SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 30, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2 Jose DeJesus, et al., Index 23205/06
Plaintiffs-Respondents,

-against-

Solanny Paulino, et al.,
Defendants-Respondents,

Sergio P. Nunez, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovitz, P.C., New York (Stacy R. Seldin of counsel), for appellants.

The Edelsteins, Faegenburg & Brown, LLP, New York (Evan M. Landa of counsel), for Jose DeJesus and Eric Martinez, respondents.

Buratti, Kaplan, McCarthy & McCarthy, Yonkers (Debra A. Kellman of counsel), for Solanny Paulino and Louis Moreno, respondents.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered August 22, 2008, which, to the extent appealed from, denied the motion of defendants Nunez and Brickyard for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as against all defendants. The Clerk is directed to enter judgment accordingly.

This action for personal injuries arose out of a motor vehicle accident that occurred on April 8, 2004 on Sedgewick

Avenue near its intersection with Hall of Fame Road in the Bronx. Plaintiffs allege they each sustained injuries to the cervical and lumbar spine, and plaintiff DeJesus also alleges an injury to his knee.

Nunez and Brickyard moved for summary judgment dismissing the complaint on the grounds that neither plaintiff sustained a "serious injury" as defined in Insurance Law § 5102(d). In support of that motion, they submitted a report by Dr. Tariq Yousef, a neurologist who conducted several tests on each plaintiff's cervical and lumbar spine. These tests found each plaintiff's range of motion to be normal, and Dr. Yousef concluded that each plaintiff could work and perform normal activities without restriction. This conclusion was supported by the underlying data revealed in those tests. Dr. Yousef reviewed each plaintiff's bill of particulars prior to conducting these tests; he did not, however, review their MRIs or other medical records.

Also submitted in support of the motion was the report of Dr. Wayne Kerness, an orthopedic surgeon who examined DeJesus. Dr. Kerness also conducted range of motion tests to this plaintiff's cervical and lumbar spine and found them to be within a normal range. Further objective tests led him to conclude that DeJesus also had full range of motion in his knees. Dr. Kerness opined that DeJesus was able to carry out his daily activities

without restrictions, and that there was no permanency of any of the claimed injuries. As with Dr. Yousef, Dr. Kerness did not review DeJesus's MRI or medical records, but only the bill of particulars.

The report of Dr. Audrey Eisenstadt, a radiologist, was also submitted. Dr. Eisenstadt reviewed Martinez's lumbar and cervical MRI films. She found indications of "pre-existing, degenerative disease" in Martinez's lumbar region which "could not have occurred in the time interval between examination and injury." She also found no recent or post-traumatic changes in Martinez's cervical spine.

In response was submitted the affirmation of Dr. Benjamin Cortijo, Jr., who had examined both plaintiffs on April 12, 2004, four days after the accident, finding limitations in the range-of-motion tests performed on their lumbar and cervical spine. After examining both plaintiffs approximately four years later, he again found limitations in the range of motion tests of their cervical and lumbar spines.

Plaintiffs also submitted reports by Dr. David H. Stemerman, who conducted cervical and lumbar MRIs on both plaintiffs, revealing herniations and disc bulges.

The IAS court denied the summary judgment motion, finding that the moving defendants failed to meet their initial burden of proof by showing that plaintiffs had not suffered a serious

injury. The court further stated that assuming, arguendo, defendants had met their burden, plaintiffs' medical proof was sufficient to raise a triable issue of fact.

Contrary to the finding of the IAS court, the moving defendants sustained their prima facie burden. Notwithstanding their failure to review plaintiffs' medical records, defendants' experts detailed the specific objective tests used in their personal examinations, as well as the underlying data from those tests, to show full range of motion (*Day v Santos*, 58 AD3d 447 [2009]) and, as to Martinez, the degenerative condition in his lumbar spine. It was sufficient that defendants' radiologist reviewed plaintiffs' MRI films. Moreover, the reference to plaintiffs' proof and deposition testimony sufficiently refuted the 90/180 day allegation of serious injury (*see Rivera v Gelco Corp.*, 58 AD3d 477 [2009]).

Taken as a whole, defendants' submissions were sufficient to meet their initial burden and thus shift the burden to plaintiffs, who failed to carry that burden in several respects. The unsworn emergency room records and other reports had no probative value (*Black v Regalado*, 36 AD3d 437 [2007]. Plaintiffs submitted insufficient objective medical evidence to support their 90/180-day claim. Their deposition testimony about inability to play sports or mop floors was not supported by

objective medical evidence (*see Nelson v Distant*, 308 AD2d 338, 340 [2003]).

With respect to plaintiff Martinez, the medical submissions failed to address sufficiently the allegations that his lumbar injuries were the result of degenerative disease (*Reyes v Esquilin*, 54 AD3d 615 [2008]). With respect to both plaintiffs, bulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury (*Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Toulson v Young Han Pae*, 13 AD3d 317, 319 [2004]). That objective evidence was not submitted here.

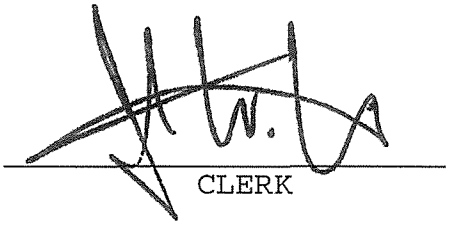
Dr. Cortijo's reports contained the objective tests conducted and the data underlying their results, both as to his examinations four days after the accident and approximately four years later with respect to both plaintiffs' lumbar and cervical condition. However, the affirmations submitted by plaintiffs' medical providers in opposition to the summary judgment motion did not address the findings made by the defense witnesses. Moreover, DeJesus did not produce any evidence to rebut the finding that he had full range of motion in his right knee. In response to Dr. Kerness's finding of a normal range of motion after examining DeJesus, Dr. Cortijo affirmed that on the later examination, DeJesus had positive compression, positive straight

leg raising and "motor strength of the right knee 4/5, and right ankle 4+/5 dorsiflexion." None of the underlying data or the names of the tests utilized to arrive at this determination were mentioned. In short, DeJesus failed to address directly Dr. Kerness's finding of normal range of motion, thus leaving no triable issue of fact with respect to his knee condition.

Although the record is unclear as to whether defendants Paulino and Moreno filed a notice of appeal, we grant summary judgment in their favor as well "because, obviously, if plaintiff[s] cannot meet the threshold for serious injury against one [set of] defendant[s, they] cannot meet it against the other" (*Lopez v Simpson*, 39 AD3d 420, 421 [2007]).

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

ENTERED: APRIL 30, 2009



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

18N Marvin Gibbs, Index 16364/05
Plaintiff-Respondent,

-against-

St. Barnabas Hospital,
Defendant-Respondent,

Fausto Vinces, M.D.,
Defendant-Appellant,

Scott Russo, M.D., et al.,
Defendants.

Kaufman Borgeest & Ryan LLP, New York (Dennis J. Dozis of counsel), for appellant.

Napoli Bern Ripka, LLP, New York (Denis A. Rubin of counsel), for Marvin Gibbs, respondent.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital, respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered January 16, 2008, which granted the motion of defendant Vinces motion to enforce a conditional order of preclusion to the extent of directing plaintiff to pay $500 as costs for his delay in complying with discovery, affirmed, without costs.

The law strongly prefers that matters be decided on their merits (*Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [2002]). Accordingly, the drastic sanction of striking a pleading is inappropriate without a clear showing that the failure to comply with disclosure obligations was willful,

contumacious, or the result of bad faith (*see Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [2003]).

The record reflects that defendant Vinces moved to compel plaintiff to provide a bill of particulars. This motion was withdrawn when plaintiff served a bill of particulars. Subsequently, Vinces apparently became dissatisfied with the bill of particulars plaintiff provided to him. Hence, at a preliminary conference held after service of the bill of particulars, plaintiff was ordered to provide a supplemental bill of particulars. Plaintiff does assert that he should have insisted that he not be required to serve a supplemental bill until after the completion of discovery, since he was hard-pressed to further particularize his contentions at that point. In any event, when a supplemental bill was not furnished according to the schedule set forth in the preliminary conference order, defendant moved again in that regard, which motion resulted in the conditional order of preclusion under review.

While it is true that plaintiff did not timely comply with the court-ordered deadlines, the delay was not lengthy, and defendant Vinces cannot claim prejudice because of the tardy supplemental bill of particulars that plaintiff ultimately furnished (*see Marks v Vigo*, 303 AD2d 306 [2003]). There is no evidence that plaintiff's inaction was willful, contumacious, or the result of bad faith. As a result, striking the complaint as

against Vinces would have been an overly drastic remedy for plaintiff's delay in complying with discovery (*see Cooper v Shepherd*, 280 AD2d 337 [2001]). That the Court of Appeals in *Wilson v Galicia Contr. & Restoration Corp.* (10 NY3d 827 [2008]) upheld Supreme Court's enforcement of an order of preclusion does not mean that Supreme Court's determination in this case not to enforce such an order constituted such an abuse of discretion as to warrant reversal.

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

McGUIRE, J. (dissenting)

The order on appeal granting defendant Vinces's motion to enforce a conditional order precluding plaintiff from offering certain evidence at trial to the extent of imposing a $500 disclosure sanction against plaintiff should be modified, the conditional order, which became absolute, should be enforced and the complaint as against Vinces should be dismissed. Accordingly, I dissent.

On June 2, 2005, plaintiff commenced this medical malpractice and lack of informed consent action against, among others, Vinces. On August 9, 2005, Vinces served plaintiff with his answer, disclosure demands and a demand for a bill of particulars. Plaintiff served bills of particulars as to two other defendants on October 14, 2005, but did not serve one as to Vinces.

By a letter dated January 24, 2006, Vinces's counsel reminded plaintiff that Vinces had demanded a bill of particulars in August 2005, noted that no bill of particulars as to Vinces had been served and stated that if no bill was served within 10 days Vinces would make a motion to compel service of the bill. After no bill of particulars was served, Vinces's counsel sent a similar letter to plaintiff on March 21, 2006, again stating that a motion to compel would be made if no bill was served. Another letter to the same effect was sent on May 24, 2006 because

plaintiff had still failed to serve his bill of particulars as to Vinces. In June 2006, Vinces moved to compel plaintiff to serve Vinces with a bill of particulars and comply with disclosure demands. Plaintiff finally served a bill of particulars on Vinces on August 21, 2006, and the parties stipulated that Vinces would withdraw his motion.

In the November 30, 2006 preliminary conference order, Supreme Court found the bill of particulars served on Vinces to be "unsatisfactory" and, without specifying a date by which compliance was necessary, directed plaintiff to serve a supplemental bill particularizing his claim that Vinces was vicariously liable for the negligence of the other defendants, the dates of the alleged malpractice and the specific allegations of negligence against Vinces.[1] As of January 2007, plaintiff had

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[1]The majority writes that "[p]laintiff does assert that he should have insisted that he not be required to serve a supplemental bill until after the completion of discovery, since he was hard-pressed to further particularize his contentions at that point." Why the majority recites this assertion is unclear, particularly because the majority does not state whether it agrees with the assertion. In any event, no sympathy is due to plaintiff on this account for his assertion is patently irrelevant. Supreme Court found that the original bill of particulars was "unsatisfactory" and directed plaintiff to serve a supplemental bill particularizing his claim that Vinces was vicariously liable for the negligence of the other defendants, the dates of the alleged malpractice and the specific allegations of negligence against Vinces. If plaintiff disagreed with that directive, he should have moved to vacate the preliminary conference order. Obviously, Supreme Court -- not plaintiff -- is the arbiter of the sufficiency of the bill of particulars, and plaintiff was required to comply with the court's unequivocal order. Apart from the irrelevance of this assertion, the

not served the supplemental bill of particulars, and Vinces moved for disclosure sanctions under CPLR 3126, requesting that the complaint be dismissed. A February 21, 2007 order mooted the motion. In that order, Supreme Court directed plaintiff, within 45 days of the order, to provide Vinces with, among other things, the supplemental bill of particulars required by the preliminary conference order. The order concluded by warning that "[plaintiff] will be precluded from offering any testimony as to the above unless provided within 45 days." Thus, plaintiff had until April 9 to comply with the February 21, 2007 order.[2] Vinces's counsel sent a letter to plaintiff on March 7, 2007 demanding compliance with the February 21 order.

On May 21, 2007, Vinces moved to enforce the February 21, 2007 order, asserting that plaintiff failed to serve a supplemental bill of particulars within 45 days of the order and consequently that the conditional order had become absolute, precluding plaintiff from offering any testimony as to the alleged malpractice of Vinces. Because plaintiff was so precluded, Vinces sought summary judgment dismissing the complaint as against him on the ground that plaintiff could not

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implicit effort to blame the court for plaintiff's failure to comply is as revealing as it is troubling.

[2]The forty-fifth day after February 21, 2007 was April 7. Because April 7 was a Saturday, plaintiff's deadline to comply with the order was Monday April 9 (*see* General Construction Law § 25-a).

make a prima facie case. Alternatively, Vinces sought dismissal of the complaint under CPLR 3126. Plaintiff opposed, arguing that his conduct was not willfull and contumacious and therefore the penalty of precluding him from offering testimony against Vinces was not warranted. Plaintiff also stressed that he served a supplemental bill of particulars on Vinces on June 21, 2007, one day before he served his opposition to the motion and approximately 75 days after the court-ordered deadline. Supreme Court granted Vinces's motion to the extent of directing plaintiff to pay Vinces $500 "as cost for [plaintiff's] delay in providing the requested discovery."

The February 21, 2007 order was a conditional order of preclusion that became absolute on April 9 upon plaintiff's failure to serve Vinces with a supplemental bill of particulars (*see e.g. Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827 [2008]; *Callaghan v Curtis*, 48 AD3d 501 [2008]; *Gilmore v Garvey*, 31 AD3d 381 [2006]; *see also State Farm Mut. Auto Ins. Co. v Hertz Corp.*, 43 AD3d 907 [2007]). There is no dispute that plaintiff failed to serve the supplemental bill of particulars before that deadline; plaintiff acknowledges that he did not serve it until June 21, approximately 75 days after the deadline had passed.

