SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 10, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6419 William Hartnett, et al., Index 400132/08
Plaintiffs-Appellants,

-against-

Chanel, Inc., et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]

Grey & Grey LLP, Farmingdale (Sherman B. Kerner of counsel), for appellants.

Clausen Miller PC, Chicago, IL (Edward M. Kay of the bar of the State of Illinois, admitted pro hac vice, of counsel), for Chanel, Inc., respondent.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for Display Craft Manufacturing Co., respondent.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered October 5, 2010, which, to the extent appealed from, granted the motions of Chanel, Inc. and Display Craft Manufacturing Company for summary judgment dismissing the complaint, affirmed, without costs.

On November 14, 2006, plaintiff, an electrician employed by

third-party defendant Bloomingdale's, Inc. (Bloomingdale's), was injured in Bloomingdale's Manhattan department store while attempting to run electrical wires for a fire alarm system for Bloomingdale's into a 8'3" x 4'7" glass display box, manufactured by defendant Display Craft Manufacturing Company (Display Craft). The illuminated display box was mounted on a column in a boutique operated by defendant Chanel, Inc. (Chanel) inside the department store, and advertised the Chanel product line. In March 2007, plaintiff commenced the instant personal injury action against Chanel and Display Craft alleging negligence, products liability, and violations of Labor Law §§ 200, 240(1) and § 241(6).

At deposition, plaintiff testified that he was trying to open the display box in order to determine whether it was possible to snake the fire alarm wire into it. First, he pressed on the sides of the display box to open it, as he had done with other smaller, hinged display boxes in the store. Although he did not see any hinges, he assumed that the display box had hinges. When it did not open, he then knelt down next to the box and attempted to open it by prying off the glass panel with a thin screwdriver along the bottom of the left edge. He testified that he believed this method would work because he had opened smaller, hinged boxes this way. As plaintiff was wedging the

screwdriver under the panel, the 146-pound panel bowed, sprang loose from the box, and fell on his hand.

Display Craft's chief executive officer testified that the display box, rather than using a piano-hinge system where the glass panel opened as a door, had a "U-channel" system where the glass panel slid into grooves on three sides of the box and was secured by bullet catches. He explained that his design utilized a "U-channel," because a piano hinge system was not capable of supporting a glass panel of that weight (146 pounds) on a box that size.

In January 2010, Chanel moved for summary judgment dismissing the complaint, arguing, inter alia, that it did not manufacture the display box and that there was no evidence that it was negligent. Chanel's engineering expert stated in an affidavit that design of the display box, including the manner in which the glass frame was secured, was safe for its intended use, and had functioned as intended for the two years before plaintiff's attempt to pry it open. He further testified that the interior of the display box was designed to house only its own components.

In February 2010, Display Craft also moved for summary judgment dismissing the complaint. Display Craft argued, inter

alia, that there was no evidence that the display box was defectively designed or manufactured and that it was plaintiff's attempt to open the box with a screwdriver that proximately caused his injury.

Plaintiff opposed the motions on the ground that the display box was defectively designed because there was no hinge and no indication of how the glass panel could be safely removed. Plaintiff argued that the design posed a latent hazard, and that Display Craft had a duty to warn against such a hazard, and Chanel had a duty to protect against known latent hazards on the premises it occupied. In support, plaintiff submitted the report of his expert industrial designer who opined that the design of the display box was negligent and that defendants failed to place any warnings on the display box, which constituted a departure from industrial design and constituted a design defect. The court granted defendants' motions,[1] finding that "it was . . . plaintiff's unilateral decision to open the box using an

[1] In the same order, the court granted a motion by Bloomingdale's to dismiss a third-party action commenced against it by Chanel. Chanel has not cross-appealed from that dismissal. The motion court also found that plaintiff abandoned his Labor Law claims, which plaintiff does not contest on appeal. Thus, plaintiff's only remaining claims are for negligence and products liability asserted against Chanel and Display Craft.

obviously unsafe method that was the sole proximate cause of the accident."

For the reasons set forth below, Chanel and Display Craft are entitled to summary judgment dismissing plaintiff's negligence and product liability claims. Plaintiff failed to raise a question of material fact as to whether the display box was defectively designed, or whether Display Craft had a duty to warn.

A manufacturer may be held liable for a defective product when it "contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]). A defectively designed product is one that "is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983] [internal quotation marks omitted]). To recover for injuries caused by a defective product, the defect must have been a substantial factor in causing the injury, and "the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable" (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 532 [1991]).

A manufacturer has a duty to warn foreseeable users of the product "against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (*Liriano*, 92 NY2d at 237). This duty also extends to dangers posed by reasonably foreseeable unintended uses of a product (*id.*).

In this case, the court properly determined that Chanel did not design the display case. The record reflects that Chanel provided conceptual drawings, but Display Craft designed and manufactured the box, including incorporation of the "U-channel" system.

Furthermore, defendants' evidence established that the display box was not defectively designed. It is undisputed that the box functioned effectively for two years until plaintiff attempted to pry off the glass panel. Chanel's expert engineer's unrebutted testimony established that the display box conformed with all applicable codes and regulations and that the use of a "U-channeled, bullet-catch design" was common in the industry.

In opposition, plaintiff failed to raise a triable issue of fact. His expert's opinion that the design was defective was purely speculative as he failed to cite to any regulations, facts or data in support of his conclusion, and as such was not sufficient to raise a triable issue of fact (*see e.g. Diaz v New*

York Downtown Hosp., 99 NY2d 542, 544 [2002]; *Delgado v County of Suffolk*, 40 AD3d 575, 576 [2007] [the plaintiff's expert's conclusions "were not supported by empirical data or any relevant construction practices or industry standards"]).

As to Display Craft's alleged duty to warn, the record reveals that Chanel was the foreseeable user and that Display Craft was aware of the difficulty of servicing the display. Display Craft's chief executive officer testified that Display Craft specifically advised Chanel to procure the services of an expert to maintain the display box. The reason for this is obvious from both the size and weight of the display itself as well as the aesthetics of the display. The record reflects that Chanel hired an expert to perform all necessary maintenance and service work on the light box display unit.

Contrary to the dissent's view, the mere fact that plaintiff had changed light bulbs in smaller display boxes in the store does not make him a foreseeable user of this particular box. There is no evidence that Bloomingdale's personnel ever performed any service tasks on the display box, including changing the light bulbs, at any time during the two years between its installation and plaintiff's accident.

Nor was plaintiff's misuse of the display unit foreseeable.

It is undisputed that the display unit was not designed to accommodate anything other than its own parts, and that neither defendant was advised that plaintiff planned to open the display box to see if he could run fire alarm wire into it. Just because the display box was located in an open area and designed so that the interior could be accessed does not mean that Display Craft should have anticipated that Bloomingdale's workers would attempt to access it for reasons having nothing to do with maintenance of the display.

Even were we to find, arguendo, that there is an issue of fact on this question, there is no duty to warn of a product's obvious danger, particularly where the injured party was fully aware of the hazard through general knowledge, observation, or common sense (*Liriano*, 92 NY2d at 242). Here, the sheer size of the glass panel, coupled with the lack of visible hinges and its failure to open as other smaller boxes did by pressing on the side, should have been warning enough to plaintiff not to attempt to pry it open from the bottom with a screwdriver *(see e.g. Bazerman v Gardall Safe Corp.*, 203 AD2d 56 [1994] [no duty to warn of the obvious risk and possibility of injury posed by moving and turning over a heavy safe which slipped and crushed the plaintiff's hand]).

Finally, Chanel is not liable to plaintiff for common-law negligence. It is undisputed that Chanel had no knowledge of the installation of the fire alarm system. Furthermore, as discussed above, it was plaintiff's method of opening the display box with a screwdriver that was the sole proximate cause of his injury. An owner may not be held liable when the accident arose out of the means and methods of a plaintiff's work, over which the owner had no authority (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

All concur except Mazzarelli, J.P. who dissents in part in a memorandum as follows:

MAZZARELLI, J.P. (dissenting in part)

Plaintiff William Hartnett worked for third-party defendant Bloomingdale's, Inc. as an electrician at its store in Manhattan. Defendant Chanel, Inc. operates a boutique in Bloomingdale's. Located inside the boutique is a large glass display box, over eight feet tall and four feet wide. The sole purpose of the box is to illuminate a transparent poster which is attached to the front panel of the box. The box was manufactured by defendant Display Craft Manufacturing Company (Display Craft) and installed in 2004.

On November 14, 2006, plaintiff was working with his supervisor, Patrick O'Toole, and a coworker, on a store-wide project to move certain modules connected to the fire alarm system. The modules had been installed inside the ceiling but O'Toole wanted them moved much closer to the floor. The module that was located in the Chanel space was in the ceiling, above a structural building column. The display box was affixed to that column. O'Toole directed plaintiff and the coworker to accompany him to the Chanel boutique to investigate whether the wiring for the module could be run through the display box so the module could be attached to the lower portion of the column.

As they walked over to the display box, O'Toole stepped away

to answer a telephone call. Before doing so, however, he asked plaintiff and his coworker to begin looking inside the display box to determine whether the plan to run wires through it was feasible. Although he had never before attempted to open up the large display box, plaintiff thought he knew how to because he had accessed other display boxes to change light bulbs. In his experience, the front panel of such a display box was a door that opened on a piano hinge. One would gently push on the side of the door opposite where the hinge was located, and it would open. Plaintiff first pressed the left side of the large panel door, and then the right side, but nothing happened. Not believing it was necessary to seek instructions on how to open the case, plaintiff got on his knees, positioned himself at the left side of the box and, using a small screwdriver, tried to pry the front panel frame from the box so that he could peer inside and determine if he could run wires through the box. Plaintiff had in the past used a screwdriver to facilitate the opening of such boxes. Because he was not able to see the entire inside of the box, plaintiff continued to pry the panel glass, with very little force, until, suddenly, it popped off the frame and struck his fingers, injuring them. As it turned out, the display box did not have a piano hinge but rather channel grooves in which the

panel glass slid into place.

