

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**AUGUST 7, 2014**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzairelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12407N Calvin E. Thomas, Index 311416/11  
Plaintiff-Appellant,

-against-

New York City Housing Authority,  
Defendant-Respondent.

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Burns & Harris, New York (Blake G. Goldfarb of counsel), for  
appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick  
J. Lawless of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered  
February 4, 2013, which granted defendant's motion to strike from  
the bill of particulars allegations concerning the handrail of  
the staircase where plaintiff allegedly fell, and denied  
plaintiff's cross motion for leave to amend the notice of claim,  
modified, on the law, to deny defendant's motion, and otherwise  
affirmed, without costs.

Plaintiff claims that on August 15, 2011, as he stepped from  
the stairs and onto the second floor landing of stairway "A" in  
defendant's building, he slipped and fell on a puddle of urine,  
feces and debris on the landing. He testified that he held onto

the handrail as he descended the stairs but "quickly released" his hand upon encountering a lock at the base of the handrail.

In the amended notice of claim, dated November 11, 2011, plaintiff alleged that the accident was attributable to the dangerous, defective and unsafe condition of the second-floor landing. In the bill of particulars, dated March 12, 2012, plaintiff further specified that defendant was negligent in failing to maintain, repair and clean the handrail near the landing, and in causing and allowing the handrail to remain obstructed so as to prevent its use by people traversing the stairway.

Defendant moved to strike the allegations in the bill of particulars concerning the condition of the handrail, and plaintiff cross-moved for leave to serve an amended notice of claim. The motion court granted defendant's motion and denied plaintiff's cross motion.

We modify to deny defendant's motion. Plaintiff's claim that defendant failed to maintain the handrail along the stairway at or near the second floor may be fairly inferred from the notice of claim, which alleged that defendant was negligent in maintaining the second floor landing area ( *Jackson v New York City Tr. Auth.*, 30 AD3d 289, 291 [1st Dept 2006]). The notice of claim alleged generally that defendant failed to maintain

stairway "A" in the vicinity of the second floor landing, causing plaintiff's injury. The bill of particulars merely amplified the allegations of negligence concerning the landing area by further specifying that defendant had failed to maintain the handrail at the landing area (e.g. *Jackson*, 30 AD3d at 291 [claim of general negligence in notice of claim sufficient to encompass plaintiff's more specific claims that the absence of handholds or grab bars inside of bus contributed to the accident]; also *Jiminez v City of New York*, \_\_\_ AD3d \_\_\_, 2014 NY Slip Op 3585 [1st Dept 2014]; *Brown v City of New York*, 56 AD3d 304 [1st Dept 2008]).

To the extent claims concerning the handrail were "new," they were made well within the year-and-90 day limitation period and did not impede defendant's ability to conduct a meaningful investigation. Plaintiff testified at the 50-h hearing concerning the obstructed handrail and the feces and urine filled landing area. Moreover, photographs of the landing area depicting the stairs and the obstructed handrail were shown to plaintiff at the hearing.

In light of our ruling that allegations concerning the handrail may be fairly inferred from the notice of claim, plaintiff's cross motion to amend the notice of claim is rendered academic.

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

SWEENEY, J. (dissenting)

Because I cannot agree with the majority's conclusion that plaintiff's allegations concerning a defective handrail may be fairly inferred from the notice of claim, I must dissent.

The amended notice of claim states the accident was: "due to the dangerous, defective, broken, hazardous, dimly lit, wet, feces-filled and unsafe condition of said landing. . . .

[Defendant was also negligent] in its ownership, design, construction, operation, maintenance, management, repair and control of the premises mentioned, and more specifically the aforementioned landing. [Defendant was] further negligent in allowing, causing, creating and permitting the landing to be, become and remain in a broken, dangerous, defective, unstable, dimly lit, wet, feces-filled and unsafe condition; in causing, allowing and permitting the landing to be carelessly, negligently and dangerously maintained, creating a trap, nuisance and hazard upon the said premises and more particularly upon the landing and in failing to post any notice or warning of the said dangerous and defective condition at said premises and landing." Nowhere in the amended notice of claim is there even an indication of a defective handrail being a substantial factor in the accident.

Therefore, the allegations contained in the bill of particulars regarding defective conditions of the handrail were

not set forth in, and, despite the majority's conclusion, cannot fairly be inferred from, the allegations in the notice of claim (*DeJesus v New York City Hous. Auth.*, 46 AD3d 474, 475 [1st Dept 2007]).

