SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 3, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1685 All Craft Fabricators, Inc., et al.,
Plaintiffs-Respondents,

-against-

Syska Hennessy Group, Inc.,
Defendant-Appellant.

Index 155408/15

Wasserman Grubin & Rogers, LLP, New York (Michael T. Rogers of counsel), for appellant.

London Fischer LLP, Bellport (John E. Sparling of counsel), for respondents.

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered November 24, 2015, which denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs allege that they were harmed by defendant's failure to advise them that there was asbestos in wood panels and doors delivered to their facility for refurbishment. Defendant

moved to dismiss based on, among other things, the three-year statute of limitations applicable to plaintiffs' claim, whether grounded in professional negligence (malpractice) or ordinary negligence (CPLR 214[4], [6]).

Because the parties have no contractual relationship with each other, the claim must be viewed in terms of simple negligence (*Board of Mgrs. of Yardarm Beach Condominium v Vector Yardarm Corp.*, 109 AD2d 684, 685 [1st Dept 1985], appeal dismissed 65 NY2d 998 [1985]), with accrual occurring within three years of the date of injury (*Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1031 [2013]), rather than a claim for professional negligence, which generally accrues upon the completion of the work at issue (*Germantown Cent. School Dist. v Clark, Clark, Millis & Gilson*, 100 NY2d 202 [2003]). We reject defendant's position that the date of injury was in January 2012 when the asbestos-laden doors and panels were delivered to the facility. Until plaintiffs' personnel actually unsealed the wooden crates that the doors and panels were encased in and cut into the material, any contamination of plaintiffs' facility had not yet occurred.

Nevertheless, plaintiffs' contention that the date of injury was, at the earliest, May 29, 2012, exactly three years before

they commenced the action, when they first noticed what they believed to be asbestos, is unavailing. "[T]he damage that [plaintiffs] are seeking to 'undo' is not the fact that they discovered asbestos, but the fact of its incorporation in their buildings" (*MRI Broadway Rental v United States Min. Prods. Co.*, 92 NY2d 421, 428 [1998]). The record makes clear that, while plaintiffs may have first noticed asbestos on May 29, they exposed the facility to it earlier that month.

CPLR 214-c does not avail plaintiffs. As they claim no additional damage to their facility since the asbestos was introduced, it cannot be said that the injury they sustained resulted from the latent effects of exposure to asbestos (*Germantown*, 100 NY2d at 206-207).

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

ENTERED: NOVEMBER 3, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1789-
1789A Aozora Bank, Ltd.,
Plaintiff-Respondent,

-against-

UBS AG, et al.,
Defendants-Appellants.

Index 652162/13

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Sullivan & Cromwell LLP, New York (Robert J. Giuffra Jr. of counsel), for UBS AG, UBS Limited and UBS Securities LLC, appellants.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (H. Christopher Boehning of counsel), for Deutsche Investment Management Americas Inc., appellant.

Kirby McInerney LLP, New York (Andrew M. McNeela of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about October 14, 2015, which, to the extent appealed from, denied the UBS defendants' motion to dismiss the causes of action alleging fraud and aiding and abetting fraud as against them; and order, same court and Justice, entered on about October 14, 2015, which, to the extent appealed from as limited by the briefs, denied defendant Deutsche Investment Management Americas Inc.'s motion to dismiss those same causes of action as against it, unanimously reversed, on the law, with costs, and the motions granted. The Clerk is directed to enter judgment

dismissing the complaint.

The motion court erred in denying defendants' motions to dismiss the fraud claims as time-barred (*see* CPLR 3211[a][5]). The parties agree that the timeliness of the claims depends on whether plaintiff "discovered the fraud, or could with reasonable diligence have discovered it," more than two years before the filing of the complaint on June 18, 2013 (CPLR 213[8]). The record demonstrates that plaintiff could, with reasonable diligence, have discovered the alleged fraud by April 2010, rendering its fraud claims untimely (*see Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d 685, 689 [1st Dept 2016]). By that date, numerous lawsuits had been filed against the UBS defendants for misconduct similar to that alleged in this complaint (*see id.* at 689-690; *see also CIFG Assur. N. Am., Inc. v Credit Suisse Sec. [USA] LLC*, 128 AD3d 607, 608 [1st Dept 2015], *lv denied* 27 NY3d 906 [2016]). Also by that date, the Securities and Exchange Commission had commenced an investigation into UBS's CDO practices (*see Aozora*, 137 AD3d at 689). In addition, news articles disclosed the alleged misconduct involving hedge fund Magnetar and the Constellation CDOs (*id.*). The foregoing lawsuits, investigations and articles also sufficed

to put plaintiff on "inquiry notice" of defendant Deutsche's alleged fraud (*id.*).

We have considered plaintiff's arguments and find them unavailing.

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Richter, Feinman, Kapnick, Kahn, JJ.

1887 Aozora Bank, Ltd., Index 652274/13
Plaintiff-Appellant,

-against-

Credit Suisse Group, et al.,
Defendants-Respondents.

_____

Kirby McInerney LLP, New York (Andrew M. McNeela of counsel), for appellant.

Cahill Gordon & Reindel LLP, New York (David G. Januszewski of counsel), for Credit Suisse Securities (USA) LLC, respondent.

Nixon Peabody LLP, Rochester (Carolyn G. Nussbaum of counsel), for Harding Advisory LLC, respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 22, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the fraud, aiding and abetting fraud, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation claims as against them, unanimously affirmed, without costs.

In May 2007, plaintiff Aozora Bank, Ltd., a sophisticated investor in the subprime market, purchased $40 million of notes issued by the Jupiter V CDO, an investment vehicle collateralized by residential mortgage backed securities and other assets.

Defendant Credit Suisse Securities (USA) LLC served as the arranger of Jupiter V, and defendant Harding Advisory LLC was the collateral manager. Like many CDO investments, Jupiter V failed during the financial crisis, resulting in Aozora's loss of all of its principal investment.

In June 2013, more than six years after it purchased the Jupiter V notes, Aozora commenced this action alleging that Credit Suisse and Harding fraudulently induced it to invest in Jupiter V. According to Aozora, it was told in marketing materials and various deal documents that Harding would serve as the collateral manager, and that it would use its independent judgment to select the collateral and to actively manage the assets. In fact, Aozora alleges, the collateral was selected largely by Credit Suisse, in collusion with Harding, and Jupiter V was used to dump toxic assets off Credit Suisse's own balance sheet. Credit Suisse and Harding filed motions to dismiss Aozora's complaint alleging, inter alia, that it was barred by the statute of limitations. In a decision entered April 22, 2015, the motion court dismissed the complaint in its entirety.

Under CPLR 213(8), a fraud claim must be brought within the longer of "six years from the date the cause of action accrued or two years from the time the plaintiff . . . could with reasonable

diligence have discovered the [fraud]." Aozora concedes that this action was commenced more than six years after the cause of action accrued, i.e., when Aozora purchased the notes. Thus, to be timely, the action must have been brought within two years from the time Aozora discovered the alleged fraud, or from when it could have discovered it in the exercise of reasonable diligence.

"[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him" (*Gutkin v Siegal*, 85 AD3d 687, 688 [1st Dept 2011] [internal quotation marks omitted]). Defendants must make a prima facie showing that Aozora was on such inquiry notice of its fraud claims more than two years before the action was commenced. The burden then shifts to Aozora to establish that even if it had exercised reasonable diligence, it could not have discovered the basis for its fraud claims (*Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d 685, 689 [1st Dept 2016]).

Applying these principles, the motion court properly determined that the fraud and misrepresentation claims were time-

barred. The publicly available information identified by defendants, considered in its totality, established prima facie that Aozora was on inquiry notice more than two years before the June 2013 commencement of the action (*see CIFG Assur. N. Am., Inc. v Credit Suisse Sec. [USA] LLC*, 128 AD3d 607, 608 [1st Dept 2015], *lv denied* 27 NY3d 906 [2016]). First, Aozora sustained substantial investment losses in 2007 and 2008, and by August 2008, the Jupiter V notes in which Aozora invested had been downgraded from the highest possible Moody's rating to the lowest (*see Aozora Bank Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d at 689 [losses that a plaintiff sustains is a factor in determining whether there was notice of possible fraud]; *Gutkin v Siegal*, 85 AD3d at 688 [a reasonable investor, upon learning that he lost millions of dollars, would have investigated further]; *In re Morgan Stanley Mtge. Pass-Through Certificates Litig.*, 2010 WL 3239430, 2010 US Dist LEXIS 84146 [SD NY, Aug. 17, 2010, No. 09-Civ-2137 (LTS)(MHD)] [finding inquiry notice based on, inter alia, ratings downgrades]).

