Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10972-
10972A   Daniel Shatz, etc.,   Index 655620/18
Plaintiff-Respondent-Appellant,

-against-

Douglas Chertok, et al.,
Defendants-Appellants-Respondents,

Vast Ventures V LP, et al.,
Defendants,

Vast Ventures VI LLC,
Nominal Defendant-Appellant-Respondent.

____

Cooley LLP, New York (Philip M. Bowman of counsel), for appellants-respondents.

Gibbons P.C., New York (Daniel S. Wienberger and Jeffrey L. Nagel of counsel), for respondent-appellant.

____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about July 10, 2019, which denied in part and granted in part defendants’ motion to dismiss the complaint, unanimously modified, on the law, to reinstate the derivative cause of action for aiding and abetting, and the individual cause of action for breach of the covenant of good faith and fair dealing, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about July 31, 2019, which granted defendants’ motion for reargument and, upon reargument, adhered to its prior order, unanimously affirmed, without costs.

Plaintiff alleges derivatively that defendants breached their fiduciary duties to the corporation by, inter alia, (1) failing to pursue a previously-agreed upon investment

opportunity; (2) diverting that opportunity to another entity in which defendant Chertok has an interest; and (3) failing to disclose to the corporation the renewed availability of the investment opportunity. Defendants argue that the claim is barred because the corporation's operating agreement gives them the "sole and absolute discretion" over investment decisions.

The motion court correctly declined to dismiss the breach of fiduciary duty cause of action. In *Richbell Info. Servs. v Jupiter Partners* (309 AD2d 288 [1st Dept 2003]), the parties entered into a joint venture to acquire a company. Under the relevant agreement, the defendants had an "apparently unfettered" right to veto certain transactions (*id.* at 302). The plaintiffs alleged that the defendants had exercised their contractual veto power in bad faith as part of a secret scheme to deprive the plaintiffs of the benefits of the joint venture.

The Court in *Richbell* rejected the defendants' argument that their right to veto, which contained no limitations, barred the breach of fiduciary duty claim. The Court found that "even where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract" (*id.*). Thus, "even an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement" (*id.*). Here, although defendants possessed sole discretion over investment

decisions, the complaint sufficiently alleges that they exercised that discretion in bad faith and to self-deal. Thus, the fiduciary duty claim was properly sustained, despite the existence of the sole discretion clause.

Defendants maintain that *Richbell* is distinguishable because the agreement there did not include a "sole and absolute discretion" clause. *Richbell*, however, did not turn on the precise language contained in the agreement, but instead stands for the general principle that an "explicitly discretionary contract right" cannot be "exercised in bad faith" so as to deprive the other party of the benefit of the bargain (*id.*). Defendants' reliance on *Sullivan v Harnisch* (96 AD3d 667 [1st Dept 2012]), and other cases, is unavailing because those decisions did not involve allegations of bad faith or self dealing.

Defendants' remaining attacks on the fiduciary duty claim are unavailing. Plaintiff sufficiently pleaded that the LLC had a tangible expectancy of the investment opportunity, making it a corporate opportunity that could be diverted (*see Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 246-249 [1st Dept 1989]). Fact issues precluded a finding that plaintiff had conceded that defendants could divert identified opportunities to their other, similar businesses (*cf. Burg v Horn*, 380 F2d 897 [2d Cir 1967]). Fact issues also exist as to whether the LLC could have made the investment, even after it was diverted. While

plaintiff does not have information sufficient to plead how much defendants benefitted from the diversion, he does raise the inference that defendants will have profited more from the opportunity if the investment was made from another fund controlled by them. Plaintiff also properly alleged that defendants breached their fiduciary duty to the LLC to disclose all material information (*Salm v Feldstein*, 20 AD3d 469, 470 [2nd Dept 2005]).

Plaintiff's derivative claim for aiding and abetting should have been sustained. Plaintiff sufficiently alleges that the other defendants substantially assisted the primary violators by actively engaging in the diverted opportunity and taking it for themselves (*see Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]). Contrary to defendants' contention, this cause of action is pleaded with the requisite particularity (*see Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 [1st Dept 2015]).

The court properly dismissed the individual claim for concealment of material information. Defendants' fiduciary duty runs to plaintiff as a member of the LLC, not to allow him to obtain information so that he could take the investment opportunity for himself (*see Malone v Brincat*, 722 A2d 5, 12 [Del 1998]).

Finally, plaintiff sufficiently pleaded a claim for breach of the covenant of good faith and fair dealing, and was entitled to plead it in the alternative or in addition to the fiduciary

duty claim (*see Richbell* at 303).

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

ENTERED: FEBRUARY 27, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10920 Thomas Caso, Index 159192/15
Plaintiff-Respondent,

-against-

Miranda Sambursky Slone Sklarin
Verveniotis LLP, et al.,
Defendants-Appellants,

"John Doe," et al.,
Defendants.

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about October 1, 2019, which denied defendants Miranda Sambursky Slone Sklarin Verveniotis LLP, Michael Miranda, Richard Sklarin and Ondine Slone's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this legal malpractice action, plaintiff, defendants' former client, contends that "but for" defendants' negligence he would have obtained a favorable jury verdict in his underlying personal injury action against the owner and driver of a truck (*Caso v Santos, et al.,* index No. 301817/2008 [Supreme Ct., Bx Cty]). Plaintiff was struck by a commercial garbage truck and badly injured. The accident was a hit and run. Plaintiff could not describe the vehicle that struck him, and his case largely

relied on the testimony of the sole eyewitness, Ted Arenas. Arenas called 911 when the accident occurred. A New York City police detective spoke to Arenas during the course of his investigation of the accident. Defendants' driver was arrested but the charges were dropped shortly thereafter, and no criminal action was commenced. The detective, however, prepared investigative reports, which include statements that Arenas made to him. One investigative report contains a statement attributed to Arenas that he had "observed a dark green colored garbage truck" and that it was not a dump truck "as he stated in his 911 call." Another statement attributable to Arenas is that the truck had a "flat front." None of these investigative reports were prepared by Arenas or signed by him.

Statements from these investigative reports were read aloud, line by line, to Arenas at his deposition in the personal injury action. Even after hearing the information from the investigative reports, Arenas denied that he recalled describing the truck as having a flat front. Instead, he recalled that the truck had an engine in front. Arenas even made a drawing reflecting a roundish front hood on the truck. Arena did not recall seeing any identifying markings on the truck, or license plate, nor did he see the driver.

Before trial, Arenas met with counsel for both plaintiff and defendants. During that meeting, Arenas stated that he recalled the front of the truck as being bullnosed. While he was not 100%

sure, even after one of the investigative reports was read to him where he described the front of the truck as flat, he drew a picture of the truck with a bullnose.

At trial, Arenas provided conflicting and inconsistent testimony about the truck, alternatively describing it as a dump truck and also a garbage truck, but once again he testified that the truck had a rounded "bullnose," with the engine up front. Such testimony did not match the description of the truck owned by the defendants and allegedly involved in the underlying accident, which had a flat front. Santos, defendants' driver testified that he had not been involved in any accident and had not hit anybody with his truck. The jury returned a verdict for the defendants in the underlying personal injury action.

Plaintiff's contention in this legal malpractice action is that Arenas should have been better "prepared" for his deposition in the underlying personal injury action, so he could "remember" the statements he made to the detective. Plaintiff claims that, had defendants not been negligent, there would have been a plaintiff's verdict. He claims that Arenas's testimony damaged his case and prevented him from prevailing.

"[M]ere speculation of a loss resulting from an attorney's alleged omissions . . . is insufficient to sustain a claim" for legal malpractice" (*Gallet, Dreyer & Berkey, LLP v Basile*, 141 AD3d 405, 405-406 [1st Dept 2016] [internal quotation marks omitted]; *Geller v Harris*, 258 AD2d 421 [1st Dept 1999]).

Plaintiff's assertion that, had Arenas been better prepared, the jury would have returned a favorable verdict is pure speculation (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 443 [2007]; *Bookwood v Alston & Bird, LLC*, 146 AD3d 662 [1st Dept 2017]. Defendants met their burden of showing that plaintiff cannot establish causation, in that plaintiff cannot prove that it would have prevailed in the underlying action "but for" defendant's alleged negligence in preparing Arenas for his deposition (*see Rudolf v Shayne*, 8 NY3d 438 at 442).

Although there are issues of fact regarding whether defendants may have departed from the applicable standard of care, any claim that the jury would have reached a different result in the personal injury action is wholly speculative. First, it is wholly speculative that Arenas would have testified to a different description of the truck either at his deposition or at trial had he been shown the investigative reports. Although the investigative reports were read to him line by line at his deposition, his description of the truck did not change and he adhered to his belief, that the front of the truck he saw strike and run over plaintiff was bullnosed. Even if Arenas's statement in support of plaintiff's motion in this case is accurate, that he would have testified differently had he been differently prepared, this, at best, creates an issue of fact about what he would have said at trial. It does not eliminate speculation about what the jury's verdict would have been, given

that Arenas's description of the truck otherwise lacked detail, and the absence of any additional proof identifying defendants' truck and driver as being involved in underlying accident.

