SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 29, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12111 2445 Creston Avenue, LLC, Index 307323/12
Plaintiff-Respondent,

-against-

Gold Star Gift Shop,
Defendant-Appellant,

Leading Insurance Group Insurance Company, Ltd.,
Defendant.

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Law Offices of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for appellant.

Kaufman Borgeest & Ryan, LLP, Valhalla (Jacqueline Mandell of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered December 27, 2012, which denied Gold Star's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In the underlying personal injury action, landlord 2445 Creston and tenant Gold Star were both named as defendants, and 2445 Creston asserted cross claims against Gold Star for common law and contractual indemnification. Thereafter, 2445 Creston

commenced this declaratory judgment action, against Gold Star and Leading Insurance, Gold Star's insurer, for indemnification and breach of agreement to procure insurance.

Although 2445 Creston frames the instant case as "based solely on the relevant language of the governing lease agreement," whether it is entitled to the relief it seeks in this declaratory judgment action will be solely dependent on factual issues which must be litigated in the underlying action. Moreover, 2445 Creston's claims against Gold Star in this action were, or could be, asserted in the underlying action. The actions are therefore so "substantially similar," the instant action should be dismissed (*see White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 93-94 [1st Dept 1997]; *DAIJ Inc. v Roth*, 85 AD3d 959, 960 [2d Dept 2011]).

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

ENTERED: MAY 29, 2014

CLERK

Tom, J.P., Renwick, Richter, Feinman, Gische, JJ.

12295 R^2 Investments, LDC, Index 601296/09
Plaintiff-Respondent, 650499/10

-against-

Carl C. Icahn, et al.,
Defendants-Appellants.

- - - - -

Youlu Zheng, et al.,
Plaintiffs-Respondents,

-against-

Carl C. Icahn, et al.,
Defendants-Appellants.

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Law Offices of Herbert Beigel, New York (Herbert Beigel of counsel), for Carl c. Icahn, Carl J. Grivner, Vincent Intrieri, Keith Meister, Peter Shea, David S. Schechter, Harold First, Daniel A. Ninivaggi, Arnos Corporation, High River Limited Partnership, ACF Industries Holding Corporation, Starfire Holding Corporation, Arnos Sub Corp., Barberry Corp., XO Merger Corp. and XO Holdings, Inc., appellants.

Berg & Androphy, Houston, TX (Christopher L. Gadoury of the bar of the State of Texas, admitted pro hac vice, of counsel), for Adam Dell, Fredrik Gradin and Robert Knauss, appellants.

Zeichner Ellman & Krause LLP, New York (Jeff Ross of counsel), for R^2 Investments, LDC, respondent.

Abbey Spanier, LLP, New York (Judith L. Spanier of counsel), for Youlu Zheng and Donald J. Hillenmeyer, respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 30, 2013, which, insofar as appealed from, denied defendants' motions for summary judgment and defendants' motions to dismiss the breach of fiduciary duty claims,

unanimously modified, on the law, to dismiss the claims against defendants Dell, Gradin and Knauss, and otherwise affirmed, without costs.

The motion court properly declined to dismiss the direct claims relating to nominal defendant XO Holdings Inc.'s (XO) merger in 2011, since plaintiffs allege fiduciary breaches that go beyond issues relating to factors of valuation or the mere inadequacy of the merger price, and adequately assert a nexus between defendants' alleged fiduciary breaches and the merger (*see Rabkin v Hunt Chem. Corp.*, 498 A2d 1099, 1106-1107 [Del 1985]; *Nymex Shareholder Litig. v New York Mercantile Exch., Inc.*, 2009 WL 3206051, *10, 2009 Del Ch LEXIS 176, *38-39 [Del Ch 2009]).

The motion court also properly declined to dismiss the breach of fiduciary duty claims regarding the 2008 transactions resulting in XO's recapitalization. Contrary to defendants' contention that plaintiffs have no cognizable direct claims in connection with these transactions and that any such claims can only be derivative claims no longer actionable by plaintiffs, who are former shareholders following the 2011 merger, plaintiffs' allegations that their voting rights were diluted as a result of the recapitalization that made defendant Carl Icahn a shareholder with "super voting rights" are sufficient for the challenged

claims to survive the motions to dismiss (*see In re Loral Space & Communications Inc. Consol. Litig.*, 2008 WL 4293781, *1-3, 2008 Del Ch LEXIS 136 [Del Ch 2008]; *Oliver v Boston Univ.*, 2006 WL 1064169, *17, 2006 Del Ch LEXIS 75, *76 [Del Ch 2006]).

The motion court properly applied Delaware's "entire fairness" standard of review to the breach of fiduciary duty claims regarding the 2008 recapitalization (*Americas Mining Corp. v Theriault*, 51 A3d 1213, 1239 [Del 2012]; *Loral Space & Communications*, 2008 WL 4293781, *21 2008 Del Ch LEXIS 136, *71-75). It also correctly determined that the burden of persuasion remains with defendants and that the record does not allow for a conclusion on summary judgment that the challenged transactions satisfy the entire fairness standard.

The court, however, should have dismissed the claims against the members of XO's special committee, defendants Dell, Gradin and Knauss. As conceded by respondent at oral argument, XO's Certificate of Incorporation exculpates directors for breaches of fiduciary duty except under limited circumstances not alleged by plaintiffs here (*see* Delaware General Corporation Law §

102[b][7]; *Emerald Partners v Berlin*, 787 A2d 85, 92 [Del 2001]; *Dirienzo v Lichtenstein*, 2013 WL 5503034, *10-*13, 2013 Del Ch LEXIS 242, *33-*43 [Del Ch 2013], *lv denied* 80 A3d 959 [Del 2013]).

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

ENTERED: MAY 29, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12324N Ana Louisa Medina by Diana Valentin as Attorney-in-Fact, Plaintiff-Respondent, Index 21118/13E

-against-

Gold Crest Care Center, Inc., Defendant-Appellant,

Sandra Kerr, Defendant-Respondent,

Jane Does I-X, et al., Defendants.

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Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Glen Feinberg of counsel), for appellant.

Law Firm of D. F. Truhowsky, New York (Deborah F. Truhowsky of counsel), for Ana Louisa Medina, respondent.

Lewis Brisbois Bisgaard & Smith, LLP, New York (David Lafarga of counsel), for Sandra Kerr, respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered August 5, 2013, which, in this action arising out of defendants' alleged negligence in caring for a nursing-home patient, denied defendant-appellant's motion to change venue from Bronx County to Westchester County based on a venue-selection clause in an admission agreement signed by plaintiff as attorney-in-fact for her grandmother, unanimously reversed, on the law, without costs, and the motion granted.

The motion court improperly determined that the venue-

selection clause is inapplicable because many of the acts or omissions complained of occurred before the execution of the agreement. The clause does not limit its applicability to acts or omissions occurring after the execution of the agreement. Rather, it merely requires that any actions arise from or relate to the agreement. Since this action arises out of or relates to the duties and obligations under the agreement, the venue-selection clause applies, and defendant's motion should have been granted (*see Public Adm'r Bronx County v Montefiore Med. Ctr.*, 93 AD3d 620, 621 [1st Dept 2012]). Moreover, since defendant moved to change venue based on the written agreement (*see* CPLR 501), it was not required to serve a written demand for a change of venue with or prior to its answer before making the motion, and the motion needed only to be made "within a reasonable time after commencement of the action," as it was here (CPLR 511[a]; *Hendrickson v Birchwood Nursing Home Partnership*, 26 AD3d 187, 187 [1st Dept 2006]). The motion court properly rejected plaintiff's conclusory assertions that the venue-selection clause violates public policy. Further, there is no evidence of fraud in the execution of the agreement, particularly since plaintiff, as attorney-in-fact for her grandmother, could have, and by signing the agreement indicated that she had, read the agreement,

understood it, and agreed to be legally bound by it, none of which she expressly denies.

We have examined plaintiff's remaining arguments and find them unavailing.

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

ENTERED: MAY 29, 2014

CLERK

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

12459 Brett Rainer, Index 109566/07
Plaintiff-Respondent, 590325/08
590112/10

-against-

Gray-Line Development Company, LLC, et al.,
Defendants-Appellants.

[And A Third-Party Action]
- - - - -
Gray-Line Development Company, LLC, et al.,
Second Third-Party
Plaintiffs-Appellants,

-against-

Sorbara Construction Corporation,
Second Third-Party
Defendant-Respondent.

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Pillinger Miller Tarallo, LLP, Elmsford (Leslie G. Abele of counsel), for Gray-Line Development Company, LLC, Gray-Line Development Company, Inc., Maclowe Properties LP, Thatch, Ripley and Company, LLC, and Thatch, Ripley and Company Inc., appellants.

Cozen O'Connor, New York (Jason L. Beckerman of counsel), for Gotham Construction Company, LLC, appellant.

Kelner and Kelner, New York (Gail S. Kelner of counsel), for Brett Rainer, respondent.

Hannum Feretic Prendergast & Merlino, LLC, New York (David P. Feehan of counsel), for Sorbara Construction Corporation, respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 9, 2012, which, insofar as appealed from as limited by the briefs, denied the motion of defendants Gotham

Construction Company (Gotham) and Thatch, Ripley & Company, LLC (Thatch) for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against them, and denied the motion of defendants Gray-Line Development Co, LLC (Gray-Line), Gotham, and Thatch for summary judgment on their contractual indemnification claims against third-party defendant Sorbara Construction Corporation (Sorbara), unanimously modified, on the law, to unconditionally grant Gray-Line's motion for summary judgment on its contractual indemnification claim against Sorbara, and conditionally granting Gotham and Thatch's motion for summary judgment on their contractual indemnification claim against Sorbara, and otherwise affirmed, without costs.

