

In view of the Court of Appeals' recent decision in *People v Boyer* (22 NY3d 15 [2013]), defendant was not entitled to relief under 440.20 from his original sentencing as a second violent felony offender.

The Decision and Order of this Court entered herein on January 28, 2014 is hereby recalled and vacated (see M-590 decided simultaneously herewith).

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

ENTERED: APRIL 22, 2014



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two-bedroom apartment. While petitioner has submitted a series of returns completed by T A Tax and Insurance, a tax preparer, that list her address as Karem's residence, each and every W-2 received from Karem's employers and submitted to the preparer for the tax years in question lists a different address (said to be that of Karem's father). Since no independent basis for the preparer's knowledge of Karem's abode has been provided, its evidentiary value is minimal. In addition, Karem's driver's license, his employment records and a juror's certificate similarly place his residence at his father's address. Even accepting a fact not in evidence and presuming that Karem should have been included in petitioner's household composition, the record establishes that he was absent from the household while working in Utah in each of two successive years for a period of, respectively, slightly more and slightly less than 90 days, and petitioner failed to report the absences. Petitioner also failed to report the income earned from Karem's employment from 2008 through 2011, totaling over \$35,000, to respondent. Thus, the record contains substantial evidence to support the agency's decision to terminate petitioner's Section 8 rent subsidy based upon the Hearing Officer's finding of "her chronic failure to provide true and complete information to HPD," and the administrative determination must be upheld (*Matter of Salvati v*

Eimicke, 72 NY2d 784, 792 [1988]).

Petitioner discounts these findings and confines her argument to Karem's most recent absence (if that is the appropriate term) to pursue a contract of employment with the Doha Film Institute in Qatar. The contract is dated July 24, 2011, and Karem's passport indicates his arrival in the Kingdom on August 5, 2011. The contract entitles the employee to an annual flight home, and he returned to the United States at the end of the year, arriving on December 12, 2011 and returning to Qatar on January 12, 2012, where he remained as of July 9, 2012, the date of the hearing.

Petitioner contends that she had no obligation to comply with the provision of respondent's administrative plan requiring that the plan participant "[n]otify HPD of any planned absences from the unit greater than 90 days." Petitioner reasons that because Karem had not actually been absent from the premises for 90 days as of the date she signed her Section 8 recertification form on October 15, 2011, he was still a permanent member of her household under the administrative plan, and she did not misrepresent his status at such time. Be that as it may, petitioner did not inform HPD of Karem's absence until February 8, 2012, and then only in response to a notice of a scheduled pretermination conference to be held on February 10. Nor did

petitioner advise HPD of his employment, stating only that "he is overseas in Quetar [sic], Dubai." Thus, the record demonstrates a clear violation of petitioner's reporting responsibilities.

Petitioner further contends that termination of her subsidy is a disproportionate penalty, portraying the financial harm to the agency as "small" and "speculative." This reasoning contravenes the Court of Appeals' decision in *Matter of Perez v Rhea* (20 NY3d 399, 405 [2013], revg 87 AD3d 476 [1st Dept 2011]), involving the misrepresentation of household income to the New York City Housing Authority (NYCHA), in which the Court stated as follows:

"A vital public interest underlies the need to enforce income rules pertaining to public housing . . . If residents believe that the misrepresentation of income carries little to no chance of eviction, the possibility of restitution after criminal conviction may not serve adequately to discourage this illegal practice. The deterrent value of eviction, however, is clearly significant and supports the purposes of the limited supply of publicly-supported housing. It follows, then, that NYCHA's decision to terminate petitioner's tenancy is not so disproportionate to her misconduct as to shock the judicial conscience."

In the matter at bar, the record contains evidence from which it can be concluded that petitioner misrepresented the composition of her household at the outset by including her son on her Section 8 application in order to obtain a two-bedroom

apartment, a unit larger – and thus more expensive – than necessary for a single individual. Alternatively, the record demonstrates that petitioner failed to report income of a household member for several years to avoid an upward revision in her responsibility to contribute towards the rental payment for the unit. In either event, HPD has sustained monetary harm, and termination of petitioner's subsidy is warranted to provide a "meaningful deterrent to residents of income-based public housing who misstate their earnings" (*id.*).

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

ENTERED: APRIL 22, 2014


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Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11732-

Index 8771/06

11732A-

11732B Hugo Carrera,
Plaintiff-Respondent-Appellant,

-against-

Westchester Triangle Housing
Development Fund Corporation, et al.,
Defendants-Appellants-Respondents.

[And A Third-Party Action]

Goldberg Segalla LLP, White Plains (William T. O'Connell of counsel), for Westchester Triangle Housing Development Fund Corporation, Integrated Building Systems Inc., M. Melnick & Co., Inc., and Westchester Triangle, LLC, appellants-respondents.

Wade Clark Mulcahy, New York (Michael A. Gauvin of counsel), for A. Enrico Contracting Corp., appellant-respondent.

Hannum Feretic Prendergast & Merlino, LLC, New York (Matthew J. Zizzamia of counsel), for J&R Masonry, Inc., appellant-respondent.

