SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 11, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Richter, Gische, JJ.

10691 In re Juan P.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about June 22, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of forcible touching and sexual abuse in the third degree, and placed him on probation for a period of 12 months, reversed, as an exercise of discretion in the interest of justice, without costs, the delinquency finding and dispositional order vacated, and the matter remanded to Family Court with a direction to order an adjournment in contemplation of dismissal pursuant to Family Court Act § 315.3(1) nunc pro tunc to June 22,

2012.

By petition dated January 11, 2011, appellant was charged with sexual abuse in the first degree (a D felony), forcible touching (an A misdemeanor) and sexual abuse in the third degree (a B misdemeanor). At the fact-finding hearing on these charges, the 14-year-old female complainant testified on direct examination that, on November 23, 2010, she walked home from school with appellant, who was 15½ years old at the time of the incident. During the complainant's walk home with appellant (whom she saw everyday at school), he asked her to kiss him, which she refused to do. He persisted in asking for a kiss, but she continued to say no. She told him to go somewhere else because she "did not want problems." At some point, appellant pulled her by the arm and again asked for a kiss, and she again refused. Appellant then placed his hands on the complainant's shoulders, put her against the wall of a shop, and lowered her blouse and bra. He then kissed her on the mouth two times, kissed her breasts two times and kissed her neck once. The complainant told appellant to leave her alone, pushed him away and started walking away fast. Appellant followed her, saying, in a voice that sounded "sexual," that he would not leave until she gave him a kiss. The complainant continued walking and, when she reached her home, she told appellant that she would not open

the door until he left. Appellant said that he would not leave until she gave him a kiss. The complainant again told him to leave because she did not want problems and that her mother was in the laundry; appellant replied there was no laundry. The complainant told him there was a laundry, opened the door and pressed the button for the elevator. When the elevator arrived, appellant entered it with her; when they arrived at the complainant's floor, appellant grabbed her to kiss her and she bit his lips. She then left appellant, who told her that was "how he liked women."

On cross-examination, the complainant admitted that she spoke to her friend Jason about the incident and told Jason that she did not want anything to happen to appellant. She initially denied that she told Jason that her father was making her do this or that the superintendent of the building had come to her apartment on the night of November 23, 2010. She did text the appellant that night telling him that she would have gotten in big trouble and that the police came to her house that night because of what he had done in the elevator. Although she texted appellant that the police came to her house that night, in fact they came the next day after her father called the police. The complainant further testified that she sent appellant a text message on January 23, 2011, at 2:32 a.m., saying "Come on, Juan,

please don't be mad at me." She also sent texts saying "I don't want you to be like this with me" and that she wanted to be his friend. She texted further that it was not her fault that this was happening, that she had done everything to defend him and that she had told him once before why this was happening, namely, that her father was making her do this. Appellant did not respond to the complainant's texts. The cross-examination then turned to the subject of the complainant's conversation with her friend Jason a few days before the hearing, on September 30, 2011, which apparently had been taped.[1] The complainant stated in that conversation that this was all happening because of the "damn super" and her father.

At the conclusion of the fact-finding hearing, the court dismissed the first count (the only one charging a felony) but sustained the two misdemeanor counts. Thereafter, the probation department submitted an investigation report, which stated in pertinent part:

> "Based on the serious, sexual nature of the instant offense that [appellant] sexually abused the victim in the street, he needs sex offender treatment counseling and the Department of Probation's intensive supervision

[1]The dissent's observation that there is no transcript of the taped conversation (which is in Spanish), while true, is irrelevant. The complainant was asked questions relating to the taped conversation at the hearing, and that examination is, of course, part of the record.

services, ESP Probation to help deter him from further delinquent activity and protect the community."

At the dispositional hearing, the presentment agency indicated that it disagreed with the foregoing recommendation to give appellant ESP probation. Rather, the presentment agency told the court that general supervision probation would be sufficient. The court thereupon imposed the aforementioned disposition of 12 months of probation.[2]

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). While appellant has raised issues concerning the credibility of the sole witness against him, we do not think that the record, viewed as whole, warrants disturbing the hearing court's resolution of those issues.

However, we conclude that an adjournment in contemplation of dismissal (ACD) would have been the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see e.g. Matter of Tyvan B.*, 84 AD3d 462 [1st Dept 2011]; *Matter of Anthony M.*, 47 AD3d 434

[2]While our dissenting colleague places much reliance on the probation department's recommendation, it bears emphasis that, as noted above, not even the presentment agency adopted the department's sanction recommendation in full.

[1st Dept 2008]). We note that an ACD could have been made subject to conditions, such as counseling and educational requirements. This was appellant's first offense, and he had an exemplary academic record, along with strong recommendations from school personnel.[3] There is no indication that he has unsavory

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[3]Appellant's ESL teacher noted that he had an overall grade-point average of "close to 90%" as of March 2012, and also wrote of him:

> "[He] has taken on a strong sense of responsibility with his grades and academic progress. He has a sense of self discipline for completing his work, maintaining a high GPA and being present in class every day. [He] is a natural leader and it is seen in the classroom. He is the first one to volunteer to assist whenever needed. In addition to being invested in his academics, [he] invests himself whole heartedly in the . . . [s]chool's baseball team. He recently became team captain as a result of his commitment and work ethic."

Appellant's college preparatory teacher and baseball coach wrote of him:

> "He has exceeded [*sic*] in his studies and as a class leader. He is boasting a 90 GPA and this is coming from a student who has been an ESL student since his freshman year. I cannot begin to express my admiration for this student. He conducts himself with such humility that it is a pleasure to work with him. . . . I know that he can and will shine in college.
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> ". . . I . . . named [appellant] captain of the baseball team. I explained to the team that [he] is a wonderful example of what I expect from my players, great grades, leadership qualities, as well as being a hard working player who is both modest about [his] ability and helpful to those who could use help both on and off the field."

friends or a record of school disciplinary problems, truancy or poor grades (*cf. Matter of Narvanda S.*, 109 AD3d 710 [1st Dept 2013]). On the contrary, appellant, who has a strong social support network, received an award for perfect school attendance and, upon graduation from eighth grade, an assemblyman and senator from the area awarded him a certificate of merit for academic achievement. He has also demonstrated leadership in sports. Additionally, appellant participated in a sexual behavior program and expressed remorse for his actions. Furthermore, appellant stayed out of trouble for the 18 months that the case was pending. Based on all these factors, there is no reason to believe that appellant needed any supervision beyond that which could have been provided under an ACD.