Contrary to plaintiff's argument, our prior decision in this case decided under the more liberal standards applicable to motions to dismiss (150 AD3d 422 [1st Dept 2017]) is not inconsistent with this summary judgment adjudication (*see Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467 [1st

Dept 1987]). Consequently, defendants' motion for summary judgment should have been granted and the case dismissed.

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11140 The People of the State of New York, Respondent, Ind. 1596/17

-against-

Jahloni Groome, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Emilia King-Musza of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered September 12, 2018, convicting defendant, upon his plea of guilty, of criminal possession of a firearm, and sentencing him to a term of 9 months, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. The court's oral colloquy, taken together with the written waiver, which defendant discussed with counsel, signed in open court and acknowledged understanding, established that the waiver was knowing, intelligent and voluntary (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *see also People v Thomas*, __NY3d__, 2019 NY Slip Op 08545 [2019]).

Regardless of the validity of defendant's waiver of his right to appeal, we find that the court properly denied his

motion to controvert a search warrant, and that there was no basis for a hearing.

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11141 Rapson Investments LLC, et al., Index 158967/17
Plaintiffs-Appellants,

-against-

45 East 22nd Street Property LLC,
Defendant-Respondent.

____

Adam Leitman Bailey, PC, New York (Jeffrey R. Metz of counsel), for appellants.

Holland & Knight LLP, New York (Robert S. Bernstein of counsel), for respondent.

____

Order, Supreme Court, New York County (Andrew S. Borrok, J.), entered March 11, 2019, which granted defendant’s motion for summary judgment dismissing the complaint, and denied plaintiffs’ cross motion for summary judgment, unanimously affirmed, with costs.

Given that plaintiffs do not deny that they were in breach of their respective purchase agreements and the amendments thereto when defendant sent out premature notices of termination, plaintiffs’ cause of action for anticipatory breach must fail. By definition, an anticipatory breach cannot be committed where, as here, one party is already in material breach of the contract (*Kaplan v Madison Park Group Owners, LLC*, 94 AD3d 616, 618 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]).

Even if we were to find the amendments to the purchase agreements unenforceable under General Business Law § 352-h because they purported to require plaintiffs to release their

deposits to defendant as consideration for extending the time to close, plaintiffs still would have forfeited their rights to the respective down payments under the purchase agreements upon their defaults and admitted subsequent failure to cure (13 NYCRR 22.3[k][2][vii]).

Plaintiff's cause of action for breach of the covenant of good faith and fair dealing cannot create new contract rights or defeat express contract provisions, and therefore was properly dismissed (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268 [1st Dept 2003]). Similarly, a claim for unjust enrichment will not stand in the face of a written agreement *(IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]), and as for appeals to equity, it has long been the law of this State that "a vendee who defaults on a real estate contract without lawful

excuse cannot recover his or her down payment” (*Uzan v 845 UN Ltd. Partnership*, 10 AD3d 230, 236 [1st Dept 2004]).

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11142 In re Chon-Michael S. also known as Chon M.S., Dkt B-33879/15

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

Shanice A.,
Respondent-Appellant,

The New York Foundling Hospital,
Petitioner-Respondent.

____

Geoffrey P. Berman, Larchmont, for appellant.

Daniel Gartenstein, Long Island City, for respondent.

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

____

Appeal from order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about March 11, 2019, which denied respondent mother’s motion to vacate her default, unanimously dismissed, without costs, as moot.

Respondent’s appeal from the denial of her motion to vacate the dispositional order terminating her parental rights is moot,

inasmuch as the subject child has been adopted (*see Matter of Alexis C. [Jacqueline A.]*, 99 AD3d 542, 543 [1st Dept 2012]).

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11143 In re Oluwafemi Olawoyin, Index 101670/16
Petitioner-Appellant,

-against-

New York City Transit Authority,
Respondent-Respondent.

____

Oluwafemi Olawoyin, appellant pro se.

David I. Farber, Acting General Counsel, Brooklyn (Bonnie C. Harper of counsel), for respondent.

____

Judgment (denominated an order), Supreme Court, New York County (Barbara Jaffe, J.), entered March 22, 2017, which granted the cross motion of respondent New York City Transit Authority (NYCTA) to dismiss the petition seeking to annul its determination dated June 14, 2016, that petitioner was liable for fare evasion by boarding a Select Bus without first retrieving a ticket from the curbside kiosk, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law and the facts, without costs, the motion to dismiss denied, the petition reinstated and granted, the Notice of Violation issued December 19, 2015 and the determinations of the Transit Adjudication Bureau (TAB) dated March 1, 2016, March 31, 2016, and June 14, 2016, annulled.

Petitioner timely filed the instant proceeding (*see Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]; Guidelines Governing Proceedings Before the Transit Adjudication Bureau [TAB

Guidelines] § 3.7[c]).

Under the unique facts and circumstances of this particular case, respondent's motion to dismiss the petition for failure to state a cause of action should have been denied, the petition granted, the Notice of Violation issued December 19, 2015 and the TAB determinations dated March 1, 2016, March 31, 2016, and June 14, 2016 annulled.

As we find that the petition should have been granted on the merits, we need not reach respondent's objection to venue raised before the Article 78 court.

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11144 Tekton Builders LLC, Index 22310/17E
Plaintiff-Respondent,

-against-

1232 Southern Blvd LLC, et al.,
Defendants,

TEC Building Consultants Inc., et al.,
Defendants-Appellants.

____

Smith, Gambrell & Russell, LLP, New York (Michael P. Regan of counsel), for appellants.

Pepper Hamilton LLP, New York (Emily D. Anderson of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 16, 2019, which, to the extent appealed from, denied the motion of defendants TEC Building Consultants Inc. (TEC) and Timothy Vetrero to dismiss the third cause of action alleging tortious interference with prospective economic advantage and contract, unanimously affirmed, without costs.

Defendant 1232 Southern Blvd LLC (Owner) entered into a contract with plaintiff to act as construction manager for the construction of a charter school. TEC was engaged by Owner to act as its representative on the project, which included reviewing payment requisitions submitted by plaintiff, evaluating the subcontractors' performance and advising Owner on all aspects of the project; Vetrero was TEC's CEO. Plaintiff was ultimately terminated before the completion of the project.

The third cause of action states a claim for tortious

interference with contract against TEC and Vetrero. The complaint alleges a valid contract between plaintiff and Owner; TEC and Vetrero's knowledge of the contract; TEC and Vetrero's intentional procurement of a breach by Owner by improperly failing to promptly pay invoices and approve change orders, thereby interfering with plaintiff's ability to meet contract deadlines and its relationship with its subcontractors; a breach of the contract by Owner in terminating plaintiff; and damages (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

The court properly rejected TEC and Vetrero's claim that the complaint alleges nothing more than that they acted as an agent for Owner. It is true that an agent cannot be held liable for inducing a principal to breach a contract with a third party where the agent was acting on behalf of the principal and within the scope of the agent's authority (*see Devash LLC v German Am. Capital Corp*, 104 AD3d 71, 79 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]). Here, however, the third cause of action alleges that TEC and Vetrero's conduct was motivated by a "vendetta" that resulted from a dispute with plaintiff in connection with a prior project, and that they made false statements to Owner about plaintiff. Presuming the allegations to be true, as we must, on this motion to dismiss (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), such conduct was wrongful and supported a claim that TEC and Vetrero were acting outside the scope of their authority and in furtherance of their own interests.

The complaint also states a claim for tortious interference with prospective economic relations against TEC and Vetrero. Plaintiff sufficiently alleges that subcontractors would have entered into future contracts with plaintiff but for their alleged misconduct in delaying payment and making false statements about plaintiff to them (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190-192 [2004]; *Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002].

The third cause of action also states a claim against Vetrero individually. Plaintiff sufficiently alleged that Vetrero personally executed the vendetta against it, and was not acting within the scope of his duties when he delayed or refused to pay valid invoices and approve change orders, in an effort to exact revenge because of a dispute on another project (*compare Bonanni v Straight Arrow Publs.*, 133 AD2d 585, 586-587 [1st Dept 1987]).

We have considered TEC and Vetrero’s remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11145 The People of the State of New York, Ind. 2248/15
Respondent,

-against-

Jorge Rivera,
Defendant-Appellant.

Janet E. Sabel, The Legal Aid Society, New York (Lauren E. Jones of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (David Gelfand of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered June 19, 2017,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

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

ENTERED: FEBRUARY 27, 2020

____
CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11147 Thomas Kehoe, Jr., et al., Index 153920/13
Plaintiffs-Appellants-Respondents,

-against-

61 Broadway Owner LLC, et al.,
Defendants-Respondents-Appellants.
- - - - -
61 Broadway Owner LLC, et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

P.S. Marcato Elevator Company,
Inc., et al.,
Third-Party Defendants-Respondents.

____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Michael H. Zhu of counsel), for appellants-respondents.

Hannum Feretic Prendergast & Merlino, LLC, New York (Michael J. White of counsel), for respondents-appellants.

