

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 21, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12943 &
M-2741

In re Trevor McK.,

A Child Under Eighteen
Years of Age, etc.,

Administration for Children's Services,
Petitioner-Appellant,

Teanja N.T.,
Respondent-Respondent.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon
of counsel), for appellant.

Venable LLP, New York (Nicholas M. Reiter of counsel), for
respondent.

Law Offices of Keith Brown, New York (Keith Brown of counsel),
attorney for the child.

Order, Family Court, Bronx County (Karen I. Lupuloff, J.),
entered on or about February 26, 2014, which, after a hearing,
dismissed with prejudice the petition alleging that respondent
mother had neglected the subject child, unanimously affirmed,
without costs.

The Family Court's determination, that petitioner failed to demonstrate by a preponderance of the evidence that the mother's mental condition placed the child in actual or imminent danger, has a sound and substantial basis in the record (*Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 435-436 [1st Dept 2010]). On appeal, the Family Court's assessment of witness credibility and its fact-finding are afforded great deference (see *Matter of Brittni K.*, 297 AD2d 236, 237-238 [1st Dept 2002]). Here, we find no reason to interfere with the Family Court's ruling. Although the mother may have some problems and may be in denial regarding the extent of her son's misdeeds, there is support in the record for the court's conclusion that the mother's behavior did not rise to the level required to support a neglect finding.¹

The court providently exercised its discretion in denying the attorney for the child's application seeking a mental health evaluation of the mother. The application was made during the hearing, and the record fails to satisfactorily establish why the application was not made sooner by the petitioner or the child's attorney. Although petitioner, in its reply brief, agrees with

¹ We note that at the time the briefs were filed, the child no longer lived with his mother as a result of the determination in the juvenile delinquency case.

the child's attorney that the mid-hearing request for a mental health evaluation should have been granted, it does not request that the case be remanded for an evaluation. Rather, petitioner argues that the evidence it presented was sufficient to support a neglect finding, a position we reject.

M-2741 - *In re Trevor McK.*

Motion to strike portions of briefs
denied.

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

ENTERED: AUGUST 21, 2014



DEPUTY CLERK

Alternatively, defendant sought a hearing. The motion court summarily denied both applications, finding that defendant's motion did not contain "sworn allegations of fact" sufficient to warrant a suppression hearing. Defendant denied "engaging in any unlawful activity at the time he was observed by plain clothes officers" in the hallway outside his apartment before being chased into his apartment by the police officers, who then broke down the door.

The facts as set forth in a search warrant application, that the police obtained after the forced entry and which were not available to defendant at the time he moved for a hearing, are that an undercover officer saw three or four men outside defendant's apartment smoking marijuana. The officer alerted the other plainclothes officers who came to the apartment but did not see or smell marijuana when they arrived. The officers identified themselves, which caused the four men to run into the apartment and lock the door. One of the officers then claimed he heard a male voice say, "[H]ide the gun." Based on these facts, the officers, after requesting entry, broke down the door in order to gain entry into the apartment, where they observed drugs and paraphernalia, and, based upon these observations, obtained a search warrant.

In denying defendant's application for a hearing, the Court summarily found that exigent circumstances justified the pursuit and warrantless entry, based upon the individuals in the hallway reportedly having smoked marijuana, then racing into the apartment and locking the door, and the need to prevent destruction of evidence. Defendant argues in his brief that at most some individuals were seen smoking marijuana, a class B misdemeanor that would not present exigent circumstances sufficient for a forced entry.

Under the circumstances presented here, where the information proffered by the People to support the forcible entry was conclusory and defendant did not have access to available information, we find that it was incumbent upon the motion court to conduct a hearing to determine whether there were sufficient exigent circumstances to justify the forced warrantless entry (*see People v Bryant*, 8 NY3d 530 [2007] [holding that a *Mapp/Dunaway* hearing should have been held where there was a question of whether defendant had actually engaged in criminal activity warranting a seizure]; *see also People v Dunnell*, 50 AD3d 606 [1st Dept 2008] [holding summary denial of a hearing

based solely on lack of standing was improper where People provided limited information concerning the basis for defendant's arrest, citing *People v Hightower*, 85 NY2d 988 [1995]).

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

ENTERED: AUGUST 21, 2014

A handwritten signature in black ink, appearing to read "Eric Schuler". The signature is written in a cursive style with a horizontal line underneath it.

DEPUTY CLERK

water, causing him to trip and fall. Petitioner applied for ADR benefits about a year and a half later. The Medical Board Police Pension Fund Article II (Medical Board) found that petitioner had suffered a permanent disability and recommended that he be granted ADR benefits. The Board of Trustees of the New York City Police Pension Fund Article II met on several occasions in 2011 to address the Medical Board's conclusion that petitioner's disability was the direct result of his accident.

The Board of Trustees is always tasked with making its own determination as to causation (see *Matter of Picciurro v Board of Trustees of N.Y. City Police Pension Fund, Art. II*, 46 AD3d 346, 348 [1st Dept 2007]). While it never questioned that petitioner suffered an accident, the Board of Trustees ultimately deadlocked on the question of causation, that is to say, whether his injury occurred as the result of a reasonable risk of his work, or of an out-of-the-ordinary, sudden mischance that would entitle him to ADR benefits. As is customary following a tie vote, the Board of Trustees denied petitioner's application for ADR, and he was awarded ordinary disability benefits (see *Matter of Walsh v Scoppetta*, 18 NY3d 850 [2011]). Petitioner then brought an article 78 proceeding challenging the Board of Trustees's determination as arbitrary and capricious or an abuse of

discretion (see CPLR 7803[3]). Supreme Court denied the petition and dismissed the proceeding, and this appeal ensued.