Goarayeb & Associates, P.C., New York (Mark H. Edwards of counsel), for respondent-appellant.

Orders, Supreme Court, Bronx County (John A. Barone, J.), entered December 27, 2012, which denied defendants' motions for summary judgment dismissing the complaint and cross claims as against them, and denied plaintiff's cross motion for partial summary judgment on his common-law negligence and Labor Law §§ 200, 240(1) and 241(6) claims against defendants Westchester Triangle Housing Development Fund Corporation, Integrated

Building Systems Inc. and Westchester Triangle, LLC, and for leave to amend his bill of particulars, unanimously modified, on the law, to the extent of dismissing the cross claims and the common-law negligence and Labor Law § 200 claims against defendants J&R Masonry, Inc. and A. Enrico Contracting Corp., and dismissing the Labor Law §§ 240(1) and 241(6) claims against all defendants, and otherwise affirmed, without costs.

Labor Law § 240(1) is inapplicable to this case, because plaintiff's injuries were not "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Plaintiff testified that he and two coworkers were carrying a metal pipe on their shoulders when he slipped on a muddy surface and tripped on an object that he speculated was a rock. He lost his ability to support the pipe, which caused his coworkers to drop it; the pipe then "jumped" and hit him on his left ear, neck and shoulder.

Industrial Code (12 NYCRR) §§ 23-1.7(d), (e) and (f) and 23-1.23(a), on which plaintiff predicates his Labor Law § 241(6) claims, are also inapplicable to this case. Contrary to plaintiff's contention, the open, unpaved area where he was walking when he fell was not a "passageway" within the meaning of section 23-1.7(d) or section 23-1.7(e) (1) (see *Raffa v City of*

New York, 100 AD3d 558, 559 [1st Dept 2012]; *Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 593 [1st Dept 2013]). Section 23-1.7(e)(2) is inapplicable because, by his own testimony, plaintiff was walking in an outdoor area where the ground was composed of dirt and rocks. To the extent he tripped over a rock after he initially slipped, the rock was part of the surface of the ground and cannot be considered accumulated "debris" (*cf. Velasquez v 795 Columbus LLC*, 103 AD3d 541, 541-542 [1st Dept 2013] [mud and water covering floor due to water main break and rain were not part of floor]). Section 23-1.23(a) does not apply, because plaintiff's accident did not occur on an earth ramp or a runway.

Plaintiff is not entitled to amend his bill of particulars to allege a violation of section 23-1.7(f), because the area where his accident occurred did not require him to gain access to "working levels above or below ground."

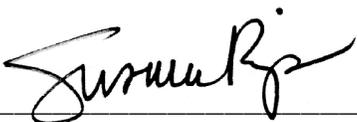
Plaintiff's Labor Law § 200 and common-law negligence claims against defendants J&R Masonry, Inc. and A. Enrico Contracting Corp. should also have been dismissed. These defendant subcontractors established entitlement to summary judgment by eliminating all material issues of fact regarding whether they created the alleged dangerous condition that led to plaintiff's accident (*see Rodriguez v Dormitory Auth. of the State of N.Y.*,

104 AD3d 529, 530 [1st Dept 2013]). While plaintiff contends that a hose used by J&R Masonry caused the wet, slippery condition, plaintiff's speculative statements that he thought or imagined the hose was used to mix cement, although he never saw anyone making cement in that area, are insufficient to raise an issue of fact whether J&R Masonry's hose caused the wet condition. Likewise, plaintiff has not shown any evidence that A. Enrico Contracting Corp. created the alleged steep slope or ramp on which he fell. Plaintiff has not disputed A. Enrico's evidence that it had already completed its excavation and leveled off the area and its work had been inspected and approved by defendant general contractor Integrated Building Systems, Inc. before plaintiff's accident. Plaintiff's common-law negligence and Labor Law § 200 claims against Westchester Triangle Housing Development Fund Corporation, Integrated Building Systems, Inc., M. Melnick & Co., Inc., and Westchester Triangle, LLC (Builder Defendants) would also be dismissed if they had been based solely on the manner in which plaintiff performed his work, as plaintiff testified that they did not control his work (see *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]). However, the Builder Defendants are not entitled to summary dismissal of these claims to the extent they are predicated on the theory of constructive notice of a

dangerous condition. While plaintiff did not know exactly what caused the trip or slip that led to his injury, he testified that the dirt area where he fell was, for at least two weeks, wet, steeply sloped, uneven, and covered in rocks, debris, and holes. The Builder Defendants' argument in reply that plaintiff's testimony lacks specificity as to the dangerous condition fails to eliminate the material issues of fact regarding whether the area's condition was dangerous and whether its dangerous nature existed for a sufficient length of time for the Builder Defendants to inspect and remedy the danger (*see Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]). Accordingly, the motion court properly denied summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against the Builder Defendants.

