SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 9, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4703 Sherma Castillo, Index 301375/13
Plaintiff-Appellant,

-against-

Montefiore Medical Center,
Defendant-Respondent.

____

Law Office of Noah A. Kinigstein, New York (Noah A. Kinigstein of counsel), for appellant.

Littler Mendelson, P.C., New York (Jean L. Schmidt of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about July 22, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

On August 6, 2012, defendant hired plaintiff as a patient care technician, subject to a 90-day probationary period. After plaintiff started her employment, the administrator of the clinic observed plaintiff at work and noticed that she "did not show that she wanted to work." Two physicians also provided negative

feedback to the administrator about plaintiff's employment, including that the physicians were unhappy with plaintiff, that "she's not working," and that she did not meet the standards expected in the department. On September 12, 2012, the administrator met with plaintiff to inform her of their concerns regarding her job performance, and advised her that she needed to improve and show initiative.

On September 19, 2012, plaintiff learned that she was pregnant. On September 21, 2012, the administrator scheduled a call with plaintiff and her unit supervisor, and the administrator terminated plaintiff's employment.

Defendant established that plaintiff received negative feedback about her performance during her probationary employment, and was told to improve and show initiative. In response, plaintiff fails to raise a triable issue to support her claims of pregnancy-based employment discrimination under the New York State and City Human Rights Laws. Plaintiff admitted that she was not aware of any facts that would support her claim that she was terminated because of her pregnancy, and she conceded that she did not inform the administrator of her pregnancy. In addition, the administrator stated at her deposition that she did not have any knowledge of plaintiff's pregnancy prior to

plaintiff’s termination (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 116-121 [1st Dept 2012]). On September 20, 2012, plaintiff told her unit supervisor that she was pregnant, but did not tell the administrator. Moreover, the unit supervisor did not tell anybody that plaintiff was pregnant. Plaintiff has failed to show that the reason proffered by defendant is merely a pretext for discrimination against her (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 44-46 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]).

Plaintiff’s challenge to the dismissal of her retaliation claims is deemed abandoned, as she failed to address those claims in her brief (*see Hardwick v Auriemma*, 116 AD3d 465, 468 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]). In any event, there is no evidence to support the retaliation claims.

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

ENTERED: NOVEMBER 9, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4791 Glaze Teriyaki, LLC, Index 653883/13
Plaintiff-Respondent,

-against-

MacArthur Properties I, LLC,
Defendant-Appellant.

____

The Tzandides Law Firm, PLLC, New York (Kirk P. Tzandides of counsel), for appellant.

O'Donoghue PLLC, New York (Kevin S. O'Donoghue of counsel), for respondent.

____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered June 1, 2016, which, to the extent appealed from, after a nonjury trial, dismissed the first, second, third, and sixth counterclaims, unanimously reversed, on the law, the counterclaims reinstated, possession awarded to defendant, and the matter remanded for a hearing on sums owed, if any, by plaintiff to defendant. The Clerk is directed to enter a judgment of possession in favor of defendant.

Plaintiff owns a fast food restaurant. Defendant is plaintiff's landlord. By notice dated October 23, 2013, defendant notified plaintiff that it was in default of the lease due to an improper exhaust system that violated the 2008 New York City Mechanical Code (Administrative Code of City of NY, tit 28,

ch 8, MC ch 5; the Mechanical Code). On November 7, 2013, plaintiff commenced this action, seeking, inter alia, to enjoin defendant from terminating the lease and a declaration that plaintiff was not in default. Plaintiff then moved for a *Yellowstone* injunction and obtained a temporary restraining order.

On November 26, 2013, Supreme Court, Commercial Division (Eileen Bransten, J.), held a hearing on plaintiff's request for a *Yellowstone* injunction at which defendant's expert testified that MC §§ 506.5.6 and 508.1 require that restaurant cooking appliances and "[a]ll of the components of the kitchen hood exhaust system have to be interlocked," including "the exhaust and makeup air systems," so that all components work on a single switch, and no single component can be turned on without the other components being on. Based on the evidence presented, the court ruled that plaintiff had violated the Code, and thus the lease, by failing to have "interlocking mechanisms in the [cooking exhaust] hood and in the electrical work and in the precipitator;" that the notice to cure was appropriate; and that the condition was curable. The court directed plaintiff to cure by the next court date, December 17, 2013. After plaintiff's counsel pointed out to the court that he had not had an

opportunity to cross-examine defendant's expert, the court stated that he would be afforded an opportunity to do so "if he so wishes." However, counsel did not raise the issue at either of the next two court dates.

On December 17, 2013, a Tuesday, plaintiff advised the court that it had not yet cured the condition. The court directed that an electrician "fix the problem at [plaintiff's] cost" by the following Thursday, December 19, 2013, to which plaintiff's counsel responded, "Fair enough." The court further directed plaintiff's counsel to bring proof on the next court date, January 8, 2014, that plaintiff had paid all rent and additional rent due.

On January 8, 2014, the court directed on the record that the *Yellowstone* injunction be lifted due to plaintiff's failure to pay all sums due to the landlord under the lease. This directive was reduced to a written order entered on February 18, 2014, that denied plaintiff's application for a *Yellowstone* injunction "for the reasons stated on the December 17, 2013 and January 8, 2014 records."[1]

On January 14, 2014, defendant served plaintiff with a

---

[1]This order is not included in the record on appeal, but is available on the Unified Court System website.

notice of cancellation of the lease. On or about January 15, 2014, defendant filed an answer with counterclaims seeking a judgment of possession on its first counterclaim for failure to cure Mechanical Code violations; an order requiring plaintiff to cure the Mechanical Code violations on its second counterclaim; damages for breach of contract on its third counterclaim; a money judgment and judgment of possession on its fourth counterclaim for nonpayment of rent and additional rent; use and occupancy on its fifth counterclaim; and counsel fees on its sixth counterclaim.

By order entered July 28, 2014, plaintiff's complaint was dismissed, defendants' counterclaims were severed, and the matter was reassigned out of the Commercial Division.

