SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 8, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Andrias, Manzanet-Daniels, Kahn, JJ.

14923 The People of the State of New York, SCI 5046/86
Respondent,

-against-

Francisco Medina,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Ellen Dille of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about April 30, 2012, which denied defendant's CPL 440.10 motion to vacate his conviction, unanimously dismissed, as moot.

The Court of Appeals has recently clarified the scope of *People v Ventura* (17 NY3d 675 [2011]), holding that while that case prohibits the appellate divisions from dismissing direct appeals on account of a defendant's involuntary deportation, we retain the discretionary authority to dismiss permissive appeals on that ground. Consistent with that authority, we dismiss defendant's permissive appeal due to his involuntary deportation

(*People v Harrison*, 27 NY3d 281 [2016]). It is accordingly unnecessary to reach defendant's further contentions.

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

ENTERED: SEPTEMBER 8, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Webber, JJ.

16526 Index 307564/09
83712/10

Francisco Albino,
Plaintiff-Appellant,

-against-

221-223 West 82 Owners Corp., et al.,
Defendants-Respondents.

- - - - -

[And a Third-Party Action]

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Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for respondents.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered October 3, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1), affirmed, without costs.

Plaintiff's employer, third-party defendant JRP Contracting Inc., was hired by defendant 221-223 West 82 Owners Corp. (Owners) to make repairs to the roof of Owners' building. Plaintiff was injured when he fell to the ground while attempting to descend from the roof of the building by means of a scaffold attached to the side of the building. In this action, plaintiff seeks to recover for his injuries under Labor Law §§ 240(1) and

241(6).

After discovery had been conducted, plaintiff moved for, inter alia, summary judgment as to liability on his cause of action under Labor Law § 240(1). The motion court denied this relief. Upon plaintiff's appeal, we affirm on the ground that triable issues exist as to both (1) whether plaintiff had available to him a harness and safety line but disobeyed instructions to use this equipment and (2) whether plaintiff's fall was caused by a violation of the statute.

We turn first to the issue relating to plaintiff's omission to use a harness and safety line while working on the roof. Plaintiff testified that, although he had his own harness, there were no safety ropes available at the site to attach the harness to the scaffold. Plaintiff further testified that he believed that he would have been fired if he had delayed the job until safety ropes had been obtained. Plaintiff's foreman, on the other hand, testified at his deposition, and averred in his affidavit, that he had instructed all employees, including plaintiff, to wear safety equipment, and that he and plaintiff had worn attached harnesses while working together earlier in the day. Plaintiff's foreman further stated that, while he had left plaintiff in charge of the work site when he left for the day and asked him to finish the job, the foreman had never indicated to

plaintiff that he was expected to work on the roof without using a properly attached harness. This conflicting testimony creates a triable issue as to whether plaintiff, in working on the roof without wearing an attached safety harness, recalcitrantly failed to use available equipment that he had been directed to use and that, if used, would have averted his injuries (*see Gonzalez v Rodless Props., L.P.*, 37 AD3d 180, 181 [1st Dept 2007]).

A triable issue of fact also exists as to whether plaintiff's fall was caused by the movement of the scaffold he was attempting to use or, alternatively, by plaintiff's losing his footing unaccompanied by any failure of the scaffold. Plaintiff testified at deposition that, after he had completed the required repairs on the roof, he attempted to descend from the roof by means of the scaffold that was tied to the side of the building. According to plaintiff, as he attempted to swing down from the roof to the scaffold, a wire attaching the scaffold to the building snapped, causing the scaffold to swing away from the wall and resulting in plaintiff's fall to the ground below. The foreman, however, testified that, in conversation after the accident, plaintiff had admitted to him that he fell because his foot had slipped as he stepped onto the scaffold from the roof, without mentioning any movement of the scaffold. These two versions of how the accident happened, each given by plaintiff,

the sole witness to the incident, are inconsistent with each other and give rise to an issue of fact as to whether plaintiff's fall was caused by a failure of a safety device within the purview of § 240(1). As this Court recently noted, "[W]here a plaintiff is the sole witness to an accident, an issue of fact may exist where he or she provides inconsistent accounts of the accident" (*Smigielski v Teachers Ins. & Annuity Assn. of Am.*, 137 AD3d 676, 676 [1st Dept 2016], citing *Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465, 466 [1st Dept 2013]; *see also Jones v W. 56th St. Assoc.*, 33 AD3d 551, 552 [1st Dept 2006] [the plaintiff was not entitled to summary judgment as to liability where inconsistencies in his accounts of how he came to be injured raised "a factual issue . . . as to whether a violation of Labor Law § 240(1) was a proximate cause of plaintiff's injury"]).

Contrary to the concurrence's view, in the event that a factfinder determines that the accident occurred as plaintiff allegedly described it to his foreman, there would be no basis for imposing liability under Labor Law § 240(1), even if plaintiff is found not to have been recalcitrant in failing to use a harness. "[A] fall from a scaffold or ladder, in and of itself, [does not] result[] in an award of damages to the injured party" under section 240(1) (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003]). Rather, liability under

section 240(1) depends upon the injury having resulted from "the failure to use, or the inadequacy of . . . a device" within the purview of the statute (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011] [internal quotation marks omitted]). Stated otherwise, "there can be no liability under section 240(1) when there is no violation and the worker's actions . . . are the sole proximate cause of the accident" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004] [internal quotation marks omitted]). Here, a factfinder could rationally determine, based on the foreman's testimony concerning plaintiff's original account of the accident, that plaintiff fell simply because he misplaced his foot when stepping onto the scaffold, without the scaffold moving or otherwise malfunctioning or failing. It would follow from such a finding — even assuming that the harness issue is determined in plaintiff's favor — that his injuries were not proximately caused by any violation of section 240(1).

Accordingly, on this record, the causation of the accident presents an issue of fact that must be determined at trial.

All concur except Saxe and Moskowitz, JJ. who concur in a separate memorandum by Moskowitz, J. as follows:

MOSKOWITZ, J. (concurring)

I agree with the majority that the IAS court's decision properly denied plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) on the ground that the record presents an issue of fact regarding the use and availability of safety equipment, and thus, as to whether plaintiff was the sole proximate cause of his injuries. However, I disagree that the record presents an issue of fact as to whether plaintiff fell because he slipped or, rather, because the scaffold moved away from the building. Accordingly, I concur in the majority's result only.

Plaintiff was injured when he was working as a bricklayer for third-party defendant JRP Contracting Inc., a subcontractor on the work site. According to his deposition testimony, plaintiff was building a brick parapet on a second-floor roof; after he completed his work, he tried to descend from the roof by stepping on the pipe scaffold that he had previously used to access the roof. Plaintiff testified that when he tried to descend, he grabbed a conduit pipe on an adjoining wall and, with his right foot, stepped over the parapet onto the top rung of the scaffold. However, he testified, the scaffold had been attached to the wall by a single metal wire lashed around a rail covering the front of a window. Plaintiff testified that as he put his

foot on the scaffold, he "pulsed" his other leg over the parapet, and as he did so, the wire tying the scaffold to the building broke. According to plaintiff's testimony, he fell to the ground when the scaffold moved away.

Plaintiff testified that although he had his own safety harness at the work site, there were no safety ropes on which to connect his harness. Moreover, he testified, someone would have had to go off site to retrieve a safety line and plaintiff could not say with certainty whether that person would have been able to return with the line that day. Plaintiff further stated that he would have been fired if he had secured himself because taking the time to attach the safety equipment would have slowed his work and the job would not have been completed that day, as his supervisor wanted.

Plaintiff's supervisor testified at his deposition that on the day of the accident, he and plaintiff had built the parapet wall while standing on the boards of the scaffold. The supervisor further noted that when he was not at the site, plaintiff himself was in charge of the work site. Plaintiff's supervisor testified that in a conversation after the accident, plaintiff stated that his foot slipped as he stepped from the roof onto the scaffold.

Plaintiff moved for summary judgment on his Labor Law

§§ 240(1) and 241(6) claims. Defendants 221-223 West 82 Owners Corp. and APA Restoration Corp., along with JRP, opposed the motion, and JRP submitted an affidavit from plaintiff's supervisor. In his affidavit, the supervisor stated that he and plaintiff had worked on a pipe scaffold in the days before the accident, and, at those times, both men wore harnesses and tied them off to safety lines. The supervisor further stated that he instructed all employees, including plaintiff, to wear a harness while working on the scaffold and to secure the harness to safety lines. According to the supervisor, on the day of the accident, when he and plaintiff stood on the pipe scaffold as they worked, they wore properly secured harnesses.

As the majority notes, plaintiff and his supervisor gave sharply different testimony regarding whether plaintiff was required to use a harness and whether safety ropes were available. As noted above, the supervisor stated in his affidavit, in contradiction to plaintiff's testimony, that he had instructed all employees to wear harnesses and safety lines when they were working on the scaffold, and that he and plaintiff had done so on the day of the accident. This averment, if true, contradicts plaintiff's testimony that he would have been fired had he secured a safety harness for his descent. Additionally, safety ropes were, in fact, shown in a photograph of the scaffold

taken soon after the accident. Thus, I agree that the conflicting testimony regarding the availability of safety devices makes this matter inappropriate for summary judgment, as the testimony raises the possibility that plaintiff was the sole proximate cause of his accident (*see Gonzalez v Rodless Props., L.P.*, 37 AD3d 180, 181 [1st Dept 2007]; *Leniar v Metropolitan Tr. Auth.*, 37 AD3d 425, 426 [2d Dept 2007]).

However, I disagree with the majority that the record presents any triable issue of fact as to the cause of the accident itself. Even assuming that plaintiff told his supervisor that his foot slipped when he stepped onto the scaffold, that statement would not make any difference to the outcome of the case; the fact remains that plaintiff fell because the scaffold moved away from the building. (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]). Indeed, plaintiff submitted an uncontradicted affidavit from a certified site safety manager, who opined that

the scaffold from which plaintiff fell was "jerry-rigged and incomplete" and that the wire holding the scaffold to the building was inadequate.

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

ENTERED: SEPTEMBER 8, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

683 Buster Green, Index 101761/12
Plaintiff-Appellant,

-against-

119 West 138th Street LLC, et al.,
Defendants-Respondents,

The City of New York,
Defendant.

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Koss & Schonfeld, LLP, New York (Simcha D. Schonfeld of counsel), for appellant.

Miller, Rosado & Algios, LLP, Garden City (Neil A. Miller of counsel), for 119 West 138th Street LLC, Wachovia Bank National Association now known as Wells Fargo Bank, N.A., and Seedco Financial Services, Inc., respondents.

Windels Marx Lane & Mittendorf, LLP, New York (Scott R. Matthews of counsel), for Abyssinian Development Corporation, respondent.

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Order and judgment (one paper), Supreme Court, New York County (Richard F. Braun, J.), entered September 11, 2014, which, insofar as appealed from as limited by the briefs, granted defendants-respondents' motions for summary judgment to the extent of declaring in defendants' favor on counts one, two and three of the complaint, dismissing the remaining request for relief in those counts, and dismissing the counts alleging fraud as against defendants 119 West 138th Street LLC (119 West) and Abyssinian Development Corporation (ADC), and declared that 119 West was the rightful and sole fee owner of the property at

issue, that defendants Wachovia Bank National Association n/k/a Wells Fargo Bank, N.A. (Wachovia) and Seedco Financial Services, Inc. (Seedco) maintain duly recorded mortgage liens against the property unaffected by plaintiff's claims, and that the notice of pendency filed by plaintiff in the New York County Clerk's Office on February 17, 2012 under index no. 101761-12, and as against the property, is cancelled and discharged, reversed, on the law, without costs, the order and judgment vacated, the dismissed claims reinstated, and the matter remanded for further proceedings.

Plaintiff commenced this action in February 2012 against ADC, 119 West and several other defendants, seeking an order (1) discharging the quitclaim deed he executed in favor of defendants ADC and 119 West on the ground that it was unconscionable; (2) discharging the mortgages on the property held by defendants Wachovia and Seedco as void; (3) requesting damages for fraud and conversion against ADC and 119 West; and requesting damages for unjust enrichment against ADC and 119 West. The factual allegations underlying this action are as follows:

Plaintiff purchased an unimproved lot located at 119 West 138th Street in Manhattan from the City in 1973 at a tax sale. The deed from this sale was never recorded. ADC became interested in purchasing this property sometime in 2002. Its

counsel, Charles E. Simpson, testified at a deposition that after a search of City records he discovered tax liens and schedules indicating that a man named Alfred Logan, then deceased, had paid taxes on this property and that Logan's heirs had filed a bankruptcy petition listing the property as an asset of the estate. In February 2004, ADC entered into a contract to purchase the property from Logan's heirs through a bankruptcy court-authorized sale for $350,000. ADC assigned the contract to 119 West. 119 West's title insurer and construction lender requested it to bring an action to quiet title, which was commenced in 2007. During that proceeding, the 1973 unrecorded deed from the City to plaintiff was discovered, and, since plaintiff was in the chain of title, he was added as a defendant.