Next, in March 2009, a complaint was filed in the Southern District of New York alleging misconduct by Harding similar to that alleged in Aozora's complaint here. Specifically, the federal complaint alleged that Harding did not independently

select collateral for a Citigroup CDO, but instead included low-quality assets that Citigroup wanted to rid itself of. This federal lawsuit was discussed in a 2010 article in *Bloomberg*, which also described another lawsuit alleging that Harding was "beholden" to a bank "that allowed it to dump unwanted holdings into their deals."

There were other published reports that should have put a sophisticated financial investor like Aozora on notice of a possible fraud. In March 2009, *Time* magazine published an article about Jupiter V entitled "One Bad Bond," reporting that 59% of its investments were worthless. The article described Jupiter V as a "toxic asset" and "one of those financial [instruments] at the root of the economic meltdown." In 2010, Michael Lewis's best-selling book The Big Short: Inside the Doomsday Machine was published. That book contained allegations presenting a negative portrayal of Harding in its management of CDOs.

Viewed in its totality, the above publicly-available information put Aozora on inquiry notice more than two years before this action was commenced. Aozora failed to satisfy its burden to show that if it had exercised reasonable diligence, it could not have discovered the basis for its claims. "Because

[Aozora] possessed information suggesting the probability that it had been defrauded, and failed to conduct an inquiry at that time, knowledge of the fraud is imputed" (*CIFG Assur.*, 128 AD3d at 608). Although Aozora ultimately conducted an investigation in 2013 into Harding's alleged misconduct, it offers no explanation why it could not have performed that investigation earlier (*see Aozora Bank*, 137 AD3d at 690).

The motion court properly found that the breach of the implied covenant of good faith and fair dealing claims are barred by the six-year statute of limitations. On appeal, Aozora contends that Harding's failure to manage Jupiter V's portfolio on an ongoing basis constitutes a breach of a recurring obligation. However, the complaint does not allege any continuing or recurring breaches. Rather, it alleges that Harding breached the covenant when it ceded control of Jupiter

V's portfolio selection to Credit Suisse and then concealed this fact. Because these alleged acts took place more than six years before this action was filed, the claim is time-barred.[1]

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

ENTERED: NOVEMBER 3, 2016

CLERK

[1] Aozora's appellate briefs make no argument that this cause of action survives with respect to Credit Suisse. In any event, the claim as against Credit Suisse is similarly time-barred.

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1974 Aozora Bank, Ltd., Index 652159/13
Plaintiff-Appellant,

-against-

J.P. Morgan Securities LLC, et al.,
Defendants-Respondents.

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Kirby McInerney LLP, New York (Andrew M. McNeela of counsel), for appellant.

Dontzin Nagy & Fleissig LLP, New York (Tibor L. Nagy Jr. of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 23, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiff's claims of fraud and breach of the implied covenant of good faith and fair dealing, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiff adequately stated a claim for fraud. Defendants failed to show that plaintiff's reliance on statements that the collateral manager would select collateral independently was unreasonable as a matter of law (*see generally ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015]). The complaint alleges that plaintiff, while aware or on notice of the concentration of Bear Stearns underwritten assets in the

collateralized debt obligation (CDO) at issue, was unaware of how this compared to other CDOs generally or those managed by the same collateral manager. On this motion, defendants have not shown that the disclaimers in the offering documents put plaintiff on notice that defendants had already colluded with the collateral manager to accept into the CDO toxic assets from Bear Stearns's own balance sheet (*see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 139 [1st Dept 2014]). The complaint, while in part pleaded on information and belief, had sufficient facts to support the reasonable inference of fraud and scienter (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). Given defendants' alleged knowledge of the toxicity of the assets going into the CDO, the fact that the assets technically met the criteria for eligibility in the offering materials did not, as a matter of law, make the representation of the assets as "high grade" true (*see NRAM PLC v Societe Generale Corp.*, 2014 NY Slip Op 32155[U], *9-10, *15-16 [Sup Ct, NY County 2014]).

Plaintiff adequately stated a claim for breach of the duty of good faith and fair dealing, given the allegation that defendants subverted the collateral manager to favor the interest of Bear Stearns, and given that many of the CDO's assets were

purchased after plaintiff's investment (*see Aozora Bank, Ltd. v Credit Agricole Corporate & Inv. Bank*, 2015 NY Slip Op 31426[U], *17 [Sup Ct, NY County 2015]).

We note that the court did not reach any statute of limitations arguments.

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2125 The People of the State of New York, Ind. 4391/10
Respondent,

-against-

Tyler Tyson,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Eduardo Padró, J.), rendered March 8, 2013, as amended April 17, 2013, convicting defendant, upon her plea of guilty, of assault in the first degree, and sentencing her, as a juvenile offender, to a term of 2½ to 7½ years, unanimously affirmed.

The court properly exercised its discretion in denying youthful offender treatment (*see generally People v Drayton*, 39 NY2d 580 [1976]), given the heinousness of the crime, defendant's

failure to comply with the conditions of her plea, and her involvement in additional violent crimes for which a Bronx indictment was pending at the time of sentencing on this case.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2126 Yolanda Acosta, Index 306803/12
Plaintiff-Appellant,

-against-

Hector A. Ramos, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

The Law Offices of Christopher P. DiGiulio, P.C., New York (William Thymius of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about September 28, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the claim of serious injury to the right shoulder within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendants met their burden of showing that plaintiff did not sustain a serious injury to her right shoulder as a result of the accident by submitting the affirmed report of a radiologist who opined that the MRI of the 22-year-old plaintiff's right shoulder showed a labrum tear, which is a chronic degenerative condition, and no evidence of a traumatic supraspinatus tear (*see*

Rosa v Mejia, 95 AD3d 402 [1st Dept 2012]). In addition, after reviewing plaintiff's postaccident medical records, defendants' expert neurologist noted that plaintiff made no contemporaneous complaints of shoulder pain and that the first record of such complaints was four months later.

In opposition, plaintiff submitted medical records showing that she complained of shoulder pain to a medical provider six days after the accident, that she continued to complain of shoulder pain while receiving therapy, and that she sought further treatment for her shoulder about four months after the accident; she then underwent an MRI that revealed supraspinatus and labral tears for which she eventually underwent arthroscopic surgery. These medical records provide sufficient evidence of contemporaneous treatment to permit a finding that plaintiff's shoulder injuries were a result of the accident (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Salman v Rosario*, 87 AD3d 482, 483-484 [1st Dept 2011]). Further, plaintiff's orthopedic surgeon disputed defendants' experts' findings of a degenerative condition and opined, based on his examination of plaintiff, his observations during surgery, his review of the MRI, and plaintiff's lack of history of previous shoulder injuries, that the shoulder tears were causally related to the accident (*see*

Steele v Santana, 125 AD3d 523 [1st Dept 2015]). The surgeon also made findings of limitations in range of motion, and attributed these limitations, as well as the objective findings of ligament tears, to plaintiff's accident.

Defendants argue that plaintiff's prolonged delay in seeking further treatment for her shoulder after the surgeon diagnosed tears precludes a finding of serious injury. However, plaintiff's explanation for the gap in treatment, including her pregnancy and ensuing care of the baby without help, is sufficient to raise an issue of fact (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905 [2013]).

Defendants' other arguments concerning discrepancies in plaintiff's medical records raise issues of fact for a factfinder to resolve (*see Jean-Louis v Gueye*, 94 AD3d 504 [1st Dept 2012]; *Sung v Mihalios*, 44 AD3d 500 [1st Dept 2007]).

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2127 In re Gabriel N.,
Appellant.
- - - - -
Presentment Agency

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Patricia W. Jellen, Eastchester, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for presentment agency.

