SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 3, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Gische, Andrias, Kapnick, Singh, JJ.

6887 Jorge Naupari, Index 111215/11
Plaintiff-Appellant,

-against-

Jennifer Murray, et al.,
Defendants-Respondents,

Shearman Cabinets, Inc., et al.,
Respondents-Appellants,

V&Z Electrical Maintenance, et al.,
Defendants.

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Monaco & Monaco, LLP, Brooklyn (Frank A. Delle Donne of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for Shearman Cabinets, Inc., respondent-appellant.

Farber Brocks & Zane, LLP, Garden City (Charles T. Ruhl of counsel), for NY Custom Home and Remodeling, Inc., respondent-appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Jennifer Murray, Jordan Murray, Rose Associates, Inc., and The Board of Managers 255 East 74th Street Condominium, respondents.

Sugarman Law Firm LLP, Syracuse (Megan K. Thomas of counsel), for Form Architecture & Interiors, respondent.

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Order, Supreme Court, New York County (Debra A. James, J.),

entered October 5, 2016, which, insofar as appealed from as limited by the briefs, denied that part of the motion of defendant Shearman Cabinets, Inc. (Shearman) for summary judgment dismissing all cross claims sounding in contractual indemnification asserted against it by defendants Board of Managers 225 East 74th Street Condominium (Board), Rose Associates, Inc. (Rose) Jennifer Murray and Jordan Murray (the Murrays), denied the motion of defendant NY Custom Home and Remodeling, Inc. (NY Custom) for summary judgment dismissing the contractual indemnification cross claims as against it, denied plaintiff's cross motion for partial summary judgment on the issue of liability on his Labor Law §§ 240(1) and 241(6) claims against defendants Form Architecture & Interiors (FAI) and Rose, and granted the motions of FAI, Rose, and the Murrays for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to grant Shearman's motion, and to grant NY Custom's motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff commenced this action for injuries he sustained when he was working as a painter/plasterer for his nonparty employer, in a unit of a residential condominium. As plaintiff was descending a ladder, the ladder, as well as the rosin paper placed underneath it, shifted, causing plaintiff to fall. The

condominium was owned by the Board, Rose was the Board's property manager and the unit was owned by the Murrays. Upon closing on the unit, the Murrays hired FAI as their interior designer. Shearman installed cabinets in the unit and NY Custom installed kitchen doors.

The court properly denied plaintiff's cross motion for partial summary judgment on the issue of liability on his Labor Law §§ 240(1) and 241(6) claims as against FAI, because FAI was an architectural firm without supervisory authority, and it did not direct or control the work or activities other than providing architectural and design services. The court also properly denied that part of plaintiff's cross motion seeking the same relief as against Rose, because while Rose was the Board's property manager, it did not have authority to supervise and control the work that plaintiff was performing (*see Guryev v Tomchinsky*, 20 NY3d 194, 198 [2012]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003]).

The court also properly dismissed plaintiff's common-law negligence claims as to all defendants. Plaintiff's accident arose out of the means and manner of his work, which was determined by plaintiff's employer, and defendants did not exert any supervisory control (*see Ciechorski v City of New York*, 154 AD3d 413, 414 [1st Dept 2017]).

Shearman was entitled to dismissal of the cross claims against it sounding in contractual indemnification, because it was not liable for plaintiff's accident, as it had no connection to plaintiff's work (*see Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 416 [2008]). Moreover, the claims for contractual indemnification against Shearman were based on the main agreement between the Murrays and the Board, to which Shearman was not a signatory. "Under New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 243 [2001]). For these same reasons, the cross claims for contractual indemnification against NY Custom are dismissed.

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

ENTERED: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7029-
7030 The People of the State of New York,
Respondent,

-against-

Jamal Armstead,
Defendant-Appellant.

Ind. 2635/08

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Rosemary Herbert, Office of the Appellate Defender, New York (Naomi J. Scotten of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; A. Kirke Bartley, Jr., J. at jury trial and sentencing), rendered December 12, 2012, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of 15 years; and judgment, same court (Ronald A. Zweibel, J.), rendered March 19, 2015, convicting defendant, upon his plea of guilty, of attempted murder in the second degree, and sentencing him to a concurrent term of 15 years, unanimously affirmed.

The court correctly denied defendant's motion to suppress statements and lineup identifications. There is no basis for disturbing the court's credibility determinations, including its resolution of any alleged discrepancy between police testimony

and paperwork.

At the time of the arrest at issue, defendant was represented on an unrelated case by an attorney from Neighborhood Defender Service, who attempted to enter the case on defendant's behalf, at defendant's mother's request, by contacting the police. The attorney's supervisor subsequently attempted to enter the case as well. However, after being apprised by the detectives of each of these attempts, in both instances defendant unequivocally declined to be represented by these attorneys. The suppression court correctly noted that the right to counsel is personal in that "[t]he decision to retain counsel rests with the client . . . not the lawyer" (*People v Bing*, 76 NY2d 331, 349 [1990]).