Of course, plaintiff could not avoid the consequences of his failure to comply timely with the conditional order merely by

serving the supplemental bill of particulars after the court-imposed deadline (*see Gilmore, supra*; *Stewart v City of New York*, 266 AD2d 452 [1999]). Rather, to be relieved of the consequences of his failure to comply timely with the conditional order, plaintiff was required to demonstrate both a reasonable excuse for his failure to comply with the order and a meritorious claim against Vinces (*see e.g. Callaghan, supra*; *G.D. Van Wagenen Fin. Services, Inc. v Sichel*, 43 AD3d 1104 [2007]; *Gilmore, supra*; *VSP Assoc., P.C. v 46 Estates Corp.*, 243 AD2d 373 [1997]; *Michaud v City of New York*, 242 AD2d 369 [1997]). Even assuming without deciding that plaintiff's counsel's excuse of law office failure is reasonable (*but see Okun v Tanners*, 11 NY3d 762 [2008], *revg* 47 AD3d 475 [2008]),[3] plaintiff failed to demonstrate that he has

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[3]The majority makes no attempt at all to defend plaintiff's excuse as reasonable. The majority's tacit conclusion that it is not reasonable is understandable. Plaintiff's counsel asserted only that she failed to comply with the conditional order in a timely fashion because:

> "I did not attend Court for the Motion on February 21, 2007 when [the conditional order] was entered . . . The attorney who did attend . . . is no longer with this firm. Routinely, the attorney who appears gives me a copy of a Stipulation [or order] to enter dates and deadlines on my personal calendar. I did not have the date on which the Supplemental Bill of Particulars, in this case, was due on my calendar. I do not remember being given a copy of the [order]. I have, however, served a Supplemental Bill of Particulars on this date [i.e., June 21, 2007]. This was an inadvertent law office failure."

This "excuse" explains nothing. Why counsel did not have the date on her calendar is unexplained, as is the relevance of the

a meritorious claim against Vinces. Notably, plaintiff failed to submit the affirmation or affidavit of a medical expert suggesting that Vinces is liable for plaintiff's injuries in this medical malpractice and lack of informed consent action (*see e.g. Gilmore, supra*; *see also Kaufman v Bauer*, 36 AD3d 481 [2007]; *Ramos v Lapommeray*, 135 AD2d 439 [1987]; *Canter v Mulnick*, 93 AD2d 751, 752 [1983], *affd* 60 NY2d 689 [1983]).

Because the conditional order became absolute and plaintiff failed to make the dual showing necessary to be relieved of the consequences of that absolute order, plaintiff should be precluded from offering testimony at trial with respect to the issues he was obligated to address in the supplemental bill of particulars, i.e., his claim that Vinces was vicariously liable for the negligence of the other defendants, the dates of the alleged malpractice and the specific allegations of negligence against Vinces. Thus, plaintiff cannot establish a prima facie case against Vinces and summary judgment in Vinces's favor

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fact that the attorney who was in court had left the firm. Notably, counsel does not deny receiving a copy of the order, but merely asserts that she did not remember receiving a copy. Moreover, the statement that the attorney who actually appears in court "[r]outinely" provides counsel with a copy of the order makes the noncompliance *more* not less puzzling.

dismissing the complaint as against him is warranted (*see e.g. Calder v Cofta*, 49 AD3d 484 [2008]; *State Farm Mut. Auto Ins. Co., supra*; *Callaghan, supra*; *G.D. Van Wagenen Fin. Services, Inc., supra*; *Gilmore, supra*; *Contarino v North Shore Univ. Hosp. at Glen Cove*, 13 AD3d 571 [2004]). Giving full force and effect to the conditional (now absolute) order is consonant with the Court of Appeals' direction that court-ordered deadlines are to be taken seriously by the parties and enforced by the courts (*see Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005]; *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]).

The majority attempts to meet Vinces's argument that the conditional order had become absolute with only an implicit and unsupportable assumption, even as it ignores the authorities cited above supporting that argument. Thus, the majority states only as follows: "That the Court of Appeals in *Wilson* upheld Supreme Court's enforcement of an order of preclusion does not mean that Supreme Court's determination in this case not to enforce such an order constituted such an abuse of discretion as to warrant reversal." As is evident, the majority simply assumes the existence of the very discretion that could support its position.

In *Wilson*, the Court of Appeals held that,

"As the conditional order was self-executing and

> appellant's 'failure to produce requested items on or before the date certain' rendered it 'absolute' (*see Zouev v City of New York*, 32 AD3d 850, 850 [2d Dept 2006]; *Lopez v City of New York*, 2 AD3d 693, 693 [2d Dept 2003]), the courts below correctly held that defendant was precluded from introducing any evidence at the inquest 'tending to defeat the plaintiff's cause of action' (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]; *see* Weinstein-Korn-Miller, NY Civ Prac ¶ 3126.03 [a conditional order 'will preclude proof as to matters not furnished unless the delinquent party provides the particulars within the time frame specified in the order']). As a result, [defendant] was deemed to admit 'all traversable allegations in the complaint, including the basic allegations of liability (*Curiale v Ardra Ins. Co.*, 88 NY2d 268, 279 [1996])" (10 NY3d at 830).

Nowhere in its opinion did the Court come close to suggesting the remarkable proposition that either Supreme Court or the Appellate Division enjoys some undefined and broad discretion not to follow the rule of law, i.e., not to enforce a conditional order of preclusion that had become absolute even when the requisite dual showing of a reasonable excuse for the party's failure to comply with the order and a meritorious claim has not been met. To the contrary, in the first of the cases cited by the Court of Appeals in *Wilson*, a conditional order of preclusion had become absolute and the Second Department stated as follows: "To be relieved of the adverse impact of the order striking its answer, the defendant was *required* to demonstrate a reasonable excuse for its failure to produce the requested items and the existence of a meritorious defense" (*Zouev*, 32 AD3d at 850 [emphasis added]). Moreover, as noted, the majority just

ignores the plethora of Appellate Division authority supporting Vinces's argument (*see e.g. Callaghan, supra; Gilmore, supra; see also State Farm Mut. Auto Ins. Co., supra*). Albeit with regret, for these reasons I respectfully submit that the majority's position is indefensible.

Even if the conditional order had not become absolute (and plaintiff was not precluded from offering testimony at trial with respect to the issues he was obligated to address in the supplemental bill of particulars), I would not agree that the "costs" imposed by Supreme Court -- a $500 penalty -- was appropriate. That disclosure sanction amounts to nothing more than the gentlest of slaps on the wrist and is not remotely commensurate with the serious, chronic and inexcusable nature of plaintiff's counsel's failures to comply with the court's directives (*see Weissman v 20 E. 9th St. Corp.*, 48 AD3d 242, 243 [2008]; *Christian v City of New York*, 269 AD2d 135, 137 [2000]). Plaintiff failed to comply with both the preliminary conference order requiring him to serve a supplemental bill of particulars and the February 21, 2007 conditional order of preclusion. Moreover, Vinces had to incur the costs of having his counsel send three letters to plaintiff and make a motion to compel just to get an initial bill of particulars from plaintiff -- which Supreme Court determined for good and sufficient reasons was "unsatisfactory." And when plaintiff inexcusably failed to

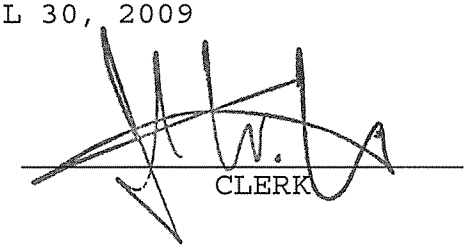
comply with the February 21, 2007 order, Vinces had to incur the costs of yet another motion. Albeit it once again with regret, I respectfully submit that the majority's affirmance of this trivial disclosure sanction is indefensible and, to say the least, does nothing to encourage the conduct that is of critical importance to the fair, expeditious and efficient resolution of civil litigation: compliance with court-ordered deadlines (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Kihl, supra*). To all the attorneys and the trial courts committed to these imperatives, the majority's affirmance will be damaging (*see generally Figdor v City of New York*, 33 AD3d 560, 561 [2006] ["We take this opportunity to encourage the IAS courts to employ a more proactive approach in such circumstances; upon learning that a party has repeatedly failed to comply with discovery orders, they have an affirmative obligation to take such additional steps as are necessary to ensure future compliance"]).

Accordingly, I would modify the order appealed to enforce the conditional order, preclude plaintiff from offering testimony at trial with respect to the issues he was obligated to address

in the supplemental bill of particulars and grant summary judgment to Vinces dismissing the complaint as against him.

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

ENTERED: APRIL 30, 2009



Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

446-
446A The People of the State of New York, Ind. 3674/06
Respondent,

-against-

Jose Acosta,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Edward A. Jayetileke of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered November 27, 2007, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a persistent felony offender, to a term of 15 years to life, and order, same court and Justice, entered on or about May 14, 2008, which denied his CPL 440.20 motion to set aside the sentence, 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 victim's testimony clearly established the element of force.

Defendant was not prejudiced by the absence of a sanction for the People's nonproduction of a police document (*see* CPL 240.75).

The court properly exercised its discretion in sentencing defendant as a persistent felony offender. Defendant's constitutional challenge to his adjudication is without merit (*People v Quinones*, __ NY3d __, 2009 NY Slip Op 01318 [Feb 24, 2009]).

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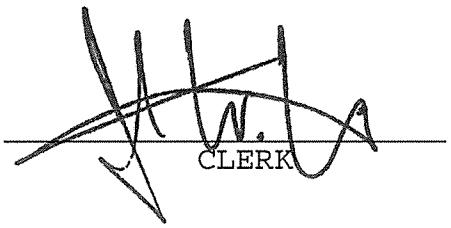

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

447 Janet Cuccia, Index 113204/07
Petitioner-Appellant,

-against-

Martinez & Ritorto, PC,
Respondent-Respondent,

New York State Division of Human Rights,
Respondent.

Janet Cuccia, appellant pro se.

O'Hare Parnagian, LLP, New York (Salvatore G. Gangemi of counsel), for Martinez & Ritorto, PC, respondent.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered April 16, 2008, dismissing this proceeding to vacate respondent agency's determination, unanimously affirmed, without costs.

Petitioner was employed by respondent law firm as a legal secretary for approximately 2½ months before her termination, purportedly due to poor job performance including excessive lateness. Denial of unemployment benefits on the ground of termination for misconduct was upheld by the Unemployment Insurance Appeal Board, and her judicial appeal of that determination was untimely (*see Matter of Cuccia v Commissioner of Labor*, 55 AD3d 1115 [2008]).

Petitioner also filed a complaint of disability discrimination with respondent agency (DHR), stating that her

lateness and the adjustments to her work schedule were necessary to attend doctors' appointments and undergo diagnostic tests for a medical condition. The law firm denied that petitioner ever told them she had a disabling medical condition and pointed to her statements attributing her discharge to other factors, such as a lull in work and the firm's desire to avoid unemployment insurance claims.

After investigation, DHR determined there was no probable cause to believe the firm had engaged in unlawful discrimination, pointing to the fact that petitioner was often permitted to make medical appointments during work hours, and she never alleged that she had told the firm about her medical condition. DHR concluded that the record suggested petitioner was terminated for nondiscriminatory reasons related to her work performance.

In order to recover under New York and federal law, petitioner has the initial burden of proving, by a preponderance of the evidence, a prima facie claim of discrimination, i.e., that she suffers from a disability, was qualified to hold the position at issue, and suffered an adverse employment action or was terminated from employment under circumstances giving rise to an inference of discrimination. The burden then shifts to the employer to rebut the presumption of discrimination by setting forth, through the introduction of admissible evidence, legitimate independent and nondiscriminatory reasons to support

the employment decision. If the employer's evidence raises a genuine issue of fact as to whether it discriminated, then the presumption raised by the prima facie case is rebutted. Petitioner is still entitled to prove that the legitimate reasons proffered by the employer were merely a pretext for discrimination (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629-630 [1997]).

In an article 78 proceeding, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only if there is a rational basis for the decision or whether it is arbitrary and capricious (*Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]). DHR's determination that petitioner failed to carry her burden of demonstrating discriminatory termination was supported by evidence in the record, including her own acknowledgment of termination for nondiscriminatory reasons. She was unable to demonstrate that the reasons provided by the law firm were pretextual.

Although petitioner takes issue with DHR's investigation, the agency has broad discretion in determining the method to be employed in investigating a claim (*see Pascual v New York State Div. of Human Rights*, 37 AD3d 215 [2007]). She was given the opportunity to provide evidence supporting her claims, and the investigation was not abbreviated.

Petitioner's remaining claims are improperly raised for the first time on appeal (*see Matter of Landmark West! v Tierney*, 25 AD3d 319 [2006], *lv denied* 6 NY3d 710 [2006]), and are, in any event, without merit.

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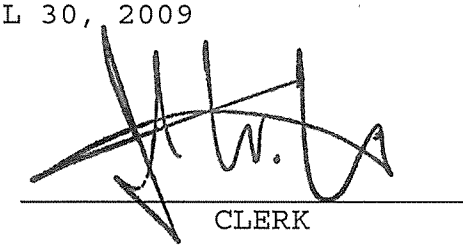

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Gonzalez, P.J., Tom, Sweeny, Buckley, JJ.

448 Alexis I. du Pont - De Bie, Sr., Index 100423/06
Plaintiff-Appellant,

-against-

Tredegar Trust Company, et al.,
Defendants-Respondents,

Alexis I. De Bie, Jr.,
Defendant.

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

Kasowitz, Benson, Torres & Friedman LLP, New York (Noelle Kowalczyk of counsel), for Tredegar Trust Company, respondent.

LeClairRyan, APC, New York (Michael T. Conway of counsel), for Joan F. De Bie, respondent.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered January 3, 2008, which granted the motion and cross motion by defendants Joan de Bie and Tredegar Trust to dismiss the complaint on the ground that trust beneficiaries Joan and her son, Alexis Jr., were necessary parties over whom the court had no jurisdiction, and without whose presence the action should not proceed, unanimously affirmed, with costs.

None of the factors set forth in CPLR 1001(b) warranted proceeding without the joinder of Joan and Alexis Jr. as necessary parties (*see Nowitz v Nowitz*, 37 AD3d 788 [2007]). First of all, plaintiff has an alternative forum for relief in Virginia, where issues pertaining to the trust have been

litigated for over a decade. In its May 19, 2004 order, the Virginia court directed the parties to "undertake to settle all remaining issues pertinent to [Tredegar]'s prayer for aid and guidance not disposed of by this Order, including, without limitation, *undertaking to agree on a mutually acceptable division of the Trust into two parts*" (emphasis added), the very relief plaintiff seeks herein. By filing in New York, plaintiff subverted the authority of the Virginia court, which had agreed, in its 2004 order, to supervise settlement of the parties' remaining disputes relating to the trust, including the division of the trust into two parts.

Second, Joan and Alexis Jr. would be prejudiced if the New York action were to proceed in their absence. Because plaintiff has sought partition of his interest in the trust, his interests are not aligned with those of his ex-wife and son. They do not stand to benefit from the recovery of $10 million on account of alleged breaches of fiduciary duty by the trustee; the complaint makes clear that plaintiff seeks judgment restoring such losses "to the Plaintiff's partitioned trust," i.e., recovery of these sums would be for plaintiff's benefit only.

Third, plaintiff engaged in forum shopping by filing suit against Tredegar in New York. Plaintiff concedes that he sought to avoid litigating this case in Virginia, given that court's history of ruling "harshly" against his interest.

Fourth, it would not be feasible to fashion an appropriate protective order. As the motion court recognized, the parties have a "long and tortured history" in this matter, and the relief sought by plaintiff, i.e., partition of his interest in the trust, would subvert the terms of the settlement agreement.