Nor did plaintiff's General Municipal Law 50-h hearing testimony provide notice that he claimed that the handrail was defective or contributed to his accident (*Scott v City of New York*, 40 AD3d 408, 410 [1st Dept 2007]). The only reference to the handrail in plaintiff's testimony was that he was holding on to it and let go because of what turned out to be a lock at the end of the railing. There was never so much as an inference that the handrail was in any way defective much less a cause of the accident. The record simply does not support the majority's conclusion concerning the allegations of a defective handrail.

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issues of fact about whether the response of its correction officers breached a duty to protect decedent from reasonably foreseeable harm in providing emergency medical assistance once she complained of difficulty breathing and otherwise exhibited signs of an asthma attack (see generally *Sanchez v State of New York*, 99 NY2d 247 [2002]). Dozens of eyewitnesses provided conflicting accounts regarding, among other things, the timing of the officers' calls for medical assistance, and whether resuscitative efforts undertaken before medical personnel arrived were performed by the officers or whether other inmates took such measures in the face of inaction by the officers. Plaintiffs' expert affirmation raised triable issues of fact as to the adequacy of the officers' response and the soundness of defendants' expert's opinions. The City's reliance on governmental immunity is unavailing, since there are triable issues of fact as to whether the death was caused in part by a negligent failure to comply with mandatory rules and regulations of the New York City Department of Corrections (DOC), requiring, among other things, that correction officers respond immediately in a medical emergency, and that officers who are trained and certified in CPR administer CPR where appropriate (see *Valdez v City of New York*, 18 NY3d 69, 80 [2011]).

Similarly, the court incorrectly dismissed plaintiffs' 42

USC § 1983 claim against Powell, since there are triable issues of fact about whether her conduct constituted "deliberate indifference" to decedent's "serious medical needs" (*Estelle v Gamble*, 429 US 97, 103-105 [1976]). Powell also failed to establish her entitlement to qualified immunity (see *Anderson v Creighton*, 483 US 635, 638 [1987]).

The court correctly dismissed plaintiffs' § 1983 claim against Perry. There is no indication in the record that Perry contributed to the decedent's death in any way. Rather, his involvement as Director of DOC's Investigations Division was to oversee the investigation of this incident after decedent's death. He had no responsibility for creating guidelines or procedures for the response to inmates' medical conditions or the provision of medical services to inmates. There is nothing before us that would warrant the imposition of § 1983 liability against him.

The court should not have dismissed plaintiffs' § 1983 claim against defendant Rashid, who did not move for summary judgment, in light of the default judgment entered against her in this action.

The court correctly dismissed the § 1983 claim against the City. Although the face of the complaint does not contain a § 1983 claim against the City, and plaintiffs' bill of particulars

clarified that they have made no such claim, the parties' submissions in their appellate briefs have treated the complaint as asserting such a claim. There is, however, no evidence of a "policy or custom" evincing deliberate indifference to the rights of inmates (*Connick v Thompson*, \_\_ US \_\_, \_\_, 131 S Ct 1350, 1359-1360 [2011]). "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action" (*id.* at 1360 [internal quotations and citations omitted]). "Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights" (*id.*).

Here, the two employees allegedly acting unconstitutionally were involved in the very incident for which § 1983 damages are sought against the City. Accordingly, their conduct could not have put the City on prior notice that its training was deficient, sufficient to demonstrate the City's "deliberate indifference" (*id.*).

The court properly found, in the alternative to its dismissal of the § 1983 claims, that plaintiffs are precluded from seeking damages for loss of enjoyment of life or loss of familial association, such damages being inapplicable to this

wrongful death action (see *Banks v Yokemick*, 177 F Supp 2d 239, 246 n5 [SD NY 2001]; see also *McCray v City of New York*, 2007 WL 4352748, \*27, 2007 US Dist LEXIS 90875, \*94-96 [SD NY, Dec. 11, 2007, No. 03-Civ-9685 (DAB)]).

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

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and checked to make sure that there was no debris before climbing to the fourth rung. While plaintiff testified that he assumed that it was a piece of debris that caused his ladder to jump or slip, he also said that he never saw any specific piece of debris under his ladder, either before or after his accident.