Not every line of duty injury will result in an award of ADR (see *Matter of McCambridge v McGuire*, 62 NY2d 563, 567-568 [1984]). When the denial of ADR benefits to a police officer is the result of a tie vote by the Board of Trustees, this Court is required to uphold the denial unless "it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident" (*Matter of Meyer v Board of Trustees of the N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997] [internal quotation marks omitted]). Thus, the issue before us is whether, reviewing the record, it can be said, as a matter of law, that petitioner's disability was the natural and proximate result of a service-related accident.

In the context of ADR benefits, the Court of Appeals has defined an accident as a "'sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact,'" while "'an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury'" (*Matter of*

Kenny v DiNapoli, 11 NY3d 873, 874 [2008], quoting *Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 57 NY2d 1010, 1012 [1982]). It is petitioner's burden to establish that his injuries resulted from an accident as defined in the context of ADR (see *Matter of Brown v Kelly*, 100 AD3d 480 [1st Dept 2013]).

Normal risks in most jobs are not unexpected (see *Matter of Gray v Kerik*, 15 AD3d 275, 275 [1st Dept 2005] [the petitioner's knee twisted and "snapped" as he exited his patrol car to direct traffic; stepping out of vehicle to direct traffic does not in itself, constitute a "sudden, fortuitous mischance" that is "accidental" under the law] [internal quotation marks omitted]; see also *Matter of Ortiz v New York City Employees' Retirement Sys.*, 173 AD2d 237, 238 [1st Dept 1991], *lv denied* 78 NY2d 864 [1991] [elevator mechanic attempted to step down from the elevator car which he was repairing, caught his foot in the elevator door's gate-chain, and fell two to three feet to the floor below; "nature of the occurrence was reasonably within the risk of the work performed"]; compare *Matter of Finazzo v Safir*, 273 AD2d 75, 75 [1st Dept 2000] [after the employee stepped out of his patrol car and walked toward the station house, he "tripped in a construction hole"; his injury was the result of an

accident within the meaning of section 13-252 of the Administrative Code]).

While it is true that petitioner was a police officer, not a firefighter, it cannot be said as a matter of law that his ordinary employment duties did not include responding to a fire emergency. As the Board of Trustees had before it some credible evidence of lack of causation, it did not err as a matter of law in concluding that petitioner's disability was not the result of an accident within the meaning of Administrative Code § 13-252 (see *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 352 [1983]). Finally, contrary to the dissent, we do not regard the charging of fire hoses at the scene of a fire as a sudden, fortuitous, or unexpected event.

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

Petitioner was the first emergency responder to a fire in a multi-level, single room occupancy residential building fire at 3:24 a.m. on April 23, 2008. He parked his vehicle and ran into the smoke-filled building, and was evacuating dozens of tenants through narrow, smoked-filled hallways and down stairwells when the fire department arrived on the scene.

Petitioner exited the building, encountering a chaotic, crowded rescue scene. Petitioner was instructed by fire department personnel to move his vehicle from the front of the building. As petitioner made his way toward the vehicle, a fire hose was unexpectedly "charged," or filled with water, causing it to jump off the ground, and petitioner, who was attempting to step over the hose, to trip and fall. It is undisputed that petitioner suffered a wrist fracture so severe that he was found to be permanently disabled for full police work.

The majority now affirms the decision of the motion court denying petitioner an ADR pension, reasoning that his injury was not the result of a service-related "accident." I cannot countenance such constrictive reasoning, nor its result.

The contemporaneous evidence establishes that petitioner tripped and fell over a fire hose that unexpectedly "charged"

while he attempted to comply with the fire department's directive to move his vehicle (see *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147 [1997]). This event constitutes "a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" (*Matter of Starnella v Bratton*, 92 NY2d 836, 838 [1998] [internal quotation marks omitted]).

A trip and fall occasioned by a fire hose, in the middle of a chaotic rescue scene, cannot be characterized as a misstep in the ordinary course of employment, as the majority finds. Petitioner did not fall down a flight of stairs, like the petitioner in *Starnella*, but encountered an unexpected and non-stationary object in the midst of a chaotic, frenetic scene, making the case more similar to *Matter of Flannelly v Board of Trustees of N.Y. City Police Pension Fund* (278 AD2d 113 [1st Dept 2000] [officer's trip and fall over a tangle of television and VCR wires in police locker room, while performing routine security inspection, constituted a service-related accident as a matter of law]).

The fact that a police officer may have familiarity with fire scenes generally, or has responded to fire scenes in the past, is not the equivalent of familiarity or knowledge of a

particular fire scene sufficient to render the placement or movement of objects "expected"; each fire scene is different and none are stationary or controlled. The majority's decision has the effect of penalizing an officer who, with no thought to his own health or safety, evacuated residents from a burning building, and will dissuade first responders in the future from taking similar heroic action.

