SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 18, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Tom, Richter, Manzanet-Daniels, Kahn, JJ.

3286 Darren James, et al., Index 302140/10
Plaintiffs-Appellants, 84150/09
84016/10

-against-

Alpha Painting & Construction Co., Inc.,
et al.,
Defendants-Respondents.
\- - - - -
Alpha Painting & Construction Co., Inc.,
et al.,
Third-Party Plaintiffs-Respondents,

-against-

Brand Energy Services, LLC,
Third-Party Defendant-Respondent.
\- - - - -
The Triborough Bridge & Tunnel Authority,
Second Third-Party Plaintiff-Respondent,

-against-

Brand Energy Services, LLC, et al.,
Second Third-Party Defendants-Respondents.

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Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for appellants.

Brody & Branch LLP, New York (Mary Ellen O'Brien of counsel), for Alpha Painting & Construction Co., Inc. and Quad Rentals, LLC, respondents.

Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for the Triborough Bridge & Tunnel Authority, respondent.

Sinnreich, Kosakoff & Messina LLP, Central Islip (Michael Stanton of counsel), for Greeman-Pederson, Inc., respondent.

Shaub, Ahmuty, Citrin & Spratt, LLP, New York (Robert M. Ortiz of counsel), for Brand Energy Services, LLC, Brand Scaffold Builders, LLC and Manuel Rendeiro, respondents.

Order, Supreme Court, Bronx County (Barry Salman, J.), entered April 1, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment as to the issue of liability on the Labor Law § 241(6) claim, and granted defendants' motions for summary judgment dismissing the Labor Law §§ 200, 240(1), and 241(6) and common-law negligence claims, modified, on the law, to deny defendants' motions insofar as they sought dismissal of plaintiffs' Labor Law § 241(6) claims, and to remand the matter to the motion court for a determination of the motions for summary judgment on the indemnity and contribution claims, and otherwise affirmed, without costs.

Plaintiffs Darren James and Balthazar Andrade were employed by Brand Energy Services, LLC (Brand) on a project to renovate and repaint the Bronx-Whitestone Bridge. Alpha Painting and Construction Co., Inc. (Alpha) was the general contractor on the

project and leased the "boom truck"[1] involved in plaintiffs' accident from Quad Rentals, LLC (Quad), an affiliate of Alpha. GPI was the construction manager for the project.[2] The Triborough Bridge and Tunnel Authority (TBTA) is the owner of the bridge.

On the date of the accident, plaintiffs were dismantling a scaffold and loading the materials onto the boom truck for transport to the other side of the bridge. Soon after the truck took off, the raised boom struck an overhead road sign and gantry, causing part of the truck to swing into the air and the sign and gantry to fall onto the bridge. Plaintiffs were thrown from the truck onto the roadway, causing severe injuries.

"Manny" Rendeiro, the operator of the boom truck on the date of the accident, testified that he went back and forth between Alpha's and Brand's employ, and admitted having received no instruction from any source concerning either the operation of the boom or the boom truck. Rendeiro testified that he had never operated "that type of truck" prior to the incident. Rendeiro was not licensed to drive a commercial vehicle, nor was he licensed or certified to operate a boom truck or a crane.

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[1]A "boom truck" is a flatbed truck equipped with a crane.

[2]Defendant Greenman-Pedersen, Inc. (GPI) was sued incorrectly as "Greeman-Pederson, Inc."

Plaintiff James testified that the Alpha foremen were present during the hour or so it took to load materials onto the boom truck, and that they repeatedly screamed at the workers to work faster. They ordered plaintiff and the other Brand workers to board the truck and to drive off the bridge. He testified that Alpha wanted them to unload the truck as quickly as possible in order to have time to return for another load. Plaintiff Andrade testified that he boarded the truck because he was ordered to do so by the Alpha foreman and Fernando, the GPI safety officer. He testified that Fernando directed traffic so that Rendeiro could pull the boom truck out of the closed lane.

According to the Occupational Safety and Health Administration (OSHA) investigative report, the boom truck traveled approximately 700 feet with the boom "raise[d] up about 60 degree[s]," when the boom struck the overhead road sign and supporting structure, causing the sign to crash down on all lanes and injure plaintiffs. OSHA cited defendants for driving the boom truck "with extended boom" in violation of then existent 29 CFR 1926.550(a)(1), and having employees operate the boom truck "without training in the safe operation of the crane," in violation of 29 CFR 1926.21(b)(2).

The motion court granted defendants' motions for summary judgment dismissing the complaint, and denied plaintiffs' motion

for partial summary judgment on their Labor Law § 241(6) claim. In dismissing the Labor Law section 240(1) claim, the court concluded that the accident was outside the scope of the statute because it occurred away from the work site. The court reasoned that even if the Labor Law statutes were applicable, such violations had not proximately caused the incident with respect to any defendant. The court dismissed the common-law negligence claim against Alpha, reasoning that Alpha had not supervised or controlled plaintiffs' work and did not have notice of any dangerous condition that caused plaintiffs' injuries.

We now modify to deny defendants' motions for summary judgment insofar as they sought dismissal of plaintiffs' section 241(6) claim. We find that the accident was part of the site for purposes of the Labor Law, as the truck was in the process of driving away and had only departed 700 feet when the accident occurred.

The motion court correctly dismissed the section 240(1) claim. Plaintiffs were not faced with the type of elevation-related hazard contemplated by Labor Law § 240(1) (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Plaintiffs' fall was not caused by an elevation-related risk, but by the motion of the truck after the boom struck the overhead road sign

and gantry (*see Dilluvio v City of New York*, 264 AD2d 115, 119 [1st Dept 2000] [section 240(1) inapplicable where the plaintiff fell off the back of a truck while being driven to the location on the roadway where he would place cones as part of lane closure process], *affd* 95 NY2d 928 [2000]). Further, the gantry was "not a material being hoisted or a load that required securing" within the meaning of the statute] (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

The Industrial Code provisions cited as predicates for the Labor Law § 241(6) claims are largely inapplicable (*see* 12 NYCRR 23-8.5 [since repealed]; 23-9.7[e]; 23-1.29[a]).