Wade Clark Mulcahy LLP, New York (Georgia G. Coats of counsel), for CEMD Elevator Corp., respondent.

Fullerton Beck, LLP, White Plains (Edward J. Guardaro, Jr. of counsel), for P.S. Marcato Elevator Company, Inc., respondent.

____

Order, Supreme Court, New York County (James E. D’Auguste, J.), entered January 9, 2018, which, insofar as appealed from as limited by the briefs, denied plaintiffs’ motion for summary judgment on the Labor Law §§ 240(1) claim, granted defendants’ motion for summary judgment dismissing the complaint, and denied defendants’ motion for summary judgment on the contractual indemnification claim against third-party defendant P.S. Marcato Elevator Company, Inc., and dismissed the claims for contractual indemnification against Marcato and third-party defendant CEMD

Elevator Corp. d/b/a City Elevator Company (City Elevator), unanimously modified, on the law, to deny defendants' motion as to the Labor Law §§ 240(1) claim as against defendant 61 Broadway Owner LLC and grant the motion as to the contractual indemnification claim against Marcato, and otherwise affirmed, without costs.

Plaintiff was allegedly injured when the pit ladder that he was ascending in an elevator shaft vibrated and caused him to fall about 20 feet to the floor of the shaft. The record demonstrates that the permanently affixed ladder was a safety device within the meaning of Labor Law § 240(1), as plaintiff was only able to access the elevator pit by ladder, and the ladder was "effectively furnished and operated ... within the meaning of the statute" as a safety device (*Kirchner v BRC Human Servs. Corp.*, 224 AD2d 270, 271 [1st Dept 1996]; *see Priestly v Montefiore Med. Center/Einstein Med. Ctr.*, 10 AD3d 493 [1st Dept 2004]; *Spiteri v Chatwal Hotels*, 247 AD2d 297, 298-299 [1st Dept 1998]).

However, while an unsecured ladder that moves or shifts constitutes a prima facie violation of Labor Law § 240(1) (*Plywacz v 85 Broad St. LLC*, 159 AD3d 543 [1st Dept 2018]), the ladder from which plaintiff fell was secured to the structure, and, other than allegedly vibrating, it did not move, shift or sway. Under the circumstances, an issue of fact exists whether the secured, permanently affixed ladder that allegedly vibrated

provided proper protection for plaintiff.

The record demonstrates, contrary to defendants' contention, that at the time of his accident plaintiff was performing not routine maintenance but repair work, which falls within the protective ambit of Labor Law § 240(1) (*see Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53 [2004]). The work in which plaintiff was engaged occurred over the course of weeks, if not longer, and its purpose was to correct the unguarded condition of traveling cables that caused the cables to strike other objects within the elevator shafts, which made noise that startled passengers and was causing damage to the cables. Plaintiff's supervisor testified that Marcato, his employer, would not have been doing the work to prevent the cables from striking objects in the shaft and causing damage if its functioning had not been problematic.

Defendants failed to establish that plaintiff was the sole proximate cause of his accident, as they submitted no evidence that plaintiff knew that he was supposed to use a harness for climbing ladders or that he disregarded "specific instructions" to do so (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]). Further, to the extent the ladder failed to provide proper protection, plaintiff's failure to use a harness amounts at most to comparative negligence, which is not a defense to a Labor Law § 240(1) claim (*Dos Santos v State of New York*, 300 AD2d 434 [2d Dept 2002]). Plaintiff does not contest that

defendants Broad Street Development LLC and Heyman Properties LLC were not owners or statutory agents, so we do not reinstate the Labor Law § 240(1) claim as against them.

61 Broadway Owner LLC is entitled to summary judgment on its contractual indemnification claim against Marcato. The contractual indemnification clause requires Marcato to indemnify 61 Broadway Owner for claims and damages arising out of, inter alia, Marcato's negligence or performance of the contract, to the full extent permitted by law, and is not void pursuant to General Obligations Law § 5-322.1 (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 208-209 [2008]). Plaintiff was injured while performing work in the course of his employment with Marcato. Contrary to Marcato's contention, there is no issue as to negligence on the part of 61 Broadway Owner; the motion court dismissed the common-law negligence and Labor Law § 200 claims against it, and Marcato did not appeal from that dismissal.

Defendants argue that they may be entitled to contractual indemnification from City Elevator and that their claim therefor should not be dismissed. However, the record shows that after City Elevator had completed modernization of the elevators, its work passed an inspection by the New York City Department of Buildings, which included examination of the pit ladders, and that it had not received any complaints about the ladders. Defendants failed to present evidence that "the cause of plaintiff's accident existed while [City Elevator] still had

responsibility for the elevators, and that such cause should have been detected by [it]" (*Karian v G&L Realty, LLC*, 32 AD3d 261, 263 [1st Dept 2006]).

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11148 In re New York Asbestos Litigation Index 190173/15

Elvis Licul, et al.,
Plaintiffs-Respondents,

-against-

A.O. Smith Water Products Co., et al.,
Defendants,

Mario & DiBono Plastering Co., Inc.,
Defendant-Appellant.

____

Clyde & Co US LLP, New York (Uriel Carni of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Jason P. Weinstein of counsel), for respondents.

____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about March 18, 2019, which denied the motion of defendant Mario & DiBono Plastering Co., Inc. for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Plaintiffs' decedent died of mesothelioma allegedly caused by exposure to asbestos brought home by her husband from his jobsite. Defendant failed to meet its prima facie burden of establishing that decedent "could not have been exposed to its [spray-on fireproofing] products or the asbestos contained therein" (*see Matter of New York City Asbestos Litig.*, 146 AD3d 700, 700 [1st Dept 2017]). Although plaintiffs' interrogatory responses did not mention spray-on fireproofing in their nonexhaustive list of possible exposure sources, decedent's

husband did mention this at his deposition. While the husband's testimony is not entirely clear, his apparent inconsistencies merely create credibility issues that cannot be resolved at the summary judgment stage (*see Latif v Eugene Smilovic Hous. Dev. Fund Co., Inc.*, 147 AD3d 507, 508 [1st Dept 2017]).

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11150 Raj G. Maraj, Index 300507/17
Plaintiff-Appellant,

-against-

Joseph Fletcher,
Defendant-Respondent.

Law Offices of Alexander Bespechny, Bronx (Louis A. Badolato of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondent.

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered on or about February 28, 2019, which, to the extent appealed as limited by the briefs, granted defendant's motion for summary judgment dismissing plaintiff's claims of serious injury to his left shoulder, cervical spine, and lumbar spine, pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant established prima facie that plaintiff did not sustain a serious injury involving permanent consequential or significant limitations in use through the affirmed reports of an orthopedist and neurologist, who concluded that there was no objective evidence of a left shoulder, cervical spine, or lumbar spine injury based on a physical examination (*see Rodriguez v Konate*, 161 AD3d 565 [1st Dept 2018]). Defendant's radiologist also concluded that the findings in plaintiff's MRIs were degenerative, longstanding, and not causally related to the accident (*see Macdelinne F. v Jimenez*, 126 AD3d 549, 551 [1st Dept 2015]), and the orthopedist opined that plaintiff's own MRI

reports revealed only mild degenerative conditions. Defendant also relied on an emergency medical expert, who opined that plaintiff's hospital records from five days after the accident were inconsistent with the claimed serious injuries, since he complained only of shoulder pain following a "minor" accident and the examination reported full range of motion in the shoulder, with no recommendation for any treatment (*see Streety v Toure*, 173 AD3d 462, 462 [1st Dept 2019]).

In opposition, plaintiff failed to raise a triable issue of fact. He submitted no evidence of permanent limitations in use of his neck, back or left shoulder. As for his cervical and lumbar spine claims, plaintiff's medical expert failed to adequately explain why plaintiff's symptoms stemmed from the subject accident rather than his two prior motor vehicle accidents, which had caused injury to his right shoulder, knee, and lumbar spine (*see Bogle v Paredes*, 170 AD3d 455, 455 [1st Dept 2019]; *see also Ogando v National Frgt., Inc.*, 166 AD3d 569, 570 [1st Dept 2018]), or address the degenerative findings in his own MRIs (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]). As to his left shoulder, plaintiff's orthopedic surgeon noted there were limitations at one visit, but did not explain the conflicting findings of full range of motion documented in plaintiff's hospital and medical records within the month after his accident (*see Booth v Milstein*, 146 AD3d 652 [1st Dept 2017]; *Jno-Baptiste*

v Buckley, 82 AD3d 578, 578-579 [1st Dept 2011]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11151 The People of the State of New York, Ind. 1412/17
Respondent,

-against-

Raymond Mullins,
Defendant-Appellant.

____

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert C. Zitt of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William Mogulescu, J. at plea, George R. Villegas, J. at sentencing), rendered November 15, 2017,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

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

ENTERED: FEBRUARY 27, 2020

____
CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11152 Board of Managers of the Walton Condominium, Index 650852/17
Plaintiff-Respondent,

-against-

264 H2O Borrower, LLC,
Defendant,

Robert Quaco, et al.,
Defendants-Appellants.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Patrick F. Palladino of counsel), for appellants.