Simpson stated he thereafter located and spoke to plaintiff, who told Simpson that he sold the property to Logan several years prior and was amenable to executing a quitclaim deed if he was paid to do so. Simpson offered plaintiff $2,500 but denied making any representations as to the value of the property. Plaintiff failed to appear to sign the quitclaim deed as arranged, and, several months later, Simpson contacted him again and offered $5,000 if plaintiff would sign. Simpson stated that he advised plaintiff to have an attorney present, but plaintiff declined, signed the deed, and deposited the $5,000 check.

Thereafter, Simpson discontinued the quiet title action.

Plaintiff, 80 years old at the time of his deposition, testified that he was retired and had a ninth grade education. He stated that he had purchased approximately 10 properties from the City in the past but never sold any of them. He was under the impression that the City sold the properties when he stopped paying taxes on them. With respect to this particular lot, plaintiff stated that he stopped paying taxes on it in 1983 and believed the City had sold it at a tax lien auction. Although plaintiff stated he did not know what a quitclaim deed was, he "signed something to them [i.e., ADC and 119 West] for $2,500," even though he did not believe that he owned the property at that time. Plaintiff testified that he was unaware the property was worth $1 million and that "they did me wrong in . . . not telling me that the property was worth more money or offering me more money than they did." Significantly, he also testified that he did not know Logan, and that the first time he heard anything about Logan was from Simpson. Finally, he testified that he was never made aware that he had been named as a defendant in the quiet title action.

Defendants moved for summary judgment dismissing the complaint. The motion court granted the motion to the extent of declaring in defendants' favor on the first three counts of the

complaint and dismissing the remaining claims save for plaintiff's claim for unjust enrichment. We now reverse to the extent appealed from as limited by the briefs[1].

Defendants failed to demonstrate, as a matter of law, that plaintiff was not the owner of the property at the time that he signed the quitclaim deed at issue and that therefore he lacked standing to challenge the deed. Although plaintiff testified that he believed that the property had been repossessed by the City after he failed to pay real estate taxes, defendants offered no evidence to show that in rem foreclosure proceedings actually occurred divesting plaintiff of his ownership. Instead, ADC and 119 West maintained that plaintiff sold the property directly to Logan. There is an issue of fact as to whether this had occurred, and the conflicting testimony from Simpson and plaintiff regarding Logan is material to the resolution of this action. Without a foreclosure, plaintiff would have retained title to the property, regardless of whether he believed that the City had repossessed it. There is also no evidence that the property was ever deeded to Logan, either by a foreclosure sale from the City or by direct sale from plaintiff. The record only contains tax documents indicating that Logan had paid taxes on

[1]Plaintiff does not challenge the dismissal of the Real Property Law § 265 and conversion claims.

the property, and these City records, do not, as a matter of law, constitute prima facie evidence of Logan's title to the property, as the dissent contends. Significantly, there is no authority to support the contention that subsequent payment of real estate taxes by a third party constitutes conclusive evidence that legal title had thus been transferred to that party as a result of such payment. To argue that "Logan may well have purchased this property at a tax lien auction" is mere speculation and is without support in the record. Indeed, since there is no deed to Logan from either plaintiff or the City, recorded or otherwise located anywhere, 119 West's title company and lenders rightfully demanded that it bring an action to quiet title. The purpose of such an action is to cut off any claims by prior owners and to remove any clouds on title which, in this case, clearly exist. These issues cannot be determined as a matter of law and require a trial.

Plaintiff also raised issues of fact as to whether the quitclaim deed, in which he transferred the property worth over $1 million for $5,000, was unconscionable or procured by fraud. The doctrine of unconscionability, "which is rooted in equitable principles, is a flexible one" that "generally requires a showing that the contract was both procedurally and substantively unconscionable when made" (*Gillman v Chase Manhattan Bank*, 73

NY2d 1, 10 [1988]). The procedural element requires examination of "such matters as the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, . . . the experience and education of the party claiming unconscionability, and whether there was [a] disparity in bargaining power (*id.* at 11 [internal citation omitted]).

Here, there are no allegations that high-pressure tactics were used. Although plaintiff had only a ninth grade education, he was, as the dissent correctly observes, no neophyte when it came to tax lien foreclosures. While plaintiff concedes that Simpson made no representations as to the value of the property, there is no doubt that Simpson was aware the property had significant value, as evidenced by the contract of sale with Logan's heirs for $350,000. Moreover, a factfinder should be given the opportunity to assess the credibility of plaintiff and Simpson regarding such issues as whether Simpson told plaintiff the quitclaim deed was a "mere formality" since ADC had already purchased the property, whether plaintiff was told that the quitclaim deed would divest him of his ownership rights, whether plaintiff was told he was a defendant in the quiet title action, and whether plaintiff had ever been divested of title by either a tax sale by the City or direct sale to Logan.

No one procedural factor can be relied upon to support or

discount a claim of procedural unconscionability. Such claims are most often fact sensitive and dependent upon the particular circumstances surrounding a transaction, which, at the very least, mandate the opportunity for an evidentiary hearing (*Matter of State of New York v Avco Fin. Serv. of N.Y.*, 50 NY2d 383, 390 [1980]). Certainly, the factual allegations as set forth above raise material issues of fact as to whether plaintiff was afforded a "meaningful choice" in his decision to execute the quitclaim deed and whether the terms of the agreement are "unreasonably favorable" to ADC and 119 West (*id.* at 389 [internal quotation marks omitted]). These issues cannot be resolved by summary judgment.

With respect to the element of substantive unconscionability, we also find that there are material issues of fact. In order to determine if the agreement is substantively unconscionable, there must be an "analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged" *Gillman*, 73 NY2d at 12; (*Avco Fin. Serv.*, 50 NY2d at 389). As noted, despite the fact that plaintiff believed he no longer owned the property, there is nothing in this record to indicate that he was ever divested of title by either an in rem proceeding or direct sale to Logan. Significantly, there is no evidence

that a deed to Logan, by either the City or plaintiff, was ever recorded, or indeed, even exists. That being the case, it is clear that plaintiff's quitclaim of his interest in a $1 million property for $5,000 may be viewed as "unreasonably favorable" to ADC and 119 West, meeting the substantive element of unconscionability (50 NY2d at 389 [internal quotation marks omitted]).

For the reasons stated, we cannot agree with our dissenting colleague that the record supports a finding that plaintiff was not the owner of the property at the time he signed the quitclaim deed. Nor can we agree that ADC was a good faith bona fide purchaser of the property. While ADC certainly did pay value for the property, it could not have lawfully purchased the property from Logan's heirs pursuant to the bankruptcy court order if Logan never owned the property.

Our decision in *Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc. v 31 Mount Morris Park, LLC* (76 AD3d 465 [1st Dept 2010]), cited by the dissent, does not require a different result. In that case, we affirmed the dismissal of the plaintiffs' claims to any interest in the property purchased by the defendants, because defendants purchased the property for value, had no notice of the fraudulent intent of the immediate grantor, and had obtained two

Supreme Court orders authorizing the sale (*id.* at 465). Significantly, however, the defendant buyers "demonstrated that a title search conducted prior to the closing revealed that *the seller was the record owner of the property*" (*id.*) (emphasis added). That is clearly not the case here. The title company and construction lender requested that 119 West commence an action to quiet title precisely because the record owner of this parcel could not adequately be determined, and they wanted to ensure no person or entity would assert a claim to the property superior to ADC.

The determinations of the factual issues raised herein can only be made by the trier of fact and we remit this matter for further proceedings.

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

TOM, J.P. (dissenting)

The evidence in the record establishes that the quitclaim deed, which plaintiff sought to set aside, was neither procedurally nor substantively unconscionable when entered into by the parties (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988]). The evidence also establishes that defendant Abyssinian Development Corporation (ADC) was a bona fide purchaser of the property and that, following the property's transfer to defendant 119 West 138th Street, LLC, 119 West became the rightful and sole fee owner of the property. Thus, Supreme Court properly declared in defendants' favor on counts one through three in the complaint, properly dismissed the remaining request for relief in those counts, and properly dismissed the fraud counts.

Plaintiff purchased the unimproved lot located at 119 West 138th Street from the City in 1973. He had significant experience with real estate and was not a neophyte to real estate investment, testifying at his deposition that he had purchased about 10 properties from the City in the past. As with his other properties, plaintiff stated that the City foreclosed on this property when he failed to pay taxes. Specifically, he believed that the City sold the property at a tax lien auction in 1983, and thus he conceded that he lost ownership of the property because he stopped paying taxes on it.

In 2002, ADC, a not-for-profit corporation that operates a church across the street from the property, became interested in purchasing the long-vacant property. After a search of City records, ADC discovered from City tax liens and schedules that a man named Alfred Logan, then-deceased, had paid the taxes on the property, and that Logan's heirs had filed a bankruptcy petition. In February 2004, ADC entered into a contract to purchase the property from Logan's heirs through a bankruptcy court-authorized sale for $350,000. Pursuant to the bankruptcy court's order, the sale could not be consummated until the Kings County Surrogate's Court permitted the transfer, which it did in March 2004. Then, ADC assigned the contract to 119 West. 119 West's title insurer and construction lender requested that 119 West commence an action to quiet title, which 119 West did in 2007. During the course of that action, 119 West discovered the unrecorded 1973 deed from the City to plaintiff, so 119 West named plaintiff in the action to quiet title.

Charles E. Simpson, ADC's counsel, located plaintiff, who told Simpson that he had sold the property to Logan several years prior. At his deposition, plaintiff denied making that sale but conceded he lost ownership through foreclosure. According to Simpson, plaintiff was amenable to executing a quitclaim deed in favor of 119 West provided he was paid to do so, and Simpson told

plaintiff that he would pay him $2,500 for his trouble. After plaintiff failed to appear to sign the quitclaim deed for several months, Simpson promised him $5,000 to sign. On January 25, 2008, plaintiff signed the quitclaim deed. Although Simpson had advised plaintiff to have an attorney present for the signing, plaintiff declined. Plaintiff deposited the $5,000 check, and Simpson then discontinued the quitclaim action. Simpson denied ever making false representations about the value of the property to plaintiff.

Initially, the evidence, including the tax lien documents and plaintiff's admissions at his deposition (*see People v Brown*, 98 NY2d 226, 232 n 2 [2002]), conclusively establishes that plaintiff was not the owner of the property, and that the property was owned by Logan. Accordingly, ADC, which paid valuable consideration for the property in good faith, and received the permission of the bankruptcy court and the Kings County Surrogate's Court to make the purchase from Logan's heirs, was a bona fide purchaser of the property and, following transfer to 119 West, 119 West became the rightful and sole fee owner of the property (*see Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc. v*

31 Mount Morris Park, LLC, 76 AD3d 465 [1st Dept 2010]).[1]

The majority maintains that, because ADC and 119 West cannot show that in rem foreclosure proceedings occurred, there is an issue of fact as to whether plaintiff owned the property. However, the tax lien documents and plaintiff's admissions at his deposition - including the fact that he has not paid taxes on the property since 1983 and that he believed the City had sold the property at a tax lien auction - are sufficient to establish that plaintiff was no longer the owner of the property, that Logan was listed as the property owner on the City tax lien certificates for the years 1998 and 2003, and that Logan had been paying taxes on this property. City records listing Logan as owner of the property are prima facie evidence of Logan's ownership of the property. The fact that plaintiff denies having sold the property to Logan, without more, is not a basis to find that he retained ownership of the property in the face of the documents produced. Logan may well have purchased this property at a tax lien auction.

While plaintiff may have been less educated than ADC's

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[1]The majority's effort to distinguish *Commandment Keepers* fails. As in this case, the purchaser in *Commandment Keepers* paid valuable consideration for the property in good faith, and in both cases the sale was expressly permitted by the court (76 AD3d at 465).

counsel, he was not an unsophisticated individual when it came to real estate and tax lien foreclosures. Further, as the majority recognizes, plaintiff conceded at his deposition that Simpson made no representations as to the value of the property when he signed the quitclaim deed, and since there was no evidence of any "high pressure tactics" on the part of ADC, the bona fide purchaser of the property, or evidence of a "lack of meaningful choice," plaintiff's procedural unconscionability claims fail (*Gillman*, 73 NY2d at 10-11). Accordingly, contrary to the majority's conclusion, plaintiff failed to raise issues of fact as to the procedural unconscionability of the contract. Therefore, there is no reason a factfinder should be given an opportunity to assess the circumstances of the execution of the quitclaim deed.

