



of tenancy procedures, the hearing officer's recommendation of probation and evidence of petitioner's uncertain mental capabilities, we exercise our discretion to direct further inquiry into her mental state during the period following the issuance of respondents' determination.

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

ENTERED: FEBRUARY 27, 2014



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accordingly.

Under the unambiguous 1957 agreement between the parties' predecessors in interest, plaintiff's predecessor transferred all of its rights to certain sound recordings forever, without any limitation, including the right to release and exploit "records," produced from the recordings, throughout the world. In exchange, defendant's predecessor agreed to pay royalties for such exploitation, but only "[f]or 78rpm and 45rpm single records sold and paid for in the Continental United States." Under those terms, defendant is not obligated to pay royalties for exploitation of the master recordings in any other format (see generally *Greenfield v Philles Records*, 98 NY2d 562 [2002]).

Plaintiff's agreement to provide indemnification to defendant for attorney's fees for any claims against defendant resulting from the recording musicians' services is not applicable in this breach of contract action.

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ENTERED: FEBRUARY 27, 2014



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Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11512      Assured Guaranty Municipal Corp.,      Index 652837/11  
             formerly known as Financial Security  
             Assurance Inc., et al.,  
             Plaintiffs-Appellants,

-against-

DLJ Mortgage Capital, Inc.,  
Defendant-Respondent,

Credit Suisse Securities (USA) LLC,  
Defendant.

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Quinn Emanuel Urquhart & Sullivan, LLP, New York (Philippe Z. Selendy of counsel), for appellants.

Orrick, Herrington & Sutcliffe LLP, New York (Barry S. Levin of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 12, 2012, which, to the extent appealed from as limited by the briefs, granted defendant DLJ Mortgage Capital, Inc.'s motion to dismiss so much of the complaint's first and second causes of action as demand rescissory damages, consequential damages and fees, based on its determination that plaintiffs' remedies are limited by the pooling and servicing agreement's "sole remedy" clause, unanimously reversed, on the law, without costs, and the first and second causes of action reinstated in their entirety.

The motion court erred in holding that, as a matter of law,

the remedy available to plaintiff monoline insurers for breach of defendant's representations and warranties under the pooling and servicing agreement is limited to cure of the breach or the substitution or repurchase of the particular securitized loan. While their remedy, as certificate insurer, for breach of other provisions of the agreement is so limited (e.g. section 2.02[b] governing mortgage documentation), the certificate insurer is not one of the parties affected by the "sole remedy" clause of the representations and warranties provision (section 2.03[c]).

As the Court of Appeals has observed, "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). Where, as here, a contract is the result of negotiations between sophisticated business entities assisted by experienced counsel, failure to include a particular party, here the certificate insurer, among those governed by a contract provision can only be construed as the intentional exclusion of that party from its application (see *Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302 [1st Dept 2007]). Nor are plaintiffs' remedies restricted by section 13.01 of the agreement, comprising merely acknowledgment of the certificate insurer's right to exercise the rights of the certificate holders without their further consent.

In view of this disposition, it is unnecessary to reach plaintiffs' alternative argument that the sole remedy clause does not apply to their claim for breach of defendant's obligation to repurchase certain mortgages.

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could and continually fought her attacker. She further testified that the attacker had his hand on her throat during the assault. The assault was brought to an end only when someone from an apartment above the alley yelled, causing the attacker to flee.

The victim immediately sought help and shortly thereafter the police arrived at the scene. She was taken to Jacobi Hospital for examination and treatment. A sexual assault evidence kit was collected which included material from the victim's fingernails. The victim provided descriptions of her assailant to police officers and a composite sketch was prepared. Approximately three weeks later, on March 18, 1998, the victim identified defendant in a police lineup. Thereafter, defendant was arrested.

At trial, the victim's eyewitness identification provided the sole evidence linking defendant to the crime. The People presented no physical evidence linking defendant to the crime, including no evidence that defendant's DNA was present at the crime scene. The defense raised issues about the reliability of the victim's identification and pointed the jury to discrepancies in the several descriptions she gave of her attacker during the investigation. The defense also produced an alibi witness, defendant's son-in-law, who testified that defendant was at home with the witness when the attack occurred. The jury returned a

guilty verdict. In affirming the conviction (11 AD3d 261 [1st Dept 2004]), this Court found no reason to disturb the jury's determination on issues of credibility and identification. The Court of Appeals affirmed our order (6 NY3d 737 [2005]).

In 2009, the Office of the Medical Examiner, with the consent of the Bronx District Attorney, tested and compared the DNA material from the victim's fingernails that had been collected and retained in the sexual assault evidence kit shortly after the crime, with the defendant's DNA. On October 20, 2010, the Medical Examiner issued a report concluding that there was male genetic material recovered from testing the fingernail scrapings, but that the genetic material did not match defendant's DNA.

The motion court granted defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction and for a new trial based upon the DNA evidence.<sup>1</sup> The People appeal. We now affirm the order of the trial court.

Although at the time he made his motion, defendant was required to show under CPL 440.10(1)(g) that "(n)ew evidence has

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<sup>1</sup>Defendant also moved to set aside the verdict based upon the People's failure to exchange *Brady* materials consisting of a letter. The trial court never ruled on the issue, finding the DNA evidence was in itself sufficient to warrant vacating the conviction and holding a new trial.

been discovered . . . which could not have been produced by [him] at the trial even with due diligence on his part and . . . that had such evidence been received at the trial the verdict would have been more favorable to the defendant," the law has since been amended. Pursuant to CPL 440.10(1)(g-1), which became effective October 1, 2012, the court may grant a defendant's motion to set aside the judgment when forensic DNA testing is performed after the entry of judgment upon a conviction and "the court has determined that there exists a reasonable probability that the verdict would have been more favorable to the defendant." Unlike a motion under CPL 440.10(1)(g), a defendant relying on the results of DNA testing no longer has to show that the results of such testing is newly discovered evidence in order to seek vacatur of a judgment of conviction. The defendant only has to show that there is a reasonable probability that he would have obtained a more favorable verdict. The newly amended statute, permitting relief at any time after the entry of judgment, applies to this case.<sup>2</sup> Thus, the People's arguments regarding the sufficiency of defendant's claim that the DNA evidence was newly discovered are moot.

The People argue that, even though the DNA material from the

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<sup>2</sup>The People conceded this point at oral argument.

victim's fingernails was from some male other than defendant, because there is no evidence that the victim ever scratched or came into contact with her attacker's skin, the DNA evidence is not exculpatory and provides no reasonable probability that defendant would have obtained a more favorable result at trial. They argue that, at the very least, the facts of this case required the court to hold a testimonial hearing to determine whether the DNA material was from the victim's attacker or some other source.

The standard for reviewing decisions on motions decided under CPL 440.10(1)(g-1) is abuse of discretion (*People v Jones*, 109 AD3d 402, 405 [1st Dept 2013]). This standard is the same for all CPL 440.10 motion decisions, except in non-capital cases before the Court of Appeals (*People v Samandarov*, 13 NY3d 433, 436 [2009]; *People v Crimmins*, 38 NY2d 407, 409 [1975]). We find that the court providently exercised its discretion in vacating the judgment of conviction and ordering a new trial in this case.

We reject the People's contention that, before deciding the motion, the court was required to hold a hearing to resolve factual disputes regarding the source of the DNA under the victim's fingernails. A hearing to develop additional facts is not invariably necessary to decide a CPL 440.10 motion. Rather, CPL 440.30 contemplates that a court will make an initial

determination on the written submissions regarding whether the motion can be decided without a hearing (*Jones*, 109 AD3d at 403). In this case the People did not request a hearing. Even if they had, the court was well within its discretion in resolving the motion without a hearing based upon the facts that had been presented at the underlying trial. The court concluded that the victim's trial testimony about her strenuous physical struggle with her attacker supported defendant's contention that the DNA material from the victim's fingernails likely came from her attacker. DNA from a victim's fingernails is a recognized forensic tool in identifying attackers, eliminating suspects and investigating crimes (*see People v Bush*, 90 AD3d 945 [2d Dept 2011]; *People v Donahue*, 81 AD3d 1348, 1350 [4th Dept 2011], *lv denied* 16 NY3d 894 [2011]).