The dissent asserts that our disposition of this appeal "unjustifiably interferes with the judgment of the trial court," and expresses "concern" over our decision. While we respect the differing judgment of the dissent (and of the trial court), we believe that our determination that an ACD should have been issued — a disposition that by no means reflects extraordinary leniency — is justified for the reasons already discussed. Moreover, we see no warrant for the dissent's professed "concern" over our decision, given that we merely replace a sentence of 12 months of probation — a sentence that appellant has already

successfully served — with a retroactive ACD that, if issued at the original disposition, would have involved supervision of 6 months.[4]

The dissent, while acknowledging that we do not disagree on what the complainant said on cross-examination, asserts that we differ on the conclusion to be drawn from some of that testimony. Although the dissent is obviously correct to the extent it takes the position that the complainant's testimony on cross-examination does not necessarily discredit her other testimony, the dissent's apparent view that there was no issue at all as to the complainant's credibility is one-sided, to say the least. In any event, the point of the dissent's discussion is unclear, since, as previously stated, we determine that the fact-finding against appellant was not only supported by legally sufficient evidence but was consistent with the weight of the evidence. The weight-of-the-evidence determination requires us to review all of the evidence in the record, not only the evidence supporting the presentment agency's case. Our dissenting colleague, by

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[4]The dissent complains that it is not the Appellate Division's role, on an appeal from a delinquency adjudication, to consider events that have occurred since the order of disposition was entered. While we generally agree with the dissent on this point, we refer to such post-disposition occurrences in this writing, not because they determine the outcome of the appeal, but to further highlight the undue severity of the dissent's approach.

contrast, limits the recitation of the hearing testimony in her opinion to the complainant's direct testimony, and focuses on the details most damning of appellant. Since the dissenter insists on publicizing the evidence most favorable to the presentment agency, and only that evidence, we deem it proper to balance the picture of the record she presents with a summary of portions of the complainant's testimony on cross-examination.[5]

Needless to say, we share the dissent's disapproval of the conduct in which appellant was found to have engaged, which was completely unacceptable. Given that the accused is a juvenile, however, we are bound to view his conduct, which was a first offense, in the context of his total life circumstances for the purpose of determining the least restrictive dispositional alternative consistent with both appellant's needs and the need for protection of the community, including the complainant. We

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[5]We do not recapitulate all of the testimony by the complainant on cross-examination that might put in question the credibility of her direct testimony. Further, while the dissent seems to fault us for failing to accept automatically the trial court's findings and credibility determinations, it bears noting that the trial court itself may not have fully accepted the complainant's testimony. As previously noted, appellant was also charged with sexual abuse in the first degree. Although the evidence presented was arguably sufficient to sustain that charge, the trial court nevertheless dismissed it. In response to the dissent's unsupported speculation about the reasons for the post-incident conduct to which the complainant admitted upon cross-examination, we note that this is not a case of domestic violence.

disagree with the dissent's view that a disposition constituting the least restrictive alternative consistent with the needs of the community and of the accused juvenile fails to treat misdemeanor sexual misconduct between adolescents with appropriate seriousness. A least restrictive disposition is what is required as part of our juvenile justice system (*see* Family Court Act § 352.1, § 352.2), and the dissent, by focusing solely on the misconduct as the basis for the disposition — which is what the dissenter seems to do, in spite of her claim to have "tak[en] into account all of the circumstances" — fails to balance the needs and circumstances of this particular appellant, as the statute requires us to do (*see Narvanda S.*, 109 AD3d at 712). Viewing the case in that context, and considering that the misdemeanor misconduct at issue was an aberration on the part of an otherwise promising young individual, we believe that appellant's prospects for rehabilitation, considered at the time of disposition, were favorable enough to warrant the issuance of an ACD. Indeed, we are puzzled by the dissent's dismissal of the supporting letters offered by appellant's teachers, which discuss not only his character but also his achievements. Obviously, however, the letters do not discuss this incident because the writers have no knowledge of it. If an ACD is not appropriate for this appellant, whose record is unblemished except for this

one incident, one wonders whether there is any juvenile charged with misdemeanor sexual abuse who would qualify for an ACD.[6]

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

[6]Our reversal for issuance of an ACD in this case is entirely consistent with *Matter of Najee A.* (26 AD3d 258 [1st Dept 2006], *lv denied* 7 NY3d 703 [2006]), a case cited by the dissent in which we affirmed a sentence of probation. The appellant in *Najee* was found to have committed acts equivalent to two counts of sexual abuse in the first degree (a felony), as well as forcible touching, based on conduct more egregious than appellant's misconduct here — specifically, "rubbing his clothed penis against the victim's buttocks while attempting to pull down the victim's pants" (26 AD3d at 259).

RICHTER, J. (dissenting)

The majority's ruling unjustifiably interferes with the judgment of the trial court in this case involving the forcible touching of an adolescent girl by another adolescent. Based on the 14-year-old complainant's account, which was credited both by the trial court and the majority here, on November 23, 2010, at around 5:20 p.m., the complainant was walking home after school with appellant. Appellant, who was 15, began asking the complainant to kiss him, telling her that she was "really hot." She told him no. When appellant continued to ask for a kiss, she told him to go somewhere else because she "did not want problems." Appellant pulled her by the arm and again told her to kiss him, and she again told him no.

Appellant then pushed her up against the wall of a store and held her there with his hands on her shoulders. He told her that he gets whatever he wants and then tried to kiss her. She tried to push him away, telling him the entire time to leave her alone. She moved her head back and forth in an effort to avoid his kisses, but he kissed her at least twice on the mouth and kissed her neck. As she tried to push him away, he grabbed the top of her blouse and pulled it, along with her bra, down, exposing her breasts. He then kissed and sucked on both of her breasts before she managed to push him away.

She then started walking quickly to her apartment building. He followed her, continually telling her that he would not leave until she kissed him. When she reached her building, she told appellant she would not open the door until he left. When he refused to leave, she finally went inside. He followed her into the elevator, where he grabbed her and backed her up against the wall, ordering her to "give [him] a kiss now." When he tried to kiss her, she bit his lips and in response he said "that's how he liked women." When the elevator reached her floor, she was finally able to get away from him. She had red marks on her neck for two days and pain in her breast for a day afterwards. Her mother noticed these red and black marks on her neck the next day and her father called the police.

The majority's decision to vacate the juvenile delinquency finding is of concern. The offense did not consist of a momentary lapse in judgment, but rather was a prolonged attack in which the victim told appellant several times that she did not want to kiss him and made it clear that he should leave her alone. Appellant ignored her pleas for him to leave her alone and proceeded to forcibly kiss her neck and breasts. Further, appellant then followed the complainant into her apartment building where he again cornered her and tried to kiss her. Appellant's actions, including his statement to the complainant

that he gets whatever he wants, indicate a sense of entitlement and disregard for the rights and well-being of others.

The majority and I do not differ on what the complainant said on cross-examination, but rather on the conclusion to be drawn from some of her statements. I discuss this issue, in part, because the implication of the majority's decision is that they think the complainant is exaggerating. For example, the fact that the complainant told her friend Jason she did not "want anything to happen to appellant," does not mean the attack did not occur. The complainant was a teenager who may not have wanted to have to relive this incident by prosecuting it, or was concerned about the possible repercussions of having someone she knew, a school athlete who was supposedly her friend, punished based on her reporting of abuse. I find her behavior to be entirely consistent with that of sexual assault victims, especially in cases where the complainant knows her assailant. In any event, she was 14 years old and it was not her decision whether he faced legal consequences; such decisions are made by the court. Further, the complainant's statement to her friend Jason that her father was making her go through with the complaint and that all of this was happening because of her father does not indicate that she is lying about appellant's

abuse.[1] Any insistence by her father that a report be filed against appellant, even if she may not have wanted to contact the police, is of little significance. Ultimately, she testified in Family Court and the judge believed her.[2]

The majority dismisses the petition because it is appellant's first offense, he has good grades, and has a strong social network. But the conduct here is not such that the extraordinary remedy of an ACD nunc pro tunc is appropriate. Appellant's academic performance, which is a positive accomplishment, does not mitigate the aggressive nature of the offense, which left marks on complainant's neck and breasts. Moreover, appellant obviously has the intellect to know the difference between right and wrong, and the majority's reference to his support network does not take into account the fact that his primary guardian, his mother, refused to accept that he did

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[1] It should be noted that the recording of the conversation between the complainant and Jason, although played during the hearing, was in Spanish and no transcript of a translation of the conversation is included in the record. We therefore do not have a complete context for her remarks. Although the complainant also mentions the super in this recorded conversation, the record provides no information about what she might have told the super and he did not testify.

