SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 25, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

15664 In re Phoenix J.,

A Child Under Eighteen Years
of Age, etc.,

Kodee J.,
Respondent-Appellant,

Administration for Children's Services
of the City of New York,
Petitioner-Respondent.

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Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

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Order of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 19, 2014, which granted petitioner agency's motion for summary judgment, finding that respondent mother had derivatively neglected the subject child, unanimously affirmed, without costs.

The agency made a prima facie showing of derivative neglect as to the subject child, based on three prior orders finding that

the mother had neglected three of her older children, and orders terminating her parental rights to all five of her older children in October 2011 (*see Matter of Camarrie B. [Maria R.]*, 107 AD3d 409 [1st Dept 2013]). The prior neglect findings, issued over a five-year period between September 2005 and September 2010, support a finding by a preponderance of the evidence that the mother, by reason of her untreated mental health issues, was unable to care for any child (*see Matter of T-Shauna K.*, 63 AD3d 420 [1st Dept 2009]). Further, the orders terminating the mother's parental rights were based on findings that she had permanently neglected the children by failing to, among other things, consistently visit them, complete parenting skills and anger management programs, and comply with mental health service referrals. The permanent neglect findings thus demonstrate that the mother had not addressed or resolved the issues that resulted in the prior findings of neglect (*see Matter of Darren Desmond W. [Nirandah W.]*, 121 AD3d 573 [1st Dept 2014]; *Matter of Jamarra S. [Jessica S.]*, 85 AD3d 803, 804-805 [2d Dept 2011]). The conduct underlying the prior findings of neglect and permanent neglect was sufficiently proximate in time to the derivative neglect proceeding to support the conclusion that the conditions still existed (*see T-Shauna K.*, 63 AD3d at 420).

In opposition to the agency's motion, the mother presented no evidence that circumstances had changed (*see Matter of Jayden C. [Luisanny A.]*, 126 AD3d 433, 434 [1st Dept 2015]).

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

ENTERED: JUNE 25, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14157 The People of the State of New York, Ind. 267/11
Respondent,

-against-

Rakeem Frazier,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ruth Pickholz, J.), rendered on or about September 13, 2011,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 10, 2015,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JUNE 25, 2015

CLERK

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

14848 In re Alexander Gliklad, Index 155518/14
Petitioner-Respondent,

-against-

Michael Chernoi also known
as Michael Cherney, et al.,
Respondents-Appellants.

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Frankfurt Kurnit Klein & Selz, P.C., New York (Brian E. Maas of counsel), for Michael Chernoi, appellant.

Rosenfeld & Kaplan, LLP, New York (Tab K. Rosenfeld of counsel), for ERIP LLC, appellant.

Winston & Strawn LLP, New York (W. Gordon Dobie of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about October 10, 2014, which, in this special proceeding pursuant to CPLR 5225(b), granted the petition to compel respondents-appellants (respondents) to turnover respondent Cherney's ownership interest in respondent ERIP and all of respondents' assets and debts in order to satisfy a judgment in favor of petitioner, unanimously affirmed, without costs.

In April 2014, petitioner obtained a $505 million judgment against respondent Michael Cherney. In June 2014, petitioner commenced the instant proceeding, seeking to compel the turnover

of Cherney's interest in respondent ERIP LLC (ERIP), as well as all assets owned by ERIP, all debts owed by ERIP to Cherney, and all debts owed to ERIP.

Petitioner alleges that Cherney is the "100% beneficial owner" of ERIP, based on statements made by Cherney and others in depositions, affidavits, and other court filings in both the action underlying the turnover proceeding (underlying action) and unrelated actions. The record supports petitioner's assertion that, in 2005, Cherney, either personally or through his ownership interest in Orsit International Ltd., invested $100 million in ERIP for the purpose of ERIP investing that money in a hedge fund called EagleRock Capital Management, LLC (EagleRock). For example, in a 2011 deposition in an unrelated action brought by ERIP against EagleRock (EagleRock action), Cherney referred several times to ERIP's $100 million investment in EagleRock as "my money." In the same deposition, he stated, "I am the principal investor" in EagleRock. ERIP's complaint in the EagleRock action stated that ERIP was formed and funded "by a successful industrialist who lives abroad" for the purpose of investing in EagleRock. In a June 2010 deposition in the underlying action, Cherney explained that the EagleRock investment was structured so that, before profits could be distributed to his business associate and his two daughters, the

$100 million principal, plus interest, was to be returned to him. In his brief to this Court in the underlying action, Cherney stated that, in 2005, he "provided $100 million" to fund ERIP's investment in EagleRock.

In opposition to the turnover petition, Cherney argued that he is not, and has "never been the beneficial owner of ERIP or any of its assets." He stated that, in 2004, he decided to give his daughters, Rina and Diana, $100 million. He transferred ownership and control of Dulli Foundation (Dulli), a Liechtenstein-based trust, to his daughters, and transferred $100 million to Dulli. In 2005, he encouraged Rina and Diana to invest Dulli's $100 million in ERIP. In opposition to the petition here, Cherney stated that he did not play any role in the formation of ERIP. Cherney also submitted a purportedly "newly-discovered" agreement dated March 2007, in which Cherney transferred his ownership of Orsit to his daughters. He stated that the agreement was located in 2013, and had been locked in the Cypriot office of a deceased man who provided advisory and consulting services to the Cherney family. Notably, a 2009 tax form shows that Orsit owned 100% of ERIP.