Although there was no testimony that the victim's fingernails came directly into contact with her attacker's skin, it is still reasonable under the facts of this case to conclude that when the victim vigorously fought her attacker she collected his DNA under her fingernails. Other explanations posited by the People regarding why DNA may not have been that of the attacker did not require a testimonial hearing conclusively ruling them out. While a defendant needs to show more than a mere possibility that the verdict would have been more favorable to

him (*see People v Rodriguez*, 193 AD2d 363, 365 [1st Dept 1993], *lv denied* 81 NY2d 1079 [1993]), he does not have to establish a virtual certainty that there would have been no conviction without the DNA evidence (*see People v Tankleff*, 49 AD3d 160 [2d Dept 2007]).

Here the DNA evidence is material and exculpatory because it supports identifying someone other than defendant as the attacker. In concluding that there was a reasonable probability that the jury would have rendered a more favorable verdict for the defendant, the court not only considered the DNA evidence but also that the underlying conviction was based solely on the resolution of a close and vigorously contested factual question regarding the attacker's identity. The court considered that the conviction was based on an arguably conflicted and uncorroborated eyewitness identification by the victim. On balance the court correctly exercised its discretion in finding that a new trial was warranted. Our recent decision in *People v Jones* (109 AD3d 402 [1st Dept 2013]), where despite new DNA evidence, we upheld the denial of a CPL 440.10 motion based on the strength of the eyewitness identification, is distinguishable. Unlike the eyewitness identification in *People v Jones*, the victim's identification in this case was not unusually strong or reliable. She had no opportunity to observe her attacker in a non-stressful

situation before the attack. Her various descriptions of her attacker in the course of the investigation contained discrepancies and there was an alibi witness placing defendant someplace else at the time of the attack.

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committing traffic infractions, does not challenge the police officers' right to stop and approach the car, nor does he contest the propriety of the officer's direction that he get out of the car. Rather, he contends that the officer was unjustified in frisking him because there was no reasonable suspicion to believe that he was armed or had been or was about to be involved in criminal activity. Even though some of the circumstances, when viewed in isolation, might be considered innocuous, the totality of the information available to the police justified the frisk of defendant (see e.g. *People v Rodriguez*, 71 AD3d 436 [2010], *lv denied* 15 NY3d 756 [2010]). The police officer's earlier observation of defendant's furtive motions in attempting to stuff something under the passenger seat, and the officer's confirmation, before the frisk, that something was protruding from under the passenger seat, when considered in the context of the physical struggle the officer observed transpiring between his partner and the driver, caused the officer to reasonably fear for his safety and reasonably believe that defendant might possess a weapon (see *People v Mundo*, 99 NY2d 55, 59 [2002] [defendant appearing to place something underneath his seat, in conjunction with other factors, supported finding that there was "an actual and specific danger" to the officer's safety]; see also *People v Newman*, 96 AD3d 34 [1st Dept 2012], *lv denied* 19

NY3d 999 [2012]; *People v Anderson*, 17 AD3d 166 [1st Dept 2005]). Thus, the protective frisk of defendant that revealed that he was wearing a bulletproof vest was lawful, as were the ensuing police actions, which led to the recovery of a firearm and other evidence.

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violent felony offender. Nevertheless, at the time defendant waived indictment, he was not charged with an offense punishable by life imprisonment. He was held on a felony complaint in which the highest charge was robbery in the first degree, a class B felony carrying a maximum sentence of 25 years. A conviction could have become the basis for a life sentence only upon completion of the procedures set forth in CPL article 400.

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK



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

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK

Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11821        In re Justice T.,  
                 A Person Alleged to  
                 be a Juvenile Delinquent,  
                 Appellant.  
                 - - - - -  
                 Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Mark Dellaquila of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about February 4, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted arson in the third degree and reckless endangerment in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for

disturbing the court's credibility determinations, including its conclusion that at the time appellant placed a match in the opening of a car's gas tank, the match was lit.

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ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK

Tom, J.P., Friedman, Saxe, Clark, JJ.

11822-

Index 651290/11

11822A Emmet & Co., Inc., et al.,  
Plaintiffs-Appellants,

-against-

Catholic Health East, et al.,  
Defendants-Respondents.

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Kasowitz, Benson, Torres & Friedman LLP, New York (Gavin D. Schryver of counsel), for appellants.

Shearman & Sterling LLP, New York (Richard F. Schwed of counsel), for Catholic Health East, respondent.

Winston & Strawn LLP, New York (J. Erik Connolly of the bar of the State of Illinois, admitted pro hac vice of counsel), for Merrill Lynch, Pierce, Fenner & Smith Inc., respondent.

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Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 13, 2012, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 25, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs' status as former bondholders does not render the "no action" clauses of the indentures governing the bonds inapplicable to them (*Bank of N.Y. v Battery Park City Auth.*, 251

AD2d 211 [1st Dept 1998]). Nor are they excused from compliance by the indentures' "principal and interest" clauses, which only authorize actions for past due principal and interest (*id.*).

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

ENTERED: FEBRUARY 27, 2014

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DEPUTY CLERK

Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11823-

11824 Darrell Bridgers, et al.,  
Plaintiffs-Appellants,

Index 112204/07

-against-

West 82nd Street Owners Corp., et al.,  
Defendants-Respondents.

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Darrell Bridgers, New York, appellant pro se, and for Franca Ferrari-Bridgers, appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about August 6, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment on their claim that defendants tortiously interfered with their business relations with prospective buyers of their apartment, granted defendants' cross motion for summary judgment dismissing the causes of action for declaratory judgment, libel, tortious interference with business relations, tortious interference with contract, and intentional infliction of emotional distress, and declared that plaintiffs had violated their proprietary lease, deemed an appeal from judgment, same court and Justice, entered August 14, 2012, and, so considered, the judgment unanimously affirmed, without costs.

Appeal from order, same court and Justice, entered on or about August 6, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for sanctions against defendants and their counsel, unanimously dismissed, without costs.

In *Bridgers v Wagner* (80 AD3d 528 [1st Dept 2011], *lv denied* 17 NY3d 717 [2011]), which arose out of many of the same facts and circumstances as the case at bar, this Court held, "Plaintiffs' allegation that the cooperative board's minutes referring to the allegedly illegal work performed in their apartment discouraged a potential purchaser is insufficient to support their claim of tortious interference with contract or with prospective business relations" (*id.* at 528). Thus, the tortious interference claims in the instant case were properly dismissed.

In *Bridgers*, we also said that Wagner's "conduct was not extreme and outrageous, as required to establish intentional infliction of emotional distress" (*id.* [internal quotation marks omitted]). The alleged conduct of defendants in the instant case is less extreme and outrageous than the conduct attributed to Wagner. Accordingly, the intentional infliction of emotional distress claim in this case was also properly dismissed.

The board minutes about which plaintiffs complain are not

defamatory (see *Ferguson v Sherman Sq. Realty Corp.*, 30 AD3d 288, 288-289 [1st Dept 2006]). Even if, arguendo, they were defamatory, they are protected by the common-interest privilege (see e.g. *Liberman v Gelstein*, 80 NY2d 429, 437 [1992]), which plaintiffs' allegations of malice are insufficient to overcome (see *Ferguson* at 288).

