

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 4, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzairelli, Saxe, Manzanet-Daniels, Clark, JJ.

14781 Jerry Beinstein, et al., Index 153575/13
Plaintiffs-Respondents,

-against-

Gagan Navani, et al.,
Defendants-Appellants,

Michael M. Amtzis, Esq.,
PLLC., et al.,
Defendants.

Herrick, Feinstein LLP, New York (David Feuerstein of counsel),
for appellants.

Pollack & Sharan, LLP, New York (Adam Paul Pollack of counsel),
for respondents.

Order and judgment (one paper), Supreme Court, New York
County (Saliann Scarpulla, J.), entered February 28, 2014,
declaring that plaintiffs are entitled to receive defendants
Navani and Sahi's down payment for the subject condominium unit
in the amount of \$365,000 and that after payment of the down
payment amount to plaintiffs the contract is null and void, and
dismissing defendants' counterclaim for specific performance,

affirmed, without costs.

Plaintiffs are the sellers, and defendants Navani and Sahi the purchasers, under a purchase and sale agreement relating to a condominium apartment. Plaintiffs seek a declaratory judgment that defendants breached the agreement by failing to close despite plaintiffs' full performance. Defendants seek specific performance on the basis that their refusal to schedule a closing was justified by plaintiffs' failure to satisfy a condition precedent to closing. The dispute relates to the apparently uncontested facts that, before the parties executed the contract, the board of managers had determined that the firestopping throughout the building, including in all of the individual apartments, was inadequate and that, at the time the contract was executed, the board was still in the midst of a significant project to complete the firestopping.

Defendants claim that they did not learn of the firestopping situation until July 27, 2012, more than a month after they signed the contract. On August 12, 2012, defendants' lawyer sent a letter to plaintiffs' counsel stating that "based on the life-safety and other issues surrounding 416 Washington Street and the fact that such substantive issues were never properly disclosed to them beforehand, my clients . . . have made the decision not

to go forward with their prospective purchase of Unit 5E." The letter also demanded the return of defendants' contract deposit. Over the next two months, the parties apparently had some discussions about resolving the impasse, while the escrow agent continued to hold the deposit. Finally, by letter dated October 17, 2012, plaintiffs' counsel advised defendants' counsel that "[i]t is clear from our conversations and your clients' actions that the above referred to Purchaser is no longer interested in proceeding to closing and purchasing the Unit. If the Purchasers are prepared to close please contact me immediately and we can proceed accordingly." By letter dated October 26, 2012, defendants' counsel responded, stating:

"This letter will serve to confirm that my clients . . . are prepared to purchase the above reference [sic] unit from your clients.

"We are ready to set a closing date as soon as: 1) we receive the information set forth in my e-mail (attached) to the Managing Agent; 2) we complete a re-inspection of the Unit (at my clients' expense, of course, and after authorization from your client; [sic] and 3) after the updated title search has been received and reviewed."

The email referenced in the letter and attached thereto included a request for, inter alia, "confirmation and evidence that the firestopping work has been completed on Unit 5E . . . including permits, paid invoices, and municipal sign off (if any)."

Plaintiffs' counsel responded to the letter the very same day, stating:

"Although you have indicated that your clients . . . are prepared to purchase the above Unit, this is to confirm that I have advised you that I do not know under what agreement you are prepared to close, as your clients breached the Contract of Sale dated June 18, 2012. While our clients are amenable to negotiate a new Contract of Sale for the premises, at the present time no agreement has been reached for the sale of the premises in question. Your indication that my partner's October 17, 2012 correspondence somehow undoes your clients' breach of contract, it is rejected [sic]. My partner's correspondence indicates that our client would be willing to close this matter but certainly not under the terms of the conditions [sic] of the Contract of Sale dated June 18, 2012.

"If your clients wish to negotiate the terms of a new Contract of Sale, as my partner's October 17, 2012 letter indicates, our clients will be willing to entertain same."

Defendants' counsel responded by insisting that plaintiffs breached the contract by failing to ensure that the unit was adequately protected from fire. However, he acknowledged that his clients had since been told that the firestopping had been completed, and reiterated their willingness to set a closing date upon receipt of the information and documentation demanded in the email appended to the October 26, 2012 letter. Plaintiffs' counsel replied in a letter in which he rejected the notion that completion of the firestopping project was a condition precedent to plaintiffs' performance.

After plaintiffs formally demanded that the escrow agent release the contract deposit to them, and upon defendants' counter-demand that he continue to hold the deposit in escrow, plaintiffs commenced this declaratory judgment action. Defendants filed a lis pendens and asserted a counterclaim for breach of contract and specific performance. The counterclaim was based on the lack of firestopping in the unit, which, as alleged by defendants, violated the New York City Building Code and rendered the unit unsuitable for legal occupancy. Defendants did not identify any particular provision of the contract that plaintiffs had breached.

Before any discovery had been conducted, plaintiffs moved for summary judgment. They argued that the contract explicitly provided that the unit was being sold as is, that it contained no representations as to the unit's condition other than what was expressly set forth therein, and that it expressly provided that they had no obligation to restore, alter or repair the premises. Plaintiffs contended that, even after they offered to close despite the purported cancellation in August 2012, defendants' insistence on confirmation that the firestopping had been completed constituted an effort to impose a new condition on the purchase that was not contained in the contract that had been

executed by the parties.

In opposition, defendants invoked, for the first time, paragraph 6(c)(ii) of the contract, and asserted that plaintiffs had breached the contract by not complying with it. That paragraph provided:

"It is a condition of Purchaser's obligation to close title hereunder that . . . Any written notice to Seller from the Condominium (or its duly authorized representative) that the Unit is in violation of the Declaration, By-Laws or rules and regulations of the Condominium shall have been cured. If the cost of compliance . . . exceeds an aggregate of \$50,000.00, Seller may cancel the contract unless Purchaser chooses to accept a credit of \$50,000.00 and close subject to the violations."

Defendants argued that plaintiffs breached the clause because the condominium's bylaws and rules and regulations required that "all valid laws, zoning ordinances and regulations of all governmental bodies having jurisdiction thereof shall be observed," and New York City Building Code (Administrative Code of City of NY) §27-345 expressly required the unit to be properly firestopped.

The IAS court granted plaintiffs' motion and declared that plaintiffs were entitled to payment of the contract deposit. The court held that defendants repudiated the contract in August 2012 when they informed plaintiffs that they did not intend to perform under the contract because of the firestopping issue. Defendants

offered no evidence that the unit or the building was in violation of the New York City Building Code, and, in any event, information about the lack of firestopping had been available to defendants, and they had decided, nonetheless, to accept the unit as is. The court further stated that since time had not been declared to be of the essence, plaintiffs were entitled to an opportunity to cure the firestopping situation before defendants summarily declared the contract cancelled. Finally, the court held that defendants' conditional acceptance of plaintiffs' offer in October 2012 to schedule a closing "can not be considered a retraction of the repudiation."

On appeal, defendants argue that they did not repudiate the contract because, given plaintiffs' purported breach of paragraph 6(c)(ii), which required them to clear the unit of all violations of the condominium's governing documents, they had no obligation to perform. Even if they did repudiate the contract, they posit, they effectively retracted the repudiation when they conditionally accepted plaintiffs' October 2012 offer to schedule a closing. They claim that their insistence on receiving certain information, including proof that the firestopping work had been completed, did not constitute an imposition of new terms, but rather an exercise of rights that were already guaranteed by the

contract. Finally, defendants assert that, at the very least, the court should have denied summary judgment without prejudice to renewal of the motion upon the completion of discovery.

Plaintiffs argue that defendants repudiated the contract because they presented no evidence that, as required by paragraph 6(c)(ii), the condominium had notified them of any violations of its governing documents. Further, they contend that defendants failed to retract their repudiation because they conditioned the scheduling of a closing on the receipt of information to which they were not entitled.

Defendants' appeal is entirely dependent upon the soundness of their position that plaintiffs were contractually obligated to complete the firestopping work in the unit. To answer that question it is necessary to consider the language in the contract, for that is what controls the parties' rights and responsibilities. We are guided by the standard rules of contractual interpretation, which provide that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Further, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract

for the parties under the guise of interpreting the writing”
(*Vermont Teddy Bear Co. v 538 Madison Realty Co.*,
1 NY3d 470, 475 [2004] [internal quotation marks omitted]).

The clause of the contract that defendants assert was breached by plaintiffs is paragraph 6(c)(ii). That clause is very clear and specific as to what it required of plaintiffs. It obligated them to clear the unit of “[a]ny written notice to Seller from the Condominium (or its duly authorized representative) that *the Unit* is in violation of *the Declaration, By-Laws or rules and regulations of the Condominium*” (emphasis added). Defendants claim that the clause was breached because the condominium’s rules and regulations required that “all valid laws, zoning ordinances and regulations of all governmental bodies having jurisdiction thereof shall be observed” by each unit owner. They further assert that included among those laws and regulations is New York City Building Code (Administrative Code)§ 27-345, which requires firestopping of “[c]oncealed spaces.”

Defendants’ argument has several flaws. First, defendants fail to demonstrate that the condominium delivered a written notice to plaintiffs that they were in breach of the condominium’s governing documents for any reason. Instead, they

rely on a letter dated January 23, 2012, five months before the agreement was executed, in which the condominium's board of managers updated all of the condominium's unit owners on the condominium's finances and on certain anticipated and ongoing construction work. A section entitled "Fire stopping" stated, in pertinent part:

"The fire stopping work in the corridors is largely complete. The next, and hopefully final phase, is to fire stop all units. In order to do so, Bone Levine must inspect and perform scopes in all units to determine the work to be done. We must do the fire stopping work to address code violations and deficient conditions."¹

This letter cannot possibly constitute the type of notice contemplated by paragraph 6(c)(ii). First, it was not delivered to plaintiffs for the purpose of informing them that they had breached the declaration, by-laws or rules and regulations of the condominium, but rather to inform them of the status of the firestopping, as well as various other condominium matters. Significantly, it did not instruct plaintiffs to cure any such breach, as one would ordinarily expect such a notice to do. Contrary to the dissent's position, paragraph 6(c)(ii) clearly refers to violations that the condominium expected plaintiffs to

¹ Defendants claim that they never saw this letter while performing their due diligence.

cure, not those that the condominium agreed to address itself. This is confirmed by the provision allowing plaintiffs to cancel the contract (or give defendants a credit) if the cost to them of curing exceeded \$50,000. Moreover, the letter did not state, as the contract clause required, that the subject unit itself was in violation of the Building Code. It alluded generally to code violations, but it is impossible to tell whether the unit itself had been the subject of a notice of violation issued by the Department of Buildings. Indeed, it can be presumed that, had such a notice of violation been issued, defendants would have presented a copy of the notice, which is a matter of public record, in connection with this motion. To interpret the letter as the "written notice" described in paragraph 6(c)(ii) would contravene the rules of contract construction outlined above. Accordingly, defendants cannot establish that plaintiffs had not fulfilled a condition precedent to their own performance.

Second, defendants point to no provision in the contract that justifies their initial purported reason for canceling the contract, which was that it threatened the safety of themselves and their children. Nor do they claim that plaintiffs somehow prevented them from learning of the firestopping issue. To the contrary, the contract itself referred expressly to a July 19,

2011 notice from the board of managers that discussed the status of the then ongoing firestopping project. This was sufficient to place defendants on notice of a potential issue that might have given them pause to execute an agreement in which they acknowledged they were accepting the unit as is.

Because defendants had no right to insist that the firestopping issue be resolved as a condition to closing, their "retraction" of the purported repudiation was ineffective. In order to be effective, a retraction of a contract repudiation must be bona fide (see *Bykowsky v Eskenazi*, 2 AD3d 115 [1st Dept 2003]). Defendants' acceptance of plaintiffs' offer to schedule a closing was not bona fide, because it was conditioned on plaintiffs' provision of documents and information establishing to defendants' satisfaction that the firestopping had been completed. We disagree with the dissent that the letter from defendants' counsel conditionally retracting the repudiation creates an issue of fact as to whether it was bona fide. That letter unquestionably adhered to defendants' position, which had supported the initial repudiation, that plaintiffs had a contractual obligation to ensure proper firestopping in the apartment before delivering the deed. The clear implication of the letter was that, if plaintiffs could not establish to

defendants' complete satisfaction that the firestopping work had been performed, defendants would once again refuse to close. As stated above, this position was untenable, and clearly, contrary to the dissent's view, sought to insert an additional material term or condition into the contract. Again, nothing in the contract required plaintiffs to perform any firestopping, and plaintiffs were entitled to view defendants' continued insistence on proof that they had done so as an justified refusal to perform under the agreement.