Plaintiff commenced this action for injuries he sustained while he was working on reinforcing the ceiling of a building under construction, when the ladder he was standing on allegedly fell due to the uneven condition of the concrete floor on which it was placed. The motion court properly declined to dismiss the Labor Law § 200 and common-law negligence claims against defendants Gotham and Thatch since there are issues of fact as to whether they "exercised general control over the work site and had constructive notice of the alleged uneven floor condition that caused plaintiff's fall" (*see Kosovrasti v Epic [217] LLC*, 96 AD3d 695, 696 [1st Dept 2012]). Although Thatch ceased to be

the legal owner of the property approximately two months before the accident, and Gotham's contract designated it as the construction manager rather than the general contractor, Gotham's job superintendent and site safety supervisor testified that he broadly supervised and controlled the work site (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). Additionally, two Gotham employees and a Thatch employee were responsible for coordinating the work of the trades, including third-party defendant Sorbara's work pouring concrete and plaintiff's employer's work reinforcing the ceiling, arguably providing these two defendants with the opportunity to stop the ceiling work from proceeding until the defects in the floor were remedied. Moreover, the evidence indicates that Gotham's safety supervisory and the Thatch employees were on site every day, and that the former conducted multiple daily walk-throughs.

However, the court improperly found that a conflict between two indemnification provisions created an ambiguity raising triable issues of fact. One of those provisions is irrelevant because it pertains only to injuries sustained by employees of third-party defendant Sorbara, and plaintiff was employed by another company. The other provision, "Exhibit D," a rider to Sorbara's subcontract, provides for indemnification from Sorbara where, inter alia, an accident is claimed to have occurred "as a

result of or connected with" Sorbara's work on the subject construction project. This clear and unambiguous indemnification provision was triggered by plaintiff's claim that his accident was caused in part by the uneven condition of the concrete floor (*see Cerverizzo v City of New York*, __ AD3d __, 983 NYS2d 515 [1st Dept 2014]). Accordingly, Gray-Line's motion for summary judgment on its claim for contractual indemnification against Sorbara should be granted unconditionally since Gray-Line's "liability is purely vicarious" in light of the court's unchallenged dismissal of the Labor Law § 200 and common-law negligence claims against it (*see Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462 [1st Dept 2014]). Contrary to Sorbara's argument, Thatch's conveyance of the property to Gray-Line before the accident effectively assigned its indemnification rights to Gray-Line pursuant to the assignment clause in the subcontract between Thatch and Sorbara. Gotham and Thatch are entitled to conditional summary judgment on indemnification under the same provision since there are pending issues of fact regarding their negligence (*see Wood v Lefrak SBN Ltd. Partnership*, 111 AD3d 532, 533 [1st Dept 2013]). Given the motion court's finding that the accident was caused at least in part by the failure to provide adequate safety devices in violation of Labor Law § 240(1), "there is no contention that plaintiff's injury resulted solely

from the negligence of" Gotham or Thatch (*Reyes v Orient Overseas Assoc.*, 309 AD2d 682, 683 [1st Dept 2003]). Notably, there is no challenge on appeal to the court's grant of plaintiff's motion for partial summary judgment on his Section 240(1) claim against Gray-Line. Pursuant to the indemnification provision, defendants are entitled to attorneys' fees (*see Flynn v 835 6th Ave. Master L.P.*, 107 AD3d 614 [1st Dept 2013]), subject to the conditional grant of summary judgment in favor of Gotham and Thatch.

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

ENTERED: MAY 29, 2014

CLERK

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

12473 In re Neven Blace, Index 103992/12
Petitioner,

-against-

New York State of Department
of Motor Vehicles,
Respondent.

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A proceeding having been commenced by the above-named petitioner, and having been transferred to this Court by order of the Supreme Court, New York County (Carol E. Huff, J.), entered on or about March 22, 2013,

And said proceeding having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 5, 2014,

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

ENTERED: MAY 29, 2014

CLERK

Mazzarelli, J.P., Acosta, Andrias, Clark, JJ.

12546 Pleiades Publishing, Inc., Index 653589/12
Plaintiff-Respondent,

-against-

Springer Science + Business Media LLC,
Defendant-Appellant.

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Phillips Nizer LLP, New York (Alan Behr of counsel), for appellant.

Skadden Arps Slate Meagher & Flom, LLP, New York (Jonathan L. Frank of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 10, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss the cause of action for breach of the implied covenant of good faith and fair dealing, unanimously affirmed, with costs.

Plaintiff is a publisher of English-language versions of Russian-language scientific, technical, and medical journals. Defendant is plaintiff's exclusive distributor pursuant to an agreement that required it to use "commercially reasonable efforts" to promote the Russian-language journals and to market and promote them as "offerings in its online database called the 'Russian Library of Science [RLS].'" Plaintiff alleges that defendant incorporated its journals into a bundle of available "non-subscribed" journals, which disguised from customers the

"separate identity, value proposition, and pricing approach for the RLS," thereby reducing the current and long-term economic value of plaintiff's journals and depriving plaintiff of the benefits it should have obtained under the distribution agreement. These allegations state a cause of action for breach of the implied covenant of good faith and fair dealing (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 302 [1st Dept 2003]). While the agreement granted defendant the discretion to decide how to market and promote the RLS, defendant did not have the right to exercise that discretion in such a way as to frustrate plaintiff's rights under the agreement, deprive plaintiff of the value of its journals, or benefit itself at plaintiff's expense (*see id.*).

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

ENTERED: MAY 29, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12591 The People of the State of New York, Respondent, Ind. 3278/05

-against-

Jason Johnson, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at suppression hearing; Charles H. Solomon, J. at protective order and motion to controvert search warrant; Edward J. McLaughlin, J. at jury trial and sentencing), rendered September 16, 2008, as amended September 24, 2008, convicting defendant, after a jury trial, of kidnapping in the first degree and two counts each of murder in the second degree, robbery in the first degree and conspiracy in the fourth degree, and sentencing him to an aggregate term of 36⅓ years to life, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress statements. Defendant did not preserve his present challenges to the court's ruling (*see e.g. People v Medina*, 93 AD3d 459 [1st Dept 2012], *lv denied* 19 NY3d 999 [2012]), and we decline to review them in the interest of justice. As an

alternative holding, we reject them on the merits. The hearing evidence established that defendant knowingly, intelligently and voluntarily waived his *Miranda* rights, notwithstanding his refusal to put anything in writing. The record fails to support defendant's claims that the detective's post-*Miranda* conduct improperly encouraged defendant to believe that his statements were given in confidence and would not be used against him, that defendant operated under that belief, or that any statement was the product of trickery (*see Matter of Jimmy D.*, 15 NY3d 417, 424 [2010]). We have considered and rejected defendant's related argument concerning the trial court's charge on the issue of the voluntariness of defendant's statements.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the four challenges at issue were not pretextual. This finding, based primarily on the court's assessment of the challenging attorney's credibility, is entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). The prosecutor was not required to show that these nondiscriminatory reasons were related to the facts of the case (*see People v Hecker*, 15 NY3d 625, 656, 663-665 [2010]), and we

do not find any disparate treatment by the prosecutor of similarly situated panelists.

Defendant's challenge to the legal sufficiency of the evidence supporting the robbery convictions is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the conclusion that when defendant pointed a loaded handgun at the victim, he did so for the purpose, among other things, of compelling him to give up his automobile (*see* Penal Law § 160.00[2]), and that defendant did so with the intent to permanently deprive the victim of it, specifically by disposing of it under circumstances rendering it unlikely that he would recover it (*see* Penal Law § 155.00[3]; *People v Kirnon*, 39 AD2d 666, 667 [1972], *affd* 31 NY2d 877 [1972]).

Defendant did not preserve his Confrontation Clause claim regarding a detective's testimony about information she received from an anonymous caller, which included a single reference to defendant by his nickname, and we decline to review in the interest of justice. Defendant's vague allusions to "confrontation issues," made in different contexts from his

present claim, were insufficiently specific to meet the preservation requirement (*see e.g. People v Rios*, 102 AD3d 473, 474 [2013], *lv denied* 20 NY3d 1103 [2013]; *People v Paulin*, 78 AD3d 557, 558 [2010], *lv denied* 16 NY3d 862 [2011]; *compare People v Hardy*, 4 NY3d 192, 197 n 3 [2005]). As an alternate holding, we find that the disputed testimony was properly admitted, not for its truth (*see Tennessee v Street*, 471 US 409 [1985]), but for the legitimate nonhearsay purposes of completing the narrative and explaining police actions (*see People v Tosca*, 98 NY2d 660 [2002]; *People v Rivera*, 96 NY2d 749 [2001]; *see also United States v Reyes*, 18 F3d 65, 70-71 [1994]). Moreover, this evidence was directly relevant to issues raised by defendant at trial. In any event, any error in receiving this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant did not preserve his claim that he was constitutionally entitled to introduce, on redirect examination, a prior statement of a defense witness, and to pursue a particular line of questioning (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we find that the proposed evidence did not satisfy the requirements for impeaching one's own witness by proof of a prior contradictory statement (*see* CPL 60.35[1]), and that defendant was not prejudiced by the court's

ruling because he was still permitted to pursue a closely related line of questioning, and was able to convey the desired information to the jury. In any event, any error in this regard was likewise harmless.