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

ENTERED: AUGUST 21, 2014

A handwritten signature in black ink, appearing to read "Eric Schuck". The signature is written in a cursive style with a horizontal line underneath it.

DEPUTY CLERK

Acosta, J.P., Andrias, Moskowitz, Manzanet-Daniels, JJ.

11225 Arkin Kaplan Rice LLP, et al., Index 652316/12
Plaintiffs-Appellants,

-against-

Howard Kaplan, et al.,
Defendants-Respondents.

Kasowitz Benson Torres & Friedman LLP, New York (Michael J. Bove of counsel), for appellants.

Kaplan Rice LLP, New York (Howard J. Kaplan of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about June 6, 2013, which granted defendants' motion for partial summary judgment to the extent of dismissing plaintiffs' claim with respect to defendants' personal liability under the sublease after the date of their withdrawal from plaintiff Arkin Kaplan Rice, LLP (AKR), and denied plaintiffs' cross motion for partial summary judgment declaring that defendants are jointly and severally liable for all remaining obligations under the sublease, both in their individual capacities and as partners of AKR, unanimously modified, on the law, to the extent of declaring that AKR is liable for obligations under the sublease through the duration of the extended period, defendants Howard Kaplan and Michelle Rice are

not jointly and severally liable for all remaining obligations under the sublease in their individual capacities, and Arkin Solbakken LLP is not the successor to AKR, and otherwise affirmed, without costs.

In 1968, plaintiff Stanley S. Arkin (Arkin) founded the law firm Arkin Horan. In March 1996, the firm changed its name to Arkin, Schaffer & Kaplan LLP (ASK). The firm represented corporate entities and individuals in civil litigation. On August 25, 1999, ASK entered into a sublease with Ladenburg Thalmann & Co., Inc. (the sublandlord) for office space on the 35th floor of 590 Madison Avenue (the sublease). ASK, Arkin, defendant Howard Kaplan, nonparties Hyman Schaffer, Jeffrey Kaplan, and Mark S. Cohen executed the sublease, as subtenants.

Section 24 of the sublease provides, in relevant part:

"A. Notwithstanding anything herein contained to the contrary, upon the admission of any new partner (hereinafter referred to as a 'New Partner') to the Partnership, such New Partner shall be jointly and severally liable for the performance of Subtenant's obligations under this Sublease without regard to any limitation of liability inherent in the business organization of the Partnership and Subtenant shall deliver confirmation thereof to Sublandlord within ten (10) days of such New Partner's admission to the Partnership.

B. Notwithstanding anything herein contained

to the contrary, upon the withdrawal of any partner (other than Stanley S. Arkin) from the Partnership (hereinafter referred to as a 'Withdrawing Partner'), such Withdrawing Partner shall, upon the date of withdrawal from the Partnership (hereinafter referred to as the 'Withdrawal Date'), be deemed to be released from this Sublease as of the Withdrawal Date and shall have no further rights or obligations under this Sublease from and after the Withdrawal Date."

In August 2002, Arkin Kaplan LLP (Arkin Kaplan) (successor in interest to ASK), Arkin, Schaffer, Howard Kaplan, nonparty Anthony B. Coles, defendant Michelle Rice, and the sublandlord executed an amendment to the sublease (the first amendment). The purpose of the first amendment was to expand the sublease space on the 35th floor. In the amendment, the sublandlord acknowledged that Jeffrey Kaplan and Mark S. Cohen had withdrawn as partners of Arkin Kaplan and were, therefore, "released from any and all obligations under the Sublease" and that Coles and Rice were admitted as partners of Arkin Kaplan.

In October 2004, Arkin Kaplan, Stanley Arkin, Howard Kaplan, Rice, nonparty Sean O'Brien and the sublandlord executed a second amendment to the sublease (the second amendment). The purpose of this amendment was to add all of the remaining space on the 35th floor. This amendment also granted Arkin Kaplan the option to extend the sublease's June 30, 2010 expiration date to June 29,

2015, upon six months' written notice to the sublandlord. In the second amendment, the sublandlord acknowledged that Jeffrey Kaplan had withdrawn as a partner of Arkin Kaplan and was released from any and all obligations under the sublease.

In July 2006, when defendant Rice was elevated to a named partner, Arkin Kaplan changed its name to AKR. By letter dated November 16, 2009, AKR informed the sublandlord that it wished to extend the sublease for an additional five years, to June 29, 2015. In July 2011, Sean O'Brien, a partner at AKR, withdrew from the firm.

In March 2012, AKR's partners began mediation in an attempt to resolve certain differences concerning the firm's structure. By letter dated May 17, 2012, counsel for defendants Kaplan and Rice informed Arkin's counsel that "[t]here is 'no continuing firm,'" as "[AKR] is a partnership-in-dissolution."¹ The AKR partners-in-dissolution were plaintiffs Arkin and Lisa Solbakken and defendants Kaplan and Rice.

Also on May 17, 2012, Kaplan and Rice announced the formation of their new law firm, defendant Kaplan Rice LLP

¹ The motion court noted that, for purposes of the parties' motions and pending a final determination on the merits, the date of AKR's dissolution was May 17, 2012.