By order entered February 3, 2016, the Supreme Court (Barry Ostrager, J.) held that Justice Bransten's earlier orders, none of which had been appealed, were the law of the case. It then scheduled a trial at which it limited the scope of evidence to be presented to "whether [plaintiff] cured the violations of the Mechanical Code requiring that [its] exhaust system, precipitator, odor equipment (the 'Exhaust System') interlock with each other so that no cooking appliances are in operation when any part of the Exhaust System is not in operation." The

court reserved the issue of "payments, if any, owed by plaintiff to the defendant-counterclaimant for past rent, additional rent, and use and occupancy" for possible referral to a special master.

A trial on the issue of whether or not the Mechanical Code violations had been cured was held on February 3 and 26, 2016. At trial, Joel Berkowitz, managing partner of Fireproofing Corporation of America (FCA), testified that FCA completed work to "interlock the precipitator with the exhaust fan" on December 31, 2013 (which was after the December 19, 2013 deadline set by Justice Bransten), but that plaintiff "wanted to keep the makeup air fan independent of the exhaust fan," so work was not performed by FCA to interlock the makeup air fan with the other exhaust system components. Defendant's expert also testified that, as of February 19, 2016, the makeup air fan was still not interlocked with the other components, in violation of the Code.

Despite its earlier ruling that Justice Bransten's orders were the law of the case and that the only issue at trial was whether the Code violation had been cured, the trial court issued an order after trial, entered June 1, 2016, that found that defendant had failed to establish any violation of the Code, determined that the notice of cancellation was null and void, and enjoined defendant from terminating the lease based upon the

notice. The court dismissed defendant's first, second, third and sixth counterclaims, and referred the remaining counterclaims to a special referee to determine the amount of outstanding rent and/or use and occupancy and other charges owed. Defendant now appeals from that order.

The "law of the case doctrine is designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case" (*People v Evans*, 94 NY2d 499, 504 [2000]). Here, the trial court was prohibited from finding that plaintiff's commercial kitchen exhaust system did not violate the Mechanical Code. The trial court adopted the earlier finding by Justice Bransten, referenced in the February 18, 2014 order, when it held that her orders were the "law of the case," and limited the issue at trial as set forth above.

Plaintiff was afforded a full and fair opportunity to litigate this issue before Justice Bransten, and was offered the opportunity, if it wished, to schedule cross-examination of defendant's expert (*People v Evans*, 94 NY2d at 502). It did not do so, and essentially conceded the existence of the Code violation when its counsel responded, "Fair enough," to the court's directive on December 17, 2013 that the violation be

cured at plaintiff's expense.

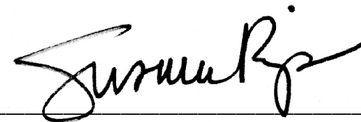
Moreover, the evidence presented at the 2016 trial, including unrefuted expert testimony, established that plaintiff's commercial kitchen exhaust system continued to violate MC § 508.1. The evidence demonstrated that the mechanical makeup air fan in plaintiff's kitchen was operated independently of the exhaust system, by a separate switch, in violation of MC § 508.1 and that the violation had not been cured as of February 19, 2016.

Thus, defendant is entitled to the relief it seeks. Accordingly, defendant's counterclaims are reinstated, and defendant is entitled to a judgment of possession and the issuance and execution of a warrant of eviction resulting from plaintiff's continued holdover after its lease had been terminated as of January 21, 2014 (*see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983] [holding that the authority of this Court "is as broad as that of the trial court and that as to a bench trial it may render the judgment it finds warranted by the facts"] [citations omitted]). To the extent defendant seeks monetary relief on any of its counterclaims, that issue is remanded to Supreme Court.

Contrary to plaintiff's contention, defendant was indeed aggrieved by the order, which, inter alia, found its notice of cancellation of lease null and void.

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

ENTERED: NOVEMBER 9, 2017



CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4893 The People of the State of New York SCI 2471/14
Respondent,

-against-

Juan Alvarez-Perez,
Defendant-Appellant.

____

Rosemary Herbert, Office of the Appellate Defender, New York (Matthew A. Wasserman of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Marc J. Whiten, J.), entered on or about June 15, 2016, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence supports the assessment of 20 points for the victim's physical helplessness. The court properly assessed these points based on facts elicited in defendant's plea allocution in the underlying case, which "shall be deemed established by clear and convincing evidence and shall not be relitigated" (Correction Law § 168-n[3]). In addition, the sentencing minutes, and evidence in the case summary, showed that part of the sexual contact occurred while the victim was not

merely intoxicated, but was physically helpless within the meaning of Penal Law § 130.00(7). The assessment of points for this factor while also assessing points for forcible compulsion was not inconsistent, because the victim's account demonstrated both physical helplessness and forcible compulsion, at different times during the incident.

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

ENTERED: NOVEMBER 9, 2017

CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4894 Illinois National Insurance Company, Index 159868/14
Plaintiff-Respondent,

-against-

Robert Schumann, et al.,
Defendants-Appellants.

____

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellants.

Frenkel Lambert Weiss Weisman & Gordon, LLP, New York (Lawrence Lambert of counsel), for respondent.

____

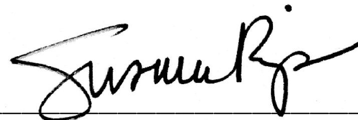
Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered September 15, 2016, in favor of plaintiff, and bringing up for review an order, same court and Justice, entered September 30, 2016, which, among other things, denied defendants' motion for summary judgment, and granted plaintiff's cross motion for summary judgment on its claim for $64,000 against defendants, unanimously affirmed, without costs.

The motion court correctly determined that defendants owed plaintiff the balance of its Workers' Compensation Law § 29 lien and that defendants had failed to prove an accord and satisfaction of the lien, as there was no bona fide dispute concerning the amount due and owing (*Marine Midland Bank v Scallen*, 161 AD2d 103, 105 [1st Dept 1990]).

In any event, and as a separate rationale for the result, the motion court providently exercised its discretion in sanctioning defendants for noncompliance with the court's discovery orders (CPLR 3126) so that accord and satisfaction was unavailable to defendants as an affirmative defense.

