SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 2, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2418 Comtesse Suzanne De Paris, Index 155033/12
Plaintiff-Appellant,

-against-

Women's National Republican Club, Inc.,
Defendant-Respondent.

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Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Baxter Smith & Shapiro, P.C., White Plains (Sam R. Shapiro of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered August 5, 2015, which granted defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion denied.

Plaintiff, a long-time member of defendant, Women's National Republican Club, arrived at an event at the club between 5:00 and 5:30 p.m on September 7, 2011. She would go to the club maybe twice per week. Although this was the beginning of cocktail hour, plaintiff, who walked with a cane, was "not a drinker" and had only a "sip" of wine. Sometime between 7:30 and 8:00 p.m.,

she went into the restroom. According to plaintiff, the floor was made of "old marble." When she took her first step with her right foot, and with her cane on the floor, she fell.

After she fell, she "felt the wetness, the waxiness of the floor," which she described as "over-waxed." She also testified that her "shoe made a demarcation line on the floor because the floor was over-waxed, and [she] saw the line." She did not, however, check her shoe for wax. She also stated that she did not see the wax before the accident. She did not know how long the wax was on the floor, and stated that "the cleaning man," who she later described as Hispanic, must have put the wax on the floor. She was certain that the floors were waxed, but acknowledged that she had never personally seen anyone waxing the floors at the club. She had no knowledge regarding what products were used to clean the floor.

Carol Simon, the director of club membership, responded to the scene after being informed of the accident. She arrived in the bathroom and found plaintiff lying on the floor. She asked plaintiff what happened, and plaintiff said she slipped, but did not say what caused her to slip. Simon looked in the area where plaintiff had fallen [it is not clear if she did this before or after the ambulance arrived], and saw nothing that looked slippery or wet, nor did she see any scuff marks. The only place

she had ever seen floors waxed in the building was in the grand salon on the third floor.

In support of its motion for summary judgment, defendant submitted the above testimony and an affidavit by Margaret O'Connor, the general manager of the club. As pertinent to this appeal, O'Connor averred that, pursuant to the practices and procedures in effect as of September 7, 2011, the porters at the club never applied wax to the floor of the ladies' room on the ground floor, and cleaned the floor with the use of a mop and water only. No additional cleaning agents were used to clean the floor. She further averred that she was on duty on the day of the incident from 9:30 a.m. to 6:45 p.m. and that the last time the floor in the ladies' room on the ground floor was mopped that day was in the morning.

O'Connor also stated that Seydou Nohou, whose hours were from 2:00 p.m. to 10:45 p.m., was the porter on duty on September 27, and that his duties did not include the mopping of the floor in the ground floor ladies' room and that he did not mop the floor in the ground floor ladies' room at any time during his shift. At no time on September 7, 2011 was any wax applied to the floor of the ground floor ladies' room nor on any day prior to the incident.

When O'Connor departed the club that day at 6:45 p.m. the

floor of the ground floor ladies' room was free of any water, wax or debris. She also averred that neither she nor any of her staff received any complaints regarding a wet, slippery or slick condition in the ladies' room on the ground floor.

Defendant argued that there was no actual or constructive notice of any wet, slippery or slick condition in the bathroom, and the fact that a floor is slippery by reason of its smoothness or polish, in the absence of proof of a negligent application of wax or polish, does not give rise to a cause of action for or an inference of negligence.

In opposition to defendant's motion, plaintiff submitted her own affidavit, in which she averred, as pertinent to this appeal, "While I was still down on the floor after I fell I looked at the floor where I had fallen and I saw the mark of the wax on the floor, from my shoe. I saw a big line, the dent of my shoe in the wax all the way that I fell. After I fell, I felt the wetness, the waxiness of the floor." She understood that defendant's employee stated that wax was never used on the floor, but "[b]ased upon [her] own observations after [she] fell, as well as what [she] felt on the floor following [her] fall, there is no question that there was an over abundance of wax upon the floor, and that this over abundance of wax is what caused [her] to fall and sustain injury."

In opposition to defendant's assertion that it had no actual or constructive notice of any wet, slippery or slick condition in the bathroom, plaintiff argued that defendant caused the defect by improper waxing, and so notice was not required.

The court found that defendant made a prima facie showing that it did not create the hazardous condition, through the testimony of its employees that it never waxed the floor of the bathroom where plaintiff fell. The court rejected plaintiff's assertion that her description of the floor as "over waxed" gave rise to an inference that defendant created the defect. The court also found plaintiff's testimony, that she saw and felt the wax, to be "mere speculation" and insufficient to constitute evidence that the floor was waxed. The court also found that, even if plaintiff established the presence of wax, there was no evidence that defendant was responsible for its presence on the floor, and there was no evidence of how long it had existed, to raise an issue of fact as to constructive notice. With regard to plaintiff's assertion that defendant created the defect, and so notice was irrelevant, the court again noted that plaintiff's assertion that she slipped on wax was "pure speculation and based on her belief that the defendant waxes the floor in the ladies room." Thus, given that the only evidence here regarding defendant's negligence was speculation, the court granted

defendant's motion for summary judgment dismissing the complaint. We now reverse.

The court's role in deciding a motion for summary judgment is issue finding, not issue determination (*Rodriguez v Parkchester S. Condominium*, 178 AD2d 231, 232 [1st Dept 1991]). "[O]n a defendant's motion for summary judgment, opposed by plaintiff, we are required to accept the plaintiff's pleadings, as true, and our decision 'must be made on the version of the facts most favorable to [plaintiff]'" (*Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]). Moreover, "[i]t is not the court's function on a motion for summary judgment to assess credibility" (*Ferrente v American Lung Assn.*, 90 NY2d 623, 631 [1997]). The drastic remedy of summary judgment, which deprives a party of his day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even "arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]).

Here, there is a triable issue of fact as to whether there was a slippery substance on the bathroom floor that caused plaintiff to fall notwithstanding defendant's assertion that it never used wax in that particular bathroom. Contrary to the motion court's findings, plaintiff's proof was not speculative and was sufficient to defeat the motion, because she set forth a

specific reason for the slippery condition on the floor, namely a build-up of wax (*see Galler v Prudential Ins. Co. of Am.*, 63 NY2d 637 [1984]; *Gracchi v Italiano*, 290 AD2d 484 [2d Dept 2002]; *Baisley v Rose*, 35 AD2d 841 [2d Dept 1970]). Indeed, as noted above, she "saw a big line, the dent of my shoe in the wax all the way that I fell," suggesting that her shoe gouged out some of the waxy substance where she fell. This was more than just leaving a streak (*see Galler v Prudential Ins. Co. of Am.*, 99 AD2d 720 [1st Dept 1984], *affd on different grounds* 63 NY2d 637 [1984] [insufficient evidence of negligent waxing of floors, where plaintiff's shoe made a streak on floor near where she fell]), which would happen regardless of the condition of the floor. *Villa v Property Resources Corp.* (137 AD3d 454 [1st Dept 2016]), recently decided by this Court, is also not dispositive. There, plaintiff merely felt a wetness on her pants and hands that smelled like wax or ammonia, while here, plaintiff saw the dent of her shoe in the waxy substance (*see also Aguilar v Transworld Maintenance Servs*, 267 AD2d 85 [1st Dept 1999], *lv denied* 94 NY2d 762 [2000] [plaintiff's claim that she felt wax was insufficient to defeat summary judgment]).

The demarcation that was caused by plaintiff's shoe when she fell on the floor, and her feeling of wetness and wax, conflicted with defendant's assertions that the area was never waxed,

creating triable issues of fact precluding the grant of summary judgment (*Ferrente v American Lung Assn.*, 90 NY2d at 631 [motion court cannot assess credibility on a motion for summary judgment]).

The fact that plaintiff had not seen anyone waxing the floor is of no moment given that her observation is circumstantial evidence that someone waxed the floors (*Caraballo v Paris Maintenance Co.*, 2 AD3d 275 [1st Dept 2003]). Plaintiff's detailed and consistent testimony sufficed to raise an issue regarding negligence in the application of wax, and, combined with circumstantial evidence (*Gonzalez v New York City Hous. Auth.*, 77 NY2d 663, 670 [1991]), creates triable issues of fact requiring denial of summary judgment.

Moreover, since plaintiff claims the floor was negligently waxed, she was not required to show that defendant had notice of the defective condition that resulted in her accident (*Cook v Rezende*, 32 NY2d 596 [1973]). But in any event, there was an issue of constructive notice, because taking plaintiff's evidence as true, and granting that the porter cleaned the area in the morning as defendant claims, defendant failed to see what should have been seen by the use of its senses (*see Blake v City of Albany*, 48 NY2d 875, 877 [1979]; *Rose v Da Ecib* USA, 259 AD2d 258 [1st Dept 1991]; *see also Negri v Stop & Shop*, 65 NY2d 625

[1985]; *Field v Waldbaum, Inc.* 35 AD3d 652 [2d Dept 2006]; *Deluna-Cole v Tonali, Inc.*, 303 AD2d 186 [1st Dept 2003]). Thus, there is an issue of fact as to whether defendant's employees failed to see the presence of a wax buildup that caused plaintiff's accident.