(Kaplan Rice).² That same day, AKR amended its certificate of registration with the Department of State to change its name to Arkin Solbakken LLP (Arkin Solbakken).

On June 26, 2012, Kaplan and Rice informed the sublandlord in writing that they had withdrawn from their obligations as signatories on the sublease. The sublandlord responded the same day, rejecting Kaplan and Rice's withdrawal and notifying them both that it intended to hold them liable under the sublease despite AKR's dissolution.

On July 10, 2012, Arkin Solbakken submitted a filing with the Department of State, purporting to change its name back to Arkin Kaplan Rice LLP. The next day, July 11, 2012, Arkin Solbakken filed a new certificate of registration with the Department of State, registering the firm as a limited liability partnership. That same month, Arkin, on behalf of AKR, served on Kaplan and Rice notices to quit and vacate, in an attempt to evict them from the premises on or before August 15, 2012. Arkin also replaced AKR on the firm's office door with the name Arkin Solbakken.

² At the time of dissolution, AKR was a 12-attorney law firm; most of the associates, along with several staff members, eventually went to work for Kaplan Rice.

Shortly thereafter, plaintiffs AKR, Arkin, and Solbakken commenced this action against Kaplan, Rice, and Kaplan Rice.³ By amended complaint, plaintiffs allege that AKR's partners-in-dissolution continued to operate two separate law partnerships out of the premises and that defendants remained in the space from May 18, 2012 to August 31, 2012 but refused to compensate AKR for their use of the space and for the services they used. The complaint further alleges that defendants converted assets belonging to AKR and engaged in other actions that interfered with the orderly winding up of AKR's affairs. For example, plaintiffs allege, Kaplan and Rice prevented them from paying rent under the sublease.

Although the complaint asserts nine causes of action, defendants moved for partial summary judgment only on the causes of action for breach of fiduciary duty, tortious interference with contract, and declaratory judgment relating to the lease obligations. In the cause of action for breach of fiduciary duty, plaintiffs seek an injunction (a) enjoining and restraining

³ In November 2012, Kaplan and Rice commenced a separate action against Arkin, Solbakken and Arkin Solbakken LLP, asserting one cause of action for an accounting (*Howard J. Kaplan and Michelle A. Rice v Stanley A. Arkin, Lisa C. Solbakken and Arkin Solbakken LLP* [Index No. 653835/2012]).

Kaplan, Rice and their employees from "preventing, delaying or in any way interfering with the payment by AKR" of rent under the sublease and any other payments owed to other entities and (b) directing Kaplan, Rice and their employees to report to AKR regarding any work they may have done for Kaplan Rice between April 2012 and May 17, 2012. The cause of action for tortious interference with contract seeks essentially the same injunctive relief as the first cause of action. The eighth cause of action for declaratory judgment seeks a declaration that AKR's rent obligations under the sublease, through its extended expiration, are AKR's liabilities and that AKR's assets must be paid or reserved against these liabilities before any distribution of AKR assets to its partners.

Defendants moved for partial summary judgment dismissing plaintiffs' claims that sought to have AKR's rent obligations paid out of AKR's partnership assets. Plaintiffs opposed the motion and cross-moved for partial summary judgment, seeking a declaration that defendants Kaplan and Rice remained jointly and severally liable for all remaining obligations under the sublease through its expiration on June 29, 2015.

The motion court correctly found that the sublease at issue is a contract subject to general principles of contract

interpretation; the plain language of section 24(B) of the sublease releases any withdrawing partner, other than Arkin, from any further rights or obligations under the sublease upon the date of withdrawal. Indeed, the language in section 24(B) is "reasonably susceptible to only one interpretation" (*Chimart Assocs. v Paul*, 66 NY2d 570, 573 [1986]). The motion court therefore properly rejected plaintiffs' argument that section 24(B) referred only to Kaplan and Rice's personal liability, and therefore, that Kaplan and Rice's share of the partnership assets should be used to pay rent or other obligations to the sublandlord under the sublease after they withdrew from the firm. On the contrary, section 24(B) does not contain any limitations or qualifications, and there is no basis to interpret the parties' agreement as impliedly stating something that they did not specifically include (see *RM 14 FK Corp. v Bank One Trust Co. N.A.*, 37 AD3d 272, 274 [1st Dept 2007]). Accordingly, defendants Howard Kaplan and Michelle Rice, as withdrawing partners, were released from any further obligations, including the requirement to pay rent, under the sublease as of the date of their withdrawal.

Similarly, plaintiffs argue that Partnership Law § 71 mandates the payment of creditors from partnership assets before

partners are individually required to make contributions to satisfy the partnership's debts and liabilities, and thus, section 24(B) of the sublease does not release Kaplan and Rice from liability under the sublease. We reject this argument. While New York Partnership Law sets forth the rules for distribution of partnership assets and liabilities in "settling accounts between the partners after dissolution," section 71 expressly provides that those rules are "subject to any agreement to the contrary." Here, the parties had a contrary agreement - namely, the sublease.