[2] Contrary to the dissent's suggestion, no conclusion about the complainant's credibility can be drawn from the trial judge's decision to dismiss the charge of sexual abuse in the first degree. The judge gives no explanation for this ruling.

anything wrong. Nor does the fact that this is appellant's first offense entitle him to a lesser disposition (*see Matter of Thomas D.*, 50 AD3d 897 [2d Dept 2008]).

Appellant also urges this Court to take into consideration his participation in athletics. I fail to see how appellant being an athlete supports an ACD. Appellant's participation in team sports did not stop him from attacking the complainant. Furthermore, the letters from his teacher and his coach about his leadership skills make no mention of the offense at issue here. We have no idea what their opinion of appellant's character would be if they knew about his inappropriate actions. The behavior appellant engaged in is consistent with intimidation and a lack of self control. It certainly does not make him someone whose behavior other young people should follow. Moreover, his unwillingness to admit what actually happened is inconsistent with leadership and shows a reluctance to be held accountable.

The Family Court has broad discretion in fashioning a disposition and its determination should be accorded a great amount of deference (*Matter of Donovan E.*, 92 AD3d 881, 882 [2d Dept 2012]). Here, the Family Court determined, after considering the nature of the instant offense and reviewing the reports provided, that an ACD was not appropriate. Rather, the court found appellant required supervision and that 12 months of

probation, with the requirement that he participate in a sexual offender treatment program, was the least restrictive alternative in light of the needs of appellant and the safety of the community (*see* Family Ct Act § 352.2[2]). The probation report also recommended that appellant receive sex offender treatment counseling and supervision.

The cases that the majority relies on to support the contention that probation was not the least restrictive disposition available do not concern sexual offenses (*e.g. Matter of Tyvan B.*, 84 AD3d 462 [1st Dept 2011] [possession of graffiti instruments and criminal possession of marihuana in the 5th degree]; *Matter of Anthony M.*, 47 AD3d 434 [1st Dept 2008] [petit larceny]). Although there are cases in which an ACD would be warranted (*see e.g. Matter of Julian O.*, 80 AD3d 525 [1st Dept 2011]), the disposition here was "appropriate in light of . . . the nature of the incident and the recommendations made in the probation report" (*Matter of Thomas*, 50 AD3d at 898; *see also Matter of Najee A.*, 26 AD3d 258 [1st Dept 2006], *lv denied* 7 NY3d 703 [2006] [probation appropriate where appellant engaged in sexualized conduct including attempting to pull down victim's pants]).

The majority also bases its determination on appellant's alleged remorse for his behavior and his participation in a

sexual offender program. In fact, appellant initially showed no remorse for his actions and denied having done anything wrong. His account in the probation report blames the victim, stating that she told him to kiss her. He also denied removing any of her clothes or touching her breasts. The record indicates that appellant did not even begin to take responsibility for his actions until he was evaluated by the Sexual Behavior Clinic for their sexual offender program. The clinic's evaluation is dated less than a week before the disposition proceeding. Indeed, the Family Court correctly noted that appellant only appeared to take responsibility for his actions when it was in his best interest to do so. Although the clinic indicated that appellant expressed remorse for his behavior, appellant only admitted to kissing the complainant even after she said stop and "playing and messing" with her. This minimization of the incident, which is not addressed by the majority, is further evidence that he needed the probation supervision mandated by the court, and not an ACD.

The majority commends appellant for attending his program, but appellant's participation in the sexual offender program was a condition of his probation. Whether he completed the program is not something we can consider because it involves facts that occurred after the Family Court proceeding was complete (*see e.g. People v Fields*, 110 AD3d 559 [lst Dept 2013], *lv denied* ___ NY3d

___, 2014 NY Slip Op 60339 [2014]). In any event, even if appellant actually complied with the court's direction, we cannot ignore the fact that he faced a possible probation violation proceeding if he had done otherwise. Furthermore, the mere fact that appellant stayed out of trouble for the 18 months that this case was pending is of little consequence as it was in appellant's self-interest to refrain from committing any further offenses during that period because the court had not decided the case.

It is not the role of an appellate court to retroactively determine what the appropriate sanction should be, but rather our role is to determine whether, based on the facts and circumstances as they existed at the time of the Family Court proceeding, the trial court acted appropriately. If the Legislature wants to create an option for an appellate court to expunge juvenile delinquency adjudications once someone has successfully completed probation, it is up to the Legislature to do so.[3] In deciding that appellant should be given an ACD nunc

[3] A few courts have vacated juvenile delinquency adjudications pursuant to Family Court Act § 355.1, which requires a substantial change of circumstances. In such an application, the trial court has a record of the juvenile's actions after the original order was issued, something that is beyond the appellate record. I take no position on whether such an application would have been appropriate here.

pro tunc, the majority does not identify a single fact that the trial judge, who actually met appellant, overlooked. After consideration of the very same mitigating factors identified by the majority, the trial judge correctly concluded probation was the least restrictive alternative. Although the majority describes appellant as "an otherwise promising young individual," his statements and behavior suggest a more deep seated problem than the majority is willing to acknowledge. Thus, taking into account all of the circumstances including his unwillingness to take full responsibility, I would affirm.

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

ENTERED: FEBRUARY 11, 2014

CLERK

Friedman, J.P., Renwick, Freedman, Feinman, JJ.

11192 69 West 9 Owners Corp., et al., Index 106005/10
Plaintiffs-Respondents-
Appellants,

-against-

Admiral Idemnity Company,
Defendant-Appellant-
Respondent.

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Arnold Stream, New York, for appellant-respondent.

Braverman Greenspun, P.C., New York (Jonathan Kolbrener of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 24, 2011, which denied the parties' motions for summary judgment, unanimously affirmed, without costs.

In this declaratory judgment action, plaintiffs seek coverage from defendant in an underlying lawsuit against the plaintiff residential cooperative and some of its board members brought by a resident shareholder. The dispute centers, in part, on the timeliness of plaintiffs' forwarding to defendant insurer of a number of documents submitted by the resident shareholder in the underlying action.

The motion court erred in finding an issue of fact as to whether plaintiffs breached their obligation under Section IV(2)(c)(1) of the Commercial General Liability portion of the

insurance policy by not immediately providing defendant insurer copies of the resident shareholder's January 2007 correspondence, as well as the correspondence received after March 2007. Although the court correctly observed that it is not entirely clear whether these letters constituted "demands, notices, summonses or legal papers" as those undefined terms are used in the policy, because this question does not involve extrinsic evidence, the court should not have determined that interpretation of the ambiguous policy language was a question of fact. Rather, as a matter of law, the motion court should have resolved the ambiguity in the insurance contract against the insurer, as drafter of the policy's language (*see Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326 [1996]; *cf. Majawalla v Utica First Ins. Co.*, 71 AD3d 958, 960 [2d Dept 2010], *lv dismissed* 16 NY3d 871 [2011] [finding an issue of fact to resolve ambiguity in a contract provision that referred to an extrinsic agreement]). Therefore, letters or correspondence that are not clearly "demands, notices, summonses or legal papers" do not fall within this provision of the policy.