All concur except Saxe, J. who dissents in a memorandum as follows:

SAXE, J. (dissenting)

In this appeal, we must determine whether defendant purchasers anticipatorily repudiated their contract with plaintiffs for the sale of a residential condominium unit, and, if they did, whether they effectively retracted that repudiation. In my view, the purchasers did not repudiate the contract by insisting that firestopping work be completed and approved before they closed on the sale, but, even if they did, they effectively retracted the earlier repudiation.

Facts

On June 18, 2012, the parties entered into a contract for the sale of a residential condominium unit; the purchasers' deposit of 10% of the \$3,650,000 purchase price was held by the sellers' then-attorney as escrowee. The contract scheduled the closing to take place on or about August 1, 2012, but there was no "time of the essence" provision.

A rider to the contract, which provided that it governed in the case of any inconsistency with the contract, recited that the purchasers represented that they had viewed the premises and the sale was "as is," and, further, disclaimed any representation by the sellers about the physical condition of the premises. Nevertheless, paragraph 6(c)(ii) of the contract made it "a

condition of Purchaser's obligation to close" that "[a]ny written notice to Seller from the Condominium. . .that the Unit is in violation of the Declaration, By-Laws or rules and regulations of the Condominium shall have been cured."

The rules and regulations of the condominium required compliance with all valid laws and regulations of all governmental bodies, and further required that violations be eliminated by and at the expense of the unit owners or the board of managers, whichever had the obligation to maintain or repair such portion of the property. In this regard, the New York City Building Code (see Administrative Code of City of NY § 27-345) requires firestopping to prevent the spreading of interior fires.

On January 23, 2012, approximately five months before the parties entered into the contract, the condominium board of managers had notified the unit owners in writing that the firestopping in the corridors was largely complete and that the next phase was to firestop all units "to address code violations and deficient conditions." Purchaser Navani contends that it was only after they entered into the contract that the purchasers learned that the subject unit still needed firestopping (from a conversation with the building's superintendent on July 27, 2012) and only learned of the board's January 23, 2012 letter after

that.

The closing did not take place on the contract's closing date of August 1, 2012.

On August 3, 2012, the purchasers' counsel by letter demanded the return of the deposit, and advised that, "based on the life-safety and other issues surrounding [the building] and the fact that such substantive issues were never properly disclosed to them beforehand," her clients "ha[d] made the decision not to go forward with the prospective purchase."

The sellers' counsel responded by email on August 6, 2012, asserting that the return of the deposit was not authorized under the contract and rejecting as false the allegations in the letter from the purchasers' counsel received August 3rd. However, rather than declaring that the purchasers' decision not to go forward with the purchase was a breach justifying the sellers' termination of the contract, he encouraged the purchasers to relent and go through with the transaction by asserting that

"the Seller expects the Purchaser to comply with the contract of sale and close title to the Unit once the Board's [firestopping] work is completed. If the Purchaser thereafter fails or refuses to still close title in this matter, the Seller will take appropriate steps to protect itself including declaring Time of the Essence for the Purchaser."

Thereafter, by letter dated August 13, 2012, the purchasers'

counsel requested the return of the deposit, asserting that the sellers had not fulfilled their obligation under the contract to deliver the unit in a safe condition. No response from the sellers or their counsel appears in the record.

Apparently, the firestopping of the unit was completed some time in October 2012.

After further discussions between counsel, by letter dated October 17, 2012, the sellers' counsel advised the purchasers' counsel that "[i]t is clear from our conversations and your clients' actions that the above referred to Purchaser is no longer interested in proceeding to closing and purchasing the Unit." However, as in his August 6 email, he did not declare the contract terminated, did not propose that the parties renegotiate the deal and enter into a new contract, and did not express an understanding that the purchasers were proposing a new contract. Instead, he again sought to encourage the purchasers to close, saying, "If the Purchasers are prepared to close please contact me immediately and we can proceed accordingly."

The purchasers' counsel responded by letter on October 26, 2012, confirming that her clients were ready to purchase the unit, stating:

"We are ready to set a closing date as soon as:

1) we receive the information set forth in my e-mail (attached) to the Managing Agent; 2) we complete a re-inspection of the Unit (at my client's expense, of course, and after authorization from your client); and 3) after the updated title search has been received and reviewed. (I should be receiving title today, if not Monday).

"Please contact me upon receipt of this letter so that we can work together to collect information and set a closing date."

The attached email requested that the condominium board provide various items of information regarding construction and repairs in the building and indicate whether there would be assessments to pay for them. The information requested included information about the schedule to firestop the other units and "confirmation and evidence that the firestopping work [on the unit] has been completed. . .including permits, paid invoices, and municipal sign off (if any)."

The sellers' counsel responded immediately, by a different attorney at the law firm. This letter stated:

"Although you have indicated that your clients . . . are prepared to purchase the above Unit, this is to confirm that I have advised you that I do not know under what agreement you are prepared to close, as your clients breached the Contract of Sale dated June 18, 2012. While our clients are amenable to negotiate a new Contract of Sale for the premises, at the present time no agreement has been reached for the sale of the premises in question. Your indication that my partner's October 17, 2012 correspondence somehow undoes your client's breach of Contract, it is rejected [sic]. My partner's correspondence indicates that our client would be willing to close this matter but

certainly not under the terms of the conditions [sic] of the Contract of Sale dated June 18, 2012.

"If your clients wish to negotiate the terms of a new Contract of Sale, as my partner's October 17, 2012 letter indicates, our clients will be willing to entertain same."

The purchasers' counsel reiterated her clients' willingness to set a closing date upon receipt of the information requested, and the sellers' counsel denied that completion of the firestopping work was a condition precedent to his clients' obligation to close. Thereafter, the sellers' counsel demanded that the escrowee release the deposit to them, while the purchasers' counsel demanded that he continue to hold it in escrow. The sellers then commenced this action seeking a declaration that they were entitled to the purchasers' deposit, based on the purchasers' refusal to close, which constituted a repudiation that rendered the contract null and void. The purchasers seek a contrary declaration and specific performance of the contract of sale.

The sellers moved for summary judgment on their complaint dismissing the defenses and counterclaim for specific performance, maintaining that the contract stated that the unit was "as is" and disclaimed any representations about the condition of the unit. In opposition, the purchasers argued that

in view of the board's January 23, 2012 letter to the unit owners advising of the need to complete firestopping "to address code violations and deficient conditions," and the condominium rules and regulations incorporating by reference the Building Code firestopping requirement, paragraph 6(c)(ii) of the contract entitled the purchasers to a cure of the violation as a condition to closing.

In reply, the sellers claimed that the purchasers had notice of the firestopping issue when they signed the contract, pointing to a footnote to the buyer's rider, which mentioned a July 19, 2011 notice from the board. They submitted that notice with their reply; it addressed assessments for construction work and stated, "The biggest unknown remains the fire stopping project. By [its] very nature, fire stopping costs remain uncertain until the work is actually performed."

Supreme Court granted the sellers' motion and declared the sellers entitled to the deposit, finding that the purchasers had repudiated the contract on August 3, 2012 by refusing to close because of the firestopping issue. The court reasoned that the purchasers had failed to offer evidence that the unit or the building were in violation of the Building Code, and that, in any event, based on the January 23, 2012 board notice to the unit

owners and the July 19, 2011 notice referring to the firestopping work, information about the lack of firestopping was available to the purchasers when they decided to accept the unit as is.

Finally, the motion court found that the purchasers' counsel's October 26, 2012 communication was not a retraction of the repudiation.

Discussion

Resolution of this appeal turns on the issues of repudiation and retraction of a repudiation.

The first question is whether the information the purchasers belatedly received regarding the need for firestopping in the building -- including in the subject unit -- entitled them to insist that the firestopping work in the unit be completed before they closed on the sale. Framed another way, we must decide whether the need for firestopping work constituted a condition of the purchaser's obligation to close, under paragraph 6(c)(ii) of the sale contract. That paragraph made it "a condition of Purchaser's obligation to close" that "[a]ny written notice to Seller from the Condominium . . . that the Unit is in violation of the Declaration, By-Laws or rules and regulations of the Condominium shall have been cured."

The majority concludes that the purchasers had no right to

delay closing under that provision, reading paragraph 6(c)(ii) of the sale contract as limited to situations where the condominium gives a unit owner a notice of violation requiring the unit owner to take action to cure the violation, and inapplicable to violations the condominium board chooses to address itself. It reasons that the board's January 23, 2012 letter notifying unit owners of the progress and future plans for firestopping work did not constitute written notice to the sellers from the condominium that their unit was in violation of the condominium's governing documents.

I disagree. While the board's letter was not denominated a notice of violation to the sellers as individual owners of their particular unit, it in effect constituted notice to them, as to all unit owners, that each unit, along with the entire building, was in violation of the condominium's rules, in that it violated a City Department of Buildings regulation requiring firestopping (Administrative Code § 27-345). I fail to see how the added language in contract paragraph 6(c)(ii), allowing the seller to cancel the contract if the cost of curing a violation is more than \$50,000 and the purchaser declines to accept a credit of \$50,000 and close subject to the violation, establishes that the type of notice of violation to which this contract provision

applies is limited to those in which the board requires the unit owner to undertake the cure.

The majority's contention that "it is impossible to tell whether the unit itself had been the subject of a notice of violation issued by the Department of Buildings" misses the point. The entire building, including all the units, was in violation of the regulation and thus required curative work. It is of no moment that the sellers were not personally served with a notice of violation specifically regarding their apartment. That the board opted to cure the violation throughout the building, rather than demanding that unit owners independently perform the necessary work within their own units, does not justify a conclusion that the sellers' unit was not in violation of the regulation.

This analysis merely addresses what type of document could constitute written notice to the sellers from the condominium that their unit was in violation of a regulation. It does not distort the meaning of contract paragraph 6(c)(ii) or otherwise contravene the rules of contract construction.

Once the purchasers learned that a condition existed that they were entitled to insist be cured before they closed on the sale, they properly informed the sellers of that fact. Doing so

was not an anticipatory breach of the contract.

However, even accepting the assumption that the purchasers repudiated the contract on August 3, the sellers, through their responsive August 6 communication, and in their October 17 communication, indicated their continued willingness to close, and encouraged the purchasers to do so. In the face of a repudiation, the sellers had the option to terminate the contract and declare the purchasers in breach; however, instead of terminating it, they elected to treat the contract as valid and to seek a date for closing (see *Deforest Radio Tel. & Tel Co. v Triangle Radio Supply Co.*, 243 NY 283, 292 [1926]; *Bykowsky v Eskenazi*, 2 AD3d 115 [1st Dept 2003]; *AG Props. of Kingston, LLC v Besicorp-Empire Dev. Co., LLC*, 14 AD3d 971 [3d Dept 2005]). While continuing to treat the contract as valid does not forfeit the right to bring an action for anticipatory breach if the nonrepudiating party fails to perform or to retract the repudiation (see *AG Properties*, 14 AD3d at 974), it allows the repudiating party the opportunity to retract its repudiation, at least until such time as the nonrepudiating party changes its position.

The central focus of this analysis is whether the purchasers' October 26 response to the sellers' October 17 letter

constituted an acceptance of the sellers' invitation to proceed on the contract, and a retraction of their earlier repudiation.

An effective retraction of a repudiation must be both timely and bona fide (*Bykowsky v Eskenazi*, 2 AD3d at 115). To be timely, a retraction must have been issued without the nonrepudiating party's having materially changed its position, to its detriment, in reliance on the repudiation (see *Dembeck v Hassler*, 248 AD2d 148, 149 [1st Dept 1998], *lv denied* 92 NY2d 805 [1998]; *Silverman Perlstein & Acampora v Reckson Operating Partnership*, 303 AD2d 576, 577 [2nd Dept 2003]).

The retraction here was timely. Notably, the purchasers' October 26 letter preceded the later communication of the same date from the sellers' attorney, advising that the sellers considered the repudiation to be final. The sellers failed to adduce evidence to show that they had materially and detrimentally changed their position in reliance on the initial claimed repudiation before the time of the purchasers' October 26 letter.

On the question of whether the October 26 retraction was bona fide, the sellers contend that the purchasers attempted to add conditions to the contract, rendering the retraction ineffective. Similarly, the majority holds that the purchasers'

October 26 letter cannot constitute a bona fide retraction of their August 3 repudiation, because the purchasers continued to adhere to their condition that the firestopping work be completed, which in the majority's view was not justified by the contract.

However, in my view, this mischaracterizes the requests in the purchasers' October 26 letter and misperceives their import. To be clear: the purchasers indicated their willingness to close as soon as they obtained information (from the board) regarding additional costs that might be assessed against the unit based on work performed after the contract was executed; a reinspection of the premises, at their own expense, reasonable since work was completed on the unit after execution of the contract; and the results of the already ordered new title search, also reasonable, considering the possibility of new liens related to the newly performed work. In my view, the expressed need to await receipt of these documents did not constitute an imposition of new terms or conditions such as would make a purported retraction ineffective.