However, we disagree with the motion court's finding that because AKR never signed the sublease, its liability ended as of the date of dissolution. Arkin Kaplan last amended the sublease in 2004 and Arkin, Kaplan, and Rice, among other partners, signed the amendment. When Rice became a named partner in the law firm in 2006 and Arkin Kaplan formally changed its name to Arkin Kaplan Rice, LLP, the sublease was never amended to replace Arkin Kaplan with AKR as a signatory to the sublease. Nonetheless, from 2006 until its dissolution in 2012, AKR's payment of rent while in possession of the premises created a presumption of an assignment of the sublease (see *Salvalore R. Beltrone Marital Trust II v Lavelle and Finn, LLP*, 22 AD3d 936, 937 [3d Dept

2005])).

Moreover, we find sufficient facts in the record to support a finding that AKR assumed Arkin Kaplan's obligations under the sublease (see *Probst v Rochester Steam Laundry Co.*, 171 NY 584, 588-589 [1902]; *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 147-148 [2d Dept 2009])). AKR exercised the option to extend the sublease for a five-year period, and represented itself to be the subtenant under the sublease, both to the sublandlord and in various sub-sublease agreements with third parties – sub-subleases to which the sublandlord consented. On this basis, among others, we find that AKR is liable for any obligations under the sublease until the expiration of the extended period.

Finally, the evidence in the record does not support the motion court's finding that Arkin Solbakken is the successor to AKR. In drawing its conclusion, the court pointed to the fact that Arkin Solbakken was "carrying on the business of AKR by having taken possession of the Premises upon AKR's dissolution." However, when defendants Kaplan and Rice commenced their new firm, Kaplan Rice, they too acquired the right of possession of the premises upon the dissolution of AKR. Moreover, although Arkin amended the AKR certificate of registration to reflect the

new firm name of Arkin Solbakken, the amended certificate was immediately changed and a new filing registering Arkin Solbakken as a limited liability partnership became effective. As to Arkin's attempts to evict defendants from the premises for nonpayment of rent, his actions could reasonably have been based on his remaining rent obligations under the sublease.

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

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

ENTERED: AUGUST 21, 2014



DEPUTY CLERK

Tom, J.P., Acosta, Andrias, DeGrasse, JJ.

12424N Arkin Kaplan Rice LLP, et al.,
Plaintiffs-Appellants,

Index 652316/12

-against-

Howard Kaplan, et al.,
Defendants-Respondents.

Kasowitz Benson Torres & Friedman LLP, New York (Joseph A. Piesco, Jr. of counsel), for appellants.

Kaplan Rice LLP, New York (Christopher J. Roche of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 4, 2012, which granted defendants' motion to enforce prior court orders to the extent of directing plaintiffs to return money to plaintiff Arkin Kaplan Rice LLP's (AKR) account at Signature Bank forthwith, and requiring two signatures on all future disbursements from the account, unanimously affirmed, with costs.

Plaintiffs' use of funds in the AKR account to pay post-dissolution rent expenses was in violation of a preliminary injunction and subsequent orders limiting plaintiffs' use of those funds to the payment of pre-dissolution expenses. Contrary to plaintiffs' apparent contention, defendants were not required to demonstrate anew their entitlement to the preliminary

injunction in support of their motion to enforce the injunction.

We reject plaintiffs' argument that they were not afforded an opportunity to be heard or to present evidence in response to defendants' motion. Plaintiffs' counsel acknowledged on the record in open court that he was prepared to address the merits of defendants' argument, and never sought to introduce any evidence or request additional time to submit a brief in opposition, despite being afforded the opportunity to do so.

Contrary to defendants' contention, the order on appeal is not superseded by the motion court's June 3, 2013 order, since the two orders do not address the same issues.

While defendants are correct that AKR lacks standing to bring this appeal, because it is not an aggrieved party within the meaning of CPLR 5511, the individual plaintiffs do not lack standing.

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

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

ENTERED: AUGUST 21, 2014

A handwritten signature in black ink, appearing to read "Eric Selinger". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

DEPUTY CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12552 Baby Phat Holding Company, LLC, Index 652409/13
 Plaintiff-Respondent,

-against-

Kellwood Company,
Defendant-Appellant.

Katten Muchin Rosenman LLP, New York (Jonathan J. Faust of
counsel), for appellant.

Gordon, Herlands, Randolph & Cox, New York (Nicholas R. Weiskopf
of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos,
J.), entered January 3, 2014, which, to the extent appealed from
as limited by the briefs, denied defendant's motion to dismiss
and to compel arbitration, unanimously modified, on the law, to
dismiss the claim for negligent misrepresentation, and otherwise
affirmed, without costs.

The complaint alleges that plaintiff entered into an
agreement with defendant's wholly owned subsidiary, nonparty Phat
Fashions, LLC (PFLLC), to purchase certain trademarks, copyrights
and contractual rights. One of the key assets sold by PFLLC was
a license under which a company called Intimateco paid royalties
directly to defendant as compensation for its use of a PFLLC
trademark. Although PFLLC is denominated as the seller under the

agreement, plaintiff alleges that all of its negotiations were exclusively with defendant and it paid the \$5.35 million purchase price directly to defendant. Prior to signing the agreement, defendant provided plaintiff with a royalty schedule showing that PFLLC's license with Intimateco would yield a minimum guaranteed income stream of \$1.5 million over the next three years. However, plaintiff further alleges that defendant knew that the guaranteed income from the Intimateco license was only \$75,000 for that period of time. The agreement expressly requires PFLLC to cease doing business following the contract closing and that PFLLC shall "wind-up, liquidate, dissolve or otherwise cease its legal existence" within 30 days of the six month period following the closing.