"[T]he evidence established that defendant unambiguously rejected [his mother's and the attorneys'] efforts to provide [him] with legal representation" (*People v Lowery*, 131 AD3d 884, 885 [1st Dept 2015], *lv denied* 26 NY3d 1090 [2015]). Accordingly, no attorney-client relationship existed, and the suppression court correctly concluded that defendant's right to counsel had not indelibly attached when he made statements to the detectives and when he was placed in a lineup (*see People v Allenye*, 66 AD3d 1039 [2d Dept 2009], *lv denied* 14 NY3d 797 [2010]; *People v Lennon*, 243 AD2d 495, 497 [2d Dept 1997], *appeal*

dismissed 91 NY2d 942 [1998]; *see also People v Grice*, 100 NY2d 318, 323-324 [2003]).

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7031 Joanne DiPasquale, Index 301957/11
Plaintiff-Respondent,

-against-

Boys & Girls Harbor Inc.
Defendant,

East Harlem Arts and Education
Local Development Corp.,
Defendant-Appellant.

_____

Miranda Sambursky Slone Sklarin Verveniotis LLP, Mineola (Ondine C. Slone of counsel), for appellant.

Ogen & Sedaghati, P.C., New York (Eitan A. Ogen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about September 11, 2017, which denied the motion of defendant East Harlem Arts and Education Local Development Corp. (East Harlem) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

East Harlem failed to establish entitlement to judgment as a matter of law in this action where plaintiff was electrocuted when she reset the power strip under the desk in her office, which was located in premises subleased by her employer from East Harlem. Plaintiff testified that, before the incident, she repeatedly had lost power to her computer, and an engineer employed by East Harlem testified that, before the incident, the

building had been experiencing problems with its electrical system and that circuit breakers were "blowing out frequently" due to overloads. On the day of the incident, plaintiff called an employee of East Harlem, who sent a maintenance person to assist her, and that person directed her to press the reset button on the power strip while he was checking the fuse box outside her office.

The record demonstrates that East Harlem offered no evidence in support of its contention that the accident was caused solely by the power strip, or to refute plaintiff's contention that the accident was related to the building-wide electrical problems. Under the sublease, East Harlem was responsible for maintaining the building's electric systems, and, as a matter of law, it had a duty to keep the premises "in a reasonably safe condition in view of all the circumstances" (*Basso v Miller*, 40 NY2d 233, 241 [1976] [internal quotation marks omitted]), including the wiring

(*see Onetti v Gatsby Condominium*, 111 AD3d 496, 497 [1st Dept 2013]). Furthermore, the evidence shows that East Harlem had notice of recurrent electrical problems in the premises.

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

ENTERED: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7032 In re Monique B.,
Petitioner-Appellant,

-against-

Anthony S.,
Respondent-Respondent.

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Orrick, Herrington & Sutcliffe LLP, New York (Rene A. Kathawala of counsel), for appellant.

_____

Order, Family Court, Bronx County (Alicea Elloras, J.), entered on or about April 6, 2016, which, upon reargument, granted petitioner's application for counsel fees and awarded $250 in fees, unanimously modified, on the law and the facts, to the extent of remanding the matter for a determination of reasonable counsel fees, and otherwise affirmed, without costs.

The record demonstrates that inasmuch as respondent was found to have wilfully violated a child support order the issuance of attorney fees was proper under Family Ct Act §§ 438(b) and 454(3) (*see Matter of Duffy v Duffy*, 30 AD3d 735, 737 [3d Dept 2006]). However, in awarding the fees, the court did not set forth the factors considered, such as "the parties' ability to pay, the nature and extent of the services rendered,

the complexity of the issues involved, and the reasonableness of the fee under all of the circumstances" (*Matter of Musarra v Musarra*, 28 AD3d 668, 669 [2d Dept 2006]).

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

ENTERED: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7033-
7034 Lita Parker,
Plaintiff-Respondent,

-against-

Paul T. Parker,
Defendant-Appellant.

Index 300564/08

_____

Peter F. Edelman & Associates, New York (Peter F. Edelman of counsel), for appellant.

Stein Riso Mantel McDonough, LLP, New York (Kevin M. McDonough of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lori S. Sattler, J.), entered November 15, 2016, awarding plaintiff wife the aggregate amount $356,834.52 pursuant to an order, same court and Justice, entered on or about September 23, 2016, which, inter alia, granted plaintiff's motion for a money judgment to the extent of $303,626.06 in compensatory damages, liquidated damages, and counsel fees, together with interest, unanimously affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In these post-divorce judgment proceedings, ample evidence supported the Special Referee's report, to the extent confirmed by the court, and defendant husband presents no grounds to

disturb the court's determinations (*see e.g. Freedman v Freedman*, 211 AD2d 580 [1st Dept 1995]; CPLR 4403). The husband's arguments regarding the Special Referee's abuse of her authority rests on a report excerpt taken out of context, and his criticism of the Special Referee's discontinuance of witness testimony before he could testify is refuted by clear record evidence that the parties had agreed to submit the matter on the papers, and that no further testimony was necessary.

Defendant's argument, not raised below, that the wife's entitlement to liquidated damages was postponed by the parties' April 6, 2009 Stipulation and Order, is belied by the Stipulation and Order itself, which did not suspend the liquidated damages provision.

The appointment of a receiver to sell the parties' property in Water Mill did not preclude the husband's performance under the parties' agreements, and he fails to explain what steps he might have taken, had no receiver been appointed.