Plaintiffs abandoned their appeal from the dismissal of their breach of contract and breach of fiduciary duty claims by failing to address them in their opening brief (see e.g. *Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009]).

Plaintiffs' right to appeal from the sanctions order terminated with entry of the final judgment (see *Matter of Aho*, 39 NY2d 241, 248 [1976]). Even if the order was reversed, the reversal would have no affect on the final judgment dismissing plaintiffs' claims (see *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 20 NY3d 37, 41-42 [2012]).

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

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basis for disturbing the jury's determinations concerning credibility and identification, including its evaluation of any inconsistencies. Defendant was identified by the victim, as well as by a witness who was acquainted with defendant.

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ENTERED: FEBRUARY 27, 2014

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DEPUTY CLERK

Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11826      Xi Mei Jia, as Administrator of      Index 652142/13  
the Estate of Marty L. McMillan,  
Plaintiff-Respondent-Appellant,

-against-

Intelli-Tec Security  
Services, Inc., et al.,  
Defendants-Appellants-Respondents,

Frank A. Bolz,  
Defendant.

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Robinson & Cole LLP, New York (Joseph L. Clasen of counsel), for  
appellants-respondents.

Law Offices of Sandra Gale Behrle, New York (Sandra Gale Behrle  
of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Eileen A. Rakower,  
J.), entered September 27, 2013, which granted defendants-  
appellants Intelli-Tec Security Services, Inc. and Russell R.  
MacDonnell's motion to dismiss the complaint to the extent of  
dismissing the fraud claim and denied so much of the motion as  
sought dismissal of the breach of contract claim, unanimously  
modified, on the law, to grant the motion as to the breach of  
contract claim, and otherwise affirmed, without costs. The Clerk  
is directed to enter judgment dismissing the complaint as against  
defendants-appellants.

By letter agreement, dated December 21, 2010, Intelli-Tec

Security Services, Inc., an S corporation in which decedent Marty McMillan was a shareholder, redeemed the shares held by the estate in exchange for \$400,000, which sale was made "free and clear of any and all . . . rights" (§1). The agreement contained a merger clause which stated that it "supersedes any prior understanding, agreements or representations by and between the parties . . . with respect to the subject matter hereto" (§5).

Plaintiff's first cause of action alleges that defendants breached their contract with her husband by failing to reimburse the estate for the tax liability it incurred as a shareholder of Intelli-Tec. The second cause of action seeks to set aside the letter agreement based upon defendants' alleged promise to enter into a separate agreement to cover the tax liabilities relating to the estate's ownership of the stock, which promise was alleged to be knowingly false when made and relied upon by plaintiff.

Intelli-Tec and MacDonnell were entitled to dismissal of the complaint as the documentary evidence flatly contradicts both causes of action (see CPLR 3211[a][1]; *Maas v Cornell Univ.*, 94 NY2d 87 [1999]). The alleged agreement to reimburse the estate for tax liabilities arises from the estate's status as a shareholder. Thus, any such agreement was extinguished when the estate sold its shares free and clear of all other rights and would have been superseded pursuant to the letter agreement's

merger clause. Additionally, plaintiff's representation in the merger clause forecloses her reliance upon any representation not contained in the letter agreement and cannot serve as a basis for her fraud claim (see *Citibank v Plapinger*, 66 NY2d 90, 94-95 [1985]).

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ENTERED: FEBRUARY 27, 2014

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DEPUTY CLERK



Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11828 William DePaul, Jr., et al., Index 113636/09  
Plaintiffs-Respondents-Appellants,

-against-

NY Brush LLC, et al.,  
Defendants-Appellants-Respondents,

Ruttura & Sons Construction Co., Inc.,  
Defendant-Respondent.

- - - - -

NY Brush LLC, et al.,  
Third-Party Plaintiffs-Appellants,

-against-

Coastal Electric Construction Corp.,  
Third-Party Defendant,

Ruttura & Sons Construction Co., Inc.,  
Third-Party Defendant-Respondent.

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Malapero & Prisco, LLP, New York (Frank J. Lombardo of counsel),  
for appellants-respondents/appellants.

Arye Lustig & Sassower, P.C., New York (Mitchell J. Sassower of  
counsel), for respondents-appellants.

Milber Makris Plousadis & Seiden, LLP, White Plains (David C.  
Zegarelli of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.),  
entered January 2, 2013, which, insofar as appealed from, denied  
the part of defendants Holt Construction Corp., Pepsi Cola  
Bottling Company of New York, Inc., and NY Brush LLC's  
(collectively, defendants) motion for summary judgment that

sought to dismiss the Labor Law § 200 and common-law negligence claims as against them, granted the part of their motion that sought to dismiss the Labor Law § 241(6) claim as against them, denied the part of their motion that sought summary judgment on their contractual indemnification claim against defendant/third-party defendant Ruttura & Sons Construction Co., Inc., and granted the part of Ruttura's motion for summary judgment that sought to dismiss the aforementioned contractual indemnification claim, unanimously modified, on the law, to deny defendants' motion as to the Labor Law § 241(6) claim insofar as it is predicated on a violation of Industrial Code (12 NYCRR) § 23-1.11(a), and to deny the part of Ruttura's motion that sought to dismiss the contractual indemnification claim against it, and otherwise affirmed, without costs.

Defendants, who do not dispute that plaintiff's injuries arose from a dangerous condition, failed to demonstrate that they did not have constructive notice of that dangerous condition, which was a wooden plank that plaintiff testified broke underneath him while he was walking across it, and thus are not entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims. Plaintiff's photographs of the site, taken immediately after he fell, show three wooden planks lined up side by side but unconnected. The job superintendent

and the site safety manager of defendant Holt, the general contractor, admitted that these photos showed planks that were wet and rotten, posing a hazard to any workers walking across them. These Holt employees denied that Holt placed the planks there, and testified that they did not see any dangerous condition on the site before the accident. However, they both conducted regular inspections of the whole site, and the site safety manager would have inspected the subject area about an hour before plaintiff fell. Moreover, plaintiff testified that he had seen planks there for three weeks preceding his accident, and the defects observed in the planks would tend to be longstanding. This evidence raises triable issues of fact about Holt's constructive notice (*see Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511 [1st Dept 2012]; *Burton v CW Equities, LLC*, 97 AD3d 462, 462 [1st Dept 2012]). Defendants Brush and Pepsi also failed to demonstrate that they neither created nor had actual or constructive notice of the dangerous condition that caused plaintiff's injuries, since they do not point to any probative evidence on these questions.

Insofar as the Labor Law § 241(6) claim is based on a violation of Industrial Code (12 NYCRR) § 23-1.7(e)(1), it should be dismissed because the accident occurred in an open working area, the evidence that workers traversed the plank to get from

the street to the job site notwithstanding (see *Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]). However, insofar as it based on a violation of 12 NYCRR 23-1.11(a), the § 241(6) claim should not be dismissed because defendants failed to demonstrate that the accident was not caused by unsound or defective lumber (see *Purcell v Metlife Inc.*, 108 AD3d 431, 432-433 [1st Dept 2013]).

Neither defendants nor defendant Ruttura is entitled to summary judgment on defendants' contractual indemnification claim against Ruttura. The subcontract between Holt and Ruttura broadly requires the latter to indemnify defendants for, inter alia, any claims arising from or in connection with Ruttura's performance of the work. The subcontract requires Ruttura to keep its work areas free of debris and unsafe conditions. The accident occurred in an area of the exterior parking lot where Ruttura, the concrete subcontractor, had graded the ground and reinforced it with rebar in preparation for pouring concrete. Thus, plaintiff's accident may be connected with Ruttura's performance of its work insofar as Ruttura may have failed to satisfy its contractual obligation to keep this area clear of

debris, such as the concededly hazardous planks. However, as indicated, issues of fact exist as to the extent of defendants' liability for plaintiff's injuries (see *Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 [1st Dept 2008]).