Upon discovering the alleged misrepresentation concerning the income stream expected from Intimateco, plaintiff made a demand for arbitration based on the agreement's arbitration clause, which provides that any dispute arising under or related to the agreement shall be submitted to binding arbitration. Defendant resisted, claiming that it is not a party to the agreement and is therefore not bound by the arbitration provision. Thereafter, plaintiff commenced the instant action asserting causes of action for: (1) breach of contract based upon

an alter-ego theory; (2) constructive trust; (3) negligent misrepresentation; (4) restitution; and (5) abatement of the purchase price for mutual mistake. Defendant moved to dismiss the complaint or to stay the action and compel arbitration against non-party PFLLC. Defendant argued that the complaint should be dismissed because plaintiff's only recourse was to arbitrate against PFLLC. In the alternative, it argued that the complaint should be dismissed for failure to join PFLLC, a necessary party.

Defendant's effort to compel plaintiff to arbitrate its contract claim against PFLLC as the basis for having this action dismissed against it was properly rejected by the motion court. The complaint only contains claims against defendant, which resisted plaintiff's original demand for arbitration. Even were defendant correct that PFLLC, its now defunct subsidiary, stands to be inequitably affected by any judgment rendered in plaintiff's favor in this action, dismissal is not warranted (see CPLR 1001). Were the complaint dismissed, plaintiff would have no other effective forum in which to have its claims against defendant resolved. Given the parameters of the arbitration clause in the agreement with PFLLC, plaintiff cannot include or assert claims against PFLLC in this action; nor has defendant

agreed to participate in arbitration. Moreover, PFLLC has been dissolved and is now judgment proof, making any judgment or award plaintiff achieves against it a pyrrhic victory. There is no prejudice to defendant in that it can assert all of its claims and defenses in this action. In any event, even assuming defendant is prejudiced, it could have avoided such prejudice by participating in arbitration when it was originally demanded of it (see CPLR 1001[b][3]); *L-3 Communications Corp.*, 45 AD3d at 13).

We also reject defendant's argument that any liability alleged in the complaint predicated on an alter-ego theory must be dismissed. In order to state a claim for alter-ego liability plaintiff is generally required to allege: "complete domination of the corporation [here PFLLC] in respect to the transaction attacked" and "that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing the varying circumstances when this power may be

exercised (*Matter of Morris v New York State Dept. of Taxation & Fin., supra*).

Provided plaintiff prevails in proving that PFLLC owes it a debt (see *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 141), the further allegations in the complaint are sufficiently pleaded to support plaintiff's claim that defendant is an alter-ego of PFLLC. The complaint asserts that with respect to the transaction at issue, defendant dominated and controlled the negotiations on behalf of PFLLC and actually provided the erroneous information which persuaded plaintiff to enter into the agreement. The allegations that plaintiffs paid the full purchase price directly to defendants and not PFLLC, and that before the instant transaction Intimateco directly paid defendant monies owed to PFLLC, sufficiently frame factual issues about whether defendant, as the parent company of PFLLC commingled funds and disregarded corporate formalities (*International Credit Brokerage Co. V Agapov*, 249 AD2d 77 [1st Dept 1998]).

In addition, the allegations that defendant, through its domination of PFLLC, misrepresented the value of the assets sold and then caused PFLLC to become judgment proof, are also sufficient to support claims that defendant perpetrated a wrong

or injustice against plaintiff, thus warranting intervention by a court of equity (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]; *Teachers Ins. Annuity Assn. of Am. v Cohen's Fashion Opt. of 485 Lexington Ave., Inc.*, 45 AD3d 317, 318 [1st Dept 2007]). Wrongdoing in this context does not necessarily require allegations of actual fraud. While fraud certainly satisfies the wrongdoing requirement, other claims of inequity or malfeasance will also suffice (see *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 [1998]). Allegations that corporate funds were purposefully diverted to make it judgment proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory (*Grammas v Rockwood Assoc., LLC*, 95 AD3d 1073 [2d Dept 2012]).

Defendant is correct, however, that the negligent misrepresentation claim asserted against it fails for lack of any special relationship between plaintiff and defendant (see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]).

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

ENTERED: AUGUST 21, 2014

A handwritten signature in black ink, appearing to read "Eric Schuck", written in a cursive style.

DEPUTY CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Rolando T. Acosta
David B. Saxe
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

12201
Ind. 3173/09

x

The People of the State of New York,
Respondent,

-against-

Neal McLeod,
Defendant-Appellant.

x

Defendant appeals from the judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered January 26, 2012, convicting him, after a jury trial, of robbery in the first degree, robbery in the second degree (two counts), attempted assault in the first degree, and assault in the second degree, and imposing sentence.

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen and Eleanor J. Ostrow of counsel), for respondent.

ACOSTA, J.