At this stage, however, an issue of fact exists as to whether defendants violated section 23-8.2(d)(3) of the Industrial Code, pertaining to "[m]obile crane travel," which provides that "[a] mobile crane, with or without load, shall not travel with the boom so high that it may bounce back over the cab"[3] (12 NYCRR 23-8.2[d][3]; *see Braun v Fischbach & Moore*, 280 AD2d 506 [2d Dept 2001] [issue of fact as to whether the defendant violated the section, where the raised boom of a crane collided with a support beam, causing the crane to dislodge from

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[3]This argument was preserved inasmuch as plaintiffs alleged a violation of the regulation in their amended complaint. At least one defendant argued its inapplicability, prompting a response by plaintiffs.

the turntable and be pushed onto a flatbed car on which the plaintiff was standing]).[4] Defendants complain that there was no evidence that the boom bounced back over the cab. However, the regulation is violated when a mobile crane has "the boom so high that it *may* bounce back over the cab" (*id.* at 507-508 [emphasis added]). Even assuming defendants are correct, the boom was high enough to strike a gantry sign. We reject the dissent's argument that the regulation was not implicated because plaintiffs were not injured by the boom bouncing over the cab, but rather, when the boom hit the road sign. In *Braun*, the plaintiff was injured not by the boom bouncing over the cab per se, but by beams, grates and railroad ties that were propelled by the turret of the crane after the crane collided with a support beam and became dislodged from the turntable (*id.* at 507). We accordingly reinstate plaintiffs' section 241(6) claims as against defendants. Given the apparent conflict between the contract and the testimony about the operation of the work site, whether GPI functioned as a statutory agent with control over the injury-producing work presents an issue for the jury to resolve (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 434 [2015]).

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[4]The dissent maintains that the boom truck did not qualify as a "mobile crane." The dissent admits, however, that "mobile crane" is not formally defined in the pertinent regulation.

Defendants established prima facie that they had only general supervisory authority over plaintiffs' work, which is insufficient to establish liability under Labor Law § 200 or common-law principles (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306-307 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]; *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003]). In opposition, plaintiffs failed to raise an issue of fact.

All concur except Tom and Kahn, JJ. who dissent in part a memorandum by Tom, J. as follows:

TOM, J. (dissenting in part)

While I agree with the majority that Supreme Court correctly dismissed the Labor Law § 240(1), the Labor Law § 200, and the common-law negligence claims, I would find that the court also properly dismissed the Labor Law § 241(6) claim. Accordingly, I respectfully dissent.

Plaintiffs Darren James and Baltazar Andrade were employed by third-party defendant/second third-party defendant Brand Energy Services, LLC (Brand), which had been retained by defendant/third-party plaintiff Alpha Painting and Construction Co., Inc. (Alpha), the general contractor on a project to renovate and paint the Bronx-Whitestone Bridge. Plaintiffs' job was to provide, install and dismantle scaffolding for the project.

Plaintiffs had been dismantling scaffolding on a tower located on the Queens side of the bridge and loading the scaffolding materials onto the boom truck for transport. The boom truck is a flatbed truck with a hoist or "boom" affixed to the back of the flatbed. Defendant/third-party plaintiff Quad Rentals, LLC, an affiliate of Alpha, owned and leased the truck to Alpha, which in turn loaned the truck to Brand via a verbal agreement. Since Brand did not have the necessary equipment to transport the scaffolding parts back to its yard, it borrowed the

truck from Alpha. The dismantled parts were lowered onto the flatbed part of the truck using an electric rope hoist operated by Brand. Brand workers had raised the boom about 45 degrees to make it easier to lower the parts onto the truck with the rope and pulley system. While there was sufficient room to lower the boom after the truck was loaded, the Brand workers apparently forgot to return the boom to its resting position.

Plaintiff James testified that after the truck was loaded, James and several other Brand employees were directed to board the boom truck. Just after the truck pulled into the moving lane, James heard a “bang” as the boom struck the road sign and gantry, causing part of the truck to swing into the air and the sign and gantry to fall onto the bridge, and he was thrown onto the pavement, sustaining injuries.

Plaintiff Andrade testified that after he hopped into the cab of the truck, the driver pulled the truck into the middle lane where the accident occurred. During the impact, the boom truck “went up in the air,” causing him to hit his head “hard” on the windshield.

To establish liability under section 241(6), a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation. An action may be predicated upon Labor Law § 241(6) only where there has been a violation of a

specific, detailed rule governing the conduct at issue (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 504 [1993]). "The Code regulation must constitute a specific, positive command," and "must also be applicable to the facts and be the proximate cause of the plaintiff's injury" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). The cited provisions should not be interpreted "too broadly" (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 92 [1st Dept 2012]), and, as plainly expressed, 12 NYCRR 23-8.2(d) only applies to mobile cranes. This Court routinely affirms the dismissal of claims under Labor Law § 241(6) where the supporting Industrial Code provisions are inapplicable to the claim (*see e.g. Urbano v. Rockefeller Ctr. N., Inc.*, 91 AD3d 549, 550 [1st Dept 2012]), and we should follow suit here.

In support of plaintiffs' section 241 (6) claim, the majority finds that an issue of fact exists as to whether defendants violated 12 NYCRR 23-8.2(d)(3), which pertains to mobile crane travel. I would find that plaintiffs cannot predicate their section 241(6) claim on this provision because that provision is not applicable to the boom truck used by the plaintiffs, and because plaintiffs' injuries were not caused by the hoist bouncing over the cab of the truck — which is the focus

of the regulation.

12 NYCRR 23-8.2(d), entitled “Mobile crane travel,” provides:

> “(1) A mobile crane traveling to or from one job site to another or traveling on a street or highway shall not carry any jibs, attachments, buckets or other devices or material attached in any way to the boom whether the boom is in the folded position or not. . . .
>
> “(2) Mobile cranes shall not travel with suspended loads unless such crane is under the control of a competent, designated person who shall be responsible for the position of the load, boom location, ground support, travel route and speed of movement.
>
> “(3) A mobile crane, with or without load, shall not travel with the boom so high that it may bounce back over the cab.”

First, contrary to the majority’s contention, I would find that this regulation does not apply to the boom truck at issue, which clearly is not a mobile crane. While “mobile crane” is not formally defined by the definition section of the regulation (*see* 12 NYCRR 23-1.4), a thorough review of the entirety of section 23-8.2 reveals that a mobile crane has certain elements not present on the boom truck. More specifically, mobile cranes are required to have (1) footings “sufficient to distribute the load so as not to exceed the safe bearing capacity of the underlying material” (12 NYCRR 23-8.2[b][1]); (2) outriggers, i.e., a beam that gives stability to the crane (12 NYCRR 23-8.2[b][2]); (3) counterweights “as specified by the manufacturers or builders of

such cranes or by professional engineers licensed to practice in the State of New York” (12 NYCRR 23-8.2[e]); and (4) booms with a breaking mechanism and sheave guard (12 NYCRR 23-8.2[f]). The record evidence, including photographs of the truck, demonstrates that the truck did not have the components required for a mobile crane such as outriggers and counterweights. Thus, it would be improper to treat the boom truck as a mobile crane, and therefore, the provision is inapplicable.

