SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 22, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Moskowitz, Kapnick, Gesmer, JJ.

1226 Frenkel Benefits, LLC doing business as Frenkel & Company, Plaintiff-Appellant-Respondent, Index 651559/11

-against-

Joseph Mallory, et al., Defendants-Respondents-Appellants.

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Law Offices of Russell E. Adler, PLLC, New York (Russell E. Adler of counsel), for appellant-respondent.

Law Offices of Andrew P. Saulitis, P.C., New York (Andrew P. Saulitis of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about August 28, 2015, which denied the parties' motions for summary judgment, affirmed, on the law, without costs.

Many of the facts underlying this motion are not in dispute. In October 2005, defendant Joseph Mallory became employed by plaintiff Frenkel Benefits LLC (Frenkel). On October 7, 2005, Frenkel and Mallory signed a letter agreement that was drafted by Frenkel's former general counsel. In relevant part, the letter

agreement provided as follows:

> "[Mallory] will not, directly or indirectly, without the written consent of Frenkel . . . for a period of 24 months from the date [he] cease[s] to be employed by Frenkel, knowingly, solicit, represent in any capacity or accept business from any of Frenkel's clients or accounts or 'prospective clients or accounts' with which [he] had any involvement while [he] [was] employed by Frenkel insofar as such solicitation, representation or business involves the brokering or placement of insurance" (emphasis omitted).

The letter agreement did not define "insurance," although it defined other terms.

Mallory resigned from Frenkel, effective February 11, 2011. At that time, he held the title of vice-president of surety.

On February 28, 2011, Mallory began employment with defendant C&H Agency, Inc. (C&H), which is primarily a construction risk management firm. Mallory signed an employment agreement with C&H that provides the following:

> "10. Non-Competition . . . Employee agrees that during his employment and for a period of 36 months from and after the termination of his employment . . . he will not . . . (ii) solicit, attempt to obtain, accept or transact insurance business of any nature from any customer or account of the Company . . . (iii) aid or assist anyone in soliciting, attempting to obtain, or accepting insurance business of any nature from such customer or account . . ."

While at C&H, Mallory communicated with two companies that

had been surety clients of Frenkel. As a result, C&H, through Mallory, brokered surety bonds for those two companies.

Upon learning of this, Frenkel advised C&H that it had learned of Mallory's acts, and that it believed that his actions violated the letter agreement and that C&H was supporting his violations. Frenkel unsuccessfully sought assurance that C&H was taking steps to ensure Mallory's compliance with the letter agreement.

Frenkel then commenced this action, seeking damages against Mallory for breach of contract and against C&H for tortious interference, damages against both for unfair competition, and an injunction against both to enforce the letter agreement. After discovery and filing of a note of issue, Mallory and C&H moved for summary judgment dismissing the complaint and Frenkel cross-moved for partial summary judgment on liability. Both sides contend that "insurance" is unambiguous, but plaintiff claims that it includes surety bonds, and defendant contends that it does not. Alternatively, plaintiff argues that, if "insurance" is ambiguous, parol evidence shows that "insurance" includes surety.

In a thoughtful decision, the motion court correctly denied both parties' motions, finding that the term "insurance" was ambiguous, since it was unclear whether "insurance" included

surety work. The court further correctly found that the parties' respective proffers of extrinsic evidence of the meaning of those terms did not resolve the issue but rather raised material issues of fact as to the contracting parties' intent when entering into the letter agreement.

Each party cites respectable support for its position as to the meaning of "insurance." For example, to demonstrate that surety is a type of insurance, Frenkel cites to Insurance Law § 1101, which defines "doing an insurance business in this state" to include the "making . . . [of] any contract of . . . suretyship" (Insurance Law § 1101[b][1][B]), and to Insurance Law § 1113(a), which defines "[t]he kinds of insurance which may be authorized in this state" to include "[f]idelity and surety insurance," which in turn is defined as "[a]ny contract bond; including a bid, payment or maintenance bond or a performance bond where the bond is guaranteeing the execution of any contract other than a contract of indebtedness or other monetary obligation" (Insurance Law § 1113[a][16][C]). In addition, relying on the principle that "[t]he Superintendent[] [of Insurance's] interpretation of the Insurance Law provisions is entitled to great deference because of his special competence and expertise with respect to the insurance industry unless such interpretation is irrational or contrary to the clear

wording of a statutory provision" (*Matter of Colonial Life Ins. Co. of Am. v Curiale*, 205 AD2d 58, 61-62 [3d Dept 1994], citing *Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N.Y.*, 72 NY2d 753 [1988], *cert denied* 490 US 1080 [1989]), plaintiff directs the court's attention to two formal opinions of the New York State Insurance Department (NYSID),[1] which state unequivocally that a surety contract constitutes an insurance contract. Plaintiff also cites a New York judicial opinion holding the same. In contrast, defendants cite to *Pearlman v Reliance Ins. Co.* (371 US 132, 140 n 19 [1962]), in which the Supreme Court refers, in a footnote in a bankruptcy case, to "the usual view, grounded in commercial practice, that suretyship is not insurance," and to other decisions reaching similar results, none of which are from the courts of this state. On the other hand, defendants acknowledge in their brief that there are "myriad contexts in which the terms ['insurance' and 'suretyship'] sometimes merge and sometimes remain discrete." Thus the evidence produced by each side does not show that the interpretation urged by each is inevitable; rather, it shows that the language of the letter agreement is "on its face . . .

[1]In 2011, the NYSID and the New York State Banking Department were consolidated and became the New York State Department of Financial Services.

reasonably susceptible of more than one interpretation" (*US Oncology, Inc. v Wilmington Trust FSB*, 102 AD3d 401, 402 [1st Dept 2013], quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]]). Accordingly, the motion court properly denied the motions for summary judgment.

Our dissenting colleagues, in reaching the opposite result, rely heavily on the deposition testimony of Dan Culnen, C&H's president, in which he states that C&H had concluded that the letter agreement did not bar Mallory from doing surety business with his clients at Frenkel, and that this was part of the reason C&H hired him. However, at a later point in the deposition, Mr. Culnen stated that, if Mallory were to leave C&H and broker surety for a competitor, C&H would consider it a breach of Mallory's employment agreement with C&H, which is identical in all relevant respects to the letter agreement. Therefore, rather than resolving the issues in defendants' favor, Mr. Culnen's deposition testimony creates further questions of fact.

The dissent also relies on the deposition testimony of Anthony Spina, an assistant vice-president at Frenkel, to establish that "surety" and "insurance" have different meanings. However, he also testified, in defining "surety," that the insurance company issuing the surety contract is referred to as the "surety," thus collapsing the two terms.

We also disagree with the dissent that, in order to determine the relationship between suretyship and insurance, we should give little weight to the provisions of the New York Insurance Law and the opinions of the NYSID and should instead rely on a footnote in a Supreme Court case, and cases from a federal court in Pennsylvania and a state court in North Carolina.

The dissent also argues that we have not taken into account the principles that noncompete agreements are to be interpreted narrowly, and that contracts are to be interpreted against the drafter. However, neither of those issues was raised below and therefore we cannot consider them at this time (*Sea Trade Mar.Corp. v Coutsodontis*, 111 AD3d 483, 486 [1st Dept 2013]). In addition, the noncompete clause in the letter agreement is limited in time, and does not prevent Mallory from pursuing his career, but only from soliciting, representing, or accepting business from any of Frenkel's clients with which he had contact while employed by Frenkel, and is therefore, not on its face, overbroad (*TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 [1st Dept 2014] [nonsolicitation covenant limited to protecting company's client relationships and good will is enforceable]; *cf. BDO Seidman v Hirshberg*, 93 NY2d 382, 392 [1999] [limitation of former employee's use of client

relationships beyond those acquired through work for the former employer was overbroad]). In any event, these doctrines can properly be taken into account by the motion court in its evaluation of the evidence proffered at the hearing on the contracting parties' intent at the time that they entered into the letter agreement.

All concur except Renwick and Moskowitz, JJ. who dissent in a memorandum by Moskowitz, J. as follows:

MOSKOWITZ, J. (dissenting)

I disagree with the majority that this matter is appropriate for trial rather than summary disposition. On the contrary, I believe that the extrinsic evidence, which is admissible because the agreement is ambiguous as drafted, leads inexorably to the conclusion that the noncompete clause in the contracting parties' letter agreement permits defendant Joseph Mallory to engage in surety work. Therefore, I respectfully dissent.

In October 2005, when Mallory began working for plaintiff Frenkel Benefits, LLC, Frenkel presented Mallory with a letter agreement governing his employment. The agreement provided that for a period of 24 months after the end of Mallory's employment with Frenkel, Mallory was not to solicit, represent, or accept business from any of Frenkel's clients with which Mallory had any involvement while he was working for Frenkel, "insofar as such solicitation, representation or business involve[d] the brokering or placement of insurance." While certain terms in the letter agreement were defined, the term "insurance" was not. Mallory did not consult an attorney before signing the agreement.

According to Frenkel, Mallory's last position working with it was as vice-president of its surety division. Frenkel further stated that Mallory left its employ in February 2011 and began working for a competitor, defendant C&H Agency, Inc., an

insurance brokerage focusing on the construction industry. Part of Mallory's duties at C&H included procuring surety bonds, and indeed, C&H hired Mallory specifically because it believed he was permitted to work in the area of surety bonds.

In April 2011, Frenkel learned that a surety client that Mallory had serviced while in Frenkel's employ had named C&H as its new broker of record; Frenkel alleged that Mallory had solicited that client and one other. As a result, Frenkel commenced this action against Mallory and C&H, alleging breach of contract (against Mallory); tortious interference with contract (against C&H); and unfair competition (against both Mallory and C&H). After discovery and the filing of a note of issue, defendants moved for summary judgment dismissing the complaint and plaintiff cross-moved for partial summary judgment on liability.