It has been held in other jurisdictions that a retraction is ineffective if it seeks to add terms or conditions to the contract (*see Ratliff v Hardison*, 219 Ariz 441, 445, 199 P3d 696,

700 [Ariz Ct App 2008]; *Anderson Excavating & Wrecking Co. v Sanitary Improvement Dist. No. 177*, 265 Neb 61, 69, 654 NW2d 376, 383 [2002]; *Gilmore v Duderstadt*, 125 NM 330, 336, 961 P2d 175, 181 [NM Ct App 1998]; *Vahabzadeh v Mooney*, 241 Va 47, 51, 399 SE2d 803, 805 [1991]; *Pichignau v City of Paris*, 264 Cal App 2d 138, 142 [Cal Ct App 1968]; *Vision Entertainment Worldwide, LLC v Mary Jane Prods., Inc.*, 2014 WL 5369776, *6, 2014 US LEXIS 154099, *16-17 [SD NY 2014]). While there is no appellate authority in this State clearly setting out this rule, I accept for these purposes that New York authorities on the general subject of the retraction of repudiation (see e.g. *Bykowsky*, 2 AD3d 115) support the equivalent rule, that the attempted imposition of new terms or conditions by a party purporting to retract a repudiation should be considered a lack of good faith.

However, the type of non-material or non-essential information that the purchasers raised in their October 26th letter, namely, an updated inspection and title search, and documentation to be obtained from the board, does not amount to the type of new contract terms and conditions that the rule contemplates.

The cases discussing the imposition of new contract terms in a retraction refer to terms that are indisputably material. For

example, in *Pichignau v City of Paris* (264 Cal App 2d 138), the plaintiff's employer sought to retract its repudiation of her employment contract by offering to reemploy her but expressly without reinstating her contract or employing her for the remainder of its term, and purported to give itself the option to discharge her on short notice and the right to insist that her contract had been terminated at the time of her initial discharge. In *Gilmore v Duderstadt* (125 NM 330, 961 P2d 175), the repudiating purchaser of a business sought to require the payment of an additional \$200,000 for his retraction. And in *Ratliff v Hardison* (219 Ariz 441, 199 P3d 696), while the court primarily held the purported retraction ineffective because it was ambiguous, it was also noted that the repudiating party had not indicated his willingness to meet the nonrepudiating seller's purchase price.

The rule that the retraction of a repudiation must not seek to add terms or conditions therefore should be understood to mean that the party attempting to retract a repudiation may not seek to add essential, material or significant terms or conditions to the contract. It is not required that the retraction exactly mirror the contract the way an acceptance must reflect the offer; there is no prohibition against the attempted addition of non-

material or non-essential provisions, so long as there is a manifestation of a clear intent to treat the contract as valid and enforceable and a willingness to perform.

The purchasers' requests here did not materially deviate from the essential obligations under the contract of sale or add significant ones, and required virtually no additional performance by the sellers. It was undisputed that the firestopping work in the building had already been completed; the purchasers sought nothing more than information and documentation related to that work, including information regarding additional costs that might be assessed against the unit based on work performed after the contract was executed. This information and documentation was to be provided by the condominium board manager, and did not impose any obligation on the sellers. The purchasers also sought a reinspection of the premises, but only with the sellers' consent and at their own expense, presumably with respect to work that was completed after the execution of the contract, and their counsel indicated that a new title search, possibly in order to disclose any liens related to the newly performed work, had already been ordered and would be received by her imminently.

Relief for a claimed breach of contract will be denied

unless the breach is material or so substantial as to strongly tend to defeat the object of the contract (see e.g. *Bisk v Cooper Sq. Realty, Inc.*, 115 AD3d 419 [1st Dept 2014]; *Smolev v Carole Hochman Design Group, Inc.*, 79 AD3d 540, 541 [1st Dept 2010]), and a repudiation may be found where the new terms the repudiating party seeks to add to the contract are material or essential (see e.g. *IBM Credit Fin. Corp. v Mazda Motor Mfg. [USA] Corp.*, 92 NY2d 989, 993 [1998] [untenable interpretation of "key" contract provision]; *Richmor Aviation, Inc. v Sportsflight Air, Inc.*, 82 AD3d 1423, 1425 [3d Dept 2011] [no "essential" term repudiated]). A similar standard should apply to determining whether a repudiation has been retracted.

A purported retraction is rendered ineffective by the proposed addition of a *material* term to the contract (see *Vahabzadeh v Mooney*, 241 Va at 51, 399 SE2d at 805 [purported retraction rendered ineffective by addition of a "tax-free exchange" as condition for settlement]; *Ratliff v Hardison*, 219 Ariz at 446, 199 P3d at 701 [buyer who re-affirmed that he still wanted to obtain the land but was "unwilling to meet his obligation to pay for it" did not make bona fide retraction of his repudiation]). However, if the repudiating party makes a "positive and unequivocal statement of his desire to once again

abide by the contract" (*Ratliff v Hardison*, 219 Ariz at 446, 199 P3d at 701), that bona fide retraction is not negated by a request that is non-material and non-essential and does not alter the material terms of the extant contract.

None of the proposals in the purchasers' October 26 letter evinced bad faith so as to justify a conclusion that as a *matter of law* their retraction of their August 3 repudiation was not bona fide. To the extent the sellers may raise a question as to the purchasers' intent in seeking these additional items, that would merely present an issue of fact as to whether the purchasers' retraction of their repudiation was bona fide.

The majority also reasons that the October 26 letter by the purchasers' counsel cannot constitute a bona fide retraction of their repudiation, because it continued to adhere to what the majority considers an improperly imposed condition to closing, the requirement that the firestopping work first be completed. But, on October 26 there was no question that the firestopping work *had already* been completed; so, in that letter, the completion of the work clearly was not meant to be a condition to closing. All the purchasers indicated they would need before closing was an essentially negligible amount of easily obtained additional information. Nothing in the letter constituted a

continued imposition of a condition to closing.

Finally, the responsive October 26 communication from the sellers' counsel, purporting to refer to a prior termination of the contract, was disingenuous, amounting to an ineffective attempt to disavow the effect of his partner's communications of October 17 and August 6. Neither of those earlier communications in which the sellers' counsel explicitly expressed a desire to set a new closing date made the deal contingent on the execution of a new contract, indicated that renegotiation of the deal would be necessary, or terminated the contract. Indeed, the threat in the sellers' August 6 email to declare time of the essence could only have made sense if the sellers continued to consider the contract to be still in effect.

For the foregoing reasons, I dissent.

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

ENTERED: AUGUST 4, 2015

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CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Kapnick, JJ.

14724 Elizabeth Hasbrouck Anderson, Index 150407/13
Plaintiff-Respondent,

-against-

Edmiston & Company, Inc.,
Defendant-Appellant.

Greenfield Stein & Senior, LLP, New York (Paul T. Shoemaker of
counsel), for appellant.

Schwartz & Perry, LLP, New York (Brian Heller of counsel), for
respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.),
entered December 20, 2013, which denied defendant's motion to
dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously
affirmed, without costs.

Defendant is a New York corporation specializing in the
sale, charter, management, and new construction of yachts around
the world. Defendant employed plaintiff as a Charter Assistant
from July 2008 until November 8, 2012, when allegedly she "was
effectively terminated . . . as a result of her complaint of
gender discrimination." According to the allegations in
plaintiff's complaint, plaintiff's supervisor harbored a
discriminatory animus against women and made numerous sexist and
misogynist remarks, both directed at her and in her presence.

Plaintiff's allegations suffice to state claims of gender-based employment discrimination (see *Serdans v New York & Presbyt. Hosp.*, 112 AD3d 449, 450 [1st Dept 2013]; *Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]) and retaliation under the New York City Human Rights Law (see *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]; *Albunio v City of New York*, 67 AD3d 407 [1st Dept 2009], *affd* 16 NY3d 472 [2011]). In particular, according her the benefit of every possible favorable inference (see *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Askin*, 110 AD3d at 622), plaintiff has adequately alleged that she was terminated, for purposes of stating the foregoing claims.

Plaintiff has also adequately alleged a claim for hostile work environment by alleging that her supervisor routinely made deprecatory, vulgar, and offensive remarks about women, including

that they were useful only for administrative services and sex
(see *Salemi v Gloria's Tribeca, Inc.*, 115 AD3d 569, 569-570 [1st
Dept 2014]; *Gaffney v City of New York*, 101 AD3d 410, 410 [1st
Dept 2012], *lv denied* 21 NY3d 858 [2013]).

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

ENTERED: AUGUST 4, 2015

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CLERK

at an administrative expungement hearing by a fair preponderance of the evidence (see *Matter of Lee TT. v Dowling*, 87 NY2d 699, 703 [1996]). “Upon judicial review, the inquiry is limited to whether the administrative determination is supported by substantial evidence in the record” (see *Matter of Valentine v New York State Cent. Register of Child Abusers & Maltreatment*, 37 AD3d 249, 250 [1st Dept 2007]).

OCFS’s denial of petitioner’s request to have the indicated report marked unfounded and sealed is supported by substantial evidence. The record does not support petitioner’s claim that OCFS and the New York City Administration for Children’s Services relied on prior unsubstantiated reports of abuse or maltreatment.

We have considered petitioner’s other arguments and find them unavailing.

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

ENTERED: AUGUST 4, 2015



CLERK

consider the relevant factors (*Islamic Republic of Iran v. Pahlavi*, 62 NY2d at 479, 478 NYS2d 597, 467 NE2d 245). While it gave weight to the factual findings of the district court, it also made its own factual findings and did not apply the federal legal standard. The court considered where the underlying events took place; whether Singapore was an adequate alternative forum; the location and availability of the evidence and witnesses; the potential hardship to defendants; and the applicability of Singapore law (see *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], cert denied 469 US 1008 [1985]).

The complaint sufficiently alleges a breach of the indemnification provision of the parties' agreement, including plaintiff's performance thereunder. The claim of breach of the implied covenant of good faith and fair dealing is not duplicative of the breach of contract claim, since it arises out of different facts (see *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 [1st Dept 2011]). The complaint

sufficiently alleges fraudulent inducement (see *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]).

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

ENTERED: AUGUST 4, 2015

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

resources, and provided a “reasoned elaboration” of the basis for their approval of the program (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007]). Accordingly, its determination was not arbitrary and capricious and was not affected by an error of law (see *id.*; *Akpan v Koch*, 75 NY2d 561, 570 [1990]; see also *Matter of Cambridge Owners Corp. v New York City Dept. of Transp.*, 118 AD3d 634 [1st Dept 2014]).

Contrary to petitioner’s contention, the municipal respondents properly examined the citywide program as a whole because individual review could fail to disclose the overall impact of the program (see CEQR Technical Manual at 2-2 to 2-3; *Matter of Cambridge Owners Corp.*, 118 AD3d at 634). Thus, each individual Bike Share station did not necessitate its own environmental review. The record also establishes that the municipal respondents considered alternate sites for this particular bike station, and rejected them for various reasons, including pedestrian congestion, safety, parking issues, and failure to comport with the siting guidelines (see *C/S 12th Avenue LLC v City of New York*, 32 AD3d 1, 5 [1st Dept 2006])

Even assuming that the program was misclassified as Unlisted instead of being designated a Type I action, as petitioner

claims, respondents properly found that no significant environmental impact will result from the program and thus no environmental impact statement was required (*see Matter of Hells Kitchen Neighborhood Assn. v City of New York*, 81 AD3d 460, 462 [1st Dept 2011], *lv denied* 16 NY3d 712 [2011]). Thus, any alleged misclassification would constitute harmless error since it was nonprejudicial (*see Matter of Rusciano & Son Corp. v Kiernan*, 300 AD2d 590, 590-91 [2d Dept 2002], *lv denied* 99 NY2d 510 [2003]; *Matter of Jaffe v RCI Corp.*, 119 AD2d 854, 855 [3d Dept 1986], *lv denied* 68 NY2d 607 [1986]).

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

ENTERED: AUGUST 4, 2015


CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Clark, Kapnick, JJ.

14970 James Gregware, et al., Index 108013/07
Plaintiffs-Respondents,

-against-

The City of New York,
Defendant-Appellant,

Burtis Construction Co. Inc.,
Defendant-Appellant-Respondent,

Abelardo Da-Silva,
Defendant-Respondent.

Simpson Thacher & Bartlett LLP, New York (George S. Wang of counsel), for appellant.

Mauro Lilling Napraty LLP, Woodbury (Deidre E. Tracey of counsel), for appellant-respondent.

Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, New York (Ben Rubinowitz of counsel), for Gregware respondents.

Thomas M. Bona, P.C., White Plains (James C. Miller of counsel), for Abelardo Da-Silva, respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 15, 2013, modified, on the law and the facts, to grant the City's motion for summary judgment on its cross claim, and to remand the matter for a new trial on the issue of the apportionment of liability as between the City and Burtis, and otherwise affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur except Tom, J.P. and Sweeny, J. who dissent in an Opinion by Sweeny, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Sallie Manzanet-Daniels
Darcel D. Clark
Barbara R. Kapnick, JJ.