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

ENTERED: NOVEMBER 9, 2017



CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4895 In re Nekia C., etc.,

A Dependanent Child Under the Age
of Eighteen Years, etc.,

- - - - -

Kevin E.C., etc.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent,

Laurel S.McC., etc.,
Respondent.

____

Daniel R. Katz, New York, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

____

Order, Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about April 1, 2016, which to the extent appealed from, after a fact-finding hearing, found that respondent father Kevin E.C. permanently neglected the subject child, unanimously affirmed, without costs.

Although this nondispositional order is not appealable as of right, since this is a case based on permanent neglect (*see* Family Court Act § 1112[a]; *Matter of Alyssa L. [Deborah K.]*, 93 AD3d 1083 [3d Dept 2012]; *Matter of Tasha E.*, 161 AD2d 226 [1st

Dept 1990]), the finding of permanent neglect constitutes a "permanent and significant stigma" that may impact respondent's status in future proceedings (*Matter of Latisha T'Keyah J. [Monie J.]*, 117 AD3d 1051, 1052 [2d Dept 2014]; *see also Matter of Joseph Benjamin P. [Allen P.]*, 81 AD3d 415 [1st Dept 2011], *lv denied* 16 NY3d 710 [2011]). Accordingly, the Court, on its own motion, deems the notice of appeal to be a request for leave to appeal, and hereby grants leave to appeal.

Clear and convincing evidence in the record supports Family Court's finding that the agency made diligent efforts to strengthen the parental relationship by scheduling visitation and providing referrals for services, to address the reason for the child's placement into foster care, and respondent had failed, for more than a year, to plan for the return of the child.

The fact that respondent completed services does not preclude a finding of permanent neglect, since the record shows that he was unable to demonstrate the necessary parenting skills and failed to adequately plan for the subject child because of his inability to separate from the mother, who continued to suffer from untreated alcoholism (*see Matter of Leroy Simpson M. [Joanne M.]*, 122 AD3d 480 [1st Dept 2014]; *Matter of Kie Asia T. [Shaneene T.]*, 89 AD3d 528 [1st Dept 2011]; *Matter of John G.,*

Jr. [John G.], 70 AD3d 419, 420 [1st Dept 2010]; Social Services Law § 384-b[7][a], [f]). Respondent refused to acknowledge his failure to protect the child from the effects of the mother's alcoholism that started, according to him, before the child's birth, and continued up to the date of the petitions (*see Matter of John G., Jr., supra*).

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

ENTERED: NOVEMBER 9, 2017

CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4896 Angelique Vasquez, Index 306489/14
Plaintiff-Appellant,

-against-

Segundo I. Buri Chimborazo, et al.,
Defendants-Respondents.

____

Law Offices of Alexander Bespechny, Bronx (Louis A. Badolato of counsel), for appellant.

Law Offices of Gialleonardo Gizzo & Rayhill, White Plains (Peter H. Cohen of counsel), for respondents.

____

Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered November 28, 2016, which, in this action for personal injuries sustained in a motor vehicle accident, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established her entitlement to judgment as a matter of law by submitting evidence that her vehicle was stopped at a red light when it was rear-ended by defendants' vehicle (*see Bajrami v Twinkle Cab Corp.*, 147 AD3d 649 [1st Dept 2017]). In opposition, defendants failed to provide a nonnegligent explanation for the accident. Defendants' opposition consisted of an affirmation of their attorney, who had no personal

knowledge of the accident (*see Brown v Nocella*, 149 AD3d 470 [1st Dept 2017]). Moreover, the contention by defendants' counsel that plaintiff's vehicle stopped suddenly in the intersection was insufficient to rebut the presumption of negligence on the part of defendants' vehicle (*see Alvarez v Bryant*, 143 AD3d 527 [1st Dept 2016]).

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

ENTERED: NOVEMBER 9, 2017

CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4897-
4897A SPRE Realty, Ltd., etc.,
Plaintiff-Appellant,

-against-

Daniel Dienst, et al.,
Defendants-Respondents.

____

Frydman LLC, New York (David S. Frydman of counsel), for appellant.

Greenspoon Marder, P.A.P.C., New York (Wendy Michael of counsel), for respondents.

____

Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered July 14, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from purported order, same court and Justice, entered February 2, 2016, unanimously dismissed, without costs, as taken from a nonappealable paper.

In dismissing the cause of action for breach of implied contract, the motion court properly concluded that plaintiff failed to establish any triable issue of fact whether defendants employed plaintiff's agent, Susan Penzner, because the evidence established that the parties expected the seller to pay any

commission (*Julien J. Studley, Inc. v New York News*, 70 NY2d 628, 629 [1987]; *Brener & Lewis Mgt. v Engel*, 168 AD2d 254 [1st Dept 1990]). In addition, a brokerage agreement executed by the seller and plaintiff in connection with the first unit defendants had considered buying obligated the seller, not defendants (the potential buyers), to pay plaintiff its commission.

Nor was there any triable issue whether defendants acted in bad faith and terminated their relationship with Penzner in 2008 to avoid her earning a commission. As defendants were not obligated to pay the commission, they had no incentive to act in bad faith, and in any case, the evidence established that the financial crisis and deteriorating market from July 2008 to September 2008, along with Penzner's tenacious belief that New York real estate would never decline in value, eliminated defendants' financial incentive to buy an apartment at that time, or to work with Penzner in searching for residential property.

Plaintiff also failed to raise any triable issue whether defendants owed her a commission based on any arbitrary abandonment or refusal to sign a contract of sale on Unit 3, the first unit defendants had considered buying in 2008, located in the same building where they ultimately purchased Unit 4 in 2010 (*see* 119 AD3d 93, 101 [1st Dept 2014]). Even assuming there was

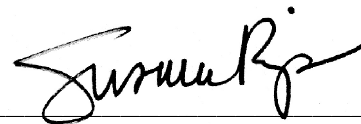
any implied employment agreement with defendants, plaintiff failed to procure a contract of sale that included the terms defendants sought. In particular, the seller had refused to include a price protection clause, which defendants had made clear to plaintiff was important in light of the financial crisis in mid to late 2008. Although the seller's counsel eventually included such a clause, neither party had agreed to it, as it was still in a draft agreement that had yet to be approved by either side, and the clause was added in September 2008, months after defendants requested it, by which time the market had deteriorated so much that defendants' refusal to sign any finalized agreement cannot be deemed arbitrary.