A contract will be considered ambiguous if it is "reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Here, the motion court correctly found ambiguous the covenant restricting Mallory from brokering or soliciting "insurance" from any clients of plaintiff with which he had been involved while working for plaintiff, as it was unclear whether the term "insurance" as used in the restrictive

covenant included surety work (*see generally Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012]).

Thus, because the covenant is ambiguous, we may resort to extrinsic evidence in order to glean the contracting parties' intent (*Chimart Assoc.*, 66 NY2d at 572-573). Here, defendants' extrinsic evidence, and a well-settled canon of interpretation, support defendants' interpretation of the term in the covenant.

According to the deposition testimony, both C&H and Frenkel understood "insurance" and "surety" as separate fields, consonant with the common law's distinction (*see Pearlman v Reliance Ins. Co.*, 371 US 132, 140 n 19 [1962]; *Henry Angelo & Sons, Inc. v Property Dev. Corp.*, 63 NC App 569, 574, 306 SE2d 162, 166 [1983]; *Reginella Constr. Co., Ltd. v Travelers Cas. & Sur. Co. of Am.*, 949 F Supp 2d 599, 611 [WD Pa 2013], *affd* 568 Fed Appx 1741 [3d Cir 2014]). This industry usage is probative of the meaning that Frenkel and Mallory imputed to the term when they signed the letter agreement (*see Zurakov v Register.Com, Inc.*, 304 AD2d 176, 179 [1st Dept 2003]; *see also J.P. Morgan Inv. Mgt. Inc. v AmCash Group, LLC*, 106 AD3d 559 [1st Dept 2013]).

This conclusion holds especially true in light of the fact that Frenkel's own witness, an assistant vice-president in Frenkel's surety department, testified unequivocally that

"surety" and "insurance" have different meanings. Specifically, Frenkel's witness testified that "surety" refers to a situation in which a third party – that is, a surety company – guaranties to an owner that a principal will perform the principal's obligations under a contract, whereas "insurance" is a transfer of risk arising from fortuitous events. In fact, Frenkel's witness testified that these definitions were customarily applied at Frenkel. Thus, Frenkel was well aware of the meaning of these term; had it wished to prevent Mallory from brokering both surety bonds and insurance products, it could have included "surety" in the scope of the covenant. It did not do so.

Further, even putting aside the applicable canon of construction, the law is well-settled that noncompetition agreements are to be construed as narrowly as possible and "rigorously examined" so as to avoid interfering with one's ability to earn a living (*American Broadcasting Co. v Wolf*, 52 NY2d 394, 403, 404 [1981] [noting "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood" (internal quotation marks omitted]). Interpreting the letter agreement to include surety business as well as insurance business constitutes an overbroad and oppressive reading of the agreement (*see Am. Inst. of Chem. Engineers v Reber-Friel Co.*, 682 F2d 382, 387 [2d Cir 1982] [as a

matter of public policy, restrictive covenants are to be enforced "only to the extent necessary to protect the employer from unfair competition which stems from the employee's use or disclosure of trade secrets or confidential customer lists" (internal quotation marks omitted)]).

The majority's memorandum does not, as New York State law instructs us to do, view an anticompetitive covenant with disfavor (*see id.* at 386 [noting the "strict approach to enforcement" of anticompetitive covenants]). Rather, in effect, the majority places two principles, one in the company's favor and one in the employee's favor, on an equal footing, even though the law in this area intends quite the opposite (*see American Broadcasting Co.*, 52 NY2d at 404 ["(t)here is, in short, general judicial disfavor of anticompetitive covenants contained in employment contracts"; *see also IBM Corp. v Johnson*, 629 F Supp 2d 321, 337 [SD NY 2009] [applying New York law and noting that New York public policy "strong(ly) disfavor(s) . . . non-competition covenants in employment contracts" (alterations in original) (internal quotation marks omitted)]).

In fact, with the possible exception of an answer from a representative of C&H (an entity that was not even a party to the letter agreement) to a hypothetical question at a deposition, nothing in the record suggests that Frenkel and Mallory intended

to restrict Mallory's ability to work in surety bonding. On the contrary, the record makes clear that "insurance" and "surety" are two separate things, with the former not comprising the latter. And indeed, as I have noted, even an assistant vice-president of Frenkel – the entity that actually signed the letter agreement – so opined at his deposition.

The majority does not dispute the long-standing New York State policy that noncompete agreements are disfavored and are to be interpreted narrowly, nor does it dispute that contracts are to be interpreted against the drafter. Rather, the majority concludes that at the trial, those policies "can properly be taken into account." This conclusion, however, undoubtedly provides cold comfort to Mallory, as he is still obliged to wait for a trial, thus rendering him, for the time being, unable to pursue his livelihood free from the specter of ongoing litigation. The New York State law on anticompetition covenants is meant to prevent this result.

Moreover, I believe that the IAS court correctly rejected Frenkel's extrinsic evidence of an administrative agency's interpretations of the statutes it administers, as the agency's interpretations, which concern licensing and insurance company insolvency priorities meant to protect members of the public, have little if any bearing on the contractual language in Frenkel

and Mallory's letter agreement.

Finally, as noted above, this is an apt occasion for application of the doctrine of contra proferentum (that is, the doctrine stating that a contract is to be construed against the drafter) against Frenkel, the drafter of the restrictive covenant (*see Arbeeny v Kennedy Exec. Search, Inc.*, 71 AD3d 177, 182 [1st Dept 2010]; *Yudell v Israel & Assoc.*, 248 AD2d 189, 189 [1st Dept 1998]). Here, not only did Frenkel present Mallory with a letter agreement that Frenkel drafted without any input from Mallory, but Mallory was not represented by an attorney when he signed the agreement.

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

ENTERED: SEPTEMBER 22, 2016

CLERK

Mazzarelli, J.P., Andrias, Richter, Manzanet-Daniels, Kahn, JJ.

1255 Heather James, LLC, et al., Index 651226/14
Plaintiffs-Respondents,

-against-

Day & Meyer, Murray & Young Corp., et al.,
Defendant-Appellant.

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George W. Wright & Associates, LLC, New York (George W. Wright of counsel), for appellant.

William M. Pinzler, New York, for respondents.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered September 21, 2015, which, to the extent appealed from, denied defendant's motion for summary judgment limiting its liability to the damages specified in the parties' contracts, unanimously affirmed, without costs.

Plaintiff Heather James Jackson, LLC, the owner of an art gallery in Wyoming, facilitated for a client the purchase of 10 original framed Marilyn Monroe silk-screen prints created by Andy Warhol. Included in the collection, and making it unique, was the box that Warhol himself had selected and labeled to sell the prints in. Defendant, which specializes in storing and shipping rare fine art, was to receive the collection from Sotheby's and ship it to the Wyoming gallery. In an email notifying defendant that the collection would be arriving the next day, an employee

of plaintiff advised that the prints were to be shipped to Wyoming, "along with the original box the prints came in." However, the prints arrived in Wyoming without the original box.

Contrary to the motion court's conclusion that gross negligence on defendant's part would deprive defendant of the benefit of the contractual limitation on its liability, the only circumstance that would render the contractual limitation inapplicable in this case is defendant's conversion of the original box (*see* former UCC 7-204[2], now 7-204[b]; *I.C.C. Metals v Municipal Warehouse Co.*, 50 NY2d 657 [1980]). Although defendant proffered a non-conversion explanation for its failure to return the box to plaintiff, the evidence it submitted fails to demonstrate the truth of that explanation for summary judgment purposes (*see I.C.C. Metals*, 50 NY2d 657).

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

The Decision and Order of this Court entered herein on June 16, 2016 is hereby recalled and vacated (*see* M-3393 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 22, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1269 West Midtown Management Group, Inc., doing business as West Midtown Medical Group, Petitioner-Appellant, Index 100325/14

-against-

State of New York, etc., Respondent-Respondent.

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Goidel & Siegel, LLP, New York (Jonathan M. Goidel of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Eric Del Pozo of counsel), for respondent.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered October 14, 2014, which denied the CPLR article 78 petition seeking, inter alia, a judgment declaring that the principal sum to which respondent is entitled to seek repayment from petitioner under the Final Audit Report dated June 16, 2010 (FAR), is no more than $1,460,914.00, and dismissed the proceeding, unanimously reversed, on the law, without costs, the petition granted, and it is declared that the principal sum that respondent is entitled to recover from petitioner pursuant to the FAR is $1,460,914.00.

Petitioner seeks to limit its Medicaid reimbursement overpayment liability, in connection with a final audit report issued by respondent Office of the Medicaid Inspector General

(OMIG), to the "lower confidence limit" amount of $1,460,914 set forth in the FAR. The FAR states that, although OMIG did not waive any available remedies, if petitioner did not remit payment or arrange a payment plan within 20 days, OMIG would withhold a percentage of Medicaid billings to "liquidate the lower confidence limit amount." In the alternative, if petitioner challenged OMIG's findings at a hearing, OMIG would seek to recover at the hearing the FAR's higher point estimate of overpayments, which was $1,857,401.

Petitioner sought to challenge OMIG's findings at a hearing, but was denied the opportunity, because it failed to provide OMIG with the required written notice of intent to seek a hearing within 60 days. Accordingly, OMIG commenced withholding by delivering the statutorily required written notice, stating the basis and duration of the withholding (18 NYCRR 518.7[b], [c][2]). On December 9, 2010, OMIG delivered written notice informing petitioner that withholding had commenced, as "an overpayment totaling $1,460,914.00 was identified," and that "[t]his withholding is temporary and will continue until such time as the balance due is recovered." In a telephone conversation on September 12, 2013, however, OMIG orally informed petitioner that it intended to continue withholding until the higher point estimate of $1,857,401 had been recovered.

Petitioner contends that the FAR and subsequent notice of withholding failed to provide adequate notice that, even in the absence of a hearing, OMIG intended to withhold the higher point estimate of $1,857,401. OMIG responds that petitioner's unsuccessful (because untimely) request for a hearing entitled OMIG to pursue the higher point estimate of $1,857,401. OMIG further contends that it is entitled to recoup the higher point estimate pursuant to the statement in the FAR that OMIG's withholding from payments to petitioner would "not bar[] any other remedy allowed by law" and pursuant to the reference in the subsequent notice of withholding to a "balance due" as determined by the FAR.