Plaintiff asserted in his complaint that Chanel and Display Craft are liable for his injuries based on theories of negligence, products liability, and violations of Labor Law §§ 200, 240(1) and §241(6). In his supplemental verified bill of particulars, plaintiff alleged that the display box was defectively designed, constructed and maintained insofar as it lacked hinges to hold the front panel in place, especially because the front panels are "customarily" secured by hinges.

After discovery, Chanel and Display Craft both moved for summary judgment dismissing the entire complaint. Chanel argued that plaintiff was the sole proximate cause of the accident because, after the front panel did not pop out as he expected, he failed to investigate how the case could be safely opened, but rather forced the box open. Chanel further argued that the display box was not defective. In support of that position, it annexed the expert affidavit of George H. Pfreundschuh, P.E. Mr. Pfreundschuh stated that the manner in which the glass frame was secured was safe for its intended use. He opined that the box's channel-design at the bottom supported the glass panel's 146-pound weight, while spring-loaded pins at the top of the glass panel frame along with "bullet catches" in the "channel" kept the

front glass panel from tipping out, or sliding out of the wall-mounted display box. Pfreundschuh stated that the display case, including its lack of warnings, did not violate any safety standards, codes or regulations, and that it was obvious from the large size of the display case, its lack of hinges, and considerable weight, that the glass could not be removed with a screwdriver.

Finally, Chanel argued that, even if the display case was defective, it was not liable because it did not design or manufacture the case. In this regard, Chanel relied on the deposition testimony of two of its employees, as well as a former employee who had been an in-house architect. These witnesses collectively testified that Chanel designed the concept and "look" of the display box, but had nothing to do with its mechanics. The mechanical workings of the display case, including how it opened and closed, they testified, was contracted out to Display Craft. However, one of the Chanel employees testified that Chanel understood that the design in question could not involve the inclusion of a piano hinge because the front panel was too heavy.

Display Craft also moved for summary judgment.[1] It too argued that plaintiff's attempt to pry the panel open with a screwdriver was the sole proximate cause of the accident. It further stated that it manufactured the display box pursuant to Chanel's design intent, which called for a large case that could not possibly employ a piano hinge. Display Craft noted that, according to the testimony of Chanel's employees, there had never been an incident involving the display box in the two years between its installation and plaintiff's accident. It further pointed out that those employees testified that Chanel did not rely on Bloomingdale's employees to change the transparencies in the box but rather used a specialist named Charles Samples for such work. Display Craft also relied on the deposition testimony of its principal, Ronald Weitzman, who also stated that he understood that the transparencies in the display box would be changed by Charles Samples. He did not know, however, who was responsible for changing the light bulbs in the case.

In opposition to the motions, plaintiff argued that the sole proximate cause issue was a jury question. On the issue of whether the display case was defective, plaintiff submitted the

[1] Display Craft contends that it was improperly sued and that the proper defendant is Weitzman Industries, Inc.

expert affidavit of industrial designer Robert Anders. Anders opined that Chanel and Display Craft knew or should have known that Bloomingdale's employees might attempt to open the display box, as it encased a support column against which there was a "riser" that Bloomingdale's might need to access and because they might need to change the light bulbs in the box. He further faulted Chanel and Display Craft for failing to provide Bloomingdale's with a manual for servicing and maintaining the display box, which he stated constituted a departure from "Point of Purchase display design and industrial design standards," and for failing to place any warnings on the display box, which he stated constituted a departure from industrial design and "created a design defect in the product for all end users such as [plaintiff]." Anders further explained that the design for opening the display box was non-ergonomic, as it necessitated four men, using suction cups, to remove the glass panel and such design method/means for opening a display box was "inconsistent with acceptable display fixture design/manufacturing standards."

Anders opined that Display Craft and Chanel could have designed and engineered alternative means of creating a large glass display box. Specifically, Anders opined that the glass front panel should have been hinged, and a caster could have been

affixed at the bottom of the door (opposite of the hinged side) so as to safely distribute the weight of the glass panel door. Anders reasoned that his proposed design could be opened by a single person if the need arose to change the display box's transparency image or lights.

The court granted the motions in their entirety. It found that plaintiff abandoned his Labor Law claims against Chanel, since he failed to address those claims in his opposition papers. The court also dismissed plaintiff's products liability and negligence claims against Chanel, finding there to be no evidence that Chanel manufactured the display box, and no evidence that Chanel had any role in the installation of the wiring (for the fire alarm), or even knowledge that such work was taking place. The court further noted that plaintiff alone had decided to open the display box using a screwdriver, and that there was no evidence that Chanel contributed to plaintiff's misapprehension that the display box was hinged. The court concluded that there was no dangerous condition on the premises which contributed to the accident, and that plaintiff was injured solely as a consequence of his own decision to open the display box with a screwdriver. The court rejected Anders's expert affidavit as vague and speculative. The court also granted Display Craft's

motion for summary judgment, "[s]ince there is no evidence that the display box was defective or dangerous and since the plaintiff's own actions were the sole proximate cause of his accident."

"A manufacturer who places a defective product on the market that causes injury may be liable for the ensuing injuries. A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings for the use of the product" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998], citing *Codling v Paglia*, 32 NY2d 330, 342 [1973]). Plaintiff does not contend that the actual manufacture of the case was flawed. Rather, he contends that the design was defective, and that the case should have contained instructions on how to open it, as well as warnings that opening it in an inappropriate manner could lead to serious injury. Further, while Display Craft manufactured the display case at issue, plaintiff also seeks to have this Court hold Chanel liable as a manufacturer, based on the design input it gave Display Craft.

To establish a claim based on a design defect, a plaintiff must demonstrate that the product, though "meticulously made according to detailed plans and specifications," is "unreasonably dangerous for its intended use" (*Robinson v Reed-Prentice Div. of*

Package Mach. Co., 49 NY2d 471, 479 [1980]). The plaintiff must also show that "the product as designed was 'not reasonably safe' - that is, . . . a product which, if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 108 [1983]).

Even where a product is otherwise safe, "[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known. A manufacturer also has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable" (*Liriano*, 92 NY2d at 237 [1998] [internal citations omitted]). To be sure, where the hazard which caused the injury is open and obvious, no warning is necessary (*id.* at 241). Further, a defendant that fails to provide a warning that was otherwise required may be absolved of liability where the plaintiff should have known from common sense that his or her actions would lead to injury and can thus be considered the sole proximate cause of the accident (*see Howard v Poseidon Pools*, 72 NY2d 972, 974-975 [1988]).

The court properly determined that Chanel was not a

"manufacturer" of the display case. Although it dictated the aesthetic design of the display box at issue, plaintiff has not cited to sufficient facts or authority establishing that Chanel could be considered a manufacturer for purposes of liability. Indeed, other than one of its employees' general awareness that the design could not support the use of piano hinges, there is no evidence that Chanel was involved in determining how the display case would open. Nor is Chanel liable to plaintiff for common-law negligence as a landowner. The accident arose out of the means and methods of plaintiff's work and Chanel had no authority over his activities (*see Lombardi v Stout*, 80 NY2d 290 [1992]).

The display case was not defectively designed. It is not disputed that in the two years between the installation of the display box and the accident, the box functioned exactly as it was designed to without incident. Accordingly, it cannot be said that it was "unreasonably dangerous for its intended use" (*Robinson*, 49 NY2d at 479).

However, this does not end the inquiry, because plaintiff claims that defendants should have warned against the dangers of *unintended* use of the case's front panel. In analyzing whether Display Craft should have provided a warning regarding the display box, it is important to remember that this case comes

before this Court on a motion for summary judgment. Thus, we are bound by the usual admonition that summary judgment is a drastic remedy, to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]) and where the non-moving party has failed "to establish the existence of material issues of fact which require a trial of the action" (*id.*). This being a product liability case, we are further guided by the specific, and well-settled, principle that whether a particular misuse of a product was foreseeable, or so unreasonable as to preclude liability, is fact-intensive and is ordinarily a question for the jury (*see Liriano*, 92 NY2d at 241; *Magadan v Interlake Packaging Corp.*, 45 AD3d 650, 652 [2007]). Accordingly, to affirm the grant of summary judgment to defendants here we must conclude that, on this record, a reasonable juror could find only that plaintiff's actions were so unforeseeable as to displace defendants' liability, that a warning would have been futile, or that plaintiff was the sole proximate cause of the accident.

Display Craft does not, and cannot, argue that the display case was not meant to be opened. It is not disputed that the case was designed and built with a front panel that was intended

to be removed so workers could access the inside of the box. The initial question then, with respect to foreseeability, is whether it could reasonably have been anticipated that workers such as plaintiff would attempt to open the case in the first place. Display Craft argues that it could not, for three reasons. First, it claims that the box only covered one side of the support column and could have been accessed from other points. Thus, it argues, it could not have anticipated that a person would opt to access the column through the case when he or she could just as easily have gone through the column. Display Craft next asserts that the box was not designed to have external wires run through it, and that it was never advised that Bloomingdale's might do so. Third, Display Craft maintains that only Charles Samples was authorized to access the case. Display Craft also argues that, even if it should have foreseen that someone would attempt to open the case, it could not have anticipated that such a person would have opened it in the manner plaintiff did. This, Display Craft claims, is because the danger involved in opening the case in such a manner was open and obvious.

