

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 11, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7429 Philip Capuano, et al., Index 302194/09
Plaintiffs-Respondents,

-against-

Tishman Construction Corporation,
et al.,
Defendants-Appellants.

Molod Spitz & DeSantis, P.C., New York (Hendrick Vandamme of
counsel), for appellants.

Duffy & Duffy, Uniondale (Michael J. Regan of counsel), for
respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-
Hughes, J.), entered September 19, 2011, which granted
plaintiffs' motion for partial summary judgment on the issue of
liability on the Labor Law § 241(6) cause of action, affirmed,
without costs.

Plaintiff Philip Capuano, a member of the Empire State's
Carpenter's Union, Local 7, was employed by non party Donaldson
Acoustics from 1998 until 2007. Defendant Yeshiva University,
owner of the premises, retained defendant Tishman Construction
Corporation pursuant to a construction management agreement for a

project known as the "Block Research Pavilion."

Plaintiff's employer was retained for carpentry work to be done on the site, as well as for the installation of drywall and acoustical ceilings.

On or about February 26, 2007, plaintiff was working on the fifth floor of the job site, installing "abuse board" (a heavy duty sheetrock), when he slipped on a piece of sprinkler pipe, sustaining an injury to his back. Following a workers' compensation hearing, it was determined that plaintiff's injuries were causally related to the accident, and plaintiff began receiving benefits.

Thereafter, plaintiff and his wife commenced this action alleging violations of Labor Law §§ 200, 240(1) and 241(6). Defendants' violation of § 241(6) was predicated on their violation of Industrial Code 12 NYCRR § 23-1.7(e)(2) (protection from tripping and other hazards) and § 23-1.30 (illumination). Defendants' answer contained general denials and affirmative defenses, including Capuano's own culpable conduct.

Plaintiff testified that on the date of the accident, he unloaded 10 sheets of abuse board from a transport cart and leaned them against a wall. As he began carrying the first board to its installation, he slipped on a piece of discarded sprinkler pipe between 12 to 18 inches long and 1 to 1¼ of an inch in

diameter, "did a split," and injured his lower back. Plaintiff further testified that the room where the accident occurred was dark, with no exterior windows. At the time of the accident the temporary lighting that had been installed was not working, and plaintiff estimated that the nearest functioning lights were approximately 20 feet behind him.

Plaintiffs moved for partial summary judgment on the issue of defendants' Labor Law § 241(6) liability. Defendants opposed, arguing that § 241(6) did not impose absolute liability arising from the breach, but rather required a determination as to whether the safety measures employed were "reasonable and adequate" under the circumstances. Defendants contended that there was a material issue of fact as to whether the alleged violations of the regulations existed for a sufficient period of time to be discovered and remedied. Defendants also questioned Capuano's testimony regarding the lighting in the room, the nature and extent of his injuries, and whether the injuries occurred as a result of this accident, noting that plaintiff did not report the accident until the next day, and did not seek treatment for his pain until over two months later.

The motion court granted plaintiffs' motion, finding that Capuano sufficiently stated a prima facie case of violations of the pertinent regulations and that the violations proximately

caused Capuano's injuries. The court concluded that defendants had not raised an issue of fact, as they had presented no testimony or affidavits from individuals with personal knowledge of the accident, but merely tried to undermine Capuano's credibility with an unsworn medical report. The motion court also noted that there was no testimony contradicting plaintiff's statements that the area contained insufficient lighting or that there was piping present on the floor.

The motion court properly granted plaintiffs' motion for summary judgment as to liability on the Labor Law § 241(6) claim. Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed (*see e.g. Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). To state a claim under § 241(6), a plaintiff must identify a specific Industrial Code provision "mandating compliance with concrete specifications" (*Ross*, 81 NY2d at 505).

Here, plaintiffs met their burden of establishing liability under Labor Law § 241(6) based upon the alleged violations of 12 NYCRR 23-1.7(e)(2), which provides that working areas shall be kept free from the accumulation of dirt and debris and scattered

tools and materials, and 12 NYCRR 23-1.30, which provides that "[i]llumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction . . . but in no case shall such illumination be less than 10 foot candles in any area where persons are required to [do] work."

Defendants have not demonstrated the existence of an issue of fact concerning inadequate lighting at the work site. Defendants argue that Capuano's claim that there was insufficient light in the room was not credible inasmuch as Capuano testified that he was able to take out his tool box, unload 10 abuse boards, and lean them against the wall. Defendants also contend that Capuano's testimony regarding the lighting in the area was inconsistent since Capuano testified that two days prior to the accident there was no problem with lighting in the area, with sufficient natural light coming through the window to light up the entire area. In addition, defendants contend that Capuano offered only "vague" statements about the quality of lighting, which are "insufficient to create an inference that the amount of lighting fell below the specific statutory standard" (*Carty v Port Auth. of N.Y. and N.J.*, 32 AD3d 732, 733 [2006] [internal quotation marks omitted], *lv denied* 8 NY3d 814 [2007]). In addition, defendants posit that Capuano's statements that the

nearest artificial light was 20 feet away, and his contention that the lighting was "bad," were insufficient to create an inference that the amount of light fell below the specific statutory amount of 10 foot candles. Taken together with plaintiff's statement that there was natural light coming through the windows during the daytime sufficient to light up the area, defendants argue that an issue of fact exists as to whether the lighting was sufficient.

Defendants' arguments are unavailing. In the first instance, defendants' characterization of plaintiff's testimony concerning the structure of the fifth floor work space is misleading. Defendants' summary of plaintiff's testimony is that the entire area was dark or not well lit, making it improbable that he was able to unload his tools, unload the abuse boards, and then suddenly get injured when he began working. However, this summary of plaintiff's testimony is inaccurate. Plaintiff made clear that he was working in stages, in two separate rooms on the fifth floor. First, he arrived, opened his tool box, and took out his tools. Next, plaintiff stated that he unloaded the board from the cart, and leaned them against the wall. Then, he began, piece by piece, to bring the abuse boards into the room where they were to be installed. Plaintiff stated that there was sufficient natural light in the area where he unloaded the

boards, which was where the windows were located. However, there was insufficient light in the room where he brought the boards to be installed; that area had no windows to provide natural light and the artificial light was not working.

Nor is it persuasive that plaintiff apparently testified that two days before the accident, there was sufficient natural light in the room. On that day, plaintiff was present in the room at about one in the afternoon; on the day of the accident, he was there in the morning, between 7:30 and 8:00 a.m. Accordingly, it cannot be said that plaintiff's affidavit is self-serving or that it contradicts his deposition testimony. Plaintiff's affidavit simply provides additional details illuminating his prior deposition testimony. Apart from attempting to attack plaintiff's credibility, defendants have failed to proffer any evidence that would raise a question of fact as to the adequacy of the lighting.

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

ACOSTA, J. (concurring)

Although I agree with the majority's holding, I write separately because I think it is important for the parties and the bar that we address the specific arguments raised on appeal. Specifically, defendants' main argument on appeal is that *Calcano v Rodriguez* (91 AD3d 468 [2012]), which was decided after the motion court ruled on plaintiffs' motion for partial summary judgment, dictates a different result in defendants' favor. The issue, as raised by defendants on appeal, is whether a plaintiff has the burden to disprove an affirmative defense in order to make a prima facie showing of entitlement to summary judgment. I would hold that a plaintiff does not have that burden. Once a prima facie showing is made, the burden shifts to the defendant to raise issues of fact, such as by submitting evidence in support of an affirmative defense.

Initially, it should be noted that, contrary to defendants' assertions, there was no evidence in admissible form suggesting that plaintiff was negligent. Thus, *Calcano*, assuming that it was correctly decided, is inapposite to the facts of this case.