Initially, the petition is not barred by the four month statute of limitations applicable to article 78 proceedings. Where a party must receive written notice, the statute of limitations does not commence to run until written notice is received (*90-92 Wadsworth Ave. Tenants Assn. v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 227 AD2d 331 [1st Dept 1996]). OMIG was required to provide petitioner, within five days of the commencement of the withholding, with a written notice advising petitioner of, among other matters, the duration of the withholding (18 NYCRR 518.7[b], [c][2]). The notice of withholding that OMIG provided to petitioner did not inform

petitioner that the withholding would continue until OMIG had recouped principal equal to the FAR's higher point estimate of $1,857,401. Accordingly, the statute of limitations for petitioner to challenge OMIG's withholding of the higher point estimate of $1,857,401 has not yet commenced to run.

Turning to the merits, as previously noted, OMIG was required by law to provide petitioner with notice of the duration of the withholding from payments on its billings (18 NYCRR 518.7[c][2]). Pursuant to this obligation, OMIG delivered a notice of withholding, dated December 9, 2010. This notice stated that "an overpayment totaling $1,460,914 was identified as a result of the above-referenced audit," and further stated that "[t]his withholding is temporary and will continue until such time as the balance due is recovered." Thus, the notice, read as a whole, indicated that the withholding would cease once the balance due, i.e., the identified overpayment of $1,460,914, was recouped.

The statement in the notice of withholding that the withholding "will continue until such time as the balance due is recovered" does not authorize OMIG to continue the withholding beyond the point at which $1,460,914 has been recovered. The reference to "the balance due," even in combination with the notice's reference to the FAR, did not give petitioner fair

notice that OMIG intended to recoup the FAR's higher point estimate of $1,857,401 rather than the FAR's lower confidence limit amount of $1,460,914, since the notice expressly referred to $1,460,914 as the identified overpayment.

Any document, and particularly a document attempting to deliver statutorily required notice, should be interpreted according to its plain meaning, without distortion through undue emphasis on a particular phrase (*Matter of Westmoreland Coal Co. v Entech Inc.*, 100 NY2d 352, 358 [2003]). The plain meaning of the notice is that withholding will cease once the identified overpayment figure of $1,460,914, plus interest, has been recouped. $1,460,914 is the figure set forth in the notice as the basis for the intended withholding, and nothing in the FAR refers the reader to the FAR's higher point estimate of $1,857,401.

The dissent mistakenly interprets the FAR as informing petitioner that if there were no settlement within 20 days there would be "no other way that petitioner would have the right to claim entitlement to limit its liability to the lower amount." The actual FAR language states that, in the event a settlement is not reached within 20 days, OMIG will begin withholding "to recover payment and liquidate *the lower confidence amount*, interest, and/or penalty, not barring any other remedy at law"

(emphasis added). FAR expressly states that if a settlement is not reached, OMIG will begin withholding to collect "the lower confidence amount" of $1,460,914. Thus, contrary to the dissent's interpretation, the FAR expressly states that in the event there is no settlement, OMIG will withhold the lower confidence limit.

The dissent further errs when interpreting the statement in the FAR that OMIG's withholding from payments to petitioner based on the lower confidence limit amount will not "bar[] any other remedy allowed by law" as providing adequate notice that OMIG intended to recover the higher point estimate. The FAR stated that OMIG would seek to recover the higher point estimate in the event petitioner challenged the FAR's determination at a hearing but would otherwise recover the lower confidence limit amount. No hearing was ever held because petitioner's request for one was untimely. Accordingly, the operative clause in the FAR is the one specifying that the withholding would "liquidate the lower confidence limit amount."

Finally, the dissent, while analyzing at length whether or not OMIG forfeited its right to attempt to collect the higher point estimate, fails to address the dispositive issue, whether or not OMIG delivered the statutorily required notice. A fair reading of both the FAR and OMIG's formal Notice of Witholding

leads to the inescapable conclusion that OMIG informed petitioner that it was withholding to recoup the lower confidence amount of $1,460,914, and failed to deliver written notice informing petitioner that it would continue withholding to liquidate the higher point estimate of $1,857,401. While the dissent agrees "that the notices did not notify petitioner that OMIG intended to recover the full overpayment," the dissent accuses us of imposing "limits on the agency that are not in the applicable laws and regulations" and ignoring the agency's right to recover the higher point estimate of $1,857,401, and thereby placing a Medicaid provider who does not settle in the same position as a provider who does settle. Contrary to the dissent's assertions, we express no view as to OMIG's right to continue pursuing the higher point estimate. We simply uphold the statute's requirement that regardless of the amount OMIG chooses to pursue, OMIG must first deliver the statutorily required notice. As the dissent admits, OMIG failed to provide the required notice. Accordingly, OMIG is statutorily barred from collecting the higher point estimate, and is therefore limited to recouping the lower confidence limit amount of $1,460,914, plus interest.

All concur except Saxe and Gische, JJ. who dissent in a memorandum by Saxe, J. as follows:

SAXE, J. (dissenting)

Petitioner, a Medicaid provider, received substantial payments from Medicaid for services that an audit determined did not qualify for payment. The manner in which respondent agency reached its conclusion regarding the amount due was fully explained by the agency's final audit report issued June 10, 2010. The report also offered petitioner the option to settle for a lower set amount or to request a hearing. Although petitioner did not avail itself of either offered option, it nevertheless claims that the agency must be limited to collecting only the lower, settlement offer amount, and the majority agrees. Because in my view petitioner's submissions fail to establish any right on petitioner's part to pay less than the full assessed amount, I would affirm the motion court's dismissal of the petition.

The Office of the Medicaid Inspector General (OMIG) is the entity within the New York State Department of Health (DOH) that is charged with Medicaid fraud and abuse prevention and the recovery of improperly expended medical assistance funds (*see* Public Health Law §§ 30-36). After conducting a routine audit of petitioner's claims for Medicaid payments covering the period from January 1, 2003 through December 31, 2007, it issued a draft audit report concluding that DOH had made several million dollars

in unjustified Medicaid payments to petitioner during the five-year audit period. After giving petitioner a review period, OMIG issued the June 16, 2010 final audit report.

The final audit report assessed that petitioner had received overpayments of $1,857,401, based on extrapolations from a sampling of claims (the "extrapolated point estimate"), a method of calculation specifically authorized by controlling regulations (*see* 18 NYCRR 519.18[g]; *Matter of Vaynshelbaum v Dowling*, 237 AD2d 132 [1st Dept 1997]). According to the report, statistical analysis of the same random sample also gave rise to the "lower confidence limit," i.e., the probable lower limit of the overpayment amount, determining that "[t]he lower confidence limit of the amount overpaid is $1,469,914." Based on these amounts, the final audit report informed petitioner that it had the right to settle at the lower confidence limit amount either by paying that amount within 20 days or by entering into a repayment agreement within 20 days. *There was no other way that petitioner would have the right to claim entitlement to limit its liability to the lower amount.* In the alternative, petitioner also had the option to request an administrative hearing to challenge the calculations, at which OMIG would have the right to seek, and defend, the full assessed amount of $1,857,401. To do so, petitioner had to request a hearing, in writing, within 60

days of the date of the report.

Finally, the final audit report explained that if petitioner did not enter into a settlement within 20 days, as offered, OMIG would begin withholding 50% of petitioner's Medicaid billings "to recover payment and liquidate the lower confidence limit amount, interest and/or penalty, *not barring any other remedy allowed by law*" (emphasis supplied). In addition, the cover letter to the report emphasized that "[i]n addition to recovering the overpayments . . . OMIG reserve[d] the right to take additional actions," and that if it determined to take such additional action, it would notify petitioner in a separate notice.

On July 2, 2010, petitioner's counsel contacted OMIG by email, stating, "I anticipate that we will be requesting a hearing and will let you know within the 60 day period provided," implicitly declining to settle at the lower confidence limit amount. However, petitioner failed to make the requisite written request for a hearing within the 60-day period.

As the final audit report had indicated, on July 12, 2010 OMIG sent petitioner a notice that it would begin withholding 50% of its Medicaid billings to recover the lower confidence limit amount. Petitioner successfully negotiated with the agency to reduce the withholding percentage to 5%, and a revised notice of withholding was sent on December 9, 2010, accommodating

petitioner by agreeing to reduce from 50% to 5% the rate at which it would withhold petitioner's Medicaid payments.

When petitioner learned on September 12, 2013 that OMIG intended to continue withholding Medicaid payments until it had collected the full $1,857,401, plus interest, rather than stopping when it reached the lower confidence limit, it commenced this proceeding pursuant to CPLR article 78, seeking an order prohibiting OMIG from collecting more than the lower confidence amount from its Medicaid billings. Although petitioner does not, and cannot, dispute OMIG's calculations of the overpayments, or that it failed to enter into a settlement or properly request a hearing to challenge the agency's findings, the petition inexplicably asserts that by failing to settle or obtain a hearing, petitioner became liable for repayment of only the lower confidence limit of the amount overpaid, $1,460,914. Petitioner argues that by seeking the full amount of the calculated overpayment, the agency is acting in a manner outside the scope of its authority.

There is no merit in petitioner's contention that it did not receive adequate notice that in the absence of a settlement or different determination after a hearing, OMIG would collect the full amount of the overpayment. Petitioner unquestionably understood the amount that OMIG intended to collect. Its own

October 27, 2010 letter to an administrative law judge regarding its claimed right to a hearing notwithstanding its failure to make a proper request for one recognized the full amount of the calculated overpayment; the decision of the ALJ rejecting petitioner's claim also recited the full amount that OMIG sought to recover from petitioner.