Moreover, plaintiff also testified that he had no discussions about the fair market value of the property with Simpson. Accordingly, there is no proof of misrepresentation of a material fact to support the fraud claims (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]).

Nor is there any evidence to support the claim that the quitclaim deed was substantively unconscionable. While there was evidence that at the time plaintiff executed the quitclaim deed the property was worth more than $1 million, the payment of

$5,000 to plaintiff was not unreasonably favorable to ADC given the fact that plaintiff had not owned the property for some time, as reflected by the 2004 purchase of the property by ADC from Logan's heirs pursuant to orders of the bankruptcy court and Kings County Surrogate's Court; had not paid taxes on it; and had essentially abandoned it as far back as 1983. In addition, all the information regarding the value of the property could have been obtained from the public record.

The fact that there is no evidence that a deed to Logan was ever recorded does not make the quitclaim deed substantively unconscionable, in light of the foregoing facts.

Accordingly, I would affirm the order and judgment of the Supreme Court as indicated.

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

ENTERED: SEPTEMBER 8, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

736 Francisca Miranda, etc., Index 17975/07
Plaintiff-Appellant,

-against-

Riverdale Manor Home for Adults, et al.,
Defendants-Respondents,

New York City, et al.,
Defendants.

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Robert R. Arena, Astoria, for appellant.

O'Connor, McGuinness, Conte, Doyle, Oleson, Watson & Loftus, LLP, White Plains (Montgomery L. Effinger of counsel), for Riverdale Manor Home for Adults and Elener Associates, respondents.

Carroll McNulty & Kull LLC, New York (Frank J. Wenick of counsel) for Federation Employment and Guidance Services, Inc. and Susanne Choe, M.D., respondents.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 21, 2013, which, insofar as appealed from as limited by the briefs, granted the motion of defendants Federation Employment and Guidance Services and Susanne Choe, M.D., and the motion of defendants Riverdale Manor Home for Adults, and Elener Associates, LLC (collectively Riverdale) for summary judgment dismissing the complaint as against them and denied plaintiff's cross motion for leave to amend the complaint

to add a new cause of action, unanimously affirmed, without costs.

The court properly granted defendants' respective motions for summary judgment in this action where Luis Miranda, a person with a serious mental disorder and cognitive impairment sustained injuries after leaving the premises of Riverdale, an "open door" residential facility for disabled adults.

The court correctly found, as plaintiff's attorney recognized at oral argument, that Riverdale was properly classified as an adult home under 18 NYCRR 487.2(a), not a residential health care facility or nursing home subject to article 28 of the Public Health Law (*see* 18 NYCRR 485.2[a]).

In addition, the record demonstrates that Miranda was evaluated by psychiatrists independent of Riverdale prior to admission to the facility and before each re-admission. These professionals found that Riverdale was a suitable residence for Miranda, despite its open-door policy and his tendency to leave the facility and not return for several days. Defendants met their prima facie burden to show that they did not deviate from the appropriate standard of care. As defendants noted, on several occasions, hospital doctors cleared Miranda for discharge and determined that the Riverdale facility was suitable for him.

The affirmation of plaintiff's expert did not raise any

triable issue of fact. The motion court correctly noted plaintiff's expert did not point to any other viable alternatives and did not specifically opine that either a nursing home or a locked-door state psychiatric hospital was a viable option for Miranda, given his medical condition at the time. Moreover, plaintiff does not cite to any regulatory authority that refutes defendants' position that they fulfilled their responsibilities when the facility or the psychiatrist sent Miranda to the hospital for an evaluation.

The court exercised its discretion in a provident manner in denying plaintiff leave to amend the complaint to assert a negligence claim against Riverdale more than a year after the filing of the note of issue. Plaintiff failed to provide a reasonable excuse for the delay or cite material facts that were not known prior to the close of discovery (*see e.g. Haddad v New York City Tr. Auth.*, 5 AD3d 255 [1st Dept 2004]).

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

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

ENTERED: SEPTEMBER 8, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Richter, Kahn, JJ.

787-
788 Index 653767/13

172 Van Duzer Realty Corp.,
Plaintiff-Appellant-Respondent,

-against-

878 Education, LLC, et al.,
Defendants-Respondents,

Globe Institute of Technology, Inc., et al.,
Defendants-Respondents-Appellants,

Globe Alumni Student Assistance Association, Inc., et al.,
Defendants.

_____

Cox Padmore Skolnik & Shakarchy LLP, New York (Noah B. Potter of counsel), for appellant-respondent.

Friedman Kaplan Seiler & Adelman LLP, New York (Andrew W. Goldwater of counsel), for respondents.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondents-appellants.

_____

Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 16, 2015, dismissing the complaint as against defendants 878 Education, LLC (878 LLC), Martin Oliner, and ISO, LLC (collectively, the Oliner defendants), pursuant to an order of the same court and justice, entered January 8, 2015, which granted the Oliner defendants' motion to dismiss the complaint as against them, unanimously modified, on the law, to vacate the award of judgment to 878 LLC, deny the

Oliner defendants' motion to dismiss the complaint as against 878 LLC, reinstate the complaint as against 878 LLC, and otherwise affirmed, without costs. So much of the aforesaid order as, upon the motion by defendants Globe Institute of Technology, Inc., Oleg Rabinovich, Lyubov Rabinovich a/k/a Luba Rabinovich, Michael Rabinovich, and Edward Rabinovich (collectively, the Globe defendants) to dismiss the complaint as against them, granted the motion to the extent of dismissing the first, second and third causes of action as against the Globe defendants and otherwise denied the motion, unanimously modified, on the law, to deny the motion as to the first, second and third causes of action, and otherwise affirmed, without costs. Appeal from so much of the aforesaid order as addressed the Oliner defendants' motion to dismiss the complaint as against them, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid judgment.

Defendant Globe Institute of Technology, Inc. (Globe Institute) began operating a for-profit technical school in 1994.[1] Nonparty Leon Rabinovich was the original shareholder and president of the corporation. In 2003, Leon Rabinovich pleaded

[1]The facts set forth in this decision are alleged in the complaint or other documents appearing in the record and are assumed to be true for purposes of this appeal from the disposition of motions to dismiss the complaint.

guilty to a felony, and as part of his plea agreement, transferred ownership of the shares of Globe Institute to his wife, defendant Lyubov Rabinovich a/k/a Luba Rabinovich, and his three sons, defendants Oleg Rabinovich, Michael Rabinovich and Edward Rabinovich (collectively, the Rabinovich defendants). In 2005, Globe Alumni Student Association, Inc. (Globe Alumni) (a defendant in this action but not a party to this appeal) was formed to acquire space for use as a dormitory for students enrolled at Globe Institute's school. Subsequently, in September 2006, plaintiff 172 Van Duzer Realty Corp., an entity owned by Leon Rabinovich's brother-in-law, purchased a building for that purpose, at Leon Rabinovich's request, and leased it to Globe Alumni for such use. The building's certificate of occupancy was issued based on plaintiff's execution of a restrictive declaration that the premises would be used solely as a student dormitory, which reduced the building's market value. In May 2007, plaintiff and Globe Alumni executed a nine-year lease extension. Globe Institute guaranteed Globe Alumni's rental payments to plaintiff during the term of the nine-year lease extension. The guarantee was not executed, however, by Globe Institute's shareholders, the Rabinovich defendants.

In June 2007, the United States Department of Education (DOE) denied Globe Institute's application to participate in

federal financial aid programs, which participation was vital to the operation of the school. DOE indicated that it would reconsider this determination only if the Rabinovich defendants ceased to own and control the school. Accordingly, the Rabinovich defendants began to seek a buyer for the school. Although offers ranging from $3 million to $10 million were received, most of the prospective buyers insisted on a lengthy due diligence period before closing. Under pressure to effect an immediate sale, the Rabinovich defendants entered into a hastily-negotiated agreement to sell Globe Institute's operating assets to defendant 878 LLC, an entity owned by defendant Martin Oliner. Pursuant to the asset purchase agreement, Globe Institute transferred substantially all of its assets to 878 LLC in exchange for 878 LLC's assumption of specified liabilities of Globe Institute (totaling more than $3 million), some of which were personally guaranteed by the Rabinovich defendants, and for a payment of $1.35 million directly to the Rabinovich defendants. Critically to this action, Globe Institute's guarantee of rental payments to plaintiff under the lease to Globe Alumni was not among the liabilities that 878 LLC assumed pursuant to the asset purchase agreement. Apart from 878 LLC's assumption of certain of its liabilities, Globe Institute did not receive any consideration as a result of the transaction, which closed in

October 2007.[2]

In 2008, Globe Alumni ceased making payments to plaintiff under the dormitory lease. Plaintiff subsequently obtained a judgment for $1,488,604 against Globe Alumni and Globe Institute for breaches of the lease and the guarantee, which judgment was affirmed by this Court and, upon a further appeal to the Court of Appeals, remanded for a determination as to whether the lease's acceleration clause is an unenforceable penalty (*172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 102 AD3d 543 [1st Dept 2013], *mod* 24 NY3d 528 [2014]). However, given plaintiff's allegations that Globe Alumni and Globe Institute were left without assets as a result of the October 2007 transaction, it is not clear that either of these entities have the resources to satisfy this judgment.

In this action, plaintiff asserts, as relevant to this appeal, claims of constructive fraudulent conveyance (the first, second and third causes of action, under Debtor and Creditor Law §§ 273, 274 and 275, respectively) and actual fraudulent conveyance (the fourth cause of action, under Debtor and Creditor

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[2]Oliner formed defendant ISO LLC to assume from 878 LLC certain of the liabilities the latter had assumed from Globe Institute. We note that Globe Institute and the Rabinovich defendants are currently pursuing separate litigation against 878 LLC, based on allegations that 878 LLC failed to fulfill certain of its obligations under the asset purchase agreement.

Law § 276) against 878 LLC, Martin Oliner, ISO LLC, Globe Institute, and the Rabinovich defendants. These causes of action seek to set aside the transfer of Globe Institute's assets to 878 LLC pursuant to Debtor and Creditor Law § 279, and to recover from those assets the amounts due plaintiff under Globe Institute's guarantee of Globe Alumni's obligations under the dormitory lease.

The complaint states a cause of action for constructive fraudulent conveyance against Globe Institute, the Rabinovich defendants and 878 LLC by alleging that the conveyance of Globe Institute's assets to 878 LLC was made without the exchange of "fair consideration," since the transaction could be viewed as resulting in part of the value of Globe Institute's assets being paid to its shareholders indirectly, suggesting bad faith (*see* Debtor and Creditor Law § 272[a]). Further, while the asset purchase agreement provided for 878 LLC to assume certain liabilities of Globe Institute and to make future conditional payments to Globe Institute's shareholders, in opposition to the motion, plaintiff presented supplementary evidence that the consideration was not a "fair equivalent" for the valuable assets transferred (*see id.*). The complaint also adequately alleges that the transaction rendered Globe Institute insolvent (Debtor and Creditor Law § 273) and was accomplished while Globe

Institute was engaged in business (Debtor and Creditor Law § 274), and that Globe Institute and the Rabinovich defendants were aware that the transaction would prevent Globe Institute from fulfilling its obligations under its guarantee of rental payments due under Globe Alumni's lease (Debtor and Creditor Law § 275; *see In re Chin*, 492 BR 117, 129 [Bankr ED NY 2013]; *Continental Bank N.A. v Modansky*, 159 BR 129, 131 [Bankr SD NY 1993], *aff'd* 41 F3d 1501 [2nd Cir 1994]).

The cause of action for actual fraudulent conveyance under Debtor and Creditor Law § 276 is also adequately pleaded against Globe Institute, the Rabinovich defendants, and 878 LLC. Although the transaction was conducted at arm's length, plaintiff has sufficiently alleged "'badges of fraud,'" i.e., "circumstances so commonly associated with fraudulent transfers 'that their presence gives rise to an inference of intent,'" including (1) the parties' structuring of the transaction so that the sole consideration promised to Globe Institute, aside from 878 LLC's assumption of certain of Globe Institute's liabilities, was a $1.35 million payment directly to its shareholders, the Rabinovich defendants, rather than to Globe Institute itself, (2) the exclusion of Globe Institute's guarantee of the lease agreement from the list of assumed liabilities, although the parties knew that Globe Institute would be left as a corporate

shell as result of the transaction and would therefore be unable to honor any future liabilities, (3) inadequate consideration, and (4) the transaction's having been outside the usual course of business and hastily closed over the course of only a few days, while other potential buyers required a much longer due diligence period (*Wall St. Assoc. v Brodsky,* 257 AD2d 526, 529 [1st Dept 1999], quoting *Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386 [2nd Dept 1997]; *In re Kaiser*, 722 F2d 1574, 1582-1583 [2d Cir 1983]).