The court lawfully imposed consecutive sentences for the robbery, kidnapping and conspiracy convictions because defendant committed these crimes through separate and distinct acts (*see People v McKnight*, 16 NY3d 43, 48-49 [2010]).

We reject defendant's contention that the sentencing court denied him due process by considering the allegations of a sworn criminal felony complaint without sufficiently ascertaining the complaint's reliability. Defendant was afforded sufficient opportunity to contest the facts upon which the court relied but never expressly contended that the allegations in the complaint were materially untrue (*see People v Hansen*, 99 NY2d 339, 346 [2003]). Moreover, defense counsel's statements and defendant's unsolicited outbursts during the sentencing proceeding provided the court with a sufficient basis for concluding that the complaint's allegations were based on reliable and accurate information.

We perceive no basis for reducing defendant's aggregate sentence.

We decline to revisit this Court's prior order (M-5987,

decided April 9, 2013), made after its in camera examination of the sealed materials, which denied defendant's motion to unseal the search warrant affidavit and documents or transcripts related to the warrant application.

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

ENTERED: MAY 29, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12592 Marsha Edelman, Index 112888/10
Plaintiff-Respondent,

-against-

O This Way Up, Inc., etc., et al.,
Defendants-Appellants,

Myra Tugendhaft, also known
as Myra Cohen, et al.,
Defendants.

_____

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for appellants.

Andrew L. Weitz & Associates, P.C., Mineola (James M. Lane of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 12, 2013, which, to the extent appealed from, denied the motion of defendants O This Way Up, Inc., a/k/a and d/b/a This Way Up, Robert Salloum and Okib Salloum (collectively OTWU) for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

OTWU established its entitlement to judgment as a matter of law, in this action where plaintiff alleges she was injured when a medicine cabinet installed in her bathroom by OTWU and/or by defendant Sunshine Quality Construction, Inc., fell and hit her.

OTWU submitted deposition testimony of its principal that OTWU did not install the medicine cabinet in plaintiff's bathroom before she terminated its employment. Such testimony was consistent with the testimony of Sunshine's president and its employee that the medicine cabinets had not been installed when they took over the job from OTWU. Thus, since OTWU demonstrated it was not responsible for the installation of the cabinet, it owed no duty to plaintiff with respect to its condition (*see Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]).

In opposition, plaintiff failed to raise a triable issue of fact. Her expert engineer opined that the accident was caused by the negligent installation of the cabinet, which failed to give it the proper support and structural integrity. However, the deposition testimony of both of the principals of OTWU and Sunshine demonstrated that OTWU was not involved in the installation of the cabinet, even if OTWU had performed some initial preparatory work for the cabinet's installation. Furthermore, although Sunshine also denies having installed the medicine cabinet, that does not raise an issue of fact as to whether its predecessor on the job, OTWU, was responsible.

In view of the evidence that OTWU did not install the

subject cabinet, plaintiff's reliance on the doctrine of res ipsa loquitur, is misplaced (*see e.g. Hodges v Royal Realty Corp.*, 42 AD3d 350 [1st Dept 2007]).

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

ENTERED: MAY 29, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12594-
12595 The People of the State of New York,
Respondent,

-against-

Jason Vega,
Defendant-Appellant.

Ind. 461/12
1983/12

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

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Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered on or about July 17, 2012,

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

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

ENTERED: MAY 29, 2014

CLERK

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

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12596 In re Michael P. Thomas, Index 102224/12
Petitioner-Appellant,

-against-

Richard J. Condon, etc., et al.,
Respondents-Respondents.

_____

Hagan, Coury & Associates, Brooklyn (Paul Golden of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondents.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered July 25, 2013, which denied the petition brought pursuant to CPLR article 78 seeking to annul the determination of respondent Richard J. Condon, Special Commissioner of Investigation for the New York City School District, dated November 29, 2011, that petitioner was not a whistleblower pursuant to the Administrative Code of the City of New York § 12-113, and dismissed the proceeding, unanimously affirmed, without costs.

The matter is not moot, despite petitioner's retirement, because he alleges that he lost in excess of $27,000 in stipends from a fellowship program as a result of respondents' adverse personnel actions, in violation of Administrative Code § 12-113.

However, we find that the court properly determined that

petitioner's pre-May 3, 2008 complaints were not reported by him to the appropriate officials, pursuant to Administrative Code § 12-113(a)(6). Moreover, respondent's determination that petitioner's post-May 3, 2008 complaints did not result in adverse personnel actions was rational and neither arbitrary nor capricious, in that the filing of an inaccurate report of misconduct against an employee is not an adverse personnel action, and petitioner's temporary reassignment resulted from earlier sustained charges of misconduct (*see* Administrative Code § 12-113[a][1]).

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

ENTERED: MAY 29, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12601 In re Hezekiah J., and Others,

Children Under the Age of
Eighteen Years, etc.,

Stacy J.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

Andrew J. Baer, New York, attorney for the children Hezekiah J., Jeremiah J., Joshua J., and Gabriel J.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child Ezekiel J.

Karen Freedman, Lawyers For Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child Isaiah J.

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Appeal from order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about November 16, 2012, which, after a hearing, denied respondent mother's application for return of the subject children to her care, unanimously dismissed, without costs, as moot.

The mother's arguments regarding the denial of her application pursuant to Family Court Act § 1028 are moot, given the subsequent finding of neglect against her (*see Matter of Terrell H.*, 197 AD2d 372, 373 [1st Dept 1993]).

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

ENTERED: MAY 29, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12602 In re Warmann Dipoumbi, Petitioner, Index 118114/09

-against-

Barbara Fiala, etc., et al., Respondents.

Law Firm of Karen Winner, New York (Karen Winner of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondents.

Determination of the Department of Motor Vehicles Appeals Board, dated August 26, 2009, which affirmed a determination of an administrative law judge (ALJ) finding, after a hearing, that petitioner was guilty of failing to stop for a stop sign and failing to wear his corrective lenses, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Lucy Billings, J.], entered March 24, 2010), dismissed, without costs.

The determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). The determination turned entirely on the relative credibility of petitioner and the officer who issued the summonses, and we find no reason to disturb the ALJ's

determination in this respect. Petitioner was not denied his right to counsel (*cf. Matter of Watson v Fiala*, 101 AD3d 1649, 1650-1651 [4th Dept 2012]), but expressly chose to proceed with the hearing when his counsel failed to appear due to illness. Petitioner's remaining arguments are unpreserved and, in any event, are unavailing.

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

ENTERED: MAY 29, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12606 Lorna Stubbs, Index 305053/10
Plaintiff-Appellant,

Roma Thomas,
Plaintiff,

-against-

350 East Fordham Road, LLC,
Defendant-Respondent.

_____

Bailly and McMillan, LLP, White Plains (Keith J. McMillan of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy Kazansky of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered February 22, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff Lorna Stubbs's motions for partial summary judgment on the issue of liability and for leave to amend her bill of particulars, and granted defendant 350 East Fordham Road, LLC's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, the cross motion denied as to plaintiff's common-law negligence claim, and otherwise affirmed, without costs.

Plaintiff Lorna Stubbs was standing on the sidewalk in front of the two-story building located at 350 East Fordham Road when part of the stucco siding on the building fell off the facade and

struck her.

The court acted within its discretion in denying plaintiff leave to amend the bill of particulars to allege violations of section 28-301.1 and former section C26-352.0 of the Administrative Code of the City of New York, as plaintiff did not seek leave to add such allegations until over two years after commencement of the action, and eight months after the note of issue had been filed (*see Reilly v Newireen Assoc.*, 303 AD2d 214, 218 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]). In any event, there is no basis to impose liability under section 28-301.1, which "imposes a general duty on owners to maintain their premises and does not specifically address the alleged structural defect at issue" (*Miki v 335 Madison Ave., LLC*, 93 AD3d 407, 408 [1st Dept 2012], *lv denied* 19 NY3d 814 [2012]; *see Maksuti v Best Italian Pizza*, 27 AD3d 300 [1st Dept 2006], *lv denied* 7 NY3d 715 [2006]; *Lane v Fisher Park Lane Co.*, 276 AD2d 136, 141-142 [1st Dept 2000]). Here, while Administrative Code § 28-302.1 requires maintenance of "exterior walls," that provision applies only to "buildings greater than six stories." Administrative Code § C26-352.0 is inapplicable because the facade of the building was not an "exposed structure[] on the top[] of [the] building."

Nevertheless, the common-law negligence claim should be reinstated. While defendant established that it did not create

or have actual notice of any defect in the facade, it failed to establish that it exercised reasonable care in maintaining the facade of the building through a program of inspection. Defendant's managing member testified only that he would observe the exterior facade of the building as he walked past the building, and plaintiff's engineer opined that even a cursory inspection would have disclosed the issues that required repair. Thus, the record presents an issue of fact as to whether defendant exercised reasonable care in maintaining the facade, and whether constructive notice may be imputed (*see Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 501 [1st Dept 2007], *lv denied* 9 NY3d 809 [2007]).