The primary issue on appeal is whether defendant's constitutional right of confrontation was violated when the trial court curtailed defense counsel's cross-examination of a key prosecution witness - defendant's alleged accomplice - who entered into a cooperation agreement with the People, admitted to committing and implicated defendant in prior robberies, and intended to invoke his privilege against self-incrimination in response to questions about those crimes. We find that the trial court improvidently exercised its discretion by precluding the proposed line of questioning concerning the witness's prior crimes - thereby allowing the witness to avoid asserting his Fifth Amendment privilege in the jury's presence - because the probative value of the questions, targeted at the witness's credibility, bias, and motive to fabricate testimony, was not outweighed by any purported prejudice against the People. At bottom, defendant's fundamental right of confrontation requires that he be permitted to adequately probe the bias of the People's witness, and he was unduly restricted from doing so.

Defendant was charged with several crimes relating to an incident on June 20, 2009, in which he and four codefendants allegedly robbed an off-duty police officer in Manhattan. One of the codefendants (to whom we will refer as "M.") entered into a

cooperation agreement with the prosecution and testified at trial that defendant participated in planning the robbery and was to serve as the getaway driver. Contradicting M.'s testimony, defendant testified that he was only driving his friends around town to "meet girls" and was unaware that M. or anyone else was going to commit a robbery. At some point in the evening, defendant testified, he parked and let M. and two other friends out of the car to talk to girls, when M. unexpectedly robbed the victim.

The accomplice witness, M., admitted to ripping a gold chain from the victim's neck and then running away. The victim, off-duty police officer Erickson Peralta, was unable to catch M. and instead approached another codefendant, D. (ultimately adjudicated a youthful offender), and held him at gunpoint. Defendant testified that he had remained in the car with another codefendant and was sending text messages to his girlfriend. A commotion caught his attention. When he looked up, he saw from his car that his friend D. was being held at gunpoint, so he removed a crowbar from the trunk of his car and used it in an attempt to disarm Peralta.

As a key prosecution witness, M.'s trial testimony was the only evidence that suggested defendant's intent to participate in the Manhattan robbery. Defense counsel sought to question M. on

prior uncharged Bronx robberies to which he admitted during his cooperation proffer, but M.'s attorney indicated his client's intention to invoke his Fifth Amendment privilege against self-incrimination.¹ Defense counsel also intended to question M. about the circumstances underlying his guilty plea and youthful offender adjudication for another robbery in the Bronx, the disposition of which was pending when he committed the instant robbery.

The trial court curtailed defense counsel's proposed line of questioning, reasoning that the issues were collateral and that the jury would be misled - and the People prejudiced - if M. asserted the Fifth Amendment in the jury's presence because the jury would not learn that M. had also implicated defendant in some of the uncharged crimes.

The jury found defendant guilty of robbery in the first degree, two counts of robbery in the second degree, attempted assault in the first degree, and assault in the second degree. Defendant was sentenced to an aggregate term of five years

¹ In his cooperation agreement with the New York County District Attorney's Office, M. admitted to committing uncharged robberies in Bronx County. The New York County D.A.'s Office told the trial court it was unable to grant immunity for those crimes, and the trial court declined to grant an adjournment to allow defense counsel to contact the Bronx County D.A. to seek a grant of immunity.

imprisonment and now appeals.

A defendant's confrontation right is guaranteed by the New York and US constitutions (NY Const, art I, § 6; US Const, 6th Amend), and its elemental function is to ensure a defendant's opportunity to cross-examine witnesses against him or her (see *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]; *People v Hudy*, 73 NY2d 40, 56-57 [1988]). Although trial courts are accorded discretion in deciding which evidence to admit based on considerations such as prejudice or confusion of issues (*People v Corby*, 6 NY3d 231, 234-235 [2005]; see also *Van Arsdall*, 475 US at 679), their discretion is nonetheless "circumscribed by the defendant's constitutional rights to present a defense and confront his accusers" (*Hudy*, 73 NY2d at 57). Indeed, a trial court's discretion should be narrowly construed when a defendant's fundamental rights are at issue (see *People v Foy*, 32 NY2d 473, 476-477 [1973]), and the confrontation right is perhaps as fundamental as any other.

Here, defendant sought to avail himself of this right by questioning M. in an attempt to cast doubt on his credibility by revealing his bias and motive to fabricate testimony. Defense counsel's theory was that M. had implicated defendant in the prior uncharged robberies in order to bolster the value of his cooperation agreement with the People. This was unquestionably

an appropriate trial strategy, since “exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination” (*Van Arsdall*, 475 US at 678-679). That M. intended to invoke his Fifth Amendment privilege and refuse to answer the questions does not abrogate defendant’s Sixth Amendment right of confrontation.

As an accomplice witness, M.’s credibility, bias, and motive to fabricate were not collateral issues (see *Hudy*, 73 NY2d at 56-57; *People v Chin*, 67 NY2d 22, 28 [1986] [“If the cross-examiner seeks to explore more than mere general credibility, as, for example, to establish bias or interest, the subject of inquiry is not collateral”]; *People v Ashner*, 190 AD2d 238, 248 [2d Dept 1993]). Therefore, defense counsel should have been permitted to question him on the prior crimes. If he subsequently invoked his Fifth Amendment privilege, the trial court should have gone as far as striking all or some of his direct testimony (see *People v Siegel*, 87 NY2d 536, 544 [1995]). At a minimum, the court should have pursued the “least drastic relief” (typically reserved for “collateral matters or cumulative testimony concerning credibility”) by instructing the jury that it could consider M.’s invocation of the Fifth Amendment in determining his credibility (see *id.*; *People v Jimenez*, 287 AD2d 297 [1st Dept 2001], *lv denied* 97 NY2d 683 [2001]).