The majority cannot and does not dispute that the subject truck did not have the components of a mobile crane, and resorts to merely noting that “mobile crane” is not defined in the regulation. This is an unconvincing response to the inapplicability of the regulation, which prescribes travel operation of a crane and not a truck. The two vehicles are clearly distinguishable. In addition, because the boom on the truck was located behind the cab and was facing away from it and toward the rear of the truck, it would be physically impossible for the boom to bounce back over the cab, which is the focus of the cited provision. In this case, there is no evidence that the boom bounced over the cab. Moreover, the proof here indicates that the boom was not so high that it could have bounced back over the cab, as the evidence shows that the boom was raised only at either 45 or 60 degrees. Nor were plaintiffs’ injuries caused

by the boom bouncing over the cab as required by the "specific" language of the regulation (*Misicki v Caradonna*, 12 NY3d at 515). Rather, they were caused when the boom hit the road sign.

In *Braun v Fischbach & Moore* (280 AD2d 506 [2d Dept 2001]), relied on by the majority, the Second Department found an issue of fact as to whether the defendant violated section 23-8.2 where the boom of a crane located on a work train was raised high enough that it collided with a support beam, causing the crane to become dislodged from the turntable and pushed onto the flatbed car also located on the train and where the plaintiff was standing. However, crucially, it was undisputed that a mobile crane was involved in that case, and not a boom truck. Moreover, that decision did not indicate how high or at what angle the boom

was raised. Thus, this case is not controlled by *Braun*.

Accordingly, I would affirm the order on appeal in its entirety.

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

ENTERED: JULY 18, 2017

CLERK

Tom, J.P., Richter, Mazzarelli, Gische, JJ.

16588 The People of the State of New York, Ind. 847/13
Respondent,

-against-

Rhuster Etheart,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered December 4, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JULY 18, 2017

CLERK

Friedman, J.P., Andrias, Kapnick, Gesmer, JJ.

3312 The People of the State of New York, Ind. 2757/13
Respondent,

-against-

Ramel Bethea,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Charity L. Brady of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 15, 2015, as amended May 8, 2015, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously affirmed.

Supreme Court did not err in denying defendant's motion to withdraw his guilty plea at the sentencing hearing. The record establishes that defendant entered the plea knowingly, intelligently and voluntarily. Defendant's contrary argument, raised for the first time on this appeal, is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the court's full statement at the plea hearing of the minimum sentence for which defendant would be eligible in the event he violated his plea agreement

(which, had defendant complied with it, would have permitted him to plead guilty to misdemeanor) was neither inaccurate, confusing nor ambiguous (*cf. People v Gray*, 65 AD2d 525 [1st Dept 1978]; *People v Davey*, 193 AD2d 1108 [4th Dept 1993]). Although the court, at the plea hearing, initially misstated the minimum term for which defendant, as a second violent felony offender, would have been eligible upon his plea of guilty to first-degree robbery, the court immediately corrected itself and stated the minimum term (10 years) accurately.[5]

In subsequently seeking to withdraw his plea at the sentencing hearing, held after he violated his plea agreement by, inter alia, bringing marijuana into Rikers Island, defendant never stated that it had been his understanding that violating the plea agreement would subject him to a minimum sentence of only five years. Rather, the clear import of defendant's statements was that he did not realize that he would subject himself to the 10-year minimum sentence for committing what he deemed a minor infraction ("I didn't know I was facing this much time for some weed"). Indeed, defendant's counsel, who supported his client's motion to withdraw the plea, confirmed to the court

[5]Specifically, the court stated, in pertinent part, "[T]he minimum is five years — ten years state prison, up to twenty five years state prison and five years post-release supervision."

that defendant had “signed an agreement for ten years.” In any event, since the court stated the terms of the plea agreement in an objectively clear manner at the plea hearing, defendant cannot invoke his alleged subjective misunderstanding of those terms as a basis for withdrawal of his plea (*see People v Guy*, 63 AD3d 609 [1st Dept 2009], *lv denied* 13 NY3d 836 [2009]). We reiterate that defendant first alleges such a misunderstanding upon this appeal.

The argument that the court abdicated its authority is not preserved, as it was not raised by either defendant or his counsel before the sentencing court, and we decline to review it in the interest of justice. As an alternative holding, we find that the court did not improperly abdicate to the People its authority to oversee the plea and sentencing process (*cf. People v Farrar*, 52 NY2d 302 [1981]). Rather, the court simply found no basis on which to permit defendant to withdraw his plea after he and the People were unable to reach an alternative plea agreement that would allow a lesser sentence. In the context of the colloquy on the record, the court’s comparison of the plea agreement to a contract merely expressed the view that defendant had a duty to abide the terms of the agreement (which he had failed to do) and did not indicate that the court believed itself to lack power to allow defendant to withdraw the plea if

circumstances warranted such relief. Further, the court imposed the minimum sentence for which defendant, as a second violent felony offender, was eligible on the charge to which he had pleaded guilty, which was based on a brutal crime of violence.[6]

Finally, Supreme Court did not abuse its discretion in denying defendant's request for an additional adjournment of the sentencing to allow the Osborne Society to complete a mitigation report. The court had asked defendant to submit a mitigation report at the initial sentencing hearing on November 25, 2014, which was adjourned before sentence was pronounced. At the final sentencing hearing on January 15, 2015, more than six weeks later, the representative from the Osborne Society stated that the report had not been completed because he had been on vacation for three of those six weeks. When the court then offered to adjourn the sentencing for one more week, the representative from the Osborne Society stated that 10 more days were needed to complete the report. The court did not abuse its discretion in proceeding to pronounce sentence rather than granting the requested additional adjournment of 10 days. In any event, given

[6]Defendant pleaded guilty to having, in concert with others, beaten the victim's face and body with a metal bar and closed fists, while stealing his cell phone, diamond earrings, and $100 in cash.

that defendant received the minimum sentence available to a second violent felony offender convicted of robbery in the first degree, it is unclear what impact, if any, a mitigation report would have had.

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

ENTERED: JULY 18, 2017

CLERK

Acosta, P.J., Friedman, J.P., Mazzarelli, Andrias, Moskowitz, JJ.

2430 Avraham Gold, et al., Index 653923/12
Plaintiffs-Appellants,

-against-

New York Life Insurance Co., et al.,
Defendants-Respondents.

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Lovell Stewart Halebian Jacobson, LLP, New York (John Halebian of counsel), for appellants.

Morgan Lewis & Bockius LLP, Princeton, New Jersey (Richard G. Rosenblatt of the bar of the State of Jersey and Commonwealth of Pennsylvania, admitted pro hac vice of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about September 4, 2015, modified, on the law, to grant the motion for summary judgment dismissing the second, third, and fourth causes of action as to all plaintiffs, and to deny the motion to compel Kartal to arbitrate, and otherwise affirmed, without costs.

Opinion by Moskowitz, J. All concur except Friedman and Andrias, JJ. who dissent in part in an Opinion by Andrias, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
David Friedman
Angela M. Mazzarelli
Richard T. Andrias
Karla Moskowitz, JJ.