Further, while plaintiff may be entitled to invoke the doctrine of res ipsa loquitur at trial (*see Dittiger v Isal Realty Corp.*, 290 NY 492 [1943]; *Kaplan v New Floridian Diner*, 245 AD2d 548, 548 [2d Dept 1997]; *Shinshine Corp. v Kinney Sys.*, 173 AD2d 293 [1st Dept 1991]), since the inference of negligence arising from plaintiff's circumstantial proof is not inescapable,

she is not entitled to partial summary judgment in her favor (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 207-209 [2006]).

We have reviewed the remaining contentions and find them unavailing.

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

ENTERED: MAY 29, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12607 In re James P. Caputo, Jr., Index 113232/10
Petitioner-Appellant,

-against-

Raymond Kelly, etc.,
Respondent-Respondent.

_____

Law Offices of John S. Chambers, New York (John S. Chambers of counsel), for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Hanh H. Le of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered January 30, 2013, denying the petition to annul respondent's determination, dated July 19, 2011, which denied petitioner's application for a premises (residence) handgun license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination that petitioner's 2001 felony conviction for filing a false instrument in the first degree (Penal Law § 175.35) and misdemeanor conviction for assault in the third degree (Penal Law § 120.00), which stemmed from an incident that occurred in the course of his duties as a police officer and resulted in his dismissal from the police force, demonstrate the lack of good moral character required for a license to own a handgun is not arbitrary and capricious (*see*

Penal Law § 400.00[1][b]; *Matter of Dale v Safir*, 283 AD2d 248 [1st Dept 2001]; *Matter of Hines v Kelly*, 222 AD2d 277 [1st Dept 1995], *lv denied* 87 NY2d 810 [1996]). Although petitioner's Certificate of Relief from Disabilities removed the automatic bar to licensure occasioned by his prior convictions, it "did not prevent respondent from relying on the convictions in the exercise of his statutory discretion to deny a license for lack of good moral character or good cause" (*Hines v Kelly*, 222 AD2d at 277 [internal quotation marks omitted]; *see also Matter of Hecht v Bivona*, 306 AD2d 410 [2d Dept 2003]).

Contrary to petitioner's contention, the Penal Law's requirement that an applicant for a firearm license be of good moral character passes intermediate constitutional scrutiny in the wake of *District of Columbia v Heller*, 554 US 570 (2008]) and *McDonald v City of Chicago* (__ US __, 130 S Ct 3020 [2010]), because "[i]t is beyond dispute that preventing the criminal use

of firearms is an important government objective; and keeping guns away from people who have shown they cannot be trusted to obey the law is a means substantially related to that end" (*People v Hughes*, 22 NY3d 44, 52 [2013]).

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

ENTERED: MAY 29, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12608 AXA Equitable Life Insurance Company, Index 106360/11
Plaintiff-Appellant,

-against-

Ronald Malen, D.M.D.,
Defendant-Respondent.

_____

White and Williams, LLP, New York (Andrew I. Hamelsky of counsel), for appellant.

Eisenberg & Margolis, LLP, Garden City (Andrea L. Maldonado of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 30, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Defendant told plaintiff's claim representative, Disability Management Services, Inc. (DMS), in a telephone interview in December 2008 the details of his 20 year medical history that were not disclosed in his application. Thus, as of December 2008, or, at the latest, January 2009, when he reiterated this information in the "Claimant's Statement" received by DMS, plaintiff had knowledge of the facts from which defendant's alleged fraud on his insurance application form could reasonably be inferred (*see AXA Equit. Life Ins. Co. v Deiana*, 2009 WL 1930004, *4, 2009 US Dist LEXIS 56439, *10-13 [SD NY 2009]).

Where an action for rescission is based on fraud, it must be brought either within six years from the commission of the fraud, or within two years from the discovery of the fraud or from when the fraud could have been discovered with reasonable diligence (*Goldberg v Mfrs. Life Ins. Co.*, 242 AD2d 175, 180 [1st Dept 1998], *appeal dismissed and lv denied* 92 NY2d 1000 [1998], citing CPLR 203 [g] and 213[8]). Therefore the commencement of this action for rescission of the policy in June 1, 2011 was untimely by at least five months (*see* CPLR 213[8]).

Further, plaintiff argues, based on its underwriting guidelines, that it would not have issued the policy if it had known that defendant's coverage under a disability income policy issued by another insurer included a monthly benefit of $4,000 or $4,200, instead of the represented $1,000. However, plaintiff did not follow those guidelines with respect to the benefit amount of the three other policies it had previously issued to

defendant when it approved his fourth application in January 1992.

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

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

ENTERED: MAY 29, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12609 Siamak Kohanoff, Index 653369/11
Plaintiff-Respondent,

-against-

Thomas Calabro,
Defendant-Appellant,

Ameritrust Mortgage Bankers, Inc., et al.,
Defendants.

_____

Law Offices of Michael G. Mc Auliffe, Melville (Vincent M. Lentini of counsel), for appellant.

Law Office of Steven Cohn, P.C., Carle Place (Jeffrey H. Weinberger of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 18, 2013, to the extent it awards plaintiff damages as against defendant Thomas Calabro, unanimously reversed, on the law, with costs, and the judgment vacated. The Clerk is directed to dismiss the complaint as against Calabro.

Plaintiff and defendants Bakhshi and Movtady agreed to extend the maturity dates of loans that defendant Calabro had agreed to guarantee, without obtaining Calabro's consent.

Calabro is thus relieved of his obligation as a guarantor (*Bier Pension Plan Trust v Estate of Schneierson*, 74 NY2d 312, 315-316 [1989]).

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

ENTERED: MAY 29, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12610 The People of the State of New York, Respondent, Ind. 5619/10 1786/11

-against-

Felix Garcia, Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered on or about June 1, 2011,

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

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

ENTERED: MAY 29, 2014

CLERK

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

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12612 The People of the State of New York, Ind. 1440/10
Respondent,

-against-

Israel Davilla,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about January 29, 2013,

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

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

ENTERED: MAY 29, 2014

CLERK

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

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12614-
12615 In re Emily Jane Star R. and Another,

Dependent Children Under
the Age of Eighteen Years, etc.,

Evelyn R.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

- - - - -

In re Emily Jane Star R. and Another,

Dependent Children Under
the Age of Eighteen Years, etc.,

John R.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for Evelyn R., appellant.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for John R., appellant.

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

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

_____

Orders, Family Court, New York County (Jane Pearl, J.), entered April 4, 2013, which, upon fact-finding determinations that respondents permanently neglected the subject children, terminated respondents' parental rights, and transferred the

custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The agency established by clear and convincing evidence that it made diligent efforts to strengthen the parent-child relationship, by scheduling regular visitation, providing the mother with a visitation coach to improve her interaction with Elijah, counseling the mother to complete the drug program in which she was enrolled, and referring both mother and father to multiple, court-ordered programs, including parenting skills and anger management classes, domestic violence counseling and therapy (*see Matter of Julian Raul S. [Oscar S.]*, 111 AD3d 456 [1st Dept 2013]). Notwithstanding these efforts, both parents failed to comply with the agency's referrals for services and to complete necessary programs, and neither the mother nor the father gained insight into the reasons the children had been placed into foster care (*see Matter of Sheila G.*, 61 NY2d 368 [1984]; *Matter of Dina Loraine P. [Ana C.]*, 107 AD3d 634 [1st Dept 2013]). The father also refused to attend a required sex offender program despite repeated referrals over an extensive period of time (*see Matter of Gloria Melanie S.*, 47 AD3d 438, 438 [1st Dept 2008]).

The finding that termination of respondents' parental rights

was in the children's best interests is supported by a preponderance of the evidence (*see* Family Court Act § 631; *Matter of Ibrahim B.*, 57 AD3d 382 [1st Dept 2008]). Notwithstanding the mother's assertion that she has completed some of the required programs, the record demonstrates, as indicated, that neither she nor the father have made any progress toward understanding their children's needs and that returning the children to either parent would be a risk to their well being. Moreover, Emily was placed into foster care when she was 18 months old, in 2008, and Elijah when he was four days old, in 2009, and neither has resided with either parent since then. They have bonded with their respective foster families and homes, where they are well cared for and wish to remain. Elijah, who has been diagnosed with autism, and has additional special needs, is cared for accordingly in his foster home. In contrast, the evidence demonstrates that his parents lack understanding of his diagnosis and care needs. A suspended

judgment was not in the best interests of the children (*see Matter of Michael B.*, 80 NY2d 299, 310-311 [1992]; *Matter of Juanita H.*, 245 AD2d 89 [1st Dept 1997], *lv denied* 91 NY2d 811 [1998]).

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

ENTERED: MAY 29, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, JJ.

12616 Orly G., Index 100697/08
Plaintiff-Respondent,

-against-

Sagi G.,
Defendant-Appellant.

_____

Morgan Lewis & Bockius LLP, New York (John Dellaportas of counsel), for appellant.

Zeichner Ellman & Krause LLP, New York (Bryan D. Leinbach of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered July 11, 2013, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The court properly determined that issues of fact precluded dismissal of plaintiff's claim that defendant, her brother, fraudulently induced her to transfer her interest in their family business to him for a fraction of its value, and her related

claims (*see generally Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

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

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

ENTERED: MAY 29, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12618 Lisa A. Serradilla, et al., Index 604328/01
Plaintiffs-Respondents,

-against-

Lords Corporation, et al.,
Defendants,

Ronald Vargo,
Defendant-Appellant.