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

ANDRIAS, J. (dissenting)

Because I believe that plaintiff's unsupported assertions do not raise a material issue of fact sufficient to defeat the motion for summary judgment, I respectfully dissent.

Plaintiff, a member of defendant, Women's National Republican Club, since 1978, slipped and fell when she took her "first step" with her right foot and with her cane onto the "old marble" floor of defendant's first-floor ladies' room. She claims that she fell due to excessive wax on the floor.

It is well settled that "the fact that a floor is slippery by reason of its smoothness or polish, in the absence of proof of a negligent application of wax or polish, does not give rise to a cause of action or an inference of negligence" (*Katz v New York Hosp.*, 170 AD2d 345, 345 [1st Dept 1991]). Where the defendant comes forth with evidence that no wax was used, the plaintiff must "come forward and make a showing that a slippery foreign substance was in fact present or that the floor was improperly maintained" (*id.* at 346).

Defendant established prima facie its entitlement to summary judgment by submitting an affidavit by its general manager showing that the ladies' room floor was cleaned with only a "mop and water," that wax was never applied to the floor, that she inspected the ladies' room an hour before the accident, at which

time the floor was "free of any water, wax or debris," and that at no time before plaintiff's fall did she or her staff receive any complaints regarding a wet, slippery or slick condition therein (*see Villa v Property Resources Corp.*, 137 AD3d 454 [1st Dept 2016] [defendants satisfied their initial burden by testimony that the floor was never waxed, but was mopped daily by a porter and polished periodically with a buffer]; *Kalish v HEI Hospitality, LLC*, 114 AD3d 444 [1st Dept 2014] [summary judgment was properly granted to defendant because it provided testimony that the floors in the ladies' rooms were never waxed and that before the accident it had not received any complaints about the ladies' room floor being slippery]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011] [defendant meets burden "by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell"]). Defendant also submitted the testimony of its membership director, who inspected the area right after plaintiff fell, and did not see any scuff marks or anything that looked slippery or wet.

In opposition, plaintiff's testimony that after she fell she "saw a big line, the dent of [her] shoe in the wax all the way that [she] fell" and that she "felt the wetness, the waxiness of

the floor" does not suffice to raise a triable issue of fact as to whether defendant was negligent (*see Villa*, 137 AD3d at 154 [plaintiff failed to raise a triable issue of fact with testimony that she saw a porter using a buffing machine the day before she fell and the conclusory claim that the substance left "wetness" on her pants and her hands smelled like wax or ammonia]; *Purcell v York Bldg. Maintenance Corp.*, 57 AD3d 210, 211 [1st Dept 2008] ["Plaintiff's deposition testimony that the floor on which she slipped was 'very shiny' and 'over waxed,' without more, does not support an inference of negligent waxing or polishing"]; *Aguilar v Transworld Maintenance Servs.*, 267 AD2d 85, 86 [1st Dept 1999] [plaintiff's conclusory claim that she "felt" wax after her fall was insufficient to raise an inference of negligent waxing], *lv denied* 94 NY2d 762 [2000]).

The majority concludes that "plaintiff's proof was not speculative and was sufficient to defeat the motion, because she set forth a specific reason for the slippery condition on the floor, namely a build-up of wax." In reaching this conclusion, the majority finds that *Villa* (127 AD3d 454) and *Aguilar* (267 AD2d 85) are inapposite because here plaintiff asserts that she "'saw a big line, the dent of my shoe in the wax all the way that I fell,' suggesting that her shoe gouged out some of the waxy substance where she fell." However, plaintiff admits that she

did not see any wax on the floor before she fell and did not check her shoe for wax after she fell. Moreover, she did not personally see the ladies' room floor waxed that day or at any time before and there were no photographs, wet clothes, or witnesses that could corroborate her conclusory assertions. Nor did plaintiff have any knowledge of the products used to clean the floor (*see Galler v Prudential Ins. Co. of Am.*, 63 NY2d 637 [1984], *affg* 99 AD2d 720 [1st Dept 1984] ["evidence insufficient to establish prima facie that what plaintiff slipped on was a wax residue" where plaintiff noticed a two foot streak on the floor where she fell and testified that, when she was leaving the hospital to which she had been taken after the accident, she saw a nurse scraping what looked like wax off of her shoe]).

Accordingly, I would affirm the grant of summary judgment in defendant's favor.

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

ENTERED: MARCH 2, 2017

CLERK

Moskowitz, J.P., Gische, Kahn, Gesmer, JJ.

2634 Pierre Arty, Index 162089/14
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corp., et al.,
Defendants-Respondents.

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Hernstadt Atlas PLLC, New York (Edward Hernstadt of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for respondents.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered April 20, 2015, which, to the extent appealed from, granted defendants' motion to dismiss plaintiff's defamation claim as time-barred, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff, a Caribbean-American physician, was the Deputy Executive Director of the Behavioral Health Division (BHD) at Kings County Hospital Center (Kings Hospital), which defendant New York City Health and Hospitals Corp. (HHC) owns and runs. On or about June 18, 2008, after allegedly being ignored for over 24 hours, a schizophrenic patient collapsed on the floor in the emergency waiting room of Kings Hospital and died. As a result, plaintiff's superiors terminated his employment on or about June

20, 2008.

Plaintiff commenced an action in the United States District Court for the Southern District of New York alleging violations of federal, state and city discrimination laws, and asserting a defamation claim. In the federal complaint, plaintiff alleged, among other things, that before the patient's death, he and other black employees were demoted or moved out of BHD while white staffers were left in place or promoted. Plaintiff also alleged that HHC had defamed him by stating to the press that he, among others, failed to render aid to the patient in the waiting room and therefore bore responsibility for her death.

In December 2013, the District Court granted defendants' motion for summary judgment dismissing plaintiff's federal, state, and city discrimination claims in the federal action. Further, the District Court declined to exercise supplemental jurisdiction over the defamation claim, dismissing that claim without prejudice. Judgment was entered, closing the federal action, on December 4, 2013.

Plaintiff then moved under Local Civil Rule 6.3 and Federal Rules of Civil Procedure (FRCP) rule 59(e) for reconsideration of the District Court's order and amendment of that order. Specifically, plaintiff requested that the District Court either (1) decline to exercise supplementary jurisdiction over his New

York City Human Rights Law (NYCHRL) claim and dismiss the NYCHRL claim on jurisdictional grounds only; or (2) deny summary judgment with respect to the NYCHRL claim and retain supplementary jurisdiction over the state law defamation claims and the NYCHRL claim.

By order dated August 18, 2014, the District Court granted plaintiff's motion for reconsideration and declined to assert supplementary jurisdiction over either the discrimination or defamation claims, instead amending the December 2013 order to dismiss the "NYCHRL claim *without prejudice*, on jurisdictional grounds only."

On or about December 8, 2014, plaintiff filed the action underlying this appeal. By motion dated February 6, 2015, defendants moved to dismiss the complaint. On their motion, defendants argued, among other things, that the defamation claim should be dismissed because plaintiff failed, as required under CPLR 205(a), to commence the state court action within six months after the United States District Court dismissed the defamation claim on December 3, 2013.[1]

Insofar as relevant to this appeal, the IAS court granted

[1] Defendants did not challenge the timeliness of plaintiff's NYCHRL discrimination claim because plaintiff had successfully obtained reconsideration of that claim in federal court.

the motion in part, dismissing the defamation claim as untimely filed. In so doing, the court found that, under CPLR 205(a), the six-month period to commence a new action after the termination of a prior action began to run on December 4, 2013, the date on which the federal court entered judgment dismissing plaintiff's complaint.

We now find that the state law defamation claim was timely filed, and therefore reinstate that claim.

CPLR 205(a) does not define "terminated" in the statute itself, and does not distinguish between "discretionary" or "nondiscretionary" appeals. Rather, the Court of Appeals found in *Lehman Bros. v Hughes Hubbard & Reed* (92 NY2d 1014, 1016 [1998]), that CPLR 205(a) applied and held that the six-month clock "began to run" on "the date plaintiff's sole *nondiscretionary* . . . appeal was exhausted" (*id.* at 1017 [emphasis added]; *see also Joseph Francese, Inc. v Enlarged City School Dist. of Troy*, 95 NY2d 59, 64 [2000]).

The broad remedial purpose of CPLR 205(a) mandates a finding that plaintiff's defamation claim was timely filed. Under Federal Rules of Appellate Procedure (FRAP) rule 4(a)(4)(A)(iv), plaintiff's motion for reconsideration extended the time for him to file a nondiscretionary appeal as of right to the United States Court of Appeals for the Second Circuit until 30 days

after the FRCP rule 59(e) motion was decided – that is, until 30 days after the August 18, 2014 order granting plaintiff's FRCP rule 59(e) motion. An FRCP rule 59(e) motion also extends a party's time to file its appeal as of right in the Federal Appeals Court – a time frame that is otherwise fixed and jurisdictional. Although an FRCP rule 59(e) motion is not an appeal, it served the same purpose here as an appeal would have – namely, it asked a motion court to correct a previous decision. In addition, the rule 59(e) motion is nondiscretionary in the sense that word is used by the Court of Appeals: the motion is as of right because a party need not seek leave to file it (*see Lehman Bros.*, 92 NY2d at 1016). Therefore, plaintiff's FRCP rule 59(e) motion had the effect of extending plaintiff's time to file a notice of appeal until 30 days from the entry of the order determining the motion (FRAP rule 4[a][4][A][iv]).