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK

Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11829      In re: East 51st Street Crane                      Index 150063/10  
Collapse Litigation  
- - - - -  
East 51st Street Development  
Company LLC, et al.,  
Plaintiffs-Respondents,

-against-

Lincoln General Insurance  
Company, et al.,  
Defendants,

Axis Surplus Insurance Company,  
Defendant-Appellant.

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Hurwitz & Fine, P.C., Buffalo (Dan D. Kohane of counsel), for  
appellant.

Clyde & Co., US LLP, New York (Paul R. Koepff of counsel), for  
respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.),  
entered June 5, 2013, which, in this action for a declaratory  
judgment, denied defendant AXIS Surplus Insurance Company's  
motion for an order declaring: (1) the remaining limit of  
liability on the policy of liability insurance issued by it to  
Reliance Construction Ltd.; and (2) that it has no further duty  
to defend or pay defense costs to plaintiffs upon payment of the  
declared limit, except to declare that the remaining limit of  
liability on the policy is \$1,000,000, unanimously affirmed, with  
costs.

Our determination on the prior appeal (103 AD3d 401 [2013]), that the ambiguity of whether "expenses" under the policy includes defense costs must be construed against AXIS, the insured, and that the policy does not provide for defense within limits, constitutes the law of the case and forecloses subsequent review of essentially the same issue (see *Board of Mgrs. of 25 Charles St. Condo v Seligson*, 106 AD3d 130, 135 [1st Dept 2013]). There is no new evidence requiring additional consideration (*Clark Const. Corp. v BLF Realty Holding Corp.*, 54 AD3d 604, 604 [1st Dept 2008]). We note, however, that our conclusion on the prior appeal conveys a continuing obligation on the part of AXIS to defend plaintiff East 51st Street, regardless of whether such defense expenses exceed the policy limit. Accordingly, the motion court's finding that no amounts incurred in the defense of East 51st Street eroded the policy limits comports with our prior ruling.

We have considered AXIS' additional arguments and find them unavailing.

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK

Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11830 Tower Insurance Company Index 107718/10  
of New York,  
Plaintiff-Appellant,

-against-

Solomon Knopf, et al.,  
Defendants-Respondents.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Louis B. York, J.), entered on or about October 12, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 7, 2014,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK



crime was confirmatory (see *People v Rodriguez*, 79 NY2d 445 [1992]). The circumstances provided assurance that the identification was not the product of police suggestion (see *People v Breland*, 83 NY2d 286, 294 [1994]).

The court properly exercised its discretion in denying defendant's motion to preclude, on the ground of belated disclosure, records showing the location where certain cell phone calls were made. The People disclosed these records as soon as they received them, which was on the day before opening statements. Additional time to review the records would have been a more appropriate remedy for any surprise to defendant, but defendant requested no relief other than the drastic sanction of preclusion (see *People v Jenkins*, 98 NY2d 280, 284 [2002]).

Defendant did not preserve his claim that the integrity of the grand jury proceeding was impaired because the cooperating accomplice admitted at trial that a portion of his grand jury testimony was false, and we decline to review it in the interest of justice. Defendant's generalized reference in his pretrial omnibus motion to the People's failure to strictly comply with the provisions of CPL article 190 was insufficient to preserve this claim (see *People v Brown*, 81 NY2d 798 [1993]), and in any event it could not preserve an issue that did not ripen until the

witness testified at trial. As an alternative holding, we find no basis for dismissing the indictment (see *People v Williams*, 7 NY3d 15, 21 [2006]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK

Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11832 Paul Barnes,  
Plaintiff-Appellant,

Index 106057/08

-against-

Jewish Association Foundation,  
Defendant-Respondent.

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Paul Barnes, appellant pro se.

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for  
respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman,  
J.), entered September 25, 2009, which denied plaintiff's motion  
for summary judgment and dismissed the complaint, unanimously  
affirmed, without costs.

In this action for negligence commenced by plaintiff pro se  
against defendant, his former court appointed legal guardian,  
plaintiff failed to demonstrate that defendant was a proximate  
cause of his purported injuries by allegedly causing him to be  
evicted from his apartment and having him admitted to the  
hospital against his wishes. Plaintiff does not dispute  
defendant's contention that there was a pending eviction  
proceeding against him for rent arrears when defendant was  
appointed his guardian, and the record is devoid of any evidence  
establishing how defendant caused him to be evicted. Moreover,

the record contains nothing to support plaintiff's contention that defendant caused him to lose his possessions by improperly allowing the landlord access to his apartment, nor does it establish that defendant caused plaintiff to be admitted to the hospital or that he suffered any injuries while he was there. Since plaintiff failed to meet the initial burden of establishing his entitlement to judgment as a matter of law, the motion for summary judgment was properly denied (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985]).

Contrary to defendant's contention, the record is insufficient to determine whether this negligence action is barred by the three-year statute of limitations, or whether the complaint is barred by the order dated August 14, 2006, releasing defendant from all future liability related to its responsibilities as plaintiff's guardian. However, since the complaint failed to properly plead a cause of action for

negligence, the motion court properly granted summary judgment dismissing the complaint to defendant upon a search of the record (see *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429 [1996]).

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK

Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11833 Rina Solano,  
Plaintiff-Respondent,

Index 303544/12

-against-

Javier Mendez,  
Defendant-Appellant.

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Cheven, Keely & Hatzis, New York (William B. Stock of counsel),  
for appellant.

Myers, Singer and Galiardo, LLP, New York (Paul A. Cagno of  
counsel), for respondent.

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Order, Supreme Court, Bronx County (Maryann Brigantti-  
Hughes, J.), entered February 27, 2013, which denied defendant's  
motion to dismiss the complaint pursuant to CPLR 3211(a) (8)  
based on improper service, and granted plaintiff's cross motion  
for an extension of time to re-serve defendant pursuant to CPLR  
306-b, unanimously affirmed, without costs.

The court properly denied defendant's motion to dismiss the  
complaint, and granted plaintiff an extension of time to serve  
the summons and complaint for good cause shown and in the  
interests of justice (see CPLR 306-b). Plaintiff demonstrated  
good cause since service was made within two weeks of the filing  
of the action, at the address and apartment for defendant listed  
on the police accident report and shown in a database search run  
by plaintiff's process server (see *Matter of Board of Mgrs. of*

*Copley Ct. Condominium v Town of Ossining*, 19 NY3d 869, 871 [2012]; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-107 [2001]).

In any event, plaintiff demonstrated that the interests of justice warranted the relief (see *Nicodene v Byblos Rest., Inc.*, 98 AD3d 445, 446 [1st Dept 2012]). Defendant's carrier was notified of the action within days of its filing, and correspondence provided by plaintiff demonstrated that an exchange of documents and settlement negotiations were ongoing prior to the filing of the complaint. No prejudice to defendant was shown since plaintiff's cross motion for the extension of time to serve defendant was made approximately four months after the 120-day period had expired. Moreover, the police accident report supported plaintiff's assertion that the action is potentially meritorious.

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

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testimony was not credited by Supreme Court and there is no basis to upset such finding (see *Travelers Prop. & Cas. Co.*, 82 AD3d at 402).

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK

Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11835N Christina Garcia, et al.,  
Plaintiffs-Appellants,

Index 101039/10

-against-

New York-Presbyterian Hospital also  
known as The University Hospital of  
Columbia and Cornell, et al.,  
Defendants-Respondents,

Steven Kushner, M.D.,  
Defendant.

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Reardon & Sclafani, P.C., Tarrytown (Michael V. Sclafani of  
counsel), for appellants.

Martin Clearwater & Bell LLP, New York (Stewart G. Milch of  
counsel), for respondents.