_____

Zinker & Herzberg, LLP, Hauppauge (Jeffrey Herzberg of counsel), for appellant.

Wayne Greenwald, P.C., New York (Wayne M. Greenwald of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 18, 2013, which denied defendant Ronald Vargo's motion to dismiss the third and fourth causes of action against him pursuant to CPLR 3211(a)(5), unanimously reversed, on the law, without costs, and the motion granted.

Plaintiffs' third and fourth causes of action, alleging fraud and malicious and willful conduct by their architect, defendant Vargo, in connection with his alleged withholding of governmental records and other relevant information vital to their obtaining necessary approvals for the commencement of renovations to their newly purchased residence, were untimely asserted in their second amended complaint, 10 years following

their closing on the premises and awareness soon thereafter that the seller had knowledge of orders and violations, against the premises, that were not disclosed (*see generally* CPLR 214-d [5], [6]; CPLR 213[8]). The new claims could not be deemed to relate back to the original pleadings in September 2003, which alleged only professional malpractice and a duplicative claim for breach of contract (*see generally* CPLR 203[f]; *Cintron v Lynn*, 306 AD2d 118 [1st Dept 2003]?). The original pleadings lacked factual allegations to indicate intentionally misleading or malicious conduct on the architect's part. The architect's mere scheduling of debts in his Chapter 7 bankruptcy proceeding did not have the effect of reviving the time-barred third and fourth causes of action (*see generally Hyde Park Flint Bottle Co. v Miller,* 179 AD 73 [1st Dept 1917]; *Erlichman v Ventura*, 271 AD2d 481 [2d Dept 2000]).

We note that the motion court properly exercised its discretion when it considered plaintiffs' late-served opposition papers, as there was no showing of prejudice, and defendant was able to submit reply papers on the motion (*see generally Marte v City of New York*, 102 AD3d 557 [1st Dept 2013]; *Matter of Jordan v City of New York*, 38 AD3d 336 [1st Dept 2007]; *Prato v Arzt,* 79 AD3d 622 [1st Dept 2010]).

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: MAY 29, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12621 Daniel Fuger, et al., Index 110399/09
Plaintiffs-Respondents, 590519/10

-against-

Amsterdam House for Continuing Care
Retirement Community, Inc., et al.,
Defendants-Respondents-Appellants.

- - - - -

Amsterdam House for Continuing Care
Retirement Community, Inc., etc., et al.,
Third-Party
Plaintiffs-Respondents-Appellants,

-against-

Car-Win Construction, Inc.,
Third-Party
Defendant-Appellant-Respondent.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Debra A. Adler of counsel), for appellant-respondent.

D'Amato & Lynch, LLP, New York (Bill V. Kakoullis of counsel), for respondents-appellants.

Law Offices of Harry C. Demiris, Jr., P.C., Westbury (Harry C. Demiris, Jr. of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 25, 2013, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment on the issue of defendants' liability under Labor Law § 240(1), granted defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims

as against defendant Pike Construction Company, Inc., and granted Pike's motion for summary judgment on its contractual indemnification claim against third-party defendant (Car-Win Construction, Inc.), unanimously modified, on the law, to deny defendants' motion as to the Labor Law § 200 and common-law negligence claims predicated on allegations that the accident was caused by a wet and/or muddy condition on the ground, and to grant Pike's motion conditionally, and otherwise affirmed, without costs.

Plaintiffs established defendants' liability under Labor Law § 240(1) by presenting evidence that plaintiff Daniel Fuger was injured in a fall from an elevation of approximately 12 or 14 feet, while erecting a steel structure, proximately caused by defendants' failure to equip him with safety devices providing adequate protection (*see Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549 [1st Dept 2013]). Defendants failed to raise a triable issue of fact whether plaintiff's failure to use a safety harness was the sole proximate cause of his injuries, since the record demonstrates that plaintiff was not expected to use any fall protection devices when working less than 30 feet above the ground (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]).

The Labor Law § 200 and common-law negligence claims predicated on allegations that plaintiff's fall was caused by the

wet or muddy condition of the ground, with the mud tracked up to the beam from which he fell, should not be dismissed as against Pike (*see Velasquez v 795 Columbus LLC*, 103 AD3d 541, 542 [1st Dept 2013]). Pike's superintendent was walking around the area taking photographs of the ground for about half an hour before the accident and shortly after the accident, and he testified that the photos showed a muddy condition. However, the accident otherwise resulted from the method, means, or materials of plaintiff's work on the steel structure from which he fell, and Pike's general oversight and authority to stop unsafe work on the site does not establish the supervisory control over plaintiff's performance of his work that is required for Pike to be held liable for plaintiff's injuries relating to those conditions (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225 [1st Dept 2006], *affd* 7 NY3d 805 [2006]).

The provision of Car-Win's subcontract requiring Car-Win to indemnify Pike for any personal injury claims "arising out of, relative to, or resulting from the performance of the Work and/or [Car-Win's] operations under this Agreement" was triggered by this action in which plaintiff, a Car-Win employee, seeks damages for injuries he sustained while performing Car-Win's work (*see Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). However, in light of the issues of fact that exist as to

Pike's negligence, Pike's motion for summary judgment on its contractual indemnification claim against Car-Win must be granted conditionally, rather than unconditionally (*see Wood v Lefrak SBN Ltd. Partnership*, 111 AD3d 532 [1st Dept 2013]). The subcontract provides for indemnification even if the injuries were caused in part by Pike's negligence; contrary to Car-Win's contention, the accident could not have been caused solely by Pike's negligence, because it was caused at least in part by Pike's violation of Labor Law § 240(1), which imposes absolute liability.

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

ENTERED: MAY 29, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12622 Brenda Joynes, Index 300284/11
Plaintiff,

-against-

Acadia-P/A 161st Street, LLC,
Defendant-Appellant,

Gateway Building Services, Inc.,
Defendant-Respondent.

Law Offices of Edward M. Eustace, White Plains (Heath A. Bender of counsel), for appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (John W. Bieder of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 9, 2013, which denied defendant Acadia P/A 161 Street, LLC's motion for summary judgment on its cross claims for contractual and common-law indemnification against its co-defendant, Gateway Building Services, Inc., unanimously modified, on the law, the motion granted on the common-law indemnification cross claim, and otherwise affirmed, without costs.

Plaintiff avers that while attempting to exit her office building located at 260 E. 161st Street on a rainy night, she slipped and fell in the building's vestibule, where no mats had been placed to protect individuals from the slipperiness of the wet terrazzo floor. She filed this action, naming Acadia, the

building owner and manager, and Gateway, its maintenance contractor, as defendants. Acadia and Gateway filed cross claims against each other for contractual and common law indemnification.

Following discovery, Acadia sought summary judgment on its cross claims for contractual and common law indemnification against Gateway. The IAS court denied the motion, finding an issue of fact existed concerning who was responsible for placing mats in the vestibule and lobby when it rained.

The testimony of both Acadia and Gateway is clear and consistent; Gateway was solely responsible for putting out the mats in the lobby and vestibule when it rained. To the extent plaintiff has alleged her injury is because of Gateway's failure to do so, Gateway is required to provide common-law indemnification to Acadia, which would only be vicariously liable for Gateway's negligence (*see e.g. 17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]).

Since we find that Acadia is entitled to common-law indemnification, we see no need to address whether it is also entitled to contractual indemnification.

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

ENTERED: MAY 29, 2014

CLERK

Mazzarelli, J.P., Saxe, Manzanet-Daniels, Feinman, JJ.

12623 Sirius XM Radio Inc., Index 650831/13
Plaintiff-Respondent,

-against-

XL Speciality Insurance Company,
Defendant-Appellant,

U.S. Specialty Insurance Company,
Defendant.

_____

Boundas Skarzynski Walsh & Black, LLC, New York (James Sandnes of counsel), for appellant.

Jones Day, New York (Edward M. Joyce of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 8, 2013, which, inter alia, denied the motion of defendant XL Specialty Insurance Company (XL) to dismiss plaintiff insured's claim for breach of contract, unanimously affirmed, without costs.

Although the "interpretation and application of unambiguous language in policies of insurance is a legal issue for the court" (*Thomson v Power Auth. of State of N.Y.*, 217 AD2d 495, 496 [1st Dept 1995]), the subject policy issued by XL is ambiguous with respect to whether its requirement of notice with respect to "any" claim pertains to claims that are related under the provisions for "Interrelated Wrongful Acts." Even assuming that plaintiff did have to notify XL of every interrelated claim as

soon as practicable, the documentary evidence fails to resolve all factual issues as a matter of law (*see Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383 [1st Dept 2002]).

Despite XL's contention that the documentary evidence demonstrated that plaintiff knew about the three actions at issue in March, April, and May 2011, and yet did not provide notice to XL until a January 2012 email, the "Prior Notice" exclusion in the U.S. Specialty Insurance Company (USS) policy, which provided primary coverage for these actions, provided that USS could deny coverage if plaintiff notified any of its prior insurance companies (*see e.g. Zahler v Twin City Fire Ins. Co.*, 2006 WL 846352, *7, 2006 US Dist LEXIS 14263, *20-21 [SD NY 2006]). Triable issues are also raised by the January 2012 email, which was plaintiff's "notice" of the subject action to XL, and as to the relatedness of the timely claim and three disputed claims.