The husband's claim that the award of liquidated damages and compensatory damages was duplicative or an unfair windfall is unavailing. The parties' Stipulation of Settlement provided that the liquidated damages were "in addition to all other rights and remedies," and her compensatory damages award arose in the context of a separate category of obligations and breaches by the

husband. The husband, moreover, failed to meet his burden to show either that the damages addressed in the liquidated damages provision were readily ascertainable or that the agreed-upon liquidated damages amount was conspicuously disproportionate to the foreseeable losses (*see Addressing Sys. & Prods., Inc. v Friedman*, 59 AD3d 359 [1st Dept 2009]).

The husband's efforts to blame the wife for the foreclosure actions on the ground that she failed to direct monthly loan payments from the parties' Loan Security Account at Smith Barney is also unavailing. The evidence demonstrates that the wife was not even aware of the defaults, as the husband never informed her of his failures to make the loan payments. Nor is there any evidence that she concealed the Citibank foreclosure from him. Furthermore, the husband articulates no legal basis for a fiduciary duty owed to him by the wife, nor facts to support his claim that she breached any such duty.

Plaintiff's entitlement to counsel fees is amply supported by multiple terms of the parties' Stipulation of Settlement. Moreover, the plain language exempting the home equity line of credit and Water Mill loan obligations from the agreement's notice requirements negates the husband's argument that the wife is not entitled to such fees for failure to comply with those requirements.

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

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

ENTERED: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7035 The People of the State of New York, Respondent, Ind. 1972/15

-against-

Harco Construction LLC, also known as H&H Builders, Inc., Defendant-Appellant.

_____

Jeremy Gutman, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered July 13, 2016, convicting defendant, after a nonjury trial, of manslaughter in the second degree, criminally negligent homicide, and reckless endangerment in the second degree (three counts), and sentencing it to a conditional discharge for an aggregate period of three years, unanimously modified, on the law, to the extent of vacating the criminally negligent homicide conviction and dismissing that count, and otherwise affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The People established that defendant, the general contractor on a construction site, was liable based on the conduct of its "high managerial agent," who

exercised managerial supervision over a subcontractor's employees (Penal Law § 20.20[1][b]), and "recklessly tolerated" conduct by the subcontractor constituting the offenses (Penal Law § 20.20[2][b]).

As the People concede, the criminally negligent homicide count should be dismissed as an inclusory concurrent count (*see* CPL 300.40[3][b]).

Defendant's contention that the reckless endangerment counts are multiplicitous 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: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7036 The People of the State of New York, Respondent, Ind. 3049/12

-against-

Jamel Maldonado, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Alberto Lorenzo, J. at plea; John S. Moore, J. at sentencing), rendered April 29, 2015, convicting defendant of assault in the second degree, and sentencing him to a term of two years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

As the People concede, defendant is entitled to an express youthful offender determination pursuant to pursuant to *People v Rudolph* (21 NY3d 497 [2013]).

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

ENTERED: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7037 Lantau Holdings Ltd., Index 650085/17
Plaintiff-Respondent-Appellant,

-against-

General Pacific Group Ltd.,
Defendant-Appellant-Respondent,

SVK Capital Management, Ltd., et al.,
Defendants.

_____

Friedman Kaplan Seiler & Adelman LLP, New York (Andrew W. Goldwater of counsel), for appellant-respondent.

CKR Law LLP, New York (Michael J. Maloney of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered February 13, 2018, which, to the extent appealed from as limited by the briefs, granted defendant General Pacific Group Ltd.'s motion to dismiss the complaint to the extent of dismissing "counts" 1 and 2 for breach of contract, 3 and 4 for rescission, 5 and 6 for declaratory judgments, and 14 for constructive trust, and denied the motion with respect to count 7 for unjust enrichment, unanimously modified, on the law, to reinstate the breach of contract claims and dismiss the unjust enrichment claim, and otherwise affirmed.

Plaintiff Lantau Holdings Ltd. is a securities repurchase lender, which means it typically lends money to borrowers in

exchange for publicly traded securities, which it holds as collateral. In this case, Rex Global Entertainment Holdings Limited, a Hong Kong entity listed on the Hong Kong Stock Exchange (Rex) issued stock to two borrowers in April 2016. The two borrowers then entered into various loan documents with Lantau to exchange the Rex stock for loans. In these documents, the borrowers represented that the stock was unrestricted, and Lantau could sell the stock. Lantau turned around and sold the stock to defendant General Pacific Group Ltd. (GPG) pursuant to two stock purchase agreements (SPAs) dated a few days apart. The SPAs included numerous representations and warranties from Lantau that the stock was unrestricted. They also stated that GPG was not obligated to make any payments to Lantau until Lantau's collateral broker issued a notice of final acceptance acknowledging that there were no restrictions. The parties executed the first SPA on May 16, 2016, and stock was transferred shortly thereafter pursuant to that agreement into GPG's account. On May 21, Lantau and GPG learned that the Rex stock was actually restricted. On May 23, 2016, Lantau and GPG entered into the second SPA, which was substantially similar to the first SPA and contained the same representations and warranties, and more Rex stock was transferred into GPG's account. Even though no notice of final acceptance was issued pursuant to either SPA, GPG

instructed the collateral broker to sell some of the stock on its behalf. After some of the stock was sold into the market, Rex obtained an injunction in Hong Kong prohibiting the further transfer or sale of the collateral stock.