Fifth, an effective judgment cannot be rendered in the absence of Joan and Alexis Jr. The fact that plaintiff has not asserted any claims against them is of no moment, given that the relief he seeks would subvert the settlement agreement and, if he were to prevail, diminish the value of their interests in the trust.

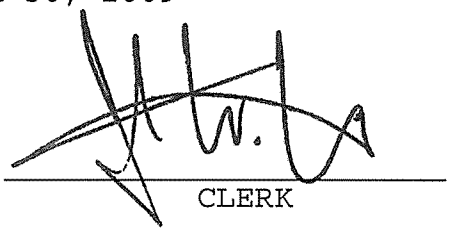
In light of our ruling, it is unnecessary to address defendants' further arguments in support of dismissal.

M-1545 - ***Alexis I. du Pont - De Bie, Sr. v Tredegar Trust Company, et al.***

Motion seeking leave to strike portions of reply brief denied.

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

ENTERED: APRIL 30, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

449 Christopher Jorgensen, Index 13163/02
Plaintiff-Appellant,

-against-

New York Foundation for Senior
Citizen Guardian Services, Inc., et al.,
Defendants-Respondents.

Anthony M. Wilger, Santa Clara, CA, for appellant.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Dawn C. Faillace-Dillon of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered October 27, 2008, upon a jury verdict in defendants' favor, unanimously affirmed, without costs.

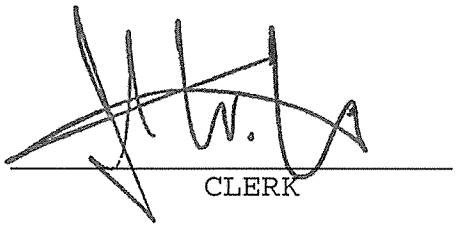
In reaching its verdict that defendant James was not negligent, the jury could fairly have concluded that James could not have foreseen that an object hidden from view would fall and cause plaintiff's injury (*see White v New York City Tr. Auth.*, 40 AD3d 297, 297 [2007]).

The court's jury charge did not impermissibly narrow the scope of foreseeability but properly "incorporate[d] the factual

contentions of the parties in respect of the legal principles charged" (*Green v Downs*, 27 NY2d 205, 208 [1970]).

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

ENTERED: APRIL 30, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

450 The People of the State of New York, Ind. 664/06
Respondent,

-against-

Julio Lugo,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered February 13, 2007, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the second degree and three counts of criminally using drug paraphernalia in the second degree, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The police raided an apartment that was an obvious drug factory and arrested several men not including defendant. Among other things, they found a large quantity of drugs in a locked room, contained in two locked

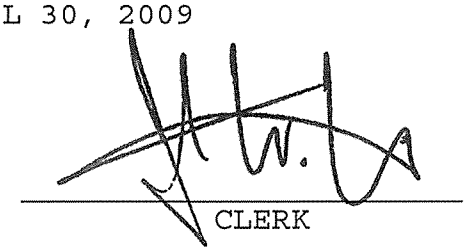
safes. The police, who had seen defendant entering and leaving the building on other occasions, arrested him in front of a nearby building. Defendant was in possession of keys for the apartment, the locked room, and the safes, and the jury had ample basis upon which to discredit his testimony, in which he sought to explain his possession of the keys. The conclusion is inescapable that a person carrying this particular collection of keys was, at least, a participant in the drug operation being conducted out of the apartment and at least a joint possessor of the contraband at issue (*see People v Bundy*, 90 NY2d 918, 920 [1997]; *People v Robinson*, 41 AD3d 317 [2007], *lv denied* 9 NY3d 925 [2007]).

Although the court's circumstantial evidence charge should have specifically mentioned the concept of exclusion beyond a reasonable doubt of every reasonable hypothesis of innocence, the charge sufficiently conveyed that principle in substance (*see People v Schachter*, 6 AD3d 111 [2004], *lv denied* 3 NY3d 647 [2004]). In any event, any error in the charge was harmless.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 30, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

451 In re Jennifer S.,

A Dependant Child under
the age of Eighteen Years, etc.

Elba R.,
Respondent-Appellant,

mercyFirst,
Petitioner-Respondent.

George E. Reed, Jr., White Plains, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

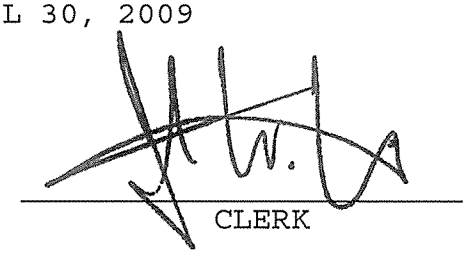
Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about November 14, 2007, which adjudicated the subject child permanently neglected, terminated respondent mother's parental rights, and committed custody and guardianship to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The determination of permanent neglect is supported by clear and convincing evidence that respondent failed to plan for the child's future, despite diligent efforts by mercyFirst to encourage and strengthen the parental relationship (Social Services Law § 384-b[7][a]). MercyFirst maintained frequent contact with respondent, ensured her participation in scheduled

services, and facilitated her visits and contact with the child. Despite those meaningful agency efforts, respondent demonstrated a complete lack of insight regarding her parenting deficiencies and inability to provide the child with a safe and appropriate home (*see Matter of Nathaniel T.*, 67 NY2d 838 [1986]). A preponderance of the evidence at the dispositional hearing supported the determination that the best interests of the child dictated termination of respondent's parental rights, to facilitate adoption by the child's foster mother, with whom she has developed a close relationship, and who has tended to her behavioral and developmental needs (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]).

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

ENTERED: APRIL 30, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

452 The People of the State of New York, Ind. 42851C/05
Respondent,

-against-

Eric Delts,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (John Carter, J.), rendered on or about March 19, 2007, unanimously affirmed.

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

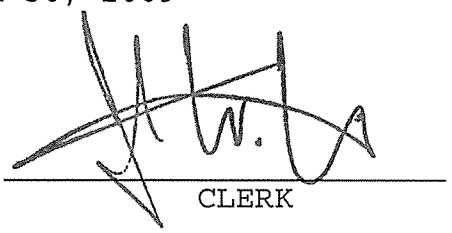
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 30, 2009



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Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

453 Richard K. Langlois, Index 13901/04
Plaintiff-Respondent,

-against-

Flame Cutsteel Products, Co., Inc.,
Defendant-Appellant,

Titan Machine Corp., et al.,
Defendants.

Law Office of Lori D. Fishman, Tarrytown (Lori D. Fishman of counsel), for appellant.

DeAngelis & Hafiz, Mount Vernon (Talay Hafiz of counsel), for respondent.

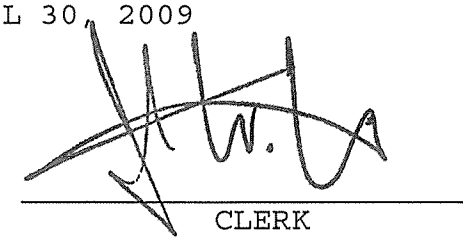
Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered June 27, 2008, which, in an action for personal injuries when an 800-pound steel plate that plaintiff was unloading from a truck fell and struck his leg, denied the motion by defendant Flame Cutsteel Products Co. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Flame, whose employees loaded the steel plate onto the truck, had a duty to load it safely (*cf. Moncion v Infra-Metals Corp.*, 20 AD3d 310, 311-312 [2005]), and clear issues of fact

exist as to whether they did. We have considered and rejected defendant-appellant's other arguments.

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

ENTERED: APRIL 30, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

454 Patrick J. Hoeffner, Index 602694/05
Plaintiff-Appellant,

-against-

Orrick, Herrington & Sutcliffe LLP, et al.,
Defendants-Respondents.

Thompson Wigdor & Gilly LLP, New York (Douglas H. Wigdor of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Gerard E. Harper of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered August 1, 2008, which, to the extent appealed from as limited by the briefs, partially granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's motions for partial summary judgment and to strike defendant's motion, unanimously modified, on the law, to reinstate so much of the first cause of action as alleges that plaintiff was induced to remain an associate with defendant law firm by the individual defendants' materially false representations about the firm's partnership process, and otherwise affirmed, without costs.

Plaintiff's alleged reliance on the individual defendants' statements concerning the partnership process at the law firm and plaintiff's partnership prospects was not unreasonable as a matter of law. He was an associate with no experience in

applying for partnership at the firm, the firm's partnership process was confidential, and defendants, as partners, were privy to information about the past practices of the firm's Executive Committee.

As to damages, if plaintiff proves his claims, he will be entitled to the difference between the immediately payable portion of the other firm's offer, such as the signing bonus, and the sum he received from defendant law firm immediately after agreeing to remain with defendant (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421-422 [1996]; *Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). His damages may not include any amount based on continued employment with the other firm, since the duration and success of his career with that firm are speculative.

Plaintiff's promissory estoppel and unjust enrichment claims are duplicative of his breach of contract claim, since he alleges no duty owed him by defendants independent of the contract (*see Brown v Brown*, 12 AD3d 176, 176-177 [2004]). His breach of fiduciary duty claim fails because an employer owes no fiduciary duty to an at-will employee (*Weintraub v Phillips, Nizer, Benjamin, Krim, & Ballon*, 172 AD2d 254, 254 [1991]).

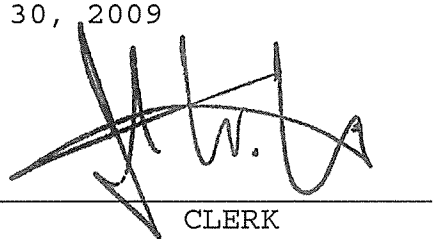
As to plaintiff's motion for summary judgment on his breach of contract claim, the contract did not require defendants to accept plaintiff as a partner, and since its language is not

ambiguous, consideration of parol evidence as to the intent of the parties would be improper (*see Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 269-270 [1990]).

"The fact that defendant[s'] supporting proof was placed before the court by way of an attorney's affidavit annexing [] deposition testimony and other proof, rather than affidavits of fact on personal knowledge, does not defeat defendant[s'] right to summary judgment" *(Olan v Farrell Lines*, 64 NY2d 1092, 1093 [1985]).

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

ENTERED: APRIL 30, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

455 The People of the State of New York, Ind. 489/06
Respondent,

-against-

Levorn Hardy,
Defendant-Appellant.

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Craig A. Ascher of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered November 8, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony drug offender, to an aggregate term of 6 years, unanimously affirmed.

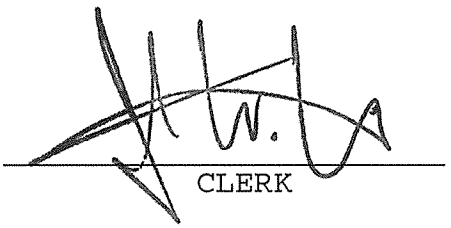
The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The prosecutor explained that she had challenged the panelist at issue because she believed the panelist, as an aspiring social worker, might be sympathetic to the defense. This was a non-pretextual reason (*see People v Wint*, 237 AD2d 195, 197-198 [1997], *lv denied* 89 NY2d 1103 [1997]). Defense counsel then argued that this reason was pretextual and the court, by permitting the peremptory challenge to stand, implicitly rejected the pretext argument and

found the proffered reason nonpretextual (*see People v Pena*, 251 AD2d 26, 34 [1998], *lv denied* 92 NY2d 929 [1998]; *compare Dolphy v Mantello*, 552 F3d 236, 239 [2d Cir 2009]). This finding is entitled to great deference and is supported by the record (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). Defendant argues that the prosecutor's failure to challenge panelists who were similarly situated, except as to national origin, later in jury selection demonstrated that the challenge was pretextual. However, defendant did not ask the court to revisit its completed *Batson* determination on the basis of these new developments. We find this argument unpreserved, and we decline to review it in the interest of justice. In this case, "an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable" (*Snyder v Louisiana*, 552 US __, __, 128 S Ct 1203, 1211 [2008]). As an alternative holding, we also reject it on the merits. Although a subsequent panelist also had a background in social work, the prosecutor actually exercised a peremptory challenge against her, and only after no other questioned panelist remained did the prosecutor permit her to serve as the second alternate juror, a position likely to prove superfluous in a short trial. Accordingly, there was no disparate treatment of comparable panelists. We have considered and rejected defendant's remaining arguments on the *Batson* issue.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The comments that defendant characterizes as vouching were permissible record-based credibility arguments (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]).

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

ENTERED: APRIL 30, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

456 Bhupinder Heer,
Plaintiff-Appellant,

-against-

North Moore Street Developers, L.L.C., et al.,
Defendants-Respondents.

[And Other Actions]

Index 26408/00
82779/01
84632/05
84919/05

Flomenhaft & Cannata, LLP, New York (Benedene Cannata of counsel), for appellant.

Hardin, Kundla, McKeon & Poletto, P.A., New York (Stephen J. Donahue of counsel), for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about October 15, 2008, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, the motion granted and the matter remanded for further proceedings.

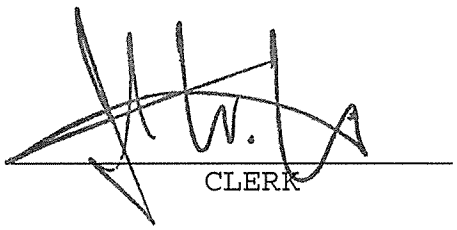
The lack of witnesses to the accident and plaintiff's inability to recall how the accident happened notwithstanding, plaintiff submitted sufficient admissible proof to establish prima facie that his head injury was the result of a fall from a sidewalk bridge at his work site (*see e.g., Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Angamarca v New York City Partnership Hous. Dev. Fund Co., Inc.*, 56 AD3d 264 [2008]), and

it is undisputed that plaintiff had not been provided with any safety device to properly protect him from such an elevation-related hazard. A coworker's sworn statements and a site accident report prepared by defendant general contractor's foreman placed him on the sidewalk bridge just before the accident occurred. Further evidence established that there was a gap of more than three feet between the bridge and the facade of the building and no railing on the building side of the bridge. The coworker stated that he heard plaintiff's fellow bricklayers yelling that plaintiff had fallen backwards off the bridge. He rushed to plaintiff's aid and found plaintiff lying on the ground near the building, beneath the gap. Since the record affords no basis for any conclusion other than that the bricklayers' exclamations were "made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication," the exclamations were admissible as excited utterances (*see People v Johnson*, 1 NY3d 302, 306 [2003]). That plaintiff's head injury was due to a fall from a height was further corroborated by his expert neurologist's affirmation that the type of severe head injury indicated by plaintiff's medical records was consistent with a fall from a height. Plaintiff's coworker also stated that he received the only safety device distributed on the day that plaintiff fell.

Defendants' speculation as to how plaintiff might otherwise have been injured failed to raise a material issue of fact on the claim.

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

ENTERED: APRIL 30, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Acosta, JJ.

457 RPI Professional Alternatives, Inc., doing business as Response Compliance and Regulatory Services, Plaintiff-Respondent, Index 600624/07

-against-

Citigroup Global Markets Inc., etc., Defendant-Appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Marshall H. Fishman of counsel), for appellant.