In the alternative, however, I would hold that *Calcano* was wrongly decided and therefore cannot support defendants' argument on appeal. In *Calcano*, a panel of this Court departed from our holding in *Tselebis v Ryder Truck Rental, Inc.* (72 AD3d 198

[2010]), where we held that a plaintiff may be entitled to summary judgment on the issue of liability, even if that plaintiff's own negligence is still an open question. In holding that a "plaintiff in a negligence action cannot obtain summary judgment as to liability if triable issues remain as to the plaintiff's own negligence and share of culpability for the accident" (91 AD3d at 468-469), *Calcano* cited to the Court of Appeals' holding in *Thoma v Ronai* (82 NY2d 736 [1993]). *Thoma*, however, does not support such a broad holding. Rather, in *Thoma*, the Court of Appeals held that plaintiff's concession that she did not observe the vehicle that struck her raised factual issues as to her reasonable care.

To be sure, the Court of Appeals held in *Thoma* that summary judgment on the issue of liability is unwarranted where there is a material issue of fact as to whether the plaintiff was negligent. However, nowhere in its decision did the Court say that a plaintiff has to disprove affirmative defenses in order to establish his or her entitlement to summary judgment. It simply found that on the record before it, there was evidence of plaintiff's negligence.

Thus, I disagree with *Calcano* to the extent that it holds that "*Thoma* stands for the proposition that a plaintiff moving for summary judgment on the issue of liability in an action for

negligence *must* eliminate any material issue, not only as to the defendant's negligence, but also as to whether the plaintiff's own comparative negligence contributed to the incident" (91 AD3d at 469) (emphasis added)¹.

Calcano's ruling not only creates confusion in this Department regarding a defendant's burden in asserting the affirmative defense of comparative negligence (*see e.g. Maniscalco v New York City Tr. Auth.*, 95 AD3d 510 [2012, DeGrasse, J., dissenting in part]), but also fails to take into account the specific statutory mandate of CPLR 1412. CPLR 1412 unequivocally states that contributory negligence is an affirmative defense to be pleaded and proved by the defendant asserting it, and the plaintiff never has the burden to demonstrate that he or she is free from negligence once a defendant asserts the defense (*see also Boulos v State of New York*, 56 NY2d 714, 716 [1982, Fuchsberg, J., dissenting]). To require that a plaintiff demonstrate that he or she is free of

¹ Indeed, in *Thoma* it was the plaintiff's own concession that she did not observe the vehicle that struck her that created an issue of fact as to her reasonable care. Again, the Court did not place on the plaintiff the burden of demonstrating that she was free of comparable fault (82 NY2d at 737). Likewise, in *Calcano* the plaintiff testified at his deposition that he did not see the defendant's car prior to the accident. As such, a question of fact was raised regarding whether the plaintiff was negligent in failing to observe what should have been observed (91 AD3d at 472).

comparative fault would render the statute meaningless and inconsistent with direct legislative guide (see 242 Siegel's Practice Rev [Feb 2012]).

I believe that my position is consistent with the Court of Appeals' decision in *Thoma*. And I decline to read into the Court of Appeals' decision something that is not there. *Calcano's* unsigned memorandum decision departs from long-established case law and legislation mandating that the issue of plaintiff's negligence is for the defendant to plead and prove (*cf. Ortega v City of New York*, 95 AD3d 125, 129 n [2012]).

Members of this Court must endeavor to give our precedent full effect whenever possible. However, we are obligated for the benefit of litigants and the bar to engage in analysis of issues properly framed for the Court, especially the *Calcano* issue, which has resulted in discrepant decisions in this Department, with concomitant confusion to the bar.

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

ENTERED: SEPTEMBER 11, 2012


CLERK

Gonzalez, P.J., Tom, Andrias, Acosta, Freedman, JJ.

8017-

8017A International Flavors & Index 601723/08
Fragrances, Inc., et al.,
Plaintiffs-Respondents,

National Union Fire Insurance
Company of Pittsburgh, PA.,
Plaintiff,

-against-

St. Paul Protective Insurance
Company, etc., et al.,
Defendants-Appellants.

SNR Denton US LLP, Chicago, IL (Donna J. Vobornik of the bars of the State of Illinois and the State of Wisconsin, admitted pro hac vice, of counsel), for St. Paul Protective Insurance Company, appellant.

Vedder Price P.C., New York (John H. Eickemeyer of counsel), for American Guarantee and Liability Insurance Company, appellant.

Dickstein Shapiro LLP, New York (Nicholas J. Zoogman of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Charles Ramos, J.), entered September 14, 2011, which granted plaintiffs-respondents' motion for summary judgment for a declaration that Bush Boake Allen Inc. (BBA) bears successor corporate liability in certain underlying actions and is therefore entitled to insurance coverage under a policy issued by defendant St. Paul Protective Insurance Company, and denied St. Paul's motion for summary judgment dismissing the complaint on

the grounds that BBA is not entitled to such insurance coverage, and, order and judgment (one paper), same court, Justice and date, which granted plaintiffs-respondents' motion for summary judgment for a similar declaration as against defendant American Guarantee and Liability Insurance Company, and denied American Guarantee's motion for summary judgment declaring that BBA is not entitled to such insurance coverage, unanimously reversed, on the law, plaintiffs' motions denied, defendants motions granted, the declarations vacated, and it is declared that the respective defendants have no duty to defend or indemnify plaintiffs-respondents in the underlying actions.

In January 1990, plaintiff BBA purchased all the common stock in its competitor, Food Materials Corporation (FMC), an Illinois corporation engaged in the distribution, manufacture and/or sale of butter flavoring products, in exchange for \$10 million in cash. FMC remained an independent and viable legal entity, retaining all of its pre-acquisition assets, obligations and liabilities, until January 1991, when BBA dissolved it, took its assets, and continued to operate the FMC business as before, until the closure of FMC's Chicago facility in 2002.

In 2004 and 2006, plaintiffs-respondents were sued in underlying actions by plaintiffs who alleged that they sustained injuries as a result of work-related exposure to certain butter

flavoring products at a microwave popcorn packaging facility in Illinois. When evidence emerged that FMC supplied butter flavoring to the facility during the time of the underlying plaintiffs' exposures, plaintiff-respondent International Flavors & Fragrances, Inc., BBA's parent company, notified the defendant insurers who had provided policies to FMC during the relevant time frame, demanding coverage.

The motion court erroneously granted plaintiffs-respondents' request for a declaration of coverage on a finding that BBA had acquired the relevant FMC liabilities and insurance policy protections based on the doctrine of de facto merger. Rather than relying on New York and other out-of-state case law that materially differs from Illinois's "rigorous" de facto merger law (*see Knoll Pharm. Co. v Auto. Ins. Co.*, 167 F Supp 2d 1004, 1011, n 9 [ND Ill 2001]) and applying a "flexible" approach that would permit a finding of a de facto merger in the instant circumstances (*see Arnold Graphics Indus., Inc. v Ind. Agent Ctr., Inc.*, 1985 WL 211, at *8, 1985 US Dist LEXIS 23201, *23 [SD NY 1985], *affd* 775 F2d 38 [2d Cir 1985]; *Fitzgerald v Fahnestock & Co.*, 286 AD2d 573 [2001]; *Sweatland v Park Corp.*, 181 AD2d 243, 246 [1992]), the motion court should have utilized Illinois law to analyze the facts of this case. Although the Illinois Supreme Court has not addressed the specific factual scenario presented

here, Illinois courts have fashioned a limited de facto merger exception to the general common law prohibition against successor liability requiring a showing that: (1) the seller ceased its ordinary business operations and dissolved; (2) the buyer assumed the seller's liabilities and obligations necessary for uninterrupted continuation of business; (3) there is a continuity of shareholders; and (4) there is a continuity of the business enterprise, including management, employees, location, general business operations, and assets (see *Gray v Mundelein Coll.*, 296 Ill App 3d at 808). The Illinois Courts have strictly enforced the exception, applying it only when all of the factors are met (see *Gray v Mundelein Coll.*, *supra* at 795, 808 [1st Dist 1998], *lv denied* 179 Ill 2d 582 [1998]; *North Shore Gas Co. v Salomon Inc.*, 152 F3d 642 [7th Cir 1998], *overruled on another ground*), and have been "distinctly unreceptive" to expansions of successor liability (*Amann v Sylvania Aero Enter.*, 1989 WL 152951, at *5, 1989 US Dist LEXIS 14069, *12-13 [ND Ill 1989]).