Finally, the motion court properly dismissed the quantum meruit claim because no triable issue of fact exists whether plaintiff could have expected compensation from defendants for its services, as the brokerage agreement states otherwise, and plaintiff presented no evidence of any other express or implied

agreement between the parties to show that plaintiff had an expectation of compensation by defendants for her services (*see Eastern Consol. Props., Inc. v Waterbridge Capital LLC*, 149 AD3d 444, 444 [1st Dept 2017]).

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

ENTERED: NOVEMBER 9, 2017



____
CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4898 TufAmerica, Inc., Index 651197/11
Plaintiff-Respondent,

-against-

EMI Unart Catalog, Inc.,
Defendant-Appellant.

____

Pryor Cashman LLP, New York (Andrew M. Goldsmith of counsel), for appellant.

Carmel, Milazzo & DiChiara LLP, New York (Michael D. Nacht of counsel), for respondent.

____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered September 12, 2016, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint as to five of the seven named songs, unanimously affirmed, with costs.

Defendant music publisher failed to establish prima facie that plaintiff music publisher did not own the exclusive administration rights to certain songs by George Patterson, a musician and composer, who died in 2003 (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). It was not plaintiff's burden on defendant's motion to prove that it owned those rights (*id.*). Defendant failed to demonstrate either the invalidity of a 2001 agreement by which Patterson allegedly

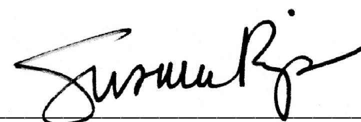
transferred the rights to plaintiff or the validity of a 1973 agreement by which, allegedly, defendant's predecessor in interest, Kama Sutra Music Inc., acquired those rights from Patterson.

The motion court denied defendant's motion on the ground that defendant did not show a clear chain of title from Kama Sutra to itself to the rights conveyed through the 1973 agreement. Defendant contends that its own chain of title is irrelevant because in any event rights conveyed to Kama Sutra in 1973 could not have been conveyed to plaintiff in 2001. However, defendant did not show that those rights were still intact and held by some entity other than itself in 2001. Thus, defendant failed to establish that it, or anyone, was in possession of those rights at the time the 2001 agreement was entered into or is in possession of those rights at present.

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: NOVEMBER 9, 2017



CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4899 In re Brandon D.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for presentment agency.

____

Order of disposition, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about June 8, 2016, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the second and third degrees, obstructing governmental administration in the second degree and resisting arrest, and placed him on probation for 12 months, unanimously affirmed, without costs.

The court's determination that appellant committed acts that, if committed by an adult, would constitute the crimes of assault in the second and third degrees, obstructing governmental administration in the second degree and resisting arrest was based on legally sufficient evidence and was not against the

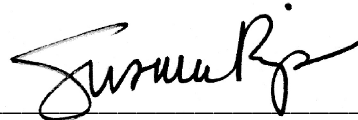
weight of the evidence (*see Matter of Luis L*, 58 AD3d 543, 544 [1st Dept 2009], citing *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The testimony firmly established that appellant assaulted a police officer and interfered with an arrest while the officer was performing her official function (*Matter of Davan L.*, 91 NY2d 88 [1997]). His physical intrusion and actions were not justified, nor can they be excused simply because it was his mother who was being arrested and he was upset. Appellant also resisted arrest when the police attempted to handcuff him.

The Family Court providently exercised its discretion in placing appellant on probation for a period of 12 months (*see* Family Ct Act § 352.2[1][b]; *Matter of Cindy A.*, 31 AD3d 440 [2d Dept 2006]). The court appropriately took into account the nature of the incident, the Department of Probation’s recommendation that appellant would benefit from probation, the

appellant's poor school performance, and his attendance and disciplinary record, and made its determination, despite the fact that this was appellant's first offense (*Matter of Javed K*, 57 AD3d 899 [2d Dept 2008]).

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

ENTERED: NOVEMBER 9, 2017



____
CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4900 The People of the State of New York, Ind. 1902/12
Respondent,

-against-

Ramon Sanchez,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

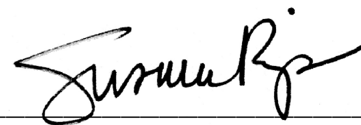
____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered May 5, 2015, unanimously affirmed.

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

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

ENTERED: NOVEMBER 9, 2017



CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4902 The People of the State of New York, Ind. 1196/14
Respondent,

-against-

Lawrence Hackshaw,
Defendant-Appellant.

____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

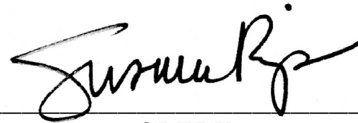
____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered May 14, 2015, unanimously affirmed.

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

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

ENTERED: NOVEMBER 9, 2017



CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4903 Eurotech Construction Corp., Index 157598/16
Plaintiff-Appellant-Respondent,

-against-

Fischetti & Pesce, LLP,
Defendant-Respondent-Appellant.

____

FG McCabe & Associates, PLLC, New York (Gerard McCabe of counsel), for appellant-respondent.

Steinberg & Cavaliere, LLP, White Plains (Steven A. Coploff of counsel), for respondent-appellant.

____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered January 17, 2007, which, to the extent appealed from, denied defendant's motion to dismiss the legal malpractice claim, and granted the motion as to the breach of fiduciary duty and breach of implied contract claims, unanimously affirmed, without costs.