2430
Index 653923/12

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Avraham Gold, et al.,
Plaintiffs-Appellants,

-against-

New York Life Insurance Co., et al.,
Defendants-Respondents.
______________________________________x

Plaintiffs appeal from the order of the Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about September 4, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the second, third, and fourth causes of action as to all plaintiffs except plaintiff Melek Kartal, and granted defendants' motion to compel Kartal to arbitrate her claims.

Lovell Stewart Halebian Jacobson, LLP, New York (John Halebian and Adam Mayes of counsel), and Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for appellants.

Morgan Lewis & Bockius LLP, New York and Princeton, NJ (Sean P. Lynch, and Richard G. Rosenblatt of the bar of the State of New Jersey and the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), for respondents.

MOSKOWITZ, J.

On this appeal, we consider an issue that we have never directly addressed before now: whether employees can be obliged to arbitrate collective disputes such as class actions regarding wage disputes with their employers. We find that plaintiffs cannot be required to arbitrate their disputes with defendant New York Life Insurance Company because that obligation would run afoul of the National Labor Relations Act.

Plaintiffs in this action are former insurance agents for defendants New York Life Insurance Company and its related companies (collectively, NY Life), all of which provide a variety of insurance products, including life insurance and annuities. Plaintiffs brought this putative class action seeking recovery for allegedly illegal wage deductions and violations of overtime and minimum wage laws.

NY Life generally hired new agents, including the four named plaintiffs, as Training Allowance Subsidy (TAS) agents for up to three years. As to training the new agents, NY Life had a "sales cycle" that it taught to its agents, which consisted of, among other things, fact-finding or gathering information and, after having done so, tailoring an insurance product to a client's needs.

Upon joining NY Life, each plaintiff signed standardized

contracts, including an “Agent’s Contract” and a “TAS Plan Agreement.” Each Agent’s Contract provided that the agent was not an employee of NY Life, but an independent contractor free to exercise his or her own discretion and judgment in soliciting applications. Plaintiffs Johnson’s and Kartal’s Agent’s Contracts further provided that they were free to work the hours of their choosing and from their own homes or offices. Moreover, their remuneration was not to be based on the number of hours worked, but on commissions “directly related to sales or other output.”

NY Life maintained a ledger system to keep track of the compensation payable to each plaintiff. Each agent’s ledger tallied credits for commissions and allowances resulting from sales, and tallied debits for certain expenses and commission reversals. Credits and debits were reconciled on a rolling basis as they were posted to the ledger, and plaintiffs’ semi-monthly pay consisted of their credits net of debits as of the date plaintiffs received their pay. Under the TAS Agreements, when a customer paid the first monthly premium on a policy, the agent was credited with an “advanced” or “annualized commission.” Thus, although NY Life had received only a single month’s premium payment, it credited the agent’s ledger with the commission and training allowance corresponding to a full year’s worth of

premium payments.

NY Life also offset two kinds of charges against the agent's earnings, only one of which is relevant to this appeal: NY Life debited agents' ledgers for commission reversals or chargebacks. These chargebacks occurred under three circumstances.

First were annualized commission reversals that occurred when a customer cancelled a policy or the policy lapsed within its first year. The TAS Agreements provided that in those circumstances, the annualized commission previously credited for a full year's worth of premium payments would be reversed and the agent would be credited only with commissions corresponding to the premiums received.

Second, the TAS Agreements provided for refunds of premium reversals. Thus, when NY Life rescinded or cancelled a policy and refunded the premium to the customer, in whole or part, NY Life debited the agent's ledger by the commission amount corresponding to the refund.

Third, NY Life charged back commissions on certain products such as annuities and universal life insurance policies if the customer withdrew money from the product or surrendered it within a certain time after purchasing it. Although charged back commissions were apparently not specified in the Agent's Contracts or TAS Agreements, NY Life's commission manual states

that commission chargebacks will occur when a policy is surrendered or foreclosed, or lapsed in the first 24 months after issuance.

Plaintiff Kartal's Agent's Contract contained an arbitration provision requiring arbitration of any claim or dispute with NY Life, with certain exceptions that the parties do not address on this appeal. Additionally, under the arbitration provision, Kartal waived any right to a jury trial and agreed that no claim could be brought or maintained "on a class action, collective action or representative action basis either in court or arbitration." But the provision also provided that if the waiver of class, collective, or representative actions were found to be unenforceable, the class, collective, or representative claim would proceed in court.

The four plaintiffs in this appeal filed this consolidated and amended class action complaint in Supreme Court, New York County, alleging four causes of action; only the second, third, and fourth causes of action are relevant to this appeal.[1] The

[1] In December 2007, plaintiff Chenensky commenced a class and collective action in the United States District Court for the Southern District of New York. Plaintiff Gold commenced a related class action in the same court in April 2009. Both complaints asserted the same state law class claims for unlawful wage deductions under Labor Law § 193. The District Court ultimately dismissed both actions on various grounds, including jurisdictional ones.

second cause of action, asserted by all plaintiffs, alleged unlawful wage deductions for commission reversals in violation of Labor Law § 193. The third cause of action, which only plaintiffs Johnson and Kartal asserted, alleged failure to pay overtime in violation of 12 NYCRR 142-2.2. The fourth cause of action, also which only plaintiffs Johnson and Kartal asserted, alleged failure to pay the minimum wage in violation of Labor Law § 652.

Insofar as relevant to this appeal, NY Life moved to dismiss the second, third, and fourth causes of action and to compel Kartal to arbitrate her claims. At oral argument, Supreme Court orally granted so much of the motion as sought to compel plaintiff Kartal to arbitrate her claims. The motion court also converted NY Life's motion to dismiss the second, third, and fourth causes of action as to the other plaintiffs to a motion for summary judgment and ordered supplementary briefing. After the additional briefing, the motion court granted summary judgment to NY Life, dismissing the second, third, and fourth causes of action as to all plaintiffs except Kartal. At the same time, the court also put in writing its granting of NY Life's motion to compel Kartal to arbitrate her claims, and, pending resolution of the arbitration, stayed the action as to Kartal's claims.

We turn first to that portion of the motion court's order addressing the arbitration provision in Kartal's Agent's Contract.[2] As noted above, the motion court granted that branch of NY Life's motion seeking to compel arbitration of Kartal's claims.

Courts of this State have not squarely addressed the question of whether this type of arbitration provision is enforceable. Further, there is a recent split among the Federal Circuit Courts regarding these types of clauses. Upon consideration of the matter, we conclude that the better view is that arbitration provisions such as the one in Kartal's contract, which prohibit class, collective, or representative claims, violate the National Labor Relations Act (NLRA) and thus, that those provisions are unenforceable.