Law Offices of Fred L. Seeman, New York (Peter Kirwin of counsel), for respondent.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about January 29, 2018, which, insofar as appealed from as limited by the briefs, denied defendants Robert Quaco and David Levine's motion to dismiss the fraud claim as against them pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

Contrary to defendants' contention, the fraud cause of action is based on affirmative misrepresentations, not omissions. Therefore, the motion court correctly found that it was not barred by the Martin Act (*see Board of Mgrs. of the S. Star v WSA Equities, LLC*, 140 AD3d 405 [1st Dept 2016]). The court also correctly found that defendants, who are principals of the sponsor, and who signed the certification in the offering plan, could be held liable (*see id.*; *see also State of New York v Sonifer Realty Corp.*, 212 AD2d 366, 367 [1st Dept 1995]).

Although the complaint does not specify the source of its on-information-and-belief allegations (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010]), plaintiff remedied this defect in opposition to defendants' motion to dismiss (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

It is true, as defendants point out, that the document submitted by plaintiff shows only that they had knowledge of leaks in December of 2013, five months after they signed the certification. However, the facts as pleaded and as amplified by documents submitted in opposition to the motion are "sufficient to permit a reasonable inference of the alleged conduct," especially as discovery may reveal that defendants knew about the defects in the roof earlier than December 2013 (*see generally*

Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 491-492 [2008]).

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11153 Brenda Ruiz, Index 23953/15E
Plaintiff-Respondent,

-against-

Andrzej J. Reiss, M.D.,
Defendant,

Bronx Lebanon Hospital Center,
Defendant-Appellant.

____

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellant.

Krentsel & Guzman, LLP, New York (Marcia K. Raicus of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about July 16, 2019, which, insofar as appealed from, denied that part of the motion of defendant Bronx Lebanon Hospital Center (Bronx Lebanon) for summary judgment dismissing plaintiff's claim that she received negligent treatment at Bronx Lebanon on February 4, 2015, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff's expert relied on a new theory of liability in opposition to Bronx Lebanon's motion for summary judgment, which was not encompassed in the pleadings (*see e.g. Hinson v Anderson*, 159 AD3d 494 [1st Dept 2018]). Thus, such theory of liability should not have been considered (*id.*).

In any event, plaintiff's expert failed to raise a triable issue of fact in opposition to Bronx Lebanon's prima facie

showing. The expert failed to address the opinions and conclusions of Bronx Lebanon’s expert regarding plaintiff’s clinical presentation upon arrival at the hospital on February 4, 2015, at which time fetal monitoring, a sonogram, and a pelvic examination all indicated no fetal distress and that plaintiff was not in labor (*see Rotante v New York Presbyt. Hosp.-N.Y. Weill Cornell Med. Ctr.*, 175 AD3d 1142, 1143 [1st Dept 2019]). Furthermore, the opinion of plaintiff’s expert that, had plaintiff been admitted, monitored, and administered certain medications to accelerate fetal brain and lung growth, the fetus would not have died in utero was conclusory. Specifically, the expert failed to provide the “requisite nexus between the malpractice allegedly committed and the harm suffered,” which was necessary in view of the medical evidence that a bacteria infection was the cause of the intrauterine fetal death (*Foster-*

Sturrup v Long, 95 AD3d 726, 727-28 [1st Dept 2012] [internal quotation marks omitted]).

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Moulton, JJ.

11155 Global Energy Efficiency Holdings, Inc., Plaintiff, Index 25687/14E

Manufacturers and Traders Trust Company,
Plaintiff-Respondent,

-against-

William Penn Life Insurance Company of New York,
Defendant-Appellant.

____

Bleakley Platt & Schmidt, LLP, White Plains (Robert D. Meade of counsel), for appellant.

Trief & Olk, New York (Barbara E. Olk of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Francis A. Kahn, III, J.), entered December 19, 2018, after a nonjury trial, in favor of plaintiff Manufacturers and Traders Trust Company and against defendant William Penn Life Insurance Company of New York, unanimously affirmed, with costs.

The trial court properly excluded as double hearsay a written report including a statement by the decedent's wife. The statement is not admissible as a business record, because the decedent's wife was under no duty to make the statement (*Matter of Imani O. [Marcus O.]*, 91 AD3d 466, 467 [1st Dept 2012]). Nor is the statement admissible as an excited utterance, because, among other things, it was not made contemporaneously with, or immediately following, a startling event (*People v Cummings*, 31 NY3d 204, 209 [2018]).

The court properly rejected the opinion of defendant's expert as unreliable, because defendant failed to show that the hearsay evidence that formed the basis of the opinion was the type of material commonly relied on in the medical profession (*see Matter of State of New York v Mark S.*, 87 AD3d 73, 77 [3d Dept 2011], *lv denied* 17 NY3d 714 [2011]).

The insurance investigator's report on his second interview with the decedent's wife, which, in a break with his custom, the investigator did not ask the decedent's wife to sign, is not admissible as a "past recollection recorded," because it lacks the requisite trustworthiness (*see People v DiTommaso*, 127 AD3d 11, 15-16 [1st Dept 2015], *lv denied* 25 NY3d 1162 [2015]; *Ianielli v Consolidated Edison Co.*, 75 AD2d 223 [2d Dept 1980]). Nor is the report admissible as a business record, because it was not prepared pursuant to the investigator's standard procedure (*see People v Kennedy*, 68 NY2d 569, 579-580 [1986]; CPLR 4518[a]).

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

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11157 In re Murgrose Construction, Inc., Index 153456/18
Petitioner-Appellant,

-against-

The City of New York Department of Transportation, et al.,
Respondents-Respondents.

____

Marco & Sitaras, PLLC, New York (George Sitaras of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Jesse A. Townsend of counsel), for respondents.

____

Order and judgment (one paper), Supreme Court, New York County (Andrew Borrok, J.), entered October 29, 2018, which denied the petition to annul a determination of respondent New York City Department of Transportation (NYCDOT), dated December 15, 2017, declaring petitioner in default of a contract between petitioner and NYCDOT, and terminating the contract, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The contract between petitioner and NYCDOT contained multiple provisions upon which NYCDOT could declare petitioner to be in default. In a notice to be heard, NYCDOT directed petitioner to appear and show cause why NYCDOT should not declare it in default pursuant to section 48.1.14 of the contract. Accordingly, the court properly determined that NYCDOT gave petitioner an opportunity to be heard, as required by article 48 of the contract, before declaring petitioner to be in default

pursuant to that provision (*see generally A.I. Smith Elec. Contrs. v Fire Dept. of City of N.Y.*, 176 AD2d 149, 150 [1st Dept 1991]). Although NYCDOT subsequently declared petitioner to be in default pursuant to other provisions as well, the contract permitted NYCDOT to declare petitioner to be in default based solely on section 48.1.14, provided NYCDOT's decision to do so was not arbitrary and capricious.

The court also properly found that NYCDOT's determination to declare petitioner in default based on the provision cited in the notice was not arbitrary (*see Matter of R.C. 27th Ave. Realty Corp. v City of New York*, 278 AD2d 142, 142-143 [1st Dept 2000]; *Matter of Clover Constr. Consultants, Inc. v New York City Hous. Auth.*, 44 AD3d 654, 655 [2d Dept 2007], *lv denied* 9 NY3d 818 [2008]). NYCDOT rationally concluded that petitioner had missed multiple deadlines, the construction work had been substantially delayed, petitioner failed to submit required documents, and petitioner could not complete the work within the time provided by the contract. Although petitioner alleged that the work

delays were outside of its control, NYCDOT rationally rejected petitioner's explanation for the delays.

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11158N-
11158NA SQN Asset Servicing, LLC, Index 652604/17
Plaintiff-Respondent,

-against-

Shunfeng International Clean Energy, Ltd.,
Defendant-Appellant.

____

Davis Wright Tremaine LLP, New York (John M. Magliery of counsel), for appellant.

Mayer Brown LLP, New York (Christopher J. Houpt of counsel), for respondent.

____

Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about September 12, 2019, which purportedly denied defendant's motion to reargue its motion to compel production, and denied defendant's motion to amend the answer, unanimously reversed, on the law and the facts, and the motions granted. Appeal from order, same court and Justice, entered on or about April 29, 2019, unanimously dismissed, without costs, as academic.

The order purporting to deny defendant's motion to reargue its motion to compel is appealable because the court addressed the merits of the motion, in effect granting it (and adhering to the prior determination) (*see High Definition MRI, P.C. v Mapfre Ins. Co. of N.Y.*, 148 AD3d 470 [1st Dept 2017]).

