the events occurred as the defendant described them, the Court in *Thoma* did not rely on the defendant's version in directing a trial on the issue of the plaintiff's possible comparative negligence; it looked only to the plaintiff's version.

Other cases of this Court and the Second Department help illustrate how, notwithstanding the *Thoma* case, there are circumstances where a pedestrian with the right of way may not be held comparatively negligent based on an alleged failure to pay ordinary attention and exercise ordinary caution. For instance,

in *Perez-Hernandez v M. Marte Auto Corp.* (104 AD3d 489 [1st Dept 2013]), where this Court affirmed a grant of partial summary judgment to the plaintiff, the appellate record establishes that the plaintiff had the right-of-way and was walking westbound in the crosswalk on Sedgewick Avenue at 195th Street in the Bronx, when the defendant's vehicle, which had been heading westbound on 195th Street, turned left onto Sedgewick Avenue, hitting him on his right side and knocking him down. So, as in the present case, the vehicle came up from behind the plaintiff before it struck him in the crosswalk. This Court, in rejecting the possibility of comparative negligence on the part of the plaintiff, observed that "[p]laintiff testified that he looked both ways before crossing the street, and *he could not have avoided the accident* given his testimony that he noticed the car moments before being struck" (104 AD3d at 490 [emphasis added]). In other words, given the situation, the plaintiff could not have avoided the accident through the exercise of ordinary attention and the exercise of ordinary caution.

In *Hines v New York City Tr. Auth.* (112 AD3d 528 [1st Dept 2013]), the appellate record reflects that the plaintiff had the right of way while crossing Greenwich Street southbound along the eastern side of Seventh Avenue, when she was hit by a vehicle making a left turn from Seventh Avenue (which runs one way,

southbound) onto Greenwich Street. When the plaintiff was in the middle of the crosswalk, she saw in her peripheral vision a large vehicle moving fast and making a left turn into the crosswalk, a split second before it struck her. This Court explained that the plaintiff could not be held comparatively negligent based on her assertion that she "continued to look for traffic as she crossed the street, and that she could not have avoided the accident because she only noticed defendants' vehicle, which was moving quickly, a 'split second' prior to being struck" (112 AD3d at 529).

The facts here are comparable to those in *Perez-Hernandez* and *Hines*, and are like the defendant's version of events in *Thoma*. There is nothing to indicate that plaintiff failed to exercise ordinary caution or pay ordinary attention as he walked, such as would have given him advance warning of defendants' bus coming up behind him. The only level of attention that could have succeeded in his avoiding being hit by defendants' bus would have required his continually turning around and checking behind him as he walked. The imposition of such an obligation on a pedestrian would be unreasonable and unsafe, and is not required by the ruling in *Thoma*.

The Second Department's ruling in *Castiglione v Kruse* (130 AD3d 957 [2d Dept 2015]) provides support for this reasoning.

The majority there, in holding that the plaintiff pedestrian was free from comparative negligence as a matter of law, offered as one of its reasons the view that the defendant's vehicle had approached the plaintiff from behind and to her right, so that it was out of her view until just before it made impact.

Based upon the foregoing discussion, we hold that as a matter of law, plaintiff, who was struck by a bus that approached from behind and to the right, and which turned left into the crosswalk where it struck plaintiff, may not be held comparatively negligent based on a theory that he could have seen and avoided the bus through the exercise of ordinary care.

Accordingly, the order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 4, 2015, which denied plaintiff's motion for partial summary judgment on the issue of liability, should be reversed, on the law, without costs, and the motion granted.

All concur.

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

ENTERED: APRIL 26, 2016

CLERK