None of these arguments leads me to conclude that there is no issue of material fact as to whether Display Craft should have

foreseen plaintiff's actions. Display Craft's first argument that the light box covered only one side of the support column is irrelevant. Just because Bloomingdale's workers may not have needed to go through the display case to access the column does not conclusively establish that it would have been unreasonable for them to do so. Indeed, Display Craft fails to explain why the existence of other access points would necessarily foreclose the possibility that workers would attempt to go through the case. Similarly, that Display Craft was not specifically advised that Bloomingdale's might try to run wires through the display is not determinative of whether a jury could find that, because the box was installed in an open area and was designed such that the inside could be accessed, Display Craft should have anticipated that different workers would attempt to open the case for a variety of reasons. Also irrelevant is the involvement of Charles Samples. The record indicates only that Samples was retained to change the transparencies in the display boxes. The various witnesses, including Weitzman, could not state whether it was also Samples's responsibility to change the bulbs inside the display case. Indeed, plaintiff himself testified that he had changed bulbs in similar-looking boxes. This suggests that

Display Craft should have foreseen that Bloomingdale's workers would attempt to open the display case doors as they did with the myriad of other such cases throughout the store.

Also not dispositive is Display Craft's argument that plaintiff ignored an open and obvious hazard in attempting to open the case. The record is not clear that the danger should have been readily apparent. There is no evidence in the record that, despite the large size of the case, plaintiff should have anticipated, before he even attempted to open the box, that it did not contain a piano hinge. Similar, but smaller, cases did have such a hinge. Importantly, as Weitzman testified, some piano hinges are hidden inside the mechanism and are not externally apparent. Thus, the fact that no hinge was visible is not dispositive of whether the case had one. There is no reason to assume that common sense, or anything in plaintiff's training or experience, should have led him to believe that a piano hinge could not have supported the front panel. Further, plaintiff's deposition testimony does not show that, at the time the panel became dislodged, he had already realized that the door was not attached with a piano hinge but had a different opening mechanism altogether. Rather, plaintiff's testified that he was almost

simultaneously in the process of prying the door open with the screwdriver and looking inside it when the panel fell off. Also, plaintiff testified that he had previously used a screwdriver to open up display cases which opened on a piano hinge. Thus, as far as plaintiff was concerned, there was no obvious danger when in attempting to do his job he applied a little bit of force to the panel.

The record is also inconclusive on the issue of whether a warning could have prevented the accident. It is true that plaintiff testified that, after he unsuccessfully attempted to open the display box by pushing on its face, he did not see the need to ask for instructions. However, the evidence is that he was not aware that the display case did not open on a hinge, and would not open with the assistance of a screwdriver as others had in the past. Further, other than a conclusory statement from its expert, Display Craft offers nothing to show that it would have been impossible or even inconvenient to provide a warning about the proper way to open the case on the front panel itself, without interfering with the general aesthetic of the display.

On the record presented, Display Craft never made a showing sufficient to shift the burden to plaintiff on that issue (*see*

Johnson v Queens-Long Is. Med. Group, P.C., 23 AD3d 525, 527 [2005]). Even had the burden shifted, Display Craft's argument that plaintiff's expert failed to cite any code provision, standard, rule or regulation is unavailing. There is no authority which limits the need for safety warnings to situations where a legislative or industry body has expressly provided for the placement of such a warning.

Finally, plaintiff's testimony that he believed at all times that the front panel was supposed to open on a piano hinge, and that in the past he had nudged such doors open with a screwdriver, precludes a finding, at this stage, that he was the sole proximate cause of the accident. While Display Craft argues that plaintiff was aware of the use of suction cups at Bloomingdale's for removing heavy glass panels, his knowledge was limited to the use of such devices to remove panels attached to the sides of escalators. This does not mean that plaintiff therefore should have known that suction cups were needed to remove the front of the display box in question.

In cases like this, summary judgment is to be awarded only where no interpretation of the facts advanced by the plaintiff could lead a rational trier of fact to return a verdict in his favor. Here, the facts certainly could support a finding that

Display Craft had a duty to warn plaintiff of the dangers attendant to the manner in which he attempted to open the display case. Accordingly, I dissent, because it was error on this record for the motion court to award Display Craft summary judgment.

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

ENTERED: JULY 10, 2012

DEPUTY CLERK

Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6563 William Jacobsen, Index 103714/08
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation,
Defendant-Respondent.

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McCallion & Associates, LLP, New York (Kenneth F. McCallion of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 19, 2011, which granted defendant's motion for summary judgment dismissing the complaint, affirmed, without costs.

Plaintiff alleges that he was wrongfully terminated from his position because of a disability, in violation of the New York State Human Rights Law (Executive Law § 296[1][a]) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107[1][a]). In 1979, plaintiff began working as an assistant health facilities planner with defendant, New York City Health and Hospitals Corporation (HHC). Plaintiff monitored the independent contractors on construction and renovation jobs at facilities operated by HHC. He would visit the job sites one or

two days a week to meet with facility directors, examine existing structures, and review and supervise the contractors' work. Plaintiff would spend the remaining work week at HHC's central office in Manhattan, completing written and oral reports on the progress of various projects.

In 1982, plaintiff was promoted to Health Facilities Planner, and although this promotion assigned him to larger projects, his daily tasks remained the same. In August 2005, plaintiff was assigned to the Queens Hospital Network, whose main hospital was undergoing major renovation. As a result of this reassignment, plaintiff's office was relocated to Queens Hospital and he only worked at the central office once a week or every other week, to attend meetings. Plaintiff was also required to visit construction areas at Queens Hospital on a daily basis.

In September 2005, plaintiff was diagnosed with pneumoconiosis, an occupational lung disease. In October 2005, plaintiff requested, and was granted, a medical leave of absence. Plaintiff's physician, Dr. Skloot, stated on plaintiff's application for leave that he "currently cannot perform usual tasks" and that he was unable to perform any one or more of the essential functions of his job since he "should not be exposed to inhaled dusts." In a December 2005 letter to HHC, Dr. Skloot

cleared plaintiff to return to work on January 3, 2006, but directed that he not be present at any construction site. HHC sent a follow-up letter to Dr. Skloot listing plaintiff's duties and explaining that he is required to spend approximately 75% of his time in the field monitoring construction sites. HHC asked for clarification as to whether or not, based on the provided information, plaintiff was cleared to fully perform the "essential functions of his duties."

On January 5, 2006, plaintiff's union representative sent a letter to HHC requesting that plaintiff be permitted to return to work with an accommodation of being assigned work "that he is capable of doing in the office." On March 21, 2006, plaintiff provided another letter from Dr. Skloot stating that he was medically cleared to work in the field. Plaintiff returned to work at the Queens Hospital location on March 27, 2006.

From March until May of 2006, plaintiff did not request any further accommodation from HHC and continued to make field visits during this time. On May 10, plaintiff sent a letter to his supervisor in the central office, Vincent James, requesting relocation to that office as a reasonable accommodation. James determined that plaintiff needed to spend approximately 80% of his time in the field, which included visiting construction

sites, to fully complete the “essential functions” of his position. James explained that eliminating all construction sites from plaintiff’s duties would make it impossible for him to perform his job.

By letter dated June 6, 2006, HHC informed plaintiff that he would be placed on unpaid medical leave for six months and his job would be left open in the event that his condition improved. The letter explained that plaintiff’s proposed accommodation, relocation to the central office, was infeasible because plaintiff’s position required that he visit facilities that have ongoing construction. In August 2006, Dr. Skloot wrote to HHC in response to a request for clarification of plaintiff’s medical condition. Dr. Skloot advised that plaintiff could never be medically cleared to perform the essential functions of his current duties because he should not be further exposed to any type of environmental dust. Dr. Skloot further stated that plaintiff was cleared to do office work only. On March 26, 2007, at the conclusion of the six months of unpaid leave, plaintiff’s employment was terminated.

Plaintiff subsequently commenced this action for wrongful termination because of a disability. Defendant moved for summary judgment, arguing that plaintiff’s termination was proper insofar

as he was unable to perform an essential function of his position - namely, visiting construction sites to inspect the progress of construction. The motion court properly granted summary judgment, finding that plaintiff's job, by his own admission, required him to spend substantial time at construction sites. The motion court further concluded that since plaintiff's own doctor determined that he could not spend time in the field, the inevitable conclusion was that he could never return to his duties.

The majority and the dissent agree on the basic law applicable to this case. To state a prima facie case of employment discrimination due to a disability, a plaintiff must demonstrate that he or she suffered from a disability and that the disability caused the behavior for which he or she was terminated (*Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]). Once a plaintiff establishes a prima facie case, the burden shifts to the employer, here HHC, to show that the disability prevented plaintiff "from performing the duties of the job in a reasonable manner or that the employee's termination was motivated by a legitimate nondiscriminatory reason" (*id.*). HHC met its burden by establishing that at the time of termination, plaintiff was unable to perform the duties of his job because of

his lung condition and that no reasonable accommodation was available.

Under the Executive Law, a "reasonable accommodation" is defined as "actions taken by [an] employer which permit an employee . . . with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held . . . provided, however, that such actions do not impose an undue hardship on the business" (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 [2006], *quoting* Executive Law § 292 [21-e], *lv denied* 7 NY3d 707 [2006]). Under the City's Human Rights Law, an employer "shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job" (Administrative Code § 8-107 [15][a]). An employer is not required to find another job for the employee, create a new job, or create a light-duty version of the current job (*Pimentel*, 29 AD3d at 148).

HHC established that plaintiff could not, even with a reasonable accommodation, perform the essential functions of his job (Executive Law § 292[21]; Administrative Code § 8-107[15]). Vincent James, plaintiff's supervisor at the central office, testified that plaintiff's position required him to spend the majority of his time at construction sites. The only way

plaintiff would be able to report on construction progress was to be present at the site; therefore, it was not possible for plaintiff to complete his duties from the central office. HHC pointed to letters from Dr. Skloot and plaintiff's own deposition testimony in which he admits that he can no longer visit construction sites, which was the bulk of his work. Although plaintiff claimed he could perform all his duties from the central office, he failed to explain how he could monitor the progress of construction and renovation projects, an essential function of his job, from the central office without visiting the sites.