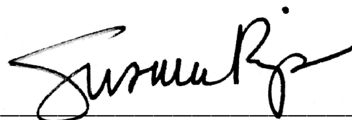
The complaint alleges that defendant failed to ensure that plaintiff gave timely notice to its excess carrier that the primary insurer's limits were likely to be exhausted in connection with the underlying personal injury claim. Conceding the general principle that a law firm may have an obligation to investigate insurance coverage (*see Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 40-41 [2d

Dept 2006]), defendant argues that it should not bear that burden in this case, because plaintiff had been advised by its insurer's third-party administrator to notify its excess carrier of the claim and had not done so. However, as the motion court observed, the issue is not what plaintiff knew but whether its attorneys committed malpractice by not providing timely information obtained from the deposition testimony or bills of particular in the underlying action. Resolution of that issue depends on facts not yet developed (*see id.* at 41).

The breach of fiduciary duty and breach of implied contract claims are premised on the same facts and seek the same relief as the legal malpractice claim, and were therefore correctly dismissed as duplicative (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]).

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

ENTERED: NOVEMBER 9, 2017



CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4904 Lauren Brenner, et al., Index 161032/14
Plaintiffs-Appellants,

-against-

Reiss Eisenpress, LLP, et al.,
Defendants-Respondents.

____

Andrew Lavoot Bluestone, New York, for appellants.

Kaufman, Dolowich & Voluck, LLP, Woodbury (Brett A. Scher of counsel), for respondents.

____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about August 11, 2016, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, the motion denied with respect to the breach of contract and breach of fiduciary duty claims, and otherwise affirmed, without costs.

In this action commenced by plaintiffs against defendants based on defendants' representation of plaintiffs in an underlying federal court action, dismissal of the legal malpractice claim was proper since the claim rested on retrospective complaints about the outcome of defendants' strategic choices and tactics, without any facts cited to support a claim that the choices were unreasonable (*see Kassel v Donohue*,

127 AD3d 674 [1st Dept 2015], *lv dismissed* 26 NY3d 940 [2015]; *Dweck Law Firm v Mann*, 283 AD2d 292 [1st Dept 2001]). The failure to anticipate the trial court's evidentiary rulings with respect to the expert report does not establish negligence (*see Leder v Spiegel,* 9 NY3d 836, 837 [2007], *cert denied* 552 US 1257 [2008]).

However, the breach of contract and breach of fiduciary duty claims should be reinstated. They are based on billing issues and are not duplicative of the claims regarding the alleged mishandling of the trial (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 8 [1st Dept 2008]).

The court correctly concluded that the action was timely based on the continuous representation doctrine. It was undisputed that defendants' filed a memorandum of law on plaintiffs' behalf on November 7, 2011, which was less than three years prior to the filing of the complaint.

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

ENTERED: NOVEMBER 9, 2017

CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4905 The People of the State of New York, Ind. 2889/12
Respondent,

-against-

Jarod Skinner,
Defendant-Appellant.

____

Rosemary Herbert, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered October 29, 2013, unanimously affirmed.

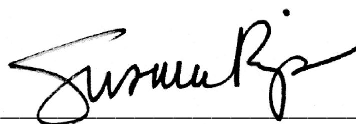
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: NOVEMBER 9, 2017



CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4906 The People of the State of New York, Ind. 4850/14
Respondent,

-against-

Celso Pena,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered November 24, 2015, as amended March 16, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

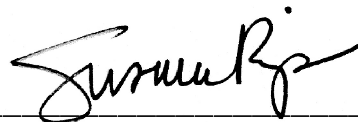
The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, including its evaluation of inconsistencies in testimony. The police had reasonable suspicion justifying the stop of the car defendant was driving, based on the car's occupants' multiple attempts to use credit cards at a variety of locations within a short period of time, several of which were

unsuccessful.

The police also had probable cause for defendant's arrest. Defendant does not dispute that the police had probable cause to arrest his codefendants, but claims that they lacked probable cause to arrest him. Contrary to defendant's contention, the totality of the circumstances would lead a reasonable person to conclude that he knowingly participated in the forged credit card scheme (*see e.g. People v Petithomme*, 131 AD3d 877 [1st Dept 2015], *lv denied* 27 NY3d 1004 [2016]). Defendant drove his codefendants around for over an hour, making multiple stops so they could attempt transactions with the forged credit cards, and accompanied them during one of these transactions. "In order to establish probable cause, the People were not required to prove accessorial liability under Penal Law § 20.00 beyond a reasonable doubt" (*id.* at 878).

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

ENTERED: NOVEMBER 9, 2017



CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4908 Paul Viselli, et al., Index 300585/13
Plaintiffs-Appellants,

-against-

The Riverbay Corporation,
Defendant-Respondent.

____

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for appellants.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered January 6, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff firefighter, while responding with other firefighters to an apartment fire on the fifth floor in defendant's residential apartment building, allegedly slipped, fell and was injured on an unknown "wet" substance upon the painted concrete stairs of an internal, common stairwell. Defendant established prima facie entitlement to summary judgment dismissing plaintiffs' claims for common law negligence, as well as under General Municipal Law (GML) § 205-a. Its deposition testimony, supporting affidavits, exhibits and expert opinion

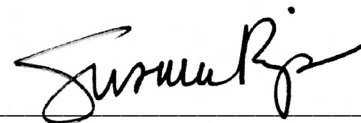
established, inter alia, that the alleged substance on which plaintiff slipped remained unidentified, its duration on the steps undetermined, and the cement stairs on which it rested had been painted with a specified non-skid paint that possessed a measured slip-resistance coefficient of between 0.550 and 0.625 (*Lopez-Ramos v New York City Hous. Auth.*, 136 AD3d 504 [1st Dept 2016]; *Sims v 3349 Hull Ave. Realty Co. LLC*, 106 AD3d 466 [1st Dept 2013]). According to a submitted professional engineering publication, the above-noted slip-resistance coefficient afforded a standard, non-hazardous traction surface. Further, to the extent plaintiff alleged the subject staircase was unsafe and violated, inter alia, Multiple Dwelling Law (MDL) § 52(1), MDL § 78 and Administrative Code of City of NY § 28-301.1 because it had only one handrail and the defendant owner otherwise failed to maintain the premises in a safe condition, defendant's submission of a certificate of occupancy which indicated that the building was in compliance with all applicable statutes, codes and ordinances shifted the burden on the motion to plaintiffs to offer evidence as might raise triable issues on the claims asserted (*see generally Hyman v Queens County Bancorp*, 307 AD2d 984, 985-986 [2d Dept 2003], *affd* 3 NY3d 743 [2004]; *Ndiaye v NEP W. 119th St., L.P.*, 145 AD3d 564 [1st Dept 2016]). Plaintiffs'