Rina Chernaya submitted an affidavit in opposition to the turnover petition, stating that she and Diana own 100% of the beneficial interest of ERIP. She further stated that, to the

extent Cherney had, in the past, claimed a right to a return of the $100 million investment, he was incorrect. In addition, Rina stated that ERIP was formed in 2005 to facilitate Dulli's investment in EagleRock, that Orsit was a member of ERIP at its formation, and that she and her sister owned Orsit, and executed the 2007 agreement transferring Orsit from Cherney to "clarif[y]" that she, Diana, and Dulli owned Orsit.

The motion court, which was quite familiar with this drawn-out dispute, granted the petition, stating that "[t]his turnover proceeding is the latest proceeding in litigation fraught with questionable behavior by Mr. Cherney." After reviewing Cherney's past depositions and affidavit, as well as the submissions in opposition to the turnover petition, the court concluded that the 2007 agreement "and surrounding tale raises nothing but 'feigned' issues of fact." The court found that Cherney had an interest in ERIP, and held that "all the assets Mr. Cherney holds in ERIP, and all debts owed to ERIP are subject to turnover." Additionally, the court held that "all the assets of ERIP, including its holdings of stock, and all debts owed by ERIP to Mr. Cherney, and any party to ERIP should be turned over to [petitioner]."

The motion court properly relied on Cherney's numerous sworn statements in the EagleRock action and the action underlying the

judgment, all of which support the conclusion that Cherney invested $100 million in ERIP at its formation in 2005. We concur with the motion court's assessment that Cherney's story about the discovery of the 2007 agreement purporting to transfer his interest in Orsit (which, as of 2009, had a 100% interest in ERIP) to his daughters was highly dubious, and that no hearing was necessary on this issue. The 2007 document, which was produced for the first time in opposition to the turnover petition, predated the EagleRock action and the action that resulted in the $505 million judgment, and Cherney provides no explanation for why he did not raise the existence of the "agreement" in those actions. Nor does he explain why, in a 2011 deposition, he referred to the $100 million as his money if, as he now says, this was his daughters' investment. Thus, we agree with the motion court that Cherney raised a "feigned issue of fact" (*see e.g. Schwartz v JPMorgan Chase Bank, N.A.*, 84 AD3d 575, 577 [1st Dept 2011]).

Although ERIP claims that Cherney's daughters ran the business, for the reasons set forth above, the motion court properly rejected those claims. ERIP offered no facts to establish that anyone else unconnected to Cherney or his family has a current role or current ownership interest in ERIP that would require a hearing in this case.

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

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

ENTERED: JUNE 25, 2015

CLERK

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

15057-
15058N Jose Martinez,
Plaintiff-Respondent,

Index 23123/05
380459/09
304342/11

-against-

The Estate of John P. Carney, etc., et al.,
Defendants,

Shariffa Whaleen Carney,
Defendant-Respondent,

Michael Katz,
Intervenor Defendant-Appellant.

[And Other Actions/Third-Party Actions]

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Michael Katz, Katonah, appellant pro se.

Jeanette M. Westphal, New York, for Jose Martinez, respondent.

Rosato & Lucciola PC, New York (Paul A. Marber of counsel), for Shariffa Whaleen Carney, respondent.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered June 20, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to renew, and, upon renewal, declared null and void intervenor defendant-appellant Michael Katz's mortgages on the subject property, declared null and void the conveyance of the property to Katz by quitclaim deed, dismissed Katz's action to foreclose on the mortgages, and granted plaintiff's motion for attorneys' fees and

costs as against Katz, unanimously modified, on the law, to limit plaintiff's attorneys' fees and costs to the extent indicated in this decision, and otherwise affirmed, without costs. Order, same court (Barry Salman, J.), entered May 22, 2014, which, to the extent appealed from as limited by the briefs, set the amount of plaintiff's legal fees and costs as against Katz, unanimously reversed, on the law, without costs, and the matter remitted to Supreme Court for further proceedings consistent herewith.

Betty Carney died and left her son Arrisini Carney a life income interest in property located at 2788 Kingsbridge Terrace in the Bronx. Upon Arrisini's death, the property was to transfer to Arrisini's daughters, Shariffa and Vanessa Carney. In March 2005, Arrisini, Vanessa, and someone purporting to be Shariffa agreed to sell the property to plaintiff Jose Martinez. The closing was adjourned because "Shariffa" could not produce valid photo identification. Thereafter, Martinez filed a lis pendens and commenced this action in November 2005, seeking specific performance of the contract. In May 2008, Martinez moved for a default judgment against the Carneys.

Meanwhile, by an executor's deed dated March 28, 2008, Arrisini purported to transfer title to the subject property to his and Vanessa's names. That same day, Arrisini and Vanessa mortgaged the property to intervenor Michael Katz, Esq., for

$300,000. In July 2008, they mortgaged the property to Katz for another $50,000 (Katz notarized the mortgage note himself). When the Carneys defaulted, Katz commenced a foreclosure action against them and, in June 2010, intervened in Martinez's action.

By order to show cause dated September 1, 2010, Martinez asked the court to decide his May 2008 motion seeking specific performance, and for attorneys' fees. Justice Patricia Anne Williams signed the order to show cause on September 2, 2010. That same day, Arrisini and Vanessa conveyed the subject property to Katz. Katz notarized the quitclaim deed himself. On September 20, 2010, Justice Williams held a hearing on Martinez's order to show cause and directed that Arrisini and Vanessa give Martinez access to the property, so that Martinez could inspect it and determine if he still wanted to purchase it. During the hearing, no one advised the court that the Carneys had already conveyed the property to Katz.