Although relevant only to plaintiff's pending Labor Law §§ 240(1) and 241(6) claims against Bovis, the undisputed evidence established that Bovis was a statutory agent for the City since it possessed and exercised supervisory control and authority over the work being done (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). "When the work giving rise to [the duty to conform to the requirements of section 240(1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). Bovis's own superintendent testified that Bovis functioned as the "eyes and ears" of the City for the subject construction project, and it had broad responsibility under its contract to coordinate and supervise the work of the four prime contractors, including plaintiff's employer (*Walls* at 864). While one of these four prime contractors, Tully Construction Co., Inc., was labeled in its contract with the City as a "general contractor," the

deposition testimony of Tully's superintendent confirmed that Bovis had the authority to direct Tully's work.

Since the indemnity provision requires Bovis to indemnify the City for Bovis's negligence "or from [its] failure to comply with any provision of this contract or of law," the City is entitled to full contractual indemnification for any violation of the Labor Law.

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the separate incidents, and the evidence as to each of the three crimes was presented separately and was readily capable of being segregated in the minds of the jury, as they occurred on different dates and involved entirely different witnesses (see *People v Ford*, 11 NY3d 875, 879 [2008]; see also *People v Streitferdt*, 169 AD2d 171, 176 [1991], *lv denied* 78 NY2d 1015 [1991]). In any event, defendant has not established that the joinder of the three incidents caused him any prejudice.

The court properly exercised its discretion in instructing the jury that it could consider similarities between two of the crimes on the issue of identification. The crimes had enough distinctive aspects to establish a pattern that was probative of defendant's identity (see *People v Beam*, 57 NY2d 241, 253 [1982]; *People v Swinton*, 87 AD3d 491, 493 [1st Dept 2011], *lv denied* 18 NY3d 862 [2011])). The two burglaries, committed within two days, shared many features that formed a pattern when viewed collectively. Although the crimes were not identical, "[i]t is not necessary that the pattern be ritualistic for it to be considered unique; it is sufficient that it be a pattern which is distinctive" (*Beam*, 57 NY2d at 253).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se claims.

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and 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]). When the incident at issue occurred, Fernandez had been a NYCTA bus driver for 15 years, had received consistently positive performance evaluations, and had never been disciplined.

Moreover, by imposing the harsh penalty of termination on its employee for a first incident, NYCTA disregarded its own disciplinary guidelines. NYCTA's policy is found in the collective bargaining agreement between the agency and Fernandez's union, which provides that NYCTA "shall be guided by 'the principle of progressive discipline' in the administration of its disciplinary procedures."

Here, depriving Fernandez of his livelihood because of a single incident "is disproportionate to the misconduct . . . or to the harm or risk of harm to the agency or institution, or to the public" (*Pell*, 34 NY2d at 234; see also *Matter of Principe v New York City Dept. of Educ.*, 94 AD3d 431 [1st Dept 2012] [termination disproportionate for petitioner with spotless, five-year record], *affd* 20 NY3d 963 [2012]; *Matter of Riley v City of New York*, 84 AD3d 442 [1st Dept 2011] [termination disproportionate for petitioner with 15 years of service and good

record]; *Matter of Solis v Department of Educ. of City of N.Y.*,  
30 AD3d 532, 532 [2d Dept 2006] [termination unwarranted for  
petitioner with "otherwise unblemished 12-year record").

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

12928-

Index 29302/02

12929 Sheryl Menkes, etc.,  
Plaintiff-Appellant,

-against-

Beth Abraham Health Services,  
Defendant-Respondent,

Beth Abraham Health Facility, et al.,  
Defendants.

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Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for  
appellant.

Carroll, McNulty & Kull, LLC, New York (Frank J. Wenick of  
counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.),  
entered January 8, 2013, which granted defendants' motion to  
quash a subpoena ad testificum served on a nonparty witness,  
unanimously reversed, on the facts, without costs, and the motion  
denied. Appeal from order, same court and Justice, entered June  
26, 2013, which, to the extent appealed from as limited by the  
briefs, denied plaintiff's motion to renew, unanimously  
dismissed, without costs, as academic.

In May 2012, plaintiff served a nonparty subpoena on Cecilia  
Zuckerman, the former chief operating officer of defendant Beth  
Abraham Health Services (BAHS), who had not been employed by BAHS  
since 1999. In support of their motion to quash, defendants

submitted Zuckerman's affidavit in which she averred that she was not properly served with the subpoena and that she did not treat any patients at BAHS and had no recollection of plaintiff's decedent or of BAHS's rules, policies, and procedures during the relevant period in the late 1990s.