Accepting the allegations in the complaint as true and affording them every favorable inference (*see People v Coventry First LLC*, 13 NY3d 108, 115 [2009]), Lantau has adequately pled a breach of contract claim. Lantau acknowledges that it breached the SPAs first by delivering restricted shares in violation of its representations and warranties. Lantau pleads, however, that even though it was aware of the breach, GPG continued to perform under the SPAs by taking control over the stock and instructing the collateral agent to trade it. In doing so, Lantau has adequately pled that GPG chose not to terminate the agreement, and rather chose to ignore the breach and continue performance. In making this choice, GPG was obligated to perform the SPAs in all essential respects on its part, including making payments owed thereunder (*Ferguson Contr. Co. v State of New York*, 202 AD 27, 35 [3d Dept 1922], *affd* 237 NY 186 [1923]; *see Rebecca Broadway L.P. v Hotton*, 143 AD3d 71, 81 [1st Dept 2016] [citing Restatement [Second] of Contracts § 246[1] and Comment b thereto; 23 Richard A. Lord, Williston on Contracts § 63:33 at 561-562]). Lantau adequately pled that GPG then breached the enforceable

SPAs by failing to make payments thereunder.

Lantau's waiver theory does not support the breach of contract claim, as even though GPG continued to perform under the SPAs, it was still entitled to seek damages for partial breach. Moreover, Lantau failed to plead that GPG entered into any written, signed waiver of any rights under the SPAs, as explicitly required by the SPAs.

Supreme Court properly dismissed the rescission claims, as given the timing of the parties' knowledge of the restrictions on the stock as pled by Lantau, there could not have been a mutual mistake with respect to the second SPA (*see Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993] [holding that "[t]he mutual mistake must exist at the time the contract is entered into"]). Moreover, rescission is a matter of discretion, and is an equitable remedy that is "to be invoked only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored" (*Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]; *see also Loreley Fin. [Jersey] No. 28 Ltd. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 AD3d 463, 468 [1st Dept 2014]). Here, Lantau seeks monetary damages for its breach of contract claim and has an adequate remedy at law. Moreover, the status quo cannot be substantially restored, as some of the stock has been sold

already.

Supreme Court also properly dismissed the declaratory judgment claims which sought a declaration that GPG waived all of its rights to indemnification under the SPAs. The SPAs clearly include an indemnification provision for all claims related to the stock and reliance on the representations and warranties with respect to the restrictions on that stock. As discussed above, GPG did not waive its rights with respect to the restrictions on the stock, and clearly relied upon the representations and warranties issued by Lantau regarding the stock being unrestricted, at least in the first SPA. Because Lantau seeks a declaration that the indemnification provision is unenforceable based upon these two grounds, these claims are insufficient as pled.

The unjust enrichment claim must be dismissed as the SPAs, which were valid and enforceable written contracts governing the relevant subject matter, preclude recovery in quasi-contract for events arising out of the same subject matter (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Norcast S.ar.l. v Castle Harlan, Inc.*, 147 AD3d 666, 668 [1st Dept 2017]).

Lantau's allegations in the complaint were insufficient to show that it had a confidential or fiduciary relationship with

GPG, and therefore, the constructive trust claim was properly dismissed (*see Sharp v Kosmalski*, 40 NY2d 119, 121-122 [1976]; *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473-474 [1st Dept 2010]).

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

ENTERED: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7038- File 1593B/15
7039 Michael Chenkin,
Plaintiff-Appellant,

-against-

The Public Administrator of New York County, etc.,
Defendant-Respondent.

_____

Julie Hyman, P.C., Bronx (Julie Hyman of counsel), for appellant.

Schram Graber & Opell P.C., New York (Allison E. Dolzoni of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about January 22, 2018, which dismissed the complaint, unanimously affirmed, without costs. Appeal from underlying decision, same court and Surrogate, dated October 13, 2017, unanimously dismissed, without costs, as taken from a nonappealable paper.

Initially, we find that the Surrogate properly exercised jurisdiction over this matter, since it relates to a decedent's estate (*see* SCPA 201[3]; *Hoffman v Sitkoff*, 297 AD2d 205, 205 [1st Dept 2002]). In fact, plaintiff asserted a claim against the estate of his former wife (the decedent) in the Surrogate's Court pursuant to SCPA 1810, and, at the time this action was commenced, the Surrogate had already presided over the

administration proceeding, and defendant had filed an accounting naming plaintiff as an interested party. Under the circumstances, this action, originally filed in Supreme Court, was properly removed to the Surrogate's Court (*see Cipo v Van Blerkom*, 28 AD3d 602, 602 [2d Dept 2006]).

The complaint was correctly dismissed for failure to state a cognizable claim (CPLR 3211[a][7]; *see generally Braddock v Braddock*, 60 AD3d 84, 86 [1st Dept 2009]) and because the plain terms of the stipulation refute plaintiff's allegations and conclusively provide a defense as a matter of law (CPLR 3211[a][1]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Plaintiff seeks the return of a lump sum payment that he made to "the Wife" (now the decedent) as her share of equitable distribution under a stipulation of settlement that was later incorporated into a judgment of divorce. The stipulation directed plaintiff to deposit the lump sum payment in the Wife's attorney's escrow account until a trust or annuity was established for her benefit, but the Wife died intestate before any such trust or annuity was created.