Nevertheless, the motion court properly denied partial summary judgment to plaintiffs, as there are remaining questions of fact regarding whether plaintiffs provided notice of claim as soon as practicable and whether they maintained a good-faith,

reasonable belief that the January 2007 correspondence was redundant of the December 2006 notice of incident (*see Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 750 [1995]).

The motion court also properly denied partial summary judgment to defendant insurer, as there is a question of fact regarding the timeliness of its disclaimer. There is a material factual dispute over the date on which the basis for defendant's disclaimer was readily apparent, as well as whether defendant's explanation for any delay is satisfactory (*see Continental Cas. Co. v Stradford*, 11 NY3d 443, 449 [2008]).

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

ENTERED: FEBRUARY 11, 2014

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11291 In re Angelina Jessie Pierre L.,

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

Anne Elizabeth Pierre L., etc.,
Respondent-Appellant,

St. Vincent's Services, Inc.,
Petitioner-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

Magovern & Sclafani, Mineloa (Joanna M. Roberson of counsel), for respondent.

Andrew J. Baer, New York, attorney for the child.

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Order, Family Court, Bronx County (Jane Pearl, J.), entered on or about January 29, 2013, which, upon a fact-finding determination that respondent mother permanently neglected the subject child, terminated respondent's parental rights and committed the care and custody of the child to petitioner and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent permanently neglected the child is supported by clear and convincing evidence (*see* Social Services Law § 384-b[3][g][i], [4][d], [7][a]). The record shows that the agency exercised diligent efforts to encourage and strengthen the parental relationship by arranging for frequent

visitation, referring respondent for mental health counseling, anger management, and parenting skills for children with special needs, and developing a plan for appropriate services for the child, and that nevertheless respondent failed to compete her service plan within the statutorily relevant time frame (*see Matter of Danielle Nevaeha S.E. [Crystal Delores M.]*, 107 AD3d 527, 528 [1st Dept 2013]; *Matter of Shaianna Mae F. [Tsipora S.]*, 69 AD3d 437 [1st Dept 2010]). Although she completed many of the services after the petition was filed, respondent failed to gain insight into her parenting problems, to understand her daughter's special needs or to demonstrate that she had the ability to care for the child (*see Matter of Janell J.* [*Shanequa J.*], 88 AD3d 512 [1st Dept 2011]). Respondent also failed to attend a majority of the child's medical appointments although the agency invited her to attend, and she was unable to have positive interaction with the child during her visits. In any event, the visitation does not preclude a finding of permanent neglect, in view of respondent's failure to plan for the child's future (*see Matter of Jonathan Jose T.*, 44 AD3d 508, 508-509 [1st Dept 2007]).

Respondent's request for a suspended judgment is improperly raised for the first time on appeal (*see Matter of Jules S. [Julio S.]*, 96 AD3d 448 [1st Dept 2012], *lv denied* 19 NY3d 814 [2012]). In any event, a preponderance of the evidence supports

the determination that it was in the child's best interests to be freed for adoption by the termination of respondent's parental rights (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child has resided with her foster parents since she was five days old, and has bonded with them, and the foster parents wish to adopt her and are capable of handling her myriad special needs (*see Matter of Fernando Alexander B. [Simone Anita W.]*, 85 AD3d 658 [1st Dept 2011]). Respondent failed to demonstrate that she could ensure that the child's special needs would be met.

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

ENTERED: FEBRUARY 11, 2014

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11355 Myrna Quinones, Index 102251/10
Plaintiff-Respondent,

-against-

The Joan and Sanford I. Weill Medical College and Graduate School of Medical Sciences of Cornell University, etc.,
Defendant-Appellant,

Doe Corporations 1-5,
Defendants.

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Ward Greenberg Heller & Reidy LLP, Rochester (Thomas S. D'Antonio of counsel), for appellant.

Schwartz & Perry, LLP, New York (Brian Heller of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered April 11, 2013, which denied the motion of defendant Cornell University, named herein as The Joan and Sanford I. Weill Medical College and Graduate School of Medical Sciences of Cornell University, to extend its time to file an otherwise untimely motion for summary judgment, unanimously affirmed, without costs.

In this action alleging employment discrimination based upon national origin and age, as well as retaliation, in violation of the New York City Human Rights Law, the preliminary conference order, dated January 5, 2011, directed that plaintiff file a note

of issue by October 21, 2011 and that any dispositive motions be made within 45 days thereafter. After several extensions, plaintiff's time to file the note of issue was extended to December 21, 2012, giving defendant until January 31, 2013 to move for summary judgment. On February 11, 2013, defendant moved pursuant to CPLR 2004 to modify the preliminary conference order and/or extend its time to move for summary judgment motion until February 19, 2013. Defendant asserted that its counsel had "overlooked" the order setting forth the deadline when reviewing the files and "since [the attorney handling the case] had not personally attended the preliminary conference . . . [he] had no independent recollection of any discussion of this deadline."

In denying the motion, Supreme Court noted that the case had been reassigned to it from Justice Goodman, who had ordered the 45-day deadline. The court rejected defendant's proffered reason for missing the deadline, stating: "Can you imagine if everyone comes back and says I didn't see the 45 days, and therefore, [the court] should extend it[?] [T]hat means I would have everyone coming back and saying I just missed the deadline, I made an error." The court found that the fact that a different attorney from defense counsel's law firm had attended the preliminary conference at which the deadline was set did not excuse the primarily responsible attorney's missing the deadline. While

acknowledging that an extension would be warranted by an attorney's illness, a death in the family, or a computer breakdown caused by Hurricane Sandy, the court saw no justification for granting an extension in this case. The court's view was that the excuse offered was a perfunctory claim of law office failure, and did not rise to the level of good cause.

In seeking to reverse the appealed order, defendant claims that CPLR 3212(a) requires a showing of good cause for a late summary judgment motion only when the motion is made more than 120 days after the filing of the note of issue. When a party fails to comply with a court-imposed deadline of less than 120 days, defendant argues, the operative statutory provision is CPLR 2004, under which "law office failure" may be considered a factor supporting a finding of good cause. Defendant further contends that, even under CPLR 3212(a), it has demonstrated good cause for its failure to move within the court-imposed time limit.

It is uncontroverted that defendant's motion was not timely under the schedule set by the preliminary conference order dated January 5, 2011. As the Court of Appeals has repeatedly reiterated, court-ordered time frames are requirements to be taken seriously by the parties (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3

NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). Contrary to the distinction defendant seeks to draw, it does not matter whether a motion for summary judgment has been made more than 120 days after the filing of the note of issue or after the expiration of a shorter time limit set by a court order or stipulation. Whatever the source of the deadline with which a party fails to comply, the lateness may not be excused without a showing of good cause within the meaning of CPLR 3212(a) — a showing of something more than mere law office failure (*see Polanco v Creston Ave. Props., Inc.*, 84 AD3d 1337, 1341 [2d Dept 2011]; *Powell v Kasper*, 84 AD3d 915, 917 [2d Dept 2011]; *Deberry-Hall v County of Nassau*, 88 AD3d 634, 635 [2d Dept 2011]; *Fine v One Bryant Park, LLC*, 84 AD3d 436 [1st Dept 2011]; *Riccardi v CVS Pharmacy, Inc.*, 60 AD3d 838 [2d Dept 2009]; *Giudice v Green 292 Madison, LLC*, 50 AD3d 506 [1st Dept 2008]; *Glasser Abramovitz*, 37 AD3d 194 [1st Dept 2007]*)*. Since the excuse proffered by defendant — that its counsel inadvertently overlooked the date set in the January 5, 2011 preliminary conference order — is a

perfunctory claim of law office failure, the motion court providently exercised its discretion in denying defendant's motion.