Arrisini and Vanessa refused to give Martinez access to the property. On November 9, 2010, the court declared null and void the contract of sale between the Carneys and Martinez, ordered a refund of Martinez's deposit, and ordered the Carneys to pay Martinez's attorneys' fees. In January 2011, Martinez moved to renew his September 2010 order to show cause based on the newly-discovered fact that the Carneys had conveyed the property to

Katz before the September 20, 2010 court hearing. Martinez sought specific performance of the contract, and requested damages, sanctions, and attorneys' fees from the Carneys and Katz.

Given the convoluted facts of the dispute, the court appointed a guardian ad litem to "investigate and report" on several issues.[1] Katz submitted affidavits in opposition to the guardian ad litem's reports. By order entered June 20, 2013, Justice Aarons granted Martinez's motion to renew, concluding that there were pertinent facts that were not set forth before Justice Williams that would have affected her November 9, 2010 order. The court, inter alia, declared the executor's deed, quitclaim deed, and both mortgages null and void. The court also found Katz liable for attorneys' fees because of his misrepresentations, including his willful failure to inform Justice Williams, during the pendency of Martinez's order to show cause, that the Carneys had conveyed the property to Katz.

The matter was referred to Justice Salman, who conducted a hearing on fees in April 2014. By order entered May 22, 2014, the court awarded Martinez attorneys' fees. Among other things, it held Katz liable for $7,585, and Katz and the Carneys jointly

[1] The court's authority to appoint a guardian ad litem in this situation was not raised below.

and severally liable for $24,912.

On appeal, Katz argues that Martinez's motion was not a proper renewal motion, because the prior motion was for specific performance and attorneys' fees against the Carneys, and the renewal motion sought relief against the Carneys and Katz. Contrary to Katz's contention, Martinez was not seeking relief that was completely different from the relief he sought in his initial motion (*see Sodano v Faithway Deliverance Ctr., Inc.*, 18 AD3d 534, 535-536 [2d Dept 2005]). The renewal motion arose out of the same dispute and sought similar relief, and thus was a proper renewal motion based on newly-discovered facts (CPLR 2221[e]).

The court is authorized to impose attorneys' fees and expenses upon a party for frivolous conduct that "asserts material factual statements that are false" (22 NYCRR 130-1.1 [c][3]). Supreme Court's June 20, 2013 order found Katz liable to Martinez for attorneys' fees "because of his misrepresentations, including his willful failure to inform Justice Williams, during the pendency of [Martinez's] prior Order to Show Cause, that on September 2, 2010, Defendants, Arrisini and Vanessa Carney, had already conveyed the property" to Katz. Our review of the record confirms that on September 2, 2010, the Carneys conveyed the subject property to Katz by a quitclaim deed

that Katz notarized himself. The deed in the record shows the conveyance by the Carneys to "2788 Kingsbridge Terrace Corporation, a New York corporation, c/o Michael Katz," and Katz acknowledged that the corporation was "a company [he] formed." Katz and his attorney failed to inform the court of the conveyance either before or during the September 20, 2010 hearing, and allowed the court to render its decision on incorrect facts. This conduct warrants an award of attorneys' fees and costs. Notably, neither Katz's affidavit nor his testimony at the attorneys' fee hearing provides any explanation for his failure to inform the court of the conveyance.

Although Katz now argues that no fees should have been imposed without a hearing, he fails to allege that he requested such a hearing in the motion court. Further, Rule 130-1.1 does not require a full evidentiary hearing, but states that attorney's fees and costs may be awarded "after a reasonable opportunity to be heard," and that "[t]he form of the hearing shall depend upon the nature of the conduct and the circumstances of the case" (22 NYCRR 130-1.1[d]). Here, Katz had the opportunity to be heard through affidavits he submitted in opposition to the guardian ad litem's reports. He also had an opportunity to offer testimony at the second proceeding, and we have reviewed that testimony.

Although the court referred to Katz's "misrepresentations," in its findings, it provided detail for only one misrepresentation. 22 NYCRR 130-1.2 provides that "[t]he court may award costs . . . only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate." As such, Katz should be liable only for fees and costs incurred on and after September 2, 2010 that resulted from the misrepresentation about the property conveyance (*see* 22 NYCRR 130-1.1[a]). To the extent that the court may have found that Katz acted inappropriately in any other way, the court provided no detail and the decision must be modified.[2]

In its May 22, 2014 order, the court did not explain its rationale for holding Katz liable for $7,585, and Katz and the Carneys jointly and severally liable for $24,912. Indeed, because we are modifying the initial decision finding Katz to have violated 22 NYCRR 130-1.1, the attorneys' fee award must necessarily be vacated because the court may have awarded fees

[2] We are not relying on the information in the report prepared by the guardian ad litem. Thus, we need not decide whether the court had the authority to appoint the guardian in the first place or should have relied on any hearsay in that report.

for other alleged misconduct. In fact, our review of Martinez's attorney's invoices in the record suggests that the amount awarded may have included fees incurred before September 2, 2010, which would be inappropriate in light of our modification. Accordingly, the matter is remitted to Supreme Court for a new fee hearing, which shall include a determination of how the fees that are awarded relate to the specific misrepresentation set forth in Justice Aarons's decision (*see McCue v McCue*, 225 AD2d 975, 979 [3d Dept 1996]).