A. Bernard Frechtman, New York, for respondent.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered November 5, 2008, awarding plaintiff damages in the principal sum of $1,023,646.14 and dismissing defendant's counterclaims, unanimously modified, on the law, the principal award reduced to $723,646.14, the first counterclaim reinstated except as it sought recovery of fees already paid under § 22.2 of the agreements, and otherwise affirmed, without costs, and the matter remanded for further proceedings consistent herewith.

Damages were awarded on an account stated, based on 68 invoices sent to defendant in connection with 4 distinct projects. Plaintiff established its prima facie entitlement to summary judgment by submitting evidence that invoices were received and retained by defendant without a reasonably timely objection (*see Manhattan Telecom. Corp. v Best Payphones*, 299 AD2d 178, 179 [2002], *lv denied* 100 NY2d 507 [2003]), and that

defendant even made partial payments on some of them. However, there is evidence in the record that within a reasonable time, defendant did inform plaintiff by e-mail that no further payments would be made on outstanding invoices issued with respect to two of the projects, pending a review of plaintiff's progress and the amounts billed. Plaintiff's acknowledged receipt of such written objection negates the inference that defendant assented to the outstanding invoices for those projects (*see Herrick, Feinstein v Stamm*, 297 AD2d 477 [2002]; *Kaye, Scholer, Fierman, Hays & Handler v L.B. Russell Chems.*, 246 AD2d 479 [1998]).

Although defendant submitted evidence that it objected to the quality of plaintiff's work on the two projects undertaken for defendant's Corporate and Investment Banking (CIB) division, there is no evidence of objection to particular invoices or the overall amount billed thereon. Instead, plaintiff offered evidence that defendant actually extended plaintiff's time to complete those projects and continued to accept the work of its employees. Although the amounts billed thereon exceeded the total estimated costs set forth in the contracts, the parties' course of dealing may waive a contractual requirement (*see Beatty v Guggenheim Exploration Co.*, 225 NY 380 [1919]). Plaintiff was thus entitled to judgment on the claims related to the CIB projects.

On the other two projects (Smith Barney and Citigroup

Private Bank), however, there was a legitimate dispute, timely raised, as to invoices amounting to about $300,000, and judgment was improperly granted thereon.

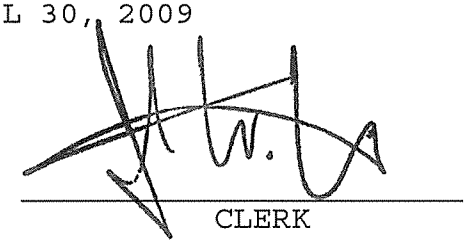
Since defendant cross-moved for summary judgment on the merits of its breach-of-contract counterclaim, the court had authority to search the record and grant summary judgment in favor of plaintiff, the nonmoving party, to the extent the record established its entitlement thereto (CPLR 3212[b]; *DCA Adv. v Fox Group*, 2 AD3d 173 [2003]). The court properly dismissed so much of the first counterclaim as sought recovery of fees paid, since the record establishes that defendant did not comply with the contractual prerequisites for such recovery, namely, providing plaintiff with notice of the claimed defects in its work product or services and an opportunity to cure. However, the record does not establish that defendant has no claim for damages incurred as a result of plaintiff's allegedly defective work, and that portion of the first counterclaim was improperly dismissed. The existence of a counterclaim of uncertain amount does not preclude the grant of summary judgment in favor of plaintiff on its account-stated cause of action; however, execution and costs should abide the resolution of the remaining claims (*see Gizzi v Hall*, 309 AD2d 1140, 1142 [2003]).

The provision of the contract precluding plaintiff from collecting interest or late fees on overdue payments does not bar

the court from assessing prejudgment interest as mandated by CPLR 5001(b) to compensate plaintiff (*id.*). However, under the terms of the contract, the earliest ascertainable date on which the account-stated cause of action existed was 60 days after the last invoice was sent, or May 27, 2006 (*see Richard Friedman Assoc., CPA PC v Jereski*, 26 AD3d 296 [2006]).

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

ENTERED: APRIL 30, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

458 The People of the State of New York, Ind. 798/06
Respondent,

-against-

Bryant Jackson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J. on motions; Charles H. Solomon, J. at suppression hearing; William A. Wetzel, J. at jury trial and sentence), rendered December 18, 2006, convicting defendant of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 20 years to life, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing evidence, including the lineup photographs, establishes that the lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Because all of the lineup participants were seated, height differences were sufficiently minimized. The lineup was not rendered suggestive by the fact that the victim described the robber as wearing a brown jacket or sweater, and defendant was the only lineup participant wearing a brown outer garment. This

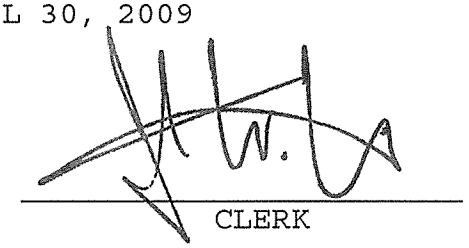
common article of clothing was not so distinctive as to unduly influence the identification (*see People v Gilbert*, 295 AD2d 275, 277 [2002], *lv denied* 99 NY2d 558 [2002]), particularly since the passage of nearly two weeks between the crime and the lineup would have reduced the significance of any similarity between an unremarkable garment worn by a lineup participant and one worn by the described suspect (*see People v Cruz*, 55 AD3d 365 [2008], *lv denied* 11 NY3d 924 [2009]).

The hearing court properly precluded defendant from using a complaint report prepared by a nontestifying officer to refresh the testifying officer's recollection of the victim's description of the robber's clothing, since the officer's recollection was clear and did not need to be refreshed (*see People v Henry*, 297 AD2d 585 [2002], *lv denied* 99 NY2d 559 [2002]). In any event, there was no prejudice to defendant, because the court, as trier of fact, was made aware of the contents of the report, and because the difference between the clothing descriptions in the report and the officer's testimony was insignificant with regard to the issue of suggestiveness.

We have considered and rejected defendant's remaining argument.

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

ENTERED: APRIL 30, 2009



CLERK

Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

459 Joseph J. Santora, etc., Index 107561/07
Plaintiff-Appellant,

-against-

Sheldon Silver, et al.,
Defendants-Respondents.

Carney & McKay, Garden City (Robert B. McKay of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Peter Karanjia of counsel), for Sheldon Silver, respondent.

E. Stewart Jones, PLLC, Troy (George E. LaMarche III of counsel), for James Michael Boxley, respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered July 17, 2008, which, in a taxpayer's action under State Finance Law § 123-b against a State official (Silver) and a private citizen previously employed by the State as Silver's legal counsel (Boxley) seeking restitution of State funds paid to settle a prior sexual harassment action brought against the State, Silver and Boxley, dismissed the complaint as against Silver for failure to state a cause of action and as against Boxley for lack of standing, unanimously modified, on the law, to dismiss the complaint as against Silver for lack of subject matter jurisdiction, the underlying decision vacated insofar as it pertains to Silver, and otherwise affirmed, without costs.

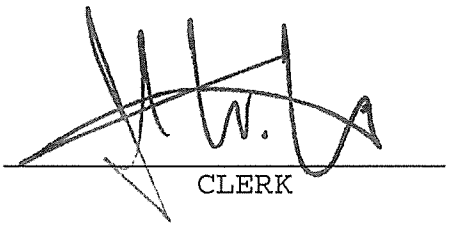
Plaintiff argues that the expenditure of State funds to settle the sexual harassment action was illegal because the

conduct alleged in that action involved "intentional wrongdoing" within the meaning of Public Officers Law § 17(3)(a). As plaintiff concedes, to the extent the settlement resolved a claim against Silver, the Attorney General's authorization was required, and plaintiff may obtain the relief he seeks only if such authorization is declared invalid. The courts, however, lack subject matter jurisdiction to make such a declaration. The Attorney General's exercise of discretion when discharging the quasi-judicial authority to oversee litigation involving State officers is immune from judicial review (*see Gerson v New York State Attorney-General*, 139 AD2d 617, *lv denied* 72 NY2d 701 [1988]), and we modify to dismiss for that reason only (*see id.*; *Matter of Metropolitan Transp. Auth.*, 32 AD3d 943, 945 [2006]). As against Boxley, who was no longer a State employee at the time the settled action was commenced, was represented in the settled action by private counsel, and personally paid the portion of the settlement that all parties agreed he should pay, the complaint was properly dismissed for lack of standing. Plaintiff cannot claim that Boxley's payment resulted in an injury-in-fact under State Finance Law § 123-b, which by its terms applies only to State officers and employees with authority to authorize the

expenditure of State funds (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-73 [1991]).

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

ENTERED: APRIL 30, 2009



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Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

461N Leeward Isles Resorts, Limited, Index 600142/99
Plaintiff-Respondent,

-against-

Charles C. Hickox,
Defendant-Appellant.

Hughes Hubbard & Reed LLP, New York (John Fellas and Hagit Elul of counsel), for appellant.

Kravet & Vogel, LLP, New York (Donald J. Kravet of counsel), for respondent.

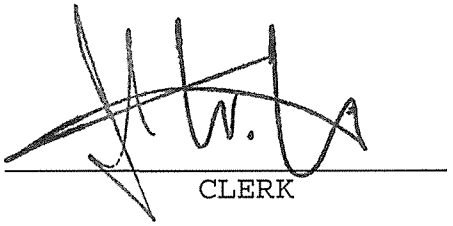
Order, Supreme Court, New York County (Helen E. Freedman, J.), entered March 14, 2008, which denied defendant's motion to vacate a prior order, same court and Justice, entered January 9, 2007, granting plaintiff's motion for partial summary judgment, and, upon said vacatur, for summary judgment dismissing the complaint on the ground that plaintiff failed to join necessary parties, unanimously affirmed, with costs.

Assuming the non-joined parties are necessary parties within the meaning of CPLR 1001(a), defendant has not shown as a matter of law that he is entitled to dismissal of the complaint for failure to join them. Defendant contends that these parties are beyond the jurisdiction of the court and cannot be joined. However, even if these parties were shown to be beyond the jurisdiction of the court, consideration of the factors enumerated in CPLR 1001(b) would support allowing the action to

proceed, especially as "dismissal for failure to join a necessary party should eventuate only as a last resort" (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 11 [2007] [internal quotation marks and citation omitted]).

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

ENTERED: APRIL 30, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, JJ.

4144
Index 114198/06

x

Lorraine C. Brady,
Petitioner-Appellant,

-against-

The Williams Capital Group, L.P.,
Respondent-Respondent,

American Arbitration Association, Inc.,
Respondent.

x

Petitioner appeals from an order and judgment (one paper) of the Supreme Court, New York County (Nicholas Figueroa, J.), entered July 13, 2007, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78 to compel respondent American Arbitration Association to enter a default judgment against her former employer, respondent The Williams Capital Group, L.P., and, pursuant to CPLR 7503, to compel Williams to pay the arbitration fees.

Wechsler & Cohen, LLP, New York (David B. Wechsler of counsel), for appellant.

Schiff & Hardin LLP, New York (Marc L. Silverman of counsel), for The Williams Capital Group, L.P., respondent.

RENWICK, J.

This dispute arises from an employment discrimination arbitration commenced by Lorraine C. Brady (Brady) against her former employer, The Williams Capital Group, L.P. (Williams) before the American Association Arbitration (AAA). The AAA cancelled the proceedings when Williams refused to pay the cost of arbitration pursuant to AAA rules. Such refusal was based on Williams's employee manual, which required the parties to equally share the arbitrator's compensation. As a result, Brady sought a court order compelling Williams to arbitrate in compliance with the AAA rules. Supreme Court denied the petition and this appeal ensued. The appeal raises two questions: first, whether the AAA's "employer pays" rule should supersede the "fee-splitting" provision of the parties' arbitration agreement with regard to the arbitrator's compensation; second, whether the fee-splitting arbitration provision should be invalidated as violative of public policy in this instance. We answer the first question in the negative and the second question in the affirmative.

Facts and Procedural Background

The material facts are not in dispute. Williams, an investment banking firm, hired Brady in January 1999 to work as a salesperson of fixed income securities. In or about January 2000, Williams adopted an employee manual signed by all employees as a condition of continued employment. The employee manual,

requiring the arbitration of all disputes, contains a clause in which the employee and employer agree to equally share the fees and costs of the arbitrator. In addition, the arbitration agreement contains a provision that provides:

> "The Company and I agree that, except as provided in this Agreement, any arbitrations shall be in accordance with the then-current Model employment Arbitration Procedures of the American Arbitration Association ('AAA') before an arbitrator who is licensed to practice law in the state in which the arbitration is convened ('the Arbitrator'). The arbitration shall take place in or near the city in which I am or was last employed by the Company."

Williams terminated Brady's employment on February 28, 2005. On December 22, 2005, Brady commenced an arbitration with the AAA against Williams claiming discriminatory termination in violation of state and federal law.[1] On January 3, 2006, the AAA notified the parties that it had determined that the arbitration would be conducted consistent with an employer-sponsored plan.[2] The applicable AAA rule provides:

> "The parties shall be deemed to have made these rules part of their arbitration agreement whenever they have provided for arbitration by [AAA] or under its National Rules for the Resolution of Employment Disputes. If a

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[1] Initially, Brady filed a complaint with the New York State Division of Human Rights. After approximately eight months, she withdrew her complaint and commenced the arbitration proceeding before the AAA.

[2] The AAA rules makes a distinction between "Employer-Promulgated Plans" and "Individually-Negotiated Employment Agreements and Contracts." In the former, the employer bears the cost of the arbitrator's compensation unless the employee elects, postdispute, to pay a portion.

> party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules."

By March 30, 2006, the parties had engaged in significant prehearing discovery. In accordance with its own "employer pays" rule, which requires the employer to pay the arbitrator's compensation, the AAA sent Williams a bill for $42,300, which represented the entire advance payment for the arbitrator's compensation. Williams refused to pay the entire advance payment of the arbitrator's compensation, and demanded that Brady pay half in accordance with the parties' arbitration agreement in the employee manual. Brady refused to make any payment.

In response to the dispute, the AAA advised the parties that Brady's position was accurate since its own rules regarding arbitration compensation superseded any agreement to the contrary. Specifically, the AAA explained:

> "The Association has determined that this matter arises from an employer-promulgated plan. The parties' attention is drawn to Rule 1 ... which provides that ... 'if a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules.'"

After waiting for about five months for payment of the arbitrator's fee, the AAA cancelled the arbitration. Brady sought to revive the arbitration by commencing this article 78 proceeding seeking to compel Williams to pay the arbitrator's fee

or to compel the AAA to enter a default judgment against Williams for failing to do so. Supreme Court, however, dismissed the article 78 petition in its entirety. First, the court reasoned that the parties' agreement, rather than the AAA rules, governed. Second, the court summarily rejected Brady's claim that her half share of arbitrator's compensation ($21,150) was prohibitively expensive due to the fact that she had been unemployed for 18 months since her termination. (For the year prior to her termination, 2004, Brady reportedly earned $204,691 in salary based on commissions.[3] Instead, the court found that Brady's rights under the antidiscrimination statutes were not substantially impaired by the requirement that she pay half of the arbitrator's compensation.