The court denied defendant's motion to compel on the ground that the discovery requests were "palpably improper" (*see Aetna Ins. Co. v Mirisola*, 167 AD2d 270, 271 [1st Dept 1990]). We

find, to the contrary, that defendant's requests are proper. In particular, a requested unredacted settlement agreement is relevant not only to the issue whether defendant, a guarantor of a loan made by plaintiff to defendant's subsidiary, a nonparty entity, is entitled to offsets of the balance due, but also to the issue whether defendant remained obligated to plaintiff at all, given the existence of a new contract (*see Compagnie Financiere de CIC et de L'Union Europeenne v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 188 F3d 31, 34 [2d Cir 1999]; *Keybro Enters. v Four Seasons Country Club Caterers*, 25 AD2d 307, 310 [1st Dept 1966], *affd* 19 NY2d 912 [1967]).

Further, compelling production would not circumvent the bankruptcy court's order to file the unredacted copy of the Settlement Agreement under seal, since that is a filing order, not a protective order, and plaintiff could simply provide an unredacted copy from its own files.

Defendant's motion to amend the answer to add the affirmative defense of release should have been granted. Issues of fact exist as to whether the bankruptcy plan of reorganization released defendant, as a current shareholder of the debtor, from any claims by plaintiff. The plan is relevant to the rights of the parties, as any release by plaintiff of its claims concerning defendant could serve as a basis to terminate this entire action. Plaintiff cannot claim surprise or prejudice, as it participated in the negotiation of the plan.

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

ENTERED: FEBRUARY 27, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11159N Project Cricket Acquisition, Inc., Index 652524/15
Plaintiff-Appellant,

against-

Florida Capital Partners, Inc., et al.,
Defendants-Respondents.

Adam M. Burton, New York, for appellant.

Mintz & Gold LLP, New York (Terence W. McCormick and Evan I. Cohen of counsel), for Florida Capital Partners, Inc., Florida Capital Partners II, Inc., FCP Investors VI, LP, FCP Investors VI (Parallel Fund), LP, FCP Partners VI, LLC and Cricket Stockholder Rep, LLC, respondents.

Akin Gump Strauss Hauer & Feld LLP, New York (Brian T. Carney of counsel), for Barry J. Thibodeaux, Thomas P. Bayham, Thomas R. Sumner, George T. Malvaney, Larry N. Lee, Robert Williams, Rodney Powell, Robert Keesee, Eric Hoffman, David Zachary and Clay Cox, respondents.

Order, Supreme Court, New York County (Salliann Scarpulla, J.), entered January 14, 2019, which, to the extent appealed from as limited by the briefs, denied plaintiff’s motion for leave to amend the complaint to allege fraud in the inducement, civil conspiracy, and breach of sections 2.2 and 2.3 of the stock purchase agreement, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying leave to amend the complaint (*see e.g. MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). The additional allegations of fraud in the inducement in the proposed Second Amended Complaint (SAC) merely add detail to previously alleged misrepresentations made in connection with plaintiff’s

purchase of USES Holding Corp. and its subsidiaries (the Company). They do not substantively change the fraud in the inducement claim in the First Amended Complaint (FAC), which this Court dismissed as duplicative of the pending indemnification claims, which arise from alleged breaches of representations and warranties in the stock purchase agreement (SPA) (*see Community Energy Alternatives v Peatco II*, 243 AD2d 371 [1st Dept 1997]; *see also Project Cricket Acquisition, Inc. v FCP Invs. VI, L.P.*, 159 AD3d 600 [1st Dept 2018], *lv dismissed in part, denied in part* 32 NY3d 1080 [2018]).

Absent a valid underlying fraudulent inducement claim, Supreme Court properly denied leave to amend the FAC to plead civil conspiracy (*Kuroda v SPJS Holdings, L.L.C.*, 971 A2d 872, 892 [Del Ch 2009]).

Supreme Court also properly denied leave to plead a claim for breach of sections 2.2 and 2.3 of the SPA, which set forth the purchase price adjustment protocol. The proposed SAC alleges that the net working capital statement was not prepared consistently with GAAP or the Company's historical accounting practices and that executives instead repeatedly changed the Company's accounting practices and manipulated the net working capital statement to maximize profits. Even assuming these allegations are not barred by *Chicago Bridge & Iron Co. N.V. v Westinghouse Elec. Co. LLC* (166 A3d 912, 916 [Del 2017]), plaintiff's corrected closing working capital statement was not

delivered within the period specified in the SPA, as this Court observed when it previously dismissed the same cause of action (*Project Cricket Acquisition*, 159 AD3d at 601). Although the proposed SAC alleges that defendants prepared a draft closing net working capital statement and somehow prevented plaintiff from making the necessary corrections in time, the SPA makes clear that timely calculation and preparation of the closing net working capital statement was plaintiff's obligation. Accordingly, the new allegations do not change the fact that plaintiff's corrected closing net working capital statement was not delivered in time to calculate and receive a purchase price adjustment under the SPA.

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

ENTERED: FEBRUARY 27, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Judith Gische, J.P.
Barbara R. Kapnick
Cynthia S. Kern
Peter H. Moulton, JJ.

10293 &
M-7369
M-7370
M-7371
Index 153759/17

____x

Tax Equity Now NY LLC,
Plaintiff-Respondent-Appellant,

-against-

City of New York, et al.,
Defendants-Appellants,

State of New York, et al.,
Defendants-Appellants-Respondents.
- - - - -
Citizen Budget Commission,
National Association for the
Advancement of Colored People
New York State Conference and
Latino Justice PRLDEF,
Amici Curiae.
____x

Plaintiff appeals from the order of the Supreme Court, New York County (Gerald Lebovits, J.), entered September 25, 2018, which denied the motion of defendants City of New York and New York City Department of Finance to dismiss the complaint as against them, and granted in part, and denied in part, the motion of

defendants State of New York and New York Office of Real Property Tax Services to dismiss the complaint as against them.

Zachary W. Carter, Corporation Counsel, New York (Joshua Sivin, Andrea M. Chan, Kevin R. Harkins, Neil Schaier and Yu Wen of counsel), for appellants.

Letitia James, Attorney General, New York (Seth M. Rokosky and Steven C. Wu of counsel), for appellants-respondents.

Latham & Watkins LLP, New York (James E. Brandt and Jonathan Lippman of counsel), for respondent-appellant.

Cadwalader, Wickersham & Taft LLP, NY (Jason M. Halper and Ellen V. Holloman of counsel), for Citizen Budget Commission, amicus curiae.

Mololamken LLP, New York (Jessica Ortiz of counsel), for National Association for the Advancement of Colored People New York State Conference, amicus curiae.

Friedman Kaplan Seiler & Adelman LLP, New York (Eric Seiler, Ricardo Solano Jr. of counsel), Juan Cartagena, New York, and Jackson Chin, New York, for Latino Justice PRLDEF, amicus curiae.

KERN, J.

In this action, plaintiff seeks a declaration that the New York State property tax system, as enacted and as applied by New York State, the New York Office of Real Property Tax Services (State defendants), New York City and the New York City Department of Finance (City defendants), violates state and federal constitutional and statutory mandates that require that property taxes be imposed uniformly within each property class and reflect a fair and realistic value of the property involved. Plaintiff also seeks a permanent injunction against the City's alleged unlawful and discriminatory exaction of property taxes. The City and State defendants separately move to dismiss this action on the grounds that plaintiff lacks standing to challenge the property tax system and that plaintiff's complaint fails to state a claim. As will be explained more fully below, this Court grants the motions to dismiss this action in their entirety.

We start with a discussion of the New York State property tax system, as it is applied in New York City. In 1981, the New York State legislature enacted article 18 of the Real Property Tax Law (RPTL) in an effort to reform the property tax system in response to the Court of Appeals' decision in *Matter of*

Hellerstein v Assessor of Town of Islip (37 NY2d 1 [1975]).[1] As part of that reform effort, article 18 established four classes of real property in New York City, which can be summarized as follows:

(1) Class One, primarily one-, two-, and three-family residential real property;

(2) Class Two, all other residential property, including condominiums, cooperatives and rental buildings;

(3) Class Three, utility real property;

(4) Class Four, all other real property (*see* RPTL 1801[a], 1802[1]).

Article 18 allocates the total property tax burden of New York City among the four statutory classes and preserves the relative tax burden of each statutory class over time. To this end, RPTL 1803-a sets forth a formula for determining the proportion of all real property taxes owed by each statutory class (*see* RPTL 1801[f] and 1803-a[1][b]) and caps the annual amount by which the class share for any particular class may

---

[1] *Hellerstein* considered the Town of Islip's practice of assessing real property at a fraction of its fair market value and held that New York State law, as it existed at that time, required real property to be assessed, for tax purposes, at full market value (37 NY2d at 3). The legislature responded by reforming the property tax system such that it is based upon the use of fractional assessments (*see Matter of O'Shea v Board of Assessors of Nassau County*, 8 NY3d 249, 254 [2007]).

increase relative to the total property tax burden.[2] Article 18 also provides yearly caps on the amount by which the assessed value of certain individual properties may be increased. Assessed values on Class One properties may not increase by more than 6% in one year or 20% over any five-year period (RPTL 1805[1]). Assessed values for Class Two properties that have fewer than 11 residential units may not increase by more than 8% in one year or 30% over any five-year period (RPTL 1805[2]). Increases in assessment values for Class Two properties with 11 or more units are not capped but must be phased in over a five-year period (RPTL 1805[3]).