submissions, including an expert affidavit that afforded no basis on which to find the expert possessed personal knowledge of the width of the subject staircase, or of the traction coefficient of the painted steps, and who offered no other competent, non-hearsay proof in support of his opinions, were insufficient to raise triable issues as to any of the claims asserted in the complaint (*see generally Gibbs v 3220 Netherland Owners Corp.*, 99 AD3d 621 [1st Dept 2012]; *Oboler v City of New York*, 31 AD3d 308 [1st Dept 2006], *affd* 8 NY3d 888 [2007]); *Pastabar Caffe Corp. v 343 E. 8th St. Assoc., LLC*, 147 AD3d 583 [1st Dept 2017]).

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

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

ENTERED: NOVEMBER 9, 2017



CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4909 Daphne O.B. Lewis, Index 305072/12
Plaintiff-Appellant,

-against-

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

Michael B. Palillo, P.C., New York (Ryan Amato of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Daniela Jampel of counsel), for respondents.

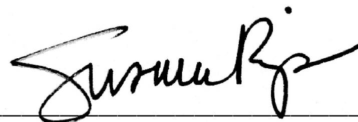
Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered May 19, 2016, which, in an action for personal injuries sustained in a motor vehicle accident, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants' motion for summary judgment was properly granted since the record shows that defendant Kohler, a police officer, was operating a police vehicle while performing an emergency operation and did not recklessly disregard the safety of others before the accident happened (*see Daniels v City of New York*, 28 AD3d 415 [2d Dept 2006], *lv dismissed in part denied in part* 7 NY3d 825 [2006]). The fact that Koehler was mistaken in believing that plaintiff was stopping her vehicle when he

proceeded to pass through the red light did not render his conduct reckless. Koehler testified that as he approached the intersection, he reduced his speed and looked left and right. He was traveling approximately 10 miles above the speed limit when the accident occurred. Koehler attempted to avoid colliding with plaintiff by braking hard and turning the steering wheel to the right upon realizing that plaintiff’s vehicle had entered the intersection (*see Frezzell v City of New York*, 105 AD3d 620 [1st Dept 2013], *affd* 24 NY3d 213 [2014]; *Quock v City of New York*, 110 AD3d 488 [1st Dept 2013]). The fact that there is a question as to whether the police vehicle’s lights and siren were activated is not material because Koehler was not required to activate either of these devices in order to be entitled to the statutory privilege of passing through a red light (*see Flynn v Sambuca Taxi, LLC*, 123 AD3d 501, 502 [1st Dept 2014]).

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

ENTERED: NOVEMBER 9, 2017



CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4910 The People of the State of New York, Ind. 656/13
Respondent,

-against-

Daquan Trent,
Defendant-Appellant.

____

Rosemary Herbert, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered September 3, 2015, unanimously affirmed.

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

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

ENTERED: NOVEMBER 9, 2017

CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4911 The People of the State of New York, SCI 3441/13
Respondent,

-against-

Steven Dilone,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, Bronx County (William McGuire, J.), rendered June 13, 2014, unanimously affirmed.

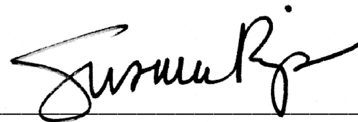
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: NOVEMBER 9, 2017



CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4912N Philip A. Hofmann, Index 312822/15
Plaintiff-Respondent,

-against-

Dina F. Hofmann,
Defendant-Appellant.

The McPherson Firm, PC, New York (Laurie J. McPherson of counsel), for appellant.

Garr Silpe, P.C., New York (Steven M. Silpe of counsel), for respondent.

Order, Supreme Court, New York County (Louis Crespo, Special Referee), entered February 2, 2017, which, to the extent appealed from, denied defendant wife's cross motion for certain relief with respect to the Hofmann 2012 Family Trust (Trust), and determined that any claims related to assets of the trust could not be asserted as equitable distribution claims in the divorce action, unanimously affirmed, without costs.

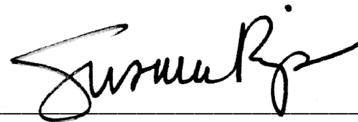
The motion court properly determined that the wife's requests for relief concerning the Trust could not be determined in the divorce action since the trust assets were not marital property subject to equitable distribution. It is undisputed that the wife voluntarily transferred her interest in the parties' Michigan house to the husband to be held in the

irrevocable family Trust, with the house as the Trust's main asset. Further, the wife was fully aware of the specific terms of the Trust, as evidenced by her notarized signature on the Trust agreement. In general, trust assets are not considered marital property subject to equitable distribution where, as here, the parties are not trustees and have relinquished control over the trust assets (*see Markowitz v Markowitz*, 146 AD3d 872, 873 [2d Dept 2017]; *Stewart v Stewart*, 133 AD3d 493, 494-495 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016]).

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

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

ENTERED: NOVEMBER 9, 2017



CLERK

PRESENT: Hon. Rolando T. Acosta, Presiding Justice,
Richard T. Andrias
Karla Moskowitz
Judith J. Gische
Troy K. Webber, Justices.

---------------------------------------X

The Bank of New York Mellon, etc.,
Plaintiff-Appellant,

-against-

WMC Mortgage, LLC, etc., et al.,
Defendants-Respondents.

---------------------------------------X

M-3116
M-3371
Index No. 653831/13

Plaintiff-appellant having moved for reargument, or alternatively leave to appeal to the Court of Appeals, from the decision and order of this Court, entered on May 11, 2017 (Appeal No. 2478) [M-3116],

And defendants-respondents having separately moved for leave to appeal to the Court of Appeals, from the decision and order of this Court, entered on May 11, 2017 (Appeal No. 2478) [M-3371],

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that both motions are denied (M-3116/M-3371).