Discussion

This case involves a former employee seeking to compel a former employer to arbitrate.[4] It is well settled that a court

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[3] Plaintiff's reported salaries for 1999 to 2003 were respectively $100,000, $137,500, $324,000, $356,00 and $405,000.

[4] The case is unusual in that the former employee here seeks to compel her former employer to arbitrate an alleged discriminatory employment termination. Usually, the party who seeks to compel arbitration of such an employment dispute is the former employer, when it also seeks to stay a judicial proceeding commenced by the former employee aggrieved by the termination (*see e.g. Primerica Life Ins. Co. v Brown*, 304 F3d 469 [5th Cir 2002]; *Thompson v Irwin Home Equity Corp.*, 300 F3d 88 [1st Cir 2002]; *Mildworm v Ashcroft*, 200 F Supp 2d 171, 179 [ED NY 2002]). However, the context of the application to compel

will not order a party to submit to arbitration absent evidence of "that party's unequivocal intent to arbitrate the relevant dispute" (*Matter of Helmsley [Wien]*, 173 AD2d 280, 281 [1991]), and unless the dispute is clearly the type of claim that the parties agreed to refer to arbitration (*Matter of Bunzl [Battanta]*, 224 AD2d 245, 246 [1996]). The threshold determination of "whether there is a clear, unequivocal and extant agreement to arbitrate" the disputed claims is to be made by the court and not the arbitrator (*Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 598 [1997]).

A.

Williams does not dispute that a valid agreement to arbitrate exists between the parties. Nor does Williams deny that the dispute Brady seeks to arbitrate -- whether her termination was discriminatory -- falls within the scope of the arbitration agreement. Instead, Williams argues that it can only be compelled to arbitrate in accordance with the terms of the employment agreement, which requires the parties to equally share the cost of the arbitrator regardless of what the AAA rules says.

We resolve this conflict between the arbitration agreement and the AAA rules in favor of the arbitration agreement. Whether

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arbitration is not significant since any "party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration" (CPLR 7503[a]).

a fee-splitting clause in an arbitration agreement supersedes a contrary AAA rule presents a general issue of contract interpretation governed by New York law (*see Credit Suisse First Boston Corp. v Pitofsky*, 4 NY3d 149, 154 [2005]). "[A]rbitration is a creature of contract, and it has long been the policy of the State to 'interfere as little as possible with the freedom of consenting parties' in structuring their relationship" (*id.* at 155, quoting *Matter of Siegel* [*Lewis*], 40 NY2d 687, 689 [1976]). As such, the parties control the scope of arbitration, the authority and selection of arbitrators, the choice of law, every aspect of the arbitration (*see Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith*, 85 NY2d 173, 182-183 [1995]). "[T]he court's role is limited to interpretation and enforcement of the terms agreed to by the parties; it does not include the rewriting of their contract and the imposition of additional terms" (*id.* at 182).

To read into the arbitration agreement the AAA rule that the "employer pays" the arbitrator's compensation would be to fundamentally modify the terms of the agreement and to force Williams to arbitrate in a manner contrary to the agreement to which it had assented. In the relevant portion of the arbitration agreement, the parties agreed to equally share the arbitrator's compensation. In another relevant portion, the parties agreed that any arbitration would be in accord with AAA

rules, except as otherwise provided in the agreement. The provisions, read together, are clear and unambiguous as to the parties' intent to share the cost of the arbitrator's compensation.

We reject petitioner's argument that, regardless of the clear language of the agreement, the AAA compensation provision that the "employer pays" must prevail because the AAA rule in effect at the time of the arbitration provided that if "an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules." The arbitration agreement must take precedence over the AAA rules since the parties explicitly agreed to be bound by the provisions of the arbitration agreement where there was a conflict between the agreement and the AAA rules, including the arbitrator's compensation. The parties were free to have the AAA rules supersede the arbitration agreement where there was a conflict between them, but decided to do otherwise.

B.

Although we find that the disputed fee-splitting provision of the employment arbitration agreement was not superseded by the conflicting AAA rule, the question remains whether this provision is unenforceable as a matter of public policy under the circumstances of this case. There is no dispute that the parties' arbitration agreement is governed by the Federal

Arbitration Act (9 USC §§ 1 *et seq.* [FAA]). The Supreme Court has held that the FAA manifests a "liberal federal policy favoring arbitration agreements" (*Gilmer v Interstate/Johnson Lane Corp.*, 500 US 20, 26 [1991] [internal quotations marks omitted]; *see also Volt Information Sciences, Inc. v Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468, 479 [1989]). It reflects Congress's recognition that arbitration is to be encouraged as a means of reducing costs and delays associated with litigation (*Vera v Saks & Co.*, 335 F3d 109, 116 [2d Cir 2003], *quoting Deloitte Noraudit A/S v Deloitte Haskins & Sells*, U.S., 9 F3d 1060, 1063 [2d Cir 1993]). The policy is not absolute.

The Supreme Court has made clear that arbitration agreements are only enforceable "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" (*Gilmer*, 500 US *at 28 [1991] [internal quotation marks omitted]*). In *Green Tree Financial Corp-Ala. v Randolph (531 US 79 [2000])*, the Supreme Court, applying *Gilmer*, recognized that "the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her statutory rights in the arbitration forum" (*id.* at 90). The Court balanced the concerns over cost with the presumption in favor of arbitration by holding that the plaintiff had the burden of demonstrating the "likelihood" of incurring prohibitive costs.

(*id.* at 92). The Court, however, declined to set forth the detail with which a party must make such a showing. It did hold that the mere risk of such "prohibitive costs is too speculative to justify the invalidation of an arbitration agreement" (*id.* at 91).

The majority of the federal circuit courts that have had occasion to apply *Green Tree's* burden-shifting approach to claims of prohibitively expensive arbitration fees have endorsed the approach taken in *Bradford v Rockwell Semiconductor Syst., Inc.* (238 F3d 549 [2001]), where the Fourth Circuit held that in the employment discrimination context the courts should engage in a case-by-case analysis focused on "the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims" (*id. at 556; see Musnick v King Motor Co. of Fort Lauderdale*, 325 F3d 1255, 1259 [11th Cir 2003], citing, inter alia, *Thompson v Irwin Home Equity Corp.*, 300 F3d 88 [1st Cir 2002]; *Blair v Scott Specialty Gases*, 283 F3d 595, 610 [3rd Cir 2002]; *Primerica Life Ins. Co. v Brown*, 304 F3d 469, 471 n 6 [5th Cir 2002]; *Gannon v Circuit City Stores, Inc.*, 262 F3d 677, 683 [8th Cir 2001]; *and LaPrade v Kidder, Peabody & Co., Inc.*, 246 F3d 702, 708 [DC Cir 2001]; *see also James v McDonald's Corp.*, 417 F3d 672, 680 [7th Cir 2005]). This case-by-case approach

primarily involves comparing the financial means of the aggrieved employee to the costs associated with arbitrating the dispute, while relying on the fact that in the judicial forum a litigant pays only a minimal fee and does not have to pay other services pertaining to the adjudication of the matter (*see Spinetti v Service Corp. Intl.*, 324 F3d 212, 218 [3d Cir 2003]; *Shankle v B-G Maintenance Mgt. Of Colo., Inc.*, 163 F3d 1230, 1234 [10th Cir 1999]). While the Second Circuit has not addressed the issue, most federal district courts in this State have also adopted the Fourth Circuit's case-by-case analysis focusing on the claimant's ability to pay the expected arbitration fees and costs (*see e.g. Equal Employment Opportunity Comm. v Rappaport, Hertz, Cherson & Rosenthal, P.C.*, 448 F Supp 2d 458, 463 [ED NY 2006], citing, inter alia, *In re Currency Conversion Fee Antitrust Litig.*, 265 F Supp 2d 385, 411 [SD NY 2003]; *Stewart v Paul, Hastings, Janofsky & Walker*, LLP, 201 F Supp 2d 291, 293 [SD NY 2002]; and *Mildworm v Ashcroft*, 200 F Supp 2d 171, 179 [ED NY 2002]. Such an analysis is consistent with the *Green Tree* decision in that it requires much more than an abstract and speculative risk of high cost; instead, it requires a showing of individualized prohibitive expense.

The New York Court of Appeals applied this case-by-case approach when it recently held in *Matter of Schreiber v K-Sea Transp. Corp.* (9 NY3d 331 [2007]) that a $10,000 cost of

arbitration before the AAA was prohibitively expensive. Schreiber was injured while serving as a seaman in the employ of K-Sea. The Jones Act permitted Schreiber to sue K-Sea if its negligence caused his injury. Schreiber, however, entered into a post-injury agreement with K-Sea to arbitrate his claims before the AAA, rather than to litigate in court. The agreement provided, among other things, that "[a]ny filing fee, up to $750.00 and any deposit for compensation of the arbitrators shall be advanced by K-Sea, subject to subsequent allocation" (*id.* at 335). When Schreiber brought a suit against K-Sea, asserting a cause of action for violation of the Jones Act, K-Sea filed a demand for arbitration with the AAA. When the AAA arbitrator demanded payment of a $10,000 fee, K-Sea responded with payment of $750 and notification that the remainder was to be provided by Schreiber (*id.*).

Schreiber moved for a court order staying the AAA arbitration, which Supreme Court granted. While rejecting Schreiber's claim that the FAA rendered the agreement unenforceable, the motion court held that K-Sea had failed to prove "'that there was no deception or coercion on its part, and that Schreiber understood his obligations under the agreement'" (*id.* at 336). On appeal, this Court, one Justice dissenting in part, reversed and directed a hearing at which K-Sea would have the burden to show that the agreement was fairly procured (*id.*).

The Court of Appeals modified so as to place on Schreiber the burden of showing, at the hearing, that he was deceived By K-Sea to enter into the agreement to arbitrate (*id.* at 340-341).

As it pertains to the issue herein, the Court of Appeals in *Schreiber*, like the dissent in this Court, viewed the cost of arbitration payable by Schreiber under the agreement, at least $9,250, as prohibitively expensive. Thus, it held, "any order compelling arbitration should be conditioned on K-Sea's agreement to bear any costs not waived by the AAA subject later to reallocation of those costs by the arbitrator" *(id. at* 341).

Here, as in *Schreiber*, the risk of prohibitive arbitration cost was more than speculative. Indeed, the record is abundantly clear that the arbitration clause requiring Brady to share half the cost of the arbitrator's compensation would require her to bear a significant arbitration cost -- $21,150. While this amount alone is substantial, it did not include other arbitration fees and costs that would have to be borne out equally by the parties. Moreover, Brady has provided sufficient information about her precarious financial situation. At the time she sought a court order to compel arbitration, Brady had not been gainfully employed for the 18-month period following her termination by Williams. A $21,150 cost may not seem onerous in light of Brady's earning history, ranging from $100,000 to $400,000 during her five-year period of employment with Williams. Yet, Brady was

terminated and no longer commands such a yearly salary. In fact, it is undisputed that, at the time of the arbitration, she was still unemployed. Thus, contrary to Supreme Court's determination, Brady adequately carried her burden of demonstrating that she was not in a position to afford the cost associated with the arbitration, and was therefore effectively precluded from vindicating her rights in the AAA forum.

While the dissent cannot -- and does not -- dispute that the fee-splitting provision with regard to the arbitrator's compensation requires Brady to bear a substantial cost for submitting her discrimination claims to arbitration, the dissent attempts to minimize the effect of such high cost by making us believe that the alternative litigation cost would be much higher. We cannot agree. It is common knowledge that an employee filing an employment discrimination claim in the federal courts must pay a minimal filing fee, generally only a few hundred dollars. Also, the costs of maintaining and operating the court system, including the salaries of judges and other court employees, are borne by the taxpayers, not the litigants themselves. While the employee filing in court is likely to incur the costs of legal representation, her attorneys may be likely to take the case on a contingency fee basis. Also, if the employee's suit is successful, the remedies available under federal anti-discrimination legislation include the award of

attorney's fees. Thus, in general, it cannot be disputed that the out-of-pocket expenses for an employee filing a legal suit are minimal.

Moreover, despite the fact that the likelihood of prohibitive cost is apparent from Brady's financial situation, due to her long-term unemployment, and the substantial arbitration cost relative to litigation, the dissent would require more documentary evidence in the form of bank statements and bills. What the dissent ignores is that the likelihood of prohibitive cost is based on these same facts that have not been disputed. Indeed, Williams does not challenge Brady's assertion that her share of the arbitration cost is prohibitively expensive due to her current financial situation created by her long-term unemployment. Instead, Williams argues that the *Bradford* case-by-case analysis does not apply where, as here, the employee seeks to compel arbitration. Specifically, Williams argues that the public policy concerns of prohibitive arbitration costs are only applicable where the employer seeks to force arbitration on an employee who has selected a court as the forum to arbitrate an employment discrimination claim. We reject that argument. The procedural context in which the issue of Brady's financial means arises is not significant since Brady was bound to arbitrate her employment claims before the AAA pursuant to the employment agreement. The same public policy concerns -- Brady's ability to

litigate her statutory rights -- would have been at issue regardless of whether it was Brady or Williams who initiated the arbitration proceedings. Thus, as a party aggrieved by the fee-splitting provision, Brady was within her rights to apply for an order compelling arbitration and raise the fee-splitting issue within an article 75 proceeding.

Significantly, in summarily rejecting Brady's claim that the significant arbitration fee precluded or substantially deterred her from pursuing her statutory rights due to her current financial situation, Supreme Court never examined the arbitrator's costs under the provision at issue and their impact on the particular plaintiff in the case. Instead, the court improperly relied on *Arakawa v Japan Network Group* (56 F Supp 2d 349 [SD NY 1999]), which is clearly distinguishable from this case. In that case, as in *Green Tree Financial Corp.* (531 US 79, *supra*), the risk of prohibitive cost was too speculative to justify invalidating the arbitration agreement. Specifically, the court stated that it could not conclude that the payment of fees would be a barrier to the vindication of Arakawa's statutory rights "since at this time in the litigation it is not clear how large the fees of the arbitration will be or whether plaintiff will be required to pay any portion of it" (*id.* at 351). Here, in contrast, Brady has been asked to pay $21,150 to cover the cost of the arbitrator, with potentially more arbitration costs

to come. Thus, as in *Schreiber*, here the risk of prohibitive costs was not speculative.