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Appeal from order of disposition, Family Court, New York County (Adetokunbo Fasanya, J.), entered on or about September 4, 2015, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of attempted robbery in the third degree, and placed him with the Office of Children and Family Services for a period up to 12 months in a limited secure facility, without credit for time served, unanimously dismissed as moot, without costs.

This appeal challenging the dispositional order, but not the juvenile delinquency adjudication, is moot because the placement

has expired (*see Matter of Omari W.*, 104 AD3d 460 [1st Dept 2013]), and has been superseded by an order extending the placement on consent (*see Matter of Fawaz A. [Franklyn B.C.]*, 112 AD3d 550 [1st Dept 2013]). In any event, the disposition was a proper exercise of discretion.

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2128 Bill Bace, Index 400803/08
Plaintiff-Appellant,

-against-

Tai May Realty, Inc.,
Defendant-Respondent.

_____

Bill Bace, appellant pro se.

Leslie Sultan, P.C., Brooklyn (Leslie Sultan of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about December 9, 2014, which denied plaintiff's motion to vacate a default judgment, unanimously affirmed, without costs.

Plaintiff failed to establish either a reasonable excuse or a meritorious claim to justify vacating the default judgment entered against him (*see generally Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). While plaintiff cited his personal and medical challenges extending over a number of years, he failed to establish that those challenges reasonably would have prevented him from appearing in court on the day in question. Furthermore, plaintiff's general references to his prior motions, and his assertion that the court previously found

his claims to be meritorious, do not establish a meritorious claim.

To the extent plaintiff argues that Supreme Court erred in its November 2013 order granting a default judgment to defendant, no appeal lies from a judgment entered on default (*see e.g. Lowenstein v Lowenstein*, 201 AD2d 286 [1st Dept 1994]). 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: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2129 In re Elizabeth Charles, Index 101212/14
Petitioner,

-against-

New York City Department of Housing Preservation, et al.,
Respondents.

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Law Offices of Andrew J. Spinnell, LLC, New York (Andrew J. Spinnell of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for New York City Department of Housing Preservation and Development, respondent.

Kagan Lubic Lepper Finkelstein & Gold, LLP, New York (Fran I. Lawless of counsel), for 158th Street & Riverside Drive Housing Co., Inc., respondent.

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Determination of respondent New York City Department of Housing Preservation and Development (HPD), dated June 26, 2014, issuing a certificate of eviction upon a finding that petitioner had violated HPD's rules and the occupancy agreement for the Mitchell-Lama apartment at issue, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Paul Wooten, J.], entered May 11, 2015), dismissed, without costs.

Substantial evidence supports HPD's determination that the

apartment was not petitioner's primary residence and had been sublet to third parties without authorization in violation of HPD's rules (*see* 28 RCNY 3-02[n][4]; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]). Petitioner failed to submit sufficient and reliable evidence to rebut the testimony demonstrating that she had violated the rules (*see Matter of O'Quinn v New York City Dept. of Hous. Preserv. & Dev.*, 284 AD2d 211 [1st Dept 2001]). There is no basis to disturb the Hearing Officer's credibility determinations (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]).

Under the circumstances, the issuance of a certificate of eviction does not shock the conscience (*see e.g. Matter of Alarape v New York City Dept. of Hous. Preserv. & Dev.*, 55 AD3d 316 [1st Dept 2008], *lv denied* 12 NY3d 801 [2009]; *Matter of Graceffo v City of New York*, 71 AD3d 603 [1st Dept 2010]; *see*

generally Matter of Scott v Peekskill Hous. Auth., 28 NY2d 610 [1971]).

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: NOVEMBER 3, 2016

CLERK

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

2130 Simon Barchi, Index 154886/13
Plaintiff-Appellant,

-against-

Rudin East 55th Street LLC, et al.,
Defendants-Respondents.

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Robert Giusti, Esq. & Associates, PLLC, Bayside (Robert Giusti of counsel), for appellant.

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about January 21, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants satisfied their prima facie burden by submitting evidence, including plaintiff's own testimony, demonstrating that the pile of Christmas trees over which plaintiff tripped was an open, obvious, and not inherently dangerous condition (*see Lazar v Burger Heaven*, 88 AD3d 591 [1st Dept 2011]; *Baynes v City of New York*, 81 AD3d 423 [1st Dept 2011]).

In opposition, plaintiff failed to raise a triable issue of fact. He admitted observing the trees before the accident, and while he claims not to have seen the specific tree trunk over

which he tripped, through the reasonable use of his senses, he should have realized that the pile of trees he observed would include tree trunks (*see Pinero v Rite Aid of N.Y.*, 294 AD2d 251 [1st Dept 2002], *affd* 99 NY2d 541 [2002]). Plaintiff also failed to dispute defendants' evidence showing that the pile of trees did not dangerously obstruct the sidewalk so as to impede the flow of pedestrian traffic.

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2131-
2131A Second Source Funding, LLC,
Plaintiff-Appellant,

-against-

Yellowstone Capital, LLC, et al.,
Defendants-Respondents,

The Mega Fund Direct, LLC, et al.,
Defendants.

Index 652675/14

Carter Ledyard & Milburn LLP, New York (Jacob H. Nemon of counsel), for appellant.

Herrick, Feinstein LLP, New York (Christopher J. Sullivan of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered February 16, 2016, which granted defendant Yellowstone Capital, LLC, David Glass, Isaac D. Stern, and Isaac D. Stern Consulting, LLC's (Yellowstone defendants) motion to dismiss the amended complaint in its entirety, with prejudice, unanimously modified, on the law, to reinstate plaintiff's breach of contract claims, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered August 6, 2015, which, to the extent appealed from as limited by the briefs, granted the Yellowstone defendants' cross motion to dismiss the original complaint, to the extent of dismissing plaintiff's claim for

misappropriation of trade secrets, with prejudice, unanimously dismissed, without costs, as academic.

Plaintiff's pleading sufficiently alleges breach of contract as against David Glass, Isaac Stern, and the John Doe defendants. To plead breach of contract, the proponent must allege the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages (*Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., Inc.*, 139 AD3d 515 [1st Dept 2016]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, the amended complaint stated that Glass, Stern and the John Doe defendants executed confidentiality agreements that contained provisions regarding proprietary information (including client lists and client information) and their obligation to keep such information confidential and use it only for plaintiff's purposes. Plaintiff alleges that it fulfilled its obligations under the agreements, and that it procured, developed, and took great lengths to protect its proprietary information. While working for plaintiff, Stern, Glass, and the John Doe defendants allegedly breached the confidentiality agreements by funding cash advance deals with plaintiff's competitors, soliciting plaintiff's agents and customers, misappropriating plaintiff's proprietary

information to create Yellowstone Capital, LLC to compete directly with plaintiff, and conspiring to direct business away from plaintiff.

Plaintiff adequately alleges that it has been damaged by Glass and Stern's breaches (*Fielding v Kupferman*, 65 AD3d 437, 442 [1st Dept 2009]). These allegations gave the Yellowstone defendants sufficient notice of the transactions intended to be proven at trial and the claims asserted (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802 [2d Dept 2010]).

The court properly dismissed the unfair competition claim as the court had previously exercised its discretion and only granted plaintiff leave to amend the complaint to replead the breach of contract claims (*see* CPLR 3025[b]; *BGC Partners, Inc. v Refco Sec., LLC*, 96 AD3d 601, 602-603 [1st Dept 2012]).

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

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2132-
2132A The People of the State of New York,
Respondent,

Ind. 3770/13
3858/14

-against-

George V. Citronnelle,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

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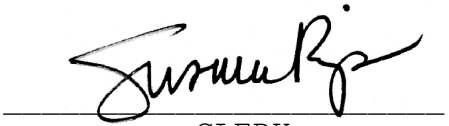
An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Michael J. Obus, J.), rendered October 15, 2014, and September 23, 2014,

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 is hereby affirmed.

ENTERED: NOVEMBER 3, 2016



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

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2133 In re Majid Zarinfar, Index 116457/10
Petitioner-Appellant,

-against-

Board of Education of the City School District of the City of New York, et al.,
Respondents-Respondents.

_____

Office of Richard E. Casagrande, New York (Lori M. Smith of counsel), for appellant.