Here, the third factor, "continuity of shareholders," which requires that the seller's shareholders receive shares of the

buyer's stock as payment for the seller's assets (see *Mamacita, Inc. V Colborne Acquisition Co., LLC*, 2011 WL 881654, *4, 2011 US Dist LEXIS 25146, *10, [ND Ill 2011]), is absent. Thus, under Illinois law, the doctrine of de facto merger does not apply. In the absence of such a merger, there is no basis for BBA's assumption of FMC's pre-dissolution liabilities or for a finding that BBA succeeded to rights under the FMC Insurer's policies.

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

ENTERED: SEPTEMBER 11, 2012


CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6844 &

M-535

New York State Superintendent
of Insurance, etc.,
Plaintiff-Respondent,

Index 100872/07

-against-

New York Central Mutual Fire
Insurance Company,
Defendant-Appellant,

Vanessa Kitaw, et al.,
Defendants.

Eisenberg & Kirsch, Liberty (Robert M. Lefland of counsel), for
appellant.

Carman, Callahan & Ingham, LLP, Farmingdale (Michael F. Ingham of
counsel), for respondent.

Order, Supreme Court, New York County (George J. Silver,
J.), entered January 13, 2011, which granted plaintiff's motion
to confirm the report and recommendation of the Special Referee,
dated December 31, 2009, granted plaintiff's motion for summary
judgment declaring that defendant Vanessa Kitaw is afforded
liability coverage for bodily injury arising from the subject
motor vehicle accident under the personal automobile policy
issued to her by defendant New York Central Mutual Fire Insurance
Company (New York Central), and denied New York Central's cross
motion for summary judgment declaring that Kitaw is not so
covered, unanimously modified, on the law, to declare that

Kitaw's New York Central policy affords her coverage for liability for bodily injury arising from the subject motor vehicle accident, and otherwise affirmed, without costs.

This coverage dispute arises from a motor vehicle accident that involved a van leased by defendant Kitaw but driven by another person. It is undisputed that Reliance Insurance Company (represented herein by plaintiff, its ancillary receiver), the liability carrier of the rental company (defendant MPT, Inc. d/b/a Thrifty Rental Car Finance Corp. [Thrifty]) that leased the van to Kitaw, has settled all personal injury claims arising from the accident. The court, adopting the recommendation of a referee, correctly determined that New York Central, which issued a personal automobile liability policy to Kitaw, is obligated to provide coverage for Kitaw for liability arising from the subject accident based on the plain language of her policy, which provides coverage for liability for bodily injury arising from her "use of any auto" (see *Hertz Corp. v Govt. Empls. Ins. Co.*, 250 AD2d 181, 186-187 [1998], *lv dismissed* 93 NY2d 1040 [1999]), and we modify to declare accordingly. While Kitaw, as lessee of a vehicle owned by Thrifty, was also covered, pursuant to Vehicle and Traffic Law § 370(1)(b), by the policy Reliance issued to Thrifty (see *ELRAC, Inc. v Ward*, 96 NY2d 58, 73-75 [2001]), the antisubrogation rule does not prevent Reliance, as Thrifty's

subrogee, from seeking to recover from Kitaw any amounts above the limits of Kitaw's coverage under the Reliance policy that Reliance has paid in settlement of the underlying personal injury actions (*see id.* at 77-78).

We have considered New York Central's remaining argument and find it unavailing.

**M-535 – New York State Superintendent of Insurance,
etc. v New York Central Mutual Fire Insurance Company,
et al.**

Motion for leave to file a supplemental affirmation denied.

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was controlled by inmates who belonged to the Bloods gang and that other inmates, such as plaintiff, were at risk of assault if they chose to use the phone. Citing *Sanchez v State of New York* (99 NY2d 247 [2002]), defendants moved for summary judgment on the ground that plaintiff cannot establish that the attack was reasonably foreseeable. Defendants submitted the deposition of a correction officer who responded to the incident and had been assigned to the quad where plaintiff was injured for two years prior to the incident. The officer testified that he had no knowledge of any issues with regard to the use of the phone or gang-related incidents prior to April 2, 2003. The officer's captain, who also responded to the incident, testified that he too was unaware of any problems related to the use of the phone by inmates who were not members of the Bloods. In moving for summary judgment, defendants made a prima facie showing that the attack on plaintiff was not reasonably foreseeable (*see Sanchez*, 99 NY2d at 254).

Plaintiff's opposition failed to raise a triable issue of fact as to whether defendants were negligent. Plaintiff relies upon a report in which a confidential informant, who was interviewed after the assault, was quoted as saying that one week before plaintiff's assault, a member of the Bloods refused to allow another inmate to use the phone and proclaimed it to be the

property of the Bloods. In denying defendants' motion, the court below apparently accepted plaintiff's argument that defendants should be charged with the confidential informant's knowledge of this prior encounter. That argument requires the assumption that the confidential informant was acting as defendants' agent when he learned of the prior dispute.¹ We decline to make that assumption because "where an informer works independently of the [authorities], provides information on his own initiative, and the government's role is limited to the passive receipt of such information, the informer is not, as a matter of law, an agent of the government" (*People v Cardona*, 41 NY2d 333, 335 [1977]). We are persuaded by the Fourth Circuit's reasoning in *Harker v State of Maryland* (800 F2d 437 [4th Cir 1986]), where it was held that a prison informant who responded to a general request for information was not a government agent where he was not paid by or acting under the instruction or solicitation of the government (*id.* at 444-445). The record before us provides no basis for an assumption that the confidential informant was acting as defendants' agent at any time prior to plaintiff's assault. We therefore reject plaintiff's argument that there is an issue of

¹Knowledge acquired by an agent while acting within the scope of his or her authority is presumptively imputed to his or her principal (*Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]).

fact as to whether defendants had actual or constructive knowledge of the prior incident regarding the phone.

In apparent reliance upon the affidavit of plaintiff's liability expert, the court found an issue of fact as to whether defendants "deviated from appropriate and accepted practice." For reasons that follow, the court should have instead rejected the expert's affidavit outright. Defendants served their demand for expert disclosure in May 2004. Plaintiff never responded to the demand, although the expert had apparently been engaged as of July 31, 2007 when he claims to have inspected the site of the incident. Plaintiff filed a note of issue and certificate of readiness in January 2010. Plaintiff submitted the expert's affidavit in November 2010 in opposition to the instant motion for summary judgment. The expert's affidavit should not have been considered in light of plaintiff's failure to identify the expert during pretrial discovery as required by defendants' demand (*see Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520 [2012]; *Colon v Chelsea Piers Mgt., Inc.*, 50 AD3d 616, 617 [2008]). Were we to consider the expert's affidavit, we would find it lacking

in probative value because it is not supported by evidence in the record (see e.g. *Gerber Trade Fin., Inc. v Skwiersky, Alpert & Bressler, LLP*, 12 AD3d 286 [2004], *lv denied* 4 NY3d 705 [2005]).

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ENTERED: SEPTEMBER 11, 2012


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be responsible for payment of the settlement in the underlying personal injury litigation (CPLR § 602[a]).

We have considered the remaining arguments and find them unavailing.

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ENTERED: SEPTEMBER 11, 2012


CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6405-

6405A Herbert Feinberg, etc.,
Plaintiff-Respondent,

Index 108498/03

-against-

Jerome S. Boros, Esq., et al.,
Defendants-Appellants.

Friedman Kaplan Seiler & Adelman LLP, New York (Edward A. Friedman of counsel), for appellants.

Storch Amini & Munves PC, New York (Steven G. Storch of counsel), for respondent.

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered June 17, 2011, bringing up for review an order of the same court and Justice, entered June 7, 2011, reversed, on the law, with costs, and the motion for judgment notwithstanding the verdict granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint. Appeal from order dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Catterson, J. All concur except Moskowitz and Renwick, JJ. who concur in a separate Opinion by Moskowitz, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
Karla Moskowitz
Rolando T. Acosta
Dianne T. Renwick, JJ.