In reaching this conclusion, we agree with the reasoning in *Lewis v Epic Sys. Corp.* (823 F3d 1147 [7th Cir 2016], *cert granted* __ US __, 137 S Ct 809 [2017]), the recent case from the United States Court of Appeals for the Seventh Circuit, which

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[2] NY Life asserts that plaintiff Kartal waived the argument that her arbitration agreement violates the National Labor Relations Act. However, Kartal's argument is based purely on recent case law issued only after issuance of the order appealed from, and therefore may be addressed on appeal (*Nuevo El Barrio Rehabilitación de Vivienda y Economía, Inc. v Moreight Realty Corp.*, 87 AD3d 465, 466 [1st Dept 2011]).

addressed the enforceability of arbitration agreements prohibiting collective actions. In *Lewis*, the plaintiff employee agreed to an arbitration agreement mandating that wage and hour claims could be brought only through individual arbitration and requiring employees to waive "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding" (*id.* at 1151) [internal quotation marks omitted]. The arbitration agreement also included a clause stating that if the waiver were unenforceable, "any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction" (*id.*) [internal quotation marks omitted].

The plaintiff later had a dispute with the defendant employer, but did not proceed under the arbitration clause (*id.*). Instead, the plaintiff sued in federal court, contending that the employer had violated the Fair Labor Standards Act (FLSA) and state law by misclassifying him and his fellow employees, thereby unlawfully depriving them of overtime pay (*id.*). The plaintiff argued that the arbitration clause violated the NLRA because it interfered with employees' right to engage in concerted activities for mutual aid and protection, and was therefore unenforceable (*id.*).

The Seventh Circuit denied the employer's motion to proceed

under the arbitration clause, declining to enforce a clause that precluded employees from "seeking any class, collective, or representative remedies to wage-and-hour disputes" because the clause "violate[d] Sections 7 and 8 of the NLRA" (*id.* at 1161). According to the Court, section 7 of the NLRA provided that employees have the right to engage in concerted activities, and concerted activities "have long been held to include resort to . . . judicial forums" (*id.* at 1152) [internal quotation marks omitted]. The Seventh Circuit also found that a lawsuit filed "by a group of employees to achieve more favorable terms or conditions of employment" is considered to constitute "concerted activity" under section 7 of the NLRA (*id.*) [internal quotation marks omitted). Accordingly, the Court held, contracts such as the one at issue were unenforceable under the NLRA because they "stipulate away employees' [s]ection 7 rights or otherwise require actions unlawful under the NRLA" (*id.* at 1155).

What is more, the Seventh Circuit found that the clause was also unenforceable under the Federal Arbitration Act (FAA) (*Lewis*, 823 F3d at 1161). The Court noted that, generally, "there is 'no doubt that illegal promises will not be enforced in cases controlled by the federal law'" (*Lewis*, 823 F3d at 1157, quoting *Kaiser Steel Corp. v Mullins*, 455 US 72, 77 [1982]). The Court noted that the FAA incorporated that principle through its

saving clause, which confirmed that agreements to arbitrate "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*" (*Lewis*, 823 F3d at 1156, quoting 9 USC § 2 [emphasis added]). The Court held that because the provision at issue is unlawful under section 7 of the NLRA, it was an illegal provision, and therefore met the criteria of the FAA's saving clause for nonenforcement (*Lewis*, 823 F3d at 1157).

A few months after the Seventh Circuit decided *Lewis*, the Ninth Circuit also held that the NLRA precludes contracts requiring employees to waive concerted legal claims regarding wages, hours, and terms or conditions of employment (*Morris v Ernst & Young, LLP*, 834 F3d 975 [9th Cir 2016], *cert granted* __ *US* __, 137 S Ct 809 [2017]). The Second, Fifth, and Eighth Circuits have disagreed, holding that requiring employees to agree to waive class or collective actions does not violate the NLRA (*Cellular Sales of Missouri, LLC v Nat. Labor Relations Bd.*, 824 F3d 772, 775-776 [8th Cir 2016]; *D.R. Horton, Inc. v Nat. Labor Relations Bd.* 737 F3d 344, 355-362 [5th Cir 2013]; *Sutherland v Ernst & Young LLP*, 726 F3d 290, 297 n 8 [2d Cir 2013]). Notably, however, three years after its decision in *Sutherland*, the Second Circuit stated that if it were writing on a clean slate, it might "well be persuaded" to join the Seventh

and Ninth Circuits in finding that a waiver of collective action is unenforceable (*Patterson v Raymours Furniture Company, Inc.*, 659 Fed Appx 40 [2d Cir 2016], *petition for cert filed* Sept. 26, 2016). The Court, however, rested its decision on stare decisis grounds, believing itself bound to follow *Sutherland* "until such time as [that case is] overruled either by an en banc panel of our Court or by the Supreme Court" (*id.*) [internal quotation marks omitted].

As is common with any question regarding enforceability of an arbitration clause, the policies underlying each side of the issue stand in stark contrast, implicating an individual's right to resort to the courts, on the one hand, and this State's preference for enforcing arbitration agreements, on the other. In *Sutherland*, the Second Circuit recognized that the cost to the plaintiff of individually litigating her claim for overtime wages would dwarf her potential recovery of less than $2,000, effectively precluding her and similar plaintiffs from pursuing such claims (*Sutherland*, 726 F3d at 294-295). Thus, the high cost of individual litigation might well mean that employers will evade consequences for allegedly unfair labor practices as long as the amount owed to each individual employee is lower than the cost of litigation. Conversely, as the Fifth Circuit explained in *D.R. Horton*, the FAA establishes a "liberal federal policy

favoring arbitration agreements" (*D.R. Horton*, 737 F3d at 360 [internal quotation marks omitted]); invalidating waivers of collective claims by employees would necessarily disfavor arbitration (*id.* at 359).

In *D.R. Horton*, the Fifth Circuit recognized that the purpose of NRLA section 7 -- the section allowing for concerted action by employees -- was to equalize bargaining power by allowing employees to band together in confronting an employer regarding the terms and conditions of employment (*D.R. Horton*, 737 F3d at 356). Nor did the Fifth Circuit dispute that collective and class claims are protected by the NLRA (*id.* at 357). Nevertheless, relying on a United States Supreme Court case addressing whether the FAA requires enforcing waivers of class arbitration in consumer contracts (*see AT&T Mobility LLC v Concepcion*, 563 US 333 [2011]), the Fifth Circuit found that "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA" (737 F3d at 360) and that there was no Congressional command to override the FAA (*id.* at 362).

We disagree with the Fifth Circuit's reasoning for two reasons. First, the Court's reasoning begs the question, essentially asserting the circular argument that individual arbitration, not collective litigation, should be the norm because any other policy would impede arbitration. The Court

determined there to be no Congressional command that the NLRA should override the FAA, but we can divine no reason that the FAA policy favoring arbitration should trump the NLRA policy prohibiting employers from preventing collective action by employees.