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Order, Supreme Court, New York County (Joan B. Lobis, J.),  
entered May 16, 2013, which denied plaintiffs' motion for leave  
to amend the pleadings to add a new party defendant and to file  
an amended summons and second amended complaint after the statute  
of limitations had run, unanimously affirmed, without costs.

In this medical malpractice action, plaintiffs allege that  
the defendant doctors, employed by or affiliated with defendant  
New York-Presbyterian Hospital, were negligent in performing a  
laparoscopic cholecystectomy procedure and providing aftercare.  
After the statute of limitations had run, plaintiffs sought leave  
to amend the complaint to add a claim against another physician,

a surgeon affiliated with the hospital, who made two notes in the injured plaintiff's medical chart after she underwent the procedure.

While leave to amend the pleadings is ordinarily freely given (CPLR 3025[b]), the court providently exercised its discretion in denying plaintiffs leave to amend for a second time to add a new party defendant, since the proposed amended pleading clearly lacks merit (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]). Since the statute of limitations has run as to the proposed medical malpractice claim against the proposed additional defendant, plaintiffs bore the burden of demonstrating the applicability of the relation-back doctrine (*Cintron v Lynn*, 306 AD2d 118, 119-120 [1st Dept 2003]; CPLR 203[c]).

Plaintiffs argue that the hospital may be vicariously liable for treatment negligently rendered by the proposed defendant, even if he was not an employee of the hospital, because the injured plaintiff sought "treatment from the hospital, not from a particular physician" (*Shafran v St. Vincent's Hosp. & Med. Ctr.*, 264 AD2d 553, 558 [1st Dept 1999]). However, that rationale for imposition of vicarious liability against the hospital is an insufficient basis for finding that the proposed defendant is so "united in interest" with the hospital that he can be charged

with notice of the commencement of the action for purposes of the relation-back doctrine (*Anderson v Montefiore Med. Ctr.*, 41 AD3d 105, 107-108 [1st Dept 2007]). Even if the proposed additional defendant could be charged with such notice, plaintiffs failed to provide any basis for finding that the proposed defendant "knew or should have known" that the action would have been brought against him too, but for a mistake by the plaintiffs as to the identity of the proper parties (see *Soto v Bronx-Lebanon Hosp. Ctr.*, 93 AD3d 481 [1st Dept 2012]; *Alvarado v Beth Israel Med. Ctr.*, 60 AD3d 981 [2d Dept 2009]; *Cintron v Lynn*, 306 AD2d at 119-120). To the contrary, under the circumstances, when plaintiffs first moved to add two other physicians as party defendants, and then allowed the statute to elapse without bringing suit against him, he could have concluded that there was no intent to sue him "at all 'and that the matter has been laid to rest as far as he is concerned'" (*Buran v Coupal*, 87 NY2d 173, 181 [1995]).

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK



denied. Based on the totality of information in their possession, the police had probable cause to arrest defendant and conduct a lawful automobile search (see e.g. *People v Wine*, 89 AD3d 465 [1st Dept 2011], *lv denied* 18 NY3d 887 [2012]).

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK



struck by a ball is the greatest" (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 330 [1981]; see *Haymon v Pettit*, 9 NY3d 324 [2007]; *Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246, 247-248 [1st Dept 2008], *affd* 10 NY2d 889 [2008]).

Accordingly, defendants cannot be held liable for the injuries suffered by plaintiff who was struck by a baseball while walking on a sidewalk adjacent to a school yard that contained a ball field.

Plaintiff failed to demonstrate that further discovery is necessary for her to properly respond to defendant's motion.

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

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK

Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11838- Index 651212/12  
11839-  
11840 David Trolman,  
Plaintiff-Appellant,

-against-

Trolman, Glaser & Lichtman, P.C., et al.,  
Defendants-Respondents.

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Andrew L. Weitz & Associates, P.C., New York (James M. Lane of  
counsel), for appellant.

Denlea & Carton, LLP, White Plains (Jeffrey I. Carton of  
counsel), for respondents.

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Judgment, Supreme Court, New York County (Melvin L.  
Schweitzer, J.), entered August 23, 2013, inter alia, awarding  
plaintiff \$500,000 to be paid within 45 days of plaintiff's  
delivery of a general release in favor of defendant law firm,  
\$250,000 to be paid on or before June 30, 2014, and \$250,000 to  
be paid on or before June 30, 2015, unanimously affirmed, without  
costs. Appeals from orders, same court and Justice, entered  
December 13, 2012 and July 11, 2013, respectively, which, to the  
extent appealed from as limited by the briefs, granted  
defendants' motion to dismiss the unjust enrichment and  
conversion claims as against the individual defendants and  
granted defendants' motion to enforce a settlement agreement,  
unanimously dismissed, without costs, as subsumed in the appeal

from the judgment.

The motion court properly determined that the handwritten memorandum executed following mediation between the parties was a binding and enforceable settlement agreement, and not merely an agreement to agree. The memorandum's plain language expressed the parties' intention to be bound (see *Bed Bath & Beyond Inc. v Ibex Constr. LLC*, 52 AD3d 413 [1st Dept 2008]), and established a meeting of the minds regarding the material terms pertaining to the settlement of plaintiff's claim for unpaid deferred compensation (see *Henri Assoc. v Saxony Carpet Co.*, 249 AD2d 63, 66 [1st Dept 1998]). The agreement was not rendered ineffective simply because certain non-material terms were left for future negotiation (see *id.*; *Conopco, Inc. v Wathne Ltd.*, 190 AD2d 587, 588 [1st Dept 1987]), or because it stated that the parties would promptly execute formal settlement papers (see *Kowalchuk v Stroup*, 61 AD3d 118, 123 [1st Dept 2009]).

The record demonstrates that the entirety of the parties' arbitration proceeding was submitted to mediation and is therefore encompassed in the enforceable settlement agreement. To the extent plaintiff may have desired to "carve out" any arbitrable claims against the individual defendants and not submit them to mediation, it was incumbent upon him to make that clear during the proceedings, which he failed to do (*accord*

*Coppola v WE Magazine Inc.*, 268 AD2d 303 [1st Dept 2000]).

The motion court did not abuse its discretion by requiring plaintiff to execute a general release of all known and unknown claims as of the date of the settlement agreement.

We have considered plaintiff's additional arguments and find them unavailing.

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

ENTERED: FEBRUARY 27, 2014

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

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DEPUTY CLERK

Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11841- Index 250306/11  
11842-  
11842A In re The State of New York,  
Petitioner-Respondent,

-against-

Enrique T.,  
Respondent-Appellant.

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Marvin Bernstein, Mental Hygiene Legal Services, New York (Sadie Zea Ishee of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Cecelia C. Chang of counsel), for respondent.

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Order of commitment, Supreme Court, Bronx County (Colleen D. Duffy, J.), entered March 1, 2012, which, upon a jury verdict that respondent suffers from a mental abnormality and a finding that he is a dangerous sex offender requiring confinement, committed respondent to a secure treatment facility, unanimously affirmed, without costs. Appeal from second amended decision and order after trial, same court and Justice, entered on or about February 15, 2012, unanimously dismissed, without costs, as superseded by the appeal from the order of commitment. Appeal from order, same court and Justice, entered on or about February 15, 2012, which ordered respondent's pretrial detention, unanimously dismissed, without costs.

Respondent is barred by the fugitive-disentitlement doctrine

from challenging the pretrial detention order since he absconded and never complied with the order (*see e.g. Wechsler v Wechsler*, 45 AD3d 470 [1st Dept 2007]). In any event, respondent concedes that his instant challenge to the constitutionality of the pretrial civil detention provisions of Mental Hygiene Law § 10.06(k) is foreclosed by our decision in a prior appeal in this proceeding (93 AD3d 158 [1st Dept 2012], *lv dismissed* 18 NY3d 976 [2012]).