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York State Off. of Children & Family Servs., 91 AD3d 489 [1st Dept 2012]). Petitioner admittedly exceeded the maximum licensed capacity by three pre-school aged children (18 NYCRR 416.15[a][4]) and stalled the inspection while attempting to conceal the additional children by bringing them to the home of a neighbor, who was not an approved caregiver, while leaving the remaining children with one assistant (18 NYCRR 416.15[a][10], 416.8[a]). In addition, petitioner initially denied the existence of the additional children, and only admitted that she had taken them next door and retrieved them after the inspector confronted her and demanded that the children be returned. There is also evidence establishing that petitioner aggravated the circumstances by attempting to bribe the inspector. These actions support respondent's finding that petitioner is not capable of providing safe and suitable care (18 NYCRR 416.13[a][3]), does not possess good character and habits (18 NYCRR 416.15[a][6]), and failed to comply with the regulations (18 NYCRR 416.15[a][1]).

There exists no basis to disturb the Administrative Law Judge's credibility determinations (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). The penalty of license revocation imposed by the ALJ does not shock the conscience (*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]).

The existence of intermittent gaps in the record created by inaudible portions of the hearing transcript did not deprive petitioner of her right to meaningful review of the record (see *Matter of Rodriguez v Coughlin*, 167 AD2d 671 [3d Dept 1990]; cf. *Maude V. v New York State Off. of Children & Family Servs.*, 75 AD3d 691, 692 [3d Dept 2010]).

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

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conditions (see *People v Cataldo*, 39 NY2d 578, 580 [1976]; *People v Castillo*, 106 AD3d 440 [1st Dept 2013], *lv denied* 22 NY3d 954 [2013]). Defendant's strained interpretation of the terms of the plea is unavailing.

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Indeed, plaintiff's own doctor testified that her degenerative disc disease predated the accident, and that she had a normal neurological exam after the accident.

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Mazzarelli, J.P., Friedman, DeGrasse, Freedman, Kapnick, JJ.

12271 In re Skyla Lanie B.,

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

Jonathan Miranda B.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

Carol Kahn, 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 (Bobette M.
Masson-Churin of counsel), attorney for the child.

Order of fact-finding and disposition, Family Court, Bronx
County (Karen L. Lupuloff, J.), entered on or about May 10, 2013,
which, to the extent appealed from as limited by the briefs,
committed the guardianship and custody of the subject child to
petitioner agency and the Commissioner of the Administration for
Children's Services for the purpose of adoption, unanimously
affirmed, without costs.

Respondent father failed to preserve his argument that the
dispositional hearing was not full and fair because an
Investigation and Report or forensic study of respondent's and
the foster mother's family had not been performed, and we decline

to review it in the interest of justice. Were we to review it, we would find it unavailing. As a notice father, respondent received the rights to which he was due – namely, notice of the proceeding and an opportunity to be heard concerning the child’s best interests (see Social Services Law § 384-c; Domestic Relations Law § 111-a; *Matter of Sjuqwan Anthony Zion Perry M. [Charnise Antonia M.]*, 111 AD3d 473, 473 [1st Dept 2013]). Further, a preponderance of the evidence supports the Family Court’s determination that the child’s best interests would be served by freeing her for adoption (see *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Respondent has had limited contact with the child, and the foster mother, with whom the child has lived for over two years, has been attentive to the child’s special needs and wishes to adopt her (see *Matter of Harold Ali D.-E. [Rubin Louis E.]*, 94 AD3d 449, 450 [1st Dept 2012]).

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

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The court properly dismissed the second cause of action, which alleged that defendants failed to assist decedent in ambulating to the bathroom, contributing to his fall. On the motion, neither plaintiff nor his expert addressed this claim with reference to the records reflecting that decedent had been so assisted less than an hour earlier, at which time safety precautions had been maintained. Plaintiff's related assertion that defendants failed to implement "high risk fall prevention measures" was the subject of a claim that was subsequently tried before, and rejected by, a jury.

The court properly dismissed the third cause of action which, on its face, was limited to the interpretation of a December 15, 2004 CT scan, as plaintiff's expert did not refute defendants' prima facie showing that the scan was negative for a bleed.

As New York does not recognize an independent claim for spoliation (see *Ortega v City of New York*, 9 NY3d 69, 80-83 [2007]), the ninth cause of action was properly dismissed. Plaintiff's argument that *Ortega* does not apply because the instant claims involve first-party, rather than third-party, spoliation, is not persuasive (see *Hillman v Sinha*, 77 AD3d 887 [2d Dept 2010]).

Plaintiff's challenge to the sufficiency of the moving

papers as to the eleventh cause of action is unpreserved and we decline to review it (see *Lawlor v Lenox Hill Hosp.*, 74 AD3d 695 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]). Were we to consider the argument, we would find it unavailing as defendants' expert opined that, given decedent's medical condition, it was appropriate for defendants to counsel decedent's family regarding a do not resuscitate order.

Under the doctrine of law of the case, the subsequent defense verdict on the eighth cause of action precludes plaintiff from pursuing his related, unpleaded cause of action for punitive damages (see *Carmona v Mathisson*, 92 AD3d 492, 494 [1st Dept 2012]).

Finally, we find that the dismissed claims were properly severed (see CPLR 603, 3212[e][1]).