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

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

ENTERED: JUNE 25, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15449- Index 114284/10
15550 Hector Medina, et al.,
Plaintiffs-Appellants-Respondents,

-against-

42nd and 10th Assoc., LLC, et al.,
Defendants-Respondents-Appellants.

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Buttafuoco & Associates, PLLC, Woodbury (Jason Murphy of counsel), for appellants-respondents.

London Fischer, LLP, New York (Robert D. Martin of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 16, 2013, which, to the extent appealed from, denied plaintiffs' motion for partial summary judgment, unanimously modified, on the law, to grant the motion as to the Labor Law § 240(1) claim, and otherwise affirmed, without costs. Order, same court and Justice, entered August 16, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion as the Labor Law § 200 and common-law negligence claims, and otherwise affirmed, without costs.

The injured plaintiff established prima facie that defendants failed to provide him with a scaffold "so constructed, placed and operated as to give [him] proper protection" (Labor

Law § 240(1); *Susko v 337 Greenwich LLC*, 103 AD3d 434 [1st Dept 2013]). The scaffold that was provided could not safely reach the window that plaintiff was required to caulk, without being elevated over the sidewalk bridge. As the superintendent of construction for the Tishman defendants testified, plaintiff "had to" place the scaffold over the sidewalk bridge to reach the windows so that he could complete his job. Leaning at an extreme angle against the sidewalk bridge, the scaffold collapsed and plaintiff fell.

In opposition, defendants contend that plaintiff was a recalcitrant worker or that his own actions were the sole proximate cause of his injuries. However, they failed to submit evidence sufficient to raise an inference that there were scaffolds adequate for plaintiff's task on site and that plaintiff chose not to use them after being directed to do so (*Stolt v General Foods Corp.*, 81 NY2d 918 [1993]). Further, defendants failed to show that plaintiff was able to connect his safety harness before reaching the top of the sidewalk bridge or that, even if he had done so, it would have prevented his fall.

Plaintiff failed to establish his entitlement to summary judgment on his Labor Law § 241(6) claim, which he appears in his appellate reply brief to have limited to three predicates. Industrial Code (12 NYCRR) § 23-5.1(c)(1) has been found

insufficiently specific to support a Labor Law § 241(6) claim (*Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept 2009]). As to 12 NYCRR 23-5.1(h) and 23-5.8(c)(1), issues of fact exist whether a "designated person" was supervising.

The Labor Law § 200 and common-law negligence claims should be dismissed, since there is no evidence that defendants controlled the means or methods of plaintiff's work (*Reilly v Newireen Assoc.*, 303 AD2d 214, 219 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]).

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

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

ENTERED: JUNE 25, 2015

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Clark, Kapnick, JJ.

15515-
15516 Aida Ortiz, et al.,
Plaintiffs-Appellants,

-against-

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

Index 300588/08

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants.

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

Carroll McNulty & Kull LLC, New York (Frank J. Wenick of counsel), for Jack D. Weiler Hospital of the Albert Einstein College of Medicine, respondent.

Judgment, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered July 2, 2014, dismissing the complaint as against defendant Jack D. Weiler Hospital of the Albert Einstein College of Medicine, a division of Montefiore Medical Center (hereinafter Montefiore), unanimously affirmed, without costs. Order, same court and Justice, entered March 14, 2014, which granted defendants' motions for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, as to defendant City, and the City's motion denied, and the appeal therefrom otherwise dismissed, without costs, as subsumed in the appeal from the aforesaid judgment.

The motion court properly considered plaintiffs' out-of-state expert affirmation; although the expert's name was redacted from the affirmation served on defense counsel, the original was provided to the court (*see Carnovali v Sher*, 121 AD3d 552 [1st Dept 2014]). Moreover, the expert swore to the contents of the affirmation before a notary public.

Defendant City established prima facie that its paramedics, who plaintiffs allege mishandled plaintiff Aida Ortiz while attempting to aid her, did not depart from the appropriate standard of care; its expert affirmation asserted that the paramedics were required to make bodily contact with Aida in order to assist her properly. The expert further stated that Aida's shoulder injuries were caused by her seizures, which involved convulsions and twisting.

In opposition, plaintiffs raised an issue of fact by submitting their daughters' testimony describing the "rough manner" in which the paramedics aided their mother, and their expert's opinion that, while a seizure could cause the trauma Aida sustained, Aida's movements as described by her daughters did not rise to the level of violent arm flailing that could cause shoulder dislocations and fractures.

Defendant Montefiore demonstrated, through its expert, that Aida sustained a grand mal seizure, that the wrist restraints it

used were necessary, since sedatives were no longer effective, and that, in any event, there was no evidence that the wrist restraints contributed to Aida's shoulder injuries. In opposition, plaintiffs failed to raise an issue of fact. Their expert offered only conclusory opinions as to Montefiore's departure from care and failed to explain how a wrist restraint could have caused or contributed to Aida's shoulder injuries (*see Kristal R. v Nichter*, 115 AD3d 409, 412 [1st Dept 2014]).

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

ENTERED: JUNE 25, 2015

CLERK

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

15530- Ind. 3451/12
15530A The People of the State of New York, 1862/13
Respondent,

-against-

Andrew Jean,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about February 27, 2013 and April 30, 2014,

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

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

ENTERED: JUNE 25, 2015

CLERK

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

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

15533 In re Sabrina T.,
Petitioner-Respondent,

-against-

Cleveland T.,
Respondent-Appellant.

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Andrew J. Baer, New York, for appellant.

Joan L. Beranbaum, New York (Joan A. Foy of counsel), for respondent.