In opposition to the motion, plaintiff did not submit evidence that the process server was denied entry into Zuckerman's building before leaving the subpoena with her doorman, as is required to show proper leave and mail service under CPLR 308(2) (see *Soils Engineering Inc. v Donald*, 258 AD2d 425 [1st Dept 1999]). Plaintiff, however, now asks this Court to take judicial notice of the process server's affidavit of service, "which is contained within the court file of the Supreme Court, Bronx County, as subpoenaed and transferred to this Court in connection with the appeal." Plaintiff argues that the affidavit establishes that leave and mail service was proper because the process server left the subpoena with Zuckerman's doorman only after he was denied entry into her building. Importantly, it is uncontested that the subpoena was then mailed to Zuckerman at her home address and was received by her. Therefore, the Court will reach the merits of the motion to quash.

Defendants' contention that the deposition would be a futile

exercise in light of the passage of time and the witness's sworn denial of any relevant knowledge, is not sufficient to establish "that the discovery sought is 'utterly irrelevant' to the action or that the 'futility of the process to uncover anything legitimate is inevitable or obvious'" (*Matter of Kapon v Koch*, 23 NY3d 32, [2014]). Therefore, the deposition of nonparty Zuckerman should go forward.

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

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Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12603-

Index 652429/11

12604 Rita Cusimano, etc., et al.,  
Plaintiffs-Appellants,

-against-

Andrew V. Schnurr, CPA, et al.,  
Defendants-Respondents,

Bernard V. Strianese, et al.,  
Third-Party Intervenors-Respondents.

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Dewey Pegno & Kramarsky LLP, New York (David S. Pegno of  
counsel), for appellants.

Garvey Schubert Barer, New York (Alan A. Heller of counsel), for  
Andrew V. Schnurr, Michael Gerard Norman, CPA, P.C. and Bernard  
V. Strianese, respondents.

Joseph & Terracciano, LLP, Syosset (Peter J. Terracciano of  
counsel), for Bernadette Strianese, respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos,  
J.), entered September 11, 2013, reversed, on the law,  
defendants' cross motion and intervenors' motions denied,  
plaintiffs' motion granted, and the action stayed pending the  
arbitration, without costs. Appeal from order, same court and  
Justice, entered July 16, 2013, dismissed, without costs, as  
subsumed in the appeal from the judgment.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.  
Karla Moskowitz  
Leland G. DeGrasse  
Rosalyn H. Richter  
Barbara R. Kapnick, JJ.

12603-12604  
Index 652429/11

x

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Rita Cusimano, etc., et al.,  
Plaintiffs-Appellants,

-against-

Andrew V. Schnurr, CPA, et al.,  
Defendants-Respondents,

Bernard V. Strianese, et al.,  
Third-Party Intervenors-Respondents.

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Plaintiffs appeal from the judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered September 11, 2013, and the order, same court and Justice, entered July 16, 2013 which, to the extent appealed from, granted defendants' cross motion and intervenors' motions to stay the arbitration to the extent of staying the arbitration of all claims against defendant Schnurr on statute of limitations grounds, and staying the arbitration of certain claims against intervenors and the remaining defendants on statute of limitations grounds, and granted plaintiffs' motion to stay the action to the extent of directing the parties to arbitrate the non-time-barred claims.

Dewey Pegno & Kramarsky LLP, New York (David S. Pegno, Tamara L. Bock and David C. Gartenberg of counsel), for appellants.

Garvey Schubert Barer, New York (Alan A. Heller and Ella Aiken of counsel), for Andrew V. Schnurr, Michael Gerard Norman, CPA, P.C. and Bernard V. Strianese, respondents.

Joseph & Terracciano, LLP, Syosset (Peter J. Terracciano and Janine T. Lynam, of counsel), for Bernadette Strianese, respondent.

RICHTER, J.

In this appeal, we must determine, first, whether the Federal Arbitration Act (FAA) (9 USC § 1, *et seq.*) applies to the underlying agreements and, second, whether plaintiffs waived their right to arbitrate a statute of limitations issue by having pursued their claims through litigation. We conclude that the FAA does apply and, therefore, the question of whether plaintiffs' claims are time-barred should be determined by the arbitrator. We also find that plaintiffs did not waive their right to have the statute of limitations issue decided by the arbitrator.