Respondent failed to preserve his argument that the handwritten homework assignments completed as part of his participation in a sex offender treatment program were disclosed in violation of the Privacy Rule promulgated by the United States Department of Health and Human Services (45 CFR parts 160, 164) and the Health Insurance Portability and Accountability Act (HIPAA) (Pub L 104-191, 110 US Stat 1936 [codified in various titles of the United States Code]) and therefore could not be entered into evidence at his trial in this Mental Hygiene Law article 10 proceeding (*see Matter of State of New York v Charada T.*, 107 AD3d 528 [1st Dept 2013], *lv granted* \_\_\_ NY3d \_\_\_, 2013 NY Slip Op 93636 [2013]). Respondent failed to object to testimony pertaining to these records at his probable cause hearing and, in fact, his counsel expressly relied on respondent's prior sex offender treatment as evidence that

respondent no longer suffered from a mental abnormality within the meaning of Mental Hygiene Law § 10.03(i). In any event, respondent's argument is without merit. Because article 10 expressly requires that these records be considered by the Commissioner of Mental Health in determining whether respondent is a "sex offender requiring civil management" (see Mental Hygiene Law § 10.05[e],[g]), the limited disclosure here was permitted under HIPAA's Privacy Rule (see *Matter of New York City Health & Hosps. Corp. v New York State Commn. of Correction*, 19 NY3d 239, 246 [2012], citing 45 CFR 164.512[a] and *Arons v Jutkowitz*, 9 NY3d 393, 414 [2007]). Even if the disclosure failed to comply with the procedural requirements of the Privacy Rule, HIPAA does not mandate exclusion of the records from evidence in the circumstances of this case (*cf. Matter of Miguel M. [Barron]*, 17 NY3d 37, 45 [2011]).

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

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

ENTERED: FEBRUARY 27, 2014



DEPUTY CLERK

Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11843 In re Esther Y.,  
Petitioner-Appellant,

-against-

Edward C.,  
Respondent-Respondent.

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Claire B. Chico, P.C., New York (Claire B. Chico of counsel), for  
appellant.

The Edelsteins, Faegenburg & Brown LLP, New York (Adam J.  
Edelstein of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim  
Nothenberg of counsel), attorney for the child.

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Appeal from order, Family Court, New York County (Jody Adams,  
J.), entered on or about October 16, 2012, which dismissed the  
petition to change custody and modified the visitation provisions  
of the parties' Amended Judgment of Divorce, unanimously  
dismissed, without costs, as taken from a nonappealable paper.

No appeal lies from the order since it was entered upon

petitioner's default in appearing at the hearing to determine whether the change in custody she requested was warranted (see CPLR 5511; *Matter of Anthony M.W.A. [Micah W.A.]*, 80 AD3d 476 [1st Dept 2011]).

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK

Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11844 Maria Del Carmen Cuaya Coyotl, Index 300638/08  
Plaintiff-Respondent,

-against-

2504 BPE Realty LLC,  
Defendant-Appellant.

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Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of  
counsel), for appellant.

Dinkes & Schwitzer, P.C., New York (Andrea M. Arrigo of counsel),  
for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered  
July 26, 2013, which denied defendant's motion for summary  
judgment dismissing the complaint, unanimously affirmed, without  
costs.

The court properly found that defendant failed to sustain its  
initial burden of demonstrating that its negligence was not a  
proximate cause of plaintiff's injuries. Defendant's manager  
testified that neither he nor the building superintendent  
inspected the fire escape at any time (see *Hayes v Riverbend Hous.  
Co., Inc.*, 40 AD3d 500, 501 [1st Dept 2007], *lv denied* 9 NY3d 809  
[2007]; *Perez v 2305 Univ. Ave., LLC*, 78 AD3d 462, 463 [1st Dept  
2010]). Numerous witnesses and a surveillance video indicated  
that the drop down ladder on the fire escape may not have  
functioned properly, since it did not extend to the ground.

Witnesses and the video indicate that persons evacuating the building because of the fire had to jump off the ladder or be assisted to the ground. Defendant failed to demonstrate as a matter of law that the resulting delay in getting off the fire escape was not a significant factor in plaintiff's accident.

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK



Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11846 Carlos Santana, Index 300661/09  
Plaintiff-Respondent,

-against-

Ernest Castillo, et al.,  
Defendants-Appellants.

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Faust Goetz Schenker & Blee LLP, New York (Lisa De Lindsay of  
counsel), for appellants.

Dinkes & Schwitzer, P.C., New York (Laurence Rogers of counsel),  
for respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.),  
entered January 3, 2013, which denied defendants' motion pursuant  
to CPLR 3126 for spoliation sanctions, unanimously affirmed,  
without costs.

On January 26, 2009, plaintiff commenced this action seeking  
damages for injuries sustained on September 5, 2008, when, while  
riding a bicycle, he was struck when the door of defendants'  
double-parked truck opened as he was riding by it. On July 6,  
2010, plaintiff testified that the bicycle was being stored at a  
friend's house. On February 6, 2012, defendants, for the first  
time, sought an opportunity to inspect the bicycle. However, the  
bicycle was no longer available because, according to plaintiff,  
his friend had disposed of the bicycle.

The court did not improvidently exercise its discretion in denying the motion. Defendants failed to show that the bicycle was disposed of in bad faith or that they were thereby prejudiced in the ability to defend the action (see *Robertson v New York City Hous. Auth.*, 58 AD3d 535, 536 [1st Dept 2009]). Defendants cite no testimony or provide any evidence to support their contention that the bicycle, by virtue of its involvement in the accident, constituted key evidence. While the destruction of evidence may diminish a party's ability to prove the relevancy of, and need for, the destroyed evidence (see *Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 17 [1st Dept 2000], *lv dismissed* 96 NY2d 937 [2001]), that is not the case here since there is no suggestion that the condition of the bicycle caused or contributed to the accident. Furthermore, defendants' claim as to the importance of the bicycle is undercut by their unexplained delay in seeking its production.

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK



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

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK



§ 189[1][g]), Executive Law § 63(12) and Article 28 of the Tax Law by knowingly making false statements material to an obligation to pay sales tax pursuant to Tax Law § 1105(b)(2). Contrary to defendants' interpretation, the Tax Law provision is not preempted by the Federal Mobile Telecommunications Sourcing Act (4 USC 116 *et seq.*).

The court also properly rejected defendants' argument that the New York False Claims Act with respect to statements made under the Tax Law should not be given its stated retroactive effect. Defendants fail to show that the Act's sanction of civil penalties, including treble damages, is so punitive in nature and effect as to have its retroactive effect barred by the Ex Post Facto Clause (US Const, art I, § 10).

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK

Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11852 Mark Kelly, Index 103338/06  
Plaintiff-Respondent, 590633/06  
591154/06  
-against- 591176/06

Glass House Development, LLC, et al.,  
Defendants-Respondents,

Zapata Construction, Inc.,  
Defendant-Appellant.

- - - - -

Glass House Development, LLC, et al.,  
Third-Party Plaintiffs-Respondents,

-against-

County Glass & Metal Installers, Inc., et al.,  
Third-Party Defendants,

Zapata Construction, Inc.,  
Third-Party Defendant/Second  
Third-Party Plaintiff-Appellant,

-against-

Hi-Rise Carpentry Corp.,  
Second Third-Party Defendant-Respondent.

- - - - -

Vendome Management, Inc.,  
Third Third-Party Plaintiff-Respondent,

-against-

County Glass & Metal Installers, Inc., et al.,  
Third Third-Party Defendants,

Zapata Construction, Inc.,  
Third Third-Party Defendant-Appellant.