ENTERED: November 9, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4743-
4744 M.H., an Infant under the Age of Eighteen years, etc., et al., Index 101083/12 590629/12
Plaintiffs-Respondents-Appellants,

-against-

Bed Bath & Beyond Inc.,
Defendant-Appellant-Respondent.
- - - - -
[And a Third-Party Action]

____

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for appellant-respondent.

Cellino & Barnes, P.C., Garden City (Stephen E. Barnes of counsel), for respondents-appellants.

____

Resettled order, Supreme Court, New York County (Debra A. James, J.), entered January 10, 2017, modified, on the law, to grant defendant's motion and the portion of plaintiffs' motion that seeks partial summary judgment on the defective design claim, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered December 23, 2016, dismissed, without costs, as superseded by the appeal from the January 10, 2017 order.

Opinion by Kern, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Sallie Manzanet-Daniels, J.P.
Angela M. Mazzarelli
Karla Moskowitz
Marcy L. Kahn
Cynthia S. Kern, JJ.

4743-4744
Index 101083/12
590629/12

M.H., an Infant Under the Age of Eighteen Years, etc., et al.,
Plaintiffs-Respondents-Appellants,

-against-

Bed Bath & Beyond Inc.,
Defendant-Appellant-Respondent.

\- - - - -

[And a Third-Party Action]

Cross appeals from the resettled order of the Supreme Court, New York County (Debra A. James, J.), entered January 10, 2017, which, insofar as appealed from as limited by the briefs, denied defendant Bed Bath & Beyond’s motion for summary judgment dismissing the manufacturing defect, breach of express warranty, failure to warn, and punitive damages claims, and denied plaintiffs’ motion for partial summary judgment on the defective design and failure to warn claims, and from the order of the same court and Justice, entered December 23, 2016, which denied defendant Bed Bath & Beyond’s motion for summary judgment, and plaintiff’s cross motion for summary judgment.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker and Deirdre E. Tracey of counsel), for appellant-respondent.

Cellino & Barnes, P.C., Garden City (Stephen E. Barnes and Ellen B. Sturm of counsel), for respondents-appellants.

KERN, J.

This action arises from injuries allegedly sustained by plaintiffs when a fire pot and fuel gel purchased from defendant suddenly combusted and exploded. The product at issue is a combination of a ceramic pot, called the "FireBurners" Pot, with a stainless steel fuel reservoir at its center and a bottle of gelled fuel for use with the fire pot called "FireGel." Plaintiffs allege that their injuries occurred when the fire pot was refueled with the fuel gel and an explosion occurred. A red sticker affixed to the fire pot itself that must be removed in order to use the product states: "WARNING . . . DON'T REFILL UNTIL FLAME IS OUT & CUP IS COOL." Additionally, a pamphlet entitled "CARE AND USE INSTRUCTIONS," which comes with the product, states in the "WARNINGS" section: "Do not add fuel when lit and never pour gel on an open fire or hot surface." The label on the back of the fuel gel bottle instructs: "NEVER add fuel to a burning fire," and under the word "WARNING," which is in bold, it states: "DANGER, FLAMMABLE LIQUID & VAPOR." The deposition testimony is inconsistent as to whether the explosion occurred after the fire pot was refueled with fuel gel while the fire pot was still hot or lit.

One of plaintiffs' experts, Stuart M. Statler, opined that the product was not reasonably safe for its intended use and was

defectively designed for a number of reasons, including that when the product is being used and the fire pot is refueled with the fuel gel, the fuel gel can combust and explode, destroying property and injuring persons in its vicinity, that when the fuel gel inside the stainless steel cup burns down, it can appear to the user that the flame is extinguished and that the gel has been exhausted when in fact remnants of fuel gel remain in the steel cup and a flame that is difficult to visually discern continues to burn and that the viscosity of the fuel gel renders it highly sticky and especially adherent to things with which it comes in contact, including skin and clothing, which increases the difficulty of extinguishing the flaming gel.

We first turn to plaintiffs' motion for partial summary judgment on the defective design claim. "In order to establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer [or seller] breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]). The Court of Appeals has held that in order to determine whether a product was designed so that it was not reasonably safe, the risks inherent in the product must be

balanced against the product’s utility and cost, which requires the consideration of certain factors, including “the utility of the product to the public as a whole and to the individual user,” “the nature of the product – that is, the likelihood that it will cause injury,” “the availability of a safer design,” “the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced,” “the ability of the plaintiff to have avoided injury by careful use of the product,” “the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff” and “the manufacturer’s ability to spread any cost related to improving the safety of the design” (*Voss*, 59 NY2d at 109). Additionally, with regard to the misuse of a product, it may be determined that “even with adequate warnings, a product may be so dangerous, and its misuse may be so foreseeable, that...‘the utility of the product did not outweigh the risk inherent in marketing’ it” (*Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 34 [2011]).

In the present case, plaintiffs have established, as a matter of law, that the product at issue, consisting of the fire pot and the fuel gel, was defectively designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiffs’ injuries. Plaintiffs have

submitted evidence, including expert affidavits, demonstrating that the product has minimal utility, serving a purely decorative purpose, that it poses an extraordinary safety risk in that it can explode and propel flaming fuel gel onto persons in its vicinity and cause them to catch fire when a person attempts to light the fire pot with the fuel gel while the fire pot is already lit or hot, that when the fuel gel in the fire pot is lit but burns down, it has a nearly invisible flame, which can mislead users into perceiving the flame as extinguished and the fuel gel exhausted, that the viscosity of the fuel gel makes it easily adherent to skin and clothing which makes it very difficult to extinguish and that alternative and safer designs are available in that instead of designing the fire pot with a deep-seated stainless steel cup into which the fuel gel is poured, the product could have been designed using fuel gel in nonrefillable metal cans or cartridges that get inserted directly into the fire pot, which would eliminate the design defect that causes an explosion upon refueling the fire pot with the fuel gel as well as the related dangers flowing from the fuel gel flame being difficult to visually discern when the fuel gel burns down and the viscosity of the fuel gel. Finally, the experts opined that the defective design of the product was a substantial factor in causing plaintiffs' injuries.