Globe Institute and the Rabinovich defendants, as transferors and beneficiaries of 878 LLC's promises, are potentially liable to plaintiff pursuant to Debtor and Creditor Law § 279, in the event the transaction is found to have been fraudulent, as is 878 LLC, as the transferee of the allegedly fraudulently conveyed assets (*see Blakeslee v Rabinor*, 182 AD2d 390 [1st Dept 1992], *lv denied* 82 NY2d 655 [1993]).

In support of the veil-piercing claim against Oliner and ISO LLC, the complaint alleges conclusorily that Oliner used 878 LLC and defendant ISO LLC "interchangeably and without regard to due corporate formalities." It fails to allege facts sufficient to show that Oliner exercised complete domination of 878 LLC "in respect to the transaction attacked," i.e., the allegedly fraudulent conveyance, and that that domination was used to

commit a fraud or wrong that caused plaintiff's injury (*Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005] [internal quotation marks omitted]). Common ownership alone is not sufficient to show domination (*see Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443 [1st Dept 2012]). Since the viability of the complaint as against Oliner and ISO LLC depends on plaintiff's ability to pierce 878 LLC corporate veil, and the complaint fails to allege sufficient grounds for doing so, the complaint was correctly dismissed as against Oliner and ISO LLC. We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: SEPTEMBER 8, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

839 Cruz Suarez, et al., Index 150374/14
Plaintiffs-Appellants-Respondents,

-against-

Axelrod Fingerhut & Dennis, et al.,
Defendants-Respondents-Appellants,

Turin Housing Development
Fund, Co., Inc., et al.,
Defendants-Respondents.

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Bierman & Associates, New York (Mark H. Bierman of counsel), for appellants-respondents.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Noah Nunberg of counsel), for respondents-appellants.

Lewis Brisbois Bisgaard & Smith LLP, New York (Mark K. Anesh and Jaime R. Wozman of counsel), for Turin Housing Development Fund, Co., Inc., Richard J. Thomas, Harvey Minsky, Ellen Durant, Martha Miller, Linda Burstion, Angela Faison-Strobe, Jacqueline Seidenberg, Evelyn Rivera and Veronica Jimenez, respondents.

Cantor, Epstein & Mazzola, LLP, New York (Gary Ehrlich of counsel), for Elliman Property Management, Deborah Hassell-Dobies and Patricia Pettway-Brown, respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 30, 2015, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment as to liability on the cause of action for wrongful eviction in Alix and Brea's favor and the causes of action for breach of the covenant of quiet enjoyment, breach of fiduciary duty, conversion, trespass to chattels, and breach of contract,

and for treble damages under RPAPL 853, and, upon a search of the record, granted summary judgment dismissing the causes of action for breach of the covenant of quiet enjoyment, conversion, and trespass to chattels, and granted plaintiffs' motion for summary judgment dismissing defendant Axelrod Fingerhut & Dennis's (Axelrod) affirmative defenses of lack of standing, lack of fiduciary duty and lack of privity, unanimously modified, on the law, to grant plaintiffs summary judgment as to liability on the cause of action for wrongful eviction on behalf of Alix and Brea as against defendant Turin Housing Development Fund, Co., Inc. (Turin), to grant summary judgment, upon a search of the record, dismissing the cause of action for breach of fiduciary duty, and to deny plaintiffs' motion as to Axelrod's affirmative defenses of lack of standing and lack of privity, and otherwise affirmed, without costs.

The record demonstrates conclusively that the eviction of plaintiffs Alix and Brea by Turin was wrongful, inasmuch as Alix and Brea were unrefutedly known occupants of the apartment. Thus, Alix and Brea are entitled to summary judgment on the cause of action for wrongful eviction as against Turin. However, issues of fact preclude summary judgment on that cause of action as against the remaining defendants, and with respect to plaintiffs' other causes of action, including the claim for

breach of contract. The court also correctly denied plaintiffs summary judgment on their claim for treble damages under RPAPL 853 on the ground that the amount of the claim must be evaluated upon a full record (*see Mayes v UVI Holdings*, 280 AD2d 153 [1st Dept 2001]).

The court correctly dismissed the causes of action for breach of the covenant of quiet enjoyment, conversion, and trespass to chattels since in the specific context of a wrongful eviction action these claims "do not constitute cognizable causes of action but merely state demands for damages to be considered as elements of the statutory cause of action [wrongful eviction] upon which summary relief is sought" (*id.* at 161).

Upon a search of the record, we grant summary judgment dismissing the cause of action for breach of fiduciary duty. No such duty is owed to plaintiffs by any of the defendants (*see Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]).

The court erred in dismissing Axelrod's affirmative defenses of lack of standing and lack of privity. These defenses are not

prima facie meritless with respect to the cause of action for negligence.

The Decision and Order of this Court entered herein on April 14, 2016 is hereby recalled and vacated (*see* M-2656 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 8, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

979 Ballyram Gopie, Index 153210/12
Plaintiff-Respondent,

-against-

Mutual of America Life
Insurance Company,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered November 3, 2014, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment on the issue of defendant's Labor Law § 240(1) liability, and denied defendant's cross motion for summary judgment dismissing the Labor Law §§ 240(1) and 200 and common-law negligence claims, unanimously modified, on the law, to deny plaintiff's motion, and otherwise affirmed, without costs.

Neither side is entitled to summary judgment on the claim under Labor Law § 240(1), because the record presents a triable issue, which cannot be resolved as a matter of law, as to whether plaintiff, at the time of his incident, was engaged in protected activity within the meaning of Labor Law § 240(1), or routine

maintenance (*cf. Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53 [2004] [finding as a matter of law that the plaintiff had been engaged in routine maintenance]).

The court also correctly denied defendant's cross motion insofar as it sought summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, because defendant admits that it owned the scaffold that collapsed under plaintiff, and the record presents factual issues as to whether the collapse resulted from a defect in the scaffold of which defendant had notice.

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

ENTERED: SEPTEMBER 8, 2016

CLERK

Friedman, J.P., Richter, Gische, Kahn, JJ.

1709-
1710
1711 Index 101068/15

In re City Club of
New York, Inc., et al.,
Petitioners-Appellants-Respondents,

-against-

Hudson River Park Trust,
Inc., et al.,
Respondents-Respondents-Appellants.

- - - - -

New Yorkers for Parks and New York
League of Conservation Voters,
Amici Curiae.

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Emery Celli Brinckerhoff & Abady LLP, New York (Richard D. Emery of counsel), for appellants-respondents.

Sive, Paget & Riesel, P.C., New York (David Paget of counsel, for Hudson River Park Trust, respondent-appellant.

Wachtell, Lipton, Rosen & Katz, New York (Marc Wolinsky of counsel), for Pier 55, Inc., respondent-appellant.

Carter Ledyard & Milburn LLP, New York (Christopher Rizzo of counsel), for New Yorkers for Parks and New York League of Conservation Voters, amici curiae.

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Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered April 7, 2016, which, among other things, declared that respondents' proposed Pier 55 project, including respondent Hudson River Park Trust's (the Trust) decision to enter into a lease with respondent PIER55, Inc., does not violate the public trust doctrine, denied the

petition, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered November 20, 2015, and April 5, 2016, which respectively denied petitioners' motion for expedited discovery and denied their motion to permit supplemental briefing, unanimously dismissed, without costs, as abandoned.

The Trust took the requisite "hard look" at the project's anticipated adverse environmental impacts, and provided a "reasoned elaboration" for the negative declaration, and its determination was not arbitrary and capricious, unsupported by the evidence, or a violation of law (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]; *see also* CPLR 7803[3]). The Trust's use of the previously permitted 2005 Pier 54 rebuild design as the "no action" alternative in its SEQRA analysis was "not irrational, an abuse of discretion, or arbitrary and capricious and, consequently, should not be disturbed" (*Matter of Gordon v Rush*, 100 NY2d 236, 244-245 [2003]). The existing record indicates that the Trust adequately considered the cumulative impacts of the Pier 55 project and the nearby Pier 57 project in issuing the negative declaration.

Petitioners lack standing to object to the Trust's failure

to issue any bid prospectus with respect to the Pier 55 lease (*see* 21 NYCRR 752.4[a]), since they never alleged before the article 78 court that they had the wherewithal to submit a plausible competing bid or that, having suitable resources and expertise, they would have done so (*see Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]; *Matter of Montgomery v Metropolitan Transp. Auth.*, 25 Misc 3d 1241[A], 2009 NY Slip Op 52539[U], *4 [Sup Ct, NY County 2009]). We reject petitioners' contention that they need not state what their bid would be since the Trust failed to state what the prospectus would have looked like. Although there is no prospectus, the record contains a detailed statement of the Pier 55 project, with projected costs and the amounts to be contributed by PIER55's philanthropic principals. Accordingly, petitioners have sufficient information to make a bid.

The construction of Pier 55 outside of Pier 54's historic footprint does not violate the Hudson River Park Act's Estuarine Sanctuary provisions (*see* McKinney's Uncons Laws of NY §§ 1643[e][iii], [l]; 1648[1]-[3][a], [b], [e]). The 2013 amendment to the provisions, referring to a "reconstruction" *or* "redesign" of Pier 54 outside of its historic footprint, makes clear that the legislature was authorizing an entirely new, redesigned structure (Uncons Laws § 1648[3][e]). Given the

amendment's plain language (*see Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471, 480 [1978]), petitioners' reliance on the statement of one of the amendment's cosponsors, who asserts that she believed that the new structure would be substantially similar to the old Pier 54, is unavailing (*see Fletcher v Kidder, Peabody & Co.*, 81 NY2d 623, 633 [1993], *cert denied* 510 US 993 [1993]).

There is no case law in New York applying the public trust doctrine to state, as opposed to municipal, parkland (*see Matter of Niagara Preserv. Coalition, Inc. v New York Power Auth.*, 121 AD3d 1507, 1511 [4th Dept 2014], *lv denied* 124 AD3d 1419 [4th Dept 2015], *lv denied* 25 NY3d 902 [2015]). We need not decide whether to follow the Fourth Department because even if the doctrine applies here, the project and lease do not violate it. The Hudson River Park Act expressly authorizes the use of the park for revenue-generating events, including performing arts events (*see* Uncons Laws §§ 1642[c], [e]; 1643[h][ii]; 1647[10][a]), and courts have upheld the charging of fees for park facilities, provided that overall public access is not unduly constrained (*see Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation*, 22 NY3d 648, 654-655 [2014]; *Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Planning Commn. of City of N.Y.*, 259 AD2d 26,

36 [1st Dept 1999]). Here, beyond the performances for which Pier 55 is designed, most of the park-like pier, most of the time, will be devoted to even more fundamental "public park uses, including passive and active public open space uses" (Uncons Laws § 1643[h][ii]). Additionally, the lease requires that 51% of the performances be free or low-cost.

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

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

ENTERED: SEPTEMBER 8, 2016

CLERK

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

529- Index 100274/13
530- 650450/14
531N Miriam Aristy-Farer, et al.,
Plaintiffs-Respondents,

-against-

The State of New York, et al.,
Defendants-Appellants.

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New Yorkers for Students' Educational Rights ("NYSER"), et al.,
Plaintiffs-Respondents,

-against-

The State of New York, et al.,
Defendants-Appellants.

- - - - -

New Yorkers for Students' Educational Rights ("NYSER"), et al.,
Plaintiffs,

City of Yonkers,
Intevenor-Plaintiff-Respondent,

-against-

The State of New York, et al.,
Defendants-Appellants.

_____

Eric T. Schneiderman, Attorney General, New York (Andrew W. Amend of counsel), for appellants.

The Law Office of Michael A. Rebell, New York (Michael A. Rebell of counsel), for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 9, 2014, modified, on the law, to dismiss the second and third causes of action, and otherwise affirmed, without costs. Order, same court and Justice, entered November 18, 2014, modified, on the law, to dismiss the third cause of action except insofar as it challenges the adequacy of defendant State's education funding accountability mechanisms, and otherwise affirmed, without costs. Order, same court and Justice, entered November 18, 2014, reversed, on the law, without costs, and the motion to intervene denied.

Opinion by Tom, J.P. All concur.

Order filed.