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Law Office of James J. Toomey, New York (Eric P. Tosca of  
counsel), for appellant.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for Mark Kelly, respondent.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for Glass House Development, LLC, Vendome Management, Inc., and Pavarini McGovern, LLC, respondents.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Evan Rudnicki of counsel), for Hi-Rise Carpentry Corp., respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered March 21, 2012, which, insofar as appealed from as limited by the briefs, denied the motion of defendant/second third-party plaintiff Zapata Construction, Inc. (Zapata) for summary judgment dismissing the complaint against it, and denied Zapata's motion for summary judgment on its contractual indemnification claim against defendant/second third-party defendant Hi-Rise Carpentry Corp. (Hi-Rise), unanimously affirmed, without costs.

Plaintiff alleges that while he was moving a large panel on a dolly toward the perimeter of the ninth floor of the new building being constructed, he sustained injuries when his entire leg got caught in an uncovered, rectangular hole in the floor, measuring about three feet by two feet. The court properly denied Zapata's motion for summary judgment based on the conflicting deposition testimony regarding Zapata's role in ensuring that any open holes in the floors, which were used by various contractors on the project, remained covered (see *Gallagher v Levien & Co.*, 72 AD3d

407 [1st Dept 2010]; *O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60 [1st Dept 1999]). Two employees of a nonparty subcontractor testified to the effect that this task was handled primarily by Hi-Rise, pursuant to its subcontract with Zapata, whereas the general contractor's highest-ranking employee who regularly worked on the site testified that Zapata itself, rather than any of its subcontractors, was directly responsible for hole protection as of the day of the accident.

The court properly denied Zapata's motion for summary judgment on its contractual indemnification claim against Hi-Rise. The provision at issue requires Hi-Rise to indemnify Zapata for injuries and damages incurred through the performance of the subcontract, insofar as caused by an act or omission of Hi-Rise, but limited to the extent of Hi-Rise's negligence. Zapata failed

to establish its freedom from negligence (see *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]), and there are issues of fact regarding the extent to which the accident may be attributed to Hi-Rise.

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK



Defendant did not preserve his challenge to the sufficiency of the evidence supporting his bail jumping conviction, and we decline to review it in the interest of justice. As an alternative holding, we find that the evidence established the elements of the crime (see Penal Law § 215.56).

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

ENTERED: FEBRUARY 27, 2014



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was made and that they did not provide a reasonable explanation for their delay in seeking the venue change (see e.g. *Romero v St. Anthony Community Hosp.*, 96 AD3d 532 [1st Dept 2012]; *Mena v Four Wheels Co.*, 272 AD2d 223 [1st Dept 2000]).

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.  
Dianne T. Renwick  
David B. Saxe  
Leland G. DeGrasse  
Rosalyn H. Richter, JJ.

10796  
Index 150935/13

x

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Kisshia Simmons-Grant,  
Plaintiff-Respondent,

-against-

Quinn Emanuel Urquhart & Sullivan, LLP,  
Defendant-Appellant.

x

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Defendant appeals from the order of the Supreme Court,  
New York County (Joan M. Kenney, J.), entered  
April 30, 2013, which, to the extent appealed  
from, denied its motion to dismiss the second  
cause of action for retaliation and to strike  
certain portions of plaintiff's complaint.

Proskauer Rose LLP, New York (Lawrence R.  
Sandak and Alychia L. Buchan of counsel), for  
appellant.

Liddle & Robinson, L.L.P., New York (James W.  
Halter of counsel), for respondent.

ACOSTA, J.P.

This appeal requires us to decide whether the doctrine of collateral estoppel bars an employee's retaliation claim under the New York City Human Rights Law (the City HRL), where a similar claim under Title VII of the Civil Rights Act of 1964 was dismissed by the U.S. District Court for the Southern District of New York.

Plaintiff is an African American woman who was employed by defendant law firm as an hourly "staff attorney" from 2006 until she resigned effective August 5, 2010. In 2011, she filed a complaint in federal court alleging racial discrimination and retaliation (including constructive discharge as a consequence of the latter) under Title VII (42 USC § 2000e *et seq.*), the New York State Human Rights Law (Executive Law, art 15, § 296), and the City HRL (Administrative Code of City of NY § 8-107). In January 2013, the District Court granted defendant's motion for summary judgment dismissing plaintiff's Title VII claims and declined to exercise supplemental jurisdiction over plaintiff's state and city claims (*Simmons-Grant v Quinn Emanuel Urquhart & Sullivan*, 915 F Supp 2d 498 [SD NY 2013]). Later that month, plaintiff refiled her City HRL claims in New York State Supreme Court. Defendant moved to strike portions of plaintiff's complaint and dismiss her retaliation cause of action pursuant to

CPLR 3211(a) (5) and (7), contending that the cause of action is barred by the doctrine of collateral estoppel.

The motion court denied defendant's motion to dismiss, stating that the District Court "never addressed the issues and the factual findings as it [sic] relates to causes of action under [the City HRL]." This appeal followed. We note that defendant did not seek to dismiss plaintiff's discrimination cause of action and, accordingly, we deal only with her City HRL retaliation claim (Administrative Code § 8-107[7]).

Substance of plaintiff's retaliation claim

In both the federal court action and the state court action, plaintiff alleged that, because she had complained in February 2010 to the managing partner of defendant's New York office about allegedly discriminatory practices (a complaint the managing attorney rejected the same month), she was retaliated against in July 2010 in connection with defendant's handling of a dispute she had with a coworker that arose out of an ongoing assignment to work on a document review project (the United Guarantee matter).

Plaintiff does not claim retaliation from her assignment, along with two coworkers, to supervise the work of "contract attorneys" on the United Guarantee matter. Indeed, she acknowledged in her complaint that she was assigned to the United

Guarantee matter in January 2010, before she made a complaint of discriminatory practices.

Nor does plaintiff claim any ongoing pattern of retaliation; her allegations of retaliation are limited to a one-day period from July 20 to July 21, 2010. Earlier that month, the associate in charge of the project had asked that the staff attorneys add a Saturday shift to the schedule to expedite the United Guarantee matter. A rotating schedule of Saturday coverage was set up, apparently by plaintiff (who does not allege that she was singled out for Saturday work).

On July 20th, plaintiff informed the senior discovery attorney and the New York office manager by email that her coworker was upset about having to work on Saturdays and that, several days earlier, he had screamed at her while he "was shaking and angry." (Plaintiff's coworker denied raising his voice.) After plaintiff attempted to ameliorate the situation by scheduling herself to work in lieu of her coworker on Saturday, July 24th, he left her a voicemail message indicating his refusal to work on Saturdays. Plaintiff, who characterized her coworker's behavior as "an obvious overreaction to a mundane scheduling matter," ultimately requested that either she or the coworker be reassigned to a different project because she was fearful of working with him. The record before this Court is

devoid of any evidence of the words exchanged at plaintiff's in-person confrontation with the coworker or in any of their correspondence, and there is no allegation that any verbal threats were made against plaintiff.

The next day, July 21st, plaintiff met with the senior discovery attorney and the New York office manager and reiterated her request that she or her coworker be reassigned. Plaintiff does not allege that they stonewalled her request to have her contact with this particular coworker limited. In fact, plaintiff's deposition testimony in the federal action established that the senior discovery attorney offered to take over responsibility assigning the shift schedule (*Simmons-Grant*, 915 F Supp 2d at 502). The court also noted that plaintiff's testimony reflected two other solutions proposed by defendant that were discussed at the meeting: "all communications between plaintiff and [the coworker] would go through" the senior discovery attorney, and "a twenty-minute buffer would be created between [their] shifts . . ." (*id.*). Plaintiff's complaint in the federal court action confirms the twenty-minute buffer proposal; her complaint in the state court action adds that the senior discovery attorney and office manager offered to make sure that plaintiff and the coworker "would not be assigned to the same projects in the future."