The District Court's August 18, 2014 order granted reconsideration to the extent of designating the dismissal of plaintiff's NYCHRL claim to be without prejudice, so that plaintiff could recommence an action, including that claim, within six months under CPLR 205(a) (*see Gesegnet v Hyman*, 285 AD2d 719 [3d Dept 2001]). Additionally, after the motion for reconsideration was decided, plaintiff could have pursued an appeal as of right, and the prior federal action then would not

have "terminated" for purposes of CPLR 205(a) until the appeal was exhausted by either a determination on the merits or dismissal (*Malay v City of Syracuse*, 25 NY3d 323, 329 [2015]). Instead, plaintiff properly commenced an action in state court, asserting a discrimination claim under the NYCHRL and a defamation claim within six months after the reconsideration decision, which is timely under CPLR 205(a). Plaintiff was not required to commence a defamation action in state court while the reconsideration motion was pending, or to file a notice of appeal in federal court, in order to gain the benefit of the six-month extension (*see Malay* at 330); were our decision otherwise, the result would waste judicial resources by forcing a party to commence either a federal appeal or a new state court action while his or her case was still ongoing in federal court.

We decline to consider defendants' alternate argument for affirmance, that the defamation claim is barred by the doctrine

of qualified privilege, since the issue is fact specific (*see Munoz v City of New York*, 18 NY2d 6, 11 [1966]), and the record on this motion to dismiss is insufficient (*see Mihlovan v Grozavu*, 72 NY2d 506, 509 [1988]).

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

ENTERED: MARCH 2, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2932 Sergio Pereira, et al., Index 157744/12
Plaintiffs-Appellants-Respondents,

-against-

The New School, et al.,
Defendants-Respondents-Appellants.

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Ledy-Gurren Bass D'Avanzo & Siff, L.L.P., New York (Deborah A. Bass of counsel), for appellants-respondents.

Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Christopher Simone of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered November 4, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-1.7(d), denied the motion as to the Labor Law § 200 and common-law negligence claims and the Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.7(e) and 23-2.1(a)(1), and denied plaintiffs' motion for partial summary judgment as to liability on the Labor Law § 241(6) claim, unanimously modified, on the law, to deny defendants' motion as to the Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.7(d), and otherwise affirmed, without costs.

Plaintiff Sergio Pereira, a carpenter working at a construction site at a building owned by defendant the New

School, was injured when he slipped on wet discarded concrete that was deposited on a piece of plywood on which he was walking, at the end of a passageway, causing his left foot to become entangled with two bundles of rebar protruding from under the plywood. On the afternoon of the accident, plaintiff was tasked with working on the building's fourth floor to erect the next batch of tables and platforms (forms) to construct the fifth floor. In constructing the tables and forms, plaintiff did not and would not use rebar or concrete.

Plaintiffs argued that they were entitled to partial summary judgment as to liability on the Labor Law § 241(6) claim because plaintiff's account of the accident demonstrated that defendants failed to provide him with a safe work space by allowing a passageway to be obstructed by slipping and tripping hazards. According to plaintiffs, Industrial Code (12 NYCRR) § 23-1.7(d) was violated because the wet cement on which plaintiff slipped was a foreign substance. Further, they argued that defendants violated Industrial Code (12 NYCRR) § 23-1.7(e) when plaintiff, in a passageway, slipped on wet cement and tripped on the rebar. Plaintiffs claimed that defendants violated Industrial Code (12 NYCRR) § 23-2.1 because the plywood and rebar were not safely stored, and obstructed a passageway. Finally, plaintiffs argued that neither the concrete nor the rebar was integral to

plaintiff's work.

Defendants opposed plaintiffs' motion, and argued that they were entitled to summary judgment dismissing the Labor Law § 241(6) claim because the Industrial Code provisions relied upon by plaintiffs were inapplicable to the facts of the case. Specifically, they argued that sections 23-1.7(d) and (e) did not apply because plaintiff did not injure himself by tripping, the accident did not occur in a passageway, and the wet cement was not a "foreign substance." Further, according to defendants, section 23-2.1 did not apply because plaintiffs' claim did not concern improperly stored materials. Defendants also argued that plaintiff's testimony did not identify what caused his accident, but merely speculated that the wet cement and rebar were the cause. Defendants also sought dismissal of the common-law negligence and Labor Law § 200 claims, asserting that there was no evidence that they controlled plaintiff's work, or that they had notice of the condition that caused the accident.

The motion court denied plaintiffs' motion for partial summary judgment in its entirety. The court found that Industrial Code (12 NYCRR) § 23-1.7(d) was inapplicable because the cement was a byproduct of plaintiff's work. Thus, the court granted defendants' motion to dismiss the 241(6) claim insofar as it was predicated on Industrial Code (12 NYCRR) § 23-1.7(d). As

to section 23-1.7(e), the court denied both parties' motions for summary judgment, finding issues of fact as to whether the rebar constituted a tripping hazard, and whether the accident site was a "passageway." The court also found an issue of fact as to section 23-1.7(e)(2) and whether the rebar involved was inherent in plaintiff's work. As to the claim predicated on section 23-2.1(a)(1), the court found issues of fact as to whether the accident happened in a passageway and whether "improper storage of the concrete and rebar . . . constituted material piles obstructing [a] passageway." Finally, as to the common-law negligence and Labor Law § 200 claims, the court held that the accident arose out of a dangerous condition, and that defendants did not show that they lacked constructive notice of the plywood and rebar, because they failed to submit adequate evidence about the site's last inspection.

We find that the motion court improperly granted defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-1.7(d) (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]). Plaintiffs established that the excess wet concrete discarded on the plywood on which plaintiff slipped was not integral to the work being performed by plaintiff at the accident site (*see Ocampo v Bovis Lend Lease LMB, Inc.*, 123 AD3d 456, 457 [1st Dept

2014]; *Velasquez v 795 Columbus LLC*, 103 AD3d 541, 542 [1st Dept 2013]). Plaintiff did not work with concrete and concrete was not a part of his responsibilities in constructing the tables and forms used to hold the rebar and other ironwork in place. Similarly, the rebar on which plaintiff tripped was not integral to the work he was performing, and defendants' motion for summary judgment dismissing the claim predicated on 12 NYCRR 23-1.7(e)(2) was correctly denied (*see Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 66 [1st Dept 2004]). Plaintiff presented evidence that he did not work with rebar and that rebar was not integral to any work being done on the day of the accident.

Contrary to defendants' contention, 12 NYCRR 23-1.7(e)(1) is applicable to plaintiff's accident whether plaintiff slipped and fell or tripped and fell (*Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 447-448 [1st Dept 2016]). Plaintiff's and the work site superintendent's conflicting testimony presents issues of fact whether the accident occurred in a "passageway" (*see Lois*, 137 AD3d at 447; *Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]). The testimony also presents an issue of fact whether the concrete placed on the piece of plywood was safely stored, pursuant to 12 NYCRR 23-2.1(a)(1) (*see Rodriguez v DRDL Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013]).

As to the Labor Law § 200 and common-law negligence claims,

defendants failed to establish that they lacked constructive notice of the dangerous condition that caused plaintiff's injury, since they submitted no evidence of the cleaning schedule for the work site or when the site had last been inspected before the accident (*see Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534 [1st Dept 2015]).

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

ENTERED: MARCH 2, 2017

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3043 In re Amira Beatty, Index 652103/14
Petitioner-Appellant,

-against-

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

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Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Richard Dearing of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Margaret A. Chan, J.), entered July 20, 2015, which granted respondents' cross motion to deny the petition seeking to vacate a penalty imposed in an arbitration award dated June 30, 2014, and dismissed the proceeding brought pursuant to CPLR article 75, reversed, on the facts, without costs, the petition granted, and the matter is remanded to respondent New York City Department of Education (DOE) for imposition of a lesser penalty.

The penalty of termination of employment was imposed by a hearing officer upon petitioner, a special education home instruction teacher, based upon the hearing officer's finding that petitioner had submitted time sheets falsely stating that she had provided instruction to a disabled student and inaccurately indicating that she had reported to certain DOE

schools and libraries over a two-month period. Notwithstanding petitioner's misconduct, under the circumstances presented here, the penalty of termination shocks our sense of fairness (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

At the time of the incident in question, petitioner was faced with an extraordinary situation. Both she and the disabled student resided in Far Rockaway, Queens. On October 29, 2012, that area was damaged extensively by Hurricane Sandy. The homes of both petitioner and the disabled student were flooded and had no power or heat for an extended period, and petitioner lost the use of her car. Both petitioner and her student were displaced from their homes. In the aftermath of this unique disaster, DOE provided teachers with no guidance or information as to the instruction of students displaced by Hurricane Sandy, other than that displaced students would not be penalized. Petitioner contacted the disabled student's mother after the storm, but never provided educational services to the student. In January 2013, the student's social worker informed petitioner's assistant principal that the student had received no instruction from petitioner since the hurricane. However, that same month, petitioner had submitted documentation saying that she had

provided such instruction. A subsequent investigation revealed that petitioner's time sheets contained the false information.