Contrary to Williams's contention, the appropriate remedy is to sever the improper provision of the arbitration agreement, rather than void the entire agreement and force Brady to pursue her claims in state or federal court. Not all courts have been as hostile to severing unenforceable cost-splitting clauses from arbitration agreements as the dissent would have us believe (*Spinetti v Service Corp. Intl.*, 324 F3d 212 [3d Cir 2003]). On the contrary, most other courts, like our own Court of Appeals in *Schreiber*, have adopted such an approach as presumably consistent with the state and federal policy favoring arbitration (*see e.g. Howard v Anderson*, 36 F Supp 2d 183, 187 [SD NY 1999]; *Res v Masterworks Dev. Corp.*, 5 Misc 3d 1003[A], 2004 NY Slip Op 51169(U) [2004]; *Phillips v Associates Home Equity Servs., Inc.*, 179 F Supp 2d 840, 844-845 [ND Ill. 2001]; *see also Spinetti v Service Corp. Intl.*, 324 F3d 212, 218 [3d Cir 2003]; *Carter v Countrywide Credit Indust., Inc.*, 362 F3d 294, 297 [5th Cir 2004]).

More importantly, the arbitration agreement herein contains an explicit clause providing that the rendering of any provision void or unenforceable "shall not affect the validity of the remainder of the Agreement." Thus, by nullifying the objectionable part of the arbitration agreement, this Court will

not be overriding the intent of the parties to arbitrate, albeit subject to the AAA rule that the employer shall pay the cost of arbitration subject later to reallocation of those costs by the arbitrator. Contrary to the dissent's arguments, this holding is consistent with the US Supreme Court's position favoring arbitration, as set forth in cases like in *Gilmer* and *Green Tree*. The rationale of these cases is that the arbitration approach provides an effective forum for vindication of an employee's statutory rights, and that the only effect of an arbitration agreement is to transfer adjudication of those rights from a judicial to an arbitral forum. However, requiring potential claimants, like Brady, to pay significant costs up front is likely to deter them from bringing a claim. Requiring litigation under Brady's circumstances is clearly not consistent with the assumption of arbitral accessibility underlying *Gilmer* and its progeny. Nor is it consistent with the social policy of the employment discrimination statutes.

In sum, while we find that the fee-splitting clause of the arbitration agreement governs over the conflicting arbitration compensation rule of the AAA, public policy dictates that we not enforce its fee-splitting provision under the circumstances of this employment discrimination claim. Brady has met her burden of establishing that the arbitration fees and costs are so high as to discourage her from vindicating her state and federal

statutory rights in the arbitral forum, rendering the subject arbitration clause unenforceable (*Green Tree Financial Corp.-Ala.*, 531 US at 90; *Schreiber*, 9 NY3d at 341). The imposition of such significant costs as a condition of vindicating her statutory rights is not a reasonable substitute for a judicial forum. In light of this disposition, we need not reach Brady's argument that the AAA should be compelled to enter a default against Williams.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Nicholas Figueroa, J.), entered July 13, 2007, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78 to compel respondent American Arbitration Association to enter a default judgment against petitioner's former employer, respondent The Williams Capital Group, L.P., and, pursuant to CPLR 7503, to compel Williams to pay the arbitration fees, should be reversed, on the law, and the petition granted to the extent of directing Williams to pay the arbitration fees, subject later to reallocation of those costs by the arbitrator.

All concur except Saxe, J.P. and McGuire, J. who dissents in part in an opinion by McGuire, J. as follows:

McGUIRE, J. (dissenting in part)

Except in one respect discussed below, I agree with the majority's conclusion that the AAA's "employer-pays" rule does not supersede the fee-splitting provision of the parties' arbitration agreement. With respect to this issue the majority essentially adopts Justice Figueroa's excellent analysis of the issue in his written decision. The majority's conclusion is compelled by well-settled precedent holding that "arbitration agreements are contracts and must be interpreted under the accepted rules of contract law" (*Matter of Salvano v Merrill Lynch, Pierce Fenner & Smith*, 85 NY2d 173, 182 [1995]). In *Salvano*, the Court of Appeals rejected the argument that Merrill Lynch could be compelled to submit to expedited arbitration of disputes with former employees even though the arbitration agreement contained no provision for expedited arbitration. As the Court stated, "[t]o read into the [agreement] a provision authorizing compulsory expedited arbitration would be to fundamentally modify the terms of the parties' contract and force [Merrill Lynch] to arbitrate in a manner contrary to the agreement to which it has assented" (*id.*). Accordingly, the majority correctly concludes that "[t]o read into the arbitration agreement the AAA rule that the employer pays the arbitrator's compensation would be to fundamentally modify the terms of the agreement and to force Williams to arbitrate in a manner contrary

to the agreement to which it had assented" (internal quotation marks omitted).

I part company with the majority's conclusion that the fee-splitting provision should be invalidated as violative of public policy, and with its resulting directive that Williams pay all the arbitration fees, albeit subject ostensibly to later reallocation by the arbitrator. As discussed below, we should not decide whether the fee-splitting provision is unenforceable as Brady is not in any event entitled to such a directive. Even if it were appropriate to decide whether the fee-splitting provision is violative of public policy because its enforcement would likely be prohibitively expensive for Brady, the majority's analysis is flawed. Brady has not met her burden on this issue as she failed to present any facts bearing on such critical matters as the extent of her financial resources and the extent to which the costs that she would incur if the fee-splitting provision were enforced would exceed the costs she would incur if she litigated her claims in court.

A

Although I agree generally with the majority's conclusion that the fee-splitting provision of the agreement trumps the "employer-pays" rule, one of Brady's arguments warrants fuller discussion. Doing so, moreover, will help explain my one point of disagreement with the majority.

At the time the arbitration agreement was entered into, Rule 39 of the National Rules for the Resolution of Employment Disputes (the National Rules) provided that the arbitrator's compensation "shall be borne equally by the parties, unless they agree otherwise, or unless the law provides otherwise." Further, a provision of the "Administrative Fee Schedule," which is incorporated into the National Rules by Rule 38, states that "[a]rbitrator compensation is not included in this schedule" and that "[u]nless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award." By contrast, at the time Brady sought arbitration, a provision of the "Costs of Arbitration" section of the National Rules, incorporated into Rule 44, "Neutral Arbitrator's Compensation," stated that for disputes such as this one arising out of "Employer-Promulgated Plans," as opposed to "Individually-Negotiated Employment Agreements and Contracts," "[t]he employer shall pay the arbitrator's compensation unless the employee, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation." When disputes arise out of "Employer-Promulgated Plans," neither arbitrator compensation nor administrative fees are subject to reallocation by the arbitrator except upon a determination that a claim or counterclaim was filed for purposes of harassment or is

patently frivolous.[1] In addition, for such disputes, the employer pays the administrative fee of $300 for each day of hearings held before the arbitrator or arbitrators.

As the majority notes, both when the arbitration agreement was entered into and when Brady sought arbitration, Rule 1 of the National Rules provided as follows:

> "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ... or under its National Rules for the Resolution of Employment Disputes. If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules."

Another provision of Rule 1, however, one the majority does not quote or discuss, also is relevant. At both relevant times Rule 1 also went on to state that:

> "These rules, and any amendment of them, shall apply in the form obtaining at the time the demand for arbitration ... is received by the AAA."

This latter provision should be deemed to have been incorporated

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[1]In addition, "[a]ll expenses of the arbitration, including required travel and other expenses ... as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne by the employer." These expenses are not subject to reallocation under any circumstances. Rather, only a narrow class of expenses, hearing room rental fees and administrative fees, are subject to reallocation by the arbitrator, but only "upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous." Under the applicable rules when the arbitration agreement was entered into, however, these expenses were "borne equally by the parties, unless they agree otherwise or unless the arbitrator directs otherwise in the award."

into the arbitration agreement, the parties having expressly agreed to arbitration under the "then-current" AAA rules for employment disputes, i.e., the rules "obtaining," i.e., in effect, at the time arbitration was demanded (*see This Is Me, Inc. v Taylor*, 157 F3d 139, 143 [2d Cir 1998] ["New York law requires that all writings which form part of a single transaction and are designed to effectuate the same purpose [must] be read together, even though they were executed on different dates and were not all between the same parties"]).

Nonetheless, Brady's reliance on Rule 1 is misplaced for the same reason her reliance on the provision of the agreement providing for the application of the "then-current" version of the rules is misplaced: both of these provisions are general. Although the parties undoubtedly could have agreed in all-inclusive terms to be bound by any and all subsequent rule changes, they did not do so. Rather, these general provisions must be read together with the specific provision of the agreement itself specifying that "[Williams] and I shall equally share the fees and costs of the Arbitrator" (*see HGCD Retail Servs., LLC v 44-45 Broadway Realty Co.*, 37 AD3d 43, 49 [2006]). Under well-settled principles of contract interpretation, "[e]ven if there [is] an inconsistency between a specific provision and a general provision of a contract ..., the specific provision controls" (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]).

My one disagreement with the majority on this issue now can be brought into focus. As noted immediately above, the agreement specifically provides for equal sharing of the "fees and costs of the *Arbitrator*" (emphasis added), not the "fees and costs of the *Arbitration*." This specific provision does not conflict with the provisions of the National Rules in effect at the time of the arbitration specifying that the employer bears all the other costs, expenses and fees (other than a nominal filing fee that is payable when an employee files a claim) of the arbitration. Accordingly, I do not agree with the majority that the relevant provisions of the agreement "are clear and unambiguous as to the parties' intent to share the cost of arbitration."[2] Rather, I would give effect to the plain and unambiguous language of the fee-splitting provision and, reading it together with the applicable provisions of the National Rules, conclude that only the fees and costs of the arbitrator must be shared equally.[3]

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[2]Similarly, the majority states that while the amount of Brady's share of the arbitrator's fee is substantial, "it [does] not include other arbitration fees and costs that would have to be borne out equally by the parties." Elsewhere in its opinion, however, the majority appears to agree with me in this regard by, for example, referring to the parties' agreement "to equally share the *arbitrator's compensation*" (emphasis added). In any event, as noted above, the majority is wrong in broadly asserting that "other arbitration fees and costs ... would have to be borne out equally by the parties."

[3]Brady argues that the AAA expressly rejected Williams' position that the fee-splitting provision trumps the "employer-pays" rule and that this determination is not subject to judicial review. This argument, however, is advanced not in her main

B

With respect to its directive that Williams pay all the arbitration fees, the majority fails to appreciate the tension between its position and *Salvano*, for the effect of its directive is to "fundamentally modify the terms of the agreement and to force Williams to arbitrate in a manner contrary to the agreement to which it had assented." The majority thereby directs on the basis of a public policy ground that Williams do precisely what it concludes Williams cannot be compelled to do consistently with first principles of contract law. To explain my substantive disagreement with the majority's directive, a review of the relevant federal cases is necessary.

In *Gilmer v Interstate/Johnson Lane Corp.* (500 US 20 [1991]), Gilmer brought an action in federal district court

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brief but in her reply brief and I would reject it for this reason alone (*see Givoldi, Inc. v United Parcel Serv.*, 286 AD2d 220 [2001]). In any event, it is without merit. In support of this argument, Brady cites to communications from the AAA case manager, not the arbitrator (*see Matter of Kingsley v Redevco Corp.*, 61 NY2d 714, 715 [1984] [the question of whether an arbitration rule "was complied with is one for the *arbitrators* to decide and is not subject to [judicial] review"] [emphasis added]). Moreover, those communications are at least equivocal, particularly in light of the submissions by the parties to the case manager. Finally, the only communication from the arbitrator bearing on this issue came after the communications from the case manager and cannot reasonably be construed to have rejected Williams' position. In an order dated September 20, 2006, the arbitrator informed the parties that the arbitration was suspended as deposits for arbitrator compensation and administrative fees had not been received even though "[t]he *parties* were directed to deposit such sums" by earlier dates (emphasis added).

asserting age discrimination claims against Interstate, his former employer. The district court denied Interstate's motion to compel arbitration pursuant to a rule of the New York Stock Exchange to which Gilmer had agreed, and the Fourth Circuit reversed (*id.* at 24). The Supreme Court affirmed, rejecting Gilmer's argument that he could be compelled to forgo his statutory right to seek judicial review of his claims. In affirming, the Supreme Court reaffirmed its prior holding that "'[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions'" (*id.* at 28, quoting *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614, 637 [1985] [second brackets in original]).

In *Green Tree Financial Corp.-Ala. v Randolph* (531 US 79 [2000]), Randolph brought an action in federal district court asserting claims under a federal statute and the district court granted Green Tree's motion to compel arbitration. The Supreme Court reversed the Eleventh Circuit's conclusion that the arbitration agreement "posed a risk that [Randolph's] ability to vindicate her statutory rights would be undone by 'steep' arbitration costs, and therefore was unenforceable" (*id.* at 84). The Court noted that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as

Randolph from effectively vindicating her federal statutory rights in the arbitral forum" (*id.* at 90). The Court held, however, that "where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs" (*id.* at 92), and that Randolph did not meet that burden (*id.*). Nothing in the Court's opinion remotely suggests that in the event Randolph had met that burden, the remedy would be to relieve her of those costs in the arbitral forum, rather than deny the motion to compel arbitration and thereby permit her to continue to exercise her right to seek redress in the courts.

In *Bradford v Rockwell Semiconductor Sys., Inc.* (238 F3d 549 [2001]), the Fourth Circuit rejected the claim that when statutory rights would be subject to arbitration pursuant to an otherwise valid arbitration agreement, fee-splitting provisions are per se invalid. Rather, the Court held that "the appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of

claims" (*id.* at 556). The majority correctly adopts this approach and correctly notes that a slew of other federal circuit courts of appeals have adopted it.

The majority concludes that Brady met her burden of showing that arbitration would be prohibitively expensive due to the fee-splitting provision. As discussed below, I would not reach that issue. But even if the majority were correct -- I argue below that it is not -- the majority nonetheless errs. Where the majority goes astray is in failing to appreciate that under this approach the issue is whether, given the costs attendant to a fee-splitting provision, the arbitral forum is "an adequate and accessible substitute to *litigation*" (*id.* [emphasis added]), which turns in part upon "the expected cost differential between arbitration *and litigation in court*" (*id.* [emphasis added]). Whenever the costs of arbitration in a particular case are prohibitively expensive relative to litigation, it makes no sense to conclude that the resulting *invalidation* of a fee-splitting provision is itself a sufficient basis to authorize courts to do what they otherwise cannot do: through an act of judicial reformation "fundamentally modify the terms of the parties' contract and force [one party] to arbitrate in a manner contrary to the agreement to which it has assented" (*Salvano*, 85 NY2d at 182). The fee-splitting provision is unenforceable because it would prevent a party alleging violations of federal rights from

vindicating those rights either in an arbitral forum or in court. Putting aside the possibility that other principles of contract law (which I discuss below) may lead to a different conclusion, the more sensible remedy is not to rewrite the arbitration agreement but to disregard it, restoring the aggrieved party to the status quo ante and thereby permitting that party to litigate his or her claims in court.

For these reasons, I submit that it is not surprising that there is no suggestion in *Green Tree* that the appropriate remedy is to excise the offending costs provision of the arbitration agreement. Nor is there any such suggestion in *Bradford* or, with two exceptions,[4] in any of the other decisions the majority cites by the federal circuit courts of appeals that follow *Bradford*. Moreover, the majority's position is undermined by two employment discrimination cases decided before *Green Tree* and *Bradford*, one by the Tenth Circuit and the other by the First Circuit.