Under both New York's Executive Law and the City's Administrative Code, an employer is required to perform an individual assessment of an employee prior to terminating him (*Bellamy v City of New York*, 14 AD3d 462 [2005]). This assessment must be part of a "good faith interactive process" (*Phillips v City of New York*, 66 AD3d 170, 175 [2009]). Contrary to the dissent's finding, the record shows that HHC engaged in an interactive process. HHC sought clarification from Dr. Skloot regarding plaintiff's medical condition and his ability to perform his job. Indeed, they kept plaintiff's job open during two separate medical leaves, during which time HHC was in

communication with plaintiff and his doctor. HHC provided Dr. Skloot with plaintiff's job description and made her aware that plaintiff was required to spend a portion of his time in the field at construction sites. It was only after plaintiff's doctor and plaintiff himself confirmed that he could no longer work at construction sites that HHC terminated him.

Plaintiff also contends that HHC failed to make a reasonable accommodation by assigning him back to Queens Hospital in March 2006 without providing him with proper respiratory equipment that would prevent any further exacerbation of his lung condition. However, plaintiff focused below on HHC's denial of his request to work in an office, not on the adequacy of the equipment provided to him. In fact, plaintiff's affidavit in opposition to the motion for summary judgment stated that HHC could have relocated him to the central office. It is only on appeal that plaintiff focuses on the argument that he could have remained at Queens Hospital full-time as long as he had proper respiratory equipment.

The dissent contends that HHC did not engage in an interactive process regarding the respiratory equipment, and as support, points to plaintiff's deposition testimony that at some point in March 2006, he complained to his supervisor at Queens

Hospital about the dust and requested a respirator. However, plaintiff also stated at his deposition that after complaining about the dust, he was provided with a dust mask. Plaintiff testified he did not consistently wear that mask because it made it difficult to communicate. Thus, having failed to wear the mask given to him, plaintiff can hardly complain he never got protection. Further, although plaintiff now argues that the dust mask was inadequate, he never made any additional complaints to his supervisor or anyone else about it, nor did he request different equipment than what he was given. Finally, all of the letters that plaintiff relies on, from his doctor, union representative, and plaintiff himself, make a request for relocation to the central office or an environment free of dust. None of the letters ask for a respirator so that plaintiff could remain at the Queens Hospital location. In this case, HHC should not be held responsible for not engaging further with plaintiff about the respirator when plaintiff's own doctor provided documentation supporting a transfer to an office job as the solution for plaintiff's disability.

The motion court also properly dismissed plaintiff's claim of gross negligence since the action was not commenced until more than three years after the claim accrued (*see* McKinney's Uncons

Laws of NY § 7401[2]). Plaintiff's argument that the claim accrued on the date of his termination is without merit since the claim for gross negligence arose from personal injuries caused by alleged exposure to asbestos and not from his termination. In any event, plaintiff's action is barred by operation of the Workers' Compensation Law (*see Acevedo v Consolidated Edison Co. of N.Y.*, 189 AD2d 497 [1993], *lv dismissed* 82 NY2d 748 [1993]; Workers' Compensation Law § 11).

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

All concur except Manzanet-Daniels, J. who dissents in part in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting in part)

I agree with the majority that the motion court properly dismissed plaintiff's claim of gross negligence; I disagree, however, with the decision to the extent it affirms dismissal of plaintiff's claims for disability discrimination. Plaintiff alleges that defendant failed to provide him with the required safety equipment, and denied his reasonable request for reassignment to a prior position or for a respirator to limit exposure to the asbestos and environmental dust he encountered at the work site. It is undisputed that plaintiff, a long-time employee of HHC, suffers from disabling, chronic lung disease as a result of occupational exposure to construction dust.

For 26 years, plaintiff worked out of HHC's central office at 346 Broadway in Manhattan. While there, he worked principally in the office and made site visits, on average, once or twice per week.[1] In August 2005, plaintiff's assignment was changed from the Bellevue Network to the Queens Hospital Network, whose main hospital was undergoing major renovation, including asbestos abatement. Plaintiff had an office at Queens Hospital Center,

[1]Plaintiff served first as a health facilities manager, and later as a network manager. He testified that his duties remained the same, despite the change in job title.

and visited construction sites on a daily basis.[2] Plaintiff testified that at no time prior to his transfer, nor at any time thereafter, was he provided with respiratory equipment by his employer. He testified that he had been provided with a "dust mask" at Queens Hospital, but explained that a dust mask is insufficient protection since, unlike a respirator, it is not specifically designed to filter particulates. He testified that he had requested a respirator from Anita O'Brien, his supervisor at the time, but that such request was never granted.

In September 2005, plaintiff was diagnosed with pneumoconiosis, an occupational lung disease. On or about October 17, 2005, plaintiff's request for a medical leave of absence under the Family and Medical Leave Act was approved retroactively for the period September 9, 2005 to December 2, 2005. Plaintiff provided HHC with a letter from his pulmonologist, Dr. Skloot, dated December 6, 2005, indicating that his condition had improved with steroid treatment, and that he was ready to return to work, but stating that it was "imperative that he not be further exposed to any type of

[2]Plaintiff testified that construction was also ongoing in his office at Queens Hospital, explaining that HHC was installing a refrigeration air conditioning system for the building.

environmental dust. Specifically, this means that he cannot be present at any construction site."

On January 3, 2006, when plaintiff returned to work, he was told there were "problems" and that he should go home until called. On or about January 5, 2006, plaintiff's union representative requested that a reasonable accommodation be made on plaintiff's behalf and that he be assigned work capable of being performed in an office.

On March 21, 2006, Dr. Skloot wrote that plaintiff had demonstrated "significant clinical improvement," and was ready to return to work immediately. She stated that "he is medically cleared to work in the field," further noting that she had advised plaintiff that it was "imperative that he not be exposed to any type of environmental dust," and that plaintiff had assured her that his field work would not include such exposure.

On March 27, 2006, plaintiff returned to work, and while he believed, based on his doctor's note, that he would be returning to the central office and only occasionally visiting construction sites, he was sent back to Queens Hospital to the same network manager position he had occupied before his medical leave. Plaintiff testified that he complained about the dust to his supervisor at Queens Hospital on several occasions from March to

May 2006, and requested a respirator as a reasonable accommodation. Plaintiff testified that in March 2006 he was capable of performing his job out of the central office. When required to visit construction sites, he could do so with proper respiratory protection.

On May 10, 2006, plaintiff requested immediate reassignment to the central office as a reasonable accommodation. Plaintiff stated that he was able to perform any and all functions that had been assigned to him prior to his relocation to Queens Hospital Center. In support of his request, plaintiff submitted a letter from Dr. Stephen M. Levin of Mt. Sinai Hospital, who was treating plaintiff for "severe, impairing scarring lung disease, the result of prior inhalation exposures to asbestos and other mineral dusts in his work environment." Dr. Levin strongly recommended that plaintiff be "placed in a work setting free from exposure to airborne irritant or fibrogenic dusts, fumes and gases."

The request was denied. On June 6, 2006, plaintiff was placed on unpaid medical leave and his job was left open in the event that his condition improved. On March 26, 2007, at the end of the leave, plaintiff's employment was terminated.

It is undisputed that plaintiff suffers from severe,

degenerative lung disease. He has suffered numerous pulmonary complications as a result of his condition, including a pneumothorax, or collapsed lung, and will eventually need a lung transplant.

On or about March 10, 2008, plaintiff commenced suit against HHC by service of a summons and verified complaint. Plaintiff's complaint alleged disability discrimination in violation of the State Human Rights Law (Executive Law § 296) and the New York City Human Rights Law (Administrative Code of the City of NY § 8-107), and gross negligence.

Defendant moved for summary judgment. The court granted the motion, finding that "[p]laintiff's own medical evidence, from his doctor's letter, leads to the inevitable conclusion that the plaintiff cannot, for medical reasons, spend any time at a construction site, and therefor [*sic*], can never return to his old duties. By the plaintiff's own evidence, he has not been discriminated against." I disagree. Plaintiff's submissions raise triable issues of fact. Plaintiff testified that he was capable of performing his job during the spring of 2006. His doctor's letter granting medical clearance stated that plaintiff was capable of performing his job so long as his exposure to construction dust was limited. Defendant asserts that plaintiff

was unable to visit construction sites, but plaintiff testified that he could visit sites so long as he was provided with proper respiratory protection. Thus, a triable issue of fact exists as to whether plaintiff was capable of performing the essential functions of his job.

A triable issue of fact also exists as to whether defendant made a reasonable accommodation for plaintiff's disability. Under the State Human Rights Law, an employer is obligated to "provide reasonable accommodations to the known disabilities of an employee . . . in connection with a job or occupation sought or held" (Executive Law § 296[3][a]; *Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 [2006], *lv denied* 7 NY3d 707 [2006]). "Reasonable accommodation" is defined as actions taken by an employer which "permit an employee . . . with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held . . . provided, however, that such actions do not impose an undue hardship on the business" (Executive Law § 292[21-e]). Similarly, the City's Human Rights Law requires that an employer "shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job" (Administrative Code § 8-107[15][a]).

There is no dispute that plaintiff suffered from a "disability" within the meaning of the relevant statutes. Plaintiff had asthma and pulmonary problems as of the date of his reassignment from the main office to the Queens Hospital construction site. In September 2005, several months after his reassignment, he was diagnosed with pneumoconiosis, an occupational lung disease, and was found, upon biopsy, to have asbestos, silicates and other construction materials in his lungs.

Under the Executive Law, "reasonable accommodation" includes, but is not limited to, "provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules" (Executive Law § 292[21-e]). The Division of Human Rights also recognizes that "reasonable accommodation" may include "reassignment to an available position" (9 NYCRR 466.11[a][1],[2]).

Plaintiff testified that he complained to his supervisor about airborne dust several times during the March 2006 through May 2006 time frame, and that he specifically requested respiratory protection. He requested reassignment when his supervisor failed to grant his request. As plaintiff notes,

defendant could have accommodated his disability by (1) reassigning him to the central office, where, for more than 20 years, he performed field visits on a once a week basis; or (2) assigning him to the Queens Hospital construction site with the requisite respiratory equipment to prevent further exacerbation of his condition. Defendant did neither. Indeed, there is no evidence that defendant engaged in a good faith interactive process to assess the needs of plaintiff and the reasonableness of the accommodation requested, the first step in providing a reasonable accommodation (*see Phillips v City of New York*, 66 AD3d 170, 176 [2009]). We have stated that the failure to consider the requested accommodation by engaging in an individualized, interactive process is a violation of the State and City statutes (*id.*).