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

712 The People of the State of New York, Ind. 693/98
Respondent,

-against-

Jon-Adrian Velazquez,
Defendant-Appellant.

_____

Gottlieb & Gordon LLP, New York (Robert C. Gottlieb of counsel), for appellant.

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

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Order, Supreme Court, New York County (Abraham L. Clott, J.), entered November 13, 2014, affirmed.

Opinion by Andrias, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
David B. Saxe
Karla Moskowitz
Marcy L. Kahn, JJ.

712
Ind. 693/98

_____x

The People of the State of New York,
Respondent,

-against-

Jon-Adrian Velazquez,
Defendant-Appellant.

_____x

Defendant appeals from the order of the Supreme Court, New York County (Abraham L. Clott, J.), entered November 13, 2014, which denied, without a hearing, defendant's CPL 440.10 motion to vacate a March 7, 2000 judgment.

Gottlieb & Gordon LLP, New York (Robert C. Gottlieb, Celia Gordon and Justin Heinrich of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hilary Hassler and Christopher P. Marinelli of counsel), for respondent.

ANDRIAS, J.

Asserting, inter alia, that two of the four eyewitnesses who testified against him at trial have recanted their identifications and that the other two have expressed doubts, and that a newly discovered witness claimed that another person confessed to the crime to her, defendant moved pursuant to CPL 440.10(1)(g) and (h) to vacate his conviction for second-degree murder and lesser offenses based on newly discovered evidence, ineffective assistance of trial counsel and actual innocence. On the extensive record before us, we find that the summary denial of defendant's motion was proper.

Defendant received meaningful representation (*see People v Benevento*, 91 NY2d 708 [1998]). When his submissions are carefully analyzed, it is clear that they do not raise a probability that the outcome of the trial would have been different if the newly discovered evidence had been introduced, and that the possibility of his actual innocence is far too remote to warrant a hearing (*see People v Griffin*, 120 AD3d 1257 [2d Dept 2014], *lv denied* 24 NY3d 1120 [2015]; *People v Woods*, 120 AD3d 595 [2d Dept 2014], *lv denied* 24 NY3d 1090 [2014]). Only one of the two recanting witnesses signed an affidavit; the other refused to swear to his recantation. The two other eyewitnesses, including one who had extensive interactions with

defendant shortly before and during the robbery, firmly stood by their identifications. Defendant also failed to present any evidence to support or explain the purported confession, and the person who purportedly confessed denied that he ever made it and offered to take "tests" to prove it. More importantly, the People proved the confession to be highly improbable through compelling and unrefuted documentary and other evidence that the person who allegedly confessed was on a fish processing boat off the Alaskan coast at the time of the murder and, most tellingly, that he had a large facial scar and a heavy accent, characteristics that were not included in any of the descriptions of the shooter given by the eyewitnesses.

Defendant and codefendant Derry Daniels were charged with first-degree murder and related offenses arising out of the shooting death of Albert Ward, a retired police officer, during a January 27, 1998 robbery of the gambling club Ward operated in Harlem. Although the police received various hearsay-based tips that the crime had been committed by others, including "Mustafa" and "Shaq," defendant was identified as the shooter by eyewitness Augustus Brown, after he viewed hundreds of photographs shown to him by the police. Thereafter, Brown and three other witnesses, Ricky Jones, Lorenzo Woodford and Phillip Jones, all of whom were in the club at the time of the robbery, positively identified

defendant as the shooter in separate lineups. At two other lineups, Phillip Jones and Brown identified Daniels as defendant's accomplice.

On September 30, 1999, Daniels pleaded guilty to first-degree robbery in return for a promised sentence of 12 years. During his allocution, Daniel stated that he planned the robbery with defendant, that his role was to duct tape club patrons, and that defendant was the gunman who shot someone he was trying to tape. However, there was no cooperation agreement and Daniels did not agree to testify against defendant.

Defendant maintained his innocence and his case proceeded to a jury trial at which Ricky Jones, Woodford, Brown, and Phillip Jones, all identified him as Ward's killer. Defendant presented interrelated misidentification and alibi defenses, asserting that, at around the time of the shooting, he was at his girlfriend's home, engaged in a 74-minute telephone conversation with his mother. The jury acquitted defendant of murder in the first degree and convicted him of murder in the second degree, attempted murder in the second degree, robbery in the first degree (three counts), and attempted robbery in the first degree. On March 7, 2000, defendant was sentenced to an aggregate term of 25 years to life.

In 2004, this Court affirmed defendant's conviction on

appeal, finding, inter alia, that there was no basis to disturb the identifications made by the four eyewitnesses and that the jury properly rejected defendant's alibi defense (13 AD3d 184 [1st Dept 2004], *lv denied* 4 NY3d 857 [2005]). In 2007, based on a careful evaluation of the trial evidence, defendant's petition for a writ of habeas corpus was denied by the Honorable Denny Chin, then of the United States District Court for the Southern District of New York, who found, inter alia, that the testimony of the four eyewitnesses firmly established that they had ample opportunity to examine the gunman's features during the robbery and to confirm his identity in a properly conducted lineup (*see Velazquez v Fischer*, 524 F Supp 2d 443 [SD NY 2007]). Judge Chin also noted that "nothing about the circumstances of the eyewitnesses' identification of [defendant] renders their testimony unreasonable or unbelievable" (*id.* at 449).

In October 2011, defendant's counsel asked the New York County District Attorney's Conviction Integrity Program to review his conviction, questioning the reliability of the eyewitnesses who had identified defendant and claiming that several of them had recanted their identifications to varying degrees. Without any concrete evidence, counsel also proposed "PT," who had previously used the nickname "Mustafa," as an alternative suspect for Ward's murder. Subsequently, defendant's counsel named

"Moustapha D." as Ward's killer, based on a confession he allegedly made to a woman in Washington State, and abandoned their claims related to PT.

On February 12, 2012, NBC broadcast an episode of the program "Dateline" about defendant's case, which featured excerpts of interviews of Brown and Phillip Jones, who appeared to recant their identifications of defendant. Excerpts of interviews with Woodford, designed to cast doubt on his identification, were also shown.

After thoroughly investigating the case, the People informed defendant that they would not consent to the vacatur of the judgment. The People's investigation found that neither PT nor Moustapha D. could have killed Ward and that defendant's claim that Ricky Jones and Woodford had recanted their trial testimony was inaccurate. In fact, they firmly stood by their original identifications. Moreover, Brown's recantations were marked by inconsistencies and he refused to sign a sworn statement. While Phillip Jones had signed an affidavit for a defense investigator, he stated in two subsequent interviews with the People that he had correctly identified defendant at trial and denied knowingly signing the affidavit. With respect to the polygraph reports submitted in support of defendant's alibi defense, an investigator from the New York County District Attorney's Office,

who is a certified polygraphist, opined that the report relating to defendant's mother based on heart monitoring was largely unreadable due to a physical condition or ailment, and that her breathing pattern potentially indicated an attempt to manipulate the test results. As to the report of defendant's charts, the investigator deemed it "inconclusive."

On May 1, 2013, defendant moved pursuant to CPL 440.10(1)(g) and (h) to vacate the conviction based on newly discovered evidence, ineffective assistance of trial counsel and actual innocence. The new evidence included: (i) the recantations by Brown and Phillip Jones; (ii) the alleged equivocation by Woodford and Ricky Jones regarding their identifications of defendant; (iii) an affidavit, dated October 7, 2012, by "DK" of Kent, Washington, stating, inter alia, that she had known Moustapha D. for about three years, and that about a year and a half earlier, he told her that he had shot and killed a retired "cop" in New York City and that "someone else was doing his time"; and (iv) statements made by the codefendant's brother indicating that his brother never met defendant. Defendant argued, inter alia, that this evidence, along with the identification process used by the police in this case, rendered the trial identifications highly unreliable and insufficient to support the guilty verdict, especially in the absence of any

other evidence connecting him to the murder, the alibi defense and the tips that the crime had been committed by others, including Mustafa and Shaq.

There is no merit to defendant's ineffective assistance claim. Defense counsel's alleged deficiencies were tactical choices that could have been made by a reasonably competent attorney. Defense counsel cross-examined the People's witnesses about their opportunity to view the robbers and purported discrepancies between the descriptions provided to the police following the murder and those given at trial; about the circumstances of the lineup identifications; about whether the police pressured the witnesses to cooperate or fed them information about the crime; and, where applicable, about the witnesses' criminal histories and use of controlled substances. Defense counsel also presented testimony in support of defendant's alibi defense and from police detectives about descriptions of the gunman provided by various witnesses in the wake of the murder.

To vacate a judgment of conviction based on newly discovered evidence pursuant to CPL 440.10(1)(g), "the evidence must fulfill all the following requirements: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as

could have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and, 6. It must not be merely impeaching or contradicting the former evidence" (*People v Deacon*, 96 AD3d 965, 967 [2d Dept 2012], *appeal dismissed* 20 NY2d 1046 [2013] [internal quotation marks omitted]).

The court must consider the parties' submissions "for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact" (CPL 440.30 [1][a]). The motion may be summarily denied, in the court's discretion, when the "moving papers" fail to allege a ground "constituting [a] legal basis for the motion"; when essential factual allegations are not supported by sworn allegations or are "conclusively refuted by unquestionable documentary proof"; or when essential allegations are either contradicted "by a court record or other official document" or are made solely by the defendant and there is "no reasonable possibility" that the allegation is true (CPL 440.30[4][a][b][c][d]; *see People v Karl Chu-Joi*, 26 NY3d 1105 [2015]).

Defendant's conviction was the result of a lengthy jury trial, presided over by a respected and seasoned Judge, in which defendant was represented by experienced and competent counsel, who raised interrelated misidentification and alibi defenses and

obtained an acquittal on the first-degree murder charge. Most of defendant's arguments merely rehash the claims he made at trial, in his prior appeal and in his federal habeas corpus petition regarding the alleged insufficiency and weight of the identification evidence, and the credibility of the witnesses, which were found to be unavailing by the jury, this Court and Judge Chin.

As to the new evidence itself, recantation of trial testimony is considered to be the most unreliable form of evidence and does not warrant a new trial unless there is compelling evidence of the reliability of the recantations and of other circumstances warranting relief (*see People v Shilitano*, 218 NY 161, 170 [1916]; *People v Lane*, 100 AD3d 1540 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013]). There is no such compelling evidence here.

Only Brown and Phillip Jones recanted, and Brown refused to swear to his recantation under oath. The other two eyewitnesses, Woodford and Ricky Jones, the latter of whom had repeated and clear opportunities to interact with defendant before and during the crime, have not recanted. Although Phillip Jones signed an affidavit years after the trial, he also made bizarre comments during his interviews with defendant's investigator, "JD," and the People. Phillip Jones told JD that, the night before their

interview, he had a "dream" that someone would visit him, woke up, and told his wife, "I think I made a mistake." Phillip Jones explained that he had a power he called the "black veil," which he characterized as an "intuition" that allowed him to "sense things sometimes."

While Phillip Jones asserted in his affidavit that he felt "pressured" to make an identification because the police were threatening to arrest him and his brother for stealing money from the crime scene, when JD asked him if detectives had threatened the brothers, he replied, "They didn't even say that," and that the detectives just asked if they knew what happened to the money. When JD implied that detectives "suggested somebody" whom he should identify in the lineup, Phillip Jones said, "No, no, they didn't do that." Phillip Jones also told JD that he felt "pressured" by NBC personnel, who tried to "bribe" him and recanted his recantation in two interviews with the People. When the People confronted Phillip Jones with his affidavit on February 3, 2012, he denied knowledge of its contents and claimed that, during a visit to the offices of NBC, he had been tricked into signing what he thought was a meal receipt.

As for Brown, in addition to refusing to sign an affidavit, there were numerous and significant inconsistencies in his recantations. At certain points, Brown stated that he did not

see the perpetrators or only saw them for a "few seconds" and that he picked defendant's photograph at random. At other points, he acknowledged that he got a good enough look to know that defendant "looked similar" to the shooter and that he "thought" defendant "might be" Ward's killer. Casting further doubt on the reliability of Brown's recantation is the fact that during his posttrial interviews, at which he recanted, Brown was incarcerated and admitted that he feared being labeled a "rat" (*see People v Cintron*, 306 AD2d 151, 151-152 [1st Dept 2003] ["We note that the witness's affidavit was made almost 10 years after defendant's conviction, and after the witness (became) an inmate of the same prison system in which defendant is incarcerated"], *lv denied* 100 NY2d 641 [2003]).