Indeed, *Shankle v B-G Maintenance Mgt. of Colo., Inc.* (163 F3d 1230 [1999]) expressly contradicts the majority's position. In *Shankle*, the Tenth Circuit concluded that a fee-splitting provision essentially identical to the one at issue here "placed Mr. Shankle between the proverbial rock and a hard place - it

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[4]As discussed below, the two exceptions, *Spinetti v Service Corp. Intl.* (324 F3d 212 [3rd Cir 2003]) and *Gannon v Circuit City Stores, Inc.* (262 F3d 677 [8th Cir 2001]), provide only superficial support for the majority's position.

prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum" (*id.* at 1235). Far from suggesting that the appropriate remedy was to excise the fee-splitting provision, the Court expressly rejected the argument that the Court "should 'redline' the fee-splitting provision and compel arbitration" (*id.* at 1235 n 6). The Court rejected that argument because the fee-splitting provision "clearly makes the employee responsible for one-half of the arbitrator's fees and we are not at liberty to interpret it otherwise" (*id.*).

Furthermore, the Court rejected this argument even though it was advanced by the *employer* in an attempt to defeat the employee's claim that he was entitled to arbitration. Regardless of whether, by failing to insist that arbitration under terms to which it had not agreed could not be compelled, the employer had waived any claim that litigation was the employee's sole remedy -- the Court did not discuss this question of state law -- in this case the employer is urging that litigation is Brady's sole remedy precisely because it insists that it cannot be compelled to arbitration under terms to which it did not agree. Although that principle of contract law is the substance behind Williams' position, the majority makes it disappear by characterizing Williams' position as one founded only on the "procedural

posture" of this case.

Cole v Burns Intl. Sec. Servs. (105 F3d 1465 [DC Cir 1997]) implicitly contradicts the majority's position. The DC Circuit affirmed the district court's grant of the employer's motion to compel arbitration despite "hold[ing] that Cole could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses" (*id.* at 1485). The Court, however, found the arbitration agreement "valid and enforceable" because it "interpret[ed] the agreement as requiring Burns Security to pay all of the arbitrator's fees necessary for a full and fair resolution of Cole's statutory claims" (*id.*). In this regard, the Court stressed that there was "no clear allocation of responsibility for payment of arbitrator's fees" under the agreement, and relied on the principle of contract interpretation that "where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful" (*id.*). Here, however, as in *Shankle*, the fee-splitting provision is unambiguous. Accordingly, if it imposes prohibitive costs on Brady it cannot be enforced by interpreting it to make Williams responsible for more than one-half of the arbitrator's fees and costs.

The flaw in the majority's position is highlighted by its

consequences. In some cases -- given the state of the record, this case may be one of them -- to excise or modify a fee-splitting provision will reduce the costs of the arbitration for the party resisting enforcement of the provision to an amount that is less, substantially less in at least some cases, than that party would incur in litigation. That is an incongruous result given that the rationale for invalidating the fee-splitting provision is that it imposes prohibitively greater costs than those that would be incurred in litigation. The correct remedy, permitting the party aggrieved by the fee-splitting provision to litigate in court his or her claims, is implicit in the rationale for invalidating such a provision.

By contrast, the majority's approach, as Justice Figueroa recognized in his written decision, "would bestow an unforeseen windfall" on the party resisting enforcement of the fee-splitting provision and "saddl[es the party seeking its enforcement] with an unexpected liability which it sought to avoid." These consequences, to say the least, cannot readily be reconciled with the intent of the parties to share equally the "fees and costs of the arbitrator." Notably, the majority does not deny that these consequences are inherent in its position, that they are incongruous or that they are at odds with the intent of the parties.

Although the majority believes that *Matter of Schreiber v K-Sea Transp. Corp.* (9 NY3d 331 [2007]) supports its position, the opposite is true. The Court concluded that it was possible for a factfinder to conclude that K-Sea, the employer, had deceived Schreiber into signing the arbitration agreement because it might reasonably be inferred from a provision stating that K-Sea would advance any filing to up to $750 that the fee was likely to be $750 or less, rather than the fee actually demanded of $10,000 (*id.* at 340). Accordingly, the Court directed a hearing on the issue of whether Schreiber had been deceived. The Court then went on to state as follows:

> "If Schreiber fails to show at the hearing that K-Sea obtained his agreement by intentionally deceiving him, Supreme Court should compel arbitration. Even in that event, however, Schreiber should not be compelled to bear costs which would effectively preclude him from pursuing his claim (*see Green Tree Financial Corp.-Ala. v Randolph*, 531 US 79, 92 [2000]). Thus, any order compelling arbitration *should be conditioned on K-Sea's agreement to bear any costs not waived by the AAA*, subject later to reallocation of those costs by the arbitrator" (*id.* at 341 [emphasis added]).

The reason any such order should be conditioned on K-Sea's *agreement* to bear those costs is apparent: K-Sea did not agree to bear them in the arbitration agreement and courts may not "fundamentally modify the terms of the parties' contract and force [a party] to arbitrate in a manner contrary to the agreement to which it has assented" (*Salvano*, 85 NY2d at 182).

The majority does not come to grips with my analysis of *Schreiber*. Indeed, it ignores the express statement in *Schreiber* that "any order compelling arbitration should be conditioned on K-Sea's agreement to bear any costs not waived by the AAA" (9 NY3d at 341). Although the conditional nature of that possible order is inconsistent with the majority's position, it nonetheless asserts that in *Schreiber* the Court of Appeals "adopted" the approach of "severing unenforceable cost-splitting clauses from arbitration agreements." Nor does the majority come to grips either with the express rejection of its approach by the Tenth Circuit in *Shankle* or with *Shankle*'s rationale, grounded in fundamental principles of contract law, that to "'redline' the fee-splitting provision and compel arbitration" would entail an impermissible judicial alteration of unambiguous contract terms (163 F3d at 1235 n 6).

As noted above, I recognize that other principles of contract law might support the conclusion that the fee-splitting provision can be severed from the arbitration agreement. Thus, the majority also relies on a severability clause in the arbitration agreement, which provides that "[i]f any provision of this Agreement is adjudged to be void or otherwise unenforceable, in whole or in part, such adjudication shall not affect the validity of the remainder of the Agreement." On the basis of the apparent facial meaning of the clause's terms, the majority

argues that "by nullifying the objectionable part of the arbitration agreement, this Court will not be overriding the intent of the parties to arbitrate, albeit subject to the AAA rule that the employer shall pay the cost[s] of arbitration." If the majority can rely on the severability clause, its disposition of this appeal is dependent nonetheless on the correctness of its conclusion that the fee-splitting provision is unenforceable, an issue to which I will soon turn.

The effect of the severability clause, however, is not properly before this Court. Brady mentions the clause for the first time in her reply brief (and, for that matter, only in a short footnote). Moreover, there is no indication in the record on appeal that the severability clause or its possible import was raised before Supreme Court: it is not mentioned in the petition; in the affidavit of Brady's counsel in support of her order to show cause seeking, among other things, to enjoin the AAA from dismissing the arbitration; in the transcript of the oral argument before Justice Figueroa; in the post-argument letter submissions of the parties; or in Justice Figueroa's written decision. For these reasons alone, the severability clause and its significance are not properly before this Court (*see Murray v City of New York*, 195 AD2d 379, 381 [1993]; *Recovery Consultants, Inc. v Shin-Hsieh*, 141 AD2d 272 [1988]). Furthermore, the meaning and effect of a severability clause do not present a pure

question of law (*see Matter of Wilson*, 50 NY2d 59, 65 [1980] [observing with respect to a severability clause that "whether the provisions of a contract are severable depends largely upon the intent of the parties as reflected in the language they employ and the particular circumstantial milieu in which the agreement came into being"]). Because Williams has not had an opportunity to address either the intent of the parties in light of the language of the severability clause or the "particular circumstantial milieu," we should resolve this appeal without reference to it (*see McGarr v Guardian Life Ins. Co. of America*, 19 AD3d 254 [2005]; *Ta-Chotani v Double-Click, Inc.*, 276 AD2d 313 [2000]).

The majority makes no effort to defend its implicit position that the import of the severability clause is properly before us. Its argument that excision of the fee-splitting clause and implementation of the AAA "employer-pays" rule would be consistent with the parties' intention to arbitrate simply assumes the answer to the critical question. To be sure, nullification would not "overrid[e] the intent of the parties to arbitrate." But the vital question is whether Williams would have agreed to arbitrate at all before the AAA without the provision of the agreement -- which must be presumed to reflect the intent of the parties (*see Slamow v Del Col*, 79 NY2d 1016 [1992]) -- providing for equal sharing of the "fees and costs of

the arbitrator." For the same reason, the majority's reliance in this regard on the federal policy favoring arbitration of disputes is misplaced. That important policy is irrelevant unless a valid agreement to arbitrate exists (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]).

Against the backdrop of the severability clause, I turn to the two decisions by the federal circuit courts of appeals cited by the majority that provide only superficial support for its position.[5] *In Spinetti*, the Third Circuit affirmed the district court's order granting the employer's motion to compel arbitration of Spinetti's discrimination claims. The Third

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[5]The two district court decisions the majority cites, *Howard v Anderson* (36 F Supp 2d 183 [SD NY 1999]) and *Phillips v Assoc. Home Equity Servs. Inc.* (179 F Supp 2d 840 [ND Ill 2001]), provide the majority with no support at all. In *Howard*, the court rejected a claim by an employee arbitrating her discrimination claims against her former employer that the employer should be directed to pay virtually all of the fees associated with the arbitration; the court did not sever any provision of the arbitration agreement (36 F Supp 2d at 186-187]). In *Phillips*, the district court concluded that Phillips, who had brought suit alleging violations by the defendants of federal laws relating to residential mortgage transactions, had met her burden of showing that the cost-allocation provision of the arbitration would be prohibitively expensive (179 F Supp 2d at 847). Accordingly, the court denied the defendants' motion to compel arbitration (*id.*). Far from severing the cost-allocation provision and directing arbitration, the court stated that "[i]n the event ... that defendants were to agree to bear the costs associated with the arbitration, the Court would be willing to entertain a motion to reconsider its ruling [denying the motion to compel arbitration] on that basis" (*id.*). As is evident, *Phillips* undercuts rather than supports the majority's position. *Res v Masterworks Dev. Corp* (5 Misc 3d 1003[A] [2004]), also cited by the majority, is indistinguishable from *Phillips* and thus it, too, undercuts the majority's position.

Circuit held that "[t]he district court properly determined that the proviso [of the arbitration agreement] requiring each party to pay its own attorney's fees -- regardless of the outcome of the arbitration -- runs counter to statutory provisions under Title VII and ADEA that permit an award of attorney's fees and costs to a prevailing party" (324 F3d at 217). In sharp contrast to this case, Spinetti, not the employer, claimed on appeal "that inasmuch as the attorney's fees and costs provision is deemed contrary to law, the court should have voided the entire arbitration agreement instead of merely trimming its offensive portions" (*id.* at 215). Because the validity of arbitration agreements is a question of state law, the court looked to Pennsylvania law in resolving Spinetti's claim. The court rejected it and wrote as follows:

> "Pennsylvania law supports the actions of the district court in referring Spinetti's employment discrimination dispute to arbitration and striking the agreement's illegal provisions. Under Pennsylvania law, a court of equity may not only remove an offensive term, but may supply a new, limiting term and enforce the covenant so modified. *This unique power to modify the parties' contract* ... arises from the general equity powers of the court" (*id.* at 220 [emphasis added; ellipsis in original; internal quotation marks omitted]).

Gannon, like *Spinetti*, presents the same twist on the facts of this case. There, too, the employer contended that the invalidity of a provision in the arbitration agreement -- a

provision that limited punitive damages (262 F3d at 679 n 2) -- should be severed from the agreement and the employee, Gannon, "should be compelled to arbitrate her claims [of sexual harassment, sex discrimination and retaliation] under the remaining terms of the agreement" (*id.* at 679). Gannon, however, "argue[d] that the invalid provision renders the entire agreement unenforceable as a matter of public policy" (*id.* at 680). The Eighth Circuit reversed the district court's conclusion that "the invalid provision rendered the entire arbitration agreement unenforceable" (*id.* at 678), relying in part on a severability clause in the agreement, but also on "Missouri contract law [that] declares severance to be proper in this instance" (*id.* at 680). The Court thus ruled that:

> "The punitive-damages clause represents only one aspect of their agreement and can be severed without disturbing the primary intent of the parties to arbitrate their disputes. '[W]here one provision in a contract, which does not constitute its main or essential feature or purpose, is void ... but is clearly separable and severable from the other parts which are relied upon, such other parts are not affected by the invalid provision, and may be enforced as if no such provision had been incorporated in the contract.' *Schibi v. Miller,* 268 S.W. 434, 436 (Mo. Ct. App. 1925)" (*id.* at 681 [brackets and ellipsis in original]).

The first point to be made about *Spinetti* and *Gannon* is that in both cases the party whose ox would be gored by enforcing the arbitration agreement without the invalid provision, the

employer, clearly waived any claim that it could not be required to arbitrate under terms to which it had not agreed. After all, the employers in both cases argued that the invalid provision should be severed and the employee should be required to arbitrate.[6]

The second, and more important, point is that *Spinetti* and *Gannon* are grounded squarely in the contract law of, respectively, Pennsylvania and Missouri. Whether New York contract law in this regard is as "unique" as Pennsylvania's (*Spinetti*, 324 F3d at 220), or is sufficiently comparable to Missouri's, need not be debated. For the same reasons that the severance clause is not properly before us, the question of whether New York contract law would permit a court to sever the fee-splitting provision and enforce the remaining provisions of the arbitration agreement also is not properly before us. Brady has never advanced any such argument. Rather, her position was and is that the alleged invalidity of the fee-splitting provision ipso facto requires Williams to arbitrate and bear financial

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[6]I note that the majority sets a precedent with which at least some employees who otherwise are in the same situation as Brady may be unhappy. If such an employee contends that because of an invalid fee-splitting provision she should be permitted to exercise her right, granted by a federal or state statute or otherwise, to litigate, the majority's approach requires the conclusion that she can be compelled to arbitrate at the election of the employer. It cannot be, after all, that the majority's holding enables claimants but not respondents in arbitration proceedings to insist on arbitration when a fee-splitting provision is found to be invalid.

burdens to which it never agreed.