Contrary to his contention, plaintiff did not retain a reversionary interest in the lump sum payment. The stipulation, which encompassed the signatories' "entire understanding," did

not make the lump sum payment contingent upon the establishment of a trust or annuity or indicate that plaintiff would be entitled to a return of the Wife's distributive share in the event that she failed to set up a trust or annuity. Further, the stipulation stated that any property division was "final and irrevocable" and the Wife's property "shall forever remain hers." Thus, the Wife's property interest in the lump sum payment vested upon entry of the judgment of divorce, and that interest survived her death (*see Peterson v Goldberg*, 180 AD2d 260, 263 [2d Dept 1992], *lv dismissed* 81 NY2d 835 [1993]).

Moreover, contrary to plaintiff's contention, the mere fact that the lump sum payment was deposited into the escrow account of the Wife's attorney does not mean that an escrow existed entitling plaintiff to the return of the funds (*see Lennar Northeast Partners Ltd. Partnership v Gifaldi*, 258 AD2d 240, 243 [4th Dept 1999], *lv denied* 94 NY2d 754 [1999]).

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: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7040 The City of New York, Index 450129/16
Plaintiff-Respondent,

-against-

Tri-Rail Construction, Inc.,
et al.,
Defendants-Appellants.

_____

Keane & Bernheimer, PLLC, Valhalla (Connor W. Fallon of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about February 23, 2017, which denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff (the City) seeks money damages for injury to trees caused by the sidewalk repairs performed by defendants for the adjacent property owner. The motion court erred in ruling that the City has the capacity to sue for the negligent destruction of its property. A municipality does not have a common-law right to bring suit; its right to sue, if any, "must be derived from the relevant enabling legislation or some other concrete statutory predicate" (*Community Bd. 7 of Borough of Manhattan v Schaffer*,

84 NY2d 148, 155-156 [1994]). Rules of City of New York Department of Parks and Recreation (DPR) (56 RCNY) § 5-01(c) permits DPR to "seek damages" against persons who "cut, remove, or destroy" its trees without a permit (*see* 56 RCNY 1-04[b][1][I]). However, the relevant enabling legislation, which authorizes DPR to promulgate rules regarding the cutting, removal, and destruction of its trees, does not authorize a municipal right of action to recover money damages for injury to the trees (*see* New York City Charter § 533[a][9]; Administrative Code of the City of New York § 18-107[e]). 56 RCNY 5-01(c) is therefore "out of harmony" with the statute, and we hold that it is invalid (*see Matter of Jones v Berman*, 37 NY2d 42, 53 [1975]).

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: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7041 The People of the State of New York, Respondent, Ind. 273/15

-against-

Todd Catronio, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Caitlin Glass of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 7, 2016, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a term of two years, with three years' postrelease supervision, unanimously modified, on the law, to the extent of reducing the period of postrelease supervision to two years, and otherwise affirmed.

As the People concede, the sentence should be reduced as indicated in order to conform to the terms of the negotiated plea.

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

ENTERED: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7042 The People of the State of New York, Respondent, Ind. 1540N/14

-against-

Gregorio Hanley, Defendant-Appellant.

_____

Edith Blumberg, New Berlin, for appellant.

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered May 19, 2016, 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: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7043-
7044-
7045

Index 655914/17

IHG Management (Maryland) LLC,
Plaintiff-Respondent,

-against-

West 44th Street Hotel LLC,
Defendant-Appellant,

Tishman Asset Corporation,
Defendant.

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Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for appellant.

Kasowitz Benson Torres LLP, New York (Paul M. O'Connor III of counsel), for respondent.

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Orders, Supreme Court, New York County (Eileen Bransten, J.), entered April 10, 2018 and September 19, 2017, which, to the extent appealed from as limited by the briefs, denied defendant West 44th Street Hotel LLC's (owner) motion to dismiss the specific performance cause of action, granted plaintiff's motion for a preliminary injunction, and denied owner's motion to vacate the TRO, unanimously affirmed, without costs.

The court properly denied defendant owner's motion to dismiss the cause of action for specific performance. It is undisputed that the hotel management agreement (HMA) at issue provides for the application of Maryland law, which specifically

provides that a court may order specific performance for anticipatory or actual breach or attempted or actual termination of a hotel management agreement (Md Code, Commercial Law §§ 23-102[b]; 23-101[c]). Sections 14.02(d) and (e) of the HMA provide that either party could seek specific performance, where applicable. Defendant owner's argument that personal service contracts such as the HMA cannot be specifically enforced as a matter of constitutional and Maryland law because such enforcement violates the Thirteenth Amendment's prohibition against involuntary servitude is inapposite since, among other things, the owner voluntarily negotiated for and signed the contract. Moreover, the Maryland statute is presumed constitutional and the presumption may be upset only by proof persuasive beyond a reasonable doubt, which is absent here (*see Hotel Dorset Co. v Trust for Cultural Resources of City of N.Y.*, 46 NY2d 358, 370 [1978]).

The court did not improvidently exercise its discretion in granting plaintiff's motion for a preliminary injunction and denying owner's request to vacate the TRO in order to maintain the status quo until a determination was made as to whether plaintiff was in default of its obligations under the HMA. Plaintiff demonstrated a probability of success on the merits, a danger of irreparable injury, and a balance of equities in its

favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Occupational Health Ctrs. of the Southwest, P.A. v Toney*, 2017 WL 1546430, *9, 2017 US Dist LEXIS 64784, *24 [D Md 2017]). "A likelihood of success on the merits may be sufficiently established even where the facts are in dispute, and the evidence need not be conclusive" (*Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016]).