In opposition, defendant has failed to raise an issue of fact as to whether the product was designed in a reasonably safe manner or whether the defective design was a substantial factor in causing plaintiffs' injuries. Initially, defendant does not seriously dispute any of the evidence provided by plaintiffs. To the extent defendant contends that there is an issue of fact as to how the accident occurred based on plaintiffs' expert's alleged statement that the fuel gel bottle itself was defectively designed, this contention is without merit. Mr. Statler opined that the "FireBurners and FireGel are not reasonably safe for their intended use and are defectively designed for multiple reasons," including that "when FireBurners are being used and are refilled or refueled with FireGel, the FireGel can combust and explode and cause flaming FireGel to be propelled onto persons and property in their vicinity" and that "[t]his condition alone renders those products unreasonably dangerous for their intended use." Mr. Statler did not state that the bottle of fuel gel itself is the defectively designed product.

To the extent defendant contends that there is an issue of fact as to whether the alleged misuse of the product substantially caused plaintiffs' injuries, this contention is without merit. Defendant points to the fact that the product contained warnings that the fire pot should not be refilled with

fuel gel until the flame is out and the cup inside the fire pot is cool and it points to inconsistent testimony in the record regarding whether the fire pot was indeed refueled while it was still lit or hot. Plaintiff Nancy R. testified that "[i]t didn't look like [the fire pot] was lit" when it was being refueled. However, another witness testified that prior to the explosion, the fire pot was "already lit," but "just a little bit," and that it "didn't look like it was lit." Another witness testified that before the explosion, there was "no heat" and "no flame." However, in a prior written statement, that same witness indicated that there was a "weak" flame.

However, even assuming there was a misuse of the product, the misuse fails to raise an issue of fact sufficient to defeat plaintiffs' motion for summary judgment on the design defect claim. We find, as a matter of law, that even with adequate warnings, the fire pot and fuel gel, when used together, were so dangerous and were so defectively designed that their misuse was foreseeable (*see Yun Tung Chow*, 17 NY3d at 34). With regard to the foreseeability of misuse of the product, Mr. Statler opined as follows:

> "The danger posed [by the product] is severe, and the likelihood of the danger occurring during normal or foreseeable use of the product is high. In addition, the condition is a latent or hidden condition, which is not

> obvious or readily apparent from a visual evaluation of the products, and which would not be known to or expected by lay persons who are not expert in ethanol-based materials. The latent nature of this highly explosive condition renders these products even more dangerous because it increases the likelihood of the danger occurring during normal or foreseeable use of the product."

As defendant has not disputed this evidence, plaintiffs are entitled to summary judgment on their design defect claim.

We next turn to defendant's motion for summary judgment dismissing the manufacturing defect, breach of express warranty, failure to warn and punitive damages claims and find that it should have been granted. Initially, with regard to the manufacturing defect claim, plaintiffs concede that they are not pursuing that claim.

With regard to the breach of express warranty claim, defendant established prima facie that plaintiffs did not rely on any express warranty (*see Meyer v Alex Lyon & Son Sales Mgrs. & Auctioneers, Inc.*, 67 AD3d 547 [1st Dept 2009]) and plaintiffs failed to address the breach of warranty claim in opposition to defendant's motion (*see Saidin v Negron*, 136 AD3d 458 [1st Dept 2016], *lv dismissed* 28 NY3d 1069 [2016]).

Defendant is also entitled to summary judgment dismissing the failure to warn claim because even assuming that the product warning labels did not comply with the requirements of the

Federal Hazardous Substances Act (15 USC § 1261 *et seq.*), plaintiffs' witnesses either admitted that they had not read the labels or could not remember whether anyone read the labels (*see Medina v Biro Mfg. Co.*, 151 AD3d 535 [1st Dept 2017]).

Additionally, defendant is entitled to summary judgment dismissing the claim for punitive damages as defendant's actions, while they may have been negligent, do not rise to the high level of "moral culpability" necessary to support an award of punitive damages. Although defendant could have done more to ensure the product's safety, defendant took a variety of steps to vet the product and to investigate reported incidents and its awareness of, at most, two unsubstantiated accident reports did not justify a full product recall (*see Camillo v Geer*, 185 AD2d 192, 194-195 [1st Dept 1992]).

Finally, defendant showed "good cause" for the delay in making its motion for summary judgment (*see* CPLR 3212[a]). It is undisputed that discovery was ongoing when the note of issue was filed and that the motion court was aware of and acquiesced in the ongoing discovery (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]; *Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338, 340 [1st Dept 2007]; *Quizhpi v Lochinvar Corp.*, 12 AD3d 252 [1st Dept 2004]).

Accordingly, the resettled order of the Supreme Court, New

York County (Debra A. James, J.), entered January 10, 2017, which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the manufacturing defect, breach of express warranty, failure to warn, and punitive damages claims, and denied plaintiffs' motion for partial summary judgment on the defective design and failure to warn claims, should be modified, on the law, to grant defendant's motion and the portion of plaintiffs' motion that seeks partial summary judgment on the defective design claim, and otherwise affirmed, without costs. Defendant's appeal from the order of the same court and Justice, entered December 23, 2016, which denied defendant's motion for summary judgment, and denied plaintiff's cross motion for summary judgment, should be dismissed, without costs, as superseded by the appeal from the January 10, 2017 order.

All concur.

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

ENTERED: NOVEMBER 9, 2017

CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4913 In re Kaseem Williams, O.P. 114/17
[M-4448] Petitioner,

-against-

Supreme Court, Bronx County,
et al.,
Respondents.

- - - - -

District Attorney, New York
County,
Nonparty Respondent.

Kaseem Williams, petitioner pro se.

John W. McConnell, New York (Pedro Morales of counsel), for Supreme Court, Bronx County and Supreme Court, New York County [incorrectly sued herein as Supreme Court, Manhattan County], respondents.

Eric T. Schneiderman, Attorney General, New York (Nicholas P. Stabile of counsel), for New York State Department of Corrections and Community Supervision and the Green Haven Correctional Facility Superintendent, respondents.

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

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: NOVEMBER 9, 2017

CLERK