14970
Index 108013/07

x

James Gregware, et al.,
Plaintiffs-Respondents,

-against-

The City of New York,
Defendant-Appellant,

Burtis Construction Co. Inc.,
Defendant-Appellant-Respondent,

Abelardo Da-Silva,
Defendant-Respondent.

x

Defendants The City of New York and Burtis Construction Co. Inc. appeal from the judgment of the Supreme Court, New York County (Eileen A. Rakower, J.), entered October 15, 2013, after a jury trial, apportioning liability 65% against the City of New York and 35% against Burtis Construction Co. Inc., awarding plaintiffs damages in the principal amounts of \$2.2 million for past pain and suffering, \$3.8 million for future pain and suffering, \$700,000 for past loss of services and consortium and \$425,000 for future loss of services and consortium, and bringing up for review the orders, same court and Justice,

entered July 12, 2013 and July 15, 2013, which, among other things denied defendants' posttrial motions to set aside the verdict and the City's posttrial motion for summary judgment on its cross claim for contractual indemnification against Burtis.

Simpson Thacher & Bartlett LLP, New York (George S. Wang, Shannon K. McGovern and Jamie H. Somoza of counsel), Corporation counsel New York (Zachary W. Carter of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Deidre E. Tracey and Matthew W. Naparty of counsel), for appellant-respondent.

Gair, Gair, Conason, Steigman, MacKauf, Bloom & Rubinowitz, New York (Ben Rubinowitz and Richard M. Steigman of counsel), for Gregware respondents.

Thomas M. Bona, P.C., White Plains (James C. Miller and Thomas M. Bona of counsel), for Abelardo Da-Silva, respondent.

MANZANET-DANIELS, J.

This appeal arises from a judgment entered in favor of plaintiffs following a multivehicle collision on the West Side Highway. The jury determined that the City of New York and Burtis Construction Co. were negligent and had acted with reckless disregard for the safety of others in setting up an unsafe lane closure on the West Side Highway for a short-term construction project, and that their negligence or recklessness was a substantial factor in causing plaintiff James Gregware's significant and debilitating injuries.

On this appeal, we consider, among other issues, whether plaintiffs' counsel's remarks during summation tainted the proceedings to such an extent that the City was deprived of a fair trial.¹ We also address whether the apportionment of damages as between the City and Burtis was supported by the evidence. While the tenor of counsel's remarks was regrettable, we do not believe that the cumulative effect of the remarks deprived defendant of a fair trial. Nonetheless, because we find that the 65%-35% apportionment of liability as between the City and Burtis is against the weight of the evidence, we remand for a new trial solely as to the apportionment of damages between the

¹Defendant Burtis does not raise this issue on appeal.

City and Burtis.

The Accident

The City, which owns the West Side Highway, has a nondelegable duty to ensure that it is maintained in a safe condition. The City hired Burtis to repair a seam in the roadway in the northbound lanes of travel. The contract between the City and Burtis contained a plan for the Maintenance and Protection of Traffic (MPT). The MPT governed the manner in which the work was to be performed and the safety measures to be undertaken for closing lanes of traffic. The MPT stated that "[a]ll maintenance and protection of traffic work shall conform to the New York State Manual of Uniform Traffic Control Devices [MUTCD] except as modified by the plans and/or the proposal."

At the time of the accident, the left and center lanes of the northbound side of the West Side Highway were closed, leaving only the right lane available for passing traffic. Plaintiffs' expert testified that the manner in which the lanes had been closed was "totally inadequate," and a "severe deviation from the standards." Using a diagram from the MPT, he described the minimum standards for a two-lane closure on a three-lane highway: multiple and specific signs of the impending lane closures prior to the first barrel, including "roadwork one mile," "left two lanes closed one half mile," "left two lanes closed 1500 feet,"

and an arrow board directing drivers to merge; additional signs as the tapered and staggered lane closure proceeds; and lighted barrels marking the lane closures, with the first barrel appearing 3,630 feet before the expansion joint under repair. Plaintiffs' expert further testified that because defendants failed to comply with these standards, drivers were forced to suddenly, and without warning, merge to the right lane.

On May 20, 2006, at approximately 1:00 a.m., a two-car accident occurred approximately 200 feet south of the taper. No changes to the lane closure set up were made following the accident, and work resumed on the roadway.

At approximately 3:00 a.m., while the left two lanes of traffic were still closed, a five-car pileup occurred in the area of the earlier accident. A taxi operated by Mohammad Kamrul Hassan that was merging from the left to center lane was rear-ended by a vehicle in the left lane driven by Omar Albahri. The Hassan vehicle in turn struck the car in front of him in the center lane, driven by Romulo Romero-Valazero. Following the collisions, the motorists exited their respective vehicles and were standing in the roadway. Plaintiff Gregware, coming over a blind hill in the road, tried to stop but rear-ended the Albahri vehicle. Plaintiff exited his vehicle to exchange insurance information, and was struck and knocked to the ground when the

vehicle driven by defendant Abelardo Da-Silva rear-ended his vehicle.

Plaintiff's Injuries

Plaintiff James Gregware suffered severe and debilitating injuries to his legs, knees, pelvis, shoulder, and ribs, including fractures of the tibia, fibula, and pelvis, and numerous tears of the ligaments supporting both knees, requiring that he spend three weeks in the trauma unit at St. Vincent's Hospital. Plaintiff underwent the first of five surgeries to stabilize his knees on May 30, 2006. On June 5, 2006, he was transferred to Warburg Nursing Home for rehabilitation.

Following removal of the casts, his legs were swollen and severely atrophied. Plaintiff was fitted with braces and had to relearn how to walk. Two physical therapists worked on his knees on a daily basis to break up scar tissue formation. After discharge from the nursing home, on August 12, 2006, plaintiff commenced outpatient physical therapy for three hour sessions three times per week.

Plaintiff underwent further surgery on his left knee on January 22, 2007, and on his right knee on February 5, 2009. On May 23, 2011, he underwent a further surgery on the left knee. Following each surgery, he was required to resume use of braces and to re-start physical therapy.

Plaintiff, who remains in considerable pain, requires anti-inflammatory and, at times, narcotic medication. His knees remain unstable and he will eventually develop osteoarthritis. Over the course of his life, he will require four total knee replacement surgeries, two on each leg. Plaintiff, 41 years of age at the time of the accident, will suffer pain in his knees for the rest of his life due to the extent of the injuries.

The City's Witnesses.

Officer Joseph Pagano and Dr. Ali Sadegh testified on behalf of the City. At Pagano's EBTs, four and five years post-accident, he professed to having no independent memory whatsoever of the accident or the surrounding circumstances. Pagano could not recall, inter alia, whether he had interviewed any of the drivers or passengers of the vehicles, whether he had spoken to or canvassed the area for any other witnesses, whether there was ongoing construction in the vicinity of the accident, whether any roadway lanes were closed at the time, whether there were any cones or video messaging boards, whether any photographs or measurements had been taken, or whether any of the injured parties had been outside of their vehicles at the time they were hit. When presented with his own memo book and asked if it refreshed his recollection of the accident or his investigation, he stated "no."

Nonetheless, at trial, two years following his last EBT and seven years after the accident, Pagano was able to remember details concerning the accident. Not only did he purport to remember the accident itself, he remembered where he had parked his patrol car, and the distance from his vehicle to the accident scene. He testified as to the configuration of the vehicles after the accident and to having seen a construction sign near the accident.

He admitted that his memory at the time of his EBTs "was not as good," explaining that review of documents and discussing the case "helped [him] recall information." On cross, Pagano testified that he had a "clearer recollection" at trial than he had at the time of the EBT. He testified that he had met with counsel for the City approximately 5 times before trial and had visited the accident scene with counsel on two occasions. Defense counsel had shown him photos of the accident scene and "pointed things out."

The only other live witness presented by the City was Dr. Ali Sadegh, a professor of mechanical engineering and an expert in accident reconstruction. Although Dr. Sadegh claimed to have sufficient knowledge in the field of medicine to provide the jury with certain medical opinions, including conclusions gleaned from reading X-rays and CT scans, he conceded that he had only audited

one medical school course at Columbia University. He also professed to having learned how to read X-rays and CT scans from two courses he had taken with the Society of Automotive Engineers.

Plaintiff's Counsel's Summation

In the course of his 125-page summation, plaintiffs' counsel argued, inter alia, that the City and Burtis took "shortcuts" in setting up the construction project on the West Side Highway, resulting in several accidents including the one that had caused serious and debilitating injuries to plaintiff James Gregware. Counsel further argued that the City and Burtis had sought to avoid liability for their own negligence by blaming one another, as well as the other motorists involved in the accident.

Counsel noted that Officer Pagano professed to have no memory of the accident at his EBTs, yet claimed to remember the accident in detail during trial. He argued that it was implausible that Officer Pagano's memory had suddenly improved after the passage of seven years. He pointed out that Officer Pagano had met with the City's attorneys on five occasions, and stated, "It is infuriating to me that they would go this far to try to change the testimony of an officer who stated under oath hundreds of times that he didn't remember, that he didn't know," and accused Pagano of being "fed information by his attorneys,"

who "are telling him what happened." Continuing in this vein, counsel stated, "I'm trying to tell you because it is so wrong for an officer to swear to tell the truth and tell less than the truth under oath, it's wrong." He also characterized Officer Pagano as "one of New York City's wors[t]."

While pointing out inconsistencies in the testimony of the City inspectors, counsel stated "So when we focus on what [the City's counsel] Mr. Wang was saying, credibility? Credibility, Mr. Wang? Really? Your own witness lied." He also, in the course of disparaging the qualifications of the City's expert, Dr. Sadegh, referred to him as a "phoney baloney."

While questioning the credibility of the defense's witness, plaintiffs' counsel remarked, "[W]hen you evaluate the believability and credibility, that is all that we have as lawyers. When we come into a courtroom such as this, before her Honor and we present proof to you, all we can do is do it honestly, do it fairly and do the right thing."

In response to Burtis's counsel's statement that one of the motorists testified to having seen five signs warning of the merge on the highway, plaintiffs' counsel pointed out that the motorist had actually testified to seeing one sign, whereupon he stated, "Now a lawyer stood before you and said, he said five signs. He said five signs. That's what I have a problem with."

When we stand up here, it's our credibility . . . credibility of the witnesses is important. But the credibility of the lawyer is equally important."

In addition, during his summation, plaintiffs' counsel referred to counsel for the City as "Wang and his gang."

Mid-way through plaintiffs' counsel's summation, the City made a motion for a mistrial based on what it characterized as "personal attacks on counsel," comments with "racial overtones," and plaintiffs' counsel's vouching for his own credibility. After reviewing the transcript, the court denied the motion.

Deliberations and Verdict

Following a six-week trial and five days of deliberations, the jury returned a verdict in favor of plaintiffs and against the City and Burtis, finding the City to be 65% responsible and Burtis to be 35% responsible for plaintiff's injuries. The jury also found that the City and Burtis had acted with reckless disregard for the safety of others. The jury awarded plaintiff \$2.2 million for past pain and suffering, and \$3.8 million for future pain and suffering. Plaintiff wife was awarded \$700,000 for past loss of services and \$425,000 for future loss of services and consortium.

The trial court denied defendants' posttrial motions to set aside the jury's verdict on liability and damages, finding ample

evidence to support the liability finding and the damages verdict. The court entered judgment in plaintiffs' favor on October 15, 2014.

Discussion

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. There was ample evidence, including witness and expert testimony, that the narrowing of the highway due to lane closures, without adequate warning, was a proximate cause of plaintiff James Gregware's injuries.

Both the City and Burtis owed plaintiff a duty of care. The City has a nondelegable duty to maintain its roadways in a reasonably safe condition (*see Thompson v City of New York*, 78 NY2d 682, 684 [1991]), and Burtis, which was performing work on the highway pursuant to a contract with the City, was responsible for providing, installing and maintaining traffic safety devices. There was sufficient evidence that Burtis's narrowing of the roadway, without adequate warning to drivers, created or exacerbated a dangerous condition (*see Belmer v HHM Assoc., Inc.*, 101 AD3d 526, 529 [1st Dept 2012]).

There was sufficient evidence that neither plaintiff nor DaSilva was negligent. Defendant DaSilva offered a nonnegligent explanation for rear-ending plaintiff's car – namely, the lack of

any warning of lane closures or the need to slow down (*cf.* *Collins v City of New York*, 105 AD3d 631, 632-633 [1st Dept 2013] [operation of DOE van, and not tapers, was a proximate cause of the plaintiff's injuries, where there was no evidence that the DOE van was unable to safely merge], *lv denied* 22 NY3d 854 [2013]). Nor was there conclusive evidence that DaSilva was speeding. Similarly, there was no evidence that plaintiff was speeding, nor was there any evidence that his vehicle's collision with a stopped car was a proximate cause of his injuries.