As the Court of Appeals has explained, and as we have recently reiterated, "a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved" (*Matter of Bolt v New York City Dept. of Educ.* (145 AD3d 450, 451 [1st Dept 2016], quoting *Pell*, 34 NY2d at 234).

Petitioner filled out the time sheets in question in advance of the dates to which those time sheets pertained. Although she did not, in fact, proceed to provide instruction to the disabled student on the days set forth in those time sheets, she submitted the time sheets without correction on a subsequent date. Because petitioner instructed other students on each of the dates in

question, she would have received the same salary regardless of how many students she had instructed or how many hours she had spent with them, and thus derived no benefit from her actions. Petitioner's misconduct is more a matter of lax bookkeeping than implementation of any venal scheme. There was no scheme to defraud or theft of services on petitioner's part, and the harm to the public and to the DOE was mitigated.

Furthermore, before the incident in question, petitioner had an unblemished record over a 17-year period as a special education home instruction teacher. At the DOE hearing, the disabled student's mother testified that petitioner was a good teacher who worked well with her son and had served his needs more successfully than had other teachers. Petitioner's principal testified that before this incident, she had never received a complaint about petitioner. And one of petitioner's coworkers, another special education teacher in the homebound program, testified that petitioner was a dedicated teacher who did everything she could to help her students excel.

At the hearing, petitioner admitted that she was guilty of submitting reports stating that she had provided instruction to the disabled student on certain dates when she had not done so and that she had reported to various schools and libraries on certain dates when she had not done so. As petitioner

acknowledges, her misconduct warrants punishment, since the disabled student was deprived of the services of a teacher for two months. Petitioner does not seek to set aside the findings of misconduct contained in the hearing officer's opinion, but only to modify the penalty imposed on her. She has acknowledged her error in judgment and has pledged to change her practices and never to repeat the error. There is no evidence that "petitioner could not remedy her behavior" (*see Bolt*, 145 AD3d at 153). The penalty of termination, we believe, is disproportionate to the level of petitioner's misconduct and exceeds the standards that society requires to be applied to this offense (*see Pell*, 34 NY2d at 234).

The cases relied upon by the dissent are distinguishable in that, among other things, none of them mention extraordinary mitigating circumstances such as those faced by petitioner (*see Matter of Davies v New York City Dept. of Educ.*, 117 AD3d 446, 447 [1st Dept 2014] [teacher failed to follow procedures and carry out duties, rendered incompetent service over two-year period and blamed others for her ineffectiveness]; *Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543 [1st Dept 2011] [non-resident New York City teacher enrolled two of her own children in City public schools, effectively stealing $98,000 in services from DOE over two-year period]; *Matter of Rogers v Sherburne-*

Earlville Cent. School Dist., 17 AD3d 823 [3d Dept 2005] [teacher's aide demonstrated a pattern of repeatedly taking excessive sick and paid leave despite two warnings not to do so and received leave time benefits as a result of his fraud]; *Matter of Hegarty v Board of Educ. of City of N.Y.*, 5 AD3d 771 [2d Dept 2004]).

This is not, as respondents would have it, a case of extended, intentional and self-serving misconduct or repeated and continuous neglect of duty, but rather an isolated instance of neglect occurring under circumstances of extraordinary personal hardship and involving a teacher who had an otherwise unblemished and longstanding record. Had Superstorm Sandy not upended her life, there is no indication that petitioner's wrongdoing would have occurred. As it is highly unlikely that the extraordinary situation presented in this case will recur, the factors of general and specific deterrence do not come into play (*see Bolt*, 145 AD3d at 152-153, *quoting Pell*, 34 NY2d at 234).

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

ANDRIAS, J. (dissenting)

Contrary to the majority's determination, considering all relevant circumstances, including the nature and severity of the misconduct and the mitigating factors raised by petitioner, the penalty of termination is not so disproportionate to the charged offenses as to shock one's sense of fairness (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). Therefore, I respectfully dissent.

Petitioner, a special education teacher, worked in the District 75 home instruction program, which provides instruction to children who are unable to attend school due to medical conditions. Home instruction teachers, with some exceptions (e.g., personal days beyond the allotted amount), are paid their full salaries regardless of the number of hours of daily instruction that they render to their students. Still, under an honor system, they must prepare a daily log showing the names of their students and the times they provided instruction to each of them, and a monthly time sheet that corresponds to the daily logs. They are also required to report any schedule changes to their supervisors and, if a student is unable to receive instruction for five consecutive days, to complete a form stating why the student was not receiving services.

In September 2012, petitioner was assigned to provide instruction for one hour a day, five days a week, to Student "A," an eight-year-old boy with cerebral palsy, who lived in the Rockaways. After Hurricane Sandy struck on October 29, 2012, Student A's family was temporarily displaced, and moved to Brooklyn. Petitioner was also displaced by the storm, and schools were closed from October 29 though November 2, 2012.

In January 2013, petitioner's supervisor was informed by Student A's social worker that he had not received instruction from petitioner since the hurricane. After an investigation was conducted, disciplinary proceedings were commenced charging that: (1) on 24 days from October 15 to December 19, 2012, petitioner submitted false or fraudulent daily logs and time sheets claiming that she provided instruction to Student A; (2) on 12 dates in December 2012, petitioner submitted false or fraudulent daily logs and time sheets that showed her reporting to various schools and/or libraries; (3) from October through December 2012, petitioner, with intent to defraud, made false representations resulting in financial benefits; (4) as a result of the foregoing activities, petitioner received her full salary during October, November, and December 2012 for services she did not perform; and (5) because of petitioner's actions Student A was deprived of educational services.

Petitioner did not deny the first two specifications. At the hearing, she claimed that her paperwork was inaccurate because she completed her time logs before the fact, did not change them after the hurricane, and was not sure if she rendered services on any particular day. Petitioner also claimed that Student A's mother had asked her to suspend instruction until the family returned to the Rockaways.

Student A's mother testified that her son did not receive instruction when they were in Brooklyn or after they returned to the Rockaways in December. Petitioner told her that she could not instruct her son in the family's apartment due to her supervisor's safety concerns, and would not agree to provide the services at a library or other place. The mother, who thought petitioner was an excellent teacher who worked well with her son, never told petitioner to discontinue services. Petitioner's supervisor testified that he spoke with her after the hurricane and that she did not report any changes in her daily schedule, as required. Petitioner was never given permission to suspend services, and he did not receive petitioner's November and December timekeeping records until January 2013.

The hearing officer found that petitioner "failed to provide home instruction to Student A and submitted false and fraudulent documentation for services that she did not provide to him and

that she gained a financial benefit by doing so." The hearing officer did not credit petitioner's excuses for her actions and found that petitioner offered no plausible reason for not discussing the situation with her supervisor. The hearing officer also found that petitioner used the disruption caused by Hurricane Sandy and Student A's dislocation to obtain free time for herself, when she was supposed to be delivering services, and, by taking advantage of the honor system at the expense of Student A, breached a fundamental tenet of the home instruction program.

Based on these findings, the hearing officer sustained specifications 1, 2, 4, and 5, and dismissed specification 3 as duplicative of 1, 2 and 4. In imposing the penalty of termination, the hearing officer stated that petitioner refused to take responsibility for her actions, sought to blame others, and failed to recognize how her actions affected Student A. While considering petitioner's long tenure, unblemished record, and good reputation and the difficulties she faced after Hurricane Sandy, the hearing officer found that these mitigating factors did not "overcome her dishonesty, fraudulent conduct and neglect of duty over an extended period of nearly two months."

The majority holds that the penalty of termination shocks its sense of fairness and remands for the imposition of a lesser

penalty. In support of this determination, the majority finds that petitioner's isolated instance of neglect, committed under extraordinary circumstances by a teacher who had an otherwise unblemished record, was "more a matter of lax bookkeeping" than misconduct, from which petitioner derived no benefit because she would have received the same salary regardless of how many students she instructed or how much time she spent with them. I disagree. The hearing officer carefully considered all of the evidence, and her credibility findings in favor of respondents' witnesses are entitled to deference (*see Matter of Nuchman v Klein*, 95 AD3d 645, 646 [1st Dept 2012], *lv denied* 20 NY3d 855 [2013]). There was more than adequate evidence of petitioner's fraudulent intent and "[c]onsidering petitioner's lack of remorse and failure to take responsibility for her actions, as well as the harm caused by petitioner's actions, the penalty of dismissal, even if there was an otherwise adequate performance record, cannot be said to shock the conscience" (*Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543, 544 [1st Dept 2011]).

Although petitioner was considered a good teacher and had an unblemished record over a 17-year period, she admittedly submitted false time sheets and continuously failed to provide instruction to a disabled child over a period of nearly two months (*see Matter of Rogers v Sherburne—Earlville Cent School*

Dist., 17 AD3d 823, 824 [3d Dept 2005] [upholding termination for falsifying time sheets and a pattern of excessive leave time usage and abuse of leave time benefits despite "a long and previously unblemished record" [internal quotation marks omitted]; *Hegarty v Bd. Of Educ.*, 5 AD3d 771, 772 [2d Dept 2004] [upholding termination for a teacher who fraudulently submitted time sheets for educational services he never rendered]). Petitioner's intentional fraud was far more than "lax bookkeeping." In addition to preparing and submitting records that she knew were false, she also failed to advise her supervisor that she had stopped providing services to Student A.