Had petitioner settled, it would be entitled to limit its liability to the lower amount; had it timely and properly sought a hearing, it could have challenged the amount that OMIG claims must be repaid, and possibly arrived at some other amount. However, petitioner neither agreed to the proposed settlement of the lower confidence limit within the indicated time frame, nor properly requested a hearing to challenge OMIG's findings. Importantly, in the absence of either a settlement or a determination at a hearing of some other overpayment amount, the final audit report becomes a final, enforceable determination of the agency, and its filing with the County Clerks gives it the "full force and effect of a judgment" (*see* Social Services Law § 145-a[2]). The amount petitioner is liable to repay is therefore the full amount of the overpayment as calculated by the agency (18 NYCRR 518.1[b]). The inclusion in the final audit report of information regarding the withholding procedure that would be automatically instituted to collect the lower confidence limit

amount if no settlement was reached does not support the argument that the agency has no right to recoup the full overpayment in the absence of a settlement or other determination after a hearing.

The majority, in reasoning that the agency must be limited to collecting the lower confidence limit amount, relies on the language of the two notices sent to petitioner regarding the agency's withholding of payments, in which the agency referenced the lower confidence limit amount and did not specify that the withholding would continue until the full overpayment amount was recouped. However, the notices were merely sent in compliance with controlling regulations in order to notify petitioner that the agency was about to begin withholding a percentage of Medicaid payments to which petitioner would otherwise be entitled; they did not alter the agency's entitlement to the full amount of the overpayment. The recitation of the lower confidence limit in the notices did not, either explicitly or implicitly, create any sort of waiver of the agency's claim to the full amount due; nor did it constrain the agency's entitlement to recoup the full amount of the overpayment by *any* available means.

It is true that the notices did not notify petitioner that OMIG intended to recover the full overpayment; the notices were

drafted with the more limited purpose of notifying the Medicaid provider that in the absence of a settlement at the lower confidence limit, the agency would recoup the lower confidence limit amount through the withholding process. The absence from the notices of reference to the full overpayment amount does not, however, preclude the agency from taking available steps to enforce its judgment to the full amount of the overpayment.

The final audit report sufficiently informed petitioner that if it did not settle or obtain a different result at a hearing, the full assessed overpayment would be due and owing. The withholding process, discussed in the final audit report and provided for in the withholding notices, did nothing to preclude OMIG from collecting an amount beyond the lower confidence limit. The wording of the withholding notices regarding when and how the automatic withholding process would be implemented cannot override or alter OMIG's entitlement to recoup the full overpayment. Although the notices reference only the lower confidence limit amount, they do not preclude OMIG from collecting the full assessed amount. Indeed, petitioner was specifically informed in the final audit report and its cover letter that the withholding process did not bar "any other remedy allowed by law" (*see* 18 NYCRR 518.7[d]).

By concluding that OMIG is "statutorily barred" from

collecting the full overpayment because of the language of its notice to petitioner (as required by regulations) that it would begin the process of recouping overpayments up to the lower confidence limit, the majority imposes limits on the agency that are not in the applicable laws and regulations. It relies on a strained and overly restrictive reading of the language of the final audit report to conclude that the agency's right to seek recoupment of the full overpayment is limited to circumstances in which a hearing is held. Indeed, that reading strangely puts the Medicaid provider who fails to either settle or properly request a hearing in the exact same position as the Medicaid provider who settles, and ignores the agency's right to a judgment for the full "amount found to be due and owing" in the absence of a settlement or hearing (*see* Social Services Law § 145-a[2]).

There is no support for petitioner's contention that OMIG agreed that petitioner's ultimate liability would be limited to the lower confidence limit amount. On the contrary, petitioner continually maintained that it did *not* intend to settle at the lower confidence limit, but rather sought to challenge the final report's findings on the merits. Petitioner's affirmative conduct was "entirely at odds with" the existence of an agreement (*see EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 50 [1st Dept 2004], *lv denied* 3 NY3d 607 [2004]).

The motion court correctly concluded that OMIG has a rational basis for withholding payments until the full overpayment plus interest is satisfied. Relief under CPLR article 78 is therefore not warranted.

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

ENTERED: SEPTEMBER 22, 2016

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, JJ.

1437 Yasmin Davila, etc., et al., Index 350738/08
Plaintiffs-Appellants,

-against-

Sleepy's, LLC,
Defendant-Respondent.
- - - - -
Sleepy's, LLC,
Third-Party Plaintiff-Respondent,

-against-

Precise Transport, Inc.,
Third-Party Defendant-Respondent.

_____

David Zevin, Roslyn, for appellants.

Varvaro, Cotter Bender, White Plains (Rose M. Cotter of counsel), for Sleepy's LLC, respondent.

Kelly, Rode & Kelly, LLP, Mineola (Susan M. Ulrich of counsel), for Precise Transport Inc., respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered December 18, 2014, which granted the motions of defendant/third-party plaintiff Sleepy's, LLC and third-party defendant Precise Transport, Inc. (Precise) for summary judgment dismissing the complaint and third-party complaint, unanimously modified, on the law, to deny the motions to the extent the complaint seeks damages for bodily or pecuniary injury, and otherwise affirmed, without costs.

Plaintiffs, who are members of the same family, allege that

they sustained bed-bug bites after a mattress they purchased from Sleepy's was delivered to their home by Precise. The evidence submitted by plaintiffs in opposition, including deposition testimony and an affidavit of an entomologist, raises triable issues as to whether negligent actions or omissions of Sleepy's or Precise resulted in the introduction of bed bugs into plaintiffs' home, and whether such bugs caused plaintiffs physical injury through bites, as well as, consequential damages on account of plaintiffs' claimed efforts to eradicate the bug problem. The circumstantial evidence relied upon by plaintiffs in support of their claims offered a basis upon which a jury could reasonably and logically infer liability for the alleged bug infestation (*see e.g. Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744-745 [1986]; *Chimilio-Ramos v Banguera*, 62 AD3d 538 [1st Dept 2009]). On this record, however, there is no evidence from which a jury could rationally conclude that defendants engaged in conduct sufficiently extreme and outrageous to support a recovery for emotional distress or mental anguish (*see Bour v 259 Bleecker LLC*, 104 AD3d 454 [1st Dept 2013]; *Sheila C. v*

Povich, 11 AD3d 120, 130 [1st Dept 2004]). Accordingly, we affirm the dismissal of the complaint solely insofar as the complaint seeks to recover for alleged psychological injury, and modify to deny the motion to dismiss the complaint insofar as it seeks damages for alleged bodily or pecuniary injury.

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

ENTERED: SEPTEMBER 22, 2016

CLERK

Tom, J.P., Friedman, Richter, Gesmer, JJ.

1567 Mary Ann La Porta, Index 155634/15
Plaintiff-Respondent,

-against-

Alacra, Inc., et al.,
Defendants-Appellants,

Armen Galoustian,
Defendant.

_____

Brody & Browne LLP, New York (Frances K. Browne of counsel), for appellants.

Alterman & Boop LLP, New York (Arlene F. Boop of counsel), for respondent.

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Order, Supreme Court, New York County (Michael L. Katz, J.), entered on or about February 8, 2016, which granted plaintiff's motion for leave to serve an amended complaint, and denied defendants-appellants' motion to dismiss the complaint, after treating the motion to dismiss as addressed to the proposed amended complaint, unanimously modified, on the law, to dismiss the proposed claim for constructive discharge and the separately pleaded causes of action for punitive damages and attorney's fees, and otherwise affirmed, without costs.

Plaintiff, the manager of defendant Alacra's New York City office, alleges that defendant Armen Galoustian was a male employee with a history of sexually harassing female coworkers.

In 2015, plaintiff and other employees witnessed Galoustian engage in unwanted touching and harassing of two female employees. Alacra's management was aware of Galoustian's conduct but did nothing to correct it. On March 15, 2015, a Saturday, Galoustian sent plaintiff an unsolicited, offensive message on Facebook stating that her "boobs are someging [sic]." Plaintiff immediately reported the remark to defendant Craig Kissel, Alacra's chief financial officer and her direct supervisor. She also promptly reported the remark to Alacra's chief executive officer (CEO). Plaintiff followed up by complaining about Galoustian's offensive conduct to Kissel when she returned to the office on Monday. She also complained that week to Alcara's CEO, and Alacra's president. Instead of correcting Galoustian or otherwise meaningfully reassuring plaintiff that he would not follow up on his sexually offensive message with the further sexual harassment he was known to have proclivities for, Alacra's managers rebuffed plaintiff and completely isolated her for the remainder of her stay at the company. Fearful that Galoustian, unrestrained by management, would harass her, plaintiff suffered a relapse of her preexisting Graves' disease, a stress-variable autoimmune disorder, forcing her to seek medical care. Plaintiff ultimately found the situation to be unbearable, and resigned on August 26, 2015.

Based on these allegations, plaintiff has stated a viable claim for sexual harassment creating a hostile work environment under the New York City Human Rights Law (City HRL) (*see Walsh v Covenant House*, 244 AD2d 214, 215 [1st Dept 1997]). Plaintiff's allegations do not, however, suffice to state a claim under the stricter standard governing constructive discharge stemming from a hostile work environment (*Gaffney v City of New York*, 101 AD3d 410, 411 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013]; *see also Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 504 [1st Dept 2010]).

Plaintiff's allegations are sufficient to sustain her claim for retaliation under the City HRL (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). We reject defendants' argument that plaintiff has failed to allege that she engaged in any protected activity because the Facebook message she complained about is not independently actionable. A plaintiff need not establish an underlying HRL violation in order to prevail on a retaliation claim (*see Pace v Ogden Servs. Corp.*, 257 AD2d 101, 104 [3d Dept 1999]), and, based on her allegations, it can be readily inferred that she had a "good faith, reasonable belief that the underlying challenged actions . . . violated the law" (*Manoharan v Columbia Univ. Coll. of Physicians & Surgeons*, 842 F2d 590, 593 [2d Cir 1998] [internal quotations marks

omitted]). In addition, her allegations of being rebuffed and isolated by Alacra's management sufficiently stated disadvantageous actions by defendants as a result of her complaints to management (*see Fletcher*, 99 AD3d at 51-52).