On a prior appeal in this action, we merely held that the drivers of the cars involved in the initial accident did not cause Da-Silva's vehicle to hit plaintiff's vehicle (see 94 AD3d 470 [1st Dept 2012]).

However, the jury's apportionment of 65% liability to the City was against the weight of the evidence, in light of the evidence that Burtis was responsible for setting up and maintaining the traffic pattern alleged to have caused plaintiff Gregware's accident (see *Lizden Indus., Inc. v Franco Belli Plumbing & Heating & Sons, Inc.*, 95 AD3d 738, 738 [1st Dept 2012] [apportionment of 75% fault to the defendant was contrary to the weight of the evidence where a co-defendant "performed the work" at issue]; *Wellington v New York City Tr. Auth.*, 79 AD3d 547, 547-48 [1st Dept 2010] [jury's apportionment of 70% of liability

against Transit Authority was against the weight of the evidence where the evidence showed that a co-defendant was more at fault])).

At trial, it was established that a team of Burtis workers, overseen by foreman Mario D'Abruzzo, transported, installed, maintained, and removed all of the construction equipment and traffic control devices near the accident site. D'Abruzzo's team set up the traffic pattern, including the taper and the layout of cones and barrels. Ruben Davydov, the only representative of the City on-site, observed the traffic pattern and looked for an "obvious problem." He disavowed any responsibility for setting up lane closures or ensuring compliance with the contract provisions regarding placement of traffic control devices. The verdict apportioning 65% of liability to the City is against the weight of the evidence where, at most, the City "fail[ed] to find and correct a dangerous condition created by others" (*Gannon Personnel Agency v City of New York*, 57 AD2d 538, 540 [1st Dept 1977] [apportionment of 65% liability to the City was contrary to the weight of the evidence where faulty plumbing by a contractor caused a gas explosion and record supported the inference that the City had actual knowledge of potential danger created by the improper gas piping and failed to take proper protective action through its on-site inspector, who permitted the gas to be turned

back on]).

The Court Properly Charged the Jury

Contrary to defendants' argument, there was sufficient evidence to support the court's "reckless disregard" charge as to the City and Burtis, including evidence of a prior accident at the same location shortly before plaintiff's accident. Following the earlier accident, neither the City nor Burtis took any action to correct the dangerous condition created by the improper lane closures. The jury was free to determine that this conscious decision constituted an act of unreasonable character in disregard of a known or obvious risk, namely, that another accident would occur (*see Detrinca v DeFillippo*, 165 AD2d 505 [1st Dept 1991] [plaintiff sufficiently alleged reckless disregard on the part of defendant garage where the record showed that there was inadequate lighting in the garage, insufficient signage, and previously reported vehicle accidents in the garage]). There was evidence that the City, which was contractually required to provide an engineer in charge and project manager to inspect the project, took "short cuts" in its oversight of the roadway. Further, the evidence showed a disregard for the many safety requirements set forth in the contract and the MPT.

The court did not err in declining to charge that DaSilva

was speeding, given the inconclusive evidence on the issue. Nor was it error for the court to decline to charge that plaintiff was presumptively at fault in rear-ending a vehicle, given the lack of evidence that this collision was a proximate cause of plaintiff's injurie.

Plaintiffs' Counsel's Summation

We next turn to the issue of whether a new trial is warranted in light of plaintiffs' counsel's inflammatory remarks during summation.

It is well settled that trial counsel is afforded wide latitude in presenting arguments to a jury in summation (see *Califano v City of New York*, 212 AD2d 146, 154 [1st Dept 1995]). During summation, an attorney "remains 'within the broad bounds of rhetorical comment in pointing out the insufficiency and contradictory nature of a plaintiff's proofs without depriving the plaintiff of a fair trial" (*Selzer v New York City Tr. Auth.*, 100 AD3d 157, 163 [1st Dept 2012] [citation omitted]). However, an attorney may not "bolster his case . . . by repeated accusations that the witnesses for the other side are liars" (*Clarke v New York City Tr. Auth.*, 174 AD2d 268, 277 [1st Dept 1992]; see e.g. *Berkowitz v Marriott Corp.*, 163 AD2d 52, 53-54 [1st Dept 1990] [counsel's conduct, including "engag(ing) in an unfair and highly prejudicial attack upon the credibility and

competence of defendants' expert witnesses and attorneys," referring to the experts repeatedly as "hired guns" brought in to "fluff up the case," warranted a new trial]).

Although the City failed to object to the bulk of the challenged comments during summation, the City moved for an immediate mistrial based on comments impugning defense counsel, the reference to "Wang and his gang," and plaintiffs' counsel's allegedly vouching for his own credibility. We find that although some of the comments were highly inflammatory, they did not "'create a climate of hostility that so obscured the issues as to have made the trial unfair'" (*Wilson v City of New York*, 65 AD3d 906, 908 [1st Dept 2009] [citation omitted]). The jury had ample reason to question the testimony of Officer Pagano, lessening the danger that they were improperly influenced by plaintiff's counsel's remarks.

Plaintiffs' counsel was certainly entitled to express skepticism regarding Officer Pagano's ability to recall details about the accident scene. It strains credulity that the officer would suddenly recollect details concerning the accident when he had been unable, during the course of two prior EBTs, to recall anything regarding the accident, even after counsel attempted to refresh his recollection using his own memo book. A witnesses's recollection does not generally improve with age, but becomes

less vivid; counsel was entitled to suggest that the officer's sudden "recollection" was instead attributable to numerous trial prep sessions. In light of Pagano's admission that his own memo book was not useful in refreshing his recollection, and his complete inability to offer any other reasonable explanation for his radically improved memory, plaintiffs' counsel properly asked the jury during summation to question the officer's credibility and the source of his knowledge about the accident (see *Seltzer*, 100 AD3d at 163 [counsel entitled to argue that the opposing party's "account of the accident did not make sense, pointing out the insufficient and contradictory nature of his testimony"]).

We do not perceive comments referring to the City's counsel as "Wang and his gang" as having improper racial overtones. Rather, the remark appeared to be a reference to the many lawyers from Mr. Wang's firm who participated in the trial. The comment was made in the context of explaining to the jury that at his EBT Pagano had been represented by other attorneys, "not Wang and his gang."

The City's assertion that plaintiffs' counsel vouched for his own credibility is a distortion of the record. To the extent that plaintiffs' counsel employed the word "credibility" in commenting on the defense's characterization of evidence, such comments were responsive to the defense's argument concerning one

of the witness's specific recollections.

Questioning the credibility of the City's witnesses and referring to them as "liars" were highly improper. The remarks were, however, isolated and constituted fair comment on the evidence (*see Nieves v Riverbay Corp.*, 95 AD3d 458, 459 [1st Dept 2012]). While the tenor of counsel's remarks was, at times, regrettable, we do not believe that the cumulative effect of the remarks deprived defendant of a fair trial.

Damages for Past and Future Pain and Suffering

The awards of \$2.2 and \$3.8 million for past and future pain and suffering, respectively, do not deviate from what is considered reasonable compensation (*see Hernandez v New York City Tr. Auth.*, 52 AD3d 367 [1st Dept 2008] [award of \$2.5 for past pain and suffering and \$3 million over 24 years for future pain and suffering appropriate where the plaintiff suffered severe injuries to her legs, along with less severe injuries to arm, shoulder and ankle, was in the hospital for three months, underwent five operations and will require at least one other in the future, and remained in pain]; *Carl v Daniels*, 268 AD2d 395 [1st Dept 2000] [\$2.3 million for past and \$2.5 million for future pain and suffering appropriate for a plaintiff who sustained a severe commutated fracture of the left femur requiring two surgical procedures post accident and a third

surgery a year-and-a-half later to remove a rod from the leg], *lv denied* 96 NY2d 704 [2001]). It should be noted that neither the City nor Burtis provided any expert testimony to contradict or challenge Dr. Hershman's opinion regarding the extent of plaintiff's injuries, despite having conducted five separate independent medical examinations.

Loss of Services and Society

The award of \$700,000 for past loss of services and society, and \$425,000 for future loss of services and society, did not deviate materially from what is considered reasonable compensation. Plaintiff wife "has effectively been thrust into the role as the sole parent for the parties' [three] young children and bears total responsibility for preparing them for their daily activities. . . ." (*Doviak v Lowe's Home Ctrs., Inc.*, 63 AD3d 1348, 1353 [3rd Dept 2009]). She assumed the responsibility for managing the household, caring for three children, and tending to her husband's most basic needs while her husband underwent multiple surgeries (*see Aguilar v New York City Tr. Auth.*, 81 AD3d 509 [1st Dept 2011] [award to husband of \$500,000 over 3.7 years for past loss of services reasonable where the wife, a 45-year-old mother of three, suffered amputation of her left leg and was dependent on others for the most basic care]). The award of \$425,000 for future loss of

services and society is reasonable in light of evidence that plaintiff and his wife are still unable to have sexual relations, are no longer socially active, and that plaintiff will require four total knee replacements in the future (see *Aguilar*, 81 AD3d at 509 [affirming \$1 million award for future loss of services]; *Villaseca v City of New York*, 48 AD3d 218, 219 [1st Dept 2008] [award of \$500,000 for future loss of services appropriate where the wife "assumed full responsibility for household chores, cooking, transportation for their young son, and helping her husband move about"]).

Cross Claim for Indemnification

The City established its entitlement to summary judgment on its cross claim for contractual indemnification. The indemnification provision, which provides that Burtis shall indemnify the City for "any and all claims . . . and from costs and expenses to which the City may be subjected . . . arising out of or in connection with any operations of [Burtis]," expressed an unmistakable intent that Burtis indemnify the City, regardless of whether either party is at fault or is found liable (see *Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 275 [2007]; see also *New York Tel. Co. v Gulf Oil Corp.*, 203 AD2d 26, 27-28 [1st Dept 1994]).

We have considered and rejected defendants' additional

arguments.

Accordingly, the judgment of the Supreme Court, New York County (Eileen A. Rakower, J.), entered October 15, 2013, after a jury trial, apportioning liability 65% against defendant City of New York and 35% against defendant Burtis Construction Co. Inc., awarding plaintiffs damages in the principal amounts of \$2.2 million for past pain and suffering, \$3.8 million for future pain and suffering, \$700,000 for past loss of services and consortium and \$425,000 for future loss of services and consortium, and bringing up for review the orders, same court and Justice, entered on July 12, 2013 and July 15, 2013, which, among other things, denied defendants' posttrial motions to set aside the verdict and defendant City's posttrial motion for summary judgment on its cross claim for contractual indemnification against Burtis, should be modified, on the law and the facts, to grant the City's motion for summary judgment on its cross claim, and to remand the matter for a new trial on the issue of the apportionment of liability as between the City and Burtis, and otherwise affirmed, without costs.

All concur except Tom, J.P. and Sweeny,
J. who dissent in an Opinion by Sweeny, J.

SWEENEY, J. (dissenting)

I dissent.

The record clearly reflects a pattern of highly inflammatory, prejudicial and improper comments made by plaintiffs' counsel during his summation. Taken as a whole, those comments deprived defendants, particularly the City of New York, of a fair trial. I would therefore remand this case for a new trial on all issues.

There are certain well-settled principles established that apply to all trials. Basic to our adversarial system of justice is the principle that "all litigants, regardless of the merits of their case, are entitled to a fair trial" (*Habinicht v R.K.O Theatres*, 23 AD2d 378, 379 [1st Dept 2007]). A trial court has "broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary" (*Campbell v Rogers & Wells*, 218 AD2d 576, 579 [1st Dept 1995], citing *Brostoff v Berkman*, 170 AD2d 364, 365 [1st Dept 1991], *affd* 79 NY2d 938 [1992]). Trial counsel is "afforded wide latitude in presenting arguments to a jury in summation" and where the attorney "remains within the broad bounds of rhetorical comment in pointing out the insufficiency and contradictory nature of [a party's evidence], such remarks do not deprive the

[opposing party] of a fair trial" (*Chappotin v City of New York*, 90 AD3d 425, 426 [1st Dept 2011], *lv denied* 19 NY3d 808 [2012]). At the end of a lengthy trial, it may be inevitable that some improper remarks will be made during closing arguments. Not all such remarks will require a new trial, so long as they are limited in nature, are deemed harmless in view of the totality of the evidence, and do not contaminate the proceedings to the extent of depriving a party of a fair trial. In addition, counsel must be quickly admonished and the jury must be given immediate curative instructions (see e.g. *Genza v Richardson*, 95 AD3d 704, 705 [1st Dept 2012]; *Chappotin*, 90 AD3d at 426; *Pareja v City of New York*, 49 AD3d 470 [1st Dept 2008]). Thus, the "wide latitude" given to counsel in summation is not without its limitations.