Plaintiffs Rita Cusimano and Dominic J. Cusimano are husband and wife, and intervenors Bernard V. Strianese and Bernadette Strianese are Rita's father and sister respectively. Rita and the Strianeses own or formerly owned, in various degrees, certain entities that invest in commercial real estate. Defendants Andrew V. Schnurr, CPA and Michael Gerard Norman, CPA are certified public accountants who, along with Michael Gerard Norman, CPA, P.C., Norman's accounting firm (collectively the accountants), are alleged to have provided accounting and tax services to the Cusimanos and the various entities. The first of these entities is the Strianese Family Limited Partnership (FLIP), which initially owned commercial property in Deer Park,

New York, and now owns a commercial property in Florida, which is currently leased to a CVS Drug Store. The second entity is Berita Realty, LLC (Berita), which currently owns a minority interest in an entity that owns a Marriott Hotel in New York State. The third enterprise consists of two entities known collectively as the Seaview Corporations (Seaview), which own two commercial buildings in New York State.

In September 2011, the Cusimanos commenced this action against the accountants alleging that they acted in concert with the Strianeses to misappropriate distributions and assets from Berita, commit tax fraud in relation to FLIP, and fraudulently induce Rita to sell her interest in Seaview to Bernard.<sup>1</sup> The complaint asserts causes of action for aiding and abetting fraud, accounting malpractice and breach of fiduciary duty, and seeks both monetary and injunctive relief.<sup>2</sup>

In February 2012, the accountants moved to dismiss the complaint, asserting that the Cusimanos' claims are barred by the statute of limitations. They also sought dismissal on several other grounds, including failure to allege the fraud claim with

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<sup>1</sup> Rita asserts claims both individually and derivatively on behalf of FLIP and Berita.

<sup>2</sup> Following the filing of the complaint, the Cusimanos moved to disqualify the accountants' counsel. The court denied that motion and that issue is not before us on this appeal.

particularity and failure to state a cause of action.<sup>3</sup> In an oral decision rendered July 17, 2012, the motion court dismissed the malpractice claims against Schnurr as time-barred based on its conclusion that he ceased to render any accounting services in or about 2002. The motion court also concluded that the malpractice claims against Norman and his firm were barred by the statute of limitations to the extent they involved acts or omissions preceding 2008. In addition, the motion court found that the fraud and breach of fiduciary duty claims were not pleaded with the specificity required by CPLR 3016(b), but gave plaintiffs leave to replead. In light of the motion court's decision on repleading, it stayed discovery.

In September 2012, instead of filing an amended complaint, the Cusimanos filed a demand for arbitration and statement of claim with the American Arbitration Association (AAA). In the arbitration, which was brought against both the accountants and the Strianeses, the Cusimanos asserted claims similar to those raised in the complaint in the court action. Plaintiffs then moved pursuant to CPLR 7503(a) to stay the action pending the arbitration. The accountants cross-moved pursuant to CPLR

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<sup>3</sup> While the accountants' motion was pending, the Cusimanos served several nonparty subpoenas. It appears that no discovery was exchanged in response to these subpoenas.

7503(b) to permanently stay the arbitration on the grounds that the arbitration claims are time-barred. By separate motions, the Strianeses each moved to intervene in the court action and to permanently stay the arbitration based on the statute of limitations. The Cusimanos opposed a stay of arbitration and argued that, because the agreements were subject to the FAA, the issue of the statute of limitations was for the arbitrator, not the court, to decide.

In a decision and order entered July 16, 2013, the motion court found that the FAA does not apply to the agreements at issue because they do not involve interstate commerce. Thus, the motion court concluded that the question of whether the claims are barred by the statute of limitations was for it to decide. The motion court then found that many of the Cusimanos' claims were barred by the statute of limitations, and granted the accountants' and the Strianeses' motions to the extent of permanently staying arbitration of the time-barred claims.<sup>4</sup> The motion court also concluded that any right Rita may have had to arbitrate was waived by her resort to, and participation in, the litigation of this action. Finally, the court granted plaintiffs' motion to the extent of directing the parties to

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<sup>4</sup> The motion court also granted the Strianeses' motions to intervene.

proceed to arbitration on the non-time-barred claims. A judgment was entered on September 11, 2013, and plaintiffs now appeal from both the order and judgment.<sup>5</sup>

We first determine whether the court properly considered the statute of limitations issue or whether it should have been left for the arbitrator. Essential to this question is the determination of whether the FAA applies to the agreements of the three family entities. It is well-settled, and the parties do not dispute, that if the agreements are governed by the FAA, then the timeliness issue is for the arbitrator, not the court (see *Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]).<sup>6</sup> The FAA governs agreements which “evidenc[e] a transaction involving commerce” (9 USC § 2). In determining if the FAA applies to a contract, the central question is whether the “agreement is a contract evidencing a transaction involving commerce within the meaning of the [FAA]” (*Citizens Bank v Alafabco, Inc.*, 539 US 52, 53 [2003] [internal

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<sup>5</sup> None of respondents cross-appealed from the motion court’s order and judgment sending some claims to arbitration.