As the majority notes, the record showed that defendant employer provided plaintiff with an ordinary cloth dust mask. However, the provision of a dust mask, of the type to be found in any hardware store, is not a "reasonable accommodation" for a worker who is exposed to asbestos dust on a daily basis. In this context, a specialized mask or respirator device designed to filter and protect against airborne dust from known toxins and potential carcinogens would be the type of "reasonable

accommodation" envisioned by the statute. Indeed, defendant was under an affirmative legal obligation by various workplace safety regulations to provide adequate protective equipment to employees assigned to work in construction sites in which they might be exposed to hazardous materials. It is certainly reasonable to expect that they would furnish such equipment to plaintiff, who was already suffering from progressive lung disease as a result of occupational exposure.

I would accordingly modify to reinstate plaintiff's claims under the New York State Human Rights Law (Executive Law § 296[1][a]) and the New York City Human Rights Law (Administrative Code § 8-107[1][a]).

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

ENTERED: JULY 10, 2012

DEPUTY CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6819 Dany David, Index 103705/11
Plaintiff-Respondent,

-against-

Michail Z. Hack, et al.,
Defendants-Appellants.

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Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Lisa L. Shrewsberry of counsel), for appellants.

Savitt Law Firm PLLC, New York (Richard P. Savitt of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered September 19, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' pre-answer motion to dismiss, pursuant to CPLR 3211(a)(1), (5) and (7), the cause of action for legal malpractice, unanimously reversed, and the motion granted, without costs.

By written agreement dated April 28, 2009, plaintiff, a commodities trader with MBF Clearing Corporation, retained defendant Quadrino & Schwartz, P.C., on an hourly fee basis, "to represent him in connection with the filing of long term disability claims under two Guardian group policies." At that time, the "look back period" for determining an employee's "Insured Earnings," used to calculate the amount of benefits to

which the employee was entitled, was one year from the date of disability. As of May 1, 2009, the look back period was increased to three years.

In support of his malpractice claim, plaintiff alleges that defendants, without his knowledge, submitted a claim form that incorrectly stated that the date of his disability was "4/9/09," which was the day he stopped trading, not the day he was determined to be disabled; the latter he alleges was May 13, 2009. Plaintiff contends that as a result of this error, Guardian applied the one-year look back period, which led to the denial of his claim on April 14, 2010, because his 2008 income tax return showed a loss. Although plaintiff, on a contingency fee basis, retained new counsel who successfully appealed the denial, he seeks to recover from defendants the additional costs, expenses and attorneys' fees he incurred in prosecuting that appeal.

Supreme Court correctly determined that issues of fact exist as to whether the release signed by plaintiff on March 31, 2010, in connection with the settlement of his fee dispute with defendants, was obtained in violation of the Rules of Professional Conduct (22 NYCRR § 1200.0), rule 1.8(h)(2)(*see Swift v Ki Young Choe*, 242 AD2d 188, 192 [1998]; *see also Newin*

Corp. v Hartford Acc. & Indem. Co., 37 NY2d 211, 217 [1975]). However, the malpractice claim must nevertheless be dismissed because the evidentiary materials submitted by the parties conclusively establish that defendants breached no duty to plaintiff, and that no alleged damages were caused by any act of defendants (*see O'Callaghan v Brunelle*, 84 AD3d 581 [2011], *lv denied* 18 NY3d 804 [2012]; *Between The Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380, 381 [2002], *lv denied* 98 NY2d 603 [2002]).

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence relied on by the defendant must "conclusively establish[ ] a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*id. at* 87-88). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]).

At the heart of plaintiff's malpractice claim is his assertion that defendants could have obtained the date of his disability from his treating physician, Dr. Schottenstein, at any time after May 13, 2009, but refused or neglected to do so. However, the record demonstrates that when plaintiff's new counsel argued in his June 14, 2010 appeal letter to Guardian that the claim turned on the date it was determined that plaintiff was disabled, not on the date he ceased trading, he relied on the "*June 10, 2010* Medical Record of Dr. Douglas Schottenstein, NYSpinemedicine, *which for the first time* gives [plaintiff] a date of disability on May 13, 2010" (emphasis added). Defendants ceased acting as plaintiff's attorney on December 23, 2009, well before the June 10, 2010 record was available.

The documentary evidence further demonstrates that defendants' submissions to Guardian were based on the information available to them. Defendants were retained to file a disability claim on April 28, 2009, which predates the date on which plaintiff claims it was determined that he was disabled. Plaintiff's claim form, dated September 2, 2009, states that April 9, 2009 was the date that he became unable to work because of illness or injury. While plaintiff asserts that he signed the

claim form in blank, the e-mail he relies on shows that he was provided with a draft claim form, asked to review it and complete the unanswered questions, and told that the information would then be typed into the form he signed. Further, on September 9, 2009, plaintiff sent defendants an e-mail stating that "[m]y last trading day was [A]pril 8th." Defendants relied on that date to complete the disability claim form, which they submitted to Guardian that day.

Defendants also submitted to Guardian Dr. Afshin Razi's physician's statement, dated August 27, 2009, which states that Dr. Razi first evaluated plaintiff for his back condition on May 27, 2008, and last treated him on March 19, 2009, and that plaintiff had "[m]oderate limitations of functional capacity; capable of clerical/administrative (sedentary) activity (60-70%)" (footnote omitted). Dr. Razi added that plaintiff "cannot carry heavy bag or be on the trading floor where he may be jostled[,] which may injure his back."

Consistent with the foregoing, the employer section of plaintiff's disability claim, dated September 25, 2009, states that the date the disability began was "unknown," that the last date plaintiff worked on the "floor" was April 7, 2009, and that the reason for leaving work was a disability. Defendants also

provided Guardian with Dr. Razi’s and Dr. Schottenstein's medical records, the receipt of which Guardian confirmed in a letter dated October 20, 2009, in which Guardian advised defendants that it had requested additional information directly from the doctors.

We also note that Guardian’s denial was not final at the point that defendants ceased representing plaintiff on December 23, 2009. In its letter dated December 17, 2009, Guardian stated that it had been determined that plaintiff's disability was “supported” from April 7, 2009, but denied the claim because it had not received his 2008 tax return and trading statements or logs for the year April 8, 2008 through April 7, 2009, which were needed to determine his monthly benefit. The letter further advised counsel that if plaintiff wished to appeal the determination he needed to submit those documents. That information was provided to Guardian on February 22, 2010, at which point defendants no longer represented plaintiff. When Guardian denied plaintiff’s disability claim on April 14, 2010 "because the information you submitted does not support any insured earnings as of the date you ceased work full-time on April 7, 2009," it stated:

"We did receive a new Long Term Disability Claim form

> from you dated March 23, 2010 indicating that your disability did not begin until May 8, 2009, however, we have copies of your trading records for 2009 that show that the last day you[] traded in April 2009 was April 8, 2009. Since we have no record of your trading past this date we would use this as the date you last worked."

Thus, after defendants ceased representing plaintiff, Guardian, which had Dr. Razi's and Dr. Schottenstein's medical records, considered plaintiff's revised claim that his disability did not start until May 2009. Nevertheless, Guardian did not grant the claim until it received Dr. Schottenstein's June 10, 2010 medical records.

Given these circumstances, the evidentiary submissions refute plaintiff's allegations that Guardian denied his disability claim because defendants failed to submit critical information that was or should have been available to them, and establish a defense as a matter of law warranting dismissal of the malpractice claim.

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

ENTERED: JULY 10, 2012

DEPUTY CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7603 Jose Torres, Index 13962/07
Plaintiff-Appellant,

-against-

Gamma Taxi Corp., et al.,
Defendants-Respondents.

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

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Lindsay J. Kalick of counsel), for respondents.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered March 25, 2011, which granted defendants' motion for renewal and, upon renewal, granted their motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), modified, on the law, to deny the motion as to the claims for property damage, and otherwise affirmed, without costs.

After their prior motion was decided, defendants discovered that plaintiff had been involved in two previous motor vehicle accidents resulting in injuries to the very body parts at issue here (*see* CPLR 2221[e][2]). Plaintiff's lack of candor at his deposition about the earlier injuries constitutes a reasonable

excuse for defendants' failure to present these facts on the prior motion.

Defendants established prima facie that plaintiff's alleged injuries were not caused by the subject accident, by submitting a radiologist's affirmed reports stating that plaintiff's lumbar and cervical spine MRIs revealed multilevel degenerative disc disease, and a neurologist's affirmation stating that the earlier accidents caused plaintiff's injuries and that plaintiff's present symptoms were mere recurrences of the earlier symptoms (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]). Plaintiff's expert states conclusorily that he reviewed plaintiff's newly discovered records from the earlier accidents, but fails to explain their effect on his updated opinion as to causation, and therefore his opinion is too speculative to raise an issue of fact (*see id.*; *Arroyo v Morris*, 85 AD3d 679, 680 [2011]).

Plaintiff's claim of property damage is distinct from his personal injury claim. Indeed, defendants' motions were directed at the latter only. For that reason, we reject their contention that plaintiff failed to preserve this argument.

All concur except Acosta and Manzanet-Daniels, JJ. who dissent in part in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting in part)

I would deny defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d). While plaintiff, admittedly, had been involved in two prior motor vehicle accidents, one in 1999, and the other in 2001, the record demonstrates that plaintiff sustained only cervical and lumbar strains and sprains and a torn medial meniscus in connection with those accidents. The record, including earlier MRIs of plaintiff's knee and lumbar spine, refute the notion that plaintiff had pre-existing lumbar and cervical bulges and herniations. Indeed, a 2001 MRI of plaintiff's cervical spine was "unremarkable," and specifically found no "bulge, herniation protrusion or extrusion." A 1999 MRI of plaintiff's lumbar spine found "slight narrowing of the L5-S1 disc space" and mild lumbar spondylosis, but was otherwise unremarkable.