6405-6405A
Index 108498/03

x

Herbert Feinberg, etc.,
Plaintiff-Respondent,

-against-

Jerome S. Boros, Esq., et al.,
Defendants-Appellants.

x

Defendants appeal from the judgment of the Supreme Court, New York County (Barbara Jaffe, J.), entered June 17, 2011, upon a jury verdict, awarding plaintiff damages, and bringing up for review an order of the same court and Justice, entered June 7, 2011, which, inter alia, denied defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

Friedman Kaplan Seiler & Adelman LLP, New York (Edward A. Friedman, Robert D. Kaplan and Steven E. Frankel of counsel), for appellants.

Storch Amini & Munves PC, New York (Steven Storch, Lita Beth Wright and Thomas M. Monahan of counsel), and Richard L. Derzaw, New York, for respondent.

CATTERSON, J.

At issue on this appeal is whether the defendant members of a law firm committed legal malpractice by not advising the plaintiff, Herbert Feinberg, that an agreement with his former business partner to limit the collateral estoppel effect of an arbitration award would have been enforceable in Feinberg's lawsuit against a third party. As set forth in greater detail below, precedent, sparse as it is on this issue, nevertheless mandates that such limiting agreements are not carved-out exceptions to normal collateral estoppel principles. We therefore find that where, as here, an issue has been fully and vigorously litigated, no limiting agreement as to an arbitration award may bar the assertion of a collateral estoppel defense by a third party as to that issue.

We further find that the trial court erroneously denied the defendants' motion for judgment notwithstanding verdict on the basis that the enforceability of limiting agreements had already been determined against the defendants by this Court in 2005, and therefore constituted law of the case. First, this was an incomprehensible conclusion given that the same court essentially permitted the parties to "re-litigate" the issue by introducing expert testimony at trial on the enforceability of limiting agreements. More significantly, it underscored the

court's misunderstanding of the law of the case concept. The sole determination made by this Court in 2005 was that Supreme Court had properly granted Feinberg's motion for leave to amend his complaint to plead sufficient facts in support of his claim that his former partner Katz would have been amenable to a limiting agreement. Feinberg v. Boros, 17 A.D.3d 275, 276, 793 N.Y.S.2d 416, 417 (1st Dept. 2005). In the context of deciding Feinberg's motion, this Court rejected the defendants' argument that as a matter of law limiting agreements cannot impose limitations on third parties. However, we never determined the ultimate claim that had Feinberg and his former partner entered into a limiting agreement, Feinberg "most likely" would have succeeded in enforcing the agreement against a third party. Hence, we never reached, nor could we have in the context of the limited appeal, the issue of the enforceability of limiting agreements.

The following facts in this protracted litigation are established in the record as follows: Feinberg is the principal shareholder of I.A. Alliance, a women's clothing manufacturer formerly known as I. Appel Corp. Defendant Jerome Boros was Feinberg's chosen arbitrator in an underlying action, and represented Feinberg in subsequent settlement talks with Feinberg's former business partner, Norman Katz.

Feinberg and Katz were equal partners in I. Appel for 20 years until 1996 when Feinberg decided to purchase Katz's interest in I. Appel. The company's 1995 financials were audited by the accounting firm of nonparty Mahoney Cohen Rashbart & Pockart, which provided Feinberg with accounting services on the Katz transaction.

In June 1996, Feinberg and Katz executed a purchase agreement, and Feinberg made a partial payment based upon the 1995 financials. Within 45 days of closing, Mahoney Cohen was to perform a new determination of value (hereinafter referred to as "DOV"), which would establish a final share price. The DOV, however, was not timely prepared, and Katz sought to enjoin its completion, as well as to lock-in the purchase agreement share price based upon the 1995 financials. The DOV was completed in October 1996 and revealed that the company's "previously stated inventory values [were] grossly overstated resulting in a difference in net worth of approximately \$10 million."

In 1997, Feinberg commenced arbitration against Katz alleging fraud in connection with the 1995 financial statement and seeking, among other things, to rescind the purchase agreement. Feinberg asserted, inter alia, that he had detrimentally relied upon the 1995 financial statement when he made his decision to purchase Katz's interest in the company. In

December 1998, Feinberg sued Stephen Katz, Norman Katz's son, who had also worked for I. Appel, also alleging fraud with respect to the 1995 financials.

On March 29, 1999, Stephen Katz moved for a stay pending the arbitration, arguing that a finding that Feinberg had not been misled by the 1995 financials would collaterally estop Feinberg from pursuing his claims against Stephen Katz. The court granted the stay.

On November 22, 1999, an arbitration award was rendered. The panel concluded, inter alia, that Feinberg had not relied upon the 1995 financials when making his decision to purchase Katz's interest in I. Appel. On May 19, 2000, Feinberg commenced an action against Mahoney Cohen for accounting malpractice. Mahoney Cohen moved for summary judgment on the ground that the claim was barred by the collateral estoppel effect of the arbitral finding that Feinberg had not relied on the 1995 financials. The motion was granted and affirmed on appeal. I. Appel Corp. v. Mahoney Cohen & Co., CPA, 294 A.D.2d 196, 742 N.Y.S.2d 239 (1st Dept. 2002).

Feinberg then initiated this action against the defendants for legal malpractice. He alleged that the defendants failed to advise him that an amendment to the arbitral award, or a post-award agreement between him and Katz could have barred Mahoney

Cohen's collateral estoppel defense. He further contended that he and Katz would have reached such an agreement, and that consequently he would have prevailed in his malpractice suit against Mahoney Cohen.

The defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(7), and the motion was granted on the grounds that Feinberg had failed to allege facts demonstrating that the defendants' alleged negligence was the proximate cause of Feinberg's damage. Feinberg moved to vacate the order, and for leave to amend the complaint.

Supreme Court granted the motion and this Court affirmed, finding that Feinberg's amended pleading was sufficient to survive the defendants' original CPLR 3211(a)(7) motion. 17 A.D.3d at 276, 793 N.Y.S.2d at 417. Subsequently, the defendants answered, denying Feinberg's allegations and asserting a number of affirmative defenses.

At trial, Feinberg testified that on January 5, 2000, a couple of months after the award was rendered, Feinberg and Boros had met with Katz's arbitrator. Katz's arbitrator proposed that the parties enter into a post-arbitration agreement to limit the collateral estoppel effect as it applied to Mahoney Cohen. Feinberg testified that after the meeting, he asked Boros to advise him concerning collateral estoppel, and whether a limiting

agreement would protect his claims against Mahoney Cohen. Boros responded that he would ask his colleagues to look into the matter. However, neither Boros nor anyone else at the firm provided Feinberg with legal advice regarding collateral estoppel. By letter dated May 15, 2000, approximately seven days before the statute of limitations on Feinberg's claims against Mahoney Cohen expired, the firm officially terminated its representation of Feinberg.

After the trial, a verdict was rendered in Feinberg's favor, finding that the defendants committed malpractice. The jury found that if the defendants had advised Feinberg that he could have executed a limiting agreement with Katz, he and Katz would have entered into such an agreement, and that it was likely that Mahoney Cohen would not then have succeeded in its collateral estoppel defense.

The defendants moved for a judgment notwithstanding the verdict (hereinafter referred to as "JNOV"), arguing that, inter alia, pursuant to the facts adduced at trial, a post-award limiting agreement between Feinberg and Katz would not have been effective to preclude Mahoney Cohen's assertion of collateral estoppel.

The court denied the motion. It found that, in the 2005 decisions of Supreme Court and this Court, the "courts

specifically stated and determined that defendants had not established, as a matter of law, that such a [limiting] agreement would not have been effective." The court determined that the prior decisions were law of the case on the issue of whether a limiting agreement would have been effective or enforceable. This was error.