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

ENTERED: FEBRUARY 11, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11687 The People of the State of New York, Respondent, Ind. 4290/08

-against-

Sharon Gilbert, Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Eunice Lee of counsel), and Covington & Burling LLP, New York (Jennifer O. Farina of counsel),for appellant.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered February 11, 2010, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing her, as a second felony offender, to an aggregate term of eight years, unanimously affirmed.

The verdict 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 credibility determinations.

The court properly denied defendant's request for an adverse inference charge regarding a slip of paper that was recovered from her at the time of the arrest but destroyed in accordance with police procedures. Although this document was within the purview of defendant's discovery request, she did not make the

necessary showing that the evidence was reasonably likely to be material (*see People v Handy*, 20 NY3d 663, 669 [2013]). Even if the contents of the document were as defendant asserts, the document would have had little probative value in contradicting the victim's testimony or corroborating that of defendant.

The court properly exercised its discretion in permitting the People to introduce rebuttal evidence that responded to evidence introduced by defendant in her testimony. Defendant's only preserved claim regarding this evidence is her claim that the People should have cross-examined her about certain discrepancies between her testimony and her statements to the police, instead of introducing this matter for the first time on rebuttal. In this regard, we find that any error was harmless (*see People v Quattlebaum*, 241 AD2d 315, 316 [1st Dept 1997], *mod on other grounds* 91 NY2d 744 [1998]). Defendant's remaining challenges to rebuttal evidence are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the rebuttal testimony was admissible because it was relevant to an issue other than credibility and tended to disprove the defense case (*see People v Beavers*, 127 AD2d 138, 141 [1st Dept 1987], *lv denied* 70 NY2d 642 [1987]).

Furthermore, even if the testimony was "not technically of a rebuttal nature," the court had discretion to allow it (CPL 260.30[7]).

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

ENTERED: FEBRUARY 11, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11688 Lydia Richards, Index 306963/08
Plaintiff-Appellant,

-against-

Kahn's Realty Corporation,
Defendant-Respondent.

_____

Asta & Associates, P.C., New York (Eliot S. Bickoff of counsel), for appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (William J. Crowe of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered May 24, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie that it was not liable for plaintiff's injuries, which she testified resulted from falling on a dark and slippery internal staircase in defendant's building, because it neither created nor had notice of the allegedly dangerous condition that caused her fall (*see Savio v Rose Flower Chinese Rest., Inc.*, 103 AD3d 575 [1st Dept 2013]). Plaintiff testified that she had never complained to anyone about the alleged defect in the staircase; defendant's witness testified that there had been no complaints about the allegedly defective step before plaintiff's accident, that he was not aware

of any accidents in the subject stairwell, that no repairs had been done to the step, and that no building code violations had been issued regarding the step.

In opposition, plaintiff failed to raise an issue of fact. The slippery condition of marble stairs due to their smoothness is not an actionable defect (*see Sims v 3349 Hull Ave. Realty Co. LLC*, 106 AD3d 466, 467 [1st Dept 2013]). Plaintiff's testimony as to the darkness is too vague to be sufficient, since she testified that she slipped on the third step from the top of the staircase, not that her foot missed the step because she was unable to see it. Nor does her expert affidavit raise an issue of fact, since the expert cites to provisions of the Administrative Code of the City of New York (former sections 27-127 and 27-128) that are not specific enough to support

liability claims (*see Centeno v 575 E. 137th St. Real Estate, Inc.*, 111 AD3d 531 [1st Dept 2013]) and addresses issues that are not material to plaintiff's claims, such as inappropriately located handrails.

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

ENTERED: FEBRUARY 11, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11689 The People of the State of New York, Ind. 645/10
Respondent,

-against-

Pedro Sena,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about July 14, 2010,

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

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

ENTERED: FEBRUARY 11, 2014

CLERK

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

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11692 Tower National Insurance Company, Index 102654/11
Plaintiff-Appellant,

-against-

$1 Plus Depot, Inc., et al.,
Defendants,

Migdalia Perez-Ruiz,
Defendant-Respondent.

_____

Law Office of Max W. Gershweir, New York (Joseph S. Wiener of counsel), for appellant.

Law Offices of Michael S. Lamonsoff, PLLC, New York (Stacey Haskel of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered February 7, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff Tower National Insurance Company's motion for summary judgment against defendants Jacob Alan Corp. (JAC) and Migdalia Perez-Ruiz for a declaration that it had no duty to defend or indemnify JAC in the underlying personal injury action, unanimously reversed, on the law, without costs, the motion granted, and it is declared that Tower had no duty to defend or indemnify JAC in said underlying action.

Supreme Court improperly denied Tower's motion for summary judgment as against JAC, the "additional insured" under the

subject policy, and Perez-Ruiz, the injured party, seeking a declaratory judgment that it had no duty to provide defense and indemnity coverage in the underlying personal injury action. Tower established that JAC's notice, made 20 months after the accident, constituted noncompliance with the condition precedent to coverage and vitiated the contract of insurance (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]). Perez-Ruiz's opposition to the motion failed to raise a triable issue regarding whether it was reasonably feasible for her to provide notice to Tower, since she failed to identify any "efforts" she undertook to facilitate proper notice (*see Cirone v Tower Ins. Co. of N.Y.*, 39 AD3d 435 [1st Dept 2007], *lv denied* 9 NY3d 808 [2007]), or "the means available for such notice" (*Appel v Allstate Ins. Co.*, 20 AD3d 367, 369 [1st Dept 2005]).

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

ENTERED: FEBRUARY 11, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11693 The People of the State of New York, Ind. 5200/10
11693A Respondent, 2150/11

-against-

Clifford James,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Renee A. White, J.), rendered on or about June 7, 2011 and June 21, 2011,

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

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

ENTERED: FEBRUARY 11, 2014

CLERK

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

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11694 In re Frank Scalera, Index 103293/11
Petitioner-Respondent,

-against-

The New York City Department
of Buildings,
Respondent-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for appellant.

Casella & Casella, LLP, Staten Island (Ralph Casella of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Paul Wooten, J.), entered July 19, 2012, granting the petition to annul respondent's determination, dated December 8, 2010, which denied petitioner's application for a master plumbers' license, and remanding the matter for reconsideration by respondent in a manner consistent with the court's decision, unanimously reversed, on the law and the facts, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78, dismissed.

Respondent's refusal to credit work experience noted by petitioner on his application for a master plumber's license where Social Security records showed that he received no wages from the employer, and where he failed to explain this

discrepancy, was rational (*see Matter of Krasniqi v Department of Citywide Admin. Servs.*, 105 AD3d 590 [1st Dept 2013]). Furthermore, respondent's consideration of the number and complexity of the work permits issued to supervising licensed master plumbers was rational and did not improperly impose an additional licensing requirement (*see Matter of Padmore v New York City Dept. of Bldgs.*, 106 AD3d 453 [1st Dept 2013]; *Matter of Licata v Department of Citywide Admin. Servs.*, 105 AD3d 520 [1st Dept 2013]). It was incumbent upon petitioner to show that he satisfied the work requirements for the master plumber's license, and he failed to detail the work he claimed to have performed for which no permits were issued.