Second, the Fifth Circuit explained that the FAA's saving clause is inapplicable because class arbitration "interferes with fundamental attributes of arbitration," which is supposed to be a streamlined process, "and thus creates *a scheme inconsistent with the FAA*" (*id.* at 359 [emphasis added] [internal quotation marks omitted]). The Court apparently concluded that because the collective claims are inconsistent with the FAA, they cannot fit within the FAA's saving clause (*id.*). But in separately discussing whether a Congressional command to override the FAA can be found in the NLRA, the Fifth Circuit stated that "we do not find . . . a conflict" between the FAA and the NLRA's purpose (*id.* at 361). Indeed, the Fifth Circuit's conclusion in this regard accords with the Seventh Circuit's decision in *Lewis*, which found that no conflict between the NLRA and the FAA existed, and therefore, that the FAA did not mandate the enforcement of the employer's arbitration clause. Hence, *D.R Horton* contains an internal contradiction – on the one hand, the Court states that the availability of collective claims under the

NLRA cannot fit within the FAA's saving clause because that requirement "creates a scheme inconsistent with the FAA" (*id.* at 359 [internal quotation marks omitted]), but at the same time, finds that there is no conflict between the FAA and the NLRA (*id.* at 361). The Fifth Circuit never adequately addresses this contradiction.

In all likelihood, the United States Supreme Court will resolve this circuit split in due course. In the meantime, we find the Seventh Circuit's reasoning in *Lewis* more persuasive – far more than that of the Fifth Circuit. Notably, the Fifth Circuit does not dispute that the NLRA protects collective and class claims (*D.R. Horton*, 737 F3d at 357). The NLRB itself has also repeatedly concluded that NLRA section 7 forecloses enforcement of arbitration agreements that waive an employee's right to pursue collective legal action in any judicial or arbitral forum (*see e.g. D.R. Horton, Inc.*, 357 NLRB No. 184 [2012]; *Murphy Oil USA, Inc.*, 361 NLRB No. 72 [2014]). It follows then, as the Seventh Circuit decided, that waiver of collective claims violates the NLRA, and is void and invalid under the FAA's saving clause.

Our relatively recent holding in *Weinstein v Jenny Craig Operations, Inc*. (132 AD3d 446 [1st Dept 2015]) does not compel any result to the contrary, despite NY Life's insistence

otherwise. In *Weinstein*, we upheld an arbitration clause even though it contained a class-action waiver. The holding in *Weinstein*, however, concerned two issues: first, whether the defendant employer had initiated the signing of arbitration agreements containing class-action waivers for the express purpose of excluding putative class members from the already ongoing court litigation; and second, whether the employer had waived its right to compel arbitration by waiting until after the court had granted class certification to try and enforce the arbitration agreement. We found that the IAS court had properly declined to enforce any agreements signed after commencement of the litigation, but that the court had improperly found the defendant to have waived its right to arbitration (*id*. at 447). The parties did not ask the IAS court to address the far broader issue of whether class-action waivers in general, or that class-action waiver in particular, ran afoul of the NLRA. Nor did we or the IAS court address that issue.

We do address that issue today, and in so doing, we choose to follow the Seventh Circuit's holding in *Lewis* and hold that the waiver of class action is unenforceable. Accordingly, under the terms of Kartal's contract, her class claim on the remaining first cause of action is to proceed in court rather than in

arbitration.[3]

As to the wage deduction claims, we find that the IAS court should have dismissed the second cause of action as to all the plaintiffs. Commission reversals, as occurred here, were not illegal wage deductions, but rather were part of the calculation of commissions earned (*Pachter v Bernard Hodes Group, Inc*., 10 NY3d 609 [2008]). Labor Law § 193 prohibits employers from making "any deduction from the wages of an employee" unless permitted by law or authorized by the employee for the employee's benefit, such as for insurance premiums or pension benefits. In *Pachter*, the Court of Appeals explained that where, similar to here, a ledger-based system of credits and deductions was used in paying commissions, the legality of deductions not authorized by Labor Law § 193 depended on whether the commission was "earned" before the deduction was made to the ledger account (10 NY3d at 617).

The *Pachter* Court held that under the common law, an employee earns his or her commission upon producing a ready, willing, and able purchaser (*id.* at 618). The Court further

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[3] The first cause of action which, as noted above, is not at issue on this appeal alleges unlawful wage deductions for work facilities (i.e., the agents' use of cubicle space, telephone service, and payments for mandatory professional liability insurance) in violation of Labor Law § 193.

held, however, that the parties "may provide that the computation of a commission will include certain downward adjustments. . . . In that event, the commission will not be deemed 'earned' or vested until computation of the agreed-upon formula" (*id.* at 617-618). The Court thus concluded that the plaintiff and the defendant had a "contract under which the final computation of the commissions earned by [the plaintiff] depended on first making adjustments for nonpayments by customers and the cost of [the plaintiff's] assistant, as well as miscellaneous work-related expenses" (*id.* at 618).

Likewise, here, each plaintiff's TAS Agreement specifically allowed for deductions for two of the three types of commission reversals plaintiffs complain about: annualized commission reversals and refund of premium reversals. Accordingly, these alleged commission reversals and chargebacks were provided for in plaintiffs' contracts with defendants as part of their agreed-upon measure of compensation, and therefore were not illegal deductions from wages under Labor Law § 193 (*see Pachter*, 10 NY3d at 618).

With regard to commission reversals for chargebacks, plaintiffs Chenensky and Gold do not dispute that they never experienced a commission reversal and therefore have no claim for those deductions. Moreover, plaintiffs Johnson's and Kartal's

Agent's Contracts provided that each would receive a charge back for payment received on any policy that NY Life deemed appropriate at any time to reject, decline, rescind, reform, modify, or cancel; in fact, plaintiffs acknowledge that Johnson's and Kartal's Agent's Contracts specifically provided for those chargebacks. Thus, those items are part of the agreed upon computation of their commissions, and do not constitute illegal wage deductions (*see Pachter*, 10 NY3d at 618).

With respect to the overtime and minimum wage claims (the third and fourth causes of action), we conclude that plaintiffs Johnson and Kartal are not entitled to overtime pay or to the minimum wage. New York has adopted the manner, methods, and exemptions of the FLSA regarding overtime pay (12 NYCRR 142-2.2; *see* 29 USC §§ 207, 213). Further, as the parties here agree, New York Law also follows the FLSA's minimum wage requirements. Federal regulations, in turn, define "outside salesman" as used in the FLSA as an employee whose primary duty is making sales or obtaining orders or contracts and who is customarily and regularly engaged away from the employer's place of business while performing that primary duty (29 CFR 541.500). Work incidental to or that furthers the employee's sales efforts is part of the primary duty of making sales (*id.*).