For the reasons set forth below, we reverse and grant the defendants' motion for judgment notwithstanding the verdict. As a threshold matter, in determining whether law of the case applies, the procedural posture and evidentiary burdens of the litigants must be considered. See e.g. 191 Chrystie LLC v. Ledoux, 82 A.D.3d 681, 920 N.Y.S.2d 324 (1st Dept 2011); Tenzer, Greenblatt, Fallon & Kaplan v. Capri Jewelry, 128 A.D.2d 467, 513 N.Y.S.2d 157 (1st Dept. 1987) (denial of motion to dismiss does not establish law of the case because it looks only to the sufficiency of the pleadings). Here, the procedural posture and evidentiary burdens of the parties at the time Feinberg moved to amend his complaint and at the time the defendants moved for JNOV were markedly different.

In this case, in 2005, the motion court found that the amended complaint cured the deficiencies of Feinberg's earlier complaint by including "sufficient facts from which one can infer that Katz would have been amenable to an agreement limiting the

estoppel effect of the arbitration award." Feinberg v. Boros, 2004 WL 5641615 (Sup. Ct., N.Y. County 2004). Thus, in rejecting the defendants' argument that *no* post-arbitral agreement could have been made to bar Mahoney Cohen's defense, the motion court found only that *an* agreement between Feinberg and Katz could have been made and that "most likely" it would have prevented the dismissal of Feinberg's suit against Mahoney Cohen. The motion court was clear about the preliminary and limited nature of the holding, finding that, "[a]t this early stage of the litigation, the Court cannot conclude, as a matter of law, that defendants were not negligent." Id.

Our affirmance on appeal was similarly limited. We held that

"[f]rom the alleged facts, accepting them as true, according them the benefit of every possible favorable inference, and evaluating them only as to whether they fit within any cognizable legal theory, one could infer that plaintiff's former partner would have been amenable to an agreement limiting the estoppel effect of the arbitration award. Defendants *have not established, as a matter of law*, that even if plaintiff and Katz had entered into an agreement limiting the collateral estoppel effect of the arbitration award, the Mahoney Cohen lawsuit would nonetheless have been dismissed on collateral estoppel grounds." Feinberg, 17 A.D.3d at 276, 793 N.Y.S.2d at 417 (emphasis added), citing Matter of American Ins. Co. [Messinger-Aetna Cas. & Sur. Co.], 43 N.Y.2d 184, 401 N.Y.S.2d 36, 371 N.E.2d 798 (1997);

accord Kerins v. Prudential Prop. & Cas., 185 A.D.2d 403, 585 N.Y.S.2d 637 (1992).

It is axiomatic that a motion addressed to the face of a complaint, wherein the motion court must construe all facts in a light favorable to the plaintiff, cannot control the outcome of a case once the facts are finally determined, just as denial of a summary judgment motion on the grounds that the non-movant has raised a triable issue of fact does not mean that the movant cannot prevail after the evidence has been considered by the trier of fact. See Smith v. Hooker Chem. & Plastics Corp., 125 A.D.2d 944, 510 N.Y.S.2d 343 (4th Dept. 1986), aff'd, 70 N.Y.2d 994, 526 N.Y.S.2d 424, 521 N.E.2d 431 (1998); see also Bukowski v. Clarkson Univ., 86 A.D.3d 736, 739, 928 N.Y.S.2d 369, 373 (3d Dept. 2011), aff'd, __ N.Y.3d __, 2012 N.Y. Slip Op. 04274 (2012).

Moreover, in this case, this Court did not reiterate the language of Supreme Court that the defendants here "cannot" establish that the limiting agreement would have been unenforceable against a third party. Instead, this Court held that the "[d]efendants *have not* established, as a matter of law," that such an agreement would have been unenforceable. 17 A.D.3d at 276, 793 N.Y.S.2d at 417 (emphasis added).

In other words, implicit in this Court's decision was the

recognition that the defendants had not *yet* so established; or had not so established *at that stage of litigation*. Finally, in the absence of language indicating a determination by the Court that such an agreement would have been effective or enforceable, the 2005 decision may only be interpreted as leaving the issue open. In concluding, the Court stated its holding only as “[a]ccordingly, plaintiff’s proposed amended complaint sufficiently states a claim for legal malpractice.” 17 A.D.3d at 276, 793 N.Y.S.2d at 417.

More significantly, the trial court erred in not setting aside the jury verdict pursuant to CPLR 4404(a) because the defendants were entitled to judgment as a matter of law. Facts developed at trial were used in conjunction with the testimony of legal experts to guide the jury to what amounts to a legal conclusion as to whether a limiting agreement would have been enforceable or effective against Mahoney Cohen. However, that question is indisputably one of law not fact, and should have been decided by the court in favor of the defendants.

It is well established that the doctrine of collateral estoppel bars a litigant from disputing an issue in another proceeding when that issue was decided against the litigant in a proceeding in which he had a “full and fair opportunity” to

contest the matter. Schwartz v. Public Adm'r of County of Bronx, 24 N.Y.2d 65, 71, 298 N.Y.S.2d 955, 959, 246 N.E.2d 725, 728 (1969). Collateral estoppel preserves party and judicial resources by preventing relitigation of matters that have already been resolved. Further, it prevents inconsistent results. 24 N.Y.2d at 74, 298 N.Y.S.2d at 962. Collateral estoppel can be asserted in a new case by a nonparty to the original proceeding. B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147, 278 N.Y.S.2d 596, 601, 225 N.E.2d 195, 198 (1967). Moreover, collateral estoppel principles "apply as well to awards in arbitration as they do to adjudications in judicial proceedings." Matter of American Ins. Co. [Messinger-Aetna Cas. & Sur. Co.], 43 N.Y.2d 184, 189-190, 401 N.Y.S.2d 36, 39, 371 N.E.2d 798, 801 (1977), citing Rembrandt Indus., v. Hodges Intl., 38 N.Y.2d 502, 381 N.Y.S.2d 451, 344 N.E.2d 383 (1976).

Confusion has arisen in this case because the Messinger Court also held, seemingly inconsistently, that "[i]n circumstances involving arbitration, ... the parties themselves can formulate their own contractual restrictions on carry-over estoppel effect." Messinger, 43 N.Y.2d at 194, 401 N.Y.S.2d at 42. On closer analysis, however, it is clear that the confusion is not warranted.

The ability of parties to formulate their own contractual

restrictions as to the estoppel effect of arbitration awards is not, in reality, a carved-out exception to normal collateral estoppel principles. The idea of entering into a contractual limitation was established by the Messinger Court in the context of a dispute arising from an arbitration between insurance carriers. Messinger, 43 N.Y.2d at 187, 401 N.Y.S.2d at 37. The Court recognized that arbitration hearings may be "summary, pro-forma proceeding[s]" and that the opportunity "for summary dispositions should not be inhibited by automatically according a binding estoppel effect to the first determination." Messinger, 43 N.Y.2d at 191, 401 N.Y.S.2d at 42. Hence, the Court concluded that in arbitration "the parties themselves can formulate their own contractual restrictions on carry-over estoppel effect." 43 N.Y.2d at 193, 401 N.Y.S.2d at 42. However, the Court cautioned that "[t]hey cannot, of course, impose similar limitations which would impair or diminish the rights of third persons." Messinger, 43 N.Y.2d at 194, 401 N.Y.S.2d at 42. This latter caution by the Court has been characterized as dicta particularly in view of two appellate division determinations that appeared to uphold agreements that imposed such a limitation on third parties. See Kerins v. Prudential Prop. & Cas., 185 A.D.2d 403, 585 N.Y.S.2d 637, 638(3rd Dept. 1992); also Matter of State Farm Ins. Co. v. Smith, 277 A.D.2d 390, 717 N.Y.S.2d 210 (2d Dept.

2000).