Magnetic resonance imaging of plaintiff's spine following the 2005 accident, on the other hand, demonstrates posterior disc bulging at L5-S1, as well as posterior disc herniation at the level of C5-C6.

We must not let what the majority describes as plaintiff's

"lack of candor" distract us from the record evidence, which demonstrates the existence of a triable issue of fact as to whether his current injuries are attributable to the 2005 accident.

Defendants' expert never opined that the injuries sustained in the 2005 accident, i.e., cervical disc herniation and lumbar disc bulge, were caused by or are in any way similar to the injuries plaintiff sustained in the two prior accidents.[1] In the absence of any such allegation, defendants have failed to make a prima facie showing that the plaintiff's alleged injuries were caused by a prior accident (*see Bray v Rosas*, 29 AD3d 422, 423-24 [2006]; *Giangrasso v Callahan*, 87 AD3d 521, 523 [2011]; *Jin Ying Zi v Vandoulakis,* 85 AD3d 975, 977 [2011]; *Messiana v Drivas*, 85 AD3d 744 [2011]; *Jean-Baptiste v Tobias*, 88 AD3d 962 [2011] [although defendants submitted evidence that plaintiffs had been involved in prior accidents where they had injured some of the same regions of the body they claim to have injured in the

[1]Defendant's expert states only that the 2005 accident caused a "recurrence of similar symptoms of sprain and strain in the cervical and lumbar spine," a clever way of sidestepping the issue of whether plaintiff's current *injuries,* cervical disc herniation and lumbar disc bulge (as opposed to transient symptoms such as sprains or strains) were caused by the prior accidents.

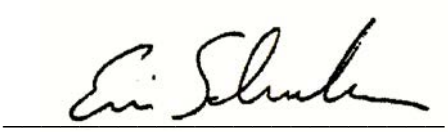
subject accident, the defendants failed to make a prima facie showing that the plaintiffs' claimed injuries in the subject accident were actually caused by the prior accidents]).

In any event, plaintiff raised a triable issue of fact as to whether his current injuries were caused by the subject accident sufficient to defeat the motion. Plaintiff's expert reviewed and considered the records from the prior accidents, and nonetheless opined that plaintiff's injuries were attributable to the 2005 accident. This opinion cannot be dismissed as "speculative" in light of the record evidence that earlier MRI studies of plaintiff's cervical and lumbar spines were negative.

I would accordingly deny the motion for summary judgment.

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

ENTERED: JULY 10, 2012



DEPUTY CLERK

Mazzarelli, J.P., Friedman, Catterson, Richter, Manzanet-Daniels, JJ.

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Index 109178/08

Elaine Blech, et al.,
Plaintiffs-Respondents,

-against-

West Park Presbyterian Church, et al.,
Defendants,

Monadnock Construction, Inc., et al.,
Defendants-Appellants.

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Mound, Cotton Wollan & Greengrass, New York (Steven A. Torrini of counsel), for Monadnock Construction, Inc., appellant.

Smith Mazure, Director, Wilkins, Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for Richmond Housing Resources, LLC, appellant.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondent.

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Orders, Supreme Court, New York County (Joan M. Kenney, J.), entered January 28, 2011, which denied defendants Richmond Housing Resources, LLC's and Monadnock Construction, Inc.'s motions to dismiss the complaint as against them pursuant to CPLR 3211 and 3212, and CPLR 3212, respectively, unanimously affirmed, without costs. Order, same court and Justice, entered on or about September 23, 2011, which, upon reargument, denied the part

of Richmond's motion that sought to dismiss pursuant to CPLR 3212, unanimously reversed, on the law, without costs, and the motion granted. Order, same court and Justice, entered September 23, 2011, which, to the extent appealable, denied Monadnock's motion to renew its motion for summary judgment, unanimously affirmed, without costs. Order, same court and Justice, entered October 12, 2011, which denied Monadnock's second motion for summary judgment dismissing the complaint and all cross claims against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants' initial motions for summary judgment were premature, since the matter was in the early stages of discovery, and depositions had not yet been taken (*see* CPLR 3212[f]; *Tucker v New York City Tr. Auth.*, 42 AD3d 316 [2007]; *Gonzalez v Vincent James Mgt. Co.*, 306 AD2d 226 [2003]). The motion court erred in denying Richmond's motion to reargue on the grounds that, inter alia, discovery "had not yet begun." At the time of Richmond's motion to reargue, virtually all discovery had concluded, including the depositions of all of the parties. The motion court also erred when it found that the motion to reargue was untimely. The record reveals that the motion was served within

30 days from service of the underlying order with notice of entry (CPLR 2221[d][3]). Finally, while the court addressed Richmond's CPLR 3211 motion in its original decision, it failed to address the merits of the 3212 motion.

We find that Richmond made out its prima facie entitlement to summary judgment. Richmond put forth evidence that it did not own the property adjacent to the sidewalk defect, performed no construction at the property, did not contract for or erect the sidewalk bridge on the property, or create the condition complained of. In response, plaintiffs failed to either refute Richmond's contentions or identify any contractual obligation of Richmond that would give rise to tort liability; namely, a duty owing to plaintiffs. Thus, the motion court should have granted reargument and dismissed the claims against Richmond on summary judgment.

Monadnock's motion for leave to renew was made in violation of a prior order of the court. However, in its second motion for summary judgment, Monadnock established prima facie, through the parties' deposition testimony and certain documentary evidence, that it provided pre-construction services, such as planning and estimating, in connection with the anticipated demolition and renovation of the subject premises. However, ultimately

Monadnock did not perform any physical work there or contract with others to do so. Indeed, the record again reveals that no construction work of any type was performed at the premises and the proposed project was abandoned due to the downturn in the economy. Additionally, the premises was being considered for landmark status. Plaintiffs failed to raise a triable issue of fact whether Monadnock's involvement at the premises created a duty to the injured plaintiffs that was breached or whether Monadnock caused or contributed to the alleged dangerous condition of the premises *(see Amarosa v City of New York*, 51 AD3d 596 [2008]; *Bermudez v City of New York*, 21 AD3d 258 [2005]; *Kenyon v City of New York*, 194 AD2d 398 [1993]). Finally, even were we to accept that Monadnock owed plaintiffs a duty, plaintiffs' claim that Monadnock's involvement establishes that it had constructive notice of the dangerous condition and raises an inference as to its creation of the condition is speculative.

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

ENTERED: JULY 10, 2012

DEPUTY CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7797 Citibank, N.A., Index 106237/10
Plaintiff-Appellant,

-against-

Uri Schwartz & Sons
Diamonds Ltd., etc., et al.,
Defendants-Respondents.

Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP, New York (Steven D. Karlin of counsel), for appellant.

Schiller Law Group, P.C., New York (Ben Kinzler of counsel), for Uri Schwartz & Sons Diamonds, Ltd., respondent.

The Law Office of Sheldon Eisenberger, New York (Sheldon Eisenberger of counsel), for Zvi Ben Yosef, respondent.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered October 20, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment in its favor as against defendants, unanimously modified, on the law, to grant plaintiff's motion for summary judgment as against defendant Zvi Ben Yosef, as to liability, and remand the matter for an inquest on damages, and otherwise affirmed.

In an action for breach of contract, account stated, unjust enrichment and breach of guaranty against corporate defendant Uri Schwartz & Sons Diamonds, Ltd. (Schwartz) and individual

defendant Zvi Ben Yosef (Ben Yosef), plaintiff Citibank seeks to recover damages under the terms of a loan agreement and a personal guarantee, both executed by Ben Yosef in November 2007. Schwartz is the New York sales office for, and owner and operator of, A. Schwartz & Sons, a wholesale diamond distribution company incorporated in Israel with its main office in Israel. Ben Yosef was employed by Schwartz as the New York office sales manager and was responsible for making sales, supervising other salespersons, and providing daily reports to A. Schwartz & Sons.

In November 2007 Ben Yosef met with a representative from Citibank to discuss banking business between Schwartz and Citibank. During the meeting, Ben Yosef executed a loan agreement for $250,000 and a personal guarantee. The loan agreement lists Schwartz as the business applicant and Ben Yosef as the "Owner" of Schwartz, and Ben Yosef signed this document as "Owner." The personal guarantee is at the end of the loan agreement and is setoff with the heading "Personal Guarantee and Collateral Agreement." Directly above the signature line it is again noted that the individual signing the agreement is personally agreeing to the terms of the personal guarantee and all other terms and conditions set forth. Ben Yosef signed and printed his name on the personal guarantee signature line.

Thereafter, in December 2007, funds were drawn under the loan agreement in the amount of $131,162.08 and $100,000, and deposited into a Citibank account allegedly controlled by Schwartz and for which Ben Yosef held signatory power. Checks were then written in the same amounts, drawn from the Citibank account and paid to the order of A. Schwartz & Sons, and signed by Ben Yosef. Both checks were then deposited into the "Uri Schwartz & Sons Diamonds, Ltd." account maintained at Bank Leumi in Israel. Interest on the amounts drawn under the loan was paid from the time the funds were drawn until February 4, 2010, by Citibank debiting the account maintained at the bank.

In late 2009 Schwartz discovered that Ben Yosef had engaged in fraudulent activities against the corporation while in its employ, and subsequently terminated him. Specifically, Schwartz discovered that Ben Yosef had falsified invoices to customers and had stolen significant amounts of money and diamonds. Schwartz contends that it first learned of the Citibank loan after it had terminated Ben Yosef, when it received a call from Citibank expressing concern that Ben Yosef had recently requested that Citibank mail all statements and correspondence pertaining to the loan to Ben Yosef's home address.