The New York City Department of Finance (DOF) assesses the taxable value of a parcel of real property by multiplying its market value by the fractional assessment rate applied to that parcel's property class, with Class One properties assessed at 6% of their market value and all other classes of property assessed at 45% of their market value. Once the taxable value is determined, and after the application of any pertinent assessment caps, the DOF applies the tax rate applicable to that class of property, a proportional rate determined based upon each class's

---

[2] The annual cap on class share growth was originally 5% and has been reduced by annual amendments to the statute such that the amount by which any class share may increase is now 0% for the 2019/2020 fiscal year (RPTL 1803-a[1][c], [gg]).

share of the tax burden, in accordance with RPTL 1803-a.

The tax assessment for any particular property may also be subject to adjustment by an abatement and/or exemption. For example, condominium and cooperative owners in the City may be eligible for abatements under the Cooperative and Condominium Property Tax Abatement Program (RPTL 467-a), with the amount of the abatement, which varies from 17.5% to 28.1%, dependent on the average assessed value of units in the building.

Condominium and cooperative owners also benefit from RPTL 581, which provides that "real property owned or leased by a cooperative corporation or on a condominium basis shall be assessed . . . at a sum not exceeding the assessment which would be placed upon such parcel were the parcel not owned or leased by a cooperative corporation or on a condominium basis" (RPTL 581[a][1]). As a result, the DOF values condominium and cooperative buildings as if they were rental properties, using buildings of comparable age, size, location, and unit number, and such buildings' income and expenses, in order to establish their value.

Turning to this action, this Court finds that plaintiff has standing to challenge the property tax system. Plaintiff, an association of owners and renters of real property who are allegedly harmed by the New York City property tax system,

adequately pleads facts tending to show that one or more of its members would have standing to sue, the interests it asserts are germane to its purposes so as to satisfy the Court that it is an appropriate representative and neither the asserted claim nor the relief requires the participation of the individual members (*see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-773 [1991]). Moreover, plaintiff's allegations and affidavits demonstrate that its members suffered an injury in fact (*compare Robinson v City of New York*, 143 AD3d 641 [1st Dept 2016]).

Construing the pleadings liberally, accepting all the facts alleged in the complaint as true and according plaintiff the benefit of every possible favorable inference (*see generally Leon v Martinez*, 84 NY2d 83, 87–88 [1994]), the complaint fails to state a cause of action against any of the defendants. Each theory of liability proffered in plaintiff's complaint is hereinafter considered.

Plaintiff's complaint includes several causes of action containing allegations that defendants violated the Federal and State Equal Protection Clauses by assessing and taxing similarly situated properties differently within and across statutory classes. Each cause of action will be addressed in turn.

However, we start with a set of bedrock legal principles that will guide our analysis.

The State Equal Protection Clause is no broader in coverage than its federal counterpart (*see Matter of Walsh v Katz*, 17 NY3d 336, 343 [2011]). Neither the Federal nor the State Constitution "prohibit[s] dual tax rates or require[s] that all taxpayers be treated the same" (*Foss v City of Rochester*, 65 NY2d 247, 256 [1985]). All that they require is "that those similarly situated be treated uniformly. Thus, the creation of different classes for purposes of taxation is permissible as long as the classification is reasonable and the taxes imposed are uniform within the class" (*id.*). Put another way, the legislature may treat one class differently from others "unless the difference in treatment is palpably arbitrary or amounts to an invidious discrimination" (*Trump v Chu*, 65 NY2d 20, 25 [1985] [internal quotation marks omitted]).

"This standard is especially deferential in the context of classifications made by complex tax laws" (*Nordlinger v Hahn*, 505 US 1, 11 [1992]). Even dramatic disparities in property taxes paid by persons who own otherwise similar property are likely to survive review (*id*. at 6-7). "Where taxation is concerned and no specific[] right, apart from equal protection, is imperiled,[] States have large leeway in making classifications and drawing

lines which in their judgment produce reasonable systems of taxation" (*Lehnhausen v Lake Shore Auto Parts Co.*, 410 US 356, 359 [1973]).

"The scope of our review is narrow. Taxing statutes, like other social and economic legislation that neither classify on the basis of a suspect class nor impair a fundamental right, must be upheld if the challenged classification is rationally related to achievement of a legitimate State purpose" (*Trump*, 65 NY2d at 25).

With these principles in mind, plaintiff's third and fourth causes of action, which allege that the City defendants' application of assessment caps to Class One properties violates the Federal and State Equal Protection Clauses because it results in properties within that class being taxed at different rates, fail to state a claim. Plaintiff's argument is that homeowners with homes that have rapidly appreciated in value disproportionately benefit from the assessment caps provided for in RPTL 1805(1). As noted earlier, those assessment caps prevent assessed values on Class One properties from increasing by more than 6% in one year or 20% over any five-year period. As a result of the caps, properties that have appreciated rapidly are arguably underassessed relative to other Class One properties that have appreciated more gradually.

Even though plaintiff is correct that the statutorily imposed assessment caps provided for in RPTL 1805(1) have a different effect on otherwise similarly situated Class One properties based on how much these properties have appreciated, such different effect is not actionable here because the legislature has a rational basis for making a distinction between those properties which appreciate rapidly and those which appreciate more gradually. The legislature adopted the assessment caps provided for in RPTL 1805(1) to protect homeowners from sudden dramatic tax increases which would make continued home ownership more burdensome and unaffordable for many homeowners. This distinction is not palpably arbitrary, does not amount to invidious discrimination and is rationally related to the achievement of a legitimate governmental purpose (*Trump*, 65 NY2d at 25). Moreover, as the Court of Appeals has held, the Federal and State Equal Protection Clauses "do not prohibit dual tax rates or require that all taxpayers be treated the same. They require only that those similarly situated be *treated uniformly*" (*Foss v City of Rochester*, 65 NY2d at 256 [emphasis added]). In the present case, the application of assessment caps contained in RPTL 1805 are applied uniformly to all Class One properties, even though not all taxpayers receive the same benefit from them, and thus they do not violate the Federal and

State Equal Protection Clauses. The fact that the assessment caps may have "created dramatic disparities in the taxes paid by persons owning similar pieces of property" does not violate the Equal Protection Clause (*Nordlinger*, 505 US at 6).

Plaintiff's argument that *Foss* compels a different result is unavailing. In *Foss*, two assessing units within the same county were each determining the value of real property subjectively and were using different assessment ratios to calculate the assessed value of particular parcels of property (65 NY2d at 254). The Court held that because otherwise similarly situated properties were being taxed differently depending solely on where they were geographically located within the county, those properties were not being treated uniformly in violation of the Federal and State Equal Protection Clauses. Unlike in *Foss*, here, the City is one assessing unit and applies one uniform assessment ratio to every property within a class. Indeed, *Foss* contemplated that achieving tax uniformity would be "relatively simple when dealing with a tax levied by one assessing unit" (65 NY2d at 254). For that reason, plaintiff's reliance on *Foss* is misplaced.

Plaintiff's seventh and eighth causes of action, which allege that defendants' enactment and application of RPTL 581, requiring condominiums and cooperatives to be assessed as if they were rental properties, and RPTL 467-a, providing tax abatements

to owners of Class Two condominiums and cooperatives, violate the Federal and State Equal Protection Clauses by treating cooperatives and condominiums favorably compared to rental buildings, also fail to state viable claims.

RPTL 581 requires that condominiums and cooperatives be assessed as if they are rental properties (RPTL 581[1][a]). In accordance with that provision, the city values pre-1974 condominium and cooperative buildings by comparing them to comparable rental buildings of a similar age, size and location, some of which are rent-regulated. It then imputes the rental income from the comparable rental buildings to the subject condominium or cooperative. The resulting average rental income will include both income from rent-regulated units and market-rate units and will form the basis for the building's assessed value. Plaintiff contends that this application of RPTL 581 undervalues pre-1974 condominiums and cooperatives, because they are assessed as if they are rent-regulated even though they are not rent-regulated, in violation of the Federal and State Equal Protection Clauses.

Plaintiff's argument that the enactment and application of RPTL 581 violates equal protection fails to state a claim. First, RPTL 581 does not create different classes for purposes of taxation, which is a prerequisite for review on equal protection

grounds. Rather, it treats pre-1974 rental, condominium and cooperative buildings as similarly situated and defendants have assessed them accordingly. Absent an allegation that RPTL 581 discriminates between similarly situated taxpayers, plaintiff cannot plead a violation of the Federal and State Equal Protection Clauses. Second, even if an equal protection analysis does apply, RPTL 581 and its application do not violate the Federal or State Equal Protection Clauses as RPTL 581 has a rational basis and is not otherwise palpably arbitrary or a form of invidious discrimination (*see Trump*, 65 NY2d at 25). RPTL 581 was adopted to "insure that owners of condominium and cooperative properties would be taxed fairly compared to rental properties held in single ownership and not penalized because of the type of ownership involved" (*Matter of D.S. Alamo Assoc. v Commissioner of Fin. of City of N.Y.*, 71 NY2d 340, 347 [1988]). The essential purposes of RPTL 581 are to encourage home ownership and to place homeowners on a level playing field with owners of rental buildings for taxation purposes. The decision to treat pre-1974 rental, condominium, and cooperative buildings similarly is rationally related to that end. The City defendants' application of RPTL 581 to value condominiums and cooperatives in comparison to rental buildings using an income-related approach is consistent with the RPTL 581 mandate that condominium and

cooperatives be treated as rental buildings.[3] Accordingly, plaintiff's allegation that the defendants' application of RPTL 581 violates equal protection by undervaluing condominiums and cooperatives relative to rental buildings fails to state a claim.