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

ENTERED: FEBRUARY 11, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11695 B.D. Estate Planning Corp., Index 651006/11
Plaintiff-Respondent,

-against-

Marcy Trachtenberg, as Trustee
of the Ellis Limquee Family
Insurance Trust,
Defendant,

Carolyn Limquee,
Defendant-Appellant.

_____

Eaton & Van Winkle LLP, New York (Steven W. Wolfe of counsel), for appellant.

Strassberg & Strassberg, P.C., New York (Robert Strassberg of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 6, 2013, which denied defendant Carolyn Limquee's motion for summary judgment dismissing the complaint as against her, and, upon searching the record, granted partial summary judgment to plaintiff dismissing Carolyn's affirmative defense of unconscionability, unanimously affirmed, without costs.

"[A]t common law an unconscionable agreement was one that no promisor (absent delusion) would make on the one hand and no honest and fair promisee would accept on the other" (*King v Fox*, 7 NY3d 181, 191 [2006]). If the Ellis Limquee Family Insurance

Trust (by its trustee, defendant Marcy Trachtenberg) had not signed the promissory note on which plaintiff sues, the policy on Ellis's life would have lapsed for nonpayment of premiums, and Carolyn (the trust's beneficiary) would ultimately have received nothing. Since the trust executed the note, it received $4 million after Ellis died, but it will have to give plaintiff approximately half of that amount if the note is enforced. A decision to get $2 million, as opposed to nothing, is not a bargain that only a delusional trustee would make.

The motion court correctly found that Carolyn may not raise the defense of civil usury because the amount of the note exceeds $250,000 (*see* General Obligations Law § 5-501[6][a]). It was permissible for the note given by the trust to The Brown Investment Fund, L.P. to be rolled over into the July 2009 note given by the trust to plaintiff and for the July 2009 note to be rolled over into the November 2009 note given by the trust to plaintiff (*see Household Fin. Corp. v Goldring*, 263 App Div 524 [1st Dept 1942], *affd* 289 NY 574 [1942]).

Carolyn may raise the defense of criminal usury. However, the court correctly found that there is an issue of fact whether

the November 2009 note on which plaintiff sues is usurious (*see Hartley v Eagle Ins. Co. of London, England*, 222 NY 178, 184, 187 [1918]; *see also Freitas v Geddes Sav. & Loan Assn.*, 63 NY2d 254, 262-265 [1984]).

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

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

ENTERED: FEBRUARY 11, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11696 The People of the State of New York, Ind. 5792/11
Respondent,

-against-

John M. Cruz,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about March 13, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [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: FEBRUARY 11, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11698 Barclays Bank México, S.A., etc., Index 651226/13
Plaintiff-Respondent,

-against-

Urbi Desarrollos Urbanos, S.A.B. De C.V.,
Defendant-Appellant.

_____

King & Spalding LLP, New York (J. Emmett Murphy of counsel), for appellant.

McGuire Woods LLP, New York (Michael L. Simes of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 16, 2013, which denied defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, without costs.

The motion court properly denied the motion seeking to dismiss the complaint for lack of personal jurisdiction. On or about December 14, 2010, the parties emtered into an ISDA (International Swap and Derivative Association, Inc.) Master Agreement. The Master Agreement recited that the parties "have entered and/or anticipate entering into one or more transactions (each a "transaction") that are or will be governed by this Master Agreement, which includes [a schedule] and the documents and other confirming evidence (each a "confirmation") exchanged between the parties confirming those transactions."

The Master Agreement provided that in the event of any inconsistency between any confirmation and the Master Agreement, the provisions of the confirmation were to prevail. Plaintiff's sole cause of action, for breach of the Master Agreement, is based on defendant's alleged failures to post additional collateral on January 14, 18 and 30, 2013. Under the terms of the Master Agreement, the parties submitted to the "jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City . . . ." There is no merit to defendant's argument that the parties' consent to the jurisdiction of the New York courts is trumped by the purportedly inconsistent provisions of two confirmations it proffers. As noted above, plaintiff's cause of action involves alleged breaches of credit support obligations that occurred in January 2013. By their own terms, the confirmations were issued "to confirm the terms and conditions of the transaction entered into" by the parties on trade dates that were specified to be February 9 and October 5, 2012. Accordingly, the confirmations were unrelated to the transactions sued upon under the Master Agreement. Therefore, The unambiguous terms of the operative documents establish that the parties consented to

jurisdiction in New York with respect to the claims at issue in this case (*see generally Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012]).

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

ENTERED: FEBRUARY 11, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11699-
11699A
11699B In re Isis M., and Others,

Children Under the Age
of Eighteen Years, etc.,

Deeanna C.,
Respondent-Appellant,

Heartshare Human Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Wingate, Kearney & Cullen LLP, Brooklyn (Allyson L. Stein of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Nicole Barnum of counsel), attorney for the children.

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Orders of fact-finding and disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about February 5, 2013, which, upon a finding that respondent mother permanently neglected the subject children, terminated respondent's parental rights, and committed the custody of the children to the Commissioner of Social Services and petitioner agency for purposes of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the court's findings that, despite the agency's diligent efforts to encourage and strengthen the parental relationship with the three children,

respondent failed to maintain contact with or plan for the future of the children (*see* Social Services Law § 384-b[7][a]). The agency explained the importance of visitation, encouraged respondent to visit, and facilitated visitation; yet respondent failed to attend approximately one-half of the scheduled visits and offered insubstantial excuses for her failure (*see Matter of Paul Antoine Devontae R. [Paul R.]*, 78 AD3d 610 [1st Dept 2010], *lv denied* 16 NY3d 707 [2011]; *Matter of Emily A.*, 216 AD2d 124 [1st Dept 1995]). Respondent's sporadic and inconsistent visitation, as well as her inattention to the children observed during at least one visit, prevented her from developing close relationships with the children (*see Matter of Jonathan M.*, 19 AD3d 197 [1st Dept 2005], *lv denied* 5 NY3d 798 [2005]).

The agency referred respondent to an appropriate parenting class and, among other things, kept her informed of medical appointments for the twin boys, who have special needs (*see Matter of Damon Bruce W. [Yvonne M.G.]*, 81 AD3d 552 [1st Dept 2011], *lv denied* 17 NY3d 701 [2011]). Although respondent completed the parenting course, she failed to attend the twins' scheduled medical appointments, and demonstrated a lack of understanding and insight into the twins' diagnoses, medications and medical treatment (*see Matter of Nahia M.*, 39 AD3d 918 [3d Dept 2007]; *Matter of Lenny R.*, 22 AD3d 240 [1st Dept 2005], *lv*

denied 6 NY3d 708 [2006]).

A preponderance of the evidence supports the court's determination that the termination of respondent's parental rights, rather than a suspended judgment, is in the children's best interests (*see generally Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). For most of their lives, the children have lived with foster families, who have appropriately provided for their needs, including the twins' special needs, and with whom the children have developed strong relationships (*see Matter of Isiah Steven A. [Anne Elizabeth Pierre L.]*, 100 AD3d 559 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Matter of Lenny R.*, 22 AD3d at 240).

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

ENTERED: FEBRUARY 11, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11702 721 Fruit & V. Mkt., Inc., Index 115754/08
Plaintiff-Appellant,

-against-

Stavia LLC,
Defendant-Respondent.

_____

Gordon & Haffner, LLP, Bayside (Steven R. Haffner of counsel), for appellant.