XL's argument that plaintiff did not ask for consent to incur defense expenses fails if the claims are found to be interrelated and treated as a single claim under the policy. Furthermore, XL's August 9, 2012 letter to plaintiff's broker requesting copies of all fees statements for the subject actions, could be found to be a waiver of its right to object to defense expenses.

In view of the foregoing issues, plaintiff's contention that XL's disclaimer was untimely cannot be decided at this juncture.

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

ENTERED: MAY 29, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12624 The People of the State of New York, Ind. 546/00
Respondent,

-against-

Wilson Llanos,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered October 25, 2012, resentencing defendant, as a second felony offender, to a term of 20 years, with five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: MAY 29, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12626 The People of the State of New York, Respondent, Ind. 2526/10

-against-

Sezzie Goodluck, Defendant-Appellant.

_____

Glenn A. Garber, P.C., New York (Glenn A. Garber of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered April 15, 2011, convicting defendant, after a jury trial, of scheme to defraud in the first degree, and sentencing her to a term of 364 days, unanimously affirmed.

Where defendant was charged with participating, along with other defendants, in a fraudulent investment scheme, the court properly exercised its discretion in receiving testimony of investors who did not have contact with defendant. Since the scheme to defraud count required the People to show a pattern of fraudulent conduct targeting more than one victim (*see* Penal Law § 190.65[1][b]), these witnesses provided highly probative evidence of the scope of the scheme. Although the People also introduced the testimony of the two investors whom defendant directly recruited, the People "were not bound to stop after

presenting minimum evidence" (*see People v Alvino*, 71 NY2d 333, 245 [1987]). Moreover, the People only called as witnesses a few of the many victims of the scheme.

The court also properly exercised its discretion in receiving evidence of defendant's refusal to cooperate with an internal, nonpolice investigation by the bank where she was employed. When a bank official who was investigating defendant's solicitation of bank customers for the investment scheme at issue asked her to appear for an interview, defendant attempted to resign, and was terminated. This evidence was probative of her consciousness of guilt (*see People v Holland*, 174 AD2d 508, 510 [1st Dept 1991], *lv denied* 78 NY2d 1011 [1991]).

The court permitted defendant a full opportunity to cross-examine all prosecution witnesses, and it imposed appropriate limits on defendant's elicitation of collateral and irrelevant matters.

The court properly precluded defendant from eliciting evidence of a statement by a codefendant, who was a fugitive, that purportedly exculpated defendant. Although defendant offered this statement as evidence of the codefendant's state of mind, it was essentially a factual assertion that was irrelevant unless offered to prove the truth of the matter asserted. Accordingly, the statement was hearsay (*see People v Reynoso*, 73

NY2d 816, 819 [1988]), and it was not admissible under any hearsay exception.

We have considered and rejected defendant's ineffective assistance of counsel claim (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant's remaining contentions, including all of her constitutional arguments, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

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

ENTERED: MAY 29, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12627 K.L.M.N.I., Inc., Index 108798/11
Plaintiff-Respondent-Appellant,

-against-

483 Broadway Realty Corp., et al.,
Defendants-Appellants-Respondents.

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Cornicello, Tendler & Baumel-Cornicello, LLP, New York (Jay H. Berg of counsel), for 483 Broadway Realty Corp., appellant-respondent.

Seyfarth Shaw LLP, New York (Jerry A. Montag of counsel), for C&A 483 Broadway LLC, appellant-respondent.

Mishaan Dayon & Lieblich, New York (Kenneth M. Lieblich of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 29, 2013, which denied defendants' motions for summary judgment on their counterclaims for contractual indemnification, and, upon a search of the record, denied summary judgment to plaintiff, unanimously modified, on the law, to grant defendants' motions, and to remand the matter for a determination of the amounts due on the counterclaims, and otherwise affirmed, without costs.

Defendants are entitled to recover the costs and expenses they incurred in defending and settling the federal action that alleged discrimination in a place of public accommodation and identified 21 alleged violations of the Americans with

Disabilities Act of 1990 (ADA) (42 USC § 12101 *et seq.*). In that action, defendants were sued in their capacities as the former and subsequent landlord of premises leased by plaintiff.

Paragraph 18(C)(1)(v) of the lease agreement entered into between plaintiff, as tenant, and defendant 483 Broadway LLC, as landlord (and later assigned by 483 Broadway LLC to defendant C & A 483 Broadway Realty Corp.), requires "Tenant ... to pay, as additional rent, all reasonable attorneys' fees and disbursements ... Landlord may incur ... by reason of ... any other appearance by Landlord ... as a witness or otherwise in any action or proceeding whatsoever involving or affecting Landlord, Tenant or this Lease." The phrase, "any other appearance," does not refer solely to situations in which landlord appears as a nonparty; it merely distinguishes subsection (v) from the preceding subsections, which refer to disputes between landlord and tenant. No determination of liability in the federal action was necessary to invoke this provision, since the provision requires only that landlord be involved in the action.

Defendants are also entitled to recover pursuant to paragraph 37 of the lease agreement, which requires plaintiff to "indemnify and save harmless Landlord from and against (a) all claims of whatever nature against Landlord arising from any act, omission or negligence of Tenant ... including any claims arising

from any act, omission or negligence of Landlord ... and (d) any breach, violation or nonperformance of ... this Lease." This broad indemnification provision is coupled with a requirement that plaintiff obtain insurance coverage "including broad form contractual liability coverage." As the parties thus allocated the risk of liability to others between themselves through insurance, indemnity is not prohibited (*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412 [2006]; *Hogeland v Sibley, Lindsay & Curr. Co.*, 42 NY2d 153, 160-161 [1977]). Moreover, the ADA expressly authorizes the allocation of responsibility between a landlord and a tenant of a place of public accommodation "by lease or other contract" (*see* 28 CFR 36.201[b]).

The failure to defend and indemnify defendants in the federal action and reimburse them for their costs and expenses rendered plaintiff in default of the lease, pursuant to paragraph 19(A) thereof, thereby entitling defendants to recover amounts paid as a result of the default.

Although 483 Broadway Realty Corp.'s costs and expenses in connection with the federal action were incurred after the lease was assigned to C & A 483 Broadway LLC, its potential liability attached while it was plaintiff's landlord, since the federal action was commenced, and the ADA violations alleged therein occurred, before the effective date of the assignment. The pre-

assignment commencement of the federal action does not preclude recovery by C & A 483 Broadway against plaintiff, since C&A 483 Broadway was made a party only after it had become plaintiff's landlord, and the federal action alleged continuing violations.

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

ENTERED: MAY 29, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12631N Celeste Asim, Index 303982/08
Plaintiff-Respondent-Appellant,

-against-

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

Metropolitan Transportation
Authority, et al.,
Defendants-Appellants-Respondents.

- - - - -

Wallace D. Gossett, et al.,
Nonparty Respondents.

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Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for appellants-respondents.

Roth & Roth, LLP, New York (David A. Roth of counsel), for respondent-appellant.

Gruvman, Giordano & Glaws, LLP, New York (Kevin Lee Bigelow of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered January 31, 2013, which, to the extent appealed from as limited by the briefs, granted so much of plaintiff's motion as sought to strike the answer of defendants Metropolitan Transportation Authority (MTA), New York City Transit Authority, and Manhattan and Bronx Surface Transit Operating Authority (collectively, the Authority), and denied so much of the motion as sought costs and sanctions against the Authority and its counsel, unanimously modified, on the law, to the extent of

granting the part of plaintiff's motion that seeks costs and sanctions against the Authority, imposing a sanction on the Authority in the amount of $10,000, payable to the Lawyers' Fund for Client Protection, and remanding the matter to Supreme Court for assessment of the costs and attorneys' fees incurred by plaintiff in making the motion for sanctions and taking this appeal, and otherwise affirmed, without costs.

Supreme Court providently exercised its discretion in striking the Authority's answer. For four years and despite discovery orders, the Authority failed to acknowledge ownership of the MTA police vehicle that caused plaintiff's injuries or to disclose the name of the driver of the vehicle. In fact, the Authority repeatedly denied ownership and employment of the vehicle's driver, and, when defendant the City of New York moved to dismiss the complaint based on its lack of ownership of the vehicle, the Authority joined in the motion on identical grounds. The Authority acknowledged ownership and disclosed the driver's identity only after the court ruled that the MTA owned the vehicle and after plaintiff moved for summary judgment on the issue of liability. In addition, while the Authority initially stated that the incident was "unreported," it disclosed an incident report after plaintiff moved for discovery sanctions. The Authority failed to provide an excuse for the late disclosure

of the report and the driver's identity.

The Authority's conduct constituted willful and contumacious behavior and was a significant waste of limited and strained judicial resources sufficient to warrant the "drastic" sanction of striking its answer (*Oasis Sportswear, Inc. v Rego*, 95 AD3d 592 [1st Dept 2012]; *Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]). The Authority's frivolous conduct also warrants the imposition of costs and sanctions (*see* 22 NYCRR 130-1.1). No sanctions are warranted against the Authority's prior counsel, as the record indicates that the Authority withheld the available information from its prior counsel.

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

ENTERED: MAY 29, 2014

CLERK

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

11593 Maxim A. Stepanov, et al., Index 150534/12
Plaintiffs-Appellants,

-against-

Dow Jones & Company, Inc.,
Defendant-Respondent.