As noted, Johnson and Kartal's directive from NY Life, as

set forth in the sales cycle, was to engage in fact-finding to determine a prospective client's needs and then devise an insurance product tailored to the prospective client's specific needs. Johnson and Kartal performed this work incidental to, and in furtherance of, their sales efforts on NY Life's behalf; indeed, the ultimate goal of the fact-finding was to sell insurance to the prospective client. Accordingly, the record here demonstrates conclusively that plaintiffs Johnson and Kartal were outside salespeople exempt from overtime and minimum wage requirements, and not, as they assert, advisors subject to the state minimum wage and overtime requirements (*see* Labor Law § 651[5][d]; 12 NYCRR 142-2.2; 142-2.14).[4]

Accordingly, the order of Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about September 4, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the second, third, and fourth causes of action as to all plaintiffs except plaintiff Melek Kartal, and granted defendants' motion to

[4] We note that the Second Circuit found in *Gold v New York Life Ins. Co.* (730 F3d 137 [2d Cir 2013]) that plaintiff Gold was hired and trained to sell insurance, his compensation depended on sales, and he maintained his own client lists and worked outside NY Life's office (*id.* at 145). At oral argument before the IAS court, plaintiffs conceded that Johnson's and Kartal's roles for NY Life were exactly the same as Gold's.

compel Kartal to arbitrate her claims, should be modified, on the law, to grant the motion for summary judgment dismissing the second, third, and fourth causes of action as to all plaintiffs, and to deny the motion to compel Kartal to arbitrate, and otherwise affirmed, without costs.

All concur except Friedman and Andrias, JJ.
who dissent in part in an Opinion by
Andrias, J.

ANDRIAS, J. (dissenting in part)

I agree with the majority that any alleged commission reversals and chargebacks plaintiffs experienced were provided for in their contracts with defendants as part of their agreed-upon measure of compensation, and therefore were not illegal deductions from wages under Labor Law § 193 (*see Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609 [2008]). I also agree with the majority that the record demonstrates conclusively that plaintiffs Johnson and Kartal were outside salespeople (*see Gold v New York Life Ins. Co.*, 730 F3d 137 [2d Cir 2013]). However, because I believe that the provisions in Kartal's contract that require employees to waive class and collective proceedings and resolve employment-related disputes through individual arbitration are enforceable under the Federal Arbitration Act (FAA) (9 USC § 1 *et seq*.), and are not prohibited by the National Labor Relations Act (NLRA) (29 USC § 151 *et seq*.), I dissent in part.

The FAA "reflects a legislative recognition of the desirability of arbitration as an alternative to the complications of litigation. The Act, reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid the costliness and delays of litigation, and to place arbitration agreements upon the same footing as

other contracts" (*Genesco, Inc. v T. Kakiuchi & Co., Ltd.*, 815 F2d 840, 844 [2d Cir 1987] [internal quotation marks and citations omitted]).

In conformity with the legislative intent, the "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms" (*Volt Information Sciences, Inc. v Board of Trustees of Leland Stanford Junior Univ.*, 489 US 468, 478 [1989]; *see also Rent-A-Center West, Inc. v Jackson*, 561 US 63, 67 [2010]). Toward this end, section 2, the Act's "primary substantive provision" (*Moses H. Cone Memorial Hospital v Mercury Constr. Corp.*, 460 US 1, 24 [1983]), states:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (9 USC § 2).

The "saving clause" of section 2 "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" (*AT&T Mobility LLC v Concepcion*, 563 US 333, 339 [2011] [internal quotation marks omitted]). The application of the FAA to

statutory claims may also be precluded where “the FAA's mandate has been overridden by a contrary congressional command” (*CompuCredit Corp. v Greenwood*, 565 US 95, 98 [2012] [internal quotation marks omitted]). “The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue” (*Shearson/American Express Inc. v McMahon*, 482 US 220, 227 [1987]).

The National Labor Relations Board (NLRB) has adopted the position that arbitration agreements that waive an employee’s right to pursue legal claims in any judicial or arbitral forum on a collective or class action basis are unenforceable because they conflict with sections 7 and 8 of the NLRA (29 USC §§ 157, 158[a][1]), which, respectively, guarantee employees the right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and prohibit employers from “interfer[ing] with [or] restrain[ing]” employees’ section 7 rights. However, as the majority observes, the United States Courts of Appeals that have ruled on the issue are divided as to whether section 7 qualifies as a contrary congressional command sufficient to overcome the FAA’s mandate that an arbitration agreement be enforced according to its terms.

The Second, Fifth and Eighth Circuits have rejected the

NLRB's position and have enforced the class or collective action waivers under the FAA and/or the Fair Labor Standards Act (FLSA) (29 USC § 201 *et seq.*) (*see Sutherland v Ernst & Young LLP*, 726 F3d 290, 297 n8 [2d Cir 2013]; *D.R. Horton, Inc. v NLRB*, 737 F3d 344, 362 [5th Cir 2013]; *Cellular Sales of Missouri, LLC v NLRB*, 824 F3d 772, 776 [8th Cir 2016]).[1]

In *Sutherland,* the Second Circuit held that nothing in the FLSA's text or legislative history indicated a congressional intent to forbid enforcement of class waiver clauses in mandatory arbitration agreements. In so ruling, the court found that "the FLSA collective action 'right'" is merely procedural in nature (*Sutherland*, 726 F3d at 297 n 6) and rejected the plaintiff's contention that it should defer to the NLRB's rationale (*id.* at 297 n 8).

In D.R. Horton, the Fifth Circuit held that a class action is a procedural device used to bring substantive claims rather than a substantive right in and of itself, and that "[n]either the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA" (*Horton*,

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[1] The Supreme Courts of California and Nevada have also upheld class waivers in employment arbitration agreements (*see Iskanian v CLS Transp. L.A., LLC*, 59 Cal 4th 348, 365-374, 327 P3d 129, 137-143 [Cal 2014], *cert denied* _US_, 135 S Ct 1155[2015]; *Tallman v Eighth Jud. Dist. Ct.*, 359 P3d 113, 122-123 [Nev 2015]).

737 F3d at 361). Noting that the NLRB's position would effectively impose an across-the-board ban on class waivers, the court observed that "[a]s *Concepcion* [*AT&T Mobility LLC v Concepcion*, 563 US 333 (2011), *supra*] held as to classwide arbitration, requiring the availability of class actions interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA" (*id.* at 360 [internal quotation marks omitted]). Consequently, the NLRB could not disregard the FAA's command that arbitration agreements be enforced according to their terms — including those limiting the availability of class procedures.

In *Cellular Sales*, the Eighth Circuit, reaffirming its decision in *Owen v Bristol Care, Inc.* (702 F3d 1050 [8th Cir 2013]), found that the NLRA did not suffice to override the mandate of the FAA in favor of individual arbitration (824 F3d at 776).