"The underlying principle is that litigants are entitled, as a matter of law, to a fair trial, free from improper comments by counsel or the trial court" (*Rodriguez v City of New York*, 67 AD3d 884, 886 [2d Dept 2009]). Where counsel's conduct violates this principle, the courts have not hesitated to set aside a verdict tainted by such conduct. Here, the summation "had as its continuing theme" personal attacks on defense counsel, charges that defense witnesses outright lied, allusions of subornation of perjury by counsel and "assertions of personal knowledge and

personal opinion as to the case and the credibility of witnesses” (*Caraballo v City of New York*, 86 AD2d 580, 581 [1st Dept 1982]). A few examples will serve to convey the tone of this summation.

Early in his summation, counsel began by vouching for his own credibility and casting aspersions on the integrity of opposing counsel by saying:

“When Jim and Eileen Gregware came to me to represent them, all can I do is give it my all, if somebody’s coming to me, yes, I will do whatever I can, within the bounds of decency, of honesty, to represent them. I will not cross that line, it will never happen if I’m trying the case. . . . But its wrong when lawyers stand before you and give you fast and loose synopses of the case. When lawyers do that, I have to tell you, there’s something very, very wrong with our system . . . The credibility of the lawyer is equally important [as the witnesses].”

He went on to state that “believability and credibility, that is all that we have as lawyers.”

Counsel then transitioned into the first of repeated characterizations of defense witnesses as liars in directly addressing counsel for the City (Mr. Wang) and counsel for defendant contractor (Mr. Baxter) stating: “Credibility, Mr. Wang? Really? Your own witnesses lied. And to Mr. Baxter: Your own witnesses lied”. Shortly thereafter, while commenting on the testimony of a defense witness, plaintiff’s counsel stated: “I wonder if Mr. Wang even believes that [testimony] when his own

witness said something like that." During the course of his summation, counsel repeatedly denigrated each and every defense witness, calling them "liars" and unworthy of belief; calling the City's expert a "phony baloney" on at least three occasions; characterizing a police officer's testimony as "disgusting and reprehensible" and repeatedly charging that both the witnesses and counsel were "trying to deny justice to Jim and Eileen Gregware." Indeed, variations on this phrase became an overarching refrain in support of counsel's theory of a tightly woven conspiracy between defense counsel, particularly counsel for the City and the witnesses called to testify for the defense, and was used with various embellishments at least seven times during the course of the summation, usually in the form of "Why are they trying so hard to deny justice to Jim and Eileen Gregware?"

Additionally, counsel repeatedly vouched for his own credibility, using phrases such as "I was there, I did the deposition, I read it carefully"; inserted his personal beliefs and feelings as to the credibility of various defense witnesses including his clients and experts; and even made veiled references as to possible misconduct by defense counsel in the preparation for trial of those witnesses. This is clearly evident with respect to the police officer witness who testified.

It is true, as the majority points out, that the jury had ample reason to question the testimony of the police officer, who testified at prior depositions that he had no recollection of this accident but was able to testify as to details of the accident at trial. Counsel properly pointed out and hammered this rather large discrepancy to the jury during cross examination and summation. But instead of leaving it to the jury to determine what weight, if any, to give to this testimony, counsel substituted his own personal opinion of, and indignation at, this testimony by repeatedly harping on his theme of an alleged defense conspiracy to deny plaintiffs justice, using less than oblique accusations of defense counsel's subornation of perjury. One example will suffice to prove this point:

"It is infuriating to me that they would go this far to try to change the testimony of an officer who stated under oath hundreds of times that he didn't remember, that he didn't know . . . I was so infuriated that an officer, again, who was duty bound to uphold the law would come into this courthouse, come in here and somehow tell you that it is okay to speak with lawyers who weren't there and then have memory. Ladies and gentlemen, when a police officer comes in this courtroom and a police officer comes in here and is fed information by his attorneys, his attorneys who he knows for a fact were not there, and they are telling him what happened and then Mr. Wang stands up and says, oh, he knows exactly where the accident happened - -

"MR. WANG: Objection.

"THE COURT: This is fair comment on the evidence.

"MR. RUBINOWITZ: Mr. Wang tells you, he certainly knows . . . but the problem is this, you have an officer, an officer who is duty bound to uphold the law is doing something that is so terribly wrong, and I'm trying to tell you because it is so wrong for an officer to swear to tell the truth and tell less than the truth under oath, it's wrong."

Continuing in this same vein, counsel stated: "I have a lot of respect for the New York City Police Department and its officers, and we all should, but that man is not one of New York City's finest. If anything, he is one of New York City's worst." He also addressed the City's counsel directly, stating: "Mr. Wang, I don't blame you for being looking down . . . why in the world is a police officer allowed to take the stand and tell less than the truth?" To compound the error, the court, rather than sustaining the objection to the comment that the police officer was being "fed information by his attorneys," stated this was "fair comment on the evidence," giving, in effect judicial, imprimatur to counsel's allegations of subornation of perjury.

The conspiracy theme continued with plaintiff's counsel referring to the City's expert as a "phoney baloney" at least three times, and counsel stating: "I'm asking you when you go into the jury room to say this, it is appropriate for the City of New York to stoop so low to call somebody like (the City's expert) to deny Jim Gregware and Eileen Gregware justice?" Counsel drew attention to the discussion of the expert's fee,

stating: "You need an opinion, he will give you an opinion. Pay for it, he will give you an opinion." In observing that under cross examination, the expert said the City was his biggest client, counsel stated: "Would you like to keep the cash register rolling? Sure, who wouldn't? When you put a phoney baloney on the witness stand, it is not right, and that man should not be testifying at all anymore."

Toward the end of his summation, counsel repeated his personal opinions of the City's witnesses, particularly the police officer and its expert, stating:

"And when they [i.e. the City's attorneys] present a witness like that police officer, I'll say this to you. I have certain words to describe that police officer. And I'm gonna use these words specifically, because it is something that angers me terribly, and it should anger you. What that police officer did in this courtroom was disgusting, it was reprehensible. To have a man who's bound to uphold the law, come into this courtroom and tell less than the truth. It is unacceptable. And to have a man like (the City's expert) come into this courtroom and tell you that he has done a full, fair, thorough and complete review and evaluation, that is also disgusting and it is terrible, it is reprehensible, and it should not be allowed . . . And those were two major witnesses put on by Mr. Wang and his lawyers."

I certainly take no issue with the majority's observation that counsel was entitled to "express skepticism" regarding the police officer's testimony, particularly regarding his "radically improved memory," or counsel's arguing to the jury that the

defense witnesses were not worthy of belief because of discrepancies and inconsistencies in their testimony. Robust cross examination and argument are to be expected as part of zealous advocacy. Had counsel stopped at expressing skepticism, even repeatedly, and left the issue for the jury's determination, there would be no issue. But here, counsel's expression of "skepticism" went well beyond the pale of fair comment. In fact, the majority concedes that the repeated references to defense witnesses as "liars" was inappropriate. I disagree with the majority's position that these remarks were harmless because they were "isolated and constituted fair comment on the evidence." The record clearly reflects that they were neither. In truth, counsel had much to work with regarding these witnesses. However, that only makes his characterizations, personal opinions, and attacks all the more prejudicial and regrettable. They were designed to create an inflammatory and prejudicial atmosphere against the defendants and, given the virulence and repetition of the statements, it cannot be said that they did not have their intended effect on the jury. Indeed, the majority tacitly recognizes this fact by its determination to remand this matter for a trial on the allocation of damages.

Nor can I agree with the majority that the City's assertion that counsel vouched for his own credibility is a distortion of

the record. The few instances quoted here (and there were more) suffice to demonstrate that these assertions were not isolated but rather were pervasive and part and parcel of an overall theme which, taken as a whole, served to inflame the passions of the jury, contaminate the proceedings and deny defendants a fair trial.

Each and every one of the above comments, when repeated without curative instructions, has been held to constitute grounds for a new trial. For example, we have ordered a new trial where counsel "made himself an unsworn witness and attempted to vouch for the credibility of clients, implied that defense counsel made up the defense raised by the defendants, labeled the defendants' expert a hired gun and insinuated that the defense experts were unworthy of belief because they were being compensated" (*Nuccio v Chou*, 183 AD2d 511, 514-515 [1st Dept 1992], *lv dismissed* 81 NY2d 783 [1993]).

Likewise, where counsel bolstered his case in summation "by repeated accusations that the witnesses for the other side are liars" and that defendant's experts are "willing to testify falsely for a fee" (*Clarke v New York City Tr. Auth.*, 174 AD2d 268, 277-278 [1st Dept 1992]), a new trial was ordered (*see also Rodriguez v New York City Hous. Auth.*, 209 AD2d 260, 261 [1st Dept 1994] [new trial ordered where "plaintiff's counsel

improperly intimated that defendant's medical expert was unworthy of belief because he was compensated for his appearance at trial"].

Similarly, we set aside a verdict where counsel, in twice claiming that the City was fabricating evidence "vouched for his own credibility and sought to bolster it as well by improperly invoking his status as a member of the bar" (*Valenzuela v City of New York*, 59 AD3d 40, 45 [1st Dept 2008]). In *Valenzuela*, counsel stated "he never created half truths or tried to fool the jury and had not done so in this case" (*id.*), not unlike the comments plaintiff's counsel made here, stating: "I will not cross that line" regarding the bounds of honesty and decency.

A new trial was also ordered where plaintiff's counsel in summation repeatedly impugned the integrity of defense counsel and defense witnesses, the result of which "could only have been devastatingly prejudicial to defendants and amounted to a violation of their right to a fair trial" (*Berkowitz v Marriott Corp.*, 163 AD2d 52, 54 [1st Dept 1990]). In *Berkowitz*, we found counsel's statement that defense counsel "possibly doesn't even believe himself some of the things that he said, but he has to do what he has to do" to be "egregious" (*id.*). In this regard, *Pareja v City of New York* (49 AD3d 470) is instructive. There, counsel's remarks concerning opposing counsel were brief, and not

so inflammatory that they affected the outcome of the trial. Despite the fact that we did not order a new trial, we stated: "We nonetheless observe that the remarks of defense counsel were uncalled for. There is no justification for attacking the credibility of opposing counsel. The veracity of counsel is simply not a subject for summation" (*id.*). Here, the repeated attacks on the integrity of opposing counsel "and the irrelevant fact that [defendant's] counsel was a member of a large, well-known law firm," coupled with an "implicit charge of subordination of perjury, cannot allow us to rule out the strong possibility that such remarks influenced the verdict" and thus require a new trial (*Weinberger v City of New York*, 97 AD2d 819, 819-820 (1st Dept 1983)).¹

In *Kohlmann v City of New York*(8 AD2d 598 [1st Dept, 1959]) when faced with similar conduct, we held, "It is regrettable that despite the apparent strength of the plaintiffs' case a new trial must be ordered in the interests of justice." Based on the

¹Plaintiffs' counsel here also made several references in his summation to the fact Mr. Wang and the attorneys assisting him at trial were from a large, well-known firm.

record in this case and the lessons of our prior holdings, we should remand the matter for a new trial.

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

ENTERED: AUGUST 4, 2015


CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Leland G. DeGrasse
Rosalyn H. Richter
Barbara R. Kapnick, JJ.

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x

Three Amigos SJL Rest., Inc.,
doing business as The Cheetah
Club, et al.,
Plaintiff,

Times Square Restaurant No. 1., Inc.,
Plaintiffs-Appellants, et al.,

-against-

CBS News Inc., et al.,
Defendants-Respondents.

x

Plaintiffs Times Square Restaurant No. 1, Inc., Times Square
Restaurant Group, Dominica O'Neill, Shawn
Callahan, and Philip Stein appeal from the
order of the Supreme Court, New York County
(Ellen M. Coin, J.), entered on or about
April 18, 2013, which, to the extent appealed
from as limited by the briefs, granted
defendants' motion for dismissal of the
defamation claims asserted by them pursuant
to CPLR 3211 (a)(1) and (7).

Law Offices of Nichelle A. Johnson, PLLC, New
Rochelle (Nichelle A. Johnson and Vivian Lee
of counsel), for appellants.

Levine Sullivan Koch & Schulz, LLP, New York (Jay Ward Brown and Chad R. Bowman of the bar of the District of Columbia and the State of Maryland admitted pro hac vice), and CBS Law Department, New York, (Anthony M. Bongiorno and Joseph F. Richburg of counsel) for respondents.

TOM, J.P.

This defamation action arises out of a wholly accurate news report stating that federal authorities raided The Cheetah Club (Cheetah's), a midtown Manhattan strip club, which they alleged to be "run by the [M]afia" and at the center of an underground immigration ring that brought Russian and eastern European women into the United States, forcing them to work as exotic dancers.