Plaintiff's other theory of liability alleged in its seventh and eighth causes of action is that RPTL 467-a, which provides temporary tax abatements to owners of three or fewer cooperative or condominium units, violates equal protection because it results in owners of Class Two condominiums and cooperatives being taxed at lower rates than owners of Class Two rental buildings. The RPTL 467-a tax abatements classify owners of three or fewer cooperative or condominium units separately from other Class Two property owners. This distinction is permissible and does not violate the Federal and State Equal Protection Clauses because it is not palpably arbitrary, does not amount to invidious discrimination and is rationally related to the achievement of a legitimate governmental purpose. The abatements

---

[3] It is worth noting that, outside of the context of equal protection, the Court of Appeals and the Second Department have held that it is permissible for assessing units to interpret RPTL 581 so as to compare condominiums and cooperatives to rent-regulated buildings (*see Matter of Greentree At Lynbrook Condominium No. 1 v Board of Assessors of Vil. of Lynbrook*, 81 NY2d 1036, 1039 [1993]; *Matter of Interlaken Owners v Assessor of Town of Eastchester*, 225 AD2d 696 [2d Dept 1996]).

serve to further a legitimate governmental purpose, which is to resolve an apparent inequity where condominium and cooperative owners pay far higher taxes compared to owners of comparably priced family homes. For that reason, plaintiff's allegations contained in its seventh and eighth causes of action fail to state a claim.

Plaintiff's eleventh and twelfth causes of action, which allege that defendants violated the Federal and State Equal Protection Clauses by arbitrarily apportioning tax burdens to each statutory class without relation to the total market value of the properties within each class, also fail to state a claim. Plaintiff argues that the apportionment of tax burdens among the classes violates the Equal Protection Clauses because Class One properties account for 47% of the total property value within New York City but generate only 15% of the city's property taxes whereas Class Two properties account for 24% of the total value but generate 37% of the taxes. The primary reason that an interclass disparity in the tax burden exists is the enactment of RPTL article 18 and, more specifically, the application of RPTL 1803 and 1803-a. As previously discussed, RPTL article 18 created four classes of properties (*see* RPTL 1802[1]) as part of a complex statutory scheme in response to the Court of Appeals' decision in *Matter of Hellerstein v Assessor of Town of Islip* (37

NY2d 1 [1975]). RPTL 1803 requires municipalities to determine the class share for each class of property, which is the proportion of the total tax burden borne by each class (*see* RPTL 1801[f] and 1803)[4]. RPTL 1803-a requires the annual adjustment of each class share based upon, for example, the addition of new property within a class to the assessment rolls, and caps the annual amount by which each class share of the total property tax burden may grow (*see* RPTL 1803-a[5] and 1803[2]). The requirements of RPTL 1803 and 1803-a were intended to "maintain the stability of relative property class tax burdens" (*see* *O'Shea*, 8 NY3d at 254 [internal quotation marks ommitted]) "by 'locking in' — subject to adjustment — specific class share relationships as they existed" in the prior years' assessment rolls (*Supreme Assoc., LLC v Suozzi*, 34 Misc 3d 255, 258 [Sup Ct, Nassau County 2011]). The cap on each class share of the tax burden, like the assessment caps provided for in RPTL 1805, has a rational basis that serves the legislature's aforementioned objective and is not otherwise palpably arbitrary or a form of invidious discrimination. Accordingly, plaintiff's allegation that RPTL article 18, and the application thereof, apportion tax burdens across statutory classes in a manner that violates the

[4] RPTL article 18 denominates each class share as its "base proportion" (*see* RPTL 1801[f], 1803 and 1803-a).

Federal and State Equal Protection Clauses fails to state a claim.

For the foregoing reasons, and in view of the deference we afford the legislature in the context of classifications made by complex tax laws, plaintiff's allegations in its third, fourth, seventh, eighth, eleventh and twelfth causes of action do not state a valid equal protection claim. In reaching this conclusion, we recognize that the property tax system does, in many respects, result in unfairness. However, as previously stated, property tax systems that result in "dramatic disparities in the taxes paid by persons owning similar pieces of property" are not, for that reason, violative of equal protection (*Nordlinger*, 505 US at 6). As the Court of Appeals has aptly stated, "[i]t is not within the province of the judiciary to balance the advisability of a lawfully implemented public policy against the hardship or illogic it may be said to impose" (*Maresca v Cuomo*, 64 NY2d 242, 253 [1984]). It is up to the legislature to implement a fair and equitable property tax system. The grievances plaintiff raises are more appropriately addressed by that branch of government.

We now shift our focus from equal protection to plaintiff's first and fifth causes of action, which allege that the City and State defendants' application of the property tax system to Class

One and Class Two properties violates the requirement of the New York State Constitution, article XVI, § 2 that assessments be equalized for the purposes of taxation. Plaintiff argues that defendants have failed to equalize assessments because properties that are of a similar market value are often assessed at different values. For the reasons that follow, plaintiff's complaint fails to state a claim.

Plaintiff interprets article XVI, § 2 of the New York State Constitution, which requires the "legislature [to] provide for the supervision, review and equalization of assessments for purposes of taxation," to mandate that all properties within each property class be assessed at the same percentage of their market value. There is no basis for such interpretation. Article XVI, § 2 of the New York State Constitution does not require that all assessments be equal in the literal sense, but rather requires the State to have a process in place for the adjustment and review of assessments of individual taxpayers to ensure that each property owner generally bears a fair share of the cost of government in relation to every other property owner in a taxing district (*see Matter of Fifth Ave. Off. Ctr. Co. v City of Mount Vernon*, 89 NY2d 735, 740 [1997]; *Foss*, 65 NY2d at 254-255). The State defendants have met their constitutional requirement to provide for the equalization of assessments for taxation purposes

by setting forth procedures for administrative and judicial review of property assessments in RPTL articles 5, 7, 12, and 18, among others. Moreover, to the extent plaintiff argues that the City defendants, separate from the State defendants, have failed to equalize assessments, this section of the New York State Constitution is clearly directed at the state legislature and does not in any way apply to the City defendants. For those reasons, plaintiff's first and fifth causes of action fail to state a claim against both the State and City defendants.[5]

We now move on to plaintiff's second and sixth causes of action, which allege that defendants violated RPTL 305. Plaintiff's second cause of action, which alleges that the City defendants' application of the assessment caps provided for in RPTL 1805 to Class One properties violates RPTL 305(2) because it results in the taxation of similar parcels of property within that class at different percentages of market value, fails to state a viable claim. RPTL 305(2) requires "[a]ll real property in each assessing unit [to be] assessed at a *uniform* percentage of value" (emphasis added). As already discussed, RPTL 1805(1)

---

[5] We note that the Second Department has also held that article 18 does not violate the New York State Constitution, article XVI, § 2 (*see Supreme Assoc., LLC v Suozzi*, 65 AD3d 1219, 1220 [2d Dept 2009]; *Tilles Inv. Co. v Gulotta*, 288 AD2d 303, 305-306 [2d Dept 2001], *appeal dismissed* 97 NY2d 725 [2002], *lv denied* 98 NY2d 605 [2002]).

caps the annual growth in assessed value of Class One properties at 6% in one year or 20% over any five-year period. RPTL 305 and 1805 were enacted during the same legislative session as part of a complex statutory scheme to reform the property tax system. Accordingly, those statutes must be read together and applied harmoniously (*see Alweis v Evans,* 69 NY2d 199, 204-205 [1987]; *Tilles Inv. Co.*, 288 AD2d at 306).

It is undisputed that the effect of the application of the assessment caps is that, over time, certain properties that appreciate in value more rapidly are assessed at a lesser percentage of their market value compared to properties that appreciate more gradually. When the legislature adopted RPTL 305(2) and the assessment caps provided for in RPTL 1805, it knew that, over time, those assessment caps were going to necessarily create disparities. Thus, the legislature could not have intended the disparities caused by the RPTL 1805 assessment caps to result in a violation of the requirement contained in RPTL 305(2) that "[a]ll real property in each assessing unit [be] assessed at a uniform percentage of value." For that reason, plaintiff's allegation that the enactment or application of RPTL 1805 violates RPTL 305(2) fails to state a claim.