Plaintiff has sufficiently stated an aiding and abetting claim against Kissel since, among other things, she has sufficiently stated claims under the City HRL for sexual harassment and retaliation (*see generally Mazyck v Metropolitan Transp. Auth.*, 893 F Supp 2d 574, 597 [SD NY 2012]).

While plaintiff is entitled to include in her prayer for relief a request that she be awarded punitive damages in the event she proves the requisite degree of culpability on her causes of action for violation of the City HRL, a claim for punitive damages may not be maintained as a separate cause of action (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616-617 [1994]). Similarly, while plaintiff, if she prevails, may be awarded attorney's fees under the City HRL (*see* Administrative Code of City of NY § 8-502[g]), neither may a claim for attorney's fees be maintained as a separate cause of action (*see Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217, 217 [1st Dept 2006], citing *Burke v Crosson*, 85 NY2d 10, 17-18 [1995]). Accordingly, we modify to dismiss the amended complaint's fifth cause of action, for punitive damages, and

sixth cause of action, for attorneys' fees, while leaving undisturbed the requests for those remedies in the prayer for relief.

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

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

ENTERED: SEPTEMBER 22, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1599 Richard Grossman, Index 307020/12
Plaintiff-Respondent,

-against-

TCR also known as the Club of Riverdale,
Defendant-Appellant.

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Rutherford & Christie, LLP, New York (Meredith Remquin of counsel), for appellant.

The Law Firm of Vaughn, Weber & Prakope, PLLC, Mineola (John A. Weber IV of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 10, 2015, which denied defendant's motion for summary judgment dismissing the complaint, affirmed, without costs.

To establish a defendant's liability in a slip and fall case, a plaintiff must show that the plaintiff's injury was caused by a hazardous condition on the defendant's premises of which the defendant had actual or constructive notice (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). We are unable to determine as a matter of law, on this record, whether a hazardous or defective condition was created by the presence of water at the location at issue on defendant's locker room floor, and, if so, whether defendant had notice of it.

Plaintiff asserts that he slipped and fell on water on the

tile floor of defendant's men's locker room. He testified at deposition that after swimming in defendant's pool and then showering in the poolside showers, he walked down the corridor between the pool and the men's locker room. Dri-Dek matting covered the ceramic tile flooring from pool-side into the corridor, but as the corridor approached the locker room area the Dri-Dek matting ended, requiring him to continue on into the locker room on the glossy ceramic floor tiles. Although plaintiff looked down at the tiles to see if they were wet prior to stepping off the matting, when he stepped onto the tiles he slipped and fell. While on the ground, he saw beads of water on the tile. He did not see any "wet floor" warning signs in the area of his fall.

The location in the locker room where plaintiff fell was apparently in a central spot from which a patron could access the showers, sinks, sauna and steam room, as well as the pool-access corridor; also within a few feet was a bathing suit spinner machine mounted on a wall and a nearby floor drain. The locker room also has two separate locker areas, one for daily users, the other for annual fee-paying members; the latter locker area is carpeted.

Plaintiff asserted that at times, one of the shower stalls would cause a water problem in which water flowed into the

central locker room corridor and soaked the carpeting at the entrance to the so-called annual members' locker room; staff would periodically place towels on the floor in front of the entrance to the annual members' locker room to protect the carpet.

One of defendant's maintenance employees, Eddie Vega, testified that two maintenance workers would be present during the day shift to clean, and that it was customary for the maintenance staff to mop the men's locker room every 15 to 20 minutes throughout the day; he did not testify as to when the area where plaintiff fell was inspected, or mopped, prior to plaintiff's accident that day.

Defendant's maintenance supervisor, Kendrick Bonner, testified that defendant's maintenance staff did not keep logs or checklists of work performed, and that they always kept "wet floor" signs in the area of the locker room at issue, so that the patrons would exercise care and so that the maintenance staff would not have to mop the area as often.

Initially, defendant cannot obtain summary judgment here by relying on the cases cited by the dissent, in which this Court dismissed personal injury claims arising out of slipping on water in gyms based on the reasoning that "water was necessarily incidental to the use of the area" (*Noboa-Jaquez v Town Sports*

Intl., LLC, 138 AD3d 493 [1st Dept 2016]; *Dove v Manhattan Plaza Health Club*, 113 AD3d 455 [1st Dept 2015], *lv denied* 24 NY3d 901 [2014]). In *Dove*, the plaintiff "slipped and fell on water located on the tile floor *around the indoor pool* of defendants' health club," prompting this Court to observe that "the presence of such water was 'necessarily incidental' to the use of the pool" (113 AD2d at 456 [emphasis added]). In *Noboa-Jaquez*, the plaintiff slipped on the tiled floor in the area of the gym's showers, and this Court applied the same reasoning as in *Dove* to hold that "[t]he mere presence of water on a tiled floor *adjacent to the gym's showers* cannot impart liability, particularly since water was necessarily incidental to the use of the area" (138 AD2d at 493 [emphasis added]). Neither of those holdings stands for the broader proposition that any water on a tiled floor anywhere in a locker room must preclude a claim for negligence because water is "necessarily incidental" to the entire locker room's intended use. From the evidence before us, it does not appear that plaintiff was in the shower area, and he had clearly left the pool area. Neither the presence of a drain in the floor nor the regular use of towels on parts of the floor to sop up excess water justifies concluding as a matter of law that the presence of water was "necessarily incidental" to the use of that area of the locker room so as to preclude a finding of liability.

On the contrary, the need for the towels could support a finding that there was a defective condition in the shower section of the locker room.

Nor can plaintiff's choice of the word "beads" to describe the water he observed on the floor properly be relied on to conclude as a matter of law that the condition was non-hazardous or a hazard that had only just been created.

The submitted evidence precludes determination as a matter of law regarding whether defendant had constructive notice of a hazardous wet condition. In particular, in the testimony of defendants' witness Eddie Vega, although he asserted that the floor was mopped "maybe every 15 to 20 minutes," he also acknowledged that there was no written schedule or written confirmation of mopping performed, and he was unable to affirmatively state when or whether the area in question had been mopped that day. Additionally, the testimony of maintenance supervisor Kendrick Bonner that the maintenance staff put out "wet floor" signs in an effort to avoid mopping as frequently, in effect acknowledged that mopping of wet floors was avoided, permitting the inference that it did not occur as often as necessary or expected. Furthermore, plaintiff's assertion that maintenance staff used towels at the doorway to the members' locker room to prevent that room's carpet from getting wet

provides further support for the inference that staff did not mop up water on the main locker room tile floor with sufficient frequency to keep hazardous conditions from developing. Finally, since plaintiff was swimming for 40 minutes before returning to the locker room and slipping, the water could have accumulated at that spot and remained there for long enough to justify an inference of constructive notice.

Accordingly, the submissions failed to establish that defendant had a right to judgment as a matter of law.

All concur except Friedman, J.P. and Andrias, J. who dissent in a memorandum by Friedman, J.P. as follows:

FRIEDMAN, J.P. (dissenting)

After swimming in defendant fitness club's swimming pool, using a pool-side shower and toweling himself off, plaintiff walked down a matted corridor to the men's locker room. When plaintiff reached the end of the matting, he stepped from the matting onto the ceramic tile floor of the locker room, an area equipped with a floor drain. Plaintiff knew that this area had a tendency to become wet. As plaintiff stepped onto the tile floor, he slipped and fell, injuring himself. According to plaintiff's testimony, while the tile floor did not appear wet to him before he stepped onto it, he noticed, while lying on the floor after his mishap, "beads" or a "film" of water on the tiles.

The only dangerous condition to which plaintiff attributes his accident is the presence on the tile floor of the "beads" or "film" of water. This condition, on the floor of a locker room serving a swimming pool, and containing showers, sinks, a steam room, and a sauna, was necessarily incidental to the locker room's intended use and cannot support a cause of action for negligence, as a matter of law (*see Conroy v Saratoga Springs Auth.*, 284 NY 723 [1940], *affg* 259 App Div 365, 368 [3d Dept 1940]; *Noboa-Jaquez v Town Sports Intl., LLC*, 138 AD3d 493 [1st Dept 2016] ["(t)he mere presence of water on a tiled floor

adjacent to the gym's showers cannot impart liability, particularly since water was necessarily incidental to the use of the area"]; *Dove v Manhattan Plaza Health Club*, 113 AD3d 455 [1st Dept 2014], *lv denied* 24 NY3d 901 [2014]). To the extent defendant failed to raise this point, we may nonetheless reach it because it is apparent from the face of the record and could not have been avoided had it been timely raised (*see Velasquez v 795 Columbus LLC*, 103 AD3d 541, 541 [1st Dept 2013]).

The majority's theory that the presence of water on the floor where plaintiff slipped was not "necessarily incidental" to the use of that portion of the locker room is conclusively refuted by the presence of a floor drain in that very area, as well as by plaintiff's testimony that he knew that the floor in that area was frequently wet and by the testimony of defendant's employee that the area required mopping "every 15 to 20 minutes." While it is true that the floor on which plaintiff slipped was not directly adjacent to the pool, and that the showers and steam room apparently were in adjoining chambers of the locker room, the presence of the drain demonstrates that the presence of water on the floor in that area was contemplated in the design of the complex as necessarily incidental to its use, as plaintiff himself understood, by his own admission. The "beads" or "film" of water that plaintiff testified that he saw on the tile floor

after his mishap would have been the normal condition of the floor in this area while in use, except perhaps immediately after being mopped. Allowing plaintiff to recover for an injury resulting from his own imprudent assumption that the floor in this area of the locker room was bone-dry because he saw no large puddle of water is, in essence, to impose strict liability on defendant.

For the foregoing reasons, I believe that the record establishes that defendant is entitled to summary judgment dismissing the complaint. Accordingly, I would reverse the order denying defendant that relief, and respectfully dissent from the majority's affirmance of that order.

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

ENTERED: SEPTEMBER 22, 2016

CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Kahn, JJ.

1658- Index 310630/11
1659 Nana Asiedu, et al.,
Plaintiffs-Appellants,

-against-

Marilyn Lieberman,
Defendant-Respondent.