Ricky Jones, who had face to face interactions with defendant shortly before and during the robbery that lasted nearly 10 minutes, expressed a high level of confidence in his identification. When an NBC producer played a video of defendant for Ricky Jones and asked what he saw, Jones replied: "The guy he did it." Ricky Jones also told the People's investigator that, after watching the episode of Dateline, he was "damn sure" that defendant killed Ward. He told JD that, when he saw defendant in the lineup, he thought defendant was "definitely" the killer.

Defendant states that Ricky Jones said that defendant's

brother looked more like the killer than defendant did. However, Ricky Jones responded to such suggestions from JD by stating, "No, no, no ... you driving one point to another where it's not consistently going where I'm saying"; and that the investigator was "playing tic-tac-toe" with his words. Ricky Jones explained that when defendant's brother showed up as an observer at trial, he might have chosen him as the perpetrator from a lineup just because he had braids in his hair, which Ward's killer had. However, because of the resemblance, Ricky Jones walked around and sized defendant's brother up. Once defendant's brother did not react to him, Ricky Jones did not believe him to be the shooter.

Woodford told JD more than a dozen times, in substance, "They got the right guy." He also recalled being so shocked to see defendant in the lineup that he felt he was going to "piss on himself" and that he recognized defendant immediately as Ward's killer. Woodford also told Dateline, "The kid that I said did it, that's who did it." Further, in seeking to obtain a recantation, Woodford was given false information by JD, such as that Ricky Jones said that defendant was a "lot taller" than the real killer and that detectives "made some stories up," "lied" at trial, and "ripped apart" a "good alibi." While this briefly "created doubt in [his] mind," Woodford subsequently confirmed

to the People that he had recognized defendant as Ward's killer at the lineup, and, that despite fears of retribution, identified him as such.[1] That the now 66-year-old Woodford, who has cataracts, had difficulty identifying defendant in photographs shown by JD, twelve years after the murder, does not undermine his original identification.

That codefendant Daniels "blamed" defendant for not telling the police that Daniels had "nothing to do" with the robbery, or that his brother stated that Daniels and defendant did not know each other, does not exculpate defendant. Rather, it merely professes Daniels's own innocence. To the extent that Daniels's statements conflict with his sworn plea allocution, in which he admitted to planning and participating in the robbery with defendant, they are inherently untrustworthy and provide an insufficient basis for upsetting defendant's conviction *(see People v Smith*, 108 AD3d 1075 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013]; *People v McGuire*, 44 AD3d 968, 969-970 [2d Dept 2007], *lv denied* 10 NY3d 813 [2008]).

Nor has defendant shown Moustapha D. to be a plausible

[1]On October 22, 2014, federal authorities arrested JD and charged him with felony conspiracy for bribing a police officer in order to obtain confidential information from the National Crime Information Center database. On January 20, 2016, JD pled guilty to conspiracy.

suspect. Hearsay evidence of a third-party confession may warrant vacatur of a conviction and a new trial if the petitioner can show a reasonable possibility that the statement is true (*see People v McFarland*, 108 AD3d 1121 [4th Dept 2013], *lv denied* 24 NY3d 1220 [2015]; *People v Deacon*, 96 AD3d 965, 968 [2d Dept 2012], *appeal dismissed* 20 NY3d 1046 [2015]). As the proponent of the confession attributed to Moustapha D., it was incumbent on defendant to demonstrate that there is sufficient competent evidence independent of the declaration to insure its trustworthiness and reliability (*see McFarland*, 108 AD3d at 1122-1123). Simply put, there is nothing either trustworthy or reliable about the purported confession attributed to Moustapha D., or the related contention that he was in New York at the time of the murder, rather than on a fish processing boat in Alaska, and a hearing on defendant's newly discovered evidence claim was not warranted.

DK stated in her affidavit that after his original confession, Moustapha D. showed her defendant's website in March 2012 and purportedly said that he was "supposed to just do a robbery" with his friend "Shaq," but ended up "shooting the cop." However, she failed to provide any details as to the circumstances leading to the purported confession and the sketchy information she provided as to the crime could have just as

easily been gleaned from defendant's website itself. Moustapha D. also provided a sworn statement denying the allegations and offered to take "tests" to prove it.

Decidedly, photographs of Moustapha D. taken between 1996 and 1998, including driver's license photographs, show a several-inch long scar on his right cheek. He also spoke English with a heavy accent, having been born in Mauritania and lived in Senegal before he came to the United States. Neither of these characteristics was attributed to the shooter by any of the multiple witnesses to the robbery, some of whom had actual conversations with the defendant. Additionally, documentary evidence, including an employment contract and pay checks, showed that Moustapha D. had moved to Washington State and that at the time of the robbery he was on a fish processing boat in Alaska. There is no evidence whatsoever that he returned to New York during that time period and the newly crafted defense theory that someone else was working on the fish processing boat using Moustapha D.'s identity is unsupported by any evidence and is entirely speculative.

Indeed, Moustapha D.'s attorney submitted a request to the Immigration and Naturalization Service in Seattle to reschedule a January 21, 1998 appointment to an earlier date because Moustapha D. had a "contract to work in Alaska beginning" on January 5th.

One of the fish processing ship's owners averred that the ship would have sailed from Seattle and arrived off the Alaskan coast no later than January 20, 1998, so as to be in place for the start of the fishing season, a week before the robbery and Ward's murder. A report issued by the Unalaska, Alaska Department of Public Safety indicates that, on February 19, 1998, Moustapha D. was still in Alaska, in the Aleutian Islands.

To vacate a judgment based on actual innocence pursuant to CPL 440.10(h), defendant must demonstrate with clear and convincing evidence, which was not presented at trial, his factual innocence, i.e. that he was actually innocent of the crimes for which he was convicted (*see People v Hamilton*, 115 AD3d 12, 23 [2nd Dept 2014]); *Bousley v United States*, 523 US 614, 623-624 [1998]). To be sufficient, clear and convincing evidence must establish that the claim asserted is "highly probable." "Mere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt, is insufficient, since a convicted defendant no longer enjoys the presumption of innocence, and in fact is presumed to be guilty" (*Hamilton* at 27).

"A prima facie showing of actual innocence is made out when there is a sufficient showing of possible merit to warrant a fuller exploration by the court" (*Hamilton*, 115 AD3d at 27,

quoting *Goldblum v Klem*, 510 F3d 204, 219 [2007], *cert denied* 555 US 859 [2008][internal quotation marks omitted]). As recently explained by this Court in *People v Jimenez* (__ AD3d __, 2016 NY Slip Op 05620 [1st Dept 2016]), which agreed with the Second Department that CPL 440.10(h) embraces a claim of actual innocence,

> "[T]his specific standard for actual innocence claims should be considered in light of, and alongside, the more general standard applicable on any motion to vacate a conviction brought under CPL 440.10. Thus, statements of fact supporting the motion must be sworn (*People v Simpson*, 120 AD3d 412 [1st Dept 2014]['[w]here a CPL 440.10 motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations of such facts (CPL 440.30[1][a])']). Further, hearsay statements in support of such motions are not probative evidence (*see People v DeVito*, 287 AD2d 265, 265 [1st Dept 2001] [holding that the defendant was not entitled to vacatur of conviction based on newly discovered evidence which was comprised in part of an affidavit based on hearsay])."

Here, defendant failed to make the requisite prima facie showing. The alleged recantations by two of the four eyewitnesses were shown to be highly suspect and the uncorroborated confession attributed to Moustapha D. was refuted by the overwhelming evidence the People unearthed in their reinvestigation of the crime. Thus, as there was an insufficient showing of possible merit, a hearing on defendant's actual innocence claim was not warranted (*see Hamilton*, 115 AD3d at 27;

Jimenez, __ AD3d at __; *see also People v Jimenez*, 46 Misc 3d 1220[A][Sup Ct, Bronx County 2015] [affidavits containing the recantation of one of two eyewitnesses, and statements of two alibi witnesses, were untrustworthy and insufficient to warrant a hearing on the defendant's actual innocence claim]).

Accordingly, the order of Supreme Court, New York County (Abraham L. Clott, J.), entered November 13, 2014, which denied, without a hearing, defendant's CPL 440.10 motion to vacate a March 7, 2000 judgment, should be affirmed.

All concur.

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

ENTERED: SEPTEMBER 8, 2016

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando Acosta
Dianne T. Renwick
Richard T. Andrias, JJ.

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_____x

Miriam Aristy-Farer, et al.,
Plaintiffs-Respondents,

-against-

The State of New York, et al.,
Defendants-Appellants.

- - - - -

New Yorkers for Students' Educational Rights ("NYSER"), et al.,
Plaintiffs-Respondents,

-against-

The State of New York, et al.,
Defendants-Appellants.

- - - - -

New Yorkers for Students' Educational Rights ("NYSER"), et al.,
Plaintiffs,

City of Yonkers,
Intevenor-Plaintiff-Respondent,

-against-

The State of New York, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Manuel J. Mendez, J.), entered April 9, 2014, which, in the *Aristy* action, denied defendants' motion to dismiss the complaint; the order, same court and Justice, entered November 18, 2014, which, in the *NYSER* action, denied defendants' motion to dismiss the complaint; and the order, same court and Justice, entered November 18, 2014, which granted the City of Yonkers's motion to intervene in the *NYSER* action as a party plaintiff.

Eric T. Schneiderman, Attorney General, New York (Andrew W. Amend, Denise A. Hartman, Steven C. Wu and Philip V. Tinse of counsel), for appellants.

The Law Office of Michael A. Rebell, New York (Michael A. Rebell of counsel), for respondents.

Morgan, Lewis & Bockius LLP, New York (Douglas T. Schwarz and John A. Vassallo, III of counsel), for New Yorkers for Students' Educational Rights, respondent.

Michael V. Curti, Corporation Counsel, Yonkers (Hiran Sherwani and Matthew Gallagher of counsel), for the City of Yonkers, respondent.

TOM, J.P.

In these three consolidated appeals, plaintiffs in the *Aristy* and *NYSER* actions contend, inter alia, that the State defendants have continued to deprive New York City public school students of the opportunity to obtain a sound basic education (NY Const, art XI, § 1) by failing to comply with school funding directives set by the Court of Appeals in the *Campaign for Fiscal Equity* cases (discussed below). The City of Yonkers was granted leave to intervene in the *NYSER* action as a party plaintiff.

A short recitation of the *Campaign for Fiscal Equity* cases is necessary to provide the procedural history leading up to the present actions. In 1993, the Campaign for Fiscal Equity, Inc., an educational advocacy group, and various other plaintiffs consisting of 14 of New York City's 32 school districts and individual students who attended New York City public schools and their parents, commenced an action seeking a judgment declaring that the State's system for financing education deprived New York City public school students of the opportunity to receive a sound basic education in violation of the Education Article of the New York Constitution (art XI, § 1).

In *Campaign for Fiscal Equity v State of New York* (86 NY2d 307 [1995] [*CFE I*]), the Court of Appeals held that the plaintiffs had stated a cause of action under the Education

Article by alleging "gross educational inadequacies that, if proven, could support a conclusion that the State's public school financing system effectively fails to provide for a minimally adequate educational opportunity" (*CFE I*, 86 NY2d at 319).

Following a trial on the plaintiffs' claims, the Court of Appeals upheld the trial court's finding that the plaintiffs had proven their claims under the Education Article, and directed the State to ensure, by means of "[r]eforms to the current system of financing school funding and managing schools, ... that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education" (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893, 930 [2003] [*CFE II*]).

Then, in *Campaign for Fiscal Equity, Inc. v State of New York* (8 NY3d 14 [2006] ["*CFE III*"]), the Court held that the State's proposed State Education Reform Plan to provide adequate funding to New York City schools was not unreasonable, and declared that the constitutionally required funding of the New York City School District included additional operating funds in the amount of $1.93 billion, adjusted for inflation since 2004. This figure was extrapolated from a statewide sum of $2.45 billion (*see CFE III*, 8 NY3d at 23-24, 27, 30).

In 2007, as part of the Budget and Reform Act of 2007 (the

2007 Reform Act) (codified at Education Law § 3602), the State promulgated a four-year plan to implement the constitutional reforms mandated by *CFE III*. The State created a new program, Foundation Aid, which established a new formula for calculating State operating aid to school districts. The Foundation Aid formula (Education Law § 3602[4][a]), which is extremely complex, has four basic components: (1) a base per-pupil amount, based on amounts spent on students in "successful" school districts (*id.*, subpar[1]); (2) modified by a regional cost index (Education Law § 3602[4][a][2]) and (3) a pupil-need index for additional costs for high-need students (Education Law § 3602[4][a][3]); (4) less the "expected minimum local contribution," itself the product of factors including the wealth of the locality (Education Law § 3602[4][a][4]); there is in addition a "[p]hase-in foundation increase" (Education Law § 3602[4][b]).