Petitioner's intentional failure to keep her supervisor apprised of the child's status prevented the school district from arranging for instruction by another teacher. As a result, Student A, who was supposed to receive one hour of instruction per day, missed approximately 40 to 45 hours during November and December 2012, and, according to his mother's testimony, became depressed and was behind his classmates as a result of the lack of instruction.

Contrary to the view of the majority, petitioner benefitted from her intentional misconduct, which allowed her to devote the time she should have been spending with Student A to other activities. If petitioner had notified her supervisor that

Student A was no longer in Queens, she would have been assigned another student. The disruption caused by the storm does not explain petitioner's failure to notify her supervisor of any hardship she faced or confusion about how to proceed.

The hearing officer's conclusion that petitioner's conduct was intentional, that she took no responsibility for her actions and continued to blame Student A's mother, and that she failed to recognize the adverse effect of her conduct on a vulnerable and physically handicapped student further supports the penalty of termination (*see Matter of Davies v New York City Dept. of Educ.*, 117 AD3d 446 [1st Dept 2014]). As the hearing officer found, theft of services is a "serious offense," and petitioner's deception, which would not have been discovered but for the social worker's call, destroyed the trust that is essential to this field-based program dependent on the honor system.

The majority's reliance on *Matter of Bolt v New York City Dept. of Educ.* (145 AD3d 450 [1st Dept 2016]) is misplaced. In *Bolt*, in a single lapse in judgment, the teacher pointed out to several students that certain answers on their exams might be wrong, and suggested they take another look at them. She did not alter any of her student's answers or advise them what the correct answers were. In contrast, petitioner submitted false

time sheets covering a nearly two-month period, during which she continuously failed to provide Student A with needed services, which benefitted her to the detriment of the child, and inflicted harm on the home instruction system.

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

ENTERED: MARCH 2, 2017

CLERK

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

3303 Wendy Tejada, Index 24461/13E
Plaintiff-Respondent,

-against-

Schuman Properties, LLC,
Defendant,

Octavio Raposo, et al.,
Defendants-Appellants.

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Gladstein Keane & Partners PLLC, New York (Thomas F. Keane of counsel), for appellants.

Law Offices of Michael S. Lamonsoff, PLLC, New York (Joseph E. Gorczyca of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered February 5, 2016, which denied defendants Octavio Raposo and Heights Condominium's motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against defendants Octavio Raposo and Heights Condominium.

When opposing summary judgment, plaintiff abandoned her claim that her injuries were caused by standing water on the exterior stairs of a building allegedly owned and managed by defendants, calling the claim a "non-issue," and relying solely on the complaint's allegation that there was no handrail on the

stairs to prevent her from falling. Even if the claim was not abandoned, plaintiff does not claim that defendants had actual notice of a dangerous water condition, and defendants made an unrebutted prima facie showing that they did not have constructive notice of any water on the steps where plaintiff fell (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Defendants also made a prima facie showing that the stairwell was equipped with a handrail when plaintiff fell. Defendants submitted the testimony of the premises's manager, who stated that the stairwell had always been equipped with a handrail, that no problem had ever been observed or reported regarding the handrail, and that a handrail was present on the day plaintiff fell. Defendants also submitted the certificate of occupancy, which "supports [the] position that the stairs complied with all applicable regulations" (*Ndiaye v NEP W. 119th St. L.P.*, 145 AD3d 564, 565 [1st Dept 2016]; *see Hyman v Queens County Bancorp, Inc.*, 3 NY3d 743 [2004]).

Under the circumstances here, plaintiff's bare assertion that there was no handrail at the time she fell, standing alone, does not raise a triable issue of fact. Plaintiff made no

showing that defendants either created, or had actual or constructive notice of a missing handrail (*see generally Haseley v Abels*, 84 AD3d 480, 482 [1st Dept 2011]; *see also Espinoza v Federated Dept. Stores, Inc.*, 73 AD3d 599, 600 [1st Dept 2010]).

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

ENTERED: MARCH 2, 2017

CLERK

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

3304-
3305 In re Lukes Jacob R.,

A Dependent Child Under Eighteen Years of Age, etc.,

Cynthia R.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

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Andrew J. Baer, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

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Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about March 29, 2016, which denied respondent-appellant mother's motion to vacate an order of fact-finding and disposition (one paper), same court and Judge, entered on or about December 14, 2015, which, upon the mother's default and findings of permanent neglect, terminated her parental rights to the subject child and committed his custody and guardianship to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs. Appeal from the order of fact-finding and disposition (one paper), unanimously

dismissed, without costs, as taken from a nonappealable paper.

Family Court providently exercised its discretion in denying appellant's motion to vacate her default because her moving papers failed to demonstrate both a reasonable excuse for her default and a meritorious defense to the allegation that she permanently neglected the child (*see Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428, 428-429 [1st Dept 2010], *lv dismissed* 15 NY3d 766 [2010]).

No appeal lies from the fact-finding and dispositional order entered on default (*see Matter of Alexander John B. [Cynthia A.]*, 87 AD3d 927, 929 [1st Dept 2011], *lv dismissed in part, denied in part* 18 NY3d 917 [2012]).

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

ENTERED: MARCH 2, 2017

CLERK

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

3307 Carbures Europe, S.A., et al., Index 653892/15
Plaintiffs-Appellants-Respondents,

-against-

Emerging Markets Intrinsic Cayman Ltd., et al.,
Defendants-Respondents-Appellants,

Bulent Toros, et al.,
Defendants.

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Pryor Cashman LLP, New York (Philip R. Hoffman of counsel), for appellants-respondents.

Chaffetz Lindsey LLP, New York (Scott W. Reynolds of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about June 9, 2016, which, to the extent appealed from as limited by the briefs, granted defendants Emerging Markets Intrinsic Cayman Ltd. and Emerging Markets Intrinsic Ltd.'s motion to dismiss the claims for fraud and breach of the implied covenant of good faith and fair dealing as against them, and denied the motion to dismiss the breach of contract claim as against them, unanimously modified, on the law, to grant the motion as to the breach of contract claim as against defendant Emerging Markets Intrinsic Ltd., and otherwise affirmed, without costs.

Pursuant to a Margin Lending Agreement (MLA), defendant EMI

Markets Intrinsic Cayman Ltd. (EMI Cayman) agreed to lend plaintiff Carbures Europe, S.A. €7 million in exchange for €14 million worth of Carbures stock as collateral for the repayment of the loan. The MLA provides, as relevant, that, except upon an event of default or as a hedge, the collateral "will not be (i) loaned, pledged, repledged, hypothecated or rehypothecated outside of the Lender or structure itself or (ii) sold or traded in any exchange or over-the-counter transactions." Plaintiffs allege that EMI Cayman repeatedly sold and lent the collateral shares, in contravention of the MLA, which caused the share price to decline.

Defendants' contention that the subject transactions constituted permissible "hedging" under the MLA is supported by a version of events that conflicts with the allegations in the complaint, which we accept as true for purposes of deciding this CPLR 3211 motion. Nor do the allegations in the complaint show that, as defendants contend, plaintiffs breached the MLA, triggering an event of default that permitted defendants to liquidate the collateral. Moreover, dismissal of the breach of contract claim is not mandated by the "no consequential damages" provision of the MLA, since the complaint alleges at least $50 million in general damages, i.e., damages flowing directly from the breach (*see Biotronik A.G. v Conor Medsystems Ireland, Ltd.*,

22 NY3d 799, 806 [2014]; *Harmit Realties LLC v 835 Ave. of the Ams., L.P.*, 128 AD3d 460, 461 [1st Dept 2015]).

However, we dismiss the breach of contract claim as against Emerging Markets Intrinsic Ltd. because section 4(c) of the MLA precludes liability against the agent absent gross negligence or willful misconduct, neither of which is present here.

The fraud claim is duplicative of the breach of contract claim, since it is based on allegations that EMI Cayman's promises to perform were not sincere (*Manas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008]). Moreover, the claim alleges expressions of future intent, not misrepresentations of present facts (*see Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]).

The claim of breach of the implied covenant of good faith and fair dealing is also duplicative of the breach of contract claim (*Feld v Apple Bank for Sav.*, 116 AD3d 549, 551 [1st Dept

2014], *lv denied* 23 NY3d 908 [2014]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: MARCH 2, 2017

CLERK

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

3308 The People of the State of New York Ind. 5413/13
Respondent,

-against-

Gustavo Martinez,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered April 24, 2014, convicting defendant, upon his plea of guilty, of attempted criminal contempt in the second degree, and sentencing him to a term of four months, unanimously affirmed.

Defendant has not established that the narrow exception to the preservation requirement applies to his *Peque* claim (*see People v Peque*, 22 NY3d 168, 182-183 [2013], *cert denied* 574 US__, 135 S Ct 90 [2014]). The record establishes that defendant was informed of his potential deportation by way of the notice of immigration consequences served upon him by the People months before his guilty plea (*see e.g. People v Diakite*, 135 AD3d 533 [1st Dept 2016], *lv denied* 27 NY3d 1131 [2016]). We decline to review this unpreserved claim in the interest of justice. In any

event, the circumstances of the plea render it highly unlikely that defendant could make the requisite showing of prejudice under *Peque* (22 NY3d at 198-201) if granted a hearing.