Goetz Fitzpatrick LLP, New York (Donald J. Carbone of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 29, 2012, which, insofar as appealed from as limited by the briefs, (1) granted defendant landlord Stavia LLC's (landlord) motion for partial summary judgment dismissing plaintiff tenant 721 Fruit & V. Mkt., Inc.'s (tenant) breach of contract claim, and (2) denied tenant's cross motion for partial summary judgment on its claims, unanimously affirmed, without costs.

Tenant entered into a lease agreement with landlord's predecessor to rent the subject premises. Paragraph 46(b) of the lease provided that the predecessor landlord had leased billboard advertising space on the exterior wall of the premises to a third party, and that such agreement was due to expire on August 14,

1994. That provision further provided:

> "Tenant agrees that the rent from such rental shall accrue to Owner and Owner agrees not to renew such lease without Tenant's consent. Tenant and Owner agree that if Tenant or any sub-Tenant shall rent any exterior space on the Demised Premises for advertisement to a third party, whether in the form of billboard or otherwise, Tenant or sub-Tenant, as the case my be, shall pay owner as additional rent one-half of such rental."

The third party advertising agreement was not renewed, but the predecessor landlord continued renting out the billboard space to other advertisers. In October 2008, six months before expiration of tenant's lease, which landlord assumed in March 2007, tenant asserted that the billboard displays on the exterior wall of the premises was in violation of the lease and sought to recover the billboard rents to offset its remaining rents due under the lease. It commenced this breach of contract action alleging "diversion of the 'Advertising Revenues.'"

As a preliminary matter, the court properly dismissed tenant's claims for trespass, breach of the covenant of quiet enjoyment, partial eviction, and improper accounting of the security deposit, which were raised for the first time in tenant's opposition/cross motion for partial summary judgment (*see Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]).

The court properly granted landlord's motion for partial summary judgment dismissing tenant's breach of contract claim,

and thus properly denied tenant's cross motion for partial summary judgment on the claim. Although the lease agreement does grant tenant the right to rent out the exterior billboard space to advertisers, the clear and unambiguous language of the agreement, including provisions requiring prior approval and consent from landlord before tenant may affix advertising on the exterior wall, demonstrates a contractual intent to reserve to landlord rights over the wall, including the billboard space (*see Nichols v Nichols*, 306 NY 490, 496 [1954]; *ABS Partnership v AirTran Airways*, 1 AD3d 24, 29 [1st Dept 2003]; *Lent & Graff Co. v Satenstein*, 210 AD 251, 254 [1st Dept 1924]). Further, tenant is not entitled to any of the billboard rent revenue as paragraph 46(b) of the lease provides for billboard rent sharing between tenant and landlord only where tenant rents the exterior space for advertising. Nothing in the agreement requires rent sharing where landlord leases out the space.

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

ENTERED: FEBRUARY 11, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11703 Mark Robert Gordon, Index 111265/05
Plaintiff-Appellant,

-against-

Chubb Group of Insurance Company, et al.,
Defendants-Respondents.

_____

Marcote & Associates, P.C., East Meadow (Louis F. Chisari of counsel), for appellant.

McDonnell & Adels, P.L.L.C., Garden City (Jannine A. Gordineer of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 24, 2010, after a nonjury trial, inter alia, awarding plaintiff damages for medical liens and out of pocket expenses and calculating interest from the commencement of the action at a simple rather than compound rate, unanimously affirmed, without costs.

The trial court found plaintiff not credible on the issue of mailing of the claim in January 1999, and since there is no documentary proof of such a mailing, there exists no basis to disturb the court's finding that the claim was not sent before June 1999 (*see generally 300 E. 34th St. Co. v Habeeb*, 248 AD2d 50, 54 [1st Dept 1997]). The various elements of lost income were properly denied as speculative, given the conflicting evidence as to plaintiff's income, and the lack of any medical

testimony linking his disability to his inability to work (*see Razzaque v Krakow Taxi*, 238 AD2d 161, 162 [1st Dept 1997]).

Because defendant's denial of coverage was timely, even if improper, the trial court correctly awarded interest from commencement of the action, at the rate of 2% simple interest per month (*see Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 871 [2003]).

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

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

ENTERED: FEBRUARY 11, 2014

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11356 Robert M. Tamburino, et al., Index 111432/10
Plaintiffs-Respondents,

-against-

Madison Square Garden, L.P.,
Defendant-Appellant.

_____

Kauff McGuire & Margolis LLP, New York (Kenneth A. Margolis of counsel), for appellant.

Advocates for Justice, Chartered Attorneys, New York (Arthur Z. Schwartz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 23, 2011, affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
Dianne T. Renwick
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

11356
Index 111432/10

_____x

Robert M. Tamburino, et al.,
Plaintiffs-Respondents,

-against-

Madison Square Garden, L.P.,
Defendant-Appellant.

_____x

Defendant appeals from the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered August 23, 2011, which denied its motion to dismiss the complaint or, in the alternative, for summary judgment.

Kauff McGuire & Margolis LLP, New York (Kenneth A. Margolis of counsel), for appellant.

Advocates for Justice, Chartered Attorneys, New York (Arthur Z. Schwartz and Tracey L. Kiernan of counsel), for respondents.

RENWICK, J.

Plaintiffs have all worked during the last decade as food and beverage servers at Madison Square Garden. The Garden, owned by defendant MSG Holdings, LLC (MSG), formerly known as Madison Square Garden, L.P., is one of the largest sports and entertainment complexes in the world. Plaintiffs bring this action, premised on Labor Law § 196-d, on behalf themselves and a class of individuals similarly situated, and claiming that the Garden retained a portion of a mandatory "service charge" that should have been allocated to them as a gratuity. The Garden, however, argues, inter alia, that the gratuities claims are preempted by federal law, and, alternatively, that the claims are subject to mandatory grievance and arbitration under a collective bargaining agreement. For the reasons stated below, we reject both arguments and therefore affirm the denial of defendant's motion to dismiss the complaint.

The complaint alleges that, at sports and entertainment events, MSG charges and collects "service charges" in the amount of 20 percent of the total charge assessed for all food and beverages. This charge is added to the bill because, unlike ordering restaurant services, during which customers tip the server individually, the servers in the Garden are presumably not permitted to collect tips from customers attending Garden events.

Plaintiffs claim that MSG led its customers and patrons to believe that the service charges were entirely gratuities for the service staff who served the food and drinks at these events. The complaint alleges that MSG did not distribute to the service staff all the service charges it collected.

Plaintiffs belong to United Here Local 100 (the Union), which represents members who work predominantly in the hotel, food service, laundry, warehouse and casino gambling industries. The terms and conditions of plaintiffs' employment are governed by a collective bargaining agreement (CBA) entered into between the Union and MSG. Article 15 of the CBA sets forth detailed provisions regarding the MSG's obligation with regard to conditions under which gratuities must be distributed and the manner of distribution of gratuities to different classifications of employees. Articles 29 and 30 of the CBA contain a mandatory grievance procedure. Under that process, any "dispute, claim or complaint concerning the interpretation or application of the terms of the [CBA]" may not be the subject of judicial action; rather it must be asserted through a three-step grievance procedure. Any dispute which remains unresolved after pursuing such process is subject to mandatory binding arbitration before an arbitrator.

As a threshold consideration, we find that plaintiffs' well-

pleaded complaint states a valid claim under Labor Law § 196-d. Section 196-d states, in relevant part, that "[n]o employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee." The plain language of section 196-d prohibits any retention or withholding of gratuities by the employer (*see Samiento v World Yacht Inc.*, 10 NY3d 70, 78 [2008]).[1] Thus, to the extent that the complaint may be understood to pursue the difference between what employees are guaranteed under the CBA and what was actually collected by MSG, this is the proper basis of a section 196-d claim.