The 2007 Reform Act called for total annual Statewide foundation funding to increase by a cumulative total of $5.49 billion over four years, as follows: 2007-08, $1.1 billion; 2008-09, $1.24 billion; 2009-10, $1.5 billion; 2010-11, $1.65 billion.

The Foundation Aid monies provided for under the 2007 Reform Act were fully distributed in school years 2007-08 and 2008-09. Following the 2008 recession, however, the State faced a $20.1 billion shortfall for the 2009-10 budget. In April 2009, it

closed that gap through a package of tax increases and broad spending cuts. The State froze Foundation Aid levels, eliminating the planned increase for 2009-10.

In 2010, the State went further, reducing aid for 2010-11 through the Gap Elimination Adjustment (GEA) (*see* Education Law § 3602[17]). The GEA apportioned reductions in aid among school districts according to factors that included wealth and student need. After factoring in federal stimulus funding, the GEA resulted in a net reduction in education aid for 2010-11 of $740 million. The GEA was subsequently extended, and then made permanent, with a $2.6 billion reduction in statewide aid for 2011-12 and total cumulative reductions of about $4 billion through 2013-14.

For the 2011-12 budget, the Legislature enacted the "Allowable Growth Amount," which limited increases in State aid to education to no more than the increase in the personal income of the State for the preceding year (*see* Education Law § 3602[1][aa]-[gg], [18]).

For 2012-13, the Legislature established a "Property Tax Cap," which required a 60% vote in a school district's voters to approve a tax levy increase in the district's education funding that exceeded the lesser of 2% of the previous year's increase or the increase in the national Consumer Price Index (*see* Education

Law § 2023-a[2][i], [6]).

Plaintiffs in the *Aristy* action are parents of New York City schoolchildren, defendants are the State of New York, the Governor of New York, and the President of the University of the State of New York. The *Aristy* plaintiffs allege in their first cause of action that underfunding of the New York City School District by billions of dollars - including a $290 million penalty imposed on the New York City School District for failure to comply with the requirement under the annual professional performance review (APPR) and penalty provisions of the Education Law to submit documentation to show that it had fully implemented new standards and procedures for conducting annual professional performance reviews by January 17, 2013 - violates the Education Article by depriving students of the opportunity for a sound basic education. The *Aristy* plaintiffs' second and third causes of action assert substantive due process and equal protection challenges based on the State's withholding of penalty funds due to the APPR and penalty provisions of the Education Law.

Plaintiffs in the the *NYSER* action are individual parents of children in a number of school districts, led by New Yorkers for Students' Educational Rights (NYSER), an educational advocacy group whose members include the named individual plaintiffs, school districts and community education councils and other

educational advocacy groups, including the New York State PTA, representing hundreds of thousands of parents. These plaintiffs sued the State of New York, the Governor of New York, the President of the University of the State of New York, and the New York State Board of Regents. The *NYSER* plaintiffs set forth four causes of action seeking declaratory and injunctive relief. They too assert that underfunding of school districts throughout New York State by billions of dollars violates the Education Article by depriving students of the opportunity for a sound basic education. The first cause of action alleges that the State has failed to comply with the *CFE* decisions. The second cause of action alleges that, through funding cuts, the State is breaching its constitutional duty to provide students with a sound basic education as required by the Education Article. The third cause of action alleges that the State is breaching its duty under the Education Article to track changes in fiscal and educational conditions by maintaining an appropriate "system of accountability" and to respond appropriately by revising state funding formulas and recommending changes to school districts. The fourth cause of action alleges generally that the State has breached its duty under the Education Article to provide students with a sound basic education.

The City of Yonkers contends that it has a right to

intervene in the *NYSER* action as a party plaintiff, because it "has a real and substantial interest in ensuring that [its] students' opportunities for a sound basic education are properly and equitably funded."

Supreme Court denied defendants' motions to dismiss the complaints pursuant to CPLR 3211, and these appeals ensued. We agree with Supreme Court that the *Aristy* and *NYSER* complaints state claims under the Education Article. However, we find certain causes of action in the complaints failed to state a claim and should be dismissed, and we modify the orders on appeal accordingly.

As a threshold matter, the State contends that the City of Yonkers, as well as the school districts and school boards that comprise some of NYSER's membership, lack capacity to sue the State. The State also contends that NYSER lacks standing and that no *NYSER* plaintiff has standing to assert a claim relating to any district other than the seven school districts in which the individually named plaintiffs reside.

The capacity to sue or be sued concerns a litigant's power to bring a grievance to the court, while standing involves whether the litigant has suffered an injury in fact and thus has an actual legal stake in the matter (*see Silver v Pataki*, 96 NY2d 532, 537-539 [2001]). In *City of New York v State of New York*

(86 NY2d 286 [1995]), the Court of Appeals held that municipalities lack capacity to bring an Education Article claim against the State unless certain exceptions apply. These exceptions are:

> "(1) an express statutory authorization to bring such a suit; (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys; (3) where the State statute impinges upon Home Rule powers of a municipality constitutionally guaranteed under article IX of the State Constitution; and (4) where the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription" (86 NY2d at 291-292 [citations and interval quotation marks omitted]).

The City of Yonkers maintains that it has capacity to sue under the second of the above exceptions, asserting that the educational funding cuts have deprived it of a proprietary interest in the Foundation Aid monies calculated to be apportioned to it by formula pursuant to the 2007 Budget and Reform Act. This argument is unpersuasive.

Contrary to Yonkers's contention, the proprietary interest exception does not apply where a municipality has "a mere hope or expectancy" of receiving funds (*Matter of Board of Educ. of Roosevelt Union Free School Dist. v Board of Trustees of State Univ. of N.Y.*, 282 AD2d 166, 173 [3d Dept 2001]), but instead

"relate[s] to funds or property of a municipal corporation in its possession or to which it had a right to immediate possession" (*County of Albany v Hooker*, 204 NY 1, 16 [1912]). The Foundation Aid monies provided for under the 2007 Budget and Reform Act (codified in Education Law § 3602) are the product of a complex formula that turns on the application of numerous variables, including things like a school district's "daily attendance figures" (*Roosevelt Union*, 282 AD2d at 173). Sums allocated pursuant to the formula therefore vary from year to year. Moreover, any sums provided for by Foundation Aid must themselves be the subject of a separate budgetary appropriation; absent such appropriation, they do not exist (*see* State Finance Law §§ 4[1]; 40[2][a]). Thus, the Foundation Aid formula does not create any "specific sum of money" that would "create[] a proprietary interest" in any school district (*Roosevelt Union*, 282 AD2d at 173).

In fact, in *City of New York*, the Court of Appeals held that the municipal plaintiffs "lack[ed] a proprietary interest in a fund or property to which their claims relate and [could not] ground capacity to sue on that basis" (*City of New York*, 86 NY2d at 295). The Court explained:

> "Finding a proprietary interest of the City of New York sufficient to confer capacity to sue without regard to a cognizable right in a

> specific fund would create a municipal power to sue the State in any dispute over the appropriate amount of State aid to a governmental subdivision or the appropriate State/local mix of shared governmental expenses. The narrow proprietary interest exception would then ultimately swallow up the general rule barring suit against the State by local governments" (*id.*).

Hence, no "specific sum of money" exists in which the City of Yonkers would have a proprietary interest for purposes of its educational funding challenge. Accordingly, the City of Yonkers's motion to intervene in the *NYSER* should be denied.

Although some of NYSER's constituent members — school districts and school boards — lack capacity to sue the State on their own, NYSER itself has the capacity to sue as an association, given the undisputed capacity of some of its other members — namely the individual named plaintiffs in the *NYSER* action (*see New York State Assn. of Small City School Dists., Inc. v State of New York*, 42 AD3d 648, 649 [3d Dept 2007]).

As to standing, the State concedes that individual parent and student plaintiffs have standing to sue, at least as to alleged educational deficiencies in the school districts where the children are enrolled. In the *NYSER* appeal, however, the State asserts that NYSER lacks standing and that no *NYSER* plaintiff has standing to assert a claim relating to any district other than the seven school districts in which the individually

named plaintiffs reside. The State contends that the *NYSER* plaintiffs' claims should be dismissed except as they relate to those seven districts.

"To establish standing, an organizational plaintiff ... must show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members" (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). NYSER has associational standing to sue by virtue of the fact that the individual named plaintiffs are also members of NYSER. The State does not argue that NYSER is not "representative of the organizational purposes it asserts" or that the *NYSER* case would otherwise require the individual plaintiffs to participate.

Also significant is that one of NYSER's constituent members is the New York State PTA, which is alleged to be comprised of "hundreds of thousands" of parents from 1,600 "local units and councils" across the State of New York. The State tacitly concedes that the State PTA thus confers standing upon NYSER as to all districts in which State PTA constituent parent members reside. The State asserts, however, that the *NYSER* complaint "does not identify any particular districts whose schools such students attend," and maintains that the complaint should thus be

dismissed as it relates to any district other than the nine in which the individual plaintiffs reside. We find that, at this early stage of the action, on a motion to dismiss, it is not necessary to determine which school districts have resident parent or student plaintiffs and are thus directly involved in the action for standing purposes. Crediting the *NYSER* complaint's allegations, the State PTA will likely have members residing in hundreds of districts.

Turning to the adequacy of the complaints pursuant to CPLR 3211, and accepting the allegations as stated, we must begin with a review of the *Campaign for Fiscal Equity* cases, discussed above, and the subsequent legislative actions, upon which plaintiffs' claims are premised. The New York Constitution's Education Article requires the Legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (NY Const, art XI, § 1). The Education Article mandates that the opportunity for a sound basic education be provided to all children (*see Board of Educ. of Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27, 48 [1982]), and imposes this obligation upon the Legislature (*see Donohue v Copiague Union Free School Dist.*, 47 NY2d 440, 443 [1979]). However, we note that the remedy in *Campaign For Fiscal Equity* was imposed only with

respect to the New York City School District rather than being applicable on a state-wide basis, notwithstanding that the State's pending plan was devised to have statewide effect.

The *NYSER* plaintiffs' first cause of action alleges that the State has failed to provide the level of education funding endorsed by the *CFE III* Court as the minimum level of funding required by the Education Article. The State argues that plaintiffs may not premise an educational funding claim on alleged failures to comply with funding levels endorsed by the *CFE III* Court and implemented through the 2007 Budget and Reform Act. Specifically, the State contends that its funding statutes did not establish a consitutional floor for education funding. The State also contends that *CFE III* set a floor for New York City only, not for the State as a whole.

In *CFE III*, the Court "declare[d] that the constitutionally required funding for the New York City School District includes additional operating funds in the amount of $1.93 billion, adjusted with reference to the latest version of the GCEI[1] and inflation since 2004" (*CFE III*, 8 NY3d at 30). The $1.93 billion figure was extrapolated from a statewide sum of $2.45 billion

[1] The GCEI is the Geographic Cost of Education Index, provided by the National Center for Education Statistics (*CFE III*, 8 NY3d at 23).

(*see id.* at 23-24, 27).

As noted, through the 2007 Budget and Reform Act, the State promulgated a four-year plan to increase educational aid to meet the constitutional minimum declared by the Court of Appeals. Educational aid was to be apportioned among the districts through the detailed Foundation Aid formulas. The 2007 Reform Act called for total annual statewide foundation funding to increase by a cumulative total of $5.49 billion over four years (much more than the $1.93 billion sum ratified by the Court of Appeals), as follows: 2007-08, $1.1 billion; 2008-09, $1.24 billion; 2009-10, $1.5 billion; 2010-11, $1.65 billion.

The Legislature met the first two years of spending increases, for a total addition of $2.34 billion — more than the $1.93 billion number endorsed by the Court of Appeals for the New York City (NYC) School District. The later years' spending increases were deferred, however, and a series of further cost-saving measures — the GEA, the Allowable Growth Cap, the Property Tax Cap, and the APPR — were implemented. The parties dispute whether the net effect of the cost-saving measures has been to reduce educational aid below the $1.93 billion floor.

Although the *CFE III* Court emphasized that its holding was based on the record before it (*see CFE III*, 8 NY3d at 27), and the Court was certainly aware that educational spending needs

would change from year to year, the *CFE III* Court's core holding was an unambiguous declaration that the State Constitution required education spending to be at least $1.93 billion higher for the City of New York (and, by extension, at least $2.45 billion statewide). The Court clearly intended this number to serve as a floor for at least four years. Indeed, the Court let stand this Court's directive, on the intermediate appeal in *CFE III*, that additional education aid spending be "'phased in over four years'" (*CFE III*, 8 NY3d at 26 & n 4, quoting 29 AD3d at 191 [modifying First Department order to reduce spending floor but not disturbing four-year phase-in provision]). And the Court directed that future years' spending be based on the $1.93 billion sum, but adjusted each year for "inflation since 2004" (*CFE III*, 8 NY3d at 27).