On November 30, 2011, federal agencies charged seven alleged members and associates of the Gambino and Bonanno crime families with, inter alia, transporting and harboring illegal aliens to work as dancers in New York area strip clubs. The indictment alleged that organized crime defendants controlled certain strip clubs and forced women who had been trafficked from eastern Europe to dance at the clubs. As the women would be placed in sham marriages for citizenship purposes, the federal operation was called "Operation Dancing Brides."

On November 30, 2011, federal authorities executed a search warrant at Cheetah's. In support of the warrant's application, a federal officer averred that organized crime conspirators had negotiated terms with strip clubs, including Cheetah's, for trafficked dancers to perform because, in Cheetah's case, other providers had not been able to meet the club's needs. According to the affidavit, the trafficked women were brought to Cheetah's,

where they were video recorded reading contracts and where the women thereafter danced. Plaintiffs take the position that no one at Cheetah's was involved in the crimes underlying Operation Dancing Brides.

The relationship of the Times Square plaintiffs and their employees, the individual plaintiffs, to Cheetah's is not explained, but there is no allegation that these entities are anything more than independent contractors. According to the complaint, plaintiff Times Square Restaurant No. 1, Inc. (No. 1) provides management and promotional services for the Champagne and VIP lounge areas of Cheetah's. Plaintiff Dominica O'Neill is president of No. 1, and plaintiff Sean Callahan is employed as a manager and consultant whose responsibilities include food and beverages, as well as vendor coordination. Plaintiff Times Square Restaurant Group (the Group) operates a booking agency for the talent (dancers) at Cheetah's, and plaintiff Philip Stein is employed by the Group as a manager. Plaintiff Three Amigos SJL Rest., Inc., doing business as The Cheetah Club, is not a party to this appeal.

After the raid at Cheetah's, defendant CBS News broadcast the event during its noon news broadcast. Reporter Kathryn Brown (in front of Cheetah's) broadcast the following:

"[S]ources tell CBS-2 News this bust is being

dubbed 'Operation Dancing Brides,' and this strip club here, Cheetahs in Midtown, they say is at the center of the operation. Cheetahs advertises exotic women and the . . . federal authorities say it is run by the mafia. They have been here -- feds have been here all morning. They conducted an early morning raid and they've been here for hours inside collecting evidence. They are still inside right now. Meantime, earlier this morning, agents with the immigrations and customs enforcement arrested 25 men described as ringleaders of this entire operation. Many of them they say are members of the Gambino and Bonanno crime families. They say the men were involved in an elaborate operation to recruit women from Russia and eastern Europe into the U.S. . . . [to] force the women to work as dancers in strip clubs across New York City, including Cheetahs . . . This is still a developing story and we will have much more on this tonight on CBS-2 News at 5:00."

At 5:00 p.m., defendants broadcast a news program called The Evening Report, which contained, inter alia, the following segment:

"Federal authorities carried out boxes of evidence from this Midtown strip club during an early morning raid. They say the club, Cheetahs, is one of several at the center of an underground immigration ring that stretches from Times Square to the heart of Russia. Investigators say Russian and Italian mobsters were working together in the elaborate scheme to bring Russian and eastern European women to the U.S., then funnel them to strip clubs to work as exotic dancers."

The Report then showed Kathryn Brown interviewing a federal law enforcement official, the director of the National Organization for Women, and David Carlebach, an attorney for

Cheetah's. Carlebach was broadcast saying, "There is absolutely no La Cosa Nostra, as you say, connection."

At 9:25 p.m., the local CBS New York website posted a summary of the story, embedding a PDF copy of the indictment. The website included the statements that Cheetah's had been "raided," and that Cheetah's was "one of several [strip clubs] at the center of an underground immigration ring" controlled by indicted defendants who "protected their turf through intimidation and threats of physical and economic harm." The story ended, "As federal teams cast a wide net around strip clubs and their owners[,] attorney David Carlebach . . . insisted his client's hands are clean. 'There is absolutely no "La Cosa Nostra," as you say, connection,' Carlebach said."

By summons and verified complaint filed April 27, 2012, plaintiffs alleged that defendants, in broadcasting and publishing stories concerning Operation Dancing Brides, defamed them. Plaintiffs claimed that the stories were misleading, false, and malicious, and that plaintiffs had no connection with the Mafia, Operation Dancing Brides, human trafficking, extortion, or any other human rights abuse. The complaint contains four causes of action – defamation per quod, defamation per se, injurious falsehood, and respondeat superior. Plaintiffs assert that the false allegations of Cheetah's involvement

subjected plaintiffs to scorn and ridicule and adversely affected their ability to earn income from their activities on behalf of the club.

Defendants moved pursuant to CPLR 3211 (a)(1) and (7) for dismissal of the complaint. Defendants argued, *inter alia*, that all claims made by the Times Square plaintiffs and by the individual plaintiffs (collectively plaintiffs) must be dismissed because the challenged news reports were not "of and concerning" plaintiffs, as a matter of law.

Plaintiffs opposed defendants' motion, arguing that the alleged libel designated plaintiffs in such a way so as to let those who knew them understand that they were the persons meant and that plaintiffs were entitled to so prove that fact to a jury. Specifically, plaintiffs pointed to the reports' assertions that Cheetah's was "run by the mafia" and "at the center" of a human trafficking ring. By making such statements, plaintiffs argued, defendants were asserting that O'Neill, Stein, and Callahan were members of organized crime.

The motion court granted defendants' motion, found that all of the challenged statements related solely to Cheetah's, and dismissed the claims of the Times Square plaintiffs and the individual plaintiffs. The court further found that nothing in any of the broadcasts mentioned, or even indirectly referred to,

the Times Square corporations, nor did any statement assert or even imply that the individually named plaintiffs were part of the Mafia or a global trafficking scheme. That the broadcast might have a negative impact on the business of the Times Square corporations, or that they might have caused plaintiffs' friends to shun them did not demonstrate that the statements were "of and concerning" plaintiffs. The court also noted that First Amendment concerns required plaintiffs to be clearly identifiable, which they were not.

On appeal, plaintiffs cling to their contention that they are clearly identifiable as the persons and entities that "run" Cheetah's on account of the functions they perform for the club. At the outset, plaintiffs do not explain why entities that merely supply services to an establishment should be perceived by the public to exercise such control over its operation as to be identified with illegal activities on the premises. To the contrary, plaintiffs' relationship to Cheetah's is peripheral, and the public at large would have no reason to think that they were implicated in the federal investigation. As to patrons, there is no explanation of why they would be aware of the businesses that supply food and beverages to the club (Times Square Restaurant No. 1) or book dancers to perform there (Times Square Restaurant Group). While the individual plaintiffs

involved in the operation of those businesses may be present at the club "on a daily basis . . . and are highly visible to . . . customers," as the affidavit of Dominica O'Neill states, they are nevertheless mere employees. Significantly, they are not employees of Cheetah's itself, but rather, present at the club to perform the services provided to it by their own employers. They can hardly be understood to be "those who 'run' the Cheetah Club," which implies persons in a position of ownership or control, not vendors that supply management services or their employees, whose presence is required in order to render those services.

As noted, Cheetah's is not a party to this appeal. The club's owner, nonparty Sam Zherka, is currently being held without bail, awaiting trial on an indictment charging him with fraud, income tax fraud and witness tampering (*United States v Zherka*, 592 Fed Appx 35 [2d Cir 2015]). Zherka has filed numerous civil rights actions against government officials who he claims described him as a "mobster." The lawsuits assert that allegations of his organized crime connections are false and are either motivated by prejudice against his Albanian ethnicity or retaliation for his ownership of strip clubs. Each case has either been dismissed prior to adjudication or voluntarily withdrawn by Zherka. Zherka, as the owner of Cheetah's, is in a

position of ownership and control, not plaintiffs. The Times Square plaintiffs are not identified in the news reports as being operated by organized crime, and their capacity as vendors to Cheetah's hardly serves to equate them with those identified by the report as "the [M]afia."

The affidavits supporting the warrant to search Cheetah's remain under seal in connection with federal indictments arising out of information obtained from its execution. Thus, the asserted falsity of the news reports cannot be assessed. However, even assuming the reports to be untrue, plaintiffs do not establish that the accurate reporting of events surrounding the search, including the purportedly untrue statements attributed to federal authorities, is outside the protection of the First Amendment. Even upon a cursory analysis, it is impossible to escape the conclusion that exposing news organizations to defamation claims by any business supplying goods or services to an entity reported to be engaged in illegal conduct would have a chilling effect on free speech, specifically, the dissemination of information of general interest to the public. Even where a news report is inaccurate, a defamation action is subject to summary dismissal if "the story covered a topic within the sphere of legitimate public concern" (*Carlucci v Poughkeepsie Newspapers*, 88 AD2d 608, 609 [2d Dept

1982], *affd* 57 NY2d 883 [1982]).

As the dissent acknowledges, whether a particular publication is capable of the meaning ascribed to it is a question for the court (*Julian v American Bus. Consultants*, 2 NY2d 1, 14 [1956]). Similarly, whether a plaintiff in a defamation action has demonstrated that a particular statement names or so identifies him so that the statement can be said to be "of and concerning" that plaintiff may be decided as a matter of law and need not be determined by a jury (*see Springer v Viking Press*, 60 NY2d 916 [1983]). Where, as here, the statement does not name the plaintiffs at all and contains nothing that would cause a reader to think defendant was referring to them, the statement is not "of and concerning" the plaintiffs (*Smith v Catsimatidis*, 95 AD3d 737 [1st Dept 2012], *lv denied* 20 NY3d 852 [2012]; *see Salvatore v Kumar*, 45 AD3d 560, 563 [2d Dept 2007], *lv denied* 10 NY3d 703 [2008] [complaint dismissed where plaintiff was not named and statement in defendant's publication about some of its "executives and personnel" was not sufficiently "of and concerning" plaintiffs, former employees of defendant]). As this Court has noted, a statement made about an organization is not understood to refer to any of its individual members unless that person is distinguished from other members of the group (*Fulani v New York Times Co.*, 260 AD2d 215, 216 [1st Dept 1999]).

Likewise, where an allegedly defamatory statement is directed at a company, it does not implicate the company's suppliers, partners, vendors or affiliated enterprises even if they sustain injury as a result (see *Kirch v Liberty Media Corp.*, 449 F3d 388, 398 [2d Cir 2006]).

The dissent accepts, as a matter of law and fact, that the individual plaintiffs (though not the Times Square plaintiffs) "run" Cheetah's, as the complaint alleges. While this contention is superficially plausible, it does not withstand closer inspection. The argument is specious, founded upon an attempt to conflate the meaning of the terms "manage" and "run." The fundamental flaw in the complaint is the failure to distinguish the concept of *control* over an organization from the mere provision of management services to the entity by a vendor or, more specifically, the employees of a vendor. The general understanding of a business "run by the [M]afia" is the subjugation of the entity by organized crime, typically by force and intimidation, in furtherance of illegal activities. Ultimately, the theory of recovery espoused in the complaint amounts to an exercise in semantics. While "run" may colloquially refer to management of the routine, day-to-day operation of a business, its meaning acquires a significantly more sinister connotation when used in the same sentence as

"[M]afia." The public certainly appreciates this distinction, even if the dissent does not appear to grasp its import. Significantly, the dissent does not contend that the individual plaintiffs were in a position to exercise such authority over Cheetah's operation that they can be said to have been in control of its affairs (conceding that their employers, the Times Square plaintiffs, do not occupy such a position of dominance). Were the individual plaintiffs to attempt to meddle in the affairs of an entity truly "run" by organized crime, they would need to adopt yet a third, considerably more dynamic definition of the term.

A plaintiff bears the burden of pleading and proving that the asserted defamatory statement "designates the plaintiff in such a way as to let those who knew him understand that he was the person meant" (*Stern v News Corp.*, 2010 WL 5158635 *5, 2010 US Dist LEXIS 13319, *16 [SDNY, Oct. 14, 2010, No. 08-Civ-7624 (DAB/RLE)], citing *Fetler v Houghton Mifflin Co.*, 364 F2d 650, 651 [2d Cir 1966]). While a plaintiff may use extrinsic facts to prove that the statement is "of and concerning" him, he must show the reasonableness of concluding that the extrinsic facts were known to those to whom the statement was made (see *Chicherchia v Cleary*, 207 AD2d 855, 856 [2d Dept 1994]; see also *Geisler v Petrocelli*, 616 F2d 636, 639 [2d Cir 1980] [noting that the

burden "'is not a light one'"). Plaintiffs seek to state their case by innuendo. As this Court stated:

"The question which an innuendo raises, is [one] of logic. It is, simply, whether the explanation given is a legitimate conclusion from the premise stated.' The innuendo, therefore, may not enlarge upon the meaning of words so as to convey a meaning that is not expressed" (*Cole Fisher Rogow, Inc. v Carl Ally, Inc.*, 29 AD2d 423, 427 [1st Dept 1968][altercation in original], quoting *Tracy v Newday, Inc.*, 5 NY2d 134, 136 [1959], *affd* 25 NY2d 943 [1969]).