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Ganfer & Shore, LLP, New York (Steven Skulnik of counsel), for appellants.

Davis Wright Tremaine, LLP, New York (Laura R. Handman of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered April 19, 2013, affirmed, with costs.

Opinion by Feinman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
David B. Saxe
Karla Moskowitz
Sallie Manzanet-Daniels
Paul G. Feinman, JJ.

11593
Index 150534/12

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Maxim A. Stepanov, et al.,
Plaintiffs-Appellants,

-against-

Dow Jones & Company, Inc.,
Defendant-Respondent.

_____x

Plaintiffs appeal from the order of the Supreme Court, New York County (Ellen M. Coin, J.), entered April 19, 2013, which granted defendant's motion to dismiss the complaint.

Ganfer & Shore, LLP, New York (Steven Skulnik of counsel), for appellants.

Davis Wright Tremaine, LLP, New York (Laura R. Handman, Camille Calman and Jason P. Conti of counsel), for respondent.

FEINMAN, J.

Nearly two decades ago, the Court of Appeals acknowledged that there existed an open question under New York law regarding which test to apply to claims of defamation by implication, but did not reach the issue and concluded that the choice must "await another day" (*Armstrong v Simon & Schuster*, 85 NY2d 373, 381 [1995]). While no appellate court in this State has since addressed that particular issue, its day has finally come.

Plaintiffs, a Russian businessman and a company he founded (Midland Consult [Cyprus] Ltd.) claim that they were defamed in Bill Alpert's article *Crime and Punishment in Putin's Russia*, which appeared on April 18, 2011 in Barron's, a weekly newspaper published by defendant. The article described an embezzlement conspiracy involving Russian businessmen and officials.

The article reported that in 2006, the hedge fund Hermitage Capital realized a profit of about $1 billion and paid $230 million in taxes to Russia. Russian Interior Ministry police raided Hermitage's Moscow offices in June 2007, seizing its Russian subsidiaries' corporate seals and certificates. In October of that year, a "convicted killer" used the corporate seals to act in the subsidiaries' names to consent to judgments in a Russian court totaling about $1 billion. On December 23,

2007, he and his "cohorts," masquerading as Hermitage officers, filed for a $230 million tax refund, applying the judgments against Hermitage's $1 billion in profits. On the following day, the Moscow tax bureau, headed by Olga Stepanova, approved the refund and wired the money to "brand-new accounts" at Moscow banks.

Hermitage launched a private investigation, hiring Russian lawyer Sergei Magnitsky. Credit Suisse records obtained through the investigation showed at least $20 million flowing through the bank accounts of a number of "dummy corporations" associated with small nations in the two years following the $230 million heist. Hermitage's informant, a Russian businessman who had been part of a network that paid Olga Stepanova and other officials for their roles in tax embezzlements, told Hermitage that these Credit Suisse transactions were intended as payments to Stepanova and her deputies for their assistance in the scam.

The article goes on to detail a number of transactions involving the Credit Suisse accounts. In doing so, it refers to plaintiffs in the following three paragraphs, out of the 40 comprising the entire article:

> "On Jan. 23, 2008 the Credit Suisse accounts received about $3 million from a shell company called Bristoll Export, registered in New Zealand by a

> company-formation agency called GT Group. After earlier *Barron's* stories showed that GT Group sold shells that were ultimately used to launder Mexican drug-cartel money through Wachovia Bank and, separately, to commission a plane filled with anti-aircraft missiles and rocket launchers from North Korea, New Zealand police raided GT Group's offices in October of 2010.
>
> "Nested inside the shell of Bristoll Export – like a Russian doll – was yet another shell company whose directors work at Midland Consult, a Russia-focused representative of offshore banks founded by a former Russian diplomat named Maxim A. Stepanov in Cyprus.
>
> "The GT Group didn't respond to questions e-mailed to its headquarters on the island of Vanuatu. Midland Group's Maxim Stepanov would not identify the owners of Bristoll Export and said in an e-mail that his customers were 'honest, decent businessmen and have no criminal conduct found by the Courts of Justice.'"

The article also reported that, shortly after the tax refund was approved by Olga Stepanova, her husband's Cyprus shell corporation received $10.9 million. Although the article does not expressly state the husband's identity, it identifies a number of properties owned by Vladlen Stepanov, "the Stepanovs," and "Stepanova's family" and refers to "Olga's obligatory income declarations" showing the cumulative income "between herself and Vladlen."

In July 2008, Hermitage's lawyer Magnitsky filed criminal complaints with Russian government agencies, accusing Olga Stepanova, police Colonel Kuznetsov, and others of being involved

in the Hermitage fraud and another similar scheme. When Magnitsky testified to Russian prosecutors in October 2008, he was arrested, delivered to Kuznetsov, and imprisoned, where he was subjected to "harsh conditions" and pressured to retract his testimony and implicate himself. While in prison, the 37-year-old attorney "became gravely ill and, denied medical care, died on November 16, 2009." This led the Russian businessman mentioned above to become Hermitage's informant and provide the Credit Suisse bank records. In January 2011, Hermitage filed a complaint with the Swiss federal Attorney General. It appears that the informant's bank records and the Swiss complaint provided the factual basis for most of the article's assertions.

In the complaint in this action, plaintiffs contended that the article was defamatory, stating that it was "false, disparaging, derogatory, and misleading to state or imply": (1) that Midland was doing business with GT Group in 2010 when GT allegedly sold shell corporations to individuals involved in narcotics and weapons; (2) that Midland was involved with the companies used to launder drug-cartel money and ship weapons; (3) that Bristoll Export or its subsidiaries had directors who "work at Midland Consult"; and (4) that plaintiff Stepanov was a former Russian diplomat, because the article is entitled *Crime and*

Punishment in Putin's Russia, but Stepanov served as a diplomat under Mikhail Gorbachev and Boris Yeltsin, not Vladimir Putin.

Defendant moved to dismiss the complaint, arguing that the article was not defamatory to plaintiffs because it was substantially true that plaintiffs had a connection to Bristoll Export and that the article's statements could not support a cause of action for defamation because they "were either not 'of and concerning' plaintiff[s] or not capable of having a defamatory meaning." Alternatively, defendant argued that the statements were privileged under Civil Rights Law § 74 as a fair and true report of an official proceeding in Switzerland. Defendant submitted copies of the article, Hermitage's Swiss complaint, and a follow-up article by Alpert and published in Barron's that reported that the Swiss Attorney General had commenced a criminal investigation.

In opposition, plaintiffs submitted an affidavit from plaintiff Stepanov stating that he resigned from the government in 1997, before Putin became president, that Midland Consult was not involved with Bristoll Export until after the January 2008 transaction, that Midland Consult had severed ties with GT Group before GT's "first legal troubles concerning the airplane," and that he has no connection to Olga Stepanova or Vladlen Stepanov.

He asserted that these facts show plaintiffs had nothing to do with the actions described in the article and that, had the timeline been included in the article, it would have been clear that the mention of plaintiffs was extraneous to the news story. Based on this, plaintiffs argued that the article's statements were defamatory per se when viewed in context or, alternatively, defamatory by implication. Plaintiffs did not allege that any statement was explicitly inaccurate, but argued that the article did not include statements that would eliminate an inference that plaintiffs were involved with people and companies engaged in illegal activity. Plaintiffs also argued that Civil Rights Law § 74 was inapplicable.

In reply, defendant argued that publishers can only be held responsible for what is actually written, stating that nothing in the article implied that plaintiffs were responsible for any wrongdoing and asserting that its inclusion of plaintiffs in the article was a matter of editorial judgment.

The court granted defendant's motion and dismissed the complaint. It found that Civil Rights Law § 74 does not apply to the specific facts of this case, but that plaintiffs did not state a valid claim for express or implied defamation. Plaintiffs appealed this ruling, which we now affirm.

Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Foster v Churchill*, 87 NY2d 744, 751 [1996] [internal quotation marks omitted]). To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm (*see Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Because the falsity of the statement is an element of the defamation claim, the statement's truth or substantial truth is an absolute defense (*see Konrad v Brown*, 91 AD3d 545, 546 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]). On a motion to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are "reasonably susceptible of a defamatory connotation," such that the issue is worthy of submission to a jury (*Silsdorf v Levine*, 59 NY2d 8, 12 [1983], *cert denied* 464 US 831 [1983] [internal quotation marks omitted]).

Insofar as plaintiffs' complaint is premised on express

defamation, it must be dismissed, as these claims are based on substantially true statements that are not reasonably susceptible of defamatory connotations.

Plaintiffs argue that, by describing various illegal activities of GT Group and noting the links between GT Group and Bristoll Export and between Bristoll Export and Midland Consult, the article defamed them by leading readers to believe that Midland was connected to the Bristoll wire transfer and GT's illegal activity. The article, however, only states that a "shell company whose directors work at Midland Consult" was "[n]ested inside the shell of Bristoll Export." At most, the article is pointing out a connection between a Bristoll Export shell company and certain directors who work at Midland Consult in the present (as of the article's publication). It does not state that there was a connection during the events of late 2007 and early 2008, over three years before the publication. Exhibits to Hermitage's Swiss complaint show that, at the time of the publication, the shell company referred to in the article was in fact the owner of Bristoll Export. Although the article indicated that Bristoll owned Midland and not vice versa, the article's assertion that the two were connected is substantially true. Therefore, it is not capable of the defamatory connotation

that plaintiffs claim it carries.