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

ENTERED: MARCH 2, 2017

CLERK

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

3309 Josephine Napoli, Index 300634/14
Plaintiff-Appellant,

-against-

Lucia Di Marco also known as
Lucy Di Marco,
Defendant-Respondent.

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Michelstein & Associates, PLLC, New York (Stephen J. Riegel of counsel), for appellant.

Nicolini, Paradise, Ferretti & Sabella, PLLC, Mineola (Joshua H. Stern of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered February 2, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff was injured when she tripped and fell on the sidewalk in front of defendant's home. Defendant, as a single family homeowner, could only be liable for the alleged half-inch height differential where the two sidewalk flagstones met in front of her house if she created or exacerbated the alleged hazardous condition (*see Coogan v City of New York*, 73 AD3d 613 [1st Dept 2010]; Administrative Code of City of NY § 7-210[b]). Here, there was no evidence in the record to indicate that defendant

created the height differential. Plaintiff, at most, alleged that tar applied by defendant's husband in the joints between the sidewalk flagstones had somehow obstructed her vision of the alleged height differential. She never claimed to have tripped over the caulking that was only applied in the joint space between the sidewalk flagstones, and her assertion that the caulking had obstructed her view of the height differential in the flagstones was insufficient to raise a triable issue of fact.

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

ENTERED: MARCH 2, 2017

CLERK

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

3311 John Rotante, Index 302363/10
Plaintiff,

-against-

Advance Transit Co., Inc., et al.,
Defendants.

- - - - -

Advance Transit Co., Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Devin Moscarelli,
Third-Party Defendant-Respondent,

Michelle Pompeo, et al.,
Third-Party Defendants-Appellants.

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Keane & Bernheimer, PLLC, Valhalla (Connor W. Fallon of counsel), for appellants.

Daniel A. Fried, Yonkers, for Advance Transit Co., Inc. and Melvin J. Colon, respondents.

Russo & Toner LLP, New York (Alexandra L. Alvarez of counsel), for Devin Moscarelli, respondent.

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Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered July 18, 2016, which denied the motion of third-party defendants Michelle Pompeo and Dominick Pompeo (the Pompeos) for summary judgment dismissing the third-party action as against them as untimely, unanimously reversed, on the law and the facts, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff seeks to recover for serious injuries allegedly sustained in a motor vehicle accident involving a vehicle owned and operated by defendants. Defendants impleaded the owners and drivers of two vehicles involved in a subsequent accident with plaintiff's vehicle, seeking contribution in the event they are found liable for plaintiff's injuries. Before completion of discovery, third-party defendants the Pompeos moved for summary judgment dismissing the third-party action on the ground that plaintiff did not suffer any injury in the second accident and that motion was denied. After plaintiff filed the note of issue, the Pompeos moved to vacate the note of issue on the ground that discovery, including the deposition of third-party defendant Moscarelli, the other driver in the second accident, was still outstanding. In the alternative, the Pompeos sought an extension of their time to move for summary judgment. Supreme Court granted the motion only to the extent of directing that post note-of-issue discovery be completed. After Moscarelli failed to appear for his deposition and was precluded from testifying at trial, the Pompeos again moved for summary judgment, arguing that they had good cause for the delay and for making a second motion. Supreme Court denied their motion as an untimely, successive motion for summary judgment.

Supreme Court improvidently exercised its discretion in

declining to entertain their motion on the merits. Movants demonstrated good cause for the delay (*Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]), and sufficient cause for the second summary judgment motion (*see generally Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010]). It was not unreasonable for the Pompeos to exhaust all efforts to secure Moscarelli's deposition before moving for summary judgment in their favor on liability, given that he purportedly rear-ended plaintiff's vehicle in the subsequent accident (*see Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 108 [1st Dept 2006]; *Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338, 339-340 [1st Dept 2007]). This constitutes sufficient cause for the second summary judgment motion, especially given that movants' liability "can be further disposed of without burdening the resources of the court and movants with a plenary trial" (*Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 [1st Dept 2002]).

On the merits, the record reflects that there is no triable issue of fact as to Michelle Pompeo's negligence. Moscarelli is

precluded from testifying at trial, and no admissible evidence was submitted to rebut Michelle Pompeo's testimony that she did not cause Moscarelli to impact plaintiff's vehicle (*cf. Morales v Amar*, 145 AD3d 1000, 1002 [2d Dept 2016]).

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

ENTERED: MARCH 2, 2017

CLERK

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

3313 The People of the State of New York, Ind. 4315/12
Respondent,

-against-

Michael Turner,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered March 27, 2014,

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

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

ENTERED: MARCH 2, 2017

CLERK

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

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

3314 Christina Matthaus, Index 161769/14
Plaintiff-Appellant-Respondent,

-against-

Michael Hadjedj,
Defendant-Respondent-Appellant.

_____

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for appellant-respondent.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Alexander K. Parachini of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 12, 2016, which granted defendant's motion pursuant to CPLR 3211(a)(7) to the extent of dismissing plaintiff's fourth and fifth causes of action alleging intentional infliction of emotional distress and prima facie tort, and denied the motion to the extent it sought dismissal of the second and third causes of action for malicious prosecution and false arrest, unanimously affirmed, without costs.

Supreme Court properly granted defendant's motion to dismiss plaintiff's claim for intentional infliction of emotional distress as duplicative of her defamation cause of action (*see Fischer v Maloney*, 43 NY2d 553, 558 [1978]; *Akpinar v Moran*, 83 AD3d 458, 459 [1st Dept 2011], *lv denied* 17 NY3d 797 [2011]). Moreover, plaintiff's factual allegation that defendant made

false statements to the police, causing her arrest and incarceration, was insufficient as a matter of law to constitute extreme and outrageous behavior to sustain the claim (*see Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421 [1st Dept 2009]). Plaintiff's cause of action for prima facie tort was also properly dismissed as duplicative of her defamation claim (*see Curiano v Suozzi*, 63 NY2d 113, 117 [1984]), and, in any event, was insufficient to state a cause of action because she failed to allege special damages (*see Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]).

Regarding defendant's cross appeal, the court properly denied the motion to dismiss those causes of action alleging malicious prosecution and false arrest. Contrary to defendant's contention, plaintiff's allegation that defendant knowingly provided false information to the police, in retaliation for a domestic dispute, was sufficient to demonstrate that he initiated the proceeding (*see Brown v Sears Roebuck & Co.*, 297 AD2d 205, 210 [1st Dept 2002]). Similarly, plaintiff's factual allegations can form the basis of a claim for false arrest (*compare Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 132-133

[1st Dept 1999]).

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: MARCH 2, 2017

CLERK

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

3315 Mahmoud M. Khanfour, Index 309119/12
Plaintiff-Appellant,

-against-

Mohammad Nayem, et al.,
Defendants-Respondents.

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Isaacson, Schiowitz & Korson LLP, Rockville Centre (Martin Schiowitz of counsel), for appellant.

Thomas Torto, New York, for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 21, 2016, which granted defendants' motion for summary judgment dismissing the complaint due to plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff alleges that he suffered serious injuries to his cervical and lumbar spine as a result of a motor vehicle accident, and that injuries he suffered in two accidents 10 years earlier had resolved many years earlier.

Defendants made a prima facie showing that plaintiff did not sustain a serious injury to his cervical or lumbar spine as a result of the subject accident by submitting expert reports by an orthopedist and neurologist, who found full range of motion in those parts and opined that the alleged injuries had resolved

(*see Birch v 31 N. Blvd., Inc.*, 139 AD3d 580, 580-581 [1st Dept 2016]). Defendants also submitted a report by a radiologist, who found no sign of injury in the lumbar spine, but preexisting degenerative conditions, including disc desiccation and osteophytes, in plaintiff's cervical spine (*see Lee v Lippman*, 136 AD3d 411, 412 [1st Dept 2016]). In addition, their orthopedist reviewed plaintiff's medical records, which included an X-ray report that similarly found multilevel disc disease and osteophytes in plaintiff's cervical spine (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]).

In opposition, plaintiff failed to raise a triable issue of fact as to either his cervical spine or his lumbar spine. As to the cervical spine claim, plaintiff submitted an MRI report finding herniations and the report of his pain management specialist who found persisting limitations in range of motion and opined that they were causally related to the accident. However, plaintiff's earlier treating physician acknowledged that plaintiff's own X-ray report revealed multilevel "disc disease" and "bilateral foraminal impingement due to foraminal osteophytes." Since plaintiff's own medical records provided evidence of preexisting degenerative changes, his pain management specialist's conclusory opinion, lacking any medical basis, was

insufficient to raise an issue of fact since it failed to explain how the accident, rather than the preexisting disc disease and osteophytes, could have been the cause of plaintiff's cervical spine condition (*see Acosta v Traore*, 136 AD3d 533 [1st Dept 2016]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d at 1044).