What plaintiff does say is retaliatory -- that is, what occurred *because* she had previously opposed allegedly discriminatory practices -- is that defendant refused during the meeting to immediately reassign her to another project, although it would have been easy to do so. Later that day, plaintiff submitted her resignation by email, effective August 5, 2010.

### Discussion

The doctrine of collateral estoppel applies where “[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue . . . had a full and fair opportunity to contest the prior determination” (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]). “The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action” (*id.* at 456).

In considering plaintiff’s Title VII constructive discharge claim, the District Court examined, as it was obliged to do, the question of whether defendant “intentionally subjected her to an intolerable work environment” (*Simmons-Grant*, 915 F Supp 2d at

506).<sup>1</sup> An integral part of the court's determination that defendant had not done so was its explicit finding that defendant "responded promptly after [p]laintiff's complaint" and "the next day, July 21, 2010, attempted to address [p]laintiff's concerns within the constraints of [defendant's] staffing situation" (*id.* at 507).

To have concluded that defendant did all that it could given its staffing constraints, the District Court also necessarily considered the argument that plaintiff had explicitly and directly advanced, namely that it "would have been simple" for defendant to switch plaintiff's assignment with any of a number of other staff attorneys, but that defendant chose not to utilize that alternative as an act of retaliation. The court explicitly found that plaintiff "ha[d] not introduced any evidence to contradict [the supervising discovery attorney's] statement that all of the contract attorneys were, at that time, working on

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<sup>1</sup>This court has not yet ruled as to the contours of a City HRL constructive discharge claim using enhanced liberal construction analysis required by the New York City Local Civil Rights Restoration Act of 2005 (Local Law 85 [2005] of City of NY [Restoration Act]). The requirements of this type of analysis are set out in *Williams v NYCHA* (61 AD3d 62 [1st Dept 2009]). As such, it should not be assumed that the standards for establishing constructive discharge under the City HRL are the same as have been set forth for Title VII, either in respect to the degree of difficulty or unpleasantness of working conditions required to make out the claim or otherwise.

time-sensitive matters which would have been disrupted by a transfer, and that no alternative placement was available” (*Simmons-Grant*, 915 F Supp 2d at 506 [emphasis added]). The supervising discovery attorney “could not immediately transfer [p]laintiff,” the court also explicitly concluded *id.*).

In the unique circumstances of this case, it is appropriate to estop plaintiff from relitigating the issue of whether an immediate reassignment was possible. Consequently, by being precluded from arguing that an immediate reassignment was possible, plaintiff will be unable to prove that the challenged failure to reassign occurred, in whole or in part, because of retaliation.<sup>2</sup> As the failure to immediately transfer plaintiff is the sole action or failure to act that comprises the *entirety* of plaintiff’s City HRL retaliation claim in this action, that retaliation claim is herewith dismissed.

There are several factors specific to this case, and

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<sup>2</sup>There can, of course, be circumstances where the fact that an employer cannot modify assignments without causing at least some disruption to the business will not be dispositive of the employer’s motive or the adequacy of its response. These include circumstances in which other employees have received reassignments with a similar business impact, harassment situations where reassignment of an alleged harasser is an “immediate and appropriate corrective action” (Administrative Code § 1-107[13][b][2]) notwithstanding business disruption, and cases of accommodation for persons with disabilities where the covered entity fails to prove that a business disruption constitutes an “undue hardship.”

integral to our determination, that make the application of the doctrine of collateral estoppel appropriate to the extent indicated.

First, plaintiff does not argue that she lacked a full and fair opportunity to litigate the issue of the feasibility of immediate reassignment. Indeed, that issue was central to the previous litigation.

Second, the feasibility-of-immediate-reassignment issue, a strictly factual question not involving application of law to facts or the expression of an ultimate legal conclusion, does not implicate any of the several ways in which City HRL claims -- including retaliation claims -- raise issues not identical to their federal and state counterparts. Those issues include a lack of identity with federal and state counterparts of elements of claims, the scope of conduct proscribed, methods and standards of proof, as well as the distinct demand made by the City HRL -- and applicable across all issues -- that evidence be assessed with maximum sensitivity to the impact that workplace realities can have on employees (see e.g. *Williams*, 61 AD3d at 70-71). Of course, the resolution of even a strictly factual issue could vary depending on the balancing process that shapes a court's

view of one or more events. The balancing process demanded by Title VII as it has been interpreted (see e.g. *Simmons-Grant*, 915 F Supp 2d at 506) and the City HRL as it has been amended by the Restoration Act (see e.g. *Williams*, 61 AD3d at 66; *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 109 [2d Cir 2013]; *Loeffler v Staten Island Univ. Hosp.*, 582 F3d 268, 278 [2d Cir 2009]) can easily yield different interpretations and, hence, different results. A federal court's factual findings under the federal analytical framework may preclude state courts from adjudicating city law claims. Here, however, the concern is minimal, because the District Court's fact-finding regarding this single, time-limited event was based on undisputed evidentiary materials and involved virtually no judicial interpretation.

Third, this case involves an explicit finding that plaintiff produced *no* evidence on the relevant specific factual issue in the litigation. Indeed, in opposition to defendant's collateral estoppel motion, plaintiff has not identified any evidence on the relevant issue that the court in the previous litigation overlooked. Thus, the frequent risk that evidence winds up being

undervalued for City HRL purposes because it has been filtered through a Title VII lens is not present here.<sup>3</sup>

On appeal, plaintiff focuses her argument on the fact that the provisions of the City HRL must be construed liberally and independently to accomplish their “uniquely broad and remedial purposes” (Admin. Code § 8-130). She correctly sets forth the general principle (see *e.g. Albunio v City of New York*, 16 NY3d 472, 477-78 [2011] [all provisions of the City HRL must be construed “broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible”]; *Williams*, 61 AD3d at 66 [clarifying that the City HRL, as amended by the Restoration Act, “now explicitly requires an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language”]). Plaintiff’s difficulty is that the general principle does not

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<sup>3</sup>Where there is some evidence that even one of the defendant’s explanations is false, misleading, or incomplete, for example, the conclusion that ought to follow differs markedly between federal law and the City HRL (see *e.g. Bennett v Health Mgmt. Sys., Inc.*, 92 AD3d 29, 41-42, 43 [1st Dept 2011] *lv denied* 18 NY3d 811 [2012] [contrasting *Reeves v Sanderson Plumbing Prods., Inc.*, 530 US 133 (2000), regarding evidence of falsity for federal purposes, with the City HRL rule that, *inter alia*, treats evidence of falsity as much more probative]. In the instant case, there is no such evidence, despite plaintiff’s bald allegations that defendant could have immediately reassigned her.

substitute for evidence as to the feasibility of an immediate reassignment (see e.g. *Bennett*, 92 AD3d at 38 ["In the context of a summary judgment motion, of course, once a defendant has laid bare its proof, a plaintiff is compelled to do the same"]). Although defendant's motion is not for summary judgment, once defendant established its nonretaliatory reason in the federal action, plaintiff was required to identify an issue of fact. She failed to do so.

Because we are dismissing the second cause of action (the retaliation claim) in the state court action, that branch of defendant's motion which seeks to limit the relief available to plaintiff arising out of plaintiff's alleged constructive discharge is denied as moot. As we read the complaint, the claim for constructive discharge is wholly unrelated to the underlying discrimination claim (the first cause of action that remains); it was allegedly a consequence only of the now-dismissed retaliation claim.

Accordingly, the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered April 30, 2013, which, to the extent appealed from, denied defendant's motion to dismiss the

second cause of action for retaliation and to strike certain portions of plaintiff's complaint, should be modified, on the law, to dismiss the second cause of action, and otherwise affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 27, 2014



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DEPUTY CLERK