SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 2, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Tom, Webber, Kahn, JJ.

6412 The People of the State of New York, Ind. 3702/13
Respondent,

-against-

Romeo Marishaw,
Defendant-Appellant.

____

Robert S. Dean, Center for Appellate Litigation, New York (Carl S. Kaplan of counsel), for appellant.

Romeo Marishaw, appellant pro se.

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered October 2, 2015, convicting defendant, after a jury trial, of assault in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of five years' imprisonment followed by five years of post-release supervision, unanimously affirmed.

The court properly declined to instruct the jury regarding justifiable use of ordinary, nondeadly physical force (*see* Penal

Law § 35.15[1]). The Court of Appeals has recently held:

> "Although it would be a rare case--particularly where, as here, the charge is assault in the second degree--we do not rule out the possibility that a defendant may be entitled to a jury instruction on the justified use of non-deadly (or 'ordinary') physical force, even though the defendant is charged with a crime containing a dangerous instrument element [citations omitted].
>
> There is no per se rule regarding which justification instructions are appropriate based solely on the fact that the defendant has been charged with second-degree assault with a dangerous instrument. Instead, as in every case where the defendant requests a justification charge, trial courts must view the record in the light most favorable to the defendant and determine whether any reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified, and, if so, which instructions are applicable [citations omitted]"

(*People v Vega*, __ NY3d __, 2019 NY Slip Op 03530 *1 [2019]; *see People v Rkein*, __ NY3d __, 2019 NY Slip Op 03528 [2019]).

Here, as in *Vega* and *Rkein*, defendant was not entitled to an ordinary force justification charge because, under the particular circumstances of this case, there is no reasonable view of the evidence that defendant did not use the pen in question in a manner readily capable of causing death or serious physical injury (*see* Penal Law § 10.00[13]; *People v Vega*, 2019 NY Slip Op 03530, at *2).

It is uncontroverted that the complainant sustained a puncture wound to his left cheek. The complainant testified that following an argument between defendant and himself that lasted

several minutes, defendant threatened to stab him. After a few minutes, the defendant then struck the complainant in the face, causing the complainant to feel what he described as a "sharp" pain to his cheek. According to the complainant, he was certain that an object had punctured his cheek, i.e., had gone through his cheek. The complainant testified that he felt the defendant stab him in the face ultimately, "opening an hole" in his cheek.

The video surveillance captures the defendant reaching into his bag or pocket with his right hand and then immediately striking the complainant with that same hand. Photographs of the complainant's cheek reflect what appears to be a puncture of the cheek. The photograph of the outside of the complainant's cheek shows that there was a thin, horizontal cut adjacent to the round through-and-through puncture on the complainant's cheek, consistent with a sharp object, such as the point of a pen, scratching the complainant's cheek before the object plunged into it.

The record further reveals that police officers who arrived at the scene observed the complainant bleeding from a puncture wound on the side of his face. At the time of defendant's arrest, the police recovered a pen that defendant was holding in his right hand.

Even viewing this evidence in the light most favorable to defendant, there was no reasonable view under which the jury could have concluded that defendant did not use a dangerous instrument to assault the complainant. Defendant's assertion that the injury could have been caused by a split tooth that pierced the complainant's cheek and created a wider laceration on the inside of his cheek than the outside is without merit and purely speculative. As noted by the People, the complainant's hospital medical records make no mention of any oral surgery or damage to the complainant's teeth.

Under the facts presented, the only possible justification charge that would have been available to defendant would have been a charge of justifiable use of *deadly*, not ordinary, physical force (*see* Penal Law § 35.15[2]; *People v Mickens*, 219 AD2d 543, 544 [1st Dept 1995] [the defendant's request for a charge of justifiable use of ordinary physical force properly rejected where trial evidence showed that the defendant struck the complainant with a baseball bat, necessitating a finding that the defendant used deadly physical force in order for jury to find the defendant guilty of assault in the second degree]). Defendant, however, did not request such a charge.

Defendant's reliance on *People v Molina* (101 AD3d 577 [1st

Dept 2012]) in support his argument that the trial court erred in failing to instruct the jury on the justified use of ordinary physical force, even where the defendant was charged with and convicted of a crime involving the use of a dangerous instrument, is misplaced. In *Molina*, the People's theory of the case was that the defendant injured the complainant with a pair of scissors. There, the defendant testified that after the complainant punched him in the face, he grabbed the complainant, causing him to fall to the floor and sustain injuries. The defendant's testimony raised a question of fact for the jury, in that the defendant's theory was that he used only ordinary physical force in self-defense, and it was entirely possible that the complainant's injury was caused when he hit the floor. This Court found that the trial court erred in refusing to instruct on nondeadly force justification "since defendant's case rested entirely on his contention that he used only nondeadly force, and that such use was justified" (*id.*). Here, by contrast, because defendant's theory that he used ordinary physical force in self-defense was unsupported by any reasonable view of the evidence, given the nature of the complainant's injury, the trial court did not err in declining to instruct the jury on the justifiable use of ordinary physical force.

Finally, even if any error had been committed by the trial court with respect to the conviction for second-degree assault of the complainant, it would have had no impact on the third-degree assault conviction, which related to a separate incident that occurred more than one month prior to the incident involving the complainant, and involved a different victim.

We have also considered and rejected defendant's claim that the second-degree assault conviction was against the weight of the evidence, as well as defendant's pro se arguments.

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

ENTERED: JULY 2, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Gesmer, Kern, Singh, JJ.

9583 Micala Sidore, Index 160738/17
Plaintiff-Appellant,

-against-

334 East 5th Street,
Defendant-Respondent.

____

The Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for appellant.

Law Offices of Tromello, Fishman & Veloce, New York (Stephanie A. Johnson of counsel), for respondent.

____

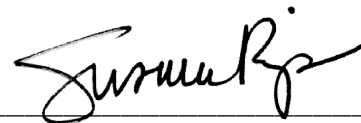
Order, Supreme Court, New York County (Paul A. Goetz, J.), entered September 28, 2018, which denied plaintiff's motion for summary judgment declaring that the number of shares of stock in defendant cooperative corporation allocated to her unit is 245, and, upon a search of the record, awarded defendant summary judgment dismissing the complaint, unanimously modified, on the law, to declare that the number of plaintiff's shares of stock is 300, and, as so modified, affirmed, without costs.

The court properly awarded defendant summary judgment, upon a search of the record, based on the doctrine of laches (*see Capruso v Village of Kings Point*, 23 NY3d 631, 641 [2014]). Based on the grant of summary judgment to defendant, defendant was entitled to a declaration that the number of shares of stock

allocated to plaintiff's unit is 300. Plaintiff acceded to the terms of her proprietary lease and related share certificates, which allocate 300 shares to her unit, for at least 15 years, and may not now seek to avoid the terms of those instruments (*see Schultz v 400 Coop. Corp.*, 292 AD2d 16, 20 [1st Dept 2002]). To the extent plaintiff argues that any amendment to the offering plan increasing the number of shares allocated to the unit was not proper, plaintiff is barred by laches from asserting such argument. Defendant is prejudiced by plaintiff's delay in raising this argument because the Attorney General no longer maintains copies of the amendments, which were filed in 1985 (*see Matter of Linker*, 23 AD3d 186, 189-190 [1st Dept 2005]).

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

ENTERED: JULY 2, 2019



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Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9780 The People of the State of New York, Respondent, Ind. 4178/15

-against-

Emil Goding, Defendant-Appellant.

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Cardozo Criminal Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Robert M. Stolz, J. at jury trial and sentencing), rendered January 11, 2017, convicting defendant of two counts of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 16 years to life, unanimously affirmed.

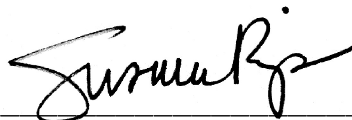
The hearing court properly denied defendant's motion to suppress identification testimony. The showup identification was justified by its close spatial and temporal proximity to the robbery (*see People v Duuvon*, 77 NY2d 541, 544-545 [1991]). Defendant did not preserve any of his present arguments regarding allegedly suggestive features of the identification, and we decline to review them in the interest of justice. As an

alternative holding, we also reject them on the merits.

Even if the victim heard a radio transmission that a suspect had been apprehended, this did not render the identification suggestive, because that transmission "merely conveyed what a witness of ordinary intelligence would have expected under the circumstances" (*People v Williams*, 15 AD3d 244, 245 [1st Dept 2005] *lv denied* 5 NY3d 771 [2005]), and "[i]nherent in any showup is the likelihood that an identifying witness will realize that the police are displaying a person they suspect of committing the crime, rather than a person selected at random" (*People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). Defendant's remaining arguments are improperly based on trial, rather than hearing, testimony (*see People v Abrew*, 95 NY2d 806, 808 [2000]), and in any event would not warrant suppression (*see Gatling*, 38 AD3d at 240).

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

ENTERED: JULY 2, 2019



CLERK

Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9781 In re Emerald Creek Capital, LLC, Index 160484/16
Petitioner-Respondent,

-against-

Mildred Trencher,
Respondent-Appellant.

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Anderson Kill P.C., New York (Devin W. Ness of counsel), for appellant.

Cullen & Dykman, LLP, Garden City (Jocelyn Lupetin of counsel), for respondent.

____

Appeal from order and judgment (one paper), Supreme Court, New York County (Nancy M. Bannon, J.), entered March 26, 2018, granting petitioner's CPLR article 52 petition to compel the sale of respondent's condominium apartment to satisfy a judgment, unanimously dismissed, without costs, as academic.

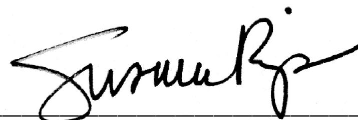
The parties assert in their appellate briefs that after the petition was granted, respondent satisfied the judgment. This rendered the instant appeal academic (*see Wisholek v Douglas*, 97 NY2d 740, 742 [2002]). Contrary to respondent's argument, satisfaction of the judgment was not the only way to preserve the status quo, as she was free to file an application before this Court for a release of the lien by posting an undertaking under CPLR 5204, or simply by posting an undertaking for a standard

stay of enforcement under CPLR 5519, neither of which she pursued.

The notion that respondent would be entitled to some amount of restitution under CPLR 5523 if the court's decision were to be reversed on appeal misunderstands the scope of the proceeding. A proceeding under CPLR article 52 is a mechanism to enforce a judgment, in this case, through a sheriff's sale of real property within the State (*see* CPLR 5236). Irrespective of the outcome of the proceeding, respondent would still be jointly and severally liable for the amounts due under the New Jersey judgment (*see* *Susi Contr. Co. v Hartford Acc. & Indem. Co.*, 213 AD2d 299 [1st Dept 1995], *lv denied* 86 NY2d 704 [1995]). The issue raised by respondent, namely the validity of the New Jersey judgment's domestication in New York, was relevant only to the extent of enforcement against respondent's New York property, which has been rendered unnecessary by the payment of the judgment.

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

ENTERED: JULY 2, 2019



CLERK

Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9782 In re Sandra Y.,
Petitioner,

-against-

Jahi J.Y.,
Respondent-Respondent.
- - - - -
Ruby Y., et al.,
Nonparty Appellants.

____

Carol L. Kahn, New York, for Jahi Y., respondent.

Tennille M. Tatum-Evans, New York, for Sandra Y., respondent.

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

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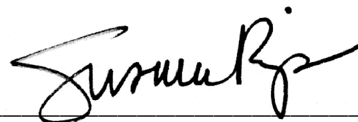
Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about November 1, 2018, which granted respondent father's application for temporary custody of the subject children, unanimously reversed, on the law, without costs, and the matter remanded for a hearing.

Modification of custody or visitation, even on a temporary basis, requires a hearing, absent a showing of an emergency (*see Matter of Kenneth J. v Lesley B.*, 165 AD3d 439, 439-440 [1st Dept 2018]; *Matter of Lela G. v Shoshanah B.*, 151 AD3d 593, 594 [1st Dept 2017]). The parties agree that a hearing should have been conducted here.

The court’s determination to grant temporary custody to the father was based exclusively on school records and allegations of educational neglect, which the parties were not given an opportunity to challenge by way of a hearing. Additionally, the court granted temporary custody to the father, over the objection of the children's attorney that was based on statements and observations in a court-ordered investigation (COI) report regarding the father’s violent nature and possible drug abuse. The court failed to articulate an emergency situation that warranted the imposition of a new custody order without a hearing, and the allegations of educational neglect did not outweigh the concerning statements in the COI report, which the court did not fully review.

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

ENTERED: JULY 2, 2019



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Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9784 Sandra E. Defay, Index 20299/17E
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Respondent,

Metropolitan Transportation Authority,
et al.,
Defendants,

New York City Transit Authority,
Defendant-Appellant.

____

Krez & Flores, LLP, New York (Jonathan Goldsmith of counsel), for appellant.

Falk & Klebanoff PC, West Hempstead (Lawrence B. Goodman of counsel), for Sandra E. Defay, respondent.

Zachary W. Carter, Corporation Counsel, New York (Eva L. Jerome of counsel), for The City of New York, respondent.

____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered November 2, 2018, which, inter alia, denied the motion of defendant New York City Transit Authority (NYCTA) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

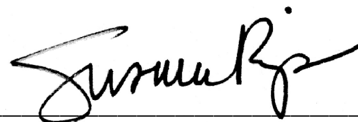
NYCTA's motion was properly denied since the record presents triable issues of fact as to whether NYCTA breached its duty as a common carrier to provide plaintiff with a safe place to board

the bus (*see Archer v New York City Tr. Auth.*, 25 AD3d 351 [1st Dept 2006]; *Malawer v New York City Tr. Auth.*, 18 AD3d 293, 294-295 [1st Dept 2005], *affd* 6 NY3d 800 [2006]). The record shows that the bus stopped seven or eight feet from the curb adjacent to the bus stop, with a pothole, into which plaintiff fell, in the path that passengers would take walking from the sidewalk to board the bus. The fact that approximately 10 other passengers safely boarded the bus at the same time that plaintiff fell in the hole while attempting to board does not entitle NYCTA to summary judgment (*see Bruno v Port Auth. of N.Y. & N.J.*, 157 AD3d 444 [1st Dept 2018]).

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

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

ENTERED: JULY 2, 2019



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Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9785-
9785A The People of the State of New York, Ind. 1278/14
Respondent, 1484/18

-against-

John Farrison,
Defendant-Appellant.

____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

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

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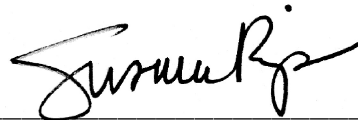
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered August 20, 2018, and from a judgment of resentence, same court and Justice, rendered July 2, 2018,

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

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

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

ENTERED: JULY 2, 2019



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

Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9786-
9786A Constantine Spathis, Index 302534/08
Plaintiff-Respondent,

-against-

Alina D. Spathis,
Defendant-Appellant.

____

Alina Dulimof, appellant pro se.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered October 27, 2017, which, to the extent appealed from as limited by the briefs, ordered that interest on the husband's maintenance arrears of $31,750 would run from January 8, 2014, and denied the wife's request for counsel fees, unanimously affirmed, without costs. Order, same court and Justice, entered on or about July 24, 2018, which, to the extent appealed from as limited by the briefs, denied the wife's motion to hold the husband in contempt for failure to transfer half of his shares of Partsearch Technologies, Inc., unanimously affirmed, without costs.

The motion court's October 27, 2017 decision reaffirmed a determination first made by this Court in March of 2016, that the interest on maintenance arrears was due and owing from January 8,

2014, the date on which the divorce judgment was entered, which is the law of the case (*Spathis v Spathis*, 137 AD3d 654 [1st Dept 2016]).

The motion court correctly denied the wife's motion for contempt, sanctions and related relief in its order entered on July 24, 2018. The wife sought relief in connection with the husband's alleged failure to transfer shares of stock to her in compliance with the judgment of divorce as modified by this Court's order dated February 28, 2013 (*Spathis v Dulimof-Spathis*, 103 AD3d 599 [2013], *lv dismissed and denied* 22 NY3d 913 [2013], *cert denied* 574 US —, 135 S Ct 140 [2014]), and with the order of the motion court entered on October 27, 2017. This Court's 2013 order did not specify a date by which the husband was to transfer the stock shares to the wife. Accordingly, there was no clear and unequivocal mandate directing the husband to transfer the shares by a particular date, so that a finding of contempt could not lie (Judiciary Law § 753[3]; *McCormick v Axelrod*, 59 NY2d 574, 583 [1983]).[1]

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[1]While we do not look favorably on the husband's apparent failure to transfer the stock shares following this court's 2013 order and entry of a modified judgment of divorce on January 8, 2014, we note that there is nothing in the record before us that suggests that the wife did anything to enforce the modified judgment until she made her motion in 2017 resulting in Supreme

That issue was remedied when the motion court entered its order on October 27, 2017 in which it directed the husband to transfer the shares to the wife within 30 days. However, in the wife's motion for contempt of that order, she attached to her moving papers a copy of a letter from the husband's attorney dated November 20, 2017 and the enclosed assignment to her of 125,000 shares of the stock in question, executed by the husband. Since the husband had complied with the October 27, 2017 order, the motion court correctly denied the wife's request to hold the husband in contempt and for related relief. Moreover, while the wife claims that the stock shares are now worthless, she fails to demonstrate a loss in value, much less that such loss occurred during a time when the husband was required to transfer the stock to her but failed to do so. Indeed, this Court previously determined that there was insufficient evidence at trial to establish any value for the stock shares (103 AD3d at 601). Accordingly, the wife also failed to demonstrate that the husband's violation or neglect of a duty imposed on him by any order prejudiced her rights.

The motion court also correctly declined to grant the wife's

Court's order entered on October 27, 2017.

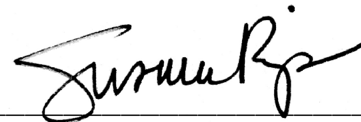
request for a distribution of funds in lieu of the shares of stock. To the extent that she sought this relief as a fine for contempt (Judiciary Law § 773), as discussed above, the wife failed to show that the husband was in contempt. This Court already held that the value of the shares could not be determined. Moreover, even if we were to consider the wife's arguments about the purchase of the stock by another corporation, she contends this occurred before the 2013 appeal and it also is outside the record. Finally, generally, a final award of equitable distribution is not subject to modification (*see O'Brien v O'Brien*, 66 NY2d 576, 591 [1985] [Meyer, J., concurring]; *Wasserman v Wasserman*, 103 AD3d 793 [2d Dept 2013]). "Indeed, permitting the modification of the equitable distribution provisions of a judgment of divorce would effectively undermine the finality of judgments in matrimonial

orders” (*Welsh v Lawler*, 282 AD2d 977, 979 [3d Dept 2001] [internal quotation marks and citation omitted]).

We have considered the wife’s remaining arguments and find them unavailing.

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

ENTERED: JULY 2, 2019



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Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9788 Lantau Holdings Ltd., Plaintiff, — Index 650085/17, 653920/16

-against-

Orient Equal International Group Limited, et al.,
Defendants.

- - - - -

Lantau Holdings Ltd.,
Plaintiff-Respondent-Appellant,

-against-

General Pacific Group Ltd.,
Defendant-Appellant-Respondent,

SVK Capital Management Ltd., et al.,
Defendants.

____

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

CKR Law, LLP, New York (Michael James Maloney of counsel), for respondent-appellant.

____

Judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered April 1, 2019, and bringing up for review an order, same court and Justice, entered February 11, 2019, as amended by order, same court and Justice, entered February 14, 2019, which, inter alia, following a bench trial, required defendant General Pacific Group (GPG) to turn over certain securities and cash to Lantau Holdings Ltd. (Lantau), and denied GPG’s claim for some

$1.6 million it allegedly paid a third party in connection with the transactions, unanimously reversed, on the law and the facts, without costs, the judgment vacated, the requirement that GPG turn over to Lantau the remaining restricted shares of REX Global Entertainment Holding Ltd. (REX) in its accounts and pay Lantau the proceeds of the shares already sold stricken, the amount on the indemnification claim for legal fees owed by GPG to third party SVK Capital Management Ltd. (SVK) modified to limit it to the amount paid and dismiss the remainder of the legal fee claim without prejudice as premature, GPG's claim for lost profits for breach of the stock purchase agreements (SPA), reinstated, and the matter remanded for a determination by the trial court as to the amount of those lost profits.

Defendant cannot be required to return REX shares and proceeds of shares as part of "terminating" the parties' contracts, where this Court previously dismissed all of plaintiff's equitable claims *(Lantau Holdings Ltd. v General Pac Group Ltd.*, 163 AD3d 407, 409 [1st Dept 2018]), including its claims for rescission and unjust enrichment (*see Brodsky v New York City Campaign Fin. Bd.*, 107 AD3d 544, 545 [1st Dept 2013]).

The court correctly concluded that defendant did not affirm the contracts after discovering plaintiff's breach. Defendant's

attempt to sell the non-conforming shares was not required by the contracts, but was an act in mitigation of its damages (*see Landmark Land Co. v Federal Deposit Ins. Corp.*, 256 F3d 1365, 1376-1377 [Fed Cir 2001] [non-required acts, even if beneficial to the transaction, are not "performance" under a contract]).

Moreover, GPG was entitled to recover for lost profits for breach of the stock purchase agreements. Defendant's damages expert used market prices, arm's length sale prices and other objective data to determine the values for his estimate. Overall, his methodology produced a reasonably certain estimate of the loss caused by the breaches (*see O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 282-283 [1st Dept 2007]).

The court correctly concluded that GPG failed to establish that it was ever out of pocket for certain monies advanced by nonparty Harsh Padia. Defendant had several transactions with Padia, and its documentary proof, mainly bank statements, did not identify the purpose of various payments. Nor did GPG ever compile an accounting of the payments to and from Padia. Thus, the fact that GPG had made certain payments could not be linked to the amounts claimed.

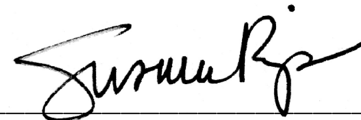
The damage award under the indemnification provision for

legal fees owed to SVK that GPG had not yet paid is dismissed without prejudice, as premature (*see 50 New Walden v Fed. Ins. Co.*, 22 AD2d 4, 6 [4th Dept 1964]).

Finally, the court correctly found that Lantau failed to show it was underpaid for the Rongsheng transaction.

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

ENTERED: JULY 2, 2019



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Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9789 Frat Star Movie, LLC, Index 651496/17
Plaintiff-Appellant,

-against-

Elliot Tebele, et al.,
Defendants-Respondents.

____

Leader Berkon Colao & Silverstein LLP, New York (Joseph G. Colao of counsel), for appellant.

Hinckley & Heisenberg LLP, New York (George R. Hinckley, Jr. of counsel), for respondents.

____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about October 12, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

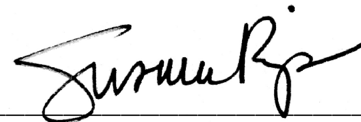
Defendants demonstrated that they complied with the obligations of the parties' agreement, including the obligation to use their best efforts to provide marketing services for plaintiff's film through their social media. In opposition, plaintiff failed to raise an issue of fact as to whether defendants breached those obligations (*see e.g. Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639 [1st Dept 2009]). The court also properly determined that, even if defendants had breached the agreement, plaintiff could not demonstrate lost profits resulting

from the breach (*see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]).

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

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

ENTERED: JULY 2, 2019



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Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9790 In re Sharon B.-D.,
Petitioner-Respondent,

-against-

Christopher C.,
Respondent-Appellant.

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Carol Kahn, New York, for appellant.

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Order of commitment, Family Court, New York County (Adetokunbo Fasanya, J.), entered on or about April 17, 2018, which confirmed a determination of the Support Magistrate, set forth in an order, entered on or about February 14, 2018, that the respondent father willfully failed to obey an order of the Family Court, and ordered, among other things, that the father be remanded to the NYC Department of Correction for a 24-week period, unanimously affirmed, without costs.

Although the father has completed his sentence, his driver's license and business license are still suspended as a result of the Family Court's finding that he willfully violated the September 23, 2011 order of child support. Accordingly, we find that this appeal is not academic (*see Matter of Angela B. v Gustavo D.*, 150 AD3d 471 [1st Dept 2017]; *Matter of April G. v Duane M.*, 105 AD3d 491 [1st Dept 2013]).

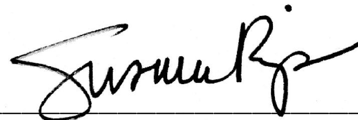
The father, however, failed to rebut the prima facie evidence of his willful violation of the order of support (*see* Family Ct Act § 454[3][a]) because he presented no evidence of his inability to provide financial support for the subject child (*see Matter of Maria T. v Kwame A.*, 35 AD3d 239, 240 [1st Dept 2006]). The father admitted in his testimony that he was not paying the support money because, among other things, he had two other children to support and the child was no longer a minor. He also inconsistently testified whether he had financial income. At first, the father indicated that he could not physically work to comply with the child support order. However, he also informed the court that his company received a contractual payment of $297,000 in 2016. He also requested the court to not incarcerate him because he planned to obtain additional employment as a glazier - a job that requires labor. Given the evidence, the court's assessment that the father lacked credibility should be afforded deference (*see Matter of Nancy R. v Anthony B.*, 121 AD3d 555, 556 [1st Dept 2014]).

In light of the father's long history of nonpayment and the large sum of arrears, which exceeds $50,000, the Family Court did not abuse its discretion in imposing a six-month jail sentence

(*see Matter of Leighton-Ryan v Ryan*, 274 AD2d 775, 776 [3d Dept 2000]; *cf. Matter of Kephart v Kephart*, 84 AD2d 644 [3d Dept 1981]), and was authorized to impose a driver's license suspension and business license suspension in order to enforce the payment of arrears (*see* Family Ct Act §§ 458-a[a]; 458-b[a]).

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

ENTERED: JULY 2, 2019



CLERK

Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9791- Ind. 1276/04
9792 The People of the State of New York, 4295/04
Respondent,

-against-

Curtis Munford,
Defendant-Appellant.

____

Edelstein & Grossman, New York (Jonathan I. Edelstein of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

____

Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about December 6, 2017, which denied in part defendant's CPL 440.20 motion to set aside his sentence; and judgment of resentence, same court and Justice, rendered January 11, 2018, resentencing defendant, as a second violent felony offender, upon his convictions of robbery in the first degree (two counts), robbery in the second degree (five counts) and grand larceny in the second degree, to an aggregate term of 35 years, unanimously affirmed.

The court properly resentenced defendant by ordering that the 25-year sentence on count one (first-degree robbery based on the taking of a security guard's pistol) would run consecutively

to a 10-year sentence on count four (second-degree robbery based on the taking of jewelry in the same incident), and ordering that the 25-year sentence on count two (first-degree robbery based on the taking of the jewelry) would run consecutively to a 10-year sentence on count three (second-degree robbery based on the taking of the pistol). As both parties agree, the resentencing court had properly vacated the sentencing court's directive that the sentence on count three run consecutively to that on count one, and the sentence on count four consecutively to that on count two. Counts one and three were both based on the same act of taking the pistol and thus, the sentences must run concurrently; similarly, counts two and four were based on the same act of taking the jewelry and thus, those sentences must run concurrently (Penal Law § §70.25[2]). The resentencing court also had properly left untouched the lawful imposition of concurrent sentences on counts one and two, and lesser concurrent sentences on all of the remaining counts (while also making a correction, which is not at issue, in an unlawful sentence on the grand larceny count), for an aggregate sentence of 35 years (*see* Penal Law § 70.25[1]; *People v Yannicelli*, 40 NY2d 598, 601-02 [1976]; *People v Carpenter*, 19 AD3d 730, 731 [3d Dept 2005], *lv denied* 5 NY3d 804 [2005]).

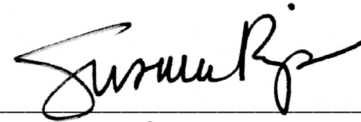
Defendant's challenges to the legality of his sentence are unavailing (*see People v Jeanty*, 268 AD2d 675, 680 [3d Dept 2000], *lv denied* 94 NY2d 949 [2000]). When, as noted, the court made the sentences in each group, relating to a particular act of either taking a pistol or jewelry, run concurrently within the group, but left intact the consecutive sentences for the two groups, this was neither illogical nor inconsistent with the court's own order on the CPL 440.20 motion. As in *Jeanty*, "at least one sentence in each group was properly made consecutive to at least one sentence in the following group and, thus, the aggregate sentence is unaffected" (268 AD2d at 680). We have considered and rejected defendant's remaining arguments on this issue.

Defendant's resentencing was solely for the purpose of correcting the illegal aspect of the structure of his sentence, and was not a plenary resentencing requiring the exercise of sentencing discretion. Therefore, we may not reduce it in the

interest of justice (*see People v Lingle*, 16 NY3d 621, 635 [2011]). In any event, as we held on defendant's direct appeal (49 AD3d 444, 446 [1st Dept 2008], *lv denied* 10 NY3d 937 [2008]), we perceive no basis for reducing the sentence.

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

ENTERED: JULY 2, 2019



CLERK

Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9793 Miami Capital, LLC, Index 150310/16
Plaintiff-Appellant,

-against-

Seymour Hurwitz,
Defendant-Respondent.

____

Richard A. Kraslow, P.C., Melville (Richard A. Kraslow of counsel), for appellant.

London Fisher LLP, New York (Thomas A. Leghorn of counsel), for respondent.

____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 12, 2017, which, in this action alleging legal malpractice, granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

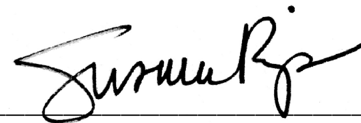
Defendant's motion was properly granted because while plaintiff anticipates that it could be subject to a rescission claim at some point in the future, such alleged damages are purely speculative and not yet ripe. Since damages in a legal malpractice case are designed "to make the injured client whole" (*Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 42 [1990]), having failed to plead actual damages, plaintiff's complaint fails to state a claim (*see Heritage Partners, LLC v Stroock & Stroock & Lavan LLP*, 133 AD3d 428 [1st Dept 2015], *lv denied* 27

NY3d 904 [2016]; *Lavanant v General Acc. Ins. Co. of Am.*, 212 AD2d 450 [1st Dept 1995]).

Plaintiff has also failed to establish defendant's negligence by alleging that he did not exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession (*see O'Callaghan v Brunelle*, 84 AD3d 581 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]). The contract of sale placed the burden on the seller to obtain any necessary court approval for the sale of its property. As seller's counsel advised defendant that the seller did not need court approval because the property was not "substantially all" of its assets (*see* N-PCL 510), plaintiff has not adequately pled that defendant breached his duty of care as its lawyer by not obtaining court approval for the sale.

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

ENTERED: JULY 2, 2019



CLERK

Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9794 OA Holding Company, LLC, Index 652169/16
Plaintiff-Appellant,

-against-

Weld North Ventures LLC,
Defendant-Respondent.

____

Peter M. Agulnick, P.C., Manhasset (Peter M. Agulnick of counsel), for appellant.

Sher Tremonte LLP, New York (Mark Cuccaro of counsel), for respondent.

____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 30, 2018, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the claim for breach of the redemption warranty, unanimously affirmed, without costs.

Plaintiff brings suit for breach of a Unit Purchase Agreement (UPA), pursuant to which it purchased 100% of the membership interests in nonparty Organic Avenue, LLC (Organic) from defendant and others. Plaintiff alleges that defendant breached its warranty that "neither [Organic] nor any of its subsidiaries has any obligation (contingent or otherwise) to purchase, redeem or otherwise acquire any equity securities or any interest therein."

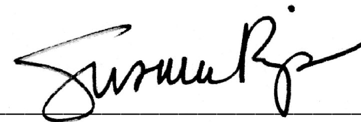
This claim was properly dismissed. Defendant warranted in the UPA that Organic and its subsidiaries had no obligation to purchase or redeem shares, but made no representations whatsoever with respect to its own obligations to do so. It is thus immaterial that Organic's Fourth Amended and Restated Limited Liability Company Operating Agreement obligated defendant to offer to purchase certain shares. Although the agreement permitted defendant to fulfill this obligation by causing Organic to make a purchase offer, this did not create any obligation (even a "contingent or otherwise" obligation) on the part of Organic itself, and the obligation still belonged to