As to the lumbar spine claim, plaintiff submitted a radiologist's report finding a bulging disc with foraminal impingement, and his pain management specialist opined that the lumbar condition was caused by the accident. There was no evidence contradicting plaintiff's testimony that his previous back injury had fully healed some 10 years before the subject accident. However, plaintiff's postaccident treatment records show that he had normal or near normal range of motion within two months after the accident, which is insufficient to support a serious injury claim (*see Gaddy v Eyler*, 79 NY2d 955 [1992]). Three years later, plaintiff's pain management specialist found arguably significant limitations in lumbar spine range of motion, but failed to reconcile his findings with the earlier conflicting

findings, and defendants are therefore entitled to summary judgment (*see Colon v Torres*, 106 AD3d 458 [1st Dept 2013]; *Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]).

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

ENTERED: MARCH 2, 2017

CLERK

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

3316 In re Andrew D. Franco, Index 101943/15
Petitioner,

-against-

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

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The Law Office of David M. Santoro, New York (Stephen T. Brewi of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan of counsel), for respondent.

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Determination of respondents dated July 6, 2015, which, after a hearing, fined petitioner based on his violation of Vehicle and Traffic Law § 1146, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Barbara Jaffe, J.], entered February 25, 2016), dismissed, without costs.

Substantial evidence supports respondents' determination (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]) that petitioner failed to exercise due care while operating his vehicle and struck the

pedestrian as she crossed the street, ultimately resulting in her death (Vehicle and Traffic Law § 1146; *see e.g. Matter of Montagnino v Fiala*, 106 AD3d 1090, 1091 [2d Dept 2013]).

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

ENTERED: MARCH 2, 2017

CLERK

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

3317 8430985 Canada Inc., Index 653564/14
Plaintiff-Respondent,

-against-

United Realty Advisors LP,
et al.,
Defendants,

Jacob Frydman,
Defendant-Appellant.

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Wrobel Markham Schatz Kaye & Fox LLP, New York (David C. Wrobel of counsel), for appellant.

The Ryan Law Group LLP, New York (Andrew J. Ryan of counsel), for respondent.

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Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 5, 2016, to the extent it awarded plaintiff the total amount of $1,302,444.80 as against defendant Jacob Frydman, and bringing up for review an order, same court and Justice, entered August 17, 2015, which granted plaintiff's motion for summary judgment in lieu of complaint, and denied defendants United Realty Advisors LP (URA) and Frydman's cross motion for summary judgment, unanimously affirmed, with costs.

Plaintiff has standing to bring this suit, as Frydman has not sustained his burden to show that plaintiff had systematic and regular unauthorized activity in New York warranting

application of Business Corporation Law § 1312(a) (*see Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 743 [2d Dept 2008]; *AirTran N.Y., LLC v Midwest Air Group, Inc.*, 46 AD3d 208, 214 [1st Dept 2007]).

The motion court properly granted plaintiff summary judgment in lieu of complaint, based on Frydman's guaranty and an affidavit from plaintiff's director establishing that there was a default in payment (*see* CPLR 3213; *see also Mariani v Dyer*, 193 AD2d 456, 457 [1st Dept 1993], *lv denied* 82 NY2d 658 [1993]). Frydman's payment obligations under the promissory note are not affected by the Heter Iska, and the guaranty is one for payment, not collection (*see General Phoenix Corp. v Cabot*, 300 NY 87, 92 [1949]).

Because URA withdrew its notice of appeal, and because its liability to plaintiff does not affect Frydman's liability under his guaranty, we decline to consider Frydman's arguments regarding URA's claim against plaintiff.

The motion court properly denied summary judgment on the cross claim against defendant Eli Verschleiser, as issue was not

properly joined (*Myung Chun v North Am. Mtge. Co.*, 285 AD2d 42, 45 [1st Dept 2001]).

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

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

ENTERED: MARCH 2, 2017

CLERK

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

3319 In re Kingsway America Inc., Index 154035/15
Petitioner-Appellant,

-against-

Zephyr Acquisition Company,
Respondent-Respondent.

Ruberry, Stalmack & Garvey, LLC, New York (James M. Barton of counsel), for appellant.

Sullivan & Worcester LLP, New York (George O. Richardson, III of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Carol Edmead, J.), entered November 18, 2015, denying the petition and dismissing the special proceeding, unanimously affirmed, with costs.

Petitioner seeks to compel respondent to submit Items of Dispute (as that term is defined in the parties' 2009 share purchase agreement) to an independent accounting firm under section 2.4(c) of the agreement. However, the record shows that the parties resolved the Items of Dispute in 2010, when petitioner did not dispute that the post-closing adjustment would

be approximately $5.5 million. We note that the language of section 2.4(c) indicates that the parties intended Items of Dispute to be resolved expeditiously.

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

ENTERED: MARCH 2, 2017

CLERK

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

3321N Gladys Suarez, Index 309840/11
Plaintiff-Appellant,

-against-

Home Dynamix, LLC, et al.,
Defendants-Respondents.

- - - - -

Ismael Justiniano, et al.,
Nonparty Respondents.

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Rosato & Lucciola, P.C., New York (Paul A. Marber of counsel), for appellant.

Law Offices of Tobias & Kuhn, New York (Anthony Bianchi of counsel), for Home Dynamix, LLC and Burma Krubally, respondents.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Ismael Justiniano, I. Rauch's Sons, Inc. and Hub Truck Rental Corp., respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered October 26, 2015, which denied plaintiff's motion to consolidate this action, based on a 2010 automobile accident, with a Queens County action also brought by plaintiff, based on a 2012 automobile accident, unanimously affirmed, without costs.

The two actions involved separate accidents, separate defendants, different alleged injuries, and unique issues of fact. Accordingly, Supreme Court did not abuse its discretion in denying plaintiff's motion to consolidate the two actions (*see McGee v Cataldi*, 169 AD2d 822 [2d Dept 1991]).

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

ENTERED: MARCH 2, 2017

CLERK

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

3322N Joseph Raia, Index 113006/09
Plaintiff-Respondent,

-against-

Hubert Pototschnig,
Defendant-Appellant,

New Century Mortgage Corporation,
et al.,
Defendants.

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Hubert Pototschnig, Woodbury, appellant pro se.

Jeffrey I. Baum & Associates, P.C., Garden City (Jeffrey I. Baum of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered January 5, 2016, which denied the motion of defendant Hubert Pototschnig to reject the report of the referee, unanimously affirmed, with costs.

The court properly denied defendant's motion, rejecting his attempts to relitigate issues already adjudicated in this action (*see Domingez v Zinnar*, 130 AD3d 414 [1st Dept 2015]). Defendant also failed to offer a proposed calculation of interest in response to the court's several requests for him to do so, and the court otherwise afforded defendant ample opportunities to be heard on his objections to the referee's report.

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

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

ENTERED: MARCH 2, 2017

CLERK

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

3323N In re Kramer Levin Naftalis & Frankel LLP, et al., Petitioners-Respondents, Index 653381/16

-against-

Michael C. Cornell, et al., Respondents-Appellants.

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Jeffrey A. Jannuzzo, New York, for appellants.

Davis Polk & Wardwell LLP, New York (Paul Spagnoletti of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered July 15, 2016, which granted the petition to permanently stay arbitration, and denied respondents' motions to dismiss the proceeding and to seal the record, unanimously affirmed, with costs.

Respondents failed to demonstrate that the parties agreed to arbitrate the subject dispute (*see Matter of Cammarata v InfoExchange, Inc.*, 122 AD3d 459, 460 [1st Dept 2014]). The potential future benefit, if any, flowing to petitioners from the attorney release in the separation agreement containing the arbitration clause is "too attenuated . . . to justify . . . an exception to the usual rule that nonsignatories cannot be compelled to arbitrate" (*Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 634 [2013]; *compare Matter of SSL*

Intl., PLC v Zook, 44 AD3d 429 [1st Dept 2007] [nonsignatory to license agreement appropriately compelled to arbitrate where it marketed products using technology covered by agreement]; *HRH Constr. LLC v Metropolitan Transp. Auth.*, 33 AD3d 568 [1st Dept 2006] [nonsignatory received monetary benefit under agreement]). There is no evidence that petitioners "knowingly exploit[ed]" the benefits of the agreement (*see Belzberg*, 21 NY3d at 631). The allegations against petitioners show, if anything, that they "may have 'exploit[ed] the contractual relation of the parties, but not the agreement itself'" (*Cammarata*, 122 AD3d at 460, quoting *Belzberg*, 21 NY3d at 631).

Nor is there evidence to support respondents' contention that petitioners "used the signatories as their agents to obtain [the attorney] release." Moreover, while an agent may bind its nonsignatory principal to an arbitration agreement where the nonsignatory seeks to compel arbitration with another signatory (*see Merrill Lynch Inv. Mgrs. v Optibase, Ltd.*, 337 F3d 125, 130-131 [2d Cir 2003]; *Hirschfeld Prods. v Mirvish*, 88 NY2d 1054, 1056 [1996]), this is not a case in which a nonsignatory seeks to compel arbitration with a signatory.

Respondents failed to show that the record contains material "so confidential or sensitive" that the record should be sealed (*Mosallem v Berenson*, 76 AD3d 345, 350 [1st Dept 2010]).