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

_____

Judgment (denominated an order), Supreme Court, New York County (Lucy Billings, J.), entered July 20, 2015, which, to the extent appealed from, denied the petition and dismissed the proceeding brought pursuant to CPLR article 78, seeking to annul respondents' termination of petitioner's probationary employment, effective August 30, 2010, and seeking a declaration that petitioner obtained a tenured teaching position in the Department of Education by estoppel, unanimously modified, on the law, solely to declare that petitioner did not obtain tenure by estoppel, and as so modified, affirmed, without costs.

Petitioner seeks credit against the three-year probationary service requirement and tenure by estoppel based on his service

in the same subject area at a different school under a different license (Education Law § 2573[1][a]). However, the court correctly found that such credit was not available to him because his initial probationary service was not found "satisfactory," and his employment under that license was terminated (*see Matter of Triana v Board of Educ. of City School Dist. of City of N.Y.*, 47 AD3d 554, 558 [1st Dept 2008]). Moreover, as the court found, a new probationary period commenced under petitioner's mathematics license after his service was terminated under his technology license.

Hence, because petitioner never received tenure, he was subject to termination at any time for any reason without a hearing (*see Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 451 [1993]).

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

ENTERED: NOVEMBER 3, 2016

CLERK

Renwick, J.P., Feinman, Gische, Kapnick, JJ.

2134 Dianna Morton, Index 6522111/14
Plaintiff,

Grant Tedaldi, et al.,
Plaintiffs-Appellants,

-against-

Michael Mulgrew, etc.,
Defendant-Respondent.

_____

Salem & Shimko, Brooklyn (Daniel Shimko of counsel), for appellants.

Stroock & Stroock & Lavan LLP, New York (Dina Kolker of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered July 23, 2015, which, to the extent appealed from, granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

The complaint alleges that New York United Federation of Teachers, Local 2, AFT, AFL-CIO, breached the duty of fair representation to plaintiffs by ratifying, on June 3, 2014, a collective bargaining agreement that provided for wage increases retroactive to the October 31, 2009 expiration of the preceding agreement both for members employed on June 3, 2014 and for members who had retired after October 31, 2009, but not for

former members, such as plaintiffs, who had resigned from their employment between those two dates.

Cognizant of the obstacle to this suit presented by the *Martin* rule, which "limit[s] such suits . . . to cases where the individual liability of every single member can be alleged and proven" (*Martin v Curran*, 303 NY 276, 282 [1951]; General Associations Law § 13), plaintiffs argue that the rule was abrogated by the enactment of the Taylor Law in 1967 (Civil Service Law § 200 *et seq.*), or by its 1990 amendment. This argument is unavailing in light of the recent decision of the Court of Appeals upholding the *Martin* rule (even as it questioned the rule's "continued utility or wisdom") (*Palladino v CNY Centro, Inc.*, 23 NY3d 140, 150 [2014]).

Given the foregoing, we need not reach plaintiffs' remaining contentions.

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2135 The People of the State of New York, Ind. 5453/12
Respondent,

-against-

Jelani Barro,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alejandro B. Fernandez of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered January 17, 2014, convicting defendant, upon his plea of guilty, of operating a motor vehicle while under the influence of alcohol or drugs, and sentencing him to a conditional discharge for a period of 3 years and a $1,000 fine, unanimously affirmed.

Defendant's ineffective assistance of counsel claim based on his counsel's failure to challenge the use of an out-of-state conviction to elevate a misdemeanor to a felony charge is unreviewable on direct appeal, because the record does not explain counsel's reasons for declining to raise such a challenge (*see People v Diaz*, 115 AD3d 483, 484 [1st Dept 2014], *lv denied* 23 NY3d 1036 [2014]; *People v Rincon*, 62 AD3d 574, 575 [1st Dept

2009], *lv denied* 13 NY3d 748 [2009]). Thus, since defendant has not filed a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. Alternatively, to the extent the record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2136 Milton Brown, Index 306277/12
Plaintiff-Appellant,

-against-

Fuseomo Mohammed Bawa, et al.,
Defendants-Respondents.

Mitchell Dranow, Sea Cliff, for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about July 28, 2015, which, to the extent appealed from as limited from the briefs, granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish that he suffered a serious injury to his left shoulder within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law by showing that plaintiff did not suffer a serious injury to his left shoulder. Defendants submitted the affirmed reports of a radiologist and an orthopedist who opined that the MRI of plaintiff's left shoulder revealed a preexisting congenital condition (os acromiale), which predisposed the shoulder joint to degenerative changes, which were also depicted in the MRI (*see*

e.g. Green v Jones, 133 AD3d 472 [1st Dept 2015]; *Kang v Almanzar*, 116 AD3d 540 [1st Dept 2014]).

In opposition, plaintiff failed to raise a triable issue of fact. As plaintiff's MRI report showed an "[u]nfused distal acromial epiphysis consistent with os acromial [sic] with rotator cuff impingement," he was required to address that condition and explain why it was not the cause of his claimed injuries (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Plaintiff's orthopedic surgeon opined, based on his observations and review of medical records, that the injuries were caused by the accident, but he did not rebut the opinions of defendants' experts that plaintiff's shoulder condition was related to a

preexisting congenital condition (*see Lee v Lippman*, 136 AD3d 411 [1st Dept 2016]).

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2139 Fred Salerno, Index 157866/14
Plaintiff-Appellant,

-against-

Coach, Inc.,
Defendant-Respondent.

_____

JSL Law Offices, P.C., Flushing (Jae S. Lee of counsel), for appellant.

DLA Piper LLP (US), New York (Joseph A. Piesco of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about April 10, 2015, which, inter alia, granted defendant employer's motion to dismiss the action brought by its former employee, on the ground it was barred by a general release executed by the parties on or about September 11, 2013, unanimously modified, on the law, to deny the motion as to the housing allowance claim, and otherwise affirmed, without costs.

Contrary to plaintiff's argument, the disputed language of the parties' posttermination separation agreement provided in plain and unambiguous terms that any form of compensation previously paid to plaintiff, even if accrued and unpaid at the time of plaintiff's termination, would be deemed waived and discharged if not specifically mentioned within the agreement as

a continuing obligation for the employer to satisfy, and was properly enforced, in accordance with its terms, by the motion court. The agreement had provided for plaintiff to receive 26 weeks of severance payments evidently in lieu of certain forgone accrued compensation benefits. Plaintiff's interpretation of a disputed phrase within a provision of the agreement was distorted and out of context with the language in that provision (*see Bank of N.Y. Mellon v WMC Mtge., LLC*, 136 AD3d 1, 6-7 [1st Dept 2015]), and as such, it was appropriately rejected, particularly as it would have rendered certain critical provisions within the agreement meaningless (*see generally Ferrari v Iona Coll.*, 95 AD3d 576 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). To the extent the agreement expressly provided that certain specified compensation that had accrued was to be paid by the employer, to the exclusion of other compensation obligations alleged to be owing, the doctrine of expressio unius est exclusio alterius appropriately applies as a tool of contract construction (*see UMG Recs., Inc. v Escape Media Group, Inc.*, 107 AD3d 51, 58-59 [1st Dept 2013]).

Insofar as the agreement expressly provided for a housing allowance, and plaintiff avers he was not fully paid such benefit, such claim survives this CPLR 3211 motion to dismiss.

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2140 The People of the State of New York, Ind. 2290/11
Respondent,

-against-

Arthur Murillo,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered March 12, 2013, convicting defendant, upon his plea of guilty, of manslaughter in the first degree and criminal possession of a weapon in the second degree, and sentencing him to consecutive terms of 25 years and 5 years, respectively, unanimously modified, on the law, to the extent of directing that the sentences run concurrently, and otherwise affirmed.

The consecutive sentences violated Penal Law § 70.25(2), which, as pertinent here, requires concurrent sentences "for two or more offenses committed through a single act or omission." The People bear the burden of demonstrating that a defendant is not entitled to concurrent sentencing under that section (*People*

v Wright, 19 NY3d 359, 363 [2012]). That burden was not met here because the plea allocution, on which the People rely, fails to demonstrate that defendant had an intent to use the weapon unlawfully that was separate and distinct from his intent to shoot the victim (*see id.* at 367). Contrary to the People's argument, the allocution does not establish an intent to use the weapon in the commission of a burglary.