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Order of protection, Family Court, New York County (Monica D. Shulman, Court Attorney Referee), entered on or about May 9, 2014, which, upon a fact-finding determination that respondent committed the family offenses of harassment in the second degree and criminal obstruction of breathing or blood circulation, directed him to stay away from petitioner until May 8, 2016, unanimously affirmed, without costs.

A fair preponderance of the evidence in the record supports the Referee's finding that respondent's behavior was at a level sufficient to constitute a "family offense" within the meaning of Family Court Act § 812 (1) and warranted the issuance of a two-year order of protection in petitioner's favor, with reasonable conditions that "are likely to be helpful in eradicating the root of [the] family disturbance" (*Matter of*

Miriam M. v Warren M., 51 AD3d 581, 582 [1st Dept 2008] [internal quotation marks and citation omitted]; *and see Matter of F.B. v W.B.*, 248 AD2d 119 [1st Dept 1998]). Issues of credibility were properly resolved by the fact-finder (*see Matter of Jason B.*, 186 AD2d 481, 482 [1st Dept 1992]; *Matter of Darryl G.*, 184 AD2d 204 [1st Dept 1992]).

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

ENTERED: JUNE 25, 2015

CLERK

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

15534 Marcelo Merchan, Index 152887/12
Plaintiff-Respondent,

-against-

609 Route 17 South Corporation,
Defendant,

Fifth Avenue Menswear, Inc.,
Defendant-Appellant.

[And a Third-Party Action]

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Law Offices of Charles J. Siegel, New York (Richard D. O'Connell of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 11, 2014, which denied defendant Fifth Avenue Menswear Inc.'s motion for summary judgment, unanimously affirmed, without costs.

Plaintiff was an employee of an independent contractor that was hired by defendant, an operator of a seasonal store and occupier of the land, to update a box sign outside of the store in New Jersey. In performing this work, plaintiff leaned a ladder against the middle of the box sign, climbed the ladder, and subsequently fell to the ground and injured himself when the box sign rotated suddenly. Both parties acknowledge that New Jersey law applies.

Under New Jersey law, an occupier of land owes a duty to an independent contractor to provide a reasonably safe workplace (*Olivo v Owens-Illinois, Inc.*, 186 NJ 394, 406, 895 A2d 1143, 1150 [2006]). However, an exception to this duty applies when the contractor is invited onto the land to perform a specific task with respect to a dangerous condition and the occupier does not retain control over the means and methods of the work (186 NJ at 406-407, 895 A2d at 1150-1151). Under those circumstances, an occupier is under no duty to protect an employee of an independent contractor from hazards created by the performance of the contract work (186 NJ at 407, 895 A2d at 1150).

In this case, defendant has not established whether the hazzard was created by plaintiff's undertaking the contract work, or instead whether the sign box shifted as the result of a latent defect.

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

ENTERED: JUNE 25, 2015

CLERK

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

15535 Melissa Guzy, Index 157576/13
Plaintiff-Appellant,

-against-

New York City,
Defendant,

The New York City Transit Authority,
Defendant-Respondent.

_____

Vince A. Sicari, New York, for appellant.

Lawrence Heisler, Brooklyn, for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered June 18, 2014, which, to the extent appealed from as limited by the briefs, granted defendant New York City Transit Authority's (NYCTA) motion for summary judgment dismissing the complaint as time-barred, unanimously affirmed, without costs.

Plaintiff was allegedly injured on October 13, 2011, when she was crossing the street and struck by a bus owned and operated by NYCTA. Plaintiff timely filed a notice of claim, and was informed that she had one year and 90 days after the accident to commence an action. As such, plaintiff was required to commence an action by February 11, 2013 (*see* Public Authorities Law §§ 1212[1], [2]). However, plaintiff commenced an action against NYCTA in the Superior Court of New Jersey in July 2013.

Plaintiff then commenced the instant action on August 15, 2013. The New Jersey action was subsequently dismissed for lack of personal jurisdiction.

The court properly granted NYCTA's motion to dismiss the complaint as time-barred, since plaintiff did not commence the action within the applicable statute of limitations period (*see Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). Plaintiff's contention that the statute of limitations should have been tolled for the period that NYCTA was conducting its investigation of the alleged accident is without merit, since plaintiff was not precluded from commencing the action during that period (*see e.g. Cespedes v City of New York*, 301 AD2d 404, 404-405 [1st Dept 2003]). Nor can plaintiff find relief under CPLR 205[a], since that statute allows a plaintiff six months to commence a new action where the previous action was timely commenced and was terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits. Here plaintiff's New Jersey action was not timely commenced, and was dismissed for lack of personal jurisdiction. Moreover, CPLR 205[a] does not apply when the initial action was commenced in a state or federal court outside of New York (*see* Siegel, NY Prac.

§ 52, at 75 [5th ed]; *Lehman Bros. V Hughes Hubbard & Reed*, 245 AD2d 203, 204 [1st Dept 1997], *affd* 92 NY2d 1014 [1998]).

The remedy of equitable estoppel to bar NYCTA's affirmative defense of the statute of limitations is not applicable in this case, as plaintiff has failed to demonstrate that NYCTA's investigation of the accident induced her to postpone commencing the action (*see Walker v New York City Health & Hosps. Corp.*, 36 AD3d 509, 510 [1st Dept 2007]). Plaintiff was aware that she was required to commence an action within one year and 90 days of her accident, and failed to give a credible explanation why she did not do so, thus plaintiff cannot demonstrate that she was justified in waiting for NYCTA to complete its investigation as reason for delaying the filing of the complaint (*see Zumpano v Quinn*, 6 NY3d 666, 674 [2006]; *Dunefsky v Montefiore Hosp. Med. Ctr.*, 162 AD2d 300, 300 [1st Dept 1990]).