Pursuant to Maryland law, plaintiff made a prima facie showing that it may be entitled to specific performance of the HMA. The court properly found that ejecting plaintiff from the hotel without a determination of the merits would subject it to irreparable harm in the loss of goodwill and injury to its reputation (*see Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 272 [1st Dept 2009]; *DMF Leasing, Inc. v Budget Rent-A-Car of Md., Inc.*, 871 A2d 639, *652 [Md Ct Spec App 2005]).

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

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

ENTERED: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7046 Deutsche Bank AG, Index 652156/16
Plaintiff-Appellant,

-against-

Erik Martin Vik, Senior, et al.,
Defendants-Respondents.

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Cahill Gordon & Reindel LLP, New York (Sheila C. Ramesh of counsel), for appellant.

Whiteman Breed Abbott & Morgan LLC, New York (Thomas P. O'Connor of counsel), for Erik Martin Vik, Senior and VBI Corporation, respondents.

Zaroff & Zaroff LLP, Garden City (Ira S. Zaroff of counsel), for Alexander Vik and Sebastian Holdings, Inc., respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 12, 2017, which granted defendants' motion to dismiss the complaint for lack of personal jurisdiction under CPLR 302(a)(3)(ii), unanimously affirmed, without costs.

A plaintiff relying on CPLR 302(a)(3)(ii) must show that (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to a person or property in New York; (4) the defendant expected or should reasonably have expected the act to have consequences in New York; and (5) the defendant derived substantial revenue from interstate or international commerce (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). In New

York, "the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred" (*CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 472 [1st Dept 2011]; *see Magwitch, L.L.C. v Pusser's Inc.*, 84 AD3d 529, 532 [1st Dept 2011], *lv denied* 18 NY3d 803 [2012]).

Here, the "original critical events" giving rise to plaintiff's injury were the 2012 and 2015 Transfers. As those transfers occurred outside of New York and did not involve New York assets, the situs of injury was not in New York (*see Cotia [USA] Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484-485 [1st Dept 2015]; *Magwitch*, 84 AD3d at 530-532). That plaintiff felt economic injury in New York, alone, is an insufficient basis to confer jurisdiction. To the extent plaintiff relies on *Deutsche Bank, AG v Vik* (2015 Slip Op 30163[U] [Sup Ct, NY County 2015]), that case relied on federal caselaw that did not apply the situs of injury test, and our decision affirming that order did not determine the issue of jurisdiction under CPLR 302(a)(3)(ii) (*see* 142 AD3d 829 [1st Dept 2016]).

Furthermore, even if the elements of CPLR 302(a)(3)(ii) have been met, asserting personal jurisdiction would not comport with due process (*see Penguin Group [USA] Inc. v American Buddha*, 16 NY3d 295, 302 [2011]). To comport with due process, "[t]here

must also be proof that the out-of-state defendant has the requisite 'minimum contacts' with the forum state and that the prospect of defending a suit here comports with 'traditional notions of fair play and substantial justice,'" (*id.* at 307, quoting *International Shoe Co. v Washington*, 326 US 310, 316 (1945)]). The "minimum contacts" requirement is satisfied where "a defendant's 'conduct and connection with the forum State' are such that it 'should reasonably anticipate being haled into court there'" (*LaMarca* at 216, quoting *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 297 [1980]). Under the "effects test" theory of personal jurisdiction, where the conduct that forms the basis for the plaintiff's claims takes place entirely out of forum, and the only relevant jurisdictional contacts with the forum are the harmful effects suffered by the plaintiff, a court must inquire whether the defendant "expressly aimed" its conduct at the forum (*Charles Schwab Corp. v Bank of Am. Corp.*, 883 F3d 68, 87 [2d Cir 2018]). Here, defendants did not expressly aim their tortious conduct at New York, and the foreseeability that the alleged fraudulent conveyances would injure plaintiff in New York is insufficient (*id.* at 87-88).

Plaintiff is not entitled to jursidictional discovery, as it has not demonstrated that facts may exists that could support the

exercise of jurisdiction (*see McBride v KPMG Intl.*, 135 AD3d 576, 577 [1st Dept 2016]).

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

ENTERED: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7047 The People of the State of New York, Ind. 3881/15
Respondent, 573/16

-against-

Jeffrey Childs,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr., of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J. at plea; Robert M. Mandelbaum, J. at sentencing), rendered April 27, 2016,

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.

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

ENTERED: JULY 3, 2018

CLERK

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

Sweeny, J.P., Webber, Kern, Oing, JJ.

7049 New York University, et al., Index 653535/15
Plaintiffs-Appellants,

-against-

Turner Construction Company,
Defendant-Respondent.

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Pillsbury Winthrop Shaw Pittman LLP, New York (Edward Flanders of counsel), for appellants.

Friedman Kaplan Seiler & Adelman LLP, New York (Robert S. Smith of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 13, 2018, which granted defendant's motion pursuant to CPLR 3211(a) to dismiss the complaint alleging breach of contract and negligence with regard to damages to plaintiffs' construction site as a result of flooding related to Hurricane Sandy, unanimously modified, on the law and facts, to reinstate all claims other than the negligence claim based on alleged defects in Smilow building and NYU/NYU School of Medicine's business interruption claim, and otherwise affirmed, without costs.