Unlike defendant's challenge to the legality of his sentence, his excessive sentence claim is foreclosed by his valid waiver of the right to appeal. Regardless of whether defendant made a valid waiver of his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2141 In re Betty Chang, Index 100777/14
Petitioner-Appellant,

-against-

Division of Housing and
Community Renewal, et al.,
Respondents-Respondents.

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

Eric T. Schneiderman, Attorney General, New York (Bethany A. Davis Noll of counsel), for respondents.

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered March 25, 2015, denying the petition to annul a determination of respondent agency, dated March 27, 2014, which denied petitioner's appeal from a housing company's rejection of her application for succession rights to the apartment formerly rented by her mother, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that the apartment was not petitioner's primary residence for at least two years prior to the death of her mother, the tenant of record, in September 2012, has a rational basis. Petitioner was not named on the income affidavit for 2010, provided inconsistent statements about her residency

during the relevant period, and failed to adequately explain a Queens address, which belonged to her husband and which she listed as her address on her father's death certificate in 2006, and was associated with her name on Internet searches. Furthermore, her residency was not otherwise established via documentary proof such as certified tax returns (*see Belok v New York City Dept. of Hous. Preserv. & Dev.*, 89 AD3d 579, 580 [1st Dept 2011]; *Matter of Cognata v New York State Div. of Hous. & Community Renewal*, 82 AD3d 482 [1st Dept 2011]).

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Feinman, Gische, Kapnick, JJ.

2143 The People of the State of New York, Ind. 1519/10
Respondent,

-against-

Luis Rivera,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered June 28, 2013, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2144 WM Specialty Mortgage LLC, Index 381160/07
Plaintiff-Respondent,

-against-

Abul K. Azad,
Defendant-Appellant,

The City of New York Environment
Control Board, et al.,
Defendants.

_____

Kenneth R. Berman, Forest Hills, for appellant.

Bonchonsky & Zaino, LLP, Garden City (Kevin M. Butler of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 28, 2014, which denied defendant Azad's motion to vacate a judgment of foreclosure and allow discovery, unanimously affirmed, without costs.

The 2010 and 2011 administrative orders on which defendant relies pertain only to foreclosure proceedings that were pending at the time of issuance and are therefore inapplicable to the subject judgment of foreclosure and sale, which was entered on or about January 13, 2009.

Defendant failed to set forth particular facts establishing the "fraud, collusion, mistake or accident" on which he bases his

motion to vacate the judgment (*see Matter of Callwood v Cabrera*, 49 AD3d 394 [1st Dept 2008]).

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: NOVEMBER 3, 2016

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2145N 17 East 96th Street Owners Corp., Index 108695/04
Plaintiff-Appellant,

-against-

Madison 96th Street Associates, LLC,
Defendant-Respondent,

21 East 96th Street Condominium,
Defendant.

- - - - -

[And a Third Party Action]

_____

Charles E. Boulbol, P.C., New York (Charles E. Boulbol of counsel), for appellant.

Schoeman, Updike & Kaufman LLP, New York (Charles B. Updike of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 8, 2015, which denied plaintiff's motion for leave to serve and file a third amended complaint, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion by denying plaintiff leave to amend its complaint on the eve of trial (*see Reuling v Consolidated Edison Co. of N.Y., Inc.*, 138 AD3d 439 [1st Dept 2016]). There is no evidence in the record to suggest that defendant's conduct rose to the level of warranting the imposition of punitive damages (*see Walker v Sheldon*, 10 NY2d

401, 405 [1961]). Furthermore, insofar as plaintiff seeks to add a claim for disgorgement of profits, the court correctly determined that profits realized by defendant are not the proper gauge of damages in a trespass action, and that the proper measure is the lesser of the decline in market value and the cost of restoration (*see Jenkins v Etlinger*, 55 NY2d 35, 39 [1982]).

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

ENTERED: NOVEMBER 3, 2016

CLERK

Renwick, J.P., Feinman, Gische, Kapnick, JJ.

2146N Cell Tower Lease Acquisition, LLC, Index 158323/13
Plaintiff-Respondent,

-against-

Rego Park N.H. Ltd., also known as
Rego Park Nursing Home, Ltd., et al.,
Defendants-Appellants.

_____

Law Offices of Morris Tuchman, New York (Morris Tuchman of counsel), for appellants.

Tarter Krinsky & Drogin LLP, New York (Debra Bodian Bernstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 20, 2015, which, insofar as appealed from, denied so much of defendants' motion to compel arbitration as sought dismissal of the action and an award of attorneys' fees, and stayed the matter pending arbitration, unanimously modified, on the facts and in the exercise of discretion on consent of the parties, to dismiss the action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Defendants failed to establish their entitlement to attorneys' fees on the ground that plaintiff acted without justification in resisting arbitration and seeking injunctive

relief pending arbitration (*see Amaprop Ltd. v Indiabulls Fin. Servs. Ltd.*, 2011 WL 1002439, *3, 2011 US Dist LEXIS 27035, *8-9 [SD NY, March 16, 2011, No. 10-Civ-1853 (PGG)], *affd* 483 Fed Appx 634 [2d Cir 2012]; *Sands Bros. & Co., Ltd. v Nasser*, 2004 WL 26550, *3, 2003 US Dist LEXIS 23406, *8 [SD NY, Jan. 5, 2004, No. 03-Civ-8128 (BSJ)]. Plaintiff correctly construed the arbitration agreement as providing for judicial injunctions in aid of arbitration, in keeping with the Federal Arbitration Act (*see Nicosia v Amazon.com, Inc.*, 834 F3d 220, 238 [2d Cir 2016]) and CPLR article 75 (*see* CPLR 7502[c]). Given the parties' long-running dispute over access to the roof of the building, which defendants own and in which plaintiff has an easement for access to cellular network equipment placed by its customers, plaintiff's application for injunctive relief to guarantee access pending arbitration was justifiable.

Since on appeal plaintiff does not object to dismissal of the action, rather than a stay pending arbitration, we modify the order solely to dismiss the action.

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

ENTERED: NOVEMBER 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Gische, Webber, JJ.

1214 CMSG Restaurant Group, LLC, doing business as Larry Flynt's Hustler Club, et al., Plaintiffs-Appellants, Index 153539/14

-against-

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

_____

Shafer & Associates, P.C., Lansing, MI (Bradley Jay Shafer of the Michigan bar, admitted pro hac vice, of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered January 30, 2015, modified, on the law, to declare Tax Law § 1105(f)(1) and (3) constitutional, and otherwise affirmed, without costs.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Rosalyn H. Richter
Judith J. Gische
Troy K. Webber, JJ.

1214
Index 153539/14

_____x

CMSG Restaurant Group, LLC, doing business as Larry Flynt's Hustler Club, et al.,
Plaintiffs-Appellants,

-against-

The State of New York, et al.,
Defendants-Respondents.
_____x

Plaintiffs appeals from the order of the Supreme Court, New York County (Anil C. Singh, J.), entered January 30, 2015, which granted defendants' motion to dismiss the complaint, and denied plaintiffs' motion for preliminary and permanent injunctions.

Shafer & Associates, P.C., Lansing, MI (Bradley Jay Shafer of the Michigan bar, admitted pro hac vice, of counsel), and, Kaiser Sauborn & Mair, P.C., New York (Henry L. Sauborn, Jr. of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco and Andrew D. Bing of counsel), for respondents.

TOM, J.P.

In this appeal, plaintiffs, which operate a men's entertainment club located on the Upper West Side of Manhattan, challenge the "Amusement Tax" (Tax Law § 1105[f][1]) and the "Cabaret Tax" (Tax Law § 1105[f][3]) (together, the Tax Laws) as unconstitutional on their face and as applied to them. Specifically, they challenge the sales taxes imposed by defendants on plaintiffs' "Beaver Bucks" or "scrips" - plaintiffs' in-house currency used by patrons at plaintiffs' club to tip topless dancers, floor hosts and bartenders, and to gain admission to private rooms to view entertainers and for lap dances.