There is New York law on point (*see e.g. Triggs v Triggs*, 46 NY2d 305 [1978]; *Artache v Goldin*, 133 AD2d 596 [1987]) and it only underscores the point that whether an illegal provision can be severed from a contract so as to permit enforcement of the remaining terms is or at least can be a fact-bound question that cannot be raised for the first time on appeal (*see McGarr, supra; Ta-Chotani, supra*). Thus, in *Triggs*, the majority held that the fact that one portion of an agreement "might have involved illegality provides no compulsion not to enforce the other, legal portion of the agreement where, as here, there has been no factual determination that enforcement of the [legal] stock purchase option was dependent on enforcement of the terms [of questionable legality]" (46 NY2d at 309-310). Here, of course, there has been no factual determination that the agreement to arbitrate was or was not dependent on the fee-splitting provision. Nor does the record permit us to make such a determination. The absence of such a factual determination in this case is attributable only to Brady, the party seeking enforcement of the remaining terms of the agreement, who has simply assumed that the illegality of the fee-splitting provision both entitles her to enforcement of the remaining terms and requires Williams to shoulder financial burdens to which it never agreed. Under these circumstances, it is manifestly unfair to

assume that Williams would have agreed to arbitrate even if it were required to pay all the arbitrator's costs and fees despite the express provision that the fee-splitting provision would trump any contrary rule of the AAA.

In *Artache v Goldin*, a panel of the Second Department wrote that "[c]ourts will be particularly ready to sever the illegal components and enforce the other components of a contract where the injured party is less culpable and the other party would otherwise be unjustly enriched by using his own misconduct as a shield against otherwise legitimate claims" (133 AD2d at 599). Of course, Williams has not had any opportunity to address the question of relative culpability or even the question of whether it plausibly can be thought to have any culpability. It must be stressed, moreover, that the fee-splitting provision unquestionably is not per se illegal. To the contrary, as *Bradford* and every case decided after *Bradford* has held -- and as the majority recognizes -- such a provision is lawful unless the particular party attacking it meets its burden of demonstrating that it would impose costs that, relative to the costs of litigation, would be prohibitive to that party in light of the party's ability to pay. Furthermore, even assuming Williams sensibly could be thought to have engaged in any misconduct, it has had no opportunity to address the question of whether it would be "unjustly enriched" by not severing the fee-splitting

provision. To assume that Williams would be unjustly enriched places on it the burden that Brady must bear of showing that the costs of arbitration would be prohibitively greater than the costs of litigation.[7]

In sum, I would not reach the issue of whether the fee-splitting provision is unenforceable, for Brady is not entitled to the relief she seeks even if it is unenforceable. But if it were proper to reach the issue, I cannot agree with the majority's conclusion that Brady met her burden of showing that she was likely to incur prohibitive costs that would deter her from arbitrating her claims.

C

As the Fourth Circuit stated in *Bradford*:

> "The cost of arbitration, as far as its deterrent effect, cannot be measured in a vacuum or premised upon a claimant's abstract contention that arbitration costs are 'too high.' Rather, an appropriate case-by-case inquiry must focus upon a claimant's expected or actual arbitration costs and his ability to pay those costs, measured against a baseline of the claimant's expected costs

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[7]Given the inadequacy of Brady's showing, as discussed below, for all we know it may be that the relief the majority bestows on her will enable her to incur costs that are substantially less than the costs she would incur if she litigated her claims in court, and that Williams will incur costs that are substantially greater than it would incur in a litigation. In that event, Brady would be enriched and Williams would be disadvantaged.

> for litigation and his ability to pay those costs" (238 F3d at 556 n 5).

As the panel went on to note, "parties to litigation in court often face costs that are not typically found in arbitration, such as the costs of longer proceedings and more complicated appeals on the merits" (*id.*; *see also Rosenberg v Merrill Lynch, Pierce, Fenner & Smith*, 170 F3d 1, 16 [1st Cir 1999] ["arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court"]; *cf. Gilmer*, 500 US at 31 [noting that "by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"] [internal quotation marks omitted]).

On the important issue of Brady's "expected costs for litigation and [her] ability to pay those costs" (*Bradford*, 238 F3d at 556 n 5), Brady made no showing at all in Supreme Court. Rather, in an affidavit from her attorney that was before the court, counsel asserted only that he "estimate[d] that the arbitration cost that will be incurred in Brady's dispute with Williams is approximately $30,000 to $35,000 greater at the AAA than it would have been if adjudicated at the NASD." First, this "estimation" is wholly conclusory as it is supported by no factual detail. Second, it is irrelevant whether arbitration before the AAA is more expensive than arbitration before the

NASD. Third, and most critically, counsel failed to offer even a conclusory assertion that arbitration before the AAA would be more expensive, let alone prohibitively so, than litigation in court. As is clear from a case the majority cites, this failure alone should be sufficient to reject Brady's claim that prohibitive costs would be visited on her by enforcing the fee-splitting provision (*see James v McDonald's Corp.*, 417 F3d 672, 680 [7th Cir 2005] [rejecting claim by James that high up-front costs of arbitration prohibit her from arbitrating her claims; "James has not provided any evidence concerning the comparative expense of litigating her claims. The cost differential between arbitration and litigation is evidence highly probative to [her] claim that requiring her to proceed through arbitration, rather than through the courts, will effectively deny her legal recourse"]). The majority makes no effort to distinguish *James* in this regard.

On the equally important issue of Brady's ability to pay the arbitration costs, Brady made a clearly inadequate showing in Supreme Court. Apart from a statement by her counsel in a letter to the AAA that was before the court asserting that she had been unemployed since she was terminated by Williams in February 2005, Brady offered statements regarding only her earned income in the preceding years. Thus, the demand for arbitration she submitted to the AAA, which was before the court as an exhibit to an

affirmation from her counsel, states that her income from her employment with Williams grew from $100,000 in 1999, to $137,500 in 2000, to $324,000 in 2001, to $356,000 in 2002, to $405,000 in 2003" before it dropped to $204,691 in 2004. It is not even clear that Brady swore to the truth of these statements; the copy of the demand in the record on appeal includes an unexecuted verification of the content of the demand. Of course, it is at least conceivable that Brady had income from other sources, such as investments. On this subject, she said nothing. In any event, it is far from obvious that someone whose income totaled more than $1,500,000 from 1999 through 2004 would be unable to pay $21,450, the amount the majority states would be her share of the arbitrator's fee.[8] Furthermore, whether that amount would be probatively expensive should be determined "against a baseline of the claimant's expected costs for *litigation* and h[er] ability to pay those costs" (*Bradford*, 238 F3d at 556 n 5 [emphasis added]), matters regarding which Brady made no showing.

On this issue, moreover, it should be emphasized that Brady also failed to make any showing at all regarding her financial assets. The majority regards as irrelevant the extent of her financial assets; it does not mention this failure in the course

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[8]The majority errs in taking into account "other arbitration fees and costs that would have to be borne out equally by the parties." As discussed above, only the fees and costs of the arbitrator must be shared equally.

of concluding that "Brady adequately carried her burden of demonstrating that she was not in a position to afford the cost associated with the arbitration." Indeed, with respect to Brady's ability to pay half of the arbitration costs, i.e., half of the arbitrator's fees and costs, the majority regards her "long-term unemployment" as dispositive. Under the majority's analysis it does not matter if Brady has hundreds of thousands of dollars in liquid or other assets. When the central issue is the ability to pay of a party resisting enforcement of a fee-splitting provision, it is startling to regard as irrelevant the extent of the party's financial assets. Not surprisingly, this startling view of the law is refuted by the applicable authorities (*see e.g. Dobbins v Hawk's Enters.*, 198 F3d 715, 717 [8th Cir 1999] [rejecting claim by plaintiffs Todd and Stacy Dobbins that arbitration agreement was unenforceable because of fees they were required to pay under AAA rules; "Mr. Dobbins refused to provide his family's financial information to the AAA. This is an important step that must be taken before an unconscionability determination can be made"]).

The majority is correct that I "cannot -- and do[] not -- dispute that the fee-splitting provision with regard to the arbitrator's compensation requires Brady to bear a substantial cost for submitting her discrimination claims to arbitration." The majority is wrong in maintaining that I "attempt[] to

minimize the effect of such high cost by making us believe that the alternative litigation cost would be much higher." I have no idea whether the alternative litigation costs would be higher, let alone much higher. My point is that neither I nor the majority knows because Brady made no effort to sustain *her* burden of showing that the cost of arbitration would be prohibitively expensive when "measured against a baseline of [her] expected costs for litigation and [her] ability to pay those costs" (*Bradford,* 238 F3d at 556 n 5). Accordingly, the majority's assertion of the ostensible "fact" that Brady would incur a "substantial arbitration cost relative to litigation" is pure ipse dixit.

The majority also misses the point in going on to argue that:

> "It is common knowledge that an employee filing an employment discrimination claim in the federal courts must pay a minimal filing fee, generally only a few hundred dollars. Also, the costs of maintaining and operating the court system, including the salaries of judges and other court employees, are borne by the taxpayers, not the litigants themselves."

The complete answer to this is the one given in *Bradford:*

> "Although the *Cole* court framed its concern with fee-splitting partially in terms of the fact that arbitrators' fees are 'unlike anything that [a claimant] would have to pay to pursue his statutory claims in court' because a claimant normally 'would be free to pursue his claims in court without having to pay for the services of a judge,' *Cole*, 105

> F3d at 1484-85, we believe the proper inquiry under *Gilmer* is not where the money goes but rather the amount of money that ultimately will be paid by the claimant. Indeed, we fail to see how a claimant could be deterred from pursuing his statutory rights in arbitration simply by the fact that his fees would be paid to the arbitrator where the overall cost of arbitration is otherwise equal to or less than the cost of litigation in court" (*Bradford*, 238 F3d at 556 [footnote omitted; brackets in original]).

The majority does not and cannot directly take issue with the obvious fact -- expressly recognized in cases such as *Bradford* and *Rosenberg* -- that arbitration can be less expensive than litigation.[9] The majority, however, does so obliquely by arguing that "[w]hile the employee filing in court is likely to incur the costs of legal representation, her attorneys may be likely to take the case on a contingency fee basis." Putting aside pro bono cases -- nothing in the record suggests that this is one -- the complainant faces the *certainty* of incurring the costs of legal representation regardless of whether his or her complaint is adjudicated in an arbitral or judicial forum. The majority appears to suggest that those costs are or can be lower

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[9]As noted above, in observing that "parties to litigation in court often face costs that are not typically found in arbitration," the *Bradford* court referred specifically to the costs of "longer proceedings and more complicated appeals on the merits" (*Bradford*, 238 F3d at 556 n 5). In New York, parties who arbitrate their disputes do not typically face the costs of discovery proceedings (*see De Sapio v Kohlmeyer*, 35 NY2d 402, 406 [1974]).

in judicial litigation because plaintiffs' attorneys "may be likely" to agree to represent their clients on a contingency fee basis. Nothing but sheer speculation supports the implicit assumption that representation on a contingency fee basis is more likely in litigation than when attorneys represent claimants in arbitration. But even if that were so, it would not get the majority anywhere because it does not follow that the costs of legal representation are for this reason generally lower for claimants than plaintiffs. In any event, what generally may be true is irrelevant as the focus must be on the particular facts of this case (*see Bradford,* 238 F3d at 556 n 5 ["an appropriate case-by-case inquiry must focus upon a claimant's expected or actual arbitration costs and his ability to pay those costs, measured against a baseline of the claimant's expected costs for litigation and his ability to pay those costs"]).[10]

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[10]For the same reason the majority's contention that "in general, it cannot be disputed that the out-of-pocket expenses for an employee filing a legal suit are minimal," also is irrelevant. Nonetheless, three points should be made about this contention. First, when attorneys are paid on an hourly basis, there is no reason to suppose that they are less likely to seek a retainer before filing a legal suit as opposed to a demand for arbitration. Second, given the "simplicity, informality, and expedition of arbitration" (*Gilmer,* 500 US at 31 [internal quotation marks omitted]), it is reasonable to suppose that the amount of the initial retainer generally will be lower when an arbitration demand is to be filled. Third, even assuming that the initial out-of-pocket expenses for an employer filing a legal suit are lower when a legal suit is filed, the proper focus is on the "amount of money that ultimately will be paid by the claimant" (*Bradford,* 238 F3d at 556).

The majority goes on to argue that "if the employee's suit is successful, the remedies available under federal anti-discrimination legislation include the award of attorney's fees." Presumably, the majority is of the view that this substantive remedy is not available to Brady. That is simply not so. In fact, the arbitration agreement expressly provides as follows: "if any party prevails on a statutory claim, which affords the prevailing party attorneys' fees ... the Arbitrator may award reasonable fees to the prevailing party." Brady alleges in her demand for arbitration that Williams committed various discriminatory and retaliatory acts in violation of federal, state and local laws that do authorize an award of reasonable attorney's fees. To the extent these claims are meritorious -- Brady made no showing that they are -- that also would undercut rather than support the majority's position that Brady met her burden of showing that the costs of arbitration relative to litigation would be prohibitive.

For these reasons, I agree with Justice Figueroa that Brady "has not proven that the fees ... are so great that it deprives her of the opportunity to enforce her rights[;] if anything, the evidence is to the contrary."

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Brady's other arguments for affirmative relief can be disposed of readily. In addition to seeking relief under CPLR

article 75 against Williams,[11] Brady sought relief under CPLR article 78 against the AAA. Specifically, Brady sought an order directing the AAA to enter an award on default against Williams in the arbitration or, in the alternative, an order directing the AAA to enter such a default award unless Williams paid all the outstanding costs and fees of the arbitration and committed to pay all future costs and fees. The AAA declined to appear, taking the position that arbitrators and arbitral organizations are immune from suits like this one. Justice Figueroa concluded that Brady could not maintain a proceeding under article 78 against the AAA. Although Brady argues on appeal that this Court should reverse and enter an order compelling the AAA to enter a default award against Williams in the event it does not pay all the arbitration costs, Brady cites to no authority supporting the proposition that she can maintain the proceeding against the AAA and makes no effort to distinguish the decision that Justice Figueroa relied on in ruling to the contrary, *Matter of Snyder-Plax v American Arbitration Assn.* (196 AD2d 872, 875 [1993], *lv denied* 83 NY2d 757 [1994]). In any event, as previously discussed, the linchpin in this argument -- that Williams is required to shoulder all the arbitration costs -- is meritless.

Finally, Brady requests from this Court alternative relief

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[11]As Williams' attorney noted during oral argument before Justice Figueroa, Brady was seeking in her petition against Williams what was in effect a motion to compel arbitration.

that she never requested in her petition: that we grant her leave to pursue her claims in "judicial litigation." As Williams correctly argues, we cannot under these circumstances grant that relief (*see Rodrigues v City of New York*, 193 AD2d 79, 88 [1993]; *Recovery Consultants*, 141 AD2d at 276). Any grant of that relief, moreover, would be appropriate only if commencing an action at this juncture would not be time-barred, an issue not briefed by the parties and on which we should not opine. If an action would not be timely, Brady's request would be at best ineffectual. It also would be inappropriate, as Williams has not taken any action that prevented Brady from bringing an action and she apparently chose not to bring an action despite her current position that enforcement of the fee-splitting provision would entail prohibitive costs. If an action would be timely, the relief she seeks is unnecessary.

For these reasons, I would affirm Justice Figueroa's order in all respects.

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

ENTERED: APRIL 30, 2009