In November 2009 Schwartz and Ben Yosef executed a

settlement agreement to resolve “various disputes and disagreements,” wherein Ben Yosef transferred the title to certain real property owned by him to Schwartz, in exchange for Schwartz agreeing to a general release of claims it had against Ben Yosef. The settlement agreement also included a clause wherein Ben Yosef warranted and represented that except for the Citibank loan, which was currently due, he had not otherwise incurred or undertaken any other debts, obligations or undertakings of any kind on behalf of Schwartz. Neither Ben Yosef nor Schwartz ever paid amounts due and owing under the loan, despite Citibank’s demands that they do so.

The motion court correctly found that triable issues of fact, which necessitate credibility determinations, preclude summary judgment as to Schwartz (*Gilmartin v City of New York*, 81 AD3d 411, 412 [2011]; *Gaspari v Sadeh*, 61 AD3d 405, 406 [2009]). Although Citibank contends that Schwartz ratified the loan in the settlement agreement with Ben Yosef, or, in the alternative, was unjustly enriched through its retention of the loan payments, Schwartz, through its President Uri Schwartz and an officer Itai Schwartz, asserts that Ben Yosef was not an owner, shareholder, or director, and did not have the authority to obtain a loan on behalf of the corporation. Further, Schwartz contends that the

settlement agreement was not an acknowledgment or ratification of the loan, and was not entered into for the benefit of Citibank. Itai Schwartz also alleges that he believed the funds deposited into the Bank Leumi account by Ben Yosef were payment for customer transactions, and that he was not aware that the deposits were from a loan disbursement. Thus, Schwartz raised material issues of fact, requiring credibility determinations, as to Ben Yosef's authority to bind the corporation, and Schwartz's knowledge and ratification, or lack thereof, of the loan, and subsequent retention of the loan funds.

The motion court, however, should have granted Citibank's motion for summary judgment as against Ben Yosef on the issue of liability. Citibank contends that, whether or not Ben Yosef had the authority to bind Schwartz, Ben Yosef did in fact sign the 2007 loan agreement and personal guarantee and is therefore liable for the amount in default and interest thereon. "[W]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement" (*National Westminster Bank USA v Sardi's Inc.*, 174 AD2d 470, 471 [1991], citing *Manufacturers & Traders Trust Co. v Mega-B, Inc.*, 169 AD2d 632 [1991]). Here,

the personal guarantee portion of the loan document was offset by a separate heading entitled, “Personal Guarantee and Collateral Agreement.” Immediately above the signature line a statement appears that the signer is personally guaranteeing the loan. Further, Ben Yosef does not deny that the documents contain his signature.

A “defendant’s conclusory allegations that he was unaware that it was a personal guaranty [and] that he advised the bank that he was unwilling to personally guarantee the loan” do not raise an issue of fact as to whether the signer was fraudulently induced into signing the documents (*National Westminster Bank USA,* 174 AD2d at 471; *see also Bank of Am. v Tatham*, 305 AD2d 183 [2003]). Ben Yosef’s arguments that he told the Citibank representative that he did not want to assume any personal liability in connection with the loan, and that he signed a blank document because the Citibank representative assured him she would complete the information requested on the application, do not create issues of fact precluding summary judgment in light of the clear and unambiguous nature of the signed personal guarantee. Further, Ben Yosef’s argument that English is not his first language, implying that he did not understand what he was signing, also fails to raise an issue of fact. A “defendant’s

failure or purported inability to read the guaranty, in the absence of any evidence of coercion, provides no basis for relief" (*Chemical Bank v Masters*, 176 AD2d 591, 591-592 [1991]).

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

ENTERED: JULY 10, 2012

DEPUTY CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7011-
7012-
7013-
7014 Index 652087/10

Ashwood Capital, Inc.,
Plaintiff-Appellant,

-against-

OTG Management, Inc., et al.,
Defendants-Respondents,

John Doe, Inc., et al.,
Defendants.

_____

K&L Gates LLP, New York (Michael R. Gordon of counsel), for appellant.

Morrison & Foerster LLP, New York (David J. Fioccola of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered July 29, 2001 and August 1, 2001, modified, on the law, to deny the motion as to the cause of action for unjust enrichment to the extent plaintiff claims to have provided services beyond those mentioned in the parties' contract and those having to do with brokering or negotiating a deal between OTG and nonparty JetBlue for OTG's operation of JetBlue's concessions at Terminal 5, and otherwise affirmed, without costs.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
Dianne T. Renwick
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

7011-7012-
7013-7014
Index 652087/10

_____x

Ashwood Capital, Inc.,
Plaintiff-Appellant,

-against-

OTG Management, Inc., et al.,
Defendants-Respondents,

John Doe, Inc., et al.,
Defendants.

_____x

Plaintiff appeals from orders of the Supreme Court, New York County (Charles E. Ramos, J.), entered July 29, 2001 and August 1, 2001, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7).

K&L Gates LLP, New York (Michael R. Gordon and Brian D. Koosed of counsel), for appellant.

Morrison & Foerster LLP, New York (David J. Fioccola, Dennis P. Orr and Shiri Bilik Wolf of counsel), for respondents.

SAXE, J.P.

The central issue in this appeal from the dismissal of an action for breach of contract, unjust enrichment and a declaratory judgment is the scope of the parties' 2003 written agreement regarding the right to operate concessions within the JetBlue terminal at John F. Kennedy Airport (JFK). We are asked to determine whether the agreement's repeated use of the term "Terminal 6" unambiguously limited the scope of the contract exclusively to the operation of concessions at Terminal 6, or whether, as plaintiff contends, the parties intended for their rights and obligations under the agreement to endure after JetBlue relocated to another JFK terminal. Because contract terms that are unambiguous must be enforced as written (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]), and not interpreted in some other way based on one party's assertion that "when [it] used the words, [it] intended something [other] than the usual meaning" (*Hotchkiss v National City Bank of N.Y.*, 200 F 287, 293 [SD NY 1911]), we affirm the dismissal of the claim for breach of contract.

Plaintiff Ashwood Capital, Inc. is a merchant bank, founded in 1991; Ashwood's chairman and sole stockholder, Lawrence J. Twill, Sr., is an investment banker and a businessman with more than 40 years of experience. According to Ashwood, from 1998 to

2002, Twill personally worked with nonparty JetBlue Airways Corporation (JetBlue), then a fledgling airline, to help "develop its overall customer experience" and "facilitate JetBlue's entry into JFK in 2000." In late 2002, JetBlue CEO David Barger approached Twill to seek his assistance with attracting new, higher-quality restaurants and concessionnaires to JetBlue's facilities at JFK, then located in JFK Terminal 6.

According to the complaint, finding interested concessionaires proved challenging because the Port Authority of New York and New Jersey, which operated JFK, had announced its plans to renovate and reorganize all JFK terminals over the next decade. With JetBlue's lease for Terminal 6 set to expire in November 2006, and the airlines' plans to relocate to Terminal 5 shortly thereafter, any newly-created concessions at Terminal 6 would be short-term and therefore were considered unattractive as an investment.

Twill ultimately committed his own company, Ashwood, to opening new concessions at Terminal 6. In mid-2003, Ashwood alleges, it entered into a Concessionaire Agreement with JetBlue, whereby Ashwood secured the rights to open three restaurants in JetBlue's Terminal 6 facilities: a Papaya King franchise, a New York-themed sports bar and grill, and a Mexican restaurant. Ashwood, however, had little interest in the day-to-day

operations and wished to acquire a business partner to assume these responsibilities. On the recommendation of JetBlue's vice president of real estate, Twill contacted defendant Eric Blatstein, then president of defendant OTG Management, Inc. (OTG[1]), which had been operating JetBlue's concessions in Philadelphia. Blatstein was undeterred by JetBlue's planned relocation and was eager to gain a foothold into JetBlue's concessions at JFK.

On December 18, 2003, Ashwood and OTG entered into a written agreement, assigning to OTG Ashwood's rights under the Concessionaire Agreement with JetBlue, namely "the right to use, for the purposes set forth therein, certain premises located at JFK International Airport, Terminal 6." Ashwood additionally agreed to provide up to twenty hours of consulting services per year to OTG "concerning the prospects for procurement and operation of additional food or liquor concessions" at "Kennedy Airport (Terminal 6)." As consideration for these rights and services, OTG agreed to pay Ashwood 1.5% of all gross sales from

[1] "OTG" refers to defendants OTG Management, Inc., OTG Consolidated Holdings, Inc.; OTG Management JFK, LLC, a New York limited liability company; OTG Management JFK, LLC, a Pennsylvania limited liability company; OTG Management JFK, Inc.; OTG JFK T5 Venture, LLC; and various John Doe Entities (collectively OTG or defendants). "Defendants" also includes defendant Eric Blatstein.

OTG's concessions "at Kennedy Airport, (Terminal 6)." The agreement is in the form of a letter, drafted by Ashwood, countersigned by Blatstein as president of OTG, and personally guaranteed by Blatstein as well.

Beginning in December 2003, OTG paid Ashwood 1.5% of gross sales from OTG's concessions at Terminal 6 on a monthly basis, as required under the agreement. In September 2008, however, JetBlue began operating out of its new facilities at JFK Terminal 5, having contracted with OTG to be the sole food concessionaire at the new terminal. After the closure of Terminal 6, in October 2008, OTG discontinued its monthly payments to Ashwood.

Ashwood commenced this action against OTG in November 2010, seeking money damages based on allegations that: (1) OTG breached the parties' agreement by failing to pay 1.5% of gross sales since November 2008; (2) Blatstein breached his guaranty; and (3) OTG is liable under the quasi-contract theory of unjust enrichment by failing to compensate Ashwood for the consulting services it provided OTG. Ashwood additionally brought a cause of action for a declaratory judgment, seeking a judicial determination of the parties' respective rights and obligations under the agreement.