_____

The Greenberg Law Firm, LLP, Purchase (Rebecca Greenberg of counsel), for appellants.

Adams, Hanson, Rego & Kaplan, Yonkers (Howard J. Kaplan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered July 1, 2015, which granted defendant's amended cross motion for summary judgment dismissing the complaint of plaintiff Rosemary Asiedu for failure to satisfy the serious injury threshold under Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the amended cross motion denied. Appeal from order, same court and Justice, entered October 29, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to renew defendant's amended cross motion, unanimously dismissed, without costs, as academic in view of the foregoing.

Defendant's mislabeled cross motion, in response to plaintiff Nana Asiedu's motion for summary judgment, was "an

improper vehicle for seeking affirmative relief from [plaintiff Rosemary Asiedu,] a nonmoving party" (*Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843, 844 [2d Dept 1986]; *see also Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]).

In light of the foregoing, we need not reach plaintiffs' remaining contentions.

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

ENTERED: SEPTEMBER 22, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1488 Avi Dorfman, Index 652269/14
Plaintiff-Respondent,

RentJolt, Inc.,
Plaintiff,

-against-

Robert Reffkin, et al.,
Defendants-Appellants.

_____

Kirkland & Ellis LLP, New York (Eric F. Leon of counsel), for appellants.

Harris, St. Laurent & Chaudhry LLP, New York (Jonathan Harris of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 10, 2015, modified, on the law, to grant the motion only to the extent the services allegedly provided by plaintiff Avi Dorfman fall under General Obligations Law § 5-701(a)(10), and otherwise affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

THE FOLLOWING MOTION ORDERS WERE ENTERED AND FILED ON SEPTEMBER 22, 2016

Tom, J.P., Mazzarelli, Friedman, Sweeny, Acosta, JJ.

M-3762 People v Thomas, Adam

Appeal withdrawn.

Tom, J.P., Mazzarelli, Friedman, Sweeny, Acosta, JJ.

M-3763 People v Deleon, Shaun

Appeal withdrawn.

Tom, J.P., Mazzarelli, Friedman, Sweeny, Acosta, JJ.

M-3929 Alvarez v New 250 GSH, LLC - New 520 Triple Crown, LLC - 38th and 8th, LLC - New 520 Eight, LLC
(And a third-party action)

M-4035 Sibony v 207 East 74th Street Owners, Inc.

M-4037 Sitbon-Robson v Robson

Appeals, previously perfected, withdrawn.

Tom, J.P., Mazzarelli, Friedman, Sweeny, Acosta, JJ.

M-3577 Aozora Bank, Ltd. v UBS AG - UBS Limited - UBS Securities LLC - Deutsche Investmnent Management Americas Inc.

Appeal deemed withdrawn.

Mazzarelli, J.P., Andrias, Richter, Manzanet-Daniels, Kahn, JJ.

M-3393 Heather James, LLC v Day & Meyer, Murray & Young Corp.

Reargument granted and, upon reargument, the decision and order of this Court entered on June 16, 2016 (Appeal No. 1255), recalled and vacated and a new decision and order substituted therefor. (See Appeal No. 1255, decided simultaneously herewith.)

Friedman, J.P., Sweeny, Renwick, Andrias, Saxe, JJ.

M-3016 People v Hendricks, Kareem

Counsel substituted.

Friedman, J.P., Sweeny, Renwick, Andrias, Saxe, JJ.

M-3079 People v Kogan, Barbara

Counsel substituted.

Friedman, J.P., Sweeny, Renwick, Andrias, Saxe, JJ.

M-2893 People v Mingo, Winston

Appeal abated, as indicated.

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

M-3059 People v Javier, Albert

Reargument denied.

Friedman, J.P., Andrias, Richter, Gische, Kahn, JJ.

M-4046
M-4286 Genger v Genger - Parnes - The Israel Bar Association

Amicus curiae brief deemed withdrawn (M-4286); dismissal of appeals taken by defendant Sagi Genger denied; leave to strike amicus curiae brief denied, as academic (M-4046).

Sweeny, J.P., Renwick, Moskowitz, Kapnick, Gesmer, JJ.

M-3147 In re Krodel v Amalgamated Dwellings, Inc.

Reargument or other relief denied.

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

M-3245 Olmedo v Farrington Realty, LLC

Appeal deemed withdrawn; motion denied, as indicated.

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

M-3220 People ex rel. Young, Douglas v Warden

Leave to prosecute appeal as a poor person granted to the extent indicated; assignment of counsel denied.

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

M-3231 People v Ferreira, Ulises

Leave to prosecute appeal as a poor person granted, as indicated.

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

M-3385 People v Christianson, Sean

Leave to prosecute appeal as a poor person granted, as indicated.

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

M-3362 Grajales v Grajales

Leave to prosecute appeal as a poor person and other relied denied, with leave to renew, as indicated.

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

M-3410 People v Ferguson, Michael

Motion to relieve assigned counsel denied.

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

M-3440 Syllman v NYC Department of Finance

Leave to prosecute appeal as a poor person and related relief denied.

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

M-3324 Britt v City of New York

Appeals consolidated; time to perfect same enlarged to the December 2016 Term.

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

M-3328 Reid v Real Estate International, Ltd. - Losner
(And another action)

Appeals consolidated; time to perfect same enlarged to the March 2017 Term.

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

M-3283 People v Draper, John

Time to perfect appeal enlarged to the November 2016 Term, as indicated.

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

M-3349
M-3461 A., Arina v D., Michael

Time to perfect appeal enlarged to the January 2017 Term (M-3349); dismissal of appeal denied (M-3461).

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

M-3254 Nunez v Park Plus, Inc. - Desoto Parking, LLC
(And a third-party action)

Appeal adjourned to the December 2016 Term.

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

M-3356 In the Matter of Putland v Department of Homeless Services - Bruno

Time to perfect appeal enlarged to the January 2017 Term.

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

M-3357 Verizon New York, Inc. v The City of New York

Time to perfect appeal enlarged to the January 2017 Term.

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

M-3371 In the Matter of G., Giovanni

Time to perfect appeal enlarged to the February 2017 Term.

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

M-2919 Butterworth v 281 St. Nicholas Partners, LLC - Monarch Realty Inc.

Stay of trial denied.

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

M-3351 Norex Petroleum Limited v Blavatnik

Judicial notice of, or supplement the record with, certain materials, denied.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3730 Rubinstein v 115 Spring Street Owners Corp. - 115 Spring Street Company - Opera Gallery, Inc.

Motion deemed withdrawn.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3507 Li v Kuan Lee Lai Si Realty, Inc.

Appeal dismissed.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-4163 S., Ira v S., Janice

Dismissal of appeal denied.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3432 People v Garland, Tamarkqua

Notice of appeal deemed timely filed; leave to prosecute appeal as a poor person granted, as indicated.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3475 People v O'Connor, Robert

Leave to prosecute appeal as a poor person and related relief granted; Clerk of the Supreme Court shall expeditiously have made and filed with the criminal court two transcripts of the SORA hearing and other proceedings, as indicated.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3574 People v Lendeborg, Nelson

Leave to prosecute appeal as a poor person and related relief granted; Clerk of the Supreme Court shall expeditiously have made and filed with the criminal court two transcripts of the SORA hearing and other proceedings, as indicated.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3564 In the Matter of A., Amaya and P., Zylah - Sheltering Arms Children and Family Services

Leave to prosecute appeal as a poor person granted, as indicated. (See M-3820, decided simultaneously herewith.)

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3820 In the Matter of A., Amaya and P., Zylah - Sheltering Arms Children and Family Services

Leave to prosecute appeal as a poor person granted, as indicated. (See M-3564, decided simultaneously herewith.)

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3430 People v Fagairo, DeMariano

Assigned counsel relieved on appeal; defendant permitted to prosecute appeal pro se, as indicated.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-4194 U-Trend New York Investment L.P. v US Suite LLC - Aura Investments LTD - 440 West 41st LLC

Plaintiff-respondent directed to file a supplemental record on appeal for the November 2016 Term, to which Term the consolidated appeals are adjourned; motion otherwise denied.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-4007 610 West Realty LLC v Riverview West Contracting LLC

Defendant-respondent granted leave to file a respondent’s appendix for the November 2016 Term, as indicated.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-4165 People v Lewis, Antoine

Leave to file pro se supplemental brief granted for the January 2017 Term, to which Term appeal adjourned, as indicated.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3296 Gonzalez v Riverbay Corporation
(And a third-party action)

Time to perfect appeal enlarged to the January 2017 Term.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3504 Wilmington Trust Company v Walker

Time to perfect appeal enlarged to the January 2017 Term.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-4305 Maestracci v Helly Nahmad Gallery, Inc.

Time to perfect consolidated appeals and cross appeals enlarged to the January 2017 Term.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3446 CBS Outdoor, Inc. v The City of New York
(And other actions)

Appeals consolidated; time to perfect same enlarged to the January 2017 Term.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3346 Tingman v Lan

M-3368 Long v Consolidated Edison; Con Edison of New York, Inc. v San Mateo Construction Corp.
(And another Action)

M-3408 Mobile Methodology, LLC v Zenova Corp. - lookit design

M-3464 Lalin v Plymouth Beef Co., Inc.; Plymouth Beef Co., Inc. v Santos Cleaning Corp.

M-3481 Arrow Financial Services, LLC v Viruet

M-3503 People v Gurity, Angel

M-3595 T., Debra v F., Andrew

Time to perfect appeals enlarged to the January 2017 Term.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-4220 Nader & Sons, LLC v Hazak Associates, LLC

Time to perfect appeal enlarged to the January 2017 Term, as indicated.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3375 Ling v Kemper Independence Ins. Co.