MSG, however, argues that no viable Labor Law § 196-d claim is averred because the CBA constitutes a negotiated modification of section 196-d. MSG correctly suggests that rights pursuant to section 196-d may be contracted away. However, as pointed out by plaintiffs, such a contract must be clear as to the waiver of the employees' rights (*see Livadas v Bradshaw*, 512 US 107, 125

[1] As the Court of Appeals held in *Sarmiento*, under New York's Labor Law, an employer cannot withhold from its employees any portion of a mandatory service charge that is added to a customer's bill unless the employer makes it clear to the customer that it is retaining some or all of the charge (10 NY3d at 78).

[1994]). In this case, nothing in the CBA states that the employees waive, or that MSG may keep for itself, gratuities exceeding the stated percentages. Since there was no clear, unmistakable waiver of plaintiffs' statutory rights to the full amount of any gratuity collected by defendant, MSG's argument that plaintiffs' contracted away their statutory rights is unavailing (*Livadas,* 512 US at 125).

Alternatively, MSG argues, plaintiffs' claims for gratuities, premised under Labor Law § 196-d, are preempted by federal law, specifically section 301 of the Labor Management Relations Act (LMRA). Section 301 of the LMRA provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties" (29 USC § 185[a]. The Supreme Court has interpreted this section to preempt state law claims "founded directly on rights created by collective bargaining agreements" as well as "claims 'substantially dependent on an analysis of a collective bargaining agreement'" (*Lingle v Norge Div. of Magic Chef, Inc.*, 486 US 399, 410, n 10 [1988], quoting *Electrical Workers v Hechler*, 481 US 851, 859 n 3 [1987]). According to the Court, preemption is necessary "to ensure uniform interpretation of

collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes" (*id.* at 404). Any claim that challenges a provision in a CBA must be brought under section 301 (*Allis-Chalmers, Corp. v Luck*, 471 US 202, 210 [1985]; *Vera v Saks & Co.*, 335 F.3d 109, 116 [2d Cir 2003] ["plaintiff's challenge to the lawfulness of a term of the CBA will require substantial interpretation of the CBA"]).

Section 301, however, does not preempt state claims when state law confers an independent statutory right to bring a claim (*Livadas v Bradshaw*, 512 US at 123 ["[section] 301 cannot be read broadly to preempt nonnegotiable rights conferred on individual employees as a matter of state law"]; *see also Hawaiian Airlines, Inc. v Norris*, 512 US 246, 260 [1994] ["Clearly, § 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law" [internal quotation marks omitted]). "'[A]s long as the state-law claim can be resolved without interpreting the [CBA] itself, the claim is "independent" of the agreement for § 301 preemption purposes'" (*Mack v Metro-North Commuter R.R.*, 876 F Supp 490, 492 [SD NY 1994], citing *Norris*, 512 US at 262). Even if resolution of a state-law claim "involves attention to the same factual considerations as the contractual determination ... such parallelism [does not mandate preemption]" (*Lingle*, 486 US at 408). A defendant's reliance on

the CBA is not enough to "inject [] a federal question into an action that asserts what is plainly a state-law claim" (*Caterpillar Inc. v Williams*, 482 US 386, 399, [1987]).

The Second Circuit's holding in *Wynn v AC Rochester* (273 F3d 153 [2001]) illustrates the point. In that case, the court held the plaintiff's state-law claims of fraud and misrepresentation were not preempted by section 301. There, the plaintiff claimed that his personnel supervisor made false representations regarding the plaintiff's rights to elect benefits after a layoff. Despite the fact that the benefits at issue arose under the parties' CBA, the Second Circuit declined to hold that the claims were preempted by Section 301. The court recognized that resolution of the plaintiff's case would require reference to the CBA (*Wynn*, 273 F3d at 158). Such reference, however, was not tantamount to interpretation of that agreement (*id.*). Since the plaintiff's claims turned mainly on the behavior and motivation of the employer, and not on interpretation of the meaning of the parties' labor agreement, the court held that the plaintiff's claims were not preempted by Section 301 (*id.* at 158-59; *see also Hernandez v Conriv Realty Assoc.*, 116 F.3d 35, 40 [2d Cir 1997) [plaintiff's claims for breach of contract and fraud held not to require interpretation of labor agreement and not preempted by section 301]).

In this case, MSG argues, plaintiffs' claims for gratuities are preempted by section 301 of the LMRA because it would be necessary to interpret the CBA to determine whether plaintiffs have a viable claim for gratuities. This argument must be rejected because, as indicated, plaintiffs' theory is not that MSG did not provide what the CBA required but that MSG withheld portions of the collected gratuities in violation of Labor Law § 196-d. At least on these facts, where the claims depend on the difference between what MSG received as gratuities and what MSG provided its employees, the claims for gratuities do not require an interpretation of the CBA. Indeed, plaintiffs may prevail on their claims regardless of whether MSG distributed the gratuities to its employees in the manner provided by the CBA.

Finally, we are not persuaded by defendant's argument that any and all disputes over plaintiffs' statutory rights for gratuities are resolvable exclusively through a mandatory grievance and arbitration process. A CBA cannot preclude a lawsuit concerning individual statutory rights unless the arbitration clause in the agreement is "clear[] and unmistakable[]" that the parties intended to arbitrate such individual claims (*see 14 Penn Plaza*, LLC v Pyett, 556 US 247, 251 [2009]; *Wright v Universal Maritime Serv Corp.*, 525 US 70, 79-80 [1998]; *Alderman v 21 Club Inc.*, 733 F Supp 2d 461, 469-470

[SD NY 2010]). "A 'clear and unmistakable' waiver exists where one of two requirements is met: (1) if the arbitration clause contains an explicit provision whereby an employee specifically agrees to submit all causes of action arising out of his employment to arbitration; or (2) where the arbitration clause specifically references or incorporates a statute into the agreement to arbitrate disputes" (*Alderman*, at 469-470). "Arbitration clauses that cover 'any dispute concerning the interpretation, application, or claimed violation of a specific term or provision' of the collective bargaining agreement do not contain the requisite 'clear and unmistakable' waiver because 'the degree of generality [in the arbitration provision] falls far short of a specific agreement to submit all federal claims to arbitration'" (*id.* at 470, quoting *Rogers v New York Univ.*, 220 F3d 73, 76 [2d Cir 2000], *cert denied* 531 US 1036 [2000]).

In this case, the CBA at issue states that any "dispute, claim or complaint concerning the interpretation or application of [its] terms'" shall proceed through the grievance procedures and, if the dispute is unable to be resolved, it shall "be submitted to arbitration." The provisions in the CBA do not expressly specify that all disputes, including those arising under state law, are subject to arbitration. Indeed, the clause does not even broadly require arbitration of any dispute

regarding employment; it merely relates to a "dispute, claim or complaint concerning the interpretation or application of [its] terms." As such, the provisions of the CBA are too broad and general to demonstrate the requisite "clear and unmistakable" intent to submit all state statutory claims to arbitration. The fact that the Union, in the past, sought relief pursuant to the CBA for other gratuity-related alleged violations is not determinative, especially because none of those claims involved an alleged violation of Labor Law § 196-d.

Accordingly, the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered August 23, 2011, which denied defendant's motion to dismiss the complaint or, in the alternative, for summary judgment, should be affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 11, 2014

CLERK