The Kerins decision, however, is particularly instructive: there the Court upheld the limitation on the preclusive effect of an arbitration award (agreed to in a master arbitration agreement) as to a third party, but not on strictly contractual grounds. Kerins, 185 A.D.2d at 404, 585 N.Y.S.2d at 639. Instead the Court's analysis focused on collateral estoppel principles. The Court observed that a collateral estoppel defense requires a showing inter alia of "a full and fair opportunity" to contest a prior determination. Where a limitation agreement exists, the Court concluded that the parties' "expectations" as to a limited estoppel effect could be an acknowledgment that they may not have "litigated vigorously." Kerins, 185 A.D.2d at 404, 585 N.Y.S.2d at 639 (internal quotation marks omitted). The import of the decision is clear: Such a showing of less-than-vigorous litigation, if established by a "practical inquiry into the realities of litigation," would preclude a collateral estoppel defense in any event. Id. (internal quotation marks omitted). Thus, in effect, the Court found that the limitation agreement at issue was valid against a third party because it was consistent with normal collateral estoppel principles. Indeed, this Court's reliance on Kerins in 2005 must be read as leaving the door open for further "practical

inquiry into the realities of litigation" which the Kerins Court indicated was the only way to determine the validity of a limiting agreement. Id. (internal quotation marks omitted).

Essentially, therefore, the sparse case law pertaining to limitation agreements indicates that limitation of the preclusive effect of certain arbitration awards is not a purely contractual restriction which may be invoked even where there has been a full and fair opportunity to contest a determination. Rather, it is a contractual creation that in cart-before-the-horse fashion reflects the parties' intentions not to litigate fully or vigorously in the arbitration. Messinger, 43 N.Y.2d at 193-194, 401 N.Y.S.2d at 42; Kerins, 185 A.D.2d at 404, 585 N.Y.S.2d at 639. Or, as the defendants assert, where such a limitation agreement is made before arbitration or in the arbitration agreement, it is an agreement reserving the parties' rights to not litigate fully and exhaustively in that arbitration without the risk of later being bound by a factual determination.

Consequently, the determinative factor as to the validity of a limiting agreement is not whether it is entered into before or after an arbitral award, but simply whether the agreement accurately reflects either the parties' expectations not to fully litigate issues, or the parties' acknowledgment that they did not fully litigate. Messinger, 43 N.Y.2d at 193, 401 N.Y.S.2d at 41

("consistent with the principles both of arbitration law and of claim and issue preclusion [...] appropriate clauses of limitation may be included [...] and postaward limiting agreements may be executed with respect to outstanding awards"). As such Messinger and its progeny stand for the proposition that an agreement cannot be used to thwart collateral estoppel principles. Moreover, clearly as a corollary, limiting agreements cannot diminish the rights of third parties where a collateral estoppel defense would normally be available based on the fact that an issue had been fully litigated. Messinger, 43 N.Y.2d at 194, 401 N.Y.S.2d at 42 ("[t]hey cannot, of course, impose similar limitations which would impair or diminish the rights of third persons"). The concurrence mischaracterizes the majority's position by stating that it "ignores th[e] language" of our 2005 decision which repeats the Messinger dicta that the "parties themselves can formulate their own contractual restrictions on carry-over estoppel effect." Messinger, 43 N.Y.2d at 194, 401 N.Y.S.2d at 42. Given the ineradicable link between that dicta and the Court's admonition that such a right cannot diminish the rights of third persons, it should be clear that the admonition is implicitly included in any decision, like our 2005 decision, that cites to the Messinger dicta; in other words that the right to "formulate contractual restrictions" is

not limitless.

In this case, as the defendants argued in their JNOV motion, evidence at trial established that Feinberg had a full and fair opportunity to litigate at arbitration the very same issues raised in his action against Mahoney Cohen, namely his reliance on the 1995 financial statements.¹ Facts developed at trial established that Feinberg had litigated the issues at arbitration fully, vigorously and exhaustively: that he was represented by a large law firm; that there was extensive pre-hearing discovery; that there were 18 days of hearings before a panel of three arbitrators; that 16 witnesses testified; that the depositions of most of the 34 deponents as well as 1,450 exhibits were

¹The concurrence's quibble, as part of its law of the case analysis, that this evidence was uncontested and therefore before the Court in 2005 misses the point. As stated above, in the procedural posture of the parties in 2005, the Court's sole focus as reflected in its short decision was whether Feinberg could amend his complaint to *sufficiently allege* that a limiting agreement was possible between him and Katz, and that under certain circumstances a limiting agreement could impose limitations on third parties. It does not avail the dissent to posit that, on the other hand, law of the case could be circumvented on the basis of "new" evidence at trial namely that "it became clear that the agreement Feinberg and Katz contemplated ... would have been directed solely at Mahoney Cohen." Just as it was known to the Court in 2005 that there had been full and exhaustive litigation, so it was known to the Court in 2005 that Feinberg's limiting agreement would have been directed solely at Mahoney Cohen. This is because Feinberg's legal malpractice action was based entirely on his claim that had he entered such a limiting agreement, his lawsuit against Mahoney Cohen would not have been dismissed.

introduced into evidence. Also established at trial was the fact that the arbitrators made specific and detailed findings denying Feinberg's claim of fraud in holding that he had full access to business and financial information, and that he had not relied on the 1995 financials in the purchase.

This should have been sufficient for the trial court to grant the defendants' JNOV motion. However, testimony at trial also established that the main objective of the limiting agreement contemplated by Feinberg and Katz was to interfere with the rights of a specific third party, Mahoney Cohen. Indeed, on summation, Feinberg's counsel, in endeavoring to show the jury that an agreement between the two enemies was a possibility because they both wanted to sue Mahoney Cohen, stated in relevant part: "It's a simple deal. It's, you know what, we can sue Mahoney Cohen. We can sue Mahoney Cohen and we're not going to allow Mahoney Cohen to use the arbitration award as collateral estoppel."

Nothing in the relevant case law supports Feinberg's argument as to the validity of a limitation agreement made after arbitration, after litigating the issues fully, vigorously and exhaustively, and where the agreement is directed at one third party after other third parties have asserted collateral estoppel defenses based on the arbitration award. Such a limitation

agreement would be nothing more than an egregious and unenforceable attempt to impermissibly thwart fundamental collateral estoppel principles. Consequently, since a limiting agreement would not have changed the outcome of Feinberg's lawsuit against Mahoney Cohen, the failure to advise Feinberg about a limiting agreement did not constitute a breach of the defendants' duty of care nor did it cause Feinberg's losses.

Accordingly, the judgment of the Supreme Court, New York County (Barbara Jaffe, J.), entered June 17, 2011, upon a jury verdict, awarding plaintiff the total sum of \$10,576,012.70, and bringing up for review an order of the same court and Justice, entered June 7, 2011, which, inter alia, denied defendants' motion for judgment notwithstanding the verdict or, in the alternative, granting a new trial, should be reversed, on the law, with costs, and the motion for judgment notwithstanding the verdict, granted. The Clerk is directed to enter judgment in favor of the defendants dismissing the complaint. The appeal from the order should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Moskowitz and Renwick, JJ.
who concur in a separate Opinion by
Moskowitz, J.

MOSKOWITZ, J. (concurring)

This appeal requires us to consider whether a post-arbitration agreement that eliminates the rights of nonparties to assert collateral estoppel would have been enforceable. Because the doctrine of law of the case is applicable, but exceptional circumstances exist involving policy considerations underlying post arbitration limiting agreements, including the opportunity for collusion, the potential agreement between plaintiff and his former business partner would not have been enforceable.

This dispute arises largely from an arbitration that occurred in the late 1990's between plaintiff and his former business partner, Norman Katz, over plaintiff's buy out of Katz's share in their business. Specifically, in June 1996, plaintiff and Katz executed a Purchase Agreement in which plaintiff agreed, inter alia, to acquire a majority interest in I. Appel and to purchase certain loans made to the company by Katz and Katz's son. The transaction closed with a partial payment that relied on financial information from certain financial documents from 1995 (the 1995 financials). Within 45 days after the closing, Mahoney Cohen, certified public accountants, were supposed to determine the value of the company (determination of value or DOV) so that the parties could calculate the final share price. Mahoney did not prepare the DOV in that time frame, however, and

Katz sought to enjoin its completion, as well as to lock in the Purchase Agreement share price based upon the 1995 financials.