The complaint alleges that plaintiff NYU School of Medicine is an administrative department of plaintiff New York University, (herein NYU/NYU School of Medicine), and plaintiff NYU Hospitals Center (NYU Hospitals) is a separate not-for-profit corporation.

Defendant's contention that they should be treated as a single entity is a factual issue not amenable to resolution on this motion to dismiss.

Contrary to defendant's contention, the 2009 Clinical Facility/Master Plan contract between NYU Hospitals and defendant is not incorporated into the 2011 Energy Building contract between NYU/NYU School of Medicine and defendant. While the 2011 Energy Building contract acknowledged that defendant's pre-construction services under the 2009 Clinical Facility/Master Plan contract would continue and overlap with construction under the 2011 Energy Building contract, the 2009 Clinical Facility/Master Plan contract, executed some two years earlier, with a different party and for a different phase of the work, was not included among the Energy Building contract documents, which contained a merger clause (*cf. J. Remora Maintenance LLC v Efromovich*, 103 AD3d 501 [1st Dept 2013], *lv denied* 21 NY3d 862 [2013]).

Accordingly, because the damages alleged here occurred during performance of the 2011 Energy Building contract, defendant's reliance on the waiver of claims provision in the 2009 Clinical Facility/Master Plan contract is misplaced. In any event, even if the waiver of claims provision of the 2009 Clinical Facility/Master Plan contract were incorporated into

2011 Energy Building contract, it only waived claims for damage adjacent to the Energy Building project that were actually covered by the separate insurance policy applicable to adjacent properties (*Gap v Red Apple Cos.*, 282 AD2d 119, 123-124 [1st Dept 2001][waiver of claims for damage "caused by any risk insured against under any insurance polic[y]" only waived claims for insured portion of loss]; *cf. Brito-Galbez v 841-853 Broadway Assoc., LLC*, 110 AD3d 549, 549-550 [1st Dept 2013] [lease provision waiving claims for damage "of the type required to be covered" by insurance warranted dismissal of complaint]).

Defendant's argument that the FM Global policy covering adjacent properties was procured pursuant to section 11.4.1 of the 2011 Energy Building Contract and therefore claims against defendant for losses covered by it were waived pursuant to section 11.4.2, is unavailing insofar as the work site did not include the damaged adjacent buildings. Section 11.4.1 only required NYU/NYU School of Medicine to procure "necessary [] insurance for the *Project ... upon the entire Work at the site*."

Defendant's contention that plaintiffs' claims were barred by the waiver of claims in the Owner-Controlled Insurance Program (OCIP), procured pursuant to the 2011 Energy Building contract, is unavailing. The OCIP is not part of the 2011 Energy Building contract or contract documents, which contain a merger clause.

Plaintiffs' interpretation of the OCIP waiver is consistent with the coverage provided by the OCIP and the waiver of claims covered by the Builder's Risk policy under sections 11.4.1 and 11.4.2 of the 2011 Energy Building contract, whereas defendant's interpretation of the OCIP waiver conflicts with the contract documents which state that the OCIP would not relieve defendant of any obligation to the owner.

We cannot conclude as a matter of law that the allegations in the complaint for property damages are not direct damages (*see Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805 [2014]). However, the waiver of consequential damages in the 2011 Energy Building contract, which was allegedly breached, specifically includes loss of use damages. Accordingly, NYU/NYU School of Medicine's claims for business interruption are barred.

Accrual of claims based on alleged construction defects in the Smilow building began to run upon completion of the work (*Amedeo Hotels Ltd. Partnership v Zwicker Elec. Co.*, 291 AD2d 322, 322-323 [1st Dept 2002]). While "occupancy, partial or full, is simply a factor to be considered in ascertaining whether there has been completion" (*Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects*, 167 AD2d 6, 12 [1st Dept 1991]), the building was completed, at the latest, upon issuance of the certificate of occupancy (*see Radmin v Bertani*,

261 AD2d 598 [2d Dept 1999]). Inasmuch as plaintiffs acknowledge that a final certificate of occupancy for the Smilow building was issued more than three years before commencement of this action, their negligence claims are time-barred.

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: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kern, Oing, JJ.

7050N In re Global Liberty Insurance Co., Index 27352/17E
Petitioner-Appellant,

-against-

ISurply, LLC As Assignee of Luis Soto,
Respondent-Respondent.

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The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Dash Law Firm, P.C., Melville (Jan Chow of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered October 26, 2017, which denied Global Liberty Insurance Co.'s (Global) petition to vacate the master arbitrator's award, dated July 24, 2017, dismissed the proceeding and confirmed the award, unanimously affirmed, with costs.

The court properly confirmed the master arbitrator's award. The master arbitrator's affirmance of the lower arbitrator's award was not irrational (*see Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 211 [1981]; *Matter of Kane v Fiduciary Ins. Co. of Am.*, 114 AD3d 405 [1st Dept 2014], nor did it ignore controlling law (*compare generally Matter of Global Liberty Ins. Co. v Therapeutic Physical Therapy, P.C.*, 148 AD3d 502 [1st Dept 2017] and *Matter of Global Liberty Ins. Co. v Professional Chiropractic Care, P.C.*, 139 AD3d 645 [1st Dept 2016]).