<sup>6</sup> Bernadette argues that even if the FAA applies, certain choice of law provisions in the various agreements require that the timeliness issue be decided by the court (see *Diamond Waterproofing*, 4 NY3d at 253). Because neither she nor the other respondents raised this issue before the motion court, it is unpreserved for appellate review and we decline to reach it in the interest of justice.

quotation marks omitted]).

Courts have interpreted the term “involving commerce” broadly (see *id.* at 56; *Allied-Bruce Terminix Companies, Inc. v Dobson*, 513 US 265, 270 [1995]). In *Allied-Bruce*, the United States Supreme Court concluded that the purpose of the FAA – to reduce the amount of litigation through the enforcement of arbitration agreements – supports a broad interpretation of the term “involving commerce” (513 US at 275). The Court declined to restrict transactions involving commerce only to those “activities within the flow of commerce” (*id.* at 273 [internal quotation marks and emphasis omitted]). Rather, it found the phrase “involving commerce” to be the equivalent of “affecting commerce,” a term associated with the broad application of Congress’s power under the Commerce Clause (*id.* at 273-274; see *Citizens Bank*, 539 US at 56).

The Supreme Court reaffirmed this interpretation of “involving commerce” in *Citizens Bank*, stating that “it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce, that is, within the flow of interstate commerce” (539 US at 56 [internal quotation marks omitted]). Further, the Court held that individual transactions do not need to have a substantial effect on interstate commerce in order for the FAA to apply (*id.*). Rather,

as long as there is economic activity that constitutes a general practice "bear[ing] on interstate commerce in a substantial way," the FAA is applicable (*id.* at 57; see also *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 478 [2006], cert dismissed 548 US 940 [2006]; *ImClone Sys. Inc. v Waksal*, 22 AD3d 387, 387 [1st Dept 2005]).

Based on a broad application of the term "involving commerce," we find that the FAA applies to the agreements at issue. Each of the agreements concerns transactions that affect commerce, and all of the entities are involved in the rental of commercial property. FLIP's rental property, which is located in Florida, is leased by a CVS drug store; Berita owns an interest in an entity that in turn owns a Marriott Hotel; and Seaview owns two commercial buildings. Because commercial real estate can affect interstate commerce, the ownership of and investment in the commercial buildings here, one of which is occupied by an international chain hotel and another which houses a national chain drug store located out-of-state, renders the FAA applicable to these agreements (see *Frumkin v P&S Constr., N.Y., Inc.*, 116 AD3d 602, 603 [1st Dept 2014]).

We reject respondents' claims that the FAA is inapplicable because, in their view, this is a dispute about the mismanagement of the family entities in New York State. The proper inquiry is

whether the economic activity in question represents a general practice that bears on interstate commerce in a substantial way (see *Citizens Bank*, 539 US at 56-57; *Diamond Waterproofing*, 4 NY3d at 250 [FAA was applicable “as the *contract* had an effect on interstate commerce”] [emphasis added]). This dispute not only involves substantial commercial transactions covering real properties, some of which are not in this state, but as plaintiffs note, the properties are part of national hotel and drug store chains.

Respondents contend that the FAA does not apply because the agreements themselves do not expressly contemplate transactions involving interstate commerce. This argument seeks to narrow the applicability of the FAA in a manner that the courts have declined to adopt. In *Allied-Bruce*, the Supreme Court faced the question of whether, at the time of agreement, the parties must have contemplated that the contract would evidence a transaction involving substantial interstate commerce or if it was enough that a transaction involving commerce had occurred in fact (513 US at 277-279). The Court found that requiring parties to include a specific reference to interstate commerce in their agreements would undermine the purpose of the FAA by encouraging further litigation as parties contested whether interstate commerce was contemplated at the time the agreement was executed

(*id.* at 278-279). The fact that the agreements here did not expressly contemplate the ownership of commercial real estate that would affect interstate commerce does not, under *Allied-Bruce*, preclude this Court from finding that the FAA applies.<sup>7</sup>

Having determined that the issue of statute of limitations should be determined by the arbitrator, we now turn to the question of waiver.<sup>8</sup> Although a party may have a right to arbitrate, the court may determine that a party has waived this

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<sup>7</sup> Respondents' reliance on *Matter of Laszlo N. Tauber & Assoc. I v American Mgt. Assn.* (304 AD2d 413 [1st Dept 2003]) is misplaced. *Laszlo* predates both *Citizens Bank* and *Diamond Waterproofing*, which reiterated the broad interpretation of the phrase "involving commerce" (*Diamond Waterproofing*, 4 NY3d at 252).