Mahoney ultimately completed the DOV in October 1996. The DOV revealed that the company's "previously stated inventory values [were] grossly overstated resulting in a difference in net worth of approximately \$10 million".

Plaintiff commenced arbitration to rescind the Purchase Agreement. In the arbitration, plaintiff asserted, inter alia, that he had relied upon I. Appel's 1995 financial statement when making his decision to purchase Katz's interest and loans to I. Appel. On November 22, 1999, the arbitrators ruled against plaintiff, concluding that plaintiff had not reasonably relied upon the 1995 financials when making his decision.

Subsequently, Katz and plaintiff considered entering into a post-arbitration agreement to limit the collateral estoppel effect of the award to allow plaintiff to sue Mahoney Cohen, but apparently abandoned discussions and did not enter any limiting agreement. At around the same time, plaintiff requested that his lawyers advise him regarding the collateral estoppel effect of the arbitral award vis-à-vis Mahoney Cohen and whether a limiting agreement could protect his claims. However, defendants never rendered this advice. Instead, the firm advised plaintiff that they could not represent him against Mahoney Cohen and, seven

days before the statute of limitations against Mahoney Cohen was to expire, defendants officially terminated their representation of plaintiff.

On May 19, 2000, plaintiff sued Mahoney Cohen for, inter alia, accounting malpractice. The trial court dismissed this suit on the grounds of collateral estoppel because of the arbitral findings, namely that plaintiff had not relied on the 1995 financials. This Court affirmed (*see I. Appel Corp. v Mahoney Cohen & Co., CPA*, 294 AD2d 196 [2002]), noting that, in the arbitration "plaintiff has had an extensive, full and fair opportunity to litigate the reliance issue" (*id.* at 197).

Plaintiff then commenced this action against his lawyers for legal malpractice for, inter alia, failing to advise him that a limiting agreement with Katz could have avoided the collateral estoppel effect of the arbitral award. The trial court initially dismissed the action. Plaintiff then moved to vacate the order and for leave to amend the complaint.

Plaintiff's lawyers, the defendants here, opposed, arguing that an agreement to limit collateral estoppel, after the completion of the arbitration, does not apply to a nonparty asserting a collateral estoppel defense in a subsequent litigation with one of the parties. The motion court disagreed and, in 2005, a different panel of this Court also disagreed:

"Defendants have not established, as a matter of law, that even if plaintiff and Katz had entered into an agreement limiting the collateral estoppel effect of the arbitration award, the Mahoney Cohen lawsuit would nonetheless have been dismissed on collateral estoppel grounds"

(17 AD3d 275, 276 [2005]). That 2005 panel also held that "[i]n circumstances involving arbitration, the parties themselves can formulate their own contractual restrictions on the carry-over estoppel effect" (*id.*). This Court subsequently denied defendants' motion for leave to appeal to the Court of Appeals.

The case eventually proceeded to trial. The jury concluded that: (1) there was an attorney-client relationship between the parties in January and February 2000, (2) defendants failed to exercise the degree of care, skill and diligence an ordinary member of the legal profession would commonly use by failing to advise plaintiff that a limiting agreement between plaintiff and Katz would likely be effective to bar Mahoney Cohen's collateral estoppel defense, and (3) if defendants had so advised plaintiff, he and Katz would have entered into a limiting agreement. The jury also found Mahoney Cohen guilty of accounting malpractice, but found that plaintiff's own negligence was also a "substantial factor" in causing his losses. Thus, the jury apportioned fault as 60% defendant lawyers, 40% plaintiff. Relying on this Court's

2005 decision, the trial court denied defendant's motion for a JNOV.

On this appeal, post-trial, defendants again argue that the jury verdict cannot stand because any post-award agreement to limit Mahoney Cohen from asserting collateral estoppel would not have been enforceable. Unfortunately for defendants, this Court has already passed on this issue and rejected defendants' position in the 2005 decision.¹ This circumstance is all the more unfortunate because the enforceability of *post-award* limiting agreements remains an open issue with serious policy implications. In New York, unless the parties to the arbitration agree otherwise, a judicially confirmed private arbitration award has collateral estoppel effect (see *Clemens v Apple*, 102 AD2d 236 [1984], *affd* 65 NY2d 746 [1985]; *Matter of American Ins. Co. [Messinger-Aetna Cas. & Sur. Co.]*, 43 NY2d 184 [1977]).²

Parties to an arbitration agreement may, however, limit the collateral estoppel effect of an award as between themselves by

¹ Defendants' argument during the 2005 appeal relied on the assumption that any post-award limiting agreement would be invalid to impair the rights of third parties.

² A minority of jurisdictions take the opposite view (see e.g. *Vandenberg v Superior Court*, 21 Cal 4th 815, 832, 982 P2d 229, 239 [1999] [California Supreme Court decided 4-2, under California law, that arbitration awards will *not* have collateral estoppel effect unless parties agree]).

including a contractual restriction in their agreement (*Messinger* at 193). They can also restrict the ability of *nonparties* to assert collateral estoppel, at least so long as the parties enter into the limiting agreement prior to the arbitration (see *Kerins v Prudential Prop. & Cas.* 185 AD2d 403 [1992] [court upheld stipulation in contract that no award made in arbitration will have estoppel impact]). There are policy reasons behind allowing the parties to an arbitration to agree to limit the collateral estoppel effect of an award against a nonparty. First, while arbitration can be a cheaper, faster alternative to litigating in court, it can also be an imprecise and truncated proceeding that does not allow for full development of the record. Parties may want this quick and informal procedure when the stakes are not high or where there is only one issue between them:

"An agreement to arbitrate particular claims reflects each party's conclusion that the immediate stakes make it preferable to avoid the delay and expense of court proceedings, and instead to resolve the matter between themselves without resort to the judicial process. Under such circumstances, each party is willing to risk that the arbitration will result in a 'final' and 'binding' defeat with respect to the *submitted claims*, even though the party would have won in court, and even though the arbitrator's errors must be accepted without opportunity to review"

(*Vandenberg v Superior Court*, 21 Cal 4th 815, 832, 982 P2d 229, 239 [1999]; see also *Messinger* at 191 ["the voluntary choice of

the arbitration forum necessarily imports acceptance of the more summary, informal and less structured procedures which characterize arbitration as compared with judicial litigation”]).

However, while arbitration may provide advantages in terms of time and money, “these same features can be serious, unexpected disadvantages if issues decided by the arbitrator are given leveraged effect in favor of strangers to the arbitration” (*Vandenburg*, 21 Cal 4th at 832, 982 P2d at 239). Thus, in New York, parties may agree ahead of time to limit the collateral estoppel effect of the arbitral award (see *Kerins* at 404, see also *Matter of State Farm Ins. Co. v Smith*, 277 AD2d 390, 391 [2000]). Because arbitration is a creature of contract, allowing the parties to limit the collateral estoppel effect of an arbitral award comports with the policies underlying freedom of contract and fulfils the expectations of the parties.

However, whether parties may agree to limit the scope of an arbitration decision *after it is rendered* so that *nonparties* cannot use it to assert collateral estoppel presents a more difficult question. Conflicting policies are at work. On the one hand, freedom of contract dictates that parties to an arbitration should be free to contract to the scope of that arbitration, including the reach of the arbitral decision. If parties are not free to limit collateral estoppel effect in

relation to nonparties, there could be a chilling effect on the agreement to engage in arbitration at all and with it the efficient disposition of private controversies. Finally, it could result in injustice to hold a party to a decision for all intents and purposes, when the proceeding that engendered that decision may have been truncated or limited to a narrow purpose.