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: JUNE 25, 2015

CLERK

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

15538 Sheila Freed, Index 313336/13
Plaintiff-Respondent,

-against-

Yochai Kapla,
Defendant-Appellant.

_____

Yochai Kapla, appellant pro se.

Jeffrey S. Schecter & Associates, P.C., Garden City (Bryce R. Levine of counsel), for respondent.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered May 20, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motion for leave to renew and granted his motion for leave to reargue the court's decision, dated January 28, 2014, and adhered to that decision directing him to vacate plaintiff's separate residential property at 225 Central Park West, Apartment 515, New York, New York; denied his requests for an award of temporary maintenance, for damages for injuries he allegedly sustained while being served by a process server, and for a psychiatric evaluation of plaintiff; and granted plaintiff's motion for summary judgment to the extent of finding the parties' prenuptial agreement valid and enforceable, unanimously affirmed, without costs.

There is a strong public policy in New York favoring the

enforcement of duly executed prenuptial agreements (*see Anonymous v Anonymous*, 123 AD3d 581, 582 [1st Dept 2014]). Here, defendant husband failed to provide any basis for invalidating the prenuptial agreement in which he consented to waive support and maintenance payments and to vacate plaintiff wife's separate residential property after notice that she intended to permanently separate from him. Her alleged oral promise to take care of him was insufficient to overcome the clear and unambigous language of the prenuptial agreement (*see Van Kipnis v Van Kipnis*, 11 NY3d 573, 577 [2008]).

The court also properly dismissed any claims asserted by the husband against the process server because the process server was not a party to the action.

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

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

ENTERED: JUNE 25, 2015

CLERK

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

15539 The People of the State of New York, Ind. 600/12
Respondent,

-against-

Shaun Jones,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered on or about July 30, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant'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: JUNE 25, 2015

CLERK

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

15540- Ind. 5062/02
15541- 2270/10
15542 The People of the State of New York,
Respondent,

-against-

Keith Fair,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc I. Eida of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered July 30, 2013, convicting defendant, upon his plea of guilty, of criminal sexual act in the third degree, and sentencing him, as a second violent felony offender, to a term of four years, unanimously modified, on the law, to the extent of vacating the second violent felony offender adjudication and substituting a second felony offender adjudication, and otherwise affirmed. Order, same court (Seth L. Marvin, J.), entered on or about October 9, 2013, which adjudicated defendant a level three predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs. Order, same court (Steven Lloyd Barrett, J.), entered on or about December 5, 2013, which adjudicated defendant a level

three sexually violent predicate sex offender pursuant to the same Act, unanimously affirmed, without costs.

Defendant's oral colloquy with the court, supplemented by a written waiver, establishes that defendant made a valid waiver of his right to appeal from the judgment of conviction (*see People v Lopez*, 6 NY3d 248, 256 [2006]). Regardless of whether defendant made a valid waiver of his right to appeal from the judgment, we perceive no basis for reducing the sentence. However, as the People concede, defendant should only have been adjudicated a second felony offender, not a second violent felony offender.

Turning to defendant's civil appeals from his sex offender adjudications, we find no basis for any modifications. With regard to the October 9, 2013 order, defendant is subject to the presumptive override for prior felony sex crime convictions, which results in a level three adjudication independent of any point assessments. In any event, defendant's challenge to a particular assessment is unavailing, because the assessment was based on reliable information (*see e.g. People v Johnson*, 77 AD3d 548 [1st Dept 2010], *lv denied* 16 NY3d 705 [2010]). With regard to the December 5, 2013 order, the record supports the court's upward departure to level three, based on the extreme seriousness of defendant's lengthy record of sexual recidivism, a factor not otherwise adequately taken into account by the risk assessment

guidelines (*see e.g. People v Faulkner*, 122 AD3d 539 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). Defendant's challenge to his predicate sex offender designation is unpreserved and we decline to review it in the interest of justice.

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

ENTERED: JUNE 25, 2015

CLERK

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

15543 American Entrance Services, Inc., et al., Plaintiffs-Appellants, Index 154079/13

-against-

Ronald Roeder, et al., Defendants-Respondents.

Altman Schochet LLP, New York (Irena Shternfeld of counsel), for appellants.

Graham Curtin, P.A., New York (John Maloney of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 13, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiffs' claims for misappropriation of trade secrets and unfair competition, and denied plaintiffs' cross motion to amend the complaint to add a claim of trespass, unanimously affirmed, with costs.

Plaintiffs' claims for misappropriation of trade secrets and unfair competition are time-barred, since plaintiffs had knowledge of defendants' alleged use of their trade secrets beginning in 2006, more than seven years before they filed this action (*see* CPLR 214[4]; *Mahmood v Research in Motion Ltd.*, 2012 WL 242836, *4, 2012 US Dist LEXIS, *9-12 [SD NY, Jan. 24, 2012,

No. 11-Civ-5345(KBF)] [unfair competition]; *Synergetics USA, Inc. v Alcon Laboratories, Inc.*, 2009 WL 2016872, *2, 2009 US Dist LEXIS 58899, *5-6 [SD NY, July 9, 2009, No. 08-Civ-3669(DLC)] [misappropriation of trade secrets]). Given plaintiffs' knowledge, the continuing tort doctrine does not apply (*see Synergetics*, 2009 WL 2016872, *2, 2009 US Dist LEXIS 58899, *6).