Contrary to the People's argument, defense counsel did not seek to "parade [the] witness before the jury for the sole purpose of eliciting in open court the witness' refusal to testify" (*People v Thomas*, 51 NY2d 466, 473 [1980]). The People, not defendant, called the witness (see *Siegel*, 87 NY2d at 545), and defense counsel sought to do more than simply have him invoke his privilege before the jury. Moreover, M.'s bias was not "fully explored through other means," nor did the precluded line of questioning "involve[] cumulative matter already presented" (see *Corby*, 6 NY3d at 235-236 [internal quotation marks omitted]). Although the jury learned of the cooperation agreement generally, it did not learn that M. admitted to committing other robberies. Defense counsel sought to demonstrate M.'s general untrustworthiness as well as his motive to fabricate in order to augment the value of his cooperation with the People. Because the trial court foreclosed defendant's proposed line of questioning, defendant was unable "to make the same impeachment argument in the absence of excluded evidence" (*Chin*, 67 NY2d at 29 [internal quotation marks omitted]).

In sum, defense counsel's proposed line of questioning would have been probative of the witness's bias and credibility, and the court's preclusion of the line of questioning violated defendant's confrontation right. Allowing the questions would

not have been unduly prejudicial to the People, even if the jury would not have learned that M. implicated defendant in the uncharged crimes. This is particularly so in light of defense counsel's indication that he would have made the strategic decision to proceed with the line of questioning, given the possibility that M. would not invoke the Fifth Amendment and would instead answer the questions, to show that he fabricated defendant's involvement in the other crimes to obtain a more favorable cooperation agreement. In any event, one of those crimes did not involve defendant, according to M.'s admissions during his cooperation proffer.

Lastly, the error was not harmless beyond a reasonable doubt because there is a "reasonable possibility that the error might have contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237 [1975]). The trial court's limitation of defense counsel's line of questioning precluded defendant from adequately impeaching the accomplice witness's credibility and revealing his bias and motive to fabricate testimony. This was an error that may have reasonably contributed to defendant's conviction, because the jury might have deemed M. incredible if they had learned about his prior robberies or heard his invocation of the Fifth Amendment. Indeed, M.'s testimony, and thus his credibility, were central in proving defendant's mens

rea; improperly curtailing defendant's impeachment of M. may very well have contributed to his conviction.

Because of our reversal based on the foregoing discussion, we need not reach defendant's remaining arguments, except that we find that the verdict was based on legally sufficient evidence and was not against the weight of the evidence.

Accordingly, the judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered January 26, 2012, convicting defendant, after a jury trial, of robbery in the first degree, robbery in the second degree (two counts), attempted assault in the first degree, and assault in the second degree, and sentencing him to an aggregate term of five years, should be reversed, on the law, and the matter remanded for a new trial.

All concur.

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

ENTERED: AUGUST 21, 2014



DEPUTY CLERK

We do not reach respondent's request for affirmative relief as she did not file a notice of appeal.

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

ENTERED: AUGUST 21, 2014

A handwritten signature in black ink, appearing to read "Eric Schuler", written in a cursive style. The signature is positioned above a horizontal line.

DEPUTY CLERK

maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to return" (Election Law § 1-104 [22]).

After a hearing before a special referee, at which both documentary and testimonial evidence was adduced, the special referee found that respondent satisfied both the five-year and one-year prongs of the constitutional residency requirement. The IAS Court confirmed the report and recommendations of the special referee and dismissed the petition.

Our review of this record is informed by two guiding principles. First, it is well settled that in a proceeding such as this, the burden of proof is on the petitioner to establish by clear and convincing evidence that the claimed residence is not bona fide or otherwise compliant with constitutional or statutory requirements (see *Matter of Stavisky v Koo*, 54 AD3d 432, 433 [2d Dept 2008]). Second, generally when a reference has been made to a special referee to hear and report, if the referee's determination turns upon an assessment of the witnesses' credibility, the court should defer to the referee as the trier of fact (*Matter of Am. Tr. Ins. Co. v Wason*, 50 AD3d 609 [1st Dept 2008]). In proceedings such as this, because the question of residence is a factual one, based on a variety of factors and circumstances, where there is conflicting evidence, "the resolution of the conflict lies within the province of the . . .

finder of fact, and should not be disturbed on appeal unless it is obvious that the . . . conclusion could not be reached under any fair interpretation of the evidence" (*Matter of Fernandez v Monegro*, 10 AD3d 429, 430 [2d Dept 2004][internal quotation marks omitted]).

Here, while it is true that the documentary evidence, including respondent's tax returns and voting record, could support an inference that respondent, who has had a peripatetic work history, did not intend to continue to reside in New York, there was also contrary evidence before the court. The contrary evidence, which was expressly credited by the special referee, included, but was not limited to, respondent's testimony as to his intent and the temporary nature of his employment and living arrangements outside New York. Accordingly, we find no basis on which to disturb the court's adoption of the special referee's report and recommendations.

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

ENTERED: AUGUST 21, 2014



DEPUTY CLERK