Plaintiffs assert that the Tax Laws infringe on their right to free speech under the United States and New York Constitutions, by imposing a differential tax on protected expression based on content, thereby penalizing disfavored expression without furthering any important governmental interest. Plaintiffs also claim that the Tax Laws violate the Equal Protection Clauses of the United States and New York Constitutions by discriminating against protected expression based on its content, and allowing for different treatment of New York businesses engaging in constitutionally protected activities. Moreover, plaintiffs contend that the exemptions to

the Tax Laws are unconstitutionally vague in giving unbridled discretion to defendants in determining who should and should not pay the taxes. In addition, plaintiffs claim that the Tax Laws deprived them of their right to procedural due process. Finally, plaintiffs contend that the performances at the club fall under the exemptions to the Tax Laws.

Plaintiff CMSG Restaurant Group, LLC (CMSG) is a Nevada limited liability company which does business in New York. The other four plaintiffs are individual members of CMSG. CMSG does business as Larry Flynt's Hustler Club in a building located at 641 West 51st Street, in Manhattan. The club "regularly presents . . . dance entertainment," "some of which involves clothed entertainers and some of which involves entertainers performing while 'topless.'"

Customers pay a cover charge to enter the club and, once inside, buy "Beaver Bucks" or "scrips" which bear the following statement: "Good for entertainers and tips only." Accordingly, the scrips cannot be redeemed for beverages, merchandise, or the cover charge required to enter the club.

On or about August 10, 2009, following an audit of the club covering the period June 1, 2006 to November 30, 2008, defendant New York State Department of Taxation and Finance (DTF) issued a notice of determination, finding that the club owed over $4.8

million, plus interest and penalties, in sales tax. After a conference with plaintiffs pursuant to Tax Law § 170(3-a), DTF reassessed the club's outstanding taxes at $2,113,204.38, plus interest, with no penalty. This tax liability is based in part on the sale of scrips.

Plaintiffs filed a petition with the New York State Division of Tax Appeals (DTA) challenging the determination, and a hearing was held before an administrative law judge (ALJ). The ALJ found that receipts from scrip sales during the period at issue totaled $23,816,540 and upheld DTF's assessment. Specifically, she concluded that the club was subject to the Amusement Tax and did not qualify for an exemption, explaining:

> "This case involves charges for admission into a place of amusement, plain and simple. This adult entertainment establishment provides a service to its patrons that essentially boils down to performers who remove their clothing and create an aura of sexual fantasy. I find that this service is delivered by means of a striptease act that incorporates some elements of dance. . . . The plain facts of this case have been obfuscated in an attempt to characterize these performances in such a way as to take advantage of an exemption available to live dramatic, choreographic performances. However, the service provided by the entertainers at the Hustler Club is sexual fantasy, not dance."

The ALJ added that any "movements, whether dance moves or other choreography, that comprise an entertainer's routine and that appeal to the patron, are ancillary to the ultimate service sold, which is sexual fantasy."

In the alternative, the ALJ found that even if plaintiffs had otherwise demonstrated that the scrip charges were exempt, plaintiffs' record-keeping practices would have precluded the ALJ from granting an exemption. The ALJ explained that plaintiffs' records lumped together all of the scrip sales, failing to reflect that entertainers redeemed the scrips at a different rate from non-entertainer employees, such as bartenders.

Plaintiffs filed an administrative appeal of the ALJ's decision with the Tax Appeals Tribunal. However, not long after, they commenced this action in Supreme Court; the administrative appeal was held in abeyance by the Tribunal pending the disposition of this action.

In this action, plaintiffs seek a declaration that the Tax Laws, including their exemptions, are unconstitutional, both on their face and as applied to plaintiffs. The complaint also seeks preliminary and permanent injunctions enjoining DTF from enforcing the Tax Laws against plaintiffs, and ordering DTF to refund all tax payments made by plaintiffs under the Tax Laws. In support of their requests for injunctive relief, plaintiffs argued that the "loss of First Amendment freedoms" would constitute irreparable injury.

Defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(2) and (7). Supreme Court granted defendants' motion to

dismiss the complaint, and denied plaintiffs' motion for injunctive relief. Initially, the court stated, in general, that "the exhaustion of administrative remedies doctrine requires that plaintiffs await the decision of the Tribunal and, if the decision is not satisfactory, file an Article 78 petition." While the court recognized certain exceptions to the requirement of exhaustion of administrative remedies, the court found that "plaintiffs fail to show that the [Tax Laws are] wholly inapplicable to the Club or that waiting for the Tribunal's decision would be futile or that it would cause irreparable injury." Accordingly, the court found that plaintiffs' "'as-applied' constitutional challenge" was barred. The court also rejected plaintiffs' facial constitutional challenges to the Tax Laws on the merits.

For the reasons set forth below, we conclude that Tax Law § 1105(f)(1) and (3) are constitutional, and do not violate plaintiffs' right to free speech or their right to equal protection of the laws (*see Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.*, 85 AD3d 1341, 1346-1347 [3d Dept 2011], *affd* 19 NY3d 1058 [2012], *cert denied* ___ US ___, 134 S Ct 422 [2013]; *see also Stahlbrodt v Commissioner of Taxation & Fin. of State of N.Y.*, 92 NY2d 646, 649-651 [1998]). We reject plaintiffs' contentions that the laws are unconstitutionally

vague or deny them procedural due process. We also find that plaintiffs' argument that the performances presented at the club were exempt from the sales taxes at issue is not properly raised in this action, due to the statute's exclusive remedy provision (Tax Law § 1140). We modify solely to declare Tax Law § 1105(f)(1) and (3) constitutional (*see Stahlbrodt*, 92 NY2d at 652 ["the proper disposition of this declaratory action is an adverse declaration to the plaintiffs, rather than a dismissal of the complaint"]), and otherwise affirm.

Initially, because plaintiffs challenge the Tax Laws as unconstitutional and as wholly inapplicable to them, these claims are not limited by an exclusive administrative remedy (*see Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315, 321 [2003]; *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]), and may be considered on the merits.

"New York State collects taxes from a wide variety of entertainment and amusement venues" (*New Loudon*, 19 NY3d at 1059). Under the Amusement Tax, a sales tax of 4% is imposed on "[a]ny admission charge . . . in excess of ten cents to or for the use of any place of amusement in the state," with inapplicable exceptions (Tax Law § 1105[f][1]). A "[p]lace of amusement" is defined as "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law §

1101[d][10]). DTF has interpreted that definition to include "sporting events, . . . stock car races, carnivals and fairs, amusement parks, rodeos, zoos, horse shows, arcades, variety shows, magic performances, ice shows, aquatic events, and animal acts" (*New Loudon*, 19 NY3d at 1059, citing 20 NYCRR 527.10).

The statute provides an exemption to the Amusement Tax. "[W]ith the evident purpose of promoting cultural and artistic performances in local communities, the legislature created an exemption that excluded from taxation admission charges for a discrete form of entertainment -- 'dramatic or musical arts performances'" (*New Loudon*, 19 NY3d at 1060, quoting Tax Law § 1105[f][1]). A "[d]ramatic or musical arts admission charge" is "[a]ny admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance" (Tax Law § 1101[d][5]).

According to guidelines published by DTF, if "[a] theatre in the round has a show which consists exclusively of dance routines[,] [t]he admission is exempt [from the Amusement Tax] since choreography is included within the term musical arts" (20 NYCRR 527.10[d] [Example 4]). In contrast, if a "show" is "composed of several acts in which performers dressed as story-book characters, appearing with musical accompaniment, portray

scenes from books, and invite audience participation," that show is not exempt from the Amusement Tax (*id.* [Example 5]).

The State also imposes a Cabaret Tax, which levies a 4% sales tax on "[t]he amount paid as charges of a roof garden, cabaret or other similar place in the state" (Tax Law § 1105[f][3]). Notably, only a single 4% sales tax is imposed on a given charge to which the Cabaret Tax, the Amusement Tax, or both are applicable. The Cabaret Tax generally applies to "[a]ny roof garden, cabaret or other similar place which furnishes a public performance for profit" (Tax Law § 1101[d][12]). The Cabaret Tax does not apply to "a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise," where "such serving or selling of food, refreshment or merchandise is merely incidental to such performances" (*id.*). However, "[t]he portion of the amount paid as the charge of a roof garden, cabaret or other similar place in the state for admission to attend a dramatic or musical arts performance at the place shall be exempt from" the Cabaret Tax, only if certain requirements are met (Tax Law § 1123), such as charging separately for admission (Tax Law § 1123[a]) and keeping records of all "charges for food, drink, service, merchandise and admission" (Tax Law § 1123[c]).