The court properly denied plaintiffs' motion to amend the complaint to add a claim for trespass. The proposed claim, as pleaded, was for conversion of property, not for trespass (*see Sporn v MCA Records*, 58 NY2d 482, 487 [1983]). Because the alleged conversion occurred in 2005, eight years before the filing of this action, the proposed claim is time-barred (*see* CPLR 214[4]).

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

ENTERED: JUNE 25, 2015

CLERK

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

15544 In re Michael Mazziotti, Index 101666/13
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

_____

Chet Lukaszewski, P.C., Lake Success (Chester Lukaszewski of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 2, 2014, which denied the petition seeking, among other things, to annul respondents' determination, dated September 12, 2013, denying retroactive accidental disability retirement (ADR) benefits, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

When respondents reclassified petitioner's retirement to ADR on September 11, 2013, they were constrained by statute to deny petitioner's request that the ADR benefits be paid retroactively (*see* Administrative Code of City of NY § 13-252.1[2][b]). The remedy, if any, lies with legislative action.

Petitioner's request for sanctions is improperly raised for the first time in his reply brief.

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

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

ENTERED: JUNE 25, 2015

CLERK

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

15545 The People of the State of New York, Ind. 4576/11
Respondent,

-against-

David Santiago,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey 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 (Thomas Farber, J.), rendered on or about November 22, 2011,

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: JUNE 25, 2015

CLERK

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

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

15546 Simcha Stern, et al., Index 153313/12
Plaintiffs-Appellants,

-against-

Morgan Stanley Smith Barney
(formerly Dean Witter Reynolds), et al.,
Defendants-Respondents.

_____

Song Law Firm, New York (Howard Z. Myerowitz of counsel), for appellants.

Morgan Stanley Legal and Compliance Department, New York (Thomas P. Briody of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 10, 2013, which granted defendants' motion to dismiss on the basis of the statute of limitations, unanimously affirmed, with costs.

Plaintiffs' fraud claims arose more than 10 years before the commencement of this action. As such, plaintiffs had to show that they could not have discovered the fraud two years prior to this action, by the exercise of reasonable diligence (CPLR 213[8]). Here, however, plaintiffs did not deny that they received monthly account statements, or assert that they inquired if no such statements were received. This failure was fatal to their claims of reasonable diligence (*see Lim v Kolk*, 122 AD3d 547 [1st Dept 2014]). The breach of fiduciary duty claim was not

tolled by the open repudiation doctrine. That rule applies only to claims for accounting or equitable relief, and plaintiffs' claims are solely at law (*Ingham v Thompson*, 88 AD3d 607, 608 [1st Dept 2011]). The doctrine could not save the fiduciary duty claim as to Morgan Stanley for the additional reason that it ceased to be plaintiffs' broker in 2001, at which time the fiduciary duty was "repudiated" (*see Kaszirer v Kaszirer*, 286 AD2d 598, 599 [1st Dept 2001]). Finally, plaintiffs' lack of reasonable diligence also bars their claims for equitable estoppel (*Matter of Jack Kent Cooke, Inc. [Saatchi & Saatchi N. Am.]*, 222 AD2d 334, 335 [1st Dept 1995]).

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

ENTERED: JUNE 25, 2015

CLERK

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

15547 Claudia Llanos, Index 103813/13
Plaintiff-Appellant,

-against-

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

_____

John J. Napolitano, Oyster Bay, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered November 25, 2013, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff has not made any factual allegations that she was adversely treated under circumstances giving rise to an inference of discrimination, as required to state a claim for discrimination under the New York State and City Human Rights Laws (*see Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621 [1st Dept 2013]; *McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676 [2d Dept 2006]). Furthermore, plaintiff's failure to adequately plead discriminatory animus is fatal to her claim of hostile work environment (*see Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 [1st Dept 2013], *lv denied* 22 NY3d 861 [2014]).

Plaintiff has abandoned her claim of retaliation, by failing to address it in her brief (*see Hardwick v Auriemma*, 116 AD3d 465, 468 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]). Were we to consider the claim, we would find that it is not viable.

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

ENTERED: JUNE 25, 2015

CLERK

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

15548 Nathalie Karg, Index 309367/12
Plaintiff-Respondent,

-against-

Anton Kern,
Defendant-Appellant.

_____

Stark & Levoritz, P.C., Brooklyn (Yonatan Levoritz of counsel), for appellant.

The McPherson Firm, P.C., New York (Laurie J. McPherson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered on or about August 29, 2014, confirming an April 4, 2014 report of the Special Referee, and, in accordance with the report, setting aside the parties' June 20, 1997 prenuptial agreement, unanimously affirmed, without costs.

The motion court properly confirmed the Special Referee's report and there is no basis to disturb the Referee's credibility findings which are supported by the record (*see Poster v Poster*, 4 AD3d 145, 145 [1st Dept 2004], *lv denied* 3 NY3d 605 [2004]). In particular, the Referee credited plaintiff's testimony that she is not proficient in German, was not given a copy of the agreement prior to her execution of it and was not given an opportunity to consult an attorney. In addition, the Referee credited plaintiff's testimony that the Notar, who was an

acquaintance of defendant husband's parents, did not translate the agreement from German into English, that the parents, who were present at the signing, had arranged and paid for the Notar, and that defendant told plaintiff that she was simply signing an agreement to waive any claim to his father's vast wealth and assets. The Referee also relied on the testimony of the parties' experts who both agreed that under German law, which governs the agreement, the totality of the circumstances as alleged by plaintiff warrants a finding that the agreement is invalid.