Time to perfect the consolidated appeals enlarged to the January 2017 Term.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3562 Lewis v Rutovsky - LHHN Medical, P.C. - Manhattan's Physician Group

Time to perfect respective appeals enlarged to the January 2017 Term.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3756 Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire

M-3892 Caputo v Koenig - Edwards - James - Owens

M-3895 The Madison Square Garden Company v Harleysville Insurance Company of New York - MSG Holdings, L.P. - Turner Construction Company - Simplexgrinnell LP

M-3965 Vinland Capital Investments, LLC v Peak Venture Partners LLC

Time to perfect appeals enlarged to the February 2017 Term.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3131 Oyague v The State of New York

Clerk of the Court of Claims directed to expeditiously provide claimant with copy of trial transcript, as indicated; claimant's time to perfect appeal enlarged to the February 2017 Term; number of reproduced appellant's briefs reduced from 8 copies to 5 copies.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-4099 In the Matter of J., Cassius v F., Lindsay; In the Matter of J., Izrael - Administration for Children's Services

Appeals consolidated; time to perfect same enlarged to the March 2017 Term.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3960 TCR Sports Broadcasting Holding, LLP v Washington National Baseball Club, LLC - WN Partner, LLC - Nine Sports Holding, LLC - The Office of the Commissioner of Baseball - The Baltimore Orioles Baseball Club

Preference denied, as indicated.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-4202 Ambac Assurance Corporation v Countrywide Home Loans, Inc. - Segregated Account of Ambac Assurance Corporation - Countrywide Securities Corp. - Countrywide Financial Corp.

Clerk directed to accept amicus curiae briefs submitted with moving papers as timely filed.

Moskowitz, J.P., Feinman, Gische, Kapnick, Gesmer, JJ.

M-3779
M-3944 S., Ira v S., Janice

Motion granted to extent of enlarging the date for defendant to submit a respondent's brief by 90 days from the entry date of this order; motion otherwise denied (M-3779). Cross-motion denied in its entirety (M-3944).

Richter, J.

M-3088 People v Bracy, Henry

Leave to appeal to this Court denied.

Feinman, J.

M-3810 People v McNeil, Joseph

Leave to appeal to this Court granted, as indicated.

Gische, J.

M-2700 People v Francis, Gerald

Leave to appeal to this Court granted, as indicated.

Mazzarelli, J.P., Friedman, Sweeny, Saxe, Kapnick, JJ.

In the Matter of Attorneys Who Are in Violation of Judiciary Law Section 468-a:

M-4380 Janet L. Baker Walker, admitted on 9-15-1997, at a Term of the Appellate Division, First Department

Petitioner reinstated as an attorney and counselor-at-law in the State of New York, effective the date hereof. No opinion. All concur.

The following order was entered and filed on September 15, 2016:

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, Gesmer, JJ.

M-4326 People v Smith, Dwight

Stay and other relief denied.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
David B. Saxe
Rosalyn H. Richter
Judith J. Gische, JJ.

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_____x

Avi Dorfman,
Plaintiff-Respondent,

RentJolt, Inc.,
Plaintiff,

-against-

Robert Reffkin, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 10, 2015, which, insofar as appealed from as limited by the briefs, denied their motion to dismiss plaintiff Avi Dorfman's claims for unjust enrichment and quantum meruit.

Kirkland & Ellis LLP, New York (Eric F. Leon, Atif Khawaja, John C. Vazquez and Lindsey R. Oken of counsel), for appellants.

Harris, St. Laurent & Chaudhry LLP, New York (Jonathan Harris L. Reid Skibell, David B. Beitch and Jared B. Foley of counsel), and Susman Godfrey LLP, New York (Shawn J. Rabin, Arun Subramanian and Zachary Savage of counsel), for respondent.

RENWICK, J.

Plaintiff Avi Dorfman is a young entrepreneur who claims to be a former partner of defendant Robert Reffkin, the founder of the apartment search website Urban Compass. Plaintiff sues Reffkin and the company, accusing Reffkin of, inter alia, stealing proprietary information that helped Urban Compass reach a $360 million evaluation in 2014, only a year after it came to fruition. The dispositive issue on this appeal is whether the statute of frauds, as embodied in General Obligations Law § 5-701(a)(10), bars the causes of action in the amended complaint for quantum meruit and unjust enrichment, through which Dorfman seeks compensation for services he provided in helping to found and initialize operations of Urban Compass.

Factual and Procedural Background

"Inasmuch as this appeal had its genesis in a motion to dismiss pursuant to CPLR 3211(a)(7), we are bound to, inter alia, 'accept the facts as alleged in the [amended] complaint as true'" (*JF Capital Advisors, LLC, v Lightstone Group, LLC,* 25 NY3d 759, 762 [2015] quoting *Leon v Martinez*, 84 NY2d 83, 87 [1994]). In or about 2008, plaintiff Avi Dorfman began developing a web-based program that would allow renters to search and apply for apartment rentals online without the assistance of a broker or

other third party. Based on this premise, in 2010, Dorfman began developing iRent, a company which reached the beta testing phase, but never went "live." Dorfman went on to create a new company, RentJolt, into which iRent was merged, and which functioned as a brokerage firm, connecting current tenants to prospective renters. By January 2012, RentJolt was a functioning business with a live website.

In 2012, Dorfman sought investors for RentJolt. A friend suggested he meet defendant Reffkin, a Goldman Sachs investment banker interested in learning about and getting involved in the New York City real estate market. During the parties' first meeting on July 14, 2012, Dorfman observed that Reffkin was well versed in private equity and investment banking, but had limited knowledge of the New York real estate market. Dorfman discussed his experiences in real estate, as well as his vision for RentJolt. Reffkin expressed an interest in partnering with Dorfman to create a new, web-based start-up for real estate rentals, which would come to be known as "Urban Compass."

Recognizing that Urban Compass would be a direct competitor of RentJolt, Reffkin consulted with his attorney, who advised him to acquire RentJolt. To that end, Urban Compass and RentJolt executed a confidentiality and non disclosure agreement dated

July 23, 2012 (NDA), which Dorfman signed on behalf of RentJolt, and Reffkin signed on behalf of Urban Compass (then identified as Newco). The NDA indicates that it was entered in contemplation of a "possible negotiated transaction between the two companies" and provides, in section 11(b):

> "Each party recognizes and acknowledges the competitive value and confidential nature of the Evaluation Material of the other party and that irreparable damage may result to the other party if information contained therein or derived therefrom is disclosed to any person except as herein provided or is used for any purpose other than the evaluation of a possible negotiated transaction between the parties."

Section 8 of the NDA, entitled "No Representations and Warranties," provides in relevant part:

> "(a) Only those representations or warranties which are made in a definitive agreement between the parties, when, as and if executed, and subject to such limitations and restrictions as may be specified therein, will have any legal effect. For purposes of this Agreement, the term 'definitive agreement' does not include any executed letter of intent or any other preliminary written agreement, nor does it include any written or verbal acceptance of any offer or bid made by one party.
>
> "(b) Each party understands and agrees that no contract or agreement providing for any transaction involving the parties shall be deemed to exist unless and until a definitive

> agreement has been executed and delivered and each party hereby waives in advance any claims, including without limitation claims for breach of contract, in connection with any transaction between the parties unless and until the parties shall have entered into a definitive agreement. Each party also agrees that unless and until a definitive agreement regarding a transaction between the parties has been executed and delivered, neither party will be under any legal obligation of any kind whatsoever with respect to such a transaction by virtue of this Agreement or any other written or oral communication with respect to such transaction, except for the matters specifically agreed to herein."

The NDA also contains a covenant not to sue, with a carve out for "the other party's failure to comply with its promises and provide benefits under this Agreement."

In reliance on the protections under the NDA, RentJolt provided Reffkin and Urban Compass with proprietary and confidential information solely for the purpose of allowing Urban Compass to assess whether to acquire RentJolt. In particular, RentJolt provided Reffkin and Urban Compass with a list of its assets, as well as full access to iRent and RentJolt's confidential and proprietary information, including proprietary software code. Further, Dorfman alleges that he made significant

contributions to Urban Compass's formation, which were separate and apart from RentJolt's preexisting trade secrets. For instance, he developed materials aimed at securing financing and recruiting engineers and helped develop Urban Compass' software. Dorfman also created a budget for Urban Compass, as well as a model showing how the company would differentiate itself from a traditional brokerage firm, and a proposal detailing the vision for Urban Compass's development and goals.

Dorfman alleges that in July 2012, Goldman Sachs made a $6 million initial investment in Urban Compass, due in large part to his efforts. He also successfully convinced Ori Allon, Twitter's New York director of engineering, to leave Twitter and join Urban Compass.

In August, Dorfman negotiated with Reffkin and Allon regarding a position with Urban Compass and compensation. A few offers were made which included a combination of equity and base salary, but Dorfman rejected them, finding them to be "insulting" and believing that they "greatly minimized" the work he had done for Urban Compass.

The parties never executed a "definitive agreement" (other than the NDA), and Urban Compass ultimately did not acquire RentJolt. On September 17, 2012, RentJolt sent Urban Compass a

cease and desist letter reminding Urban Compass that the NDA prohibited the use of RentJolt's trade secrets. Urban Compass's chief operating officer responded by noting that there was no agreement between Urban Compass and Dorfman.

Urban Compass's website went live in May 2013, allegedly premised on iRent and RentJolt's confidential and proprietary information, as well as ideas separately developed by Dorfman. Urban Compass was an immediate success and received considerable acclaim, being named by CNN as one of 10 "Start-Ups to Watch." By July 2014, a little more than one year after its launch, Urban Compass was valued at about $360 million. Dorfman alleges that without his input in the early stages of Urban Compass' formation, the company never would have grown as fast or as big as it did.

According to Dorfman, defendants did not compensate him for his valuable work. Consequently, Dorfman and RentJolt commenced this action by filing a complaint which asserts, inter alia, claims for breach of contract, breach of implied contract, unjust enrichment, and quantum meruit. The breach of contract claim is asserted by RentJolt against Urban Compass and Reffkin and is based upon the alleged violation of the NDA. The breach of implied contract is asserted by Dorfman and RentJolt against

Reffkin and Urban Compass. The unjust enrichment and quantum meruit claims are asserted by Dorfman and RentJolt against Reffkin and Urban Compass

Defendants moved pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss all the claims except for the breach of contract claim. Defendants argued, inter alia, that plaintiffs' claim for breach of implied contract, unjust enrichment and quantum meruit are barred by the statute of frauds.