Plaintiff's argument that *Matter of O'Shea v Board of Assessors of Nassau County* (8 NY3d 249, 258 [2007]) obligates the

City defendants to reduce their assessment ratio in order for its assessments of Class One properties to comply with RPTL 305(2) is without basis. In *O'Shea*, Nassau County entered into a stipulation wherein it agreed to undertake a countywide reassessment of its real property and that no more than one-half of one percent of residential property would be subject to assessment caps. The Court found that the county's only option for complying with the stipulation was to reduce its assessment ratio so that the assessment caps would not apply to more than one-half of one percent of residential property. However, the Court did not hold that the county was required to reduce its assessment ratio to comply with RPTL 305(2). Here, the City defendants have not entered into any stipulation or otherwise agreed to limit the number of properties that are subject to assessment caps. Thus, plaintiff's reliance on *O'Shea* is misplaced.

Plaintiff's sixth cause of action alleges that the State defendants' enactment of, and the City defendants' application of, RPTL 467-a, 581 and 1805 to Class Two properties violate RPTL 305(2) because Class Two properties are taxed differently depending on the use of the property and the form in which it is owned. This cause of action fails to state a claim for essentially the same reason that the second cause of action

fails. Those statutes were all enacted by the legislature as part of a complex statutory scheme to reform the property tax system and must be applied harmoniously. The legislature could not have intended the application of RPTL 467-a, 581 or 1805 to violate RPTL 305(2).

We now consider plaintiff's ninth and tenth causes of action, which allege violations of its due process rights. Plaintiff has failed to state a cause of action under either the Federal or State Due Process Clauses because it has not adequately alleged that defendants have acted in excess of their taxing power in enacting and applying the property tax system.

"The Legislature has nearly unconstrained authority in the design of taxing measures unless they are utterly unreasonable or arbitrary" (*Ames Volkswagen v State Tax Commn.*, 47 NY2d 345, 349 [1979]). A taxing statute, or the application thereof, violates the Federal and State Due Process Clauses "only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power" (*A. Magnano Co. v Hamilton*, 292 US 40, 44 [1934]). The statutes effectuating the property tax system which are at issue in this matter are not arbitrary but are instead grounded in legislative policy determinations to, for example, protect homeowners from

sudden spikes in taxes. Particularly in view of the legislature's broad authority in designing taxing measures, it cannot be said that those statutes or their application are so arbitrary as to be violative of due process.

Plaintiff's thirteenth cause of action alleges that defendants violated RPTL 1802(1), which established four classes of real property in New York City for assessment and taxation purposes, by creating de facto subclasses within Class One and Class Two depending on a property's age, form and location. The RPTL, however, does not limit the number of permissible classifications to those four contained in RPTL 1802(1), and thus plaintiff's allegation fails to state a claim.

Plaintiff interprets RPTL 1802(1) to mean that four – and only four – property classes can exist and that, therefore, RPTL 1805 and 467-a impermissibly create de facto subclasses. However, the classifications contained in RPTL 1802(2) are not the only classifications that exist in the RPTL. Indeed, RPTL article 4, among others, creates a number of classifications for properties depending on whether, for example, they are owned by a veteran (RPTL 458), or are opera houses (RPTL 426), or are providing affordable housing (RPTL 421-a). These classifications complement, rather than violate, RPTL 1802(1) and the four statutory classes provided therein, and may exist so long as they

are rationally related to a legitimate governmental purpose. Accordingly, plaintiff’s allegation that defendants violated RPTL 1802(1) by creating de facto subclasses within Class One and Class Two depending on a property’s age, form and location fails to state a claim.

Plaintiff’s final three causes of action contain allegations that defendants violated the Fair Housing Act (FHA) by applying the property tax system in a manner that assesses and taxes properties in majority-minority communities at disproportionately higher rates compared to those in majority-white communities. The FHA promotes “fair housing throughout the United States” by prohibiting any practice that “make[s] unavailable or den[ies] a dwelling to any person because of race” or otherwise “discriminate[s] against any person in the terms, conditions, or privileges of sale or rental of a dwelling” (42 USC §§ 3601, 3604[a], [b]). To that end, the FHA prohibits both intentional discrimination and practices that disparately impact a protected group (*see Texas Dept. of Hous. and Community Affairs* v *Inclusive Communities Project, Inc.*, __ US __, 135 S Ct 2507, 2519-2520 [2015]). As will be discussed, plaintiff’s allegations in its fourteenth, fifteenth and sixteenth causes of action do not state an FHA claim.

We first analyze plaintiff’s allegations that the

application of the property tax system has a disparate impact on minorities by making housing unavailable in majority-minority communities and perpetuating segregation in New York City neighborhoods. In order to maintain a disparate impact claim that relies on racial disparities in the availability of housing or in the racial composition of New York City neighborhoods, a plaintiff must point to a defendant's policy or policies causing those disparities (*id.* at 2523). Indeed, "[a] robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create [or help perpetuate]" (*id.*, quoting *Wards Cove Packing Co., Inc. v Atonio*, 490 US 642, 653 [1989]). "Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact [as] prompt resolution of these cases is important" (*Inclusive Communities Project, Inc.* at 2523). A plaintiff who does not "allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact" (*id.*).

Plaintiff contends that the application of the property tax system to Class One and Class Two properties in majority-minority communities has a disparate impact on minorities by making

housing unavailable to minority residents. Specifically, plaintiff argues that the application of the property tax system creates financial barriers that inhibit the ability of minority residents to own homes, contributes to higher rates of foreclosure in majority-minority communities and discourages the production of new rental units in affected communities. However, plaintiff does not adequately allege a causal connection between the property tax system and any racial disparities in the availability of housing. Plaintiff has failed to allege sufficient concrete facts or produce statistical evidence showing that the application of the property tax system, as opposed to other factors, causes financial barriers that inhibit the ability of minority residents to own homes. Additionally, plaintiff does not allege sufficient concrete facts or produce statistical evidence showing how the current property tax system contributes to higher rates of foreclosure or discourages the production of rental units in majority-minority communities.

Plaintiff also contends that the application of the property tax system has a disparate impact on minorities by perpetuating existing patterns of segregation in New York City. Specifically, plaintiff argues that the property tax system imposes financial burdens in majority-minority communities that prevent minority residents from moving out of, and discourage white residents from

moving into, those communities. It is undisputed that New York City is a deeply segregated city. Segregation has shamefully divided our neighborhoods for a long time. However, plaintiff has failed to meet its burden "to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection" between the property tax system and the continued segregation of New York City neighborhoods sufficient to "make out a prima facie case of disparate impact" (*Inclusive Communities Project, Inc.*, 135 S Ct at 2523). The heart of plaintiff's allegations rests on the assumption that New York City residents would elect to relocate to other neighborhoods if defendants applied the property tax system differently. Such assumption is without basis. A person's decision to relocate or not to relocate is based upon a complex set of considerations of which property taxes are but one factor. Moreover, plaintiff concedes that the changes to the property tax system it envisions would dramatically increase property taxes in majority-white neighborhoods. Such changes would make those neighborhoods less, not more, accessible to minority residents. Thus, plaintiff has failed to demonstrate a robust causality between the application of the property tax system, as opposed to other factors, and the continued patterns of segregation that have long existed in New York City.

We now analyze plaintiff's allegations that the application of the property tax system to Class One and Class Two properties in majority-minority communities has a disparate impact on minorities by imposing discriminatory terms and conditions in the sale and rental of housing. To that end, plaintiff argues that the terms and conditions of all home, condominium and cooperative sales and apartment rentals include the transfer of an illegal tax burden that make purchasing or renting a dwelling more expensive in affected communities. The portion of the FHA upon which plaintiff relies makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin" (42 USC § 3604[b]). However, in the context of taxation, defendants are not involved in the terms and conditions of the sale or rental of property (*Robinson*, 143 AD3d at 642; *see Housing Justice Campaign v Koch*, 164 AD2d 656, 672 [1st Dept 1991], *lv denied* 78 NY2d 858 [1991]). We hold here, as we held in *Robinson* that, as a matter of law, the setting of tax assessments does not constitute a term or condition of the sale or rental of property under the FHA.

For the foregoing reasons, plaintiff's complaint fails to state a claim against either the City or State defendants.

Accordingly, the order of the Supreme Court, New York County

(Gerald Lebovits, J.), entered September 25, 2018, which denied the motion of defendants City of New York and New York City Department of Finance to dismiss the complaint as against them, and granted in part, and denied in part, the motion of defendants State of New York and New York Office of Real Property Tax Services to dismiss the complaint as against them, should be modified, on the law, to dismiss the remaining causes of action against the State defendants, and to grant the City defendants' motion to dismiss the complaint against them, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

M-7369
M-7370
M-7371 - *Tax Equity Now NY LLC v City of New York*

Motions to file amicus curiae briefs granted, and the briefs deemed filed.

All concur.

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered September 25, 2018, modified, on the law, to dismiss the remaining causes of action against the State defendants, and to

grant the City defendants' motion to dismiss the complaint against them, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Opinion by Kern, J. All concur.

Gische, J.P., Kapnick, Kern, Moulton, JJ.

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

ENTERED: FEBRUARY 27, 2020

CLERK