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for an accounting. Contrary to plaintiffs' contention, no property was pledged or entrusted to defendants (see *South Shore Thrift Corp. v National Bank of Far Rockaway*, 276 NY 465, 469 [1938]; *Chalasanani v State Bank of India, N.Y. Branch*, 235 AD2d 449 [2d Dept 1997], *lv dismissed* 90 NY2d 936 [1997]). The dispute was simply between debtors and creditors, which is a contractual relationship, and therefore, not a fiduciary relationship (see *SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004]; *Marine Midlank Bank v Yoruk*, 242 AD2d 932, 933 [4th Dept 1997]).

Plaintiffs provide no basis to set aside a final determination concerning their indebtedness in a separate action as they did not allege that the court lacked jurisdiction, or that fraud occurred (see *Ruben v American & Foreign Ins. Co.*, 185 AD2d 63, 66 [4th Dept 1992]; *Di Russo v Di Russo*, 55 Misc 2d 839, 844 [Sup Ct, Nassau County 1968]). Plaintiffs' remedy was to

raise the dispute that the judgment has been satisfied in a motion pursuant to CPLR 5021(a)(2) (see *Malik v Noe*, 54 AD3d 733, 734 [2d Dept 2008]), and where there is conflicting documentary evidence, an evidentiary hearing should be held (*id.*).

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84 AD3d 526 [1st Dept 2011]). The officer also stated that he observed petitioner exchanging small objects for money from the kitchen window of her first-floor apartment, and there is no basis to disturb the Hearing Officer's finding that petitioner's testimony denying such activity was not credible (see *Matter of Santana v New York City Hous. Auth.*, 106 AD3d 449 [1st Dept 2013]). Similarly, the Hearing Officer's decision to reject petitioner's testimony that it was the other person who was present when the search was conducted who was solely responsible, is entitled to deference (see *id.*; *Matter of Satterwhite v Hernandez*, 16 AD3d 131 [1st Dept 2005]). The subsequent dismissal of the criminal charges against petitioner does not warrant a different determination (see *Matter of Whitted v New York City Hous. Auth.*, 110 AD3d 447, 448 [1st Dept 2013]).

Under the circumstances presented, the penalty of termination does not shock our sense of fairness (see *Matter of Santana*, 106 AD3d at 449; *Matter of Zimmerman*, 84 AD3d at 526).

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against Thyssenkrupp, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint and cross claims as against Thyssenkrupp and to sever said defendants' cross claims against Macy's.

The infant plaintiff was injured when, while in Macy's Herald Square store, which has wooden escalators that were installed in 1922, his hand became caught in a metal comb plate at the bottom of an escalator where the moving stairs meet the floor. Dismissal of the complaint as against Thyssenkrupp was warranted because Thyssenkrupp established that even assuming that there was a defect in the escalator which caused the accident, it neither created the condition nor had notice of it (see *Parris v Port of N.Y. Auth.*, 47 AD3d 460 [1st Dept 2008]; see also *Casey v New York El. & Elec. Corp.*, 107 AD3d 597, 598-599 [1st Dept 2013]). Thyssenkrupp also showed that pursuant to its contract with Macy's, its responsibility for particular repairs or replacements of the wooden escalator was limited. The opinion of plaintiff's expert engineer was not sufficient to create an issue of fact as to Thyssenkrupp's negligence because the opinions proffered lacked evidentiary support (see *Luciano v Deco Towers Assoc. LLC*, 92 AD3d 606 [1st Dept 2012]; *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714-715 [1st Dept 2005]).

Although Thyssenkrupp's freedom from negligence has been established, it is not yet entitled to common-law or contractual indemnification from Macy's for costs and attorney's fees since there has been no finding that Macy's negligence was a cause of the infant plaintiff's injuries (see *Espinoza v Federated Dept. Stores, Inc.*, 73 AD3d 599, 600 [1st Dept 2010]).

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CLERK

dismissing the complaint against Beck's, and dismissing the third-party complaint against MSG, unanimously affirmed, without costs.

In this action for personal injuries allegedly sustained by plaintiff when he fell while playing basketball on a court owned and operated by defendants MSG during a game sponsored by defendant Beck's, defendants met their initial burden of establishing prima facie entitlement to summary judgment dismissing plaintiff's complaint, which also warrants dismissal of the third-party action (see generally *Weingrad v New York University Medical Center*, 64 NY2d 851 [1985]). Defendants demonstrated that plaintiff did not observe, let alone identify, the specific condition which purportedly caused him to slip and fall. Although plaintiff maintains that there was water on the court in the area where he fell, he admitted that he did not observe water on the court during the basketball game or following his fall. Thus, defendants demonstrated a lack of actual or constructive notice of the hazard that allegedly caused plaintiff to fall.

In opposition, plaintiff pointed to circumstantial evidence that was insufficient to raise a triable issue of fact since the proximate cause of the accident cannot be reasonably inferred from it, nor does it render other potential causes for the

injurious fall "sufficiently remote or technical to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392 [1st Dept 2003], *lv dismissed in part, denied in part* 100 NY3d 636 [2003][internal quotation marks omitted]; *Lynn v Lynn*, 216 AD2d 194, 194-195 [1st Dept 1995]).