For example, according to guidelines published by DTF, if a

"hotel provides an orchestra and dance floor surrounded by tables, and serves refreshments to its patrons during the dancing hours [and] [n]o separate charge is made for dancing . . . [t]his is a public performance where all charges for refreshments are taxable" under the Cabaret Tax (20 NYCRR 527.12[a] [Example 2]).

Our holding in this matter is prescribed by the Court of Appeals' decision in *New Loudon*. That case similarly involved a challenge to the Tax Laws. Specifically, the petitioner in *New Loudon* operated an adult juice bar located in the Town of Colonie, Albany County, where patrons could view exotic dances performed by women in various stages of undress. In a CPLR article 78 proceeding, the petitioner challenged a tax assessment made by the Tax Appeals Tribunal, arguing that the taxes infringed on its First Amendment right to free speech and expression, and violated its right to equal protection.

The Third Department rejected the petitioner's "various constitutional claims," reasoning that "each of the [Tax Laws] is facially neutral and in no way seeks to levy a tax upon exotic dance as a form of expression" (85 AD3d 1341, 1346-1347). The Third Department also found that the Tax Laws were not "being applied in a discriminatory manner" (*id.* at 1347).

In affirming that decision, the Court of Appeals did not set forth its own constitutional analysis, but simply stated that the

petitioner's "constitutional argument is unavailing" (19 NY3d at 1061). Significantly, however, the Court of Appeals, upon reviewing the Tax Laws, found that "no specific type of recreation is singled out for taxation" and also that the legislature "with the evident purpose of promoting cultural and artistic performances in local communities . . . created an exemption that excluded from taxation admission charges for a discrete form of entertainment — "dramatic or musical arts performances" (19 NY3d at 1059-1060). Accordingly, the Court of Appeals' decision affirming the Third Department's rejection of the First Amendment and equal protection claims is binding on the issue of whether the Tax Laws violate the right to free speech and equal protection.

In any event, the Court of Appeals has made clear that the legislature may enact tax exemptions to subsidize certain forms of expression "to the advantage of some forms of expression or speakers, but not others" (*Stahlbrodt*, 92 NY2d at 649). In *Stahlbrodt*, the plaintiff was a publisher of "a weekly [pennysaver] advertising paper" called the "The Shopping Bag," which was distributed for free in Monroe County, New York (*id.* at 648). The plaintiff was assessed sales taxes, pursuant to Tax Law § 1105, on the printing services he had purchased in publishing the paper. The plaintiff claimed the paper qualified

for a tax exemption on purchases of printing services as a "shopping paper" under Tax Law § 1115 (*id.*). DTF disagreed, and on plaintiffs administrative challenge, the Tax Appeals Tribunal upheld the assessment, concluding that plaintiff failed to qualify for the exemption because The Shopping Bag did not meet the requirement of Tax Law § 1115(i)(C) that its advertising copy not exceed 90% of the printed area of "all issues as averaged on an annual basis" (Tax Law § 1115(i)(C); *see* 92 NY2d at 648).

The *Stahlbrodt* plaintiff argued that DTF's determination that it was not entitled to an exemption under Tax Law § 1115(i)(C), since more than 90% of its copy consisted of advertising, violated the First Amendment because "the 90% percentage sign rule constitutes content-based discrimination against certain forms of expression" and "singles out a small subset of newspapers for differential tax treatment" (92 NY2d at 648). The Court of Appeals rejected the claim, finding that there is a "crucial constitutional distinction . . . between direct, content-based discriminatory regulation or penalization of expression, on the one hand, and subsidization of some expressions to encourage activities deemed socially desirable while remaining neutral as to other expressions" (*id.* at 651). The Court of Appeals explained that the latter, but not the former, is "presumptively valid," and is "invalid only if

[the legislature] were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas" (*id.* at 650). Therefore, "a differential tax exemption scheme involving forms of expression . . . only becomes constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints" (*id.* [internal quotation marks omitted]). "The threat to particular ideas or viewpoints may be embodied in taxes singling out the press for a special burden, targeting a small group of speakers, or discriminating on the basis of the content of the ideas expressed by the taxpayer" (*id.*).

Further, the Court of Appeals stressed that the tax law at issue in *Stahlbrodt*, like the ones here, "is one of general application, levied against virtually all final sales of products and services" (*id.*). Accordingly, the Court concluded that no enterprise was singled out for special treatment. The Court of Appeals further reasoned that "the 90 percent rule does not enforce any differential treatment based on the content of ideas or viewpoints expressed in" the publication (*id.*). In that regard, the Court of Appeals emphasized that "absent invidious discrimination, the Legislature can pick and choose between the forms of expression it decides to subsidize through a tax exemption" (*id.*, citing *Regan v Taxation with Representation of*

Wash., 461 US 540 [1983] [holding that tax exemption for nonprofit civic welfare organizations did not violate First Amendment by excepting organizations engaged in lobbying for legislation]).

Here, the Tax Laws are laws "of general application" (92 NY2d at 650). The Amusement Tax applies to sales at "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law § 1101[d][10]), and the Cabaret Tax applies to sales at "[a]ny roof garden, cabaret or other similar place which furnishes a public performance for profit" (Tax Law § 1101[d][12]). The Tax Laws "ha[ve] not selected a narrow group to bear fully the burden of the tax" (*Leathers v Medlock*, 499 US 439, 448 [1991]), since the taxes imposed on plaintiffs are equally applicable to many other types of entertainment and recreational activities, including sporting events, car races, amusement parks, arcades, zoos, animal performances, and magic acts (*see New Loudon*, 19 NY3d at 1059, citing 20 NYCRR 527.10). Nor are the performances of the sort presented at the Hustler Club "singled out for special treatment" (*Stahlbrodt*, 92 NY2d at 650) based on their erotic, sexual, or adult nature. The performances merely happen to fall under the very broad categories of "entertainment" or "amusement," for purposes of the Amusement Tax, and "public performance for profit," for purposes

of the Cabaret Tax.

Moreover, the Tax Laws "do[] not enforce any differential treatment based on the content of ideas or viewpoints expressed in" the entertainment provided at the club (*Stahlbrodt*, 92 NY2d at 650). By enacting the exemptions for certain types of entertainment — such as live theatre, musical performances, and choreographed dancing (as opposed to spontaneous dancing, whether erotic or otherwise) — the legislature simply exercised its authority to "pick and choose between the forms of expression it decides to subsidize through a tax exemption" (*id.*). Such a legislative act is "presumptively valid," and plaintiffs failed to rebut that presumption, since they failed to demonstrate any unreasonableness in the distinction between the exempt and non-exempt forms of entertainment, or point to any "invidious discrimination" (*id.*).

There is another significant legal point to this case. In *New Loudon* (19 NY3d 1058), the establishment charged customers specifically for dance performances. As Supreme Court put it, here, by contrast,

> "the Club used scrips as a form of in-house currency for a variety of purposes, including admissions to private rooms, and to pay for a variety of services, including lap dancers and tips to entertainers, hosts and bartenders. Thus, the tax is not singling out the dancing at the Club, but rather,

> equally applying the tax to sale of the scrips by applying the statutory provisions in a facially neutral manner."

In short, the Tax Laws at issue are not even directed specifically at the dancing at plaintiffs' club, but rather at the sale of plaintiffs' "beaver bucks" which are used for multiple purposes in the club. Undoubtedly, there can be no meritorious First Amendment challenge to imposing taxes on the sale of such multiuse in-house currency.

We do not question plaintiffs' point that "exotic dancing -- in the form of clothing, 'topless,' and even fully nude entertainment --" is protected by the First Amendment (*see City of Erie v Pap's A.M.*, 529 US 277, 289 [2000] ["nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection"] [four-Justice plurality op]). But nothing in these Tax Laws prohibits such expressive conduct. Rather, they simply evidence the legislature's desire to "encourage activities deemed socially desirable while remaining neutral as to other expressions" (*Stahlbrodt*, 92 NY2d at 651).