<sup>8</sup> We reject plaintiffs' contention that the issue of waiver must be sent to arbitration because the agreements at issue reference the AAA rules. In *Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's* (66 AD3d 495 [1st Dept 2009], *affd* 14 NY3d 850 [2010]), this Court held that where the arbitration agreement referred to arbitration under the AAA rules, the question of arbitrability is left to the arbitrators. However, that case did not involve the issue presented here, *i.e.*, whether a waiver occurred as a result of conduct during litigation. Indeed, this Court in a recent case, *21st Century N. Am. Ins. Co. v Douglas* (105 AD3d 463 [1st Dept 2013]), which discussed *Life Receivables*, decided the issue of whether arbitration was waived by engaging in discovery. Furthermore, it is not apparent from the wording of the arbitration clauses that the parties intended to have the specific issue of waiver by litigation conduct decided by the arbitrator (*see generally Zachariou v Manios*, 68 AD3d 539, 539-540 [1st Dept 2009]). Nor would it make sense to do this, given the specific issue here, where the parties sought a ruling from the court as to whether the arbitration or the court action can proceed based on the parties' prior litigation posture.

right by having participated in litigation (*Matter of Advest, Inc. v Wachtel*, 253 AD2d 659, 660 [1st Dept 1998]; see *Ryan v Kellogg Partners Inst. Servs.*, 58 AD3d 481, 481 [1st Dept 2009]).<sup>9</sup> There is a “strong federal policy favoring arbitration,” and waiver should not be “lightly inferred” under the FAA (*Leadertex, Inc. v Morganton Dyeing & Finishing Corp.*, 67 F3d 20, 25 [2d Cir 1995] [internal quotation marks omitted]; see *Rush v Oppenheimer & Co.*, 779 F2d 885, 887 [2d Cir 1985]). A party does not waive the right to arbitrate simply by pursuing litigation, but by “engag[ing] in protracted litigation that results in prejudice to the opposing party” (*Kramer v Hammond*, 943 F2d 176, 179 [2d Cir 1991] [internal quotation marks omitted]).

In determining what constitutes protracted litigation for the purposes of waiver, there is no bright line rule. Rather,

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<sup>9</sup> There is no merit to plaintiffs’ contention that the issue of waiver should be decided by the arbitrator. It is true that *Diamond Waterproofing* contains dicta suggesting that waiver is a matter for the arbitrator to decide (4 NY3d at 252, citing *Howsam v Dean Witter Reynolds, Inc.*, 537 US 79, 84 [2002]). Notwithstanding that language, several circuit courts of appeal have concluded that *Howsam* did not change the long-established rule that courts, not arbitrators, decide whether a party’s litigation conduct constitutes a waiver of arbitration (see *Grigsby & Assoc., Inc. v M Sec. Inv.*, 664 F3d 1350, 1354 [11th Cir 2011]; *JPD, Inc. v Chronimed Holdings, Inc.*, 539 F3d 388, 394 [6th Cir 2008]; *Ehleiter v Grapetree Shores, Inc.*, 482 F3d 207, 217 [3d Cir 2007]; *Marie v Allied Home Mtge. Corp.*, 402 F3d 1, 11-12 [1st Cir 2005]).

the court should consider three factors: (1) the amount of time between the commencement of the action and the request for arbitration; (2) the amount of litigation thus far; and (3) proof of prejudice to the opposing party (*Leadertex*, 67 F3d at 25; see *Matter of Advest*, 253 AD2d at 660-661). Indeed, "the key to a waiver analysis is prejudice" (*Thyssen, Inc. v Calypso Shipping Corp., S.A.*, 310 F3d 102, 105 [2d Cir 2002]). Prejudice may either be substantive prejudice or result from excessive delay or costs caused by the moving party's pursuit of litigation prior to seeking arbitration (*id.* at 105), though cost alone is not sufficient to establish prejudice (see *Blimpie Intl. v D'Elia*, 277 AD2d 69, 70 [1st Dept 2000]). A party may be substantively prejudiced when the other party is attempting to relitigate an issue through arbitration, has participated in substantial motion practice, or seeks arbitration after engaging in discovery that is unavailable in arbitration (see *Leadertex*, 67 F3d at 26).