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testified that shortly after recovering the 10-dollar bill, he compared it to the photocopy he had made of one of the bills to be used in the buy operation. We also note that defendant's arguments concerning the weight of the evidence improperly include background matters that were not introduced at trial (see *People v Dukes*, 284 AD2d 236 [2001], *lv denied* 97 NY2d 681 [2001]), and that were not necessarily admissible as evidence.

The court properly admitted into evidence the particular 10-dollar bill at issue. The People established a sufficient chain of custody for the bill, providing reasonable assurances of its identity (see *People v Julian*, 41 NY2d 340 [1977]; *People v Cortijo*, 251 AD2d 256 [1st Dept 1998], *lv denied* 92 NY2d 948 [1998]). Any deficiencies in the chain of custody went to the weight and not the admissibility of this evidence (see *People v White*, 40 NY2d 797, 799-800 [1976]).

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103 [1st Dept 2000]; *Lopez v Skate Key*, 174 AD2d 534 [1st Dept 1991]).

"Logically, once a plaintiff has assumed a risk, recovery premised on injury attributable to the risk assumed is barred. Recovery may not, in such a circumstance, be had on a theory of negligent supervision" (*Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246, 251 [1st Dept 2008], *affd* 10 NY3d 889 [2008]). Thus, since plaintiffs fail to point to any evidence that defendants concealed or unreasonably increased the risk to the infant plaintiff, their claim of negligent supervision necessarily fails (*compare Ross v New York Quarterly Mtg. of Religious Socy. of Friends*, 32 AD3d 251 [1st Dept 2006]; *Traficenti v Moore Catholic High School*, 282 AD2d 216 [1st Dept 2001]).

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ENTERED: APRIL 22, 2014


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

12285 John Mueller,
Plaintiff-Appellant,

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-against-

Morrell & Company, Inc.,
Defendant-Respondent.

Meister Seelig & Fein LLP, New York (Alexander D. Pencu of
counsel), for appellant.

Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP, New
York (Stan L. Goldberg of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling,
J.), entered January 22, 2013, which granted defendant's motion
for summary judgment dismissing the complaint, and denied
plaintiff's cross motion for summary judgment as to liability,
unanimously modified, on the law, to deny defendant's motion, and
otherwise affirmed, without costs.

Plaintiff alleges that in January 1998 he purchased certain
wine futures on condition that, when they were delivered to
defendant, defendant would store them for him until he was able
to take delivery. He asserts that he knew he would be working
abroad for an extended period of time and would not be able to
take delivery until his return, and that therefore he relied on
defendant's agreement to hold the futures for him in deciding to

make his purchase. In November 1999, defendant sent a letter to plaintiff and other purchasers notifying them that their wine futures had been received and would be shipped pursuant to directions, or held until spring. Plaintiff did not respond to the letter, and defendant never contacted him again concerning his wine futures.

In February 2010, plaintiff contacted defendant to arrange for delivery. Defendant denied knowledge of the transaction and of any agreement to hold plaintiff's wine futures, and asserts that it no longer has the wine futures in its possession. Plaintiff presented proof of his purchase, and, shortly after his demand was refused, commenced this action alleging breach of a bailment relationship. Defendant moved to dismiss the complaint as time-barred and on the ground of laches, presenting proof that its ability to defend the claim had been prejudiced by the delay.

Since the bailment cause of action did not accrue until plaintiff's demand for his wine futures was refused, the action was timely commenced under any applicable statute of limitations (see *Leventritt v Sotheby's, Inc.*, 5 AD3d 225 [1st Dept 2004], *lv denied* 3 NY3d 605 [2004]; CPLR 213[2]; 214[3], [4]). However, an issue of fact exists whether plaintiff's delay in making the demand upon defendant was reasonable (see *Rahanian v Ahdout*, 258 AD2d 156, 159 [1st Dept 1999]; *Martin v Briggs*, 235 AD2d 192, 198

[1st Dept 1997])). Defendant contends that the delay of more than 10 years was unreasonable as a matter of law, and has demonstrated that the delay prejudiced its ability to defend the suit. However, plaintiff's affidavit concerning the parties' understanding raises an issue of fact as to the reasonableness of his delay. Thus, neither party is entitled to summary judgment.

Issues of fact concerning the reasonableness of plaintiff's delay similarly preclude summary judgment on defendant's laches defense (see *Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 321 [1991]; *Martin*, 235 AD2d at 199).

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

12286 Harvest Town Village Vestavia Index 650146/13
Hills LLC, et al.,
Plaintiffs-Appellants,

-against-

Tvillage Tulsa LP, et al.,
Defendants-Respondents,

Chicago Title Insurance Company, etc.,
Nominal Defendant.

Cohen & Gresser LLP, New York (Brett D. Jaffe of counsel), for appellants.

Torys LLP, New York (David Wawro of counsel), for respondents.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 22, 2013, which denied plaintiffs' motion to dismiss the first counterclaim, unanimously affirmed, with costs.

Plaintiffs moved to dismiss the first counterclaim, which alleges breach of contract and seeks consequential damages, on the basis of the liquidated damages provision of the parties' purchase agreement limiting defendants' remedy for breach or repudiation of the agreement to retention of the deposit.