Indeed, this is precisely why plaintiffs' reliance on cases involving "direct, content-based discriminatory regulation or penalization of expression" (*id.*) or a prior restraint on speech is misplaced. Plaintiffs focus on *Reed v Town of Gilbert*

(___ US ___, 135 S Ct 2218 [2015]), which they say "announced a paradigm shift in the constitutional analysis used to differentiate 'content neutral' from content specific laws." The local law found unconstitutional in *Reed* prohibited anyone from displaying outdoor signs without a permit, with exemptions for 23 categories of signs, including "[i]deological" signs, meaning ones intended to communicate "a message or ideas" for noncommercial purposes, and "[p]olitical" signs, meaning ones seeking to influence the results of a public election (135 S Ct at 2224). However, different restrictions applied to different exempt categories; for instance, ideological signs were treated more favorably than political signs as they could be placed in all zoning districts and without time limits (*id.* at 2224-2225). The Supreme Court stated: "Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny" (*id.* at 2228).

Yet, *Reed* is distinguishable since it concerned a law that prohibited speech outside of certain restrictions. The Tax Laws challenged here do not prohibit any speech under any circumstances but merely involve the payment of a broadly

applicable sales tax. The Supreme Court in *Reed* was animated by the concern that "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech" (*id.* at 2229). However, this case concerns laws that do not even have the potential to be used to suppress; the speaker will at worst be subjected to a small sales tax. Moreover, plaintiffs' contention that *Reed* "represents a radical departure from previous precedent on how courts . . . must determine the level of scrutiny applicable to laws that . . . impact protected expression" is belied by the Supreme Court's indication in *Reed* that it was merely applying the same approach it had "repeatedly" taken before -- citing five cases (*id.* at 2228), all but one of which predated *Leathers*, which the Court of Appeals found controlling in *Stahlbrodt*.

Similarly, plaintiffs are not aided by citing to *City of Ladue v Gilleo* (512 US 43 [1994]), in which the Supreme Court struck down a city's ban on almost all signage posted on residential properties, but allowed more types of signage to be posted by commercial, religious, and other entities on their properties (*id.* at 46-47). The Supreme Court found that the regulation "almost completely foreclosed a venerable means of communication" as to "political, religious, or personal messages"

(*id.* at 54) and placed great emphasis on the value of signs in allowing private citizens a uniquely inexpensive, personal, and local means of expression (*see id.* at 56-57).

Nor are plaintiffs helped by *Murdock v Commonwealth of Pa.* (319 US 105 [1943]), in which the Supreme Court struck down a law under which the petitioners had been fined for door-to-door sales of religious literature without paying a required license tax. In *Murdock*, the Supreme Court found that law "quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities," since the law at issue "restrain[ed]" the pursuit of constitutionally protected activities "in advance" (*id.* at 112, 114). As noted, in contrast, payment of the sales tax at issue here was not a precondition or restraint on the exercise of the club's right to present the performances at issue.

Plaintiffs also argue that the Tax Laws violate the Equal Protection Clauses of the Federal and New York State Constitutions since they exempt "live dramatic, choreographic or musical performances," yet "[p]erformances that do not meet these subjective standards are . . . burdened by additional governmental taxation." Plaintiffs suggest that any such distinction is irrational, even if the burdened activity

constitutes "purely sexually explicit expression." We find no merit to this claim.

The Equal Protection Clause of the US Constitution requires that "all persons similarly situated should be treated alike" (*Tennessee v Lane*, 541 US 509, 522 [2004] [internal quotation marks omitted]), and the counterpart provision in the New York Constitution "is no broader in coverage" (*Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344, 360 n 6 [1985]). However, "[f]or purposes of equal protection review, any classification creating differential taxation enjoys a strong presumption of constitutionality" (*Osborn Mem. Home Assn. v Chassin*, 100 NY2d 544, 547 [2003]). As long as the tax law "neither utilizes a suspect classification nor impairs a fundamental right," it "must be upheld if rationally related to achievement of a legitimate state purpose" (*id.*).

Rational basis review is applicable to this matter since plaintiffs do not allege any suspect classification, and the Tax Laws do not impair plaintiffs' fundamental right to free speech. We find that the tax exemptions for dramatic, musical, and artistic performances are rationally related to the legitimate "purpose of promoting cultural and artistic performances in local communities" (*New Loudon*, 19 NY3d at 1060), and thus do not deprive any class of businesses of equal protection of the law

(*see Stahlbrodt*, 92 NY2d at 648 [rejecting claim that tax exemption for newspapers consisting of less than 90% advertising, "denies a class of shopping papers equal protection of the laws"]).

Nor are the exemptions for live dramatic, choreographic, or musical performances unconstitutionally vague, as the plaintiffs contend. In particular, plaintiffs argue that a tax auditor who testified at the administrative hearing failed to clarify "how a determination could be made as to whether a given performance was sufficiently dramatic, . . . choreographic, or musical to fall within the statutory exclusion from taxation."

Generally, "[u]nder the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards" (*Natl. Endowment for the Arts v Finley*, 524 US 569, 588 [1998]). However, even if statutory terms "could raise substantial vagueness concerns" "if they appeared in a criminal statute or regulatory scheme," "the consequences of imprecision are not constitutionally severe" where, as here, the government is merely subsidizing the arts (*id.* at 588-589).

Moreover, "[i]n economic regulation especially, . . . administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope" and avoid "potentially vague or arbitrary interpretations of the ordinance"

(*Village of Hoffman Estates v The Flipside, Hoffman Estates, Inc.*, 455 US 489, 504 [1982]). As defendants note, any taxpayer may seek an advisory opinion from DTF on any issue of tax liability under a "specific set of facts" (Tax Law § 171 [Twenty-fourth]). The opinion, which must be issued within 90 days of the request, becomes binding with respect to that particular taxpayer, and may be modified only prospectively, not retroactively (*see id.*). Thus, even if the language used in the exemptions is somewhat vague, which is not the case here, the opportunity for businesses to obtain an official clarification of whether the exemptions apply to them is sufficient to allay any concerns about unpredictable enforcement.

Plaintiffs next claim that the Tax Laws violate procedural due process because "a determination as to whether or not live entertainment performances fall within the [exemptions] are dependent upon a review of the content of those . . . performances, but an [a]uditor will never be able to view the actual live . . . performances in question for an audit initiated after the conclusion of [the] tax year in question." Plaintiffs further contend that it would be "virtually impossible for a taxpayer presenting live entertainment to establish its entitlement to these exclusions given that it cannot be expected to videotape literally every single entertainment performance

that occurs during an audit period."

These arguments are unavailing. Plaintiffs' position would seem to lead to the absurd conclusion that no sales tax can be constitutionally imposed on any live performances regularly presented by a business. Although an audit will naturally take place after any allegedly taxable live performances have already occurred, a business has the right to present evidence of the nature of the performances at issue, such as testimony about performances during the period under audit or video footage of representative performances which are subject to a credibility analysis by the hearing officer.

To the extent plaintiffs argue that "the taxes in question are being assessed without the auditors ever having viewed any performances," we read this as a challenge to the weight of the evidence in this particular case under the guise of a facial due process claim. As set forth below, any such fact-specific claims are not properly raised in this action.

Plaintiffs' argument that the specific performances presented at Larry Flynt's Hustler Club were exempt from the sales taxes at issue is not properly raised in this action, due to the statute's exclusive remedy provision (Tax Law § 1140). That section provides that "no determination or proposed determination of tax . . . shall be enjoined or reviewed by an

action for declaratory judgment, . . . or by any action or proceeding other than a proceeding under article seventy-eight of the [CPLR]." Nor does plaintiffs' contention fall under the exception for claims challenging a statute "as wholly inapplicable" (*Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315, 321 [2003]). Plaintiffs' argument that exhaustion of administrative remedies would be futile is misplaced, since that exception to the judicial doctrine of exhaustion is superseded by the statutory exclusive remedy provision (*see id.* at 322).

In light of the foregoing, the court properly denied plaintiffs' motion for injunctive relief.

Accordingly, the order of the Supreme Court, New York County (Anil C. Singh, J.), entered January 30, 2015, which granted defendants' motion to dismiss the complaint, and denied plaintiffs' motion for preliminary and permanent injunctions,

should be modified, on the law, solely to declare Tax Law § 1105(f)(1) and (3) constitutional, and should otherwise be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 3, 2016

CLERK