Applying these principles, we find that plaintiffs' actions in this litigation have not prejudiced respondents such that the court must find waiver. Although plaintiffs commenced this action in court, they did not engage in aggressive litigation involving multiple motions addressed to the merits, nor did they pursue state court appeals (see *Kramer*, 943 F2d at 178-179 [defendant found to have waived right to arbitrate where he

pursued multiple appeals in two states, including petitioning the Supreme Court for writ of certiorari]). Importantly, the only substantive motion in this action was made by the accountants. Plaintiffs moved only to disqualify defense counsel, relief which could have been sought in arbitration. In any event, this type of motion would be insufficient to constitute waiver under the federal case law. Respondents point to the fact that plaintiffs requested subpoenas while the motion to dismiss was pending, but no actual discovery took place. Therefore, plaintiffs did not obtain any evidence that would not be available to them in arbitration (see *Leadertex*, 67 F3d at 26).

Respondents assert that plaintiffs, by seeking arbitration, are attempting to relitigate the issues they lost before the motion court. However the motion court gave plaintiffs leave to replead with specificity, effectively giving plaintiffs "another bite at the apple," at least as to the sufficiency of the pleadings. Thus, plaintiffs have not received any greater advantage by filing a statement of claim in an arbitration than they would have obtained had they filed an amended complaint. In any event, respondents point to no case finding waiver solely because a party filed an arbitration demand after limited motion practice, particularly where, as here, only one year had passed

and no discovery had been exchanged.<sup>10</sup>

The accountants argue that plaintiffs' delay in seeking arbitration is prejudicial because it caused them to experience unnecessary delay and expenses.<sup>11</sup> They stress the amount of time that passed between plaintiffs' filing their complaint and pursuing arbitration and argue that they incurred legal fees in challenging plaintiffs' subpoenas. A delay of one year does not, in itself, amount to protracted litigation (see *Kramer*, 943 F2d at 178-179 [party found to have waived right to arbitrate where four years had passed]), particularly where a delay "was not accompanied by substantial motion practice or discovery" (*Thyssen*, 310 F3d at 105). Further, the expense the accountants incurred in responding to plaintiffs' procedural motion and subpoenas does not, by itself, establish waiver (see *id.*; *Blimpie*, 277 AD2d at 70). Indeed, this Court has found that "pretrial expense and delay, without more, does not constitute

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<sup>10</sup> Respondents' contention that this case is analogous to *Louisiana Stadium & Exposition Dist. v Merrill Lynch, Pierce, Fenner & Smith Inc.* (626 F3d 156 [2d Cir 2010]) is unavailing. In that case, the plaintiffs filed two "essentially identical" actions in federal and state court and filed three complaints before finally seeking arbitration (*id.* at 158).

<sup>11</sup> Because the Strianeses were not named as defendants in plaintiffs' original complaint and were not involved in the motion to dismiss, they cannot claim prejudice because of the litigation costs involved in the earlier motion, and any waiver claim based solely on this argument is unavailing as to them.

prejudice sufficient to support" waiver (*Blimpie*, 277 AD2d at 70).

Although plaintiffs could have sought arbitration sooner, the fact that they did not file a substantive motion or obtain discovery material that would not have been available in arbitration weighs in favor of allowing arbitration to proceed. Indeed, when assessing the question of waiver, "any doubts concerning whether there has been a waiver are resolved in favor of arbitration" (*Leadertex*, 67 F3d at 25). In light of the strong preference for arbitration and the lack of prejudice to respondents, we find that no waiver has occurred (*see Thyssen*, 310 F3d at 104-105).

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

Accordingly, the judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered September 11, 2013, which, to the extent appealed from, granted defendants' cross motion and intervenors' motions to stay the arbitration to the extent of staying the arbitration of all claims against defendant Schnurr on statute of limitations grounds and staying the arbitration of certain claims against intervenors and the remaining defendants on statute of limitations grounds, and granted plaintiffs' motion to stay the action to the extent of directing the parties to

arbitrate the non-time-barred claims, should be reversed, on the law, defendants' cross motion and intervenors' motions denied, plaintiffs' motion granted, and the action stayed pending the arbitration, without costs. The appeal from the order of the same court and Justice, entered July 16, 2013, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: AUGUST 7, 2014

  
CLERK