The controlling law here, for reimbursement of rental costs for a Continuous Passive Motion device (CPM) and a Cold Therapy Unit (CTU), is 12 NYCRR § 442.2(b), which states: "The maximum permissible monthly rental charge for such equipment, supplies and services provided on a rental basis shall not exceed the lower of the monthly rental charge to the general public or the price determined by the New York State Department of Health area office. The total accumulated monthly charges shall not exceed the fee amount allowed under the Medicaid fee schedule."

Global failed to present sufficient evidence demonstrating that the Department of Health (DOH) had determined a price for these rentals. The July 3, 2014 letter from Joanne Criscione, Senior Attorney for the Bureau of Health Insurance Programs Division of Legal Affairs for the DOH appeared to indicate that DOH had adopted "a medicaid reimbursement policy for durable medical equipment (DME) rental items that have not been assigned a Maximum Reimbursement Amount (MRA). For DME items that do not have a MRA, the rental fee is calculated at 1/6th of the equipment provider's acquisition cost." In her June 8, 2016 letter, however, she makes clear that her July 3, 2014 letter "was not a determination by the Department of Health area office establishing the reimbursement rate" and she "merely state[d] the Medicaid reimbursement as that policy is set forth in the Medical

Provider Manual for DME." None of Global's other evidence establishes that DOH had adopted the "1/6th of the equipment provider's acquisition cost" rate.

It is true that the Medicaid DME fee schedule, which listed certain codes for DMEs, some of which had a MRA and some of which did not, established that for those that did not have a MRA, the monthly rate of 1/6th of the equipment provider's acquisition cost would apply. And it is also true that, pursuant to 12 NYCRR § 442.2(b), "the total accumulated monthly charges shall not exceed the fee amount allowed under the Medicaid fee schedule." However, it was not irrational for the arbitrator to conclude that this 1/6th rate applied only to items which had codes listed in the Medicaid fee schedule, which the CPM and CTU at issue here did not. Therefore, as Global neither demonstrated that DOH had adopted the 1/6th rental fee guideline, or that DOH had otherwise determined a rental fee, it was not irrational for the arbitrator to conclude that the reimbursement rate would be "the monthly rental charge to the general public" (12 NYCRR 442.2(b).

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

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

ENTERED: JULY 3, 2018

CLERK

Sweeny, J.P., Webber, Kahn, Kern, JJ.

7051N Huntsman International LLC, Index 650672/17
Plaintiff-Appellant,

-against-

Albemarle Corporation, et al.,
Defendants-Respondents.

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Kirkland & Ellis LLP, New York (Eugene F. Assaf of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Francis E. Bivens of counsel), for Albemarle Corporation, Rockwood Specialties Group, Inc., and Rockwood Holdings, Inc., respondents.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Jay B. Kasner of counsel), for Seifollah Ghasemi, Andrew M. Ross, Thomas J. Riordan and Michael W. Valente, respondents.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered January 8, 2018, which granted defendants' motion to compel arbitration and stay all proceedings in this action, unanimously affirmed, without costs.

Plaintiff and defendant Rockwood Specialties Group, Inc. entered into a stock purchase agreement (SPA) pursuant to which plaintiff bought Rockwood's color pigments business, including its "Bluebird" technology and several plants, including one located in Augusta, Georgia. Section 4.27 of the SPA sets forth the parties' rights and obligations with respect to the Augusta facility preceding the facility's successful completion of a

"Performance Test." Subsection (f) requires defendants to notify plaintiff of "any event, change, effect, circumstance or development of which it has Knowledge ... that ... raises reasonable concerns whether the Augusta Facility will be able to achieve successful completion of the Performance Test." Subsection (i) provides for arbitration of "any disputes between [Rockwood] and [plaintiff] regarding the terms and conditions of, and the parties[']s respective obligations under, Section 1.6 and this Section 4.27."

Plaintiff's claims are within the scope of the arbitration clause (*see generally Louis Dreyfus Negoce S.A. v Blystad Shipping & Trading Inc.*, 252 F3d 218, 223-224 [2d Cir 2001], *cert denied* 534 US 1020 [2001]). The breach of contract claims allege that defendants failed to give notice of their reasonable concerns about the Augusta facility; the fraud claims share the same factual predicate, i.e., material misrepresentations about the success and functionality of the Bluebird technology. Disputes arising from the failure to notify plaintiff of Rockwood's and its senior executives' knowledge, both before signing the SPA and after closing, that the Bluebird technology was not working and that the Augusta facility would not be able to meet performance standards are disputes under section 4.27.

The individual defendants, who were officers or employees of

Rockwood and did not sign the SPA in their individual capacities, are nevertheless entitled to enforce the arbitration provision, because any breach of the SPA would have to be the result of an action or inaction attributable to them. A rule allowing corporate officers and employees to enforce arbitration agreements entered into by the corporate principal "is necessary not only to prevent circumvention of arbitration agreements but also to effectuate the intent of the signatory parties to protect individuals acting on behalf of the principal in furtherance of the agreement" (*Hirschfeld Prods. v Mirvish*, 88 NY2d 1054, 1056 [1996]). Further, even a nonsignatory may be estopped from avoiding arbitration where he knowingly accepted the benefits of an agreement with an arbitration clause (*see Matter of Cammarata v InfoExchange, Inc.*, 122 AD3d 459 [1st Dept 2014]).

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

ENTERED: JULY 3, 2018

CLERK