The court dismissed the cause of action for breach of implied contract as void under the statute of frauds, holding that Dorfman's efforts to form Urban Compass involved a "business opportunity" covered thereunder. The court rejected defendants' argument that the statute of frauds precludes the claims for unjust enrichment and quantum meruit, and declined to dismiss those causes of action as asserted by Dorfman. However, it held that section 8 of the NDA precludes RentJolt from asserting claims for unjust enrichment and quantum meruit in the alternative to its claim for breach of the NDA, and granted defendants' motion to dismiss those two claims as asserted by RentJolt. As indicated, the only issue in dispute on this appeal is whether the claims of quantum meruit and unjust enrichment, through which Dorfman seeks compensation for helping to found and

initialize the operations of Urban Compass, should also have been dismissed as precluded by the statute of frauds.

Discussion

The statute of frauds is codified in General Obligations Law § 5-701. Under the statute of frauds, to be enforceable, certain types of agreements cannot be oral; they must be in writing. Simply stated, the purpose of the statute is to prevent perjury and fraud and to preserve the integrity of contracts (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 476 [2013]); Morris Cohon & Co. v Russell, 23 NY2d 569, 574 [1969]).

This appeal concerns a lesser-known provision of the statute of frauds, that is, General Obligations Law 5-701(a)(10), which requires a writing in an agreement pertaining to the negotiation of services for the purchase of real estate or of a business opportunity. Specifically, it provides, in pertinent part:

> "a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> . . .
>
> "10. Is a contract to pay compensation for services rendered in . . . negotiating the

> purchase . . . of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein . . . .”

The same paragraph further states that “‘[n]egotiating’ includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction” (*id.*).

The tension around this section concerns the scope of services within the meaning of “negotiating . . . a business opportunity” (*id.*). In this appeal, defendants argue that because the motion court dismissed plaintiff Dorfman’s implied contract claim, as barred by the statute of frauds, the court was required to dismiss plaintiff’s quasi contract (quantum meruit and unjust enrichment) claims as well. Defendants’ argument, however, is based on the false premise that the quasi contract claims and the implied contact claim overlap as all seeking compensation for the work Dorfman performed in creating Urban Compass, which would be barred as “assisting in the negotiation or consummation” of the business opportunity (*id.*).

Plaintiff Dorfman, however, alleges that he provided services clearly extending beyond the negotiation of a business opportunity, including developing materials to secure investor

backing, recruiting engineers and others to join Urban Compass, and developing the details of how Urban Compass's software product, web, and mobile applications would be "architected." When alleged services go beyond the negotiation of a business opportunity, claims for unjust enrichment and quantum meruit should be sustained (*see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 10-11 [1st Dept 2012]; *Venetis v Stone*, 81 AD3d 503 [1st Dept 2011]).

Nevertheless, defendants argue that any other work Dorfman may have performed is intertwined with his alleged work in "assisting in the negotiation or consummation of the business opportunity. As fully explained below, however, the Court of Appeals has rejected defendants' broad interpretation of the term negotiating a business opportunity within the meaning of General Obligations Law 5-701(a)(10).

To be sure, General Obligations Law § 5-701(a)(10)'s sweep is comprehensive as it covers conduct at the outset, during the course of, and at the conclusion of the services rendered for the purpose of "assisting in the negotiation or consummation" of a business opportunity, as illustrated by the Court of Appeals' pronouncement in *Snyder v Bronfman* (13 NY3d 504 [2009]). In *Snyder*, the Court of Appeals held that General Obligations Law

5-701(a)(10) applied where the plaintiff alleged "that he devoted years of work to finding a business to acquire and causing an acquisition to take place — efforts that ultimately led to defendant's acquisition of his interest in Warner Music" (*Snyder* at 509). Specifically, the plaintiff in *Snyder* alleged that he "developed . . . a series of business relationships with key figures in the corporate and investment banking communities," "met with defendant and defendant's other business associates to discuss possible acquisitions," "worked on several aborted deals," and "was a major contributor" to the defendant's eventual successful acquisition of Warner Music (*id.* at 507 [internal quotation marks omitted]). The plaintiff "identified the opportunity, persuaded the defendant of its merits, helped to get debt financing[,] and obtained financial information from the target company [Warner Music]" (*id.*). The Court of Appeals held that "[i]n seeking reasonable compensation for [these] services, plaintiff obviously seeks to be compensated for finding and negotiating the Warner Music transaction," and that such a "claim is of precisely the kind the statute of frauds describes" (*id.* at 509) In so finding, the Court affirmed this Court's dismissal of the plaintiff's claims.

The Court of Appeals has, however, warned against the

"pitfalls" of interpreting General Obligations Law 5-701(a)(10) too broadly (*Sporn v Suffolk Mktg.*, 56 NY2d 864, 865 [1982]); *see e.g. Freedman v Chemical Constr. Corp.*, 43 NY2d 260 [1977]). The reason for this concern is that "[t]oo broad an interpretation would extend the writing requirement" to situations beyond those intended by the legislature (*Freedman*, 43 NY2d at 266). Thus, the Court of Appeals has cautioned that the interpretation of General Obligations Law 5-701(a) (10) should be decided on a "case-by-case basis" to avoid "sweeping generalizations" about its scope (*Sporn v Suffolk Mktg.*, 56 NY2d at 865; *see also Freedman*, 43 NY2d at 267; *Tower Intl., Inc. v Caledonian Airways, Ltd.*, 133 F3d 908, 909 [2d Cir 1998]).

Indeed, just recently, *in JP Capital Advisors, LLC v Lightstone Group, LLC* (25 NY3d 759 [2015], *supra*), the Court rejected this Court's interpretation of GOL 5-701(a)(10) as barring recovery for all services rendered in connection with business opportunities including those that went beyond assisting in the negotiation or consummation of such opportunity. In that case, the plaintiff commenced an action against the Lightstone Group, LLC, seeking to be paid for investment advisory service in connection with the defendants' acquisition of certain hotels and other investment opportunities (*id.* at 762). In lieu of

answering, the defendant moved to dismiss the amended complaint pursuant to CPLR 3211(a)(7), contending that the claims for compensation of the advisory services based on the theories of unjust enrichment and quantum meruit were barred by the statute of frauds (*id.* at 763-764). As relevant to this appeal, Supreme Court denied the dismissal of the claims pertaining to 5 of the alleged 12 business opportunities for which the plaintiff provided advisory services (*id.*). The Court held that the statute of frauds was not applicable to such claims for compensation because the advisory information the plaintiff provided was not later used to assist in the negotiations or consummation of any business opportunity. Instead, the information that JP Capital provided just informed Lightstone of what those business opportunities would cost and be worth if it pursued those opportunities. This Court, however, held that these claims for compensation should have been dismissed because "investment analyses and financial advice regarding the possible acquisition of investment opportunities clearly fall within the negotiation of a business opportunity" (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 115 AD3d 591, 592 [1st Dept 2014]).

The Court of Appeals reinstated these quasi contract claims, agreeing with Supreme Court's narrower interpretation of the term

"negotiating . . . a business opportunity" (*JF Capital Advisors*, LLC, 25 NY3d at 766). Specifically, the Court held that tasks performed so as to inform the defendants whether to partake in certain business opportunities were not performed within the meaning of assisting in the negotiation or consummation of a business opportunity (*id. at 767*). Rather, in the Court's view, "work performed so as to inform defendants whether to partake in a business opportunity" is intended for the narrower purpose of deciding "*whether to negotiate*" (*id.* at 766). In so doing, the Court of Appeals distinguished *Snyder* as being more akin to the seminal case of *Freedman* (43 NY2d 260).

In *Freedman*, the Court held that an oral agreement under which the plaintiff was to negotiate a construction contract on the defendant's behalf in exchange for a fee was unenforceable under the statute of frauds (*id.* at 267). The Court explained that 5-701(a)(10) "applies to various kinds of intermediaries who perform limited services in the consummation of certain kinds of commercial transactions" (*id.* at 266). In *Freedman*, the Court found that the agreement by which the plaintiff "was to use his 'connections,' his 'ability,' and his 'knowledge' to arrange for [the defendant] to meet 'appropriate persons'" so that the defendant could procure a construction contract fell within the

statute of frauds (*id.* at 267). The Court explained that where the "intermediary's activity is so evidently that of providing 'know-how' or 'know-who,' in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in the enterprise," the statute of frauds applies (*id.*).

In the present case, the amended complaint contains allegations that, if accepted by the trier of fact, demonstrate that plaintiff's role consisted of more than functioning as an intermediary that assisted in the negotiation or consummation of the business opportunity. Rather, Dorfman allegedly rendered a wide variety of services, which presumably took place after the company came to fruition, making these services related to a purpose other than "assisting in the negotiation or consummation" of a business opportunity, so as to escape the strictures of General Obligations Law 5-701(a)(10).

To be clear, we simply hold that Dorfman's unjust enrichment and quantum meruit claims were properly sustained, but only insofar as they involved services that went beyond the negotiation or consummation of a business opportunity pursuant to General Obligations Law 5-701(a)(10). The motion court, however, sustained those claims based on all the alleged services provided. As defendants correctly indicate, the amended

complaint also avers that Dorfman was negotiating a business opportunity for defendants by providing know—how in bringing a business enterprise to fruition. Those alleged services clearly fall under the statute of frauds and should have been dismissed.

Accordingly, the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 10, 2015, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss plaintiff Avi Dorfman's claims for unjust enrichment and quantum meruit, should be modified, on the law, to grant the motion only to the extent the services allegedly provided by plaintiff Avi Dorfman fall under General Obligations Law § 5-701(a)(10), and otherwise affirmed, without costs.

All concur.

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

ENTERED: SEPTEMBER 22, 2016

CLERK