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

ENTERED: MARCH 2, 2017

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2137 Basis PAC-Rim Opportunity Fund (Master), et al., Plaintiffs-Respondents, Index 654033/12

-against-

TCW Asset Management Company, Defendant-Appellant.

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Gibson, Dunn & Crutcher LLP, New York (Christopher M. Joralemon and Peter M. Wade of counsel), for appellant.

Lewis Baach PLLC, New York (Bruce R. Grace of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about October 19, 2015, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Opinion by Kapnick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Paul G. Feinman
Judith J. Gische
Barbara R. Kapnick, JJ.

2137
Index 654033/12

_____x

Basis PAC-Rim Opportunity Fund (Master), et al.,
Plaintiffs-Respondents,

-against-

TCW Asset Management Company,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about October 19, 2015, which, to the extent appealed from, denied its motion for summary judgment dismissing the complaint.

Gibson, Dunn & Crutcher LLP, New York (Christopher M. Joralemon, Peter M. Wade, Diana M. Feinstein and Mark A. Kirsch of counsel), for appellant.

Lewis Baach PLLC, New York (Bruce R. Grace of counsel), for respondents.

KAPNICK, J.

Plaintiffs Basis PAC-Rim Opportunity Fund (Master) and Basis Yield Alpha Fund (Master) (together Basis), are two Australian-based Cayman Islands hedge funds. Defendant TCW Asset Management Company (TCW) is an investment advisor that served as the collateral manager for Dutch Hill II (Dutch Hill), a $400 million collateralized debt obligation (CDO) investment. Dutch Hill was created as an investment vehicle used for the purpose of taking a net long position on extremely risky Residential Mortgage-Backed Securities (RMBS). Nonparty Deutsche Bank was the investment banker, structurer, underwriter, and placement agent for Dutch Hill.

Deutsche Bank marketed the Dutch Hill notes to potential investors and negotiated the price of the notes. As the collateral manager, TCW selected the assets for the Dutch Hill portfolio. The primary investment strategy for Dutch Hill consisted of pairing long positions in below investment-grade tranches of RMBS, with short positions (via credit default swaps) in higher-rated tranches of the same bonds. The theory was that this strategy would significantly offset any declines in value in the long positions (the below investment-grade tranches) with gains in the corresponding credit hedge (the higher-rated tranches of the same bonds).

In January 2007, Deutsche Bank solicited Basis's investment in Dutch Hill. Part of this solicitation included a marketing book that outlined the general structure and preliminary projections for an equity investment in Dutch Hill. TCW marketed itself as having the ability to identify which risky RMBS were likely to succeed and which were likely to fail. In other words, TCW marketed itself as having the ability to select the less risky RMBS from what was then known to be the risky RMBS market. Throughout the first half of 2007, certain individuals at TCW expressed the view that portions of the subprime mortgage market were experiencing deepening deterioration, including certain types of loans originated in 2006 and certain RMBS bonds issued in 2006. However, it was TCW's view that selective portions of the subprime RMBS market remained viable and provided a fundamentally sound asset class. Prior to investing in Dutch Hill, Basis was also aware that the RMBS subprime market was becoming increasingly volatile in the first half of 2007.

Nonetheless, on May 2, 2007, Basis purchased over $27 million of Dutch Hill's Class D-3 notes, which were rated BB, the riskiest portions of the investment vehicle. By the end of July 2007, in the midst of the housing market crisis, Dutch Hill notes had lost most of their value.

Basis commenced this action on or about November 21, 2012,

asserting causes of action for fraudulent inducement, fraudulent concealment, negligent misrepresentation, breach of contract - third party beneficiary, and unjust enrichment.[1] On or about October 15, 2013, Basis filed an amended complaint asserting only the fraud claims. TCW moved for summary judgment, arguing that Basis was unable to meet its burden of proving loss causation, an element of fraud. The motion court denied TCW's motion for summary judgment, finding issues of fact as to loss causation.

Although the motion court aptly articulated the concept of loss causation, the court erred in its application. Both the motion court's decision and Basis's argument on appeal conflate the concept of loss causation with materiality, falsity and reasonable reliance - other elements of fraud. Once TCW made a prima facie showing that Basis's loss was not due to any fraudulent statements or omissions by TCW, the burden then shifted to Basis to raise an issue of fact. Basis did not meet its burden and TCW's summary judgment motion should have been granted.

A fraud claim requires "proof by clear and convincing

[1] In February 2013, TCW moved to dismiss, and on September 10, 2013, the court granted the motion to the extent of dismissing the claims for negligent misrepresentation, breach of contract, and unjust enrichment. To the extent appealed from, this Court affirmed (124 AD3d 538 [1st Dept 2015]).

evidence" as to each element of the claim (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 350 [1999]). One such element is causation, and to establish causation, plaintiffs must prove both that "defendant's misrepresentation induced plaintiff[s] to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff[s] complain (loss causation)" (*Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]). "Transaction causation is akin to reliance, and requires only an allegation that 'but for the claimed misrepresentations or omissions, the plaintiff would not have entered into the detrimental securities transaction'" (*Lentell v Merrill Lynch & Co.*, 396 F3d 161, 172 [2d Cir 2005], *cert denied* 546 US 935 [2005]).[2]

"'Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff'" (*id.* at 172). To establish loss causation a plaintiff must prove that the "'*subject* of the fraudulent statement or omission was the cause of the actual loss suffered'"(*id.* at 173). Moreover, "'when the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses

[2] TCW did not seek summary judgment on transaction causation and does not raise a transaction causation argument on appeal. Therefore, the only issue before this Court concerns loss causation.

to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases', and a plaintiff's claim fails when 'it has not . . . proven . . . that its loss was caused by the alleged misstatements as opposed to intervening events'" (*id.* at 174, quoting *First National Bank v Gelt Funding Corp.*, 27 F3d 763, 772 [2d Cir 1994]). Indeed, when an investor suffers an investment loss due to a "market crash [] of such dramatic proportions that [the] losses would have occurred at the same time and to the same extent regardless of the alleged fraud," loss causation is lacking (*see Loreley Fin. [Jersey] No. 3 Ltd. v Wells Fargo Sec., LLC*, 797 F3d 160, 186-187 [2d Cir 2015]). Although the *Loreley* case concerned a motion to dismiss and thus focused on pleading requirements for loss causation, that court did note that "[w]hether [p]laintiffs can prove [their] allegations - and whether defendants in turn can proffer evidence that the CDOs would have collapsed regardless, due to the larger crash in the [mortgage-backed securities] market - are evidentiary matters for later phases of this lawsuit" (*id.* at 188).

Here, TCW has proffered evidence that Dutch Hill would have collapsed regardless of the assets selected by TCW due to the housing market crash - a "marketwide phenomenon causing comparable losses to other investors" (*Lentell v Merril Lynch &*

Co., Inc., 396 F3d at 174). TCW submitted an expert affidavit in which the expert opined that even if TCW had selected assets that complied with the Dutch Hill model and comported with TCW's representations to Basis, Basis would still have suffered a loss due to an external and intervening cause - namely, the housing market crash. The expert conducted a common form of regression analysis to "analyze the effect that macroeconomic factors had on pools of collateral consistent with Dutch Hill II's core asset portfolio . . . in order to create a benchmark against which to compare the performance of the loan pools analyzing the collateral in Dutch Hill II." The TCW expert found that "any CDO backed by pools of loans consistent with Dutch Hill II's core asset portfolio would have suffered losses as a consequence of the general market downturn . . ." Ultimately, the expert concluded that Basis's "economic losses were caused by unforeseeable macroeconomic events . . ."

In response, Basis failed to raise an issue of fact. Despite having pleaded in its amended complaint that TCW allowed Dutch Hill to contain "toxic securities" that "performed significantly worse than a benchmark portfolio comprised of similar mortgage-backed bonds," Basis failed to produce any evidence that under the circumstances here involving the collapse of the RMBS market, it was TCW's misrepresentations, rather than

market forces, that caused the investment losses (*see e.g. Laub v Faessel*, 297 AD2d at 30-32). Instead, Basis's expert, in response, provided a general overview of the role of various players involved in CDO transactions as well as his opinion and interpretation of internal TCW emails discussing the investment vehicle at issue and the health of the market. However, Basis's expert failed to address or even discuss Basis's argument that no suitable collateral then existed and that TCW lied about its existence, and that this misrepresentation caused Basis to lose their entire investment. Basis's expert did not analyze the quality or performance of the assets purchased by TCW. Basis's expert's conclusory assessment of the economic damages suffered by Basis addressed only transaction causation, stating that "[i]n the absence of [] fraudulent inducement and concealment, [p]laintiffs aver that Basis would not have invested [$27,000,000 plus] . . . and would therefore not have suffered this total loss." This was insufficient to raise an issue of fact as to loss causation.

We do not mean to suggest that all cases in which a plaintiff alleges fraud will be unable to survive summary judgment in the event of a market collapse. However, in this case, it is Basis's complete failure to meet its burden on the issue of loss causation that compels our decision.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about October 19, 2015, which, to the extent appealed from, denied TCW's motion for summary judgment dismissing the complaint, should be reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: MARCH 2, 2017

CLERK