The suggestion that the individual plaintiffs are necessarily identified as members of organized crime because they are employees of entities that provide management services to Cheetah's - reported to be "run" by the Mafia - is simply not logical. It is based on innuendo and constitutes an attempt to enlarge the concept of managerial services to include domination and control of an organization by force, whether actual or threatened, in contravention of the rule set forth in *Tracy*.

Accordingly, the order of Supreme Court, New York County (Ellen M. Coin, J.), entered on or about April 18, 2013, which to the extent appealed from as limited by the briefs, granted defendants' motion for dismissal of the defamation claims asserted by plaintiffs Times Square Restaurant No. 1, Inc., Times Square Restaurant Group, Dominica O'Neill, Shawn Callahan, and

Philip Stein pursuant to CPLR 3211 (a) (1) and (7), should be affirmed, without costs.

All concur except Richter and Kapnick, JJ.
who dissent in part in an Opinion
by Kapnick, J.

KAPNICK, J. (dissenting in part)

I respectfully dissent in part from the majority's opinion and find that the motion court's decision should be modified to the extent of denying the motion to dismiss as to Dominica O'Neill, Shawn Callahan and Philip Stein's claims arising out of the alleged defamatory statement "it is run by the mafia," but otherwise agree that the remainder of the alleged defamatory statements are not actionable and that the Times Square plaintiffs were properly dismissed.

It is axiomatic that "to prevail in defamation litigation, a plaintiff must establish that it was he or she who was libeled or slandered: that the allegedly defamatory communication was about ('of and concerning') him or her" (Robert D. Sack, *Sack on Defamation* § 2:9 [4th ed 2012]; *Julian v American Bus. Consultants*, 2 NY2d 1, 17 [1956]). It is also well settled that

"[i]t is unnecessary for an article [or statement] to name a person in order for it to be 'of and concerning' that person. If it can be shown either that the implication of the article was that the plaintiff was the person meant or that he or she was understood to be the person spoken about in light of the existence of extrinsic facts not stated in the article, then it is 'of and concerning' the plaintiff as though the plaintiff was specifically named." (Robert D. Sack, *Sack on Defamation* § 2:9.1 [4th ed 2012], citing, inter alia, *DeBlasio v North Shore Univ. Hosp.*, 213 AD2d 584 [2d Dept 1995]).

Further, “[i]t is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that he is the person meant” (*Stern v News Corp.*, 2010 WL 5158635, *5, 2010 US Dist LEXIS 133119, *16 [SD NY, Oct. 14, 2010, No. 08-Civ-7624 (DAB/RLE)] [applying New York law] [internal quotation marks omitted]; see also NY PJI 3:25, Comment).

Plaintiffs urge that dismissal of their defamation claims at the pleading stage was premature because their claims were adequately pleaded and they were improperly foreclosed from adducing further proof to establish the “of and concerning” prong.

Defendants, on the other hand, argue that dismissal was warranted because the “of and concerning” determination presents a threshold question of law for the court based upon the specific content of the allegedly actionable publication. The defendants’ view is that a “plaintiff who is not named in an allegedly defamatory statement, ‘must sustain the burden of pleading and proving that the defamatory statement referred to him or her’” (quoting *Chicherchia v Cleary*, 207 AD2d 855, 855-856 [2d Dept 1994] [citing Prosser and Keeton, Torts § 111 at 783 [5th ed]]) and that plaintiffs here failed to sustain their burden.

Relying primarily on *Chicherchia* and *Julian*, the motion

court stated the following as authority for granting the motion to dismiss:

"The plaintiff's burden on this element is not a light one. The defamatory matter and the plaintiff must be linked together by a chain of unchallenged proof for the plaintiff to reach the jury on the element 'of and concerning'. While reference to the allegedly defamed party may be indirect and may be shown by extrinsic facts, if the plaintiff uses such extrinsic facts, he or she must show that it is reasonable to conclude that the publication refers to the plaintiff, and those facts were known to those who read or heard the publication. Plaintiff cannot use innuendo to enlarge, rather than explain, in an effort to have him or herself identified in the public mind as the target of the alleged defamation" (2013 NY Slip Op 31081[U] [Sup Ct, NY County 2013] [internal citations omitted]).

While there can be no dispute that a defamation plaintiff ultimately has the heavy burden of proving the "of and concerning" prong, the question raised by this appeal is what burden does the plaintiff, who is not named directly and must rely on extrinsic evidence, have at the *pleading stage* to overcome a motion to dismiss based on the assertion that the statements were not "of and concerning" plaintiff.

As initially observed by the motion court, "Generally, whether the complaint sufficiently alleges facts to demonstrate a connection between the particular plaintiff and the alleged libel is an issue for the court" (2013 NY Slip Op 31081[U]). As Judge

Sack explains it, "Whether the complaint alleges facts sufficient reasonably to connect the libel to the plaintiff is a question for the court, although the ultimate determination of whether the libel actually applies to the plaintiff is for the jury" (Robert D. Sack, *Sack on Defamation* § 2:9.3 [4th ed 2012]).¹

"When a defamation concerns a group of people, and one or more members of that group bring a libel or slander action, thorny questions are presented as to whether the communication is 'of and concerning' the plaintiff or plaintiffs" (Robert D. Sack, *Sack on Defamation* § 2:9.4 at 2-155 [4th ed 2012]). "Under some circumstances, courts have permitted an unnamed member of a group to maintain a claim for defamation where a defamatory statement has been made against the group" (*Algarin v Town of Wallkill*, 421

¹ CPLR 3016(a) makes it clear that a heightened pleading standard does not apply to "of and concerning" allegations, since it mandates that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, *but their application to the plaintiff may be stated generally*" (emphasis added) (see also NY PJI 3:25, Comment ["Note that although the reference to the plaintiff may be pleaded generally, the particular words complained of must be pleaded specifically"]). It is interesting to note that in some states it is necessary to plead the extrinsic facts that identified plaintiff to the reader as the defamed party (Robert D. Sack, *Sack on Defamation* § 2:9.1 at 2-151 [4th ed 2012], citing *Velle Transcendental Research Assoc. v Esquire, Inc.*, 41 Ill App 3d 799, 803, 354 NE2d 622, 626 [1976] [comparing California procedure, where, by statute, "there is no requirement that plaintiffs plead extrinsic facts to show that the defamatory words apply to the plaintiff(,)" and Illinois procedure, where there is such a requirement]).

F3d 137, 139 [2d Cir 2005]).

Courts look to a number of factors to determine the sufficiency of group defamation allegations. First, "the size of a group is critical to the sufficiency of a claim by an unnamed member of a group" (*Algarin*, 421 F3d at 139, comparing *Neiman-Marcus v Lait*, 13 FRD 311, 313, 316 [SD NY 1952] [claim by members of a group of 25 sufficient], with *Abramson v Pataki*, 278 F3d 93, 102 [2d Cir 2002] [claim by members of a group of more than 1,000 insufficient], citing Restatement (Second) of Torts § 564A, Comment *b* [1977] ["It is not possible to set definite limits as to the size of the group or class, but the cases in which recovery has been allowed usually have involved numbers of 25 or fewer."]). In *Brady v Ottaway Newspapers* (84 AD2d 226 [2d Dept 1981]), the Appellate Division, Second Department, rejected a definitive size limitation and allowed libel claims to proceed for a group of at least 53 police officers out of a department of more than 70 (*id.* at 228 n 1, 234).² Relying in part on the

² The First Amendment dictates courts' long-standing disfavor of group defamation claims. In *Brady*, the court explained that "the larger the collectivity named in the libel, the less likely it is that a reader would understand it to refer to a particular individual" (84 AD2d at 228). As a result, the court reasoned that

"individual harm cannot occur as the result of a group-libelous statement, because the hearer of the statement will make the

Court of Appeals' language in *Gross v Cantor*, 270 NY 93 (1936),³

Brady adopted the "intensity of suspicion test":

"With the intensity of suspicion test, size is a consideration and the probability of recovery diminishes with increasing size."⁴

rational assessment that such a statement is, by its nature, less likely to be true with respect to every member of a large group than it is to be true with respect to a particular individual" (*id.* at 229).

This reasoning serves to "encourage frank discussions of matters of public concern under the First Amendment guarantees" (*id.*).

³ In *Gross*, the Court of Appeals held as follows:

"[A]n impersonal reproach of an indeterminate class is not actionable. But if the words may by any reasonable application, import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide, whether the charge has the personal application averred by the plaintiff" (270 NY at 96 [internal quotation marks omitted]).

⁴ Despite the court's rejection of a group size limitation, it is clear that membership in a small group increases a plaintiff's chance of recovery:

"[A]n individual belonging to a small group may maintain an action for individual injury resulting from a defamatory comment about the group, by showing that he is a member of the group. Because the group is small and includes few individuals, reference to the individual plaintiff reasonably follows from the statement and the question of reference is left for the jury" (*Brady*, 84 AD2d at 231 [internal citation omitted]).

Size[,] however, is not the only factor evaluated. It is balanced against the definiteness in number and composition of the group and its degree of organization. This list of balancing factors or reference elements is not meant to be exclusive" (*id.* at 236 [internal citation omitted]).

The court went on to note that "the prominence of the group and the prominence of the individual within the group" are other proper "reference elements" (*id.*).

In addition to these factors, courts also consider "whether the defamatory statement refers to 'all' or only 'some' members of the group" (*Algarin*, 421 F3d at 140). In *Brady*, for example, the statement at issue referred to *all* members of a relatively small, identifiable group (the 53 unindicted police officers of the City of Newburgh in 1972) (*Brady*, 84 AD2d at 228, 237), as opposed to a statement that only refers to "some" members of a group, making it less likely for an individual plaintiff to be linked to the statement (see *e.g. Owens v Clark*, 154 Okla 108, 6 P2d 755 [1931]; see also Robert D. Sack, *Sack on Defamation* § 2:9.4 at 2-156 [4th ed 2012] ["An attack on some is less likely to associate a particular member of the group with the allegations than an attack on all the members of the same group - to say some members of a law firm are incompetent is less likely to injure the reputation of a particular partner than would the

allegation that each and every partner was incompetent."]).⁵

Here, there are sufficient facts pleaded at this early stage in the litigation to reasonably connect the individual plaintiffs with the following statement: "it [meaning Cheetah's] is run by the mafia." O'Neill provided an affidavit in which she alleged extrinsic facts that she, Callahan, and Stein were part of a "small and exclusive group of individuals" who ran and managed Cheetah's, with constant visible contact with customers, officials, dancers, and vendors. Taking these allegations as true, as we must on a motion to dismiss (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the individual plaintiffs are members of a small, identifiable group that allegedly "ran" Cheetah's and are thus implicated in the allegedly defamatory statement. We note that the result might be different had the statement only implicated *some* of those running Cheetah's. While we do not know the exact size, organization, composition or prominence of the alleged defamation group at this stage in the litigation, there are enough facts alleged at this time to demonstrate the requisite connection.

Whether or not the individual plaintiffs can come forward

⁵ The "all" versus "some" distinction is not absolute. In *Neiman-Marcus v Lait*, 13 FRD 311 (SD NY 1952), the court found that the salesmen plaintiffs did have a cause of action, despite the use of the word "most" instead of "all" (*id.* at 316).

with evidence to support these allegations and ultimately prove that they were each individually understood to be referred to in light of extrinsic facts not stated in the broadcast, is not to be decided on a pre-answer motion to dismiss.

Moreover, in reaching its result, the majority usurps the role of the trier of fact by outright deciding the meaning or the "general understanding" of the phrase "run by the mafia." The majority goes on to assert its understanding of the "colloquial[]" meaning of the phrase "to run a business" and states that the public can appreciate the "sinister connotation" of a reference to the "Mafia." Not only are these clearly questions for a jury, it is unclear why these questions are relevant to the inquiry of whether the statement is "of and concerning" the individual plaintiffs. The majority's parsing of whether "run" means to have control over an organization or whether it means to merely provide management services is misplaced. The majority argues that "run" must mean having ownership or control of the business and that because the individual plaintiffs do not allege that they have such ownership or control over Cheetah's, their claim must fail. This argument, which is not set forth by defendants, is unsound. On a motion to dismiss, we must accept the complaint as true, and here it sufficiently alleges that the individual plaintiffs "run" the

operations at Cheetah's. No further inquiry into what that means can properly be made on a pre-answer motion to dismiss.

I agree with the majority that the remaining statements are not actionable by the individual plaintiffs as they only refer to "Cheetah's," which is too general a reference to implicate even the individual plaintiffs.

With respect to the Times Square plaintiffs, they have not met their burden of showing that any of the allegedly defamatory statements are "of and concerning" them, as there are no allegations to support a reasonable connection linking these corporate entities to the statements.

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

ENTERED: AUGUST 4, 2015


CLERK