The Seventh and Ninth Circuits have reached the opposite conclusion, holding that a class or concerted action waiver in an employment agreement conflicts with the right to engage in collective activity under sections 7 and 8 of the NLRA, which they deemed a substantive right (*see Morris v Ernst & Young, LLP*, 834 F3d 975, 983 [9th Cir 2016], *cert granted* _ US_, 137 S Ct 809 [2017)]; *Lewis v Epic Sys. Corp.*, 823 F3d 1147 [7th Cir

2016], *cert granted* _US_ , 137 S Ct 809 [2017]).

The majority believes that we should follow *Lewis* and *Morris*, which will be reviewed by the United States Supreme Court, as the more persuasive authority.[2] I do not agree.

While *Lewis* and *Morris* adopt the NLRB's position, the NLRB has no special expertise in, and is not charged with administering, the FAA, and this Court need not defer to its conclusion that the right at stake is "substantive" for FAA purposes (*see e.g. Hoffman Plastic Compounds, Inc. v NLRB*, 535 US 137, 143-144 [2002]). Rather, to determine whether a contrary congressional command exists, we must look to "the text of the [NLRA], its legislative history, or an 'inherent conflict' between arbitration and the [NLRA's] underlying purposes" (*Gilmer v Interstate/Johnson Lane Corp.*, 500 US 20, 26 [1991]). Congress must demonstrate its intent to supersede the FAA with "clarity" (*CompuCredit*, 565 US at 103).

Here, Kartal has not met her burden of showing that Congress intended her employment claims to fall outside the FAA (*see Walthour v Chipio Windshield Repair, LLC*, 745 F3d 1326, 1331

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[2]*Lewis* and *Morris* have been consolidated for oral argument for the Supreme Court's October 2017 Term. The question presented is whether the collective-bargaining provisions of the NLRA prohibit the enforcement under the FAA of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than a collective, basis.

[11th Cir 2014], *cert denied* _US_, 134 S Ct 2889 [2014]). "Neither the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA," and there is no "inherent conflict between the FAA and the NLRA's purpose" (*Horton*, 737 F3d at 361). Although the NLRA gives employees a right to bargain collectively, the statute does not expressly give employees the right to arbitrate or litigate disputes as a class or collective action, and the legislative history lacks any indication of a congressional command precluding courts from enforcing collective-action waivers according to their terms. Without explicit authorization of collective actions in the text of the statute or discussion of class actions in the legislative history of the Act, there is no support for the majority's position that the NLRA prohibits enforcement of an arbitration provision with a class action waiver provision.

Moreover, "the right to bring a collective action on behalf of others" is a "litigation mechanism," and therefore a mere procedural right (*Walthour*, 745 F3d at 1337). As the United States Supreme Court explained in *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.* (473 US 614 [1985]), "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to

their resolution in an arbitral, rather than a judicial, forum" (*id. at* 628; *Joseph v Quality Dining, Inc.*, 2017 US Dist LEXIS 40604, *19 [ED Pa, Mar. 21, 2017, No. 16-1907] ["Even concerted, collective activity generally speaking should be understood as a method, a means, a procedure for securing the other underlying rights, entitlements, and interests that employees wish to pursue — such as the fair, legal use of tip pooling to compensate servers paid nominally below the minimum wage that is the real substantive right in this case"]).

Significantly, the United States Supreme Court has interpreted the FAA's saving clause narrowly. As the Fifth Circuit observed in *Horton*, "'In every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA'" (737 F3d at 357 n 8, quoting *Walton v Rose Mobile Homes LLC*, 298 F3d 470, 474 [5th Cir 2002]; *see also American Express Co. v Italian Colors Restaurant*, 570 US__, 133 S Ct 2304, 2311-2312 [2013] [waiver of class arbitration is enforceable under the FAA even when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery]; *AT&T Mobility LLC v Concepcion*, 563 US at 339 [the FAA reflects both a "liberal federal policy favoring arbitration" agreements and the "fundamental principle that arbitration is a matter of contract"

(internal quotation marks omitted)]; *DIRECTV, Inc. v Imburgia*, 577 US__, 136 S Ct 463, 471 [2015]; *Begonja v Vornado Realty Trust*, 159 F Supp 3d 402, 410 [SD NY 2016] ["the Supreme Court has recently held, for there to be a waiver of statutory rights, the *right* to pursue statutory claims must be blocked. It is not enough that the process of bringing such claims in arbitration would be prohibitively expensive or otherwise impracticable"]). Indeed, "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer simplicity, informality, and expedition, characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims" (*Walthour*, 745 F3d at 1337 [internal quotation marks omitted]).

Furthermore, prohibiting class arbitration waivers would discourage arbitration in general, to an extent that is impermissible under the FAA (*Horton* at 359-360). As the Supreme Court found in *Concepcion*, "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA (563 US at 344).

In adopting the contrary position, the majority notes that in *Patterson v Raymours Furniture Co.* (659 Fed Appx 40, 43 [2d Cir 2016], *petition for cert filed* Sept 26, 2016), the Second

Circuit stated that "[i]f we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that the EAP's waiver of collective action is unenforceable." However, despite the reservations expressed in *Patterson*, the Second Circuit has not overruled *Sutherland* (726 F3d 290), and courts within the Second Circuit and elsewhere continue to follow it (*see e.g. Mumin v Uber Tech., Inc.*, 2017 US Dist LEXIS 34008 [ED NY March 7, 2017, No. 15-CV-6143[NGG)(JO), 15-CV-7387(NGG)(JO)]; *Kai Peng v Uber Techs., Inc.*, 2017 US Dist LEXIS 25840, *41-44 [ED NY Feb. 23, 2017], No. 16-CV-545(PKC)(RER); *Joseph v Quality Dining, Inc.*, 2017 US Dist LEXIS 40604, *20-21 [ED Pa, March 21, 2017, No. 16-1907] ["The Court declines to follow recent out-of-Circuit decisions holding such a waiver void under the NLRA and instead considers more persuasive the holdings of the Fifth Circuit and other courts that enforce class arbitration waivers under the FAA"]; *Kobren v A-1 Limousine Inc.*, 2016 US Dist LEXIS 154012, *12 [DNJ, Nov. 7, 2016, No. 16-516-BRM-DGA] ["absent binding authority to the contrary, this Court agrees with the reasoning of the Second, Fifth, and Eighth Circuits that there is no 'inherent conflict' between the FAA and NLRA, particularly in light of the strong public policy considerations

underlying the FAA and the general understanding that the NLRA permits and requires arbitration in labor disputes”).

Accordingly, Kartal’s arbitration agreement should be enforced according to its terms, and the IAS court’s order should be affirmed.

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

ENTERED: JULY 18, 2017

CLERK