Defendants moved to dismiss these claims pursuant to CPLR 3211(a)(1) and (7). In four separate orders, two entered on July

29, 2011 and two on August 1, 2011, Supreme Court granted defendants' motion to dismiss the complaint, observing that the agreement "unambiguously limits Ashwood's rights to a percentage of Defendants' gross sales at Terminal 6."

Ashwood appeals the dismissal of its claims and, pursuant to CPLR 3211(d), requests discovery on the issue of the parties' intent.

Discussion

This case serves as a reminder that in order to determine the contracting parties' intent, a court looks to the objective meaning of contractual language, not to the parties' individual subjective understanding of it. As Judge Learned Hand stated:

> "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent" (*Hotchkiss,* 200 F at 293).

Ashwood contends that the motion court erroneously dismissed its breach of contract claim based on an overly literal and

formalistic interpretation of the phrase "Terminal 6." According to Ashwood, the parties intended to establish a long-term business relationship, the principal goal of which was to grant Ashwood a meaningful and effective equity interest in OTG, and thereby bind the parties to the terms of their agreement well after JetBlue's relocation to Terminal 5. To accurately reflect the parties' intent, Ashwood argues, the phrase "Terminal 6" should be read to mean "any JetBlue terminal at JFK."

According to well-established rules of contract interpretation, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc.*, 77 NY2d at 162). We apply this rule with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002]; *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [2008], *affd* 13 NY3d 398 [2009]). In such cases, "'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include'" (*Vermont Teddy Bear Co.*, 1 NY3d at 475, quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978]). "[C]ourts may

not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks omitted]). We instead concern ourselves "with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote" (*Rodolitz v Neptune Paper Prods.*, 22 NY2d 383, 387 [1968] [internal quotation marks omitted]). Accordingly, before assessing evidence regarding what was in the parties' minds at the time of the agreement, we must first look to the agreement itself.

The primary question here is whether the parties' agreement is ambiguous; specifically, whether the phrase "Terminal 6" is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177 [2006] [internal quotation marks omitted]). Whether a contractual term is ambiguous must be determined by the court as a matter of law, looking solely to the plain language used by the parties within the four corners of the contract to discern its meaning and not to extrinsic sources (*see Kass v Kass*, 91 NY2d 554, 566 [1998]). Throughout the parties' agreement, the phrase "Terminal 6" is repeated a total of five times and consistently

refers to JetBlue's facilities at JFK. In particular, the agreement specifies that OTG must pay Ashwood 1.5% "of all gross sales from concessions or food service businesses operated by OTG at Kennedy Airport, (Terminal 6)." The agreement neither mentions "Terminal 5," nor does it refer to any unspecified JetBlue terminal at JFK. We therefore agree with the IAS court that the phrase "Terminal 6" unambiguously limits the scope of the parties' agreement to concessions at JFK Terminal 6. The parties' use of the phrase "Terminal 6" is susceptible to no other interpretation.

Nor is the phrase rendered ambiguous, as Ashwood contends, by other language in the contract. Ashwood points to "future-oriented provisions" in the agreement to demonstrate an implicit long-term business relationship intended by the parties, which ostensibly would continue after JetBlue's relocation to Terminal 5. Although the agreement does give OTG the first option to acquire or operate Papaya King franchises outside of Terminal 6, OTG never exercised this option; indeed, Ashwood does not claim that it ever acquired the rights to operate Papaya King franchises either at Terminal 5 or anywhere besides Terminal 6. Ashwood's "mere assertion . . . that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity" (*New*

York City Off-Track Betting Corp., 28 AD3d at 177). As there is no reasonable alternative meaning for the phrase "Terminal 6," we find no ambiguity either in the term itself or when it is read in the context of the agreement as a whole.

If these commercially sophisticated and counseled parties had intended their agreement to apply to any JetBlue terminal at JFK, they could easily have expressed this intent in the language of the agreement. Indeed, both Ashwood and OTG were aware of JetBlue's upcoming relocation, yet their agreement neither mentions "Terminal 5" nor refers to any unspecified JetBlue terminal at JFK. That the agreement does not address the contingency of JetBlue's move to Terminal 5 does not, by itself, create an ambiguity. The parties omitted this contingency from their agreement, and it is not for the court to "imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was made, must have foreseen the contingency at issue and the agreement can be enforced according to its terms" (*Reiss*, 97 NY2d at 199).

Similarly absent from the agreement is any mention or implication that the parties intended to grant Ashwood an equity stake in OTG. With nothing in the written agreement to support Ashwood's contention that the parties intended for Ashwood to receive a permanent ownership interest in OTG, there is simply no

basis for this Court to find an implicit long-term contractual relationship between the parties.

Furthermore, the agreement contains both a no-oral-modification clause and a broad merger clause, which as a matter of law bars any claim based on an alleged intent that the parties failed to express in writing (*see Cornhusker Farms v Hunts Point Coop. Mkt.*, 2 AD3d 201, 203-204 [2003]; *see also Torres v D'Alesso*, 80 AD3d 46, 56-57 [2010]). The merger clause specifies that the agreement "constitute[s] the full and entire understanding and agreement among the Parties," and that "no Party shall be liable or bound to any other in any manner by any representations, warranties, covenants and agreements except as specifically set forth herein and therein." Accordingly, even if Ashwood, when drafting the agreement, had understood "Terminal 6" to be an implicit reference to any JetBlue terminal at JFK, the moment the written contract became fully executed by both parties, Ashwood could not rely on that understanding, as it was not included in the mutually executed written document. Moreover, in the years since entering into the agreement, Ashwood made no attempts to amend the terms of the contract pursuant to the no-oral-modification clause.

We therefore affirm Supreme Court's dismissal of Ashwood's claim for breach of contract.

Nor is Ashwood entitled to discovery regarding the parties' intent pursuant to CPLR 3211(d). Because the agreement is clear and complete on its face, "[a]ny such discovery would simply be an opportunity for plaintiff to uncover parol evidence to attempt to *create* an ambiguity in an otherwise clear and unambiguous agreement" (*RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 437 [2009]). Absent a finding of ambiguity in the agreement, discovery would be unnecessary, as any parol evidence would be inadmissible (*id.*).

Ashwood's claim against Blatstein for breach of his guaranty falls with its breach of contract claim against OTG, since Blatstein's liability under the agreement "accrues only after default on the part of the principal obligor" (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 10 [2006] [internal quotation marks omitted], *affd* 8 NY3d 59 [2006]). Similarly, the declaratory judgment Ashwood seeks, that Ashwood is entitled to 1.5% of the gross sales from OTG's concessions in the JetBlue's Terminal 5 facilities going forward, falls with its breach of contract claim.

As to Ashwood's cause of action for unjust enrichment, to the extent the claim is based on the consulting services it was required to provide under the agreement "from time to time as requested with OTG ... for procurement and operation of

additional food liquor concessions at [Terminal 6]," its claim is barred. "Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *see also Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). Only where the contract does not cover the dispute in issue may a plaintiff proceed upon a quasi-contract theory of unjust enrichment (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 405 [2007]).

However, the unjust enrichment claim may arguably extend beyond a claim for services that were owed pursuant to the agreement. Since we have concluded that the parties' rights and obligations under the agreement are limited to activities at Terminal 6, Ashwood's claims relating to Terminal 5 may fall outside the scope of the agreement. On a motion to dismiss we must read the complaint liberally, accept as true the facts alleged, and accord plaintiff the benefit of every possible inference (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). Further, we must consider the factual assertions of an affidavit submitted in opposition to the dismissal motion in order to preserve "inartfully pleaded, but

potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). Twill's affidavit elaborated on the consulting services that he, as Ashwood's principal, provided to OTG -- namely, that he advised OTG to "(a) obtain financing, rather than have Mr. Blatstein continue to give away equity in the company in exchange for funding; (b) replace its first two Chief Financial Officers; and (c) raise the quality of its concessions in order to attract more -- and more lucrative -- customers." Twill also claims that he "regularly encouraged George Sauer, JetBlue's Vice-President of Real Estate, to give OTG more concession space and to grow OTG's business at both Terminal 5 and Terminal 6. I also devised the business strategy for OTG." As these services fall outside the scope of the agreement, the contract does not completely bar Ashwood's cause of action for unjust enrichment.

However, the statute of frauds bars any unjust enrichment claim based on the assertion that Twill acted as an intermediary between JetBlue and OTG during negotiations over OTG's right to operate JetBlue's concessions at Terminal 5 (*see* General Obligations Law § 5-701[a][10]). Without a writing, an alleged agreement, promise or undertaking is unenforceable under § 5-701(a)(10), if it "[i]s a contract to pay compensation for services rendered in negotiating ... a business opportunity ...

'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction" (*id.*). The statute of frauds applies "where ... the intermediary's activity is ... that of providing ... 'know-who', in bringing about between principals an enterprise of some complexity" (*Snyder v Bronfman*, 13 NY3d 504, 510 [2009] [internal quotation marks omitted]).

Yet, Ashwood's unjust enrichment claim does not fall entirely within the scope of § 5-701(a)(10), as Ashwood also seeks compensation for Twill's advice to OTG regarding financing, its CFOs, and raising the quality of its concessions. Therefore, dismissal of Ashwood's unjust enrichment claim in its entirety at this juncture was premature.

We have considered plaintiff's remaining arguments and find them to be without merit.

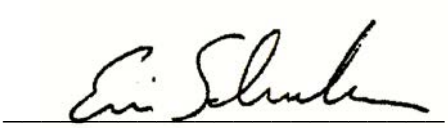
Accordingly, the orders of the Supreme Court, New York County (Charles E. Ramos, J.), entered July 29, 2001 and August 1, 2001, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), should be modified, on the law, to deny the motion as to the cause of action for unjust enrichment to the extent plaintiff claims to have provided services beyond those mentioned in the parties' contract and those having to do with brokering or negotiating a

deal between OTG and nonparty JetBlue for OTG's operation of JetBlue's concessions at Terminal 5, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JULY 10, 2012



DEPUTY CLERK