Therefore, given the clarity of the Court of Appeals' declaration, and its built-in provision for annual updating for inflation by reference to a specified inflation index (the GCEI), the $1.93 billion figure stands as a constitutional minimum that the State must meet, and that it may be compelled to meet through litigation.

Consequently, the *NYSER* plaintiffs' first cause of action, premised on the State's alleged failure to comply with *CFE* funding mandates, adequately states a claim. Specifically, NYSER

plausibly alleges that the net effect of changes in educational funding has been to drop total State education aid below the *CFE* floor. In addition, to the extent the *Aristy* complaint's first cause of action relies on the *CFE* funding mandate, it too states a claim that the State failed to meet Education Article funding obligations.

Although the State contends that a comparison of the 2003-04 State Education Department fiscal profile with its 2013-14 counterpart demonstrates that total operational spending for the NYC School District has increased by some $9 billion, far more than the *CFE* minimum, we find the State's effort to demonstrate that it is in compliance with the *CFE* mandate unavailing. Further, we decline to take judicial notice of the fiscal profile spreadsheets on which it relies, since those complex documents, each consisting of tens of thousands of cells of financial data, are outside the record on appeal and not readily comprehensible without the assistance of explanatory expert guidance, which has not been provided.

The *NYSER* complaint's second and fourth causes of action, and the *Aristy* complaint's first cause of action also state claims under the Education Article. In order to state a valid cause of action under the Education Article, a plaintiff must set forth detailed allegations of systemic district-wide educational

deficiencies that are attributable to a lack of funding by the State (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 180-182 [2005] [*NYCLU*]; *Paynter v State of New York*, 100 NY2d 434, 440-441 [2003]; *CFE I*, 86 NY2d at 317-319). This Court has recently reiterated the requirement that plaintiffs asserting a constitutional claim under the Education Article must allege "deprivation of a sound basic education" in the form of "district-wide failure" "attributable to the State" (*see New York City Parents Union v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 124 AD3d 451, 451-452 [1st Dept 2015] [internal quotation marks omitted]).

More specifically, in *Paynter*, the Court of Appeals explained that, to state a "viable Education Article claim," the plaintiffs must assert "first, that the State fails to provide them a sound basic education in that it provides deficient inputs – teaching, facilities and instrumentalities of learning – which lead to deficient outputs such as test results and graduation rates; and, second, that this failure is causally connected to the funding system" (100 NY2d at 440).

As for the standard of review on a motion to dismiss, in *CFE I*, the Court of Appeals explained:

> "In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), our well-settled task is

> to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated. We are required to accord plaintiffs the benefit of all favorable inferences which may be drawn from their pleading, without expressing our opinion as to whether they can ultimately establish the truth of their allegations before the trier of fact. . . . If we determine that plaintiffs are entitled to relief on any reasonable view of the facts stated, our inquiry is complete and we must declare the complaint legally sufficient" (86 NY2d at 318 [citations and internal quotation marks omitted]).

In *CFE I*, the Court emphasized the importance, in stating a claim under the Education Article, of "fact-based claims of inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc." (*id.* at 319).

The *NYSER* plaintiffs assert that the State has imposed new educational mandates on school districts but has not funded them, placing financial stress on many districts as evidenced by a State Comptroller's report that 87 districts "are currently in conditions of financial stress." The *NYSER* complaint devotes 39 paragraphs to educational inputs and outputs in the NYC School District. As to educational inputs, the *NYSER* plaintiffs allege, among other things, that average class sizes district-wide are above benchmarks stated in *CFE II*; the "vast majority" of NYC schools are currently failing to provide mandated academic intervention services for students performing below grade level;

nearly half of New York City schools lack adequate library facilities; "[m]ost schools" lack appropriate instructional materials for students learning English as a second language; and 16% of New York City high schools do not have a single science lab.

As to educational outputs, the *NYSER* plaintiffs allege that, in 2013, only 26% of New York City students in grades 3 through 8 obtained proficient scores on the State's achievement tests for English, while only 30% were proficient in math. Stated differently, 74% of New York City students in those grades were not proficient in English, and 70% were not proficient in math. Meanwhile, of students who entered high school in 2007, only 61% obtained high school diplomas as of 2012. If proven, these would be serious indicia of educational failure.

The *NYSER* complaint also offers additional particularized detail as to educational deficits in the Syracuse school district. Specifically, the complaint alleges that class sizes, particularly in the lower grades, have increased dramatically; the district lacks reading and math specialists to provide Academic Intervention Services and Response To Intervention (RTI) services in the elementary grades; critical after-school and summer-school services have been dramatically reduced; graduates lack sufficient credits to be accepted to SUNY schools; cutbacks

in custodian staffing have rendered many buildings filthy and mice-infested; and the paucity of support staff has weakened discipline and led to high suspension rates that undermine instructional efforts.

The State notes that neither the *NYSER* complaint nor the *Aristy* complaint provides any detailed, district-wide input/output information about any district other than New York City, Syracuse, and, to a lesser extent, Buffalo, Rochester, and Yonkers. The State accordingly argues that, at a minimum, the complaints should be dismissed insofar as they relate to the hundreds of districts as to which there are no particularized pleadings. We reject this argument. An Education Article claim must plead district-wide educational deficiencies, but that does not mean that it must be pleaded with particularity as to each and every district in the State. The State educational funding system is an interconnected web in which a complex formula is used to calculate funding for all districts. As a practical matter, actionable deficits identified in one district will require modification of the formula, necessarily affecting calculation of funding for all districts. This is evidenced by the *CFE* cases, which dealt exclusively with funding for the NYC School District but resulted in calculation of statewide funding needs and extrapolation of the NYC School District's share based

on statewide figures. Accordingly, for present purposes, it is enough that the plaintiffs have adequately alleged systemic deficiencies in at least one or two districts — New York City and Syracuse. A determination of the practical impact, and the appropriate remedy, if any, can, and should, await a later stage of this action (*see CFE II*, 100 NY2d at 902 [leaving the "actual quality of the educational opportunity in New York City, the correlation between the State's funding system and any failure to fulfill the constitutional mandate, and any justification for claimed discriminatory practices" to be resolved through "development of the record"]).

In its third cause of action, the *NYSER* complaint alleges that the State is breaching its duty under the Education Article to track changes in fiscal and educational conditions by maintaining an appropriate "system of accountability" and to respond appropriately by revising State funding formulas and recommending changes to school districts. The State argues that the *CFE III* Court held that existing accountability mechanisms were adequate and that the Education Article did not require the State to add a "new and costly layer of city bureaucracy" to ensure accountability (*CFE III*, 8 NY3d at 32).

In *CFE III*, the Court found it was "undisputed" that there were "minimally adequate accountability mechanisms now in place

for the evaluation of New York schools" (*CFE III*, 8 NY3d at 32). However, the parties dispute the adequacy of accountability mechanisms in light of the significant funding adjustments over the 10 years since *CFE III* was handed down. Thus, it would be premature to foreclose plaintiffs from exploring the adequacy of accountability mechanisms. Indeed, the adequacy of the State's education funding accountability mechanisms is directly related to the State's funding duty.

However, the remaining allegations in the third cause of action are not sufficiently related to the State's funding duty, and therefore should be dismissed (*see NYCLU*, 4 NY3d at 182). More specifically, there is merit in the State's contention that there is no precedent for that portion of the *NYSER* Plaintiffs' third cause of action that asserts that the State has provided the districts with constitutionally inadequate "information and guidance." Indeed, the Court of Appeals has rejected the notion that the State may be compelled to "intervene on a school-by-school basis to determine ... sources of failure and devise a remedial plan," because this would "subvert local control [over provision of education] and violate the constitutional principle that districts make the basic decisions on funding and operating their own schools" (*NYCLU*, 4 NY3d at 182). Accordingly, the *NYSER* complaint's third cause of action

should be dismissed except to the extent that it challenges the adequacy of the State's accountability mechanisms.

The *Aristy* complaint's second and third causes of action, asserting substantive due process and equal protection challenges to the APPR and penalty provisions of the Education Law (*see* Education Law §§ 3012-c; 3012-d[11]), fail to state a claim, because that statutory scheme readily passes the appropriate rational basis constitutional scrutiny (*see CFE I*, 86 NY2d at 320; *Levittown Union Free School Dist.*, 57 NY2d at 43).

The "Annual Professional Performance Review" (APPR) system, requiring school districts to enter into agreements with local collective bargaining units for APPR plans for teachers and principals, was promulgated in 2010. The APPR legislation required the State to withhold all education aid from any district that did not fully implement an APPR plan in any given year. This was done as part of an effort to meet Federal "Race to the Top" education funding provisions, potentially worth hundreds of millions of dollars (*see* Educ Law §§ 3012-c; 3012-d[11]). The *Aristy* plaintiffs assert that the State's withholding of some $290 million in education aid for the New York City School District for 2012-13, because of the district's failure to comply with the APPR deadline, violated the New York State Constitution's due process and equal protection clauses.

Where no fundamental interest is at stake, substantive due process concerns are satisfied as long as legislation is rationally related to a legitimate state interest (*see Washington v Glucksberg*, 521 US 702, 728 [1997]; *People v Knox*, 12 NY3d 60, 67 [2009], *cert denied* 558 US 1011 [2009]). Rational basis scrutiny is "the proper standard for review when the challenged State action implicate[s] the right to free, public education" (*Levittown Union Free Sch. Dist.*, 57 NY2d at 43; *see Matter of Levy*, 38 NY2d 653, 658 [1976], *appeal dismissed sub nom Levy v City of New York*, 429 US 805 [1976]; *see also CFE I*, 86 NY2d at 320 [applying rational basis scrutiny to equal protection challenge to educational funding]).

Judged under this standard, the *Aristy* plaintiffs' due process challenge to the APPR penalty provisions fails. The APPR compliance provision is rational because it promotes teacher effectiveness and also because it helps the State to compete for hundreds of millions of dollars in Federal "Race to the Top" funding. Therefore, it was not irrational for the Legislature to heavily incentivize local school districts to comply with the APPR provisions, even at the potential price of losing access to some State educational funding.

The *Aristy* plaintiffs' equal protection claim is likewise without merit. State educational funding claims have repeatedly

survived equal protection challenges (*see e.g. CFE I*, 86 NY2d at 319-20 [dismissing equal protection challenge to State school financing scheme under rational basis scrutiny]). The *Aristy* plaintiffs contend that the APPR compliance provision is irrational because it arbitrarily punishes students who happen to live in a school district that does not comply with the APPR statute. We find this contention unavailing; the compliance provision is rational. Further, the distinction between compliant and noncompliant school districts does not constitute the kind of suspect classification that would warrant heightened constitutional scrutiny (*see Levittown*, 57 NY2d at 43-44 [heightened scrutiny applies to equal protection claims "when the challenged State action has resulted in intentional discrimination against a class of persons grouped together by reason of personal characteristics," such as race or gender]).

Although the *Aristy* complaint focuses on the effects of APPR noncompliance funding penalties on the NYC School District, as noted, it directly points to the State's alleged failure to comply with *CFE* funding mandates, and contains some of the same allegations as the much more detailed *NYSER* Complaint regarding inputs and outputs. In any event, the *Aristy* and *NYSER* actions involve the same nucleus of operative facts, have widely overlapping claims, and have been consolidated. Thus, we do not

find it appropriate to permit one to go forward without the other.

Accordingly, the order of the Supreme Court, New York County (Manuel J. Mendez, J.), entered April 9, 2014, which, in the *Aristy* action, denied defendants' motion to dismiss the complaint, should be modified, on the law, to dismiss the second and third causes of action, and otherwise affirmed, without costs. The order of the same court and Justice, entered November 18, 2014, which, in the *NYSER* action, denied defendants' motion to dismiss the complaint, should be modified, on the law, to dismiss the third cause of action except insofar as it challenges the adequacy of defendant State's education funding accountability mechanisms, and otherwise affirmed, without costs. The order of the same court and Justice, entered November 18, 2014, which granted the City of Yonkers's motion to intervene in

the *NYSER* action as a party plaintiff, should be reversed, on the law, without costs, and the motion denied.

All concur.

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

ENTERED: SEPTEMBER 8, 2016

CLERK