Plaintiffs also argue that identifying Maxim Stepanov as a "former Russian diplomat" is expressly defamatory when viewed in conjunction with the article's headline, *Crime and Punishment in Putin's Russia*, because he served as a diplomat before Putin's presidency. The article's statement is clearly true, as plaintiffs made clear that Maxim Stepanov was, in fact, a former Russian diplomat. Furthermore, even if the language could be construed to mean that Stepanov served during Putin's tenure, the corruption detailed in the article involved Russian police and tax officials, not diplomats. This statement is also clearly not expressly defamatory.

Plaintiffs' chief argument, however, is that the article's statements were defamatory by implication. "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements" (*Armstrong v Simon & Schuster*, 85 NY2d at 380-381 [internal quotation marks omitted]). The implied defamation cause of action was recognized by the Court of Appeals in a 1963 decision determining that, although the publication at issue contained no directly defamatory statements, "a jury should decide whether a libelous intendment would naturally be given to

it by the reading public acquainted with the parties and the subject-matter" (*November v Time Inc.*, 13 NY2d 175, 179 [1963] [internal quotation marks omitted]). The following year, the U.S. Supreme Court's landmark decision in *New York Times Co. v Sullivan* (376 US 254 [1964]) found that the free speech protections guaranteed by the First Amendment to the U.S. Constitution placed substantial limits on the right to recover for defamatory statements (*see also Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 198 [1975]). In a 1977 libel decision, after discussing the impact *Sullivan* had on defamation jurisprudence, the Court of Appeals addressed an aspect of the plaintiff's claim that was akin to implied defamation, noting that although an author "could not make up facts out of whole cloth, omission of relatively minor details in an otherwise basically accurate account is not actionable. This is largely a matter of editorial judgment in which the courts, and juries, have no proper function" (*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 383 [1977], *cert denied* 434 US 969 [1977] [internal citation omitted]).

In 1995, the Court of Appeals revisited the defamation by implication cause of action, noting that courts across the country have adopted different standards to balance these claims

against the "concern that substantially truthful speech be adequately protected" (*Armstrong*, 85 NY2d at 381). However, the Court determined that the claim before it was not actually of implied defamation, but rather a more straightforward allegation of false statements of verifiable fact, and the question of the proper test for implied defamation claims remained open (*id.*).

The motion court adopted the approach taken by the court in *Biro v Condé Nast* (883 F Supp 2d 441, 463-467 [SD NY 2012]). That court, noting that neither the state nor federal appellate courts in New York had established a standard to be applied to a motion to dismiss a claim of defamatory implication, endorsed a rule articulated by several federal courts of appeals and already applied by at least one state trial court (*id.* at 464-465).

The D.C. Circuit Court of Appeals, relying in part on Eighth Circuit jurisprudence, determined:

> "[I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established. But if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends* or *endorses* the defamatory inference, the communication will be deemed capable of bearing that meaning" (*White v Fraternal Order of Police*, 909 F2d 512, 520 [DC Cir 1990]; *see Janklow v Newsweek, Inc.*, 759 F2d 644, 648-649 [8th Cir 1985], *cert denied* 479 US 883 [1986]).

The Fourth Circuit stated that this inquiry requires "an especially rigorous showing": the "language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference" (*Chapin v Knight-Ridder, Inc.*, 993 F2d 1087, 1093 [4th Cir 1993]). In a decision affirmed by this Court, the New York County Supreme Court quoted this *Chapin* standard before analyzing the plaintiff's implied defamation claims and dismissing the complaint (*Rappaport v VV Publ. Corp.*, 163 Misc 2d 1, 5-6 [Sup Ct, NY County 1994], *affd* 223 AD2d 515 [1st Dept 1996]).

Plaintiffs argue that we should instead adopt a standard, accepted by a number of other courts, that does not require showing that a defendant intended or endorsed a defamatory inference. They argue that because they are not public figures, who must show a statement was made with actual malice, they should not be held to show the author intended or endorsed a defamatory implication. In doing so, plaintiffs conflate two entirely separate issues. The "actual malice" rule requires a public figure to prove by clear and convincing evidence that a defamatory statement was published with "knowledge that it was false or with reckless disregard of whether it was false or not" (*Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 353 [2009]). It

is a subjective inquiry, "focusing upon the state of mind of the publisher of the allegedly libelous statements at the time of publication" (*id.* at 354-355). The standard at issue here is the threshold question of whether a statement is capable of a defamatory implication. "Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance" (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985]). It is not a test for fault and whether a particular plaintiff is a public or private figure is not relevant to the inquiry. Furthermore, it is not a subjective standard like the "actual malice" test, but an objective one that asks whether the plain language of the communication itself suggests that an inference was intended or endorsed.

We adopt the standard advanced by defendant and accepted by the motion court. To survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference. We believe this rule strikes the appropriate balance between a plaintiff's right to recover in tort for statements

that defame by implication and a defendant's First Amendment protection for publishing substantially truthful statements (*see Armstrong*, 85 NY2d at 381).

Applying the standard to each of plaintiffs' allegations of implied defamation, we find that none of the article's statements meet this standard and affirm the motion court's dismissal of the complaint.

Plaintiffs argue that they were impliedly defamed when the article noted that employees of Midland Consult were directors of a shell company affiliated with Bristoll Export without clarifying that the 2008 wire transfer from Bristoll occurred before anyone connected to plaintiffs began serving as a director of any affiliate of Bristoll. We do not agree that the minor omission of the timeline of Bristoll's involvement with Midland raises an implication that Midland was connected to the scheme described in the article. Nor do we agree that if the timeline had been included, it would have "revealed to the editors that [plaintiffs] had no place in the narrative." Plaintiffs misapprehend the clear purpose of this small passage in the context of the entire article.

Before describing the various transactions borne out in the Credit Suisse records, of which the Bristoll transaction was one,

the article cited a money-laundering compliance expert who explained that a bank's obligation to report suspicions of money laundering arises from a confluence of factors including not only the use of offshore shells to hide income and assets, but also high-risk jurisdictions, a lack of legitimate commercial activity, and politically connected individuals. The article claims that Hermitage's Swiss complaint points out all these factors, then goes on to describe each transaction and its associated risk factors. Viewed in this context, it is clear that the only implication intended or endorsed by the author is that the Bristoll wire transfer qualifies as a suspicious transaction. The article first links Bristoll to GT Group and states that other shell companies associated with GT were involved in unrelated illegal actions, or "a lack of legitimate commercial activity." Indeed, it is clear from the article that the GT Group's offices were not raided until over two and a half years after the unrelated Bristoll transfer, but the author still included the information, and it clearly promotes an inference that at least one of the risk factors existed.

The article then connects Bristoll to Midland and, while the connection is attenuated, it has been established that it is substantially true. The article also states the true facts that

plaintiff Stepanov is a former Russian diplomat and that plaintiff Midland was founded in Cyprus. These facts lead to an inference that Bristoll was at some point associated with two more risk factors, "politically connected individuals" and "high-risk jurisdictions." As the article did in its statements regarding GT Group, it could have more clearly stated the timeline of Bristoll's involvement with Midland, but this would not have made the involvement irrelevant, because the intended or endorsed implication, and the entire import, of this connection was clearly not to show that Midland was involved in the Bristoll transaction or the tax-fraud scheme, but rather to show that Bristoll satisfied the money-laundering risk factors and it should have been reported to regulators.

Plaintiffs also contend they were defamed by an implication that they were involved in the illegal actions perpetrated by other shell companies formed by GT Group because the article did not note that plaintiffs had severed ties with GT before the activities occurred. Again, the clear implication intended by the mention of these illegal activities was to show that the Bristoll transaction was suspicious. It cannot reasonably be read to imply that plaintiffs were somehow involved in the schemes to launder Mexican drug cartel money or transport North

Korean weapons.

Plaintiffs reiterate their contention that identifying Maxim Stepanov as a "former Russian diplomat" implied that he was involved in the corrupt activities because the article did not clarify that he left office before Putin's presidency. As discussed above, there is no reasonable reading of this true fact that can lend itself to a defamatory implication. The article does not allege any corruption at all in Russia's diplomatic corps and does not imply that plaintiff Stepanov himself was involved in any corruption.

Finally, plaintiffs argue that the article implies that Maxim Stepanov was somehow involved in the scheme because it expressly states that Olga Stepanova and her husband Vladlen Stepanov were central to the fraud without clarifying that they had no connection to Maxim. There is simply no reasonable reading of the article that imparts this inference. The lone fact that they share a last name that plaintiffs' counsel has conceded is very common in Russia, comparable to "Smith" in the United States, is far too attenuated to support a reasonable implication that Maxim was not only related to Olga and Vladlen but somehow involved in their fraudulent activities.

Given that we conclude that nothing is expressed or implied

in defendant's article that is capable of a defamatory meaning as it pertains to plaintiffs, the complaint was properly dismissed. We, therefore, need not address defendant's alternative argument that the content of the article is privileged as a fair report of an official proceeding under Civil Rights Law § 74.

Accordingly, the order of the Supreme Court, New York County (Ellen M. Coin, J.), entered April 19, 2013, which granted defendant's motion to dismiss the complaint should be affirmed, with costs.

All concur.

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

ENTERED: MAY 29, 2014

CLERK