However, the counterclaim, as supplemented by an affidavit, spreadsheets and income statements, is sufficient to state a cause of action for willful breach, i.e. that plaintiffs' proffered reasons for not performing under the agreement are

baseless and a pretext for retaining the deposit, which would render the liquidated damages provision unenforceable as a matter of public policy (see *Meridian Capital Partners, Inc. v Fifth Ave. 58/59 Acquisition Co. LP*, 60 AD3d 434 [1st Dept 2009]; *Bank of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239 [1st Dept 2007]).

Contrary to plaintiffs' contention, the motion court did not recognize a tort of "intent to inflict economic harm" that is not cognizable under New York law, but considered whether, *in connection with the counterclaim for breach of contract*, plaintiffs' alleged wrongful acts, unrelated to any legitimate economic self-interest, could allow for recovery of damages beyond the liquidated damages provision (see *Meridian Capital Partners*, 60 AD3d at 434).

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

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

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ENTERED: APRIL 22, 2014


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While plaintiff's affidavit established prima facie that the driver of a vehicle registered to defendant was negligent in hitting plaintiff's vehicle in the rear at a stoplight, it did not disclose the driver's identity, among other things, leaving defendant without the ability to determine whether there was a non-negligent explanation for the alleged accident (see *Williams v Kadri*, 112 AD3d 442 [1st Dept 2013]), or whether a defense based on non-permissive use may be available. Nor did plaintiff deny knowledge of the driver's identity, which the driver would have been required to provide in the event of personal injury or property damage resulting from the accident (see Vehicle & Traffic Law § 600).

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ENTERED: APRIL 22, 2014

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CLERK

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

12289 Grace Perez, Index 113383/07
Plaintiff-Respondent,

-against-

Violence Intervention
Program, et al.,
Defendants-Appellants.

Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for appellants.

Law Offices of Jimmy M. Santos, PLLC, Cornwall (Jimmy M. Santos of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 29, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, the motion granted, and the complaint dismissed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff was a limited purpose public figure, and therefore, to prevail on her claim of defamation, was required to show by clear and convincing evidence that defendants published the statements at issue with actual malice (*see Huggins v Moore*, 94 NY2d 296, 301-302 [1999]; *James v Gannett Co.*, 40 NY2d 415, 421-422 [1976]). Plaintiff, by not only granting news interviews, but driving media members to the property in question

and posing for a photograph in front of it, attending a press conference, answering questions in connection with the drafting of an open letter calling for her reinstatement and defendants' resignations from the Board of Directors of Violence Intervention Program (VIP), and by her involvement in a community group organized in large part to seek her reinstatement, took affirmative steps to attract public attention. Plaintiff fails to raise any triable issue of fact as to her status as a limited public figure, as she merely argues that she did not initiate certain of these contacts, such as organizing the press conference. Nevertheless, she consistently encouraged and responded to such attention and thereby thrust herself to the forefront of the public controversy in the hope of influencing her reinstatement and/or the board members' resignations.

Plaintiff, who had a full opportunity to conduct discovery, failed to present clear and convincing evidence of actual malice, i.e., that defendants "entertained serious doubts as to the truth of [their] publication or acted with a high degree of awareness of . . . probable falsity at the time of publication" (*Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 354-355 [2009]).

She cites to her contentious relationship with defendants and their dissatisfaction with her job performance, but does not cite facts suggesting that defendants had serious doubts about

the truth of any of the statements at issue, or that defendants acted with a high degree of awareness of their falsity at the time of publication. To the extent that plaintiff claims that defendants acted in retaliation to the public outcry over her termination and/or demands that they resign, she does not show by clear and convincing evidence that they knowingly published false statements, as opposed to the true reason for her termination. Indeed, the public statement, although more detailed, was consistent with her termination letter issued nearly a month earlier, prior to any public outcry that purportedly would have generated such malice.

The remaining claims of injurious falsehood, tortious interference with prospective contractual/business relations, and intentional infliction of emotional distress should have been dismissed as duplicative of the defamation claim, as they allege no new facts and seek no distinct damages from the defamation claim.

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CLERK

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

12291- Jacob Frumkin, etc., Index 650659/10
12292 Plaintiff-Appellant,

-against-

P&S Construction, N.Y., Inc.,
et al.,
Defendants-Respondents.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for
appellant.

Trachtenberg Rodes & Friedberg LLP, New York (Barry J. Friedberg
of counsel), for respondents.

Judgment, Supreme Court, New York County (Charles E. Ramos,
J.), entered April 17, 2013, which granted defendants' motion to
confirm an arbitration award and denied plaintiff's cross motion
to vacate the award, unanimously affirmed, with costs. Appeal
from underlying order, entered February 27, 2013, unanimously
dismissed, without costs, as subsumed in the appeal from the
judgment.