Defendant's reliance on our holding in *Stawski v Stawski* (43 AD3d 776 [1st Dept 2007]) is misplaced. Although *Stawski* similarly concerned a prenuptial agreement executed in Germany in front of a notar, and a wife who was not proficient in German, there the Referee did not credit the wife's version of the facts. Significantly, we recognized in *Stawski* that if the wife's testimony had been credited she would have had a viable claim for fraud based on her testimony that she was misled regarding the purpose of the agreement, having been told it was to protect her husband in the event of bankruptcy (43 AD3d at 779). Here, plaintiff's testimony that defendant defrauded her by telling her that the agreement only concerned his parents' wealth was credited, and the testimony of defendant and his parents was found to be incredible. Thus, a finding that plaintiff herein

was the victim of fraud or overreaching was proper, is consistent with *Stawski* and is supported by the record.

Defendant's challenge to the propriety of the hearing based on the alleged pleading defects was previously rejected on an earlier appeal (125 AD3d 527 [1st Dept 2015]).

Defendant waived his claim that New York law, rather than German law, applies. At the hearing and in his post-hearing memorandum he agreed that German law governs the enforceability of the agreement. Similarly, he waived his claim that plaintiff's challenge to the agreement is barred by a German 10-year statute of limitations because he did not raise this claim in his motion to dismiss.

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

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

ENTERED: JUNE 25, 2015

CLERK

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

15550N Index 651213/14
[M-2447] Oppenheimer & Co. Inc.,
Plaintiff-Appellant,

-against-

Louis Pitch, et al.,
Defendants-Respondents.

- - - - -

The Public Investors Arbitration Bar Association,
Amicus Curiae.

_____

Stradley Ronon Stevens & Young, LLP, New York (William E. Mahoney, Jr., of the bar of the Commonwealth of Pennsylvania admitted pro hac vice, of counsel), for appellant.

Timothy J. Dennin, P.C., Northport (Timothy J. Dennin of counsel), for respondents.

Malecki Law, New York (Adam M. Nicolazzo of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 25, 2014, which granted defendants' motion to compel arbitration, unanimously reversed, on the law, without costs, the motion to compel denied, and the matter remanded for further proceedings.

Plaintiff seeks a declaration that a pending arbitration, involving plaintiff's alleged failure to disclose to defendants certain documents during a prior arbitration, constitutes an unlawful collateral attack on the arbitration award in the first

arbitration.

Even if the client agreement compelling arbitration of "all controversies" between the parties demonstrates a clear intent to leave questions of arbitrability to the arbitrators (*see Gibson v Seabury Transp. Advisor LLC*, 91 AD3d 465 [1st Dept 2012]), the question of whether a second arbitration proceeding is an impermissible collateral attack of an arbitration award in the first arbitration proceeding is not a question of arbitrability, but is a legal question to be determined by the court (*see Howsam v Dean Witter Reynolds, Inc.*, 537 US 79, 83-84 [2002]; *Prime Charter v Kapchan*, 287 AD2d 419 [1st Dept 2001]). Accordingly, the motion court erred in granting the motion to compel arbitration without determining whether defendants' arbitration claim for sanctions based on plaintiff's alleged misconduct is an unlawful collateral attack on the award in the first arbitration. We find that is (*see e.g. Decker v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F3d 906, 910 [6th Cir 2000]), and that defendants must obtain an order vacating the award before their claim can be raised in arbitration (*see* CPLR 7511). We remand the matter for further consideration of defendants' alternative request for relief seeking to vacate the arbitration award, the

merits of which the motion court did not address below.

M-2447 - *Oppenheimer & Co. Inc. v Louis Pitch, et al.,*

Motion to file amicus curiae brief granted, and the brief deemed filed.

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

ENTERED: JUNE 25, 2015

CLERK

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

15551N New GPC Inc., Index 155301/12
Plaintiff-Respondent,

-against-

Kaieteur Newspaper Inc.,
Defendant-Appellant.

_____

Law Offices of James F. Sullivan, P.C., New York (Giovanna Tuttolomondo of counsel), for appellant.

Ray Beckerman, P.C., Forest Hills (Ray Beckerman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 27, 2015, which denied defendant's motion to dismiss the complaint pursuant to CPLR 3126, unanimously affirmed, with costs.

On August 15, 2014, defendant served supplemental discovery demands concerning compensatory damages on plaintiff, and by court order, dated August 21, 2014, plaintiff's responses were due on September 24, 2014. However, on November 3, 2014, the parties entered into a stipulation permitting plaintiff to file an amended complaint that removed plaintiff's claims for compensatory damages. After plaintiff communicated that it no longer intended to respond to defendant's supplemental discovery requests because the issue of compensatory damages was moot, defendant moved to dismiss by striking plaintiff's complaint,

pursuant to CPLR 3126, on the ground that plaintiff failed to comply with the August 21, 2014 order.

The court did not abuse its discretion in denying the motion (*148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]). Defendant failed to demonstrate that plaintiff engaged in a pattern of violating court orders on discovery, that plaintiff's conduct has been willful or contumacious, or that plaintiff acted in bad faith (*Christian v City of New York*, 269 AD2d 135, 136-137 [1st Dept 2000]).

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

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

ENTERED: JUNE 25, 2015

CLERK