On the other hand, if the arbitrator actually and necessarily decided the issue and the party against whom estoppel is invoked had full incentive and opportunity to litigate the matter, there are policy considerations militating in favor of giving collateral estoppel effect. First, there is the danger of inconsistent rulings. Worse, one could possibly envision a situation where a court dismisses a lawsuit against a nonparty because of collateral estoppel, only to have that dismissal undermined when the parties to the arbitration enter into a post-award limiting agreement. This is clearly unworkable and, in the commercial context where certainty and stability are paramount concerns, would wreak havoc. Moreover, where, as here, parties litigate fully without a limiting agreement, they have no legitimate expectation that there will be another chance to litigate the same issue again. Most important, to allow a losing side to limit the collateral estoppel effect against nonparties by somehow obtaining a post-award limiting agreement from the

prevailing party invites abuse. A party could simply offer a former adversary money or other consideration for a release from collateral estoppel that would then allow claims against nonparties (who are perhaps deep pockets) that the arbitrators' finding would otherwise preclude. This sort of collusion is to be discouraged, not encouraged.

Here, plaintiff does not dispute that he had a full opportunity to present his version of the facts to the arbitrators, and this Court has so found (*I. Appel v Mahoney Cohen & Co.*, CPA, 294 AD2d 196 [2002], *supra*). Discovery lasted more than 18 months and continued during the arbitration. The panel held 18 days of hearings that included testimony from 16 witnesses. The panel received more than 1,450 exhibits, containing many thousands of pages. After this full blown proceeding, the arbitrators made a determination that plaintiff had not relied on the 2005 financials. Given the complete nature of the arbitration, the factual finding the arbitrators made was fully informed. Under these circumstances, there would be no inherent unfairness in giving that decision full collateral estoppel effect against plaintiff. Indeed, to do otherwise would not only give plaintiff a second bite at the apple, but would invite collusion, especially as Katz presumably could assert the same malpractice claims against Mahoney Cohen.

Here, the parties agree that the issue of whether plaintiff and Katz could have entered into a limiting agreement is purely one of law. That legal issue was part and parcel of the 2005 decision. First, the 2005 decision specifically held that “[i]n circumstances involving arbitration, the parties themselves can formulate their own contractual restrictions on the carry-over estoppel effect” (17 AD3d at 276). The majority ignores this language. In addition, without a decision accepting the viability of post-award limiting agreements, the case could not have proceeded.

A prior decision on an appeal constitutes law of the case and is conclusive on subsequent appeals, except in extraordinary circumstances, such as a change in the law by the Court of Appeals or when the prior panel has overlooked a controlling decision (*see Sea Trade Mar. Corp v Hellenic Mut. War Risks Assn. [Bermuda Ltd.]*, 79 AD3d 601 [2010], *lv dismissed and denied* 17 NY3d 783 [2011]; *see also Welch Foods v Wilson*, 262 AD2d 949, 950 [1999] [“the doctrine of law of the case is not an absolute mandate on the court, since it may be ignored in extraordinary circumstances vitiating its effectiveness as a rule fostering orderly convenience. . . The error sought to be corrected must, however, be so plain that it would require the court to grant a reargument of a cause”] [internal quotation marks omitted]).

Dicta from the Court of Appeals decision in *Messinger v Aetna*, 43 NY2d 184 (1977) is not directly controlling precedent, such that the 2005 decision was "so plain that it would require the court to grant a reargument of the cause." In *Messinger*, the Court of Appeals noted that parties to an arbitration "cannot, of course, impose similar limitations which would impair or diminish the rights of third persons. In this sense there is a real difference between situations of issue preclusion between the same parties and issue preclusion between different parties" (43 NY2d at 194). However, *Messinger* did not involve a limiting agreement, much less one post-dating an award. Nor did *Messinger* involve a full-blown arbitration. Thus, the facts were so different that *Messinger* cannot be considered direct precedent on the issue as it presents here.

Also, contrary to the majority's view, law of the case is applicable here because, the issue the 2005 Court decided was one of law³ and is the same issue before this Court now. The cases the majority cites are irrelevant because they involved factual issues at different procedural junctures. *191 Chrystie LLC v Ledoux* (82 AD3d 681 [2011]) involved a question of fact as to whether the defendant met the criteria to be a protected tenant

³ The parties agree that the issue of the validity of post-award limiting agreements is one of law.

under a "Qualified Occupant Regulation." This issue arose because of a counterclaim defendant interposed after this Court rendered its first decision in the case. *Tenzer, Greelblatt, Fallon & Kaplan v Capri Jewelry* (128 AD2d 467 [1987]) involved an issue of fact concerning counterclaims for legal malpractice.

However, it would appear that the 2005 decision mistakenly applied dicta in *Messinger, Kerins* and *State Farm* that parties may enter into agreements to limit the carry-over collateral estoppel effect of an arbitral award, at least before that award is rendered, to a post-award limiting agreement. The 2005 decision does not discuss the opportunity for collusion or even competing policy considerations. Thus, the decision inadvertently held that the parties to an arbitration could enter into a limiting agreement after that arbitration is over. Standing alone, this error would not be enough to depart from applying law of the case.

However, extraordinary circumstances do exist to ignore the law of the case. No decision in New York had ever before held that parties to an arbitration could, after that arbitration was over, limit the collateral estoppel effect as to nonparties. By interpreting prior precedent as allowing post-arbitration limiting agreements, the 2005 decision in effect created the circumstances by which defendants became liable for failing to

advise Feinberg properly.

Alternatively, law of the case is inapplicable where new evidence emerges later in the proceeding (see *Sea Trade*, 79 AD2d at 602). The evidence adduced at trial ultimately did narrow the question from the issue this Court had to contemplate in 2005. Defendants' argument during the 2005 appeal relied on the assumption that any post-award limiting agreement would be invalid to impair the rights of third parties and thus this Court held "[i]n circumstances involving arbitration, the parties themselves can formulate their own contractual restrictions on the carry-over estoppel effect" (17 AD3d at 276). At trial, it became clear that the agreement Feinberg and Katz contemplated was not a general agreement to limit the collateral estoppel effect, but would have been directed solely at Mahoney Cohen. It also emerged that at or before the time Feinberg claims he and Katz would have negotiated a limiting agreement, Mahoney Cohen and others had already either asserted collateral estoppel as defenses in separate lawsuits or otherwise indicated an intent to use collateral estoppel as a defense.

Because these facts emerged during the trial, the 2005 decision necessarily did not consider whether a post-award agreement eliminating the right of *one particular* nonparty to assert collateral estoppel is enforceable. Nor did the 2005

decision consider whether this sort of limiting agreement would be enforceable where the parties enter into it after others have asserted collateral estoppel as defenses in subsequent litigation.

A limiting agreement under these circumstances would not be enforceable. To allow parties, who litigated tooth and nail in an arbitration, both of whom have potential claims against a particular nonparty, to single out that nonparty in a limiting agreement is an obvious invitation to collusion. That the parties to the arbitration only started to consider this limiting agreement after or at the same time several nonparties had already asserted collateral estoppel, smacks of collusion so great it borders on the ridiculous.

The majority's approach makes little sense given our well-established rules for collateral estoppel. The majority appears to say that so long as parties have the opportunity to litigate an issue fully in the arbitration, then no limiting agreement would ever be enforceable, no matter when the parties enter into it (i.e., prior to *or* post award). But, if parties do not have a chance to litigate an issue completely, then collateral estoppel is not available anyway. The majority has thus collapsed the rule for limiting agreements into the rule for collateral estoppel.

Moreover, to avoid law of the case, the majority's analysis presumes that, in *this* case, the trial established for the first time that Feinberg had litigated the issues at arbitration "fully, vigorously and exhaustively." The majority advocates that this circumstance should have been sufficient for the trial court to grant a JNOV. However, that the arbitration between Feinberg and Katz was a full blown proceeding has never been a contested issue of fact in this case. The parties conceded the point long ago and this Court passed on it in 2002 in the related litigation (*see I. Appel Corp.*, 294 AD2d at 196-197 ["The issue of whether plaintiff Feinberg had relied on the 1995 financial statement prepared by defendants was fully litigated in an arbitration proceeding brought by Feinberg . . . [who] had an extensive, full and fair opportunity to litigate the reliance issue"]).

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

ENTERED: SEPTEMBER 11, 2012


CLERK