Plaintiff is correct that, because the construction project
here involved the sale of units to many out-of-State persons, the
use of a national brokerage firm to market the units and funding
from a nationally chartered bank, the transaction at issue
sufficiently "affected commerce" to bring it within the ambit of
the Federal Arbitration Act (9 USC § 1, *et seq.*; see *Wien &*

Malkin LLP v Helmsley-Spear, Inc., 6 NY3d 471 [2006], cert dismissed 548 US 940 [2006]). Plaintiff waived his objections to arbitrability of certain counterclaims brought by defendants in the arbitration by failing to object to them, and instead actively arbitrating the counterclaims (*United Buying Serv. Intl. Corp. v United Buying Serv. of Northeastern N.Y.*, 38 AD2d 75, 79 [1st Dept 1971], *affd* 30 NY2d 822 [1972]).

Plaintiff's various claims that the arbitrators acted in "manifest disregard" or were "irrational" in resolving claims under the parties' agreements are without merit (see *Matter of ACN Digital Phone Serv., LLC v Universal Microelectronics Co., Ltd.*, __ AD3d __, 2014 NY Slip Op 1995 [1st Dept 2014]). While the parties' operating agreement did make certain construction cost overruns the obligation of defendants, the panel could rationally find that the limitation on overruns was only with regard to the original scope of the work and not to additional work. Similarly, the arbitrators' direction that the award be a credit to defendant Persaud's capital account was merely a

practical way to prevent plaintiff from imposing half of the award on the defendants. Finally, plaintiff, who repeatedly demanded his attorney's fees from the arbitrators, cannot complain that the award of fees to his opponents was outside their authority.

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The third and fourth causes of action, pleaded in the alternative, for damages resulting from defendant's alleged abandonment and for forfeiture of unearned legal fees, are merely alternative theories of damages arising out of the breach of contract alleged in the second cause of action.

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trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; see also *People v Guidice*, 83 NY2d 630, 636 [1994]).

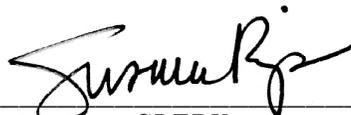
The portion of the prosecutor's summation that defendant characterized as vouching for witnesses constituted permissible comment on the evidence, and it was responsive to defense attacks on the witnesses' credibility (see *People v Overlee*, 236 AD2d 133, 144 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]).

Defendant's remaining challenges to the summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We have considered and rejected defendant's claims regarding lost exhibits and allegedly ineffective assistance of counsel.

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ENTERED: APRIL 22, 2014


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

12296- Eugene Shalik, Index 653054/11
12297 Plaintiff-Respondent,

-against-

Michael Stein,
Defendant-Appellant.

Buchanan Ingersoll & Rooney, P.C., Miami, FL (Richard A. Morgan of the bar of the State of Florida, admitted pro hac vice, of counsel), for appellant.

David Bolton, P.C., Garden City (David Bolton of counsel), for respondent.

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered November 27, 2012, awarding plaintiff the aggregate amount of \$333,591.74, pursuant to an order, same court and Justice, entered October 9, 2012, which granted plaintiff's motion for summary judgment, unanimously affirmed, with costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The parties' indemnification and contribution agreement was unambiguous in requiring that defendant pay 50% of any amount paid by plaintiff on the debt they had co-guaranteed. This was particularly true in light of the language in the precatory clauses (see *Grand Manor Health Related Facility, Inc. v Hamilton Equities, Inc.*, 65 AD3d 445, 447 [1st Dept 2009]). Furthermore,

defendant's reading of the agreement, that indemnification is only triggered upon payment of the entire loan amount, would impose only those obligations upon defendant that the law automatically imposes on a co-guarantor (see *Panish v Rudolph*, 282 AD2d 233 [1st Dept 2001]; see also *Beltrone v General Schuyler & Co.*, 229 AD2d 857 [3d Dept 1996]), and would render the agreement superfluous. Given the lack of ambiguity in the agreement, and the other undisputed facts, it was not error for the court to grant summary judgment prior to discovery.

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Dept., 106 AD3d 520, 521 [1st Dept 2013], quoting *Matter of Kelly v New York City Police Dept.*, 286 AD2d 581, 581 [1st Dept 2001]).

The court properly found that the records petitioner requested from respondent Chief Medical Examiner, pertaining to petitioner's conviction of two counts of second-degree murder (*People v Johnson*, 170 AD2d 535 [2d Dept 1991], *lv denied* 77 NY2d 996 [1991]), are exempt from disclosure under New York City Charter § 557(g) (see Public Officers Law § 87(2)(a); see also *Matter of Robles v Hirsch*, 19 AD3d 132 [1st Dept 2005], *appeal dismissed* 5 NY3d 823 [2005]; *Matter of Mitchell v Borakove*, 225 AD2d 435 [1st Dept 1996], *appeal dismissed* 88 NY2d 919 [1996]). We reject petitioner's constitutional challenge to the Charter provision on the ground that it restricts the disclosure of public records to

a greater extent than in other parts of New York State (see *Matter of Lovacco v Hirsch*, 250 AD2d 416 [1998], lv denied 92 NY2d 810 [1998], citing *Gardner v Michigan*, 199 US 325, 334 [1905])).

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

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ENTERED: APRIL 22, 2014


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

12302- Alice Raines, Index 400352/09
12303 Plaintiff-Respondent, 590686/10

-against-

Manhattan and Bronx Surface
Transit Operating Authority, et al.,
Defendants-Appellants,

Consolidated Edison Company
of New York, Inc.,
Defendant-Respondent.

- - - - -

[And A Third-Party Action]

Zaklukiewicz, Puzo & Morrissey, LLP, Islip Terrace (Eric Z.
Leiter of counsel), for appellants.

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for Alice
Raines, respondent.

David M. Santoro, New York (Stephen T. Brewi of counsel), for
Consolidated Edison Company of New York, Inc., respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright,
J.), entered January 30, 2013, which denied defendants-
appellants' motion for summary judgment, unanimously affirmed,
without costs. Order, same court and Justice, entered August 28,
2013, which, upon reargument, adhered to the original
determination, unanimously dismissed, without costs, as academic.

Triable issues of fact exist as to whether defendants-
appellants breached their duty to provide plaintiff with a safe

place to exit from the Access-A-Ride bus. In particular, there are triable issues of fact as to whether the driver knew or should have known of plaintiff's disability (see *Lewis v New York City Tr. Auth.*, 100 AD3d 554, 555 [1st Dept 2012], *lv denied* 21 NY3d 856 [2013]), and whether the driver, by waiting for plaintiff at the front of the bus, suggested a path of egress to plaintiff that caused her to navigate a portion of the roadway containing the street pothole that allegedly caused her to trip and fall (see *Malawer v New York City Tr. Auth.*, 18 AD3d 293 [1st Dept 2005], *affd* 6 NY3d 800 [2006]; *Tolbert v New York City Tr. Auth.*, 256 AD2d 171 [1st Dept 1998]).

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

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In any event, the only remedy sought by defendant is the removal of postrelease supervision from his sentence, which he characterizes as specific performance of his original plea bargain. However, a *Catu* violation would not entitle defendant to specific performance (*see People v Jones*, 101 AD3d 440, *lv denied* 20 NY3d 1100 [2013]).

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

12305 PJ Hanley's Corp., Index 156003/13
Plaintiff-Appellant,

-against-

Kiwi Pub Corp.,
Defendant-Respondent.

Stern & Stern, Brooklyn (Lawrence M. Stern of counsel), for
appellant.

Victor & Bernstein, P.C., New York (Donald M. Bernstein of
counsel), for respondent.

Order, Supreme Court, New York County (Manuel J. Mendez,
J.), entered August 15, 2013, which denied plaintiff's motion for
a *Yellowstone* injunction, unanimously affirmed, without costs.

Plaintiff's failure to seek a stay of the order denying its
motion for nearly six months after the order was issued, during
which time the cure period expired, plaintiff's sublease was
terminated, and a holdover proceeding was commenced, bars

appellate relief (see *First Natl. Stores v Yellowstone Shopping Center*, 21 NY2d 630, 637 [1968]; *166 Enters. Corp. v I G Second Generation Partners, L.P.*, 81 AD3d 154, 159 [1st Dept 2011]). It is therefore unnecessary to consider plaintiff's other arguments.

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

12306N TMR Bayhead Securities, LLC, et al., Index 115387/08
Plaintiffs-Respondents,

-against-

Aegis Texas Venture Fund II, LP,
et al.,
Defendants-Appellants.

Ganfer & Shore, LLP, New York (Ira B. Matetsky of counsel), for appellants.

Dewey Pegno & Kramarsky LLP, New York (Keara A. Bergin of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 20, 2013, which denied defendants' motion, having denominated it one for reargument of a prior order, same court and Justice, entered May 30, 2012, granting plaintiff Todd Roberts' motion for advancement of litigation costs in an underlying action, unanimously modified, on the law, defendants' motion deemed one for renewal, renewal granted, and upon renewal, the prior order adhered to, and as so modified, affirmed, without costs.

Upon their motion for renewal, defendants submitted a letter and email from the Texas Treasury Safekeeping Trust Company (Texas Trust) regarding its view on the propriety of advancing litigation costs in this action and an underlying action from

defendant Aegis Texas Venture Fund II, LP (Texas II Fund), a Texas certified capital company (CAPCO) fund. The letter and email were dated subsequent to the prior order granting plaintiff Todd Roberts' motion to compel defendants to advance him \$95,494.71 in litigation costs pursuant to defendants' operating agreements and an order of the Supreme Court entered November 16, 2010. Thus, the letter and email constituted "new facts" and the motion properly sought renewal (CPLR 2221[e]).

Defendants' arguments, however, were not directed at the \$95,494.71 in litigation costs that the prior order directed them to advance to Roberts. Rather defendants' arguments are directed at their advancement obligation generally which was not the subject of the prior order from which they sought renewal but of the Supreme Court's November 16, 2010 order which is not at issue on this appeal. We further note that the letter and email from the Texas Trust do not provide definitive guidance that it is not possible for the Texas II Fund to make advancement payments to Roberts or his counsel without expending assets of the fund in violation of Texas law, as defendants assert. Rather, the letter explicitly states that the Texas II Fund "may be in violation of the [state's] CAPCO laws."

To the extent that defendants object to specific advancement requests in the future, the Supreme Court has outlined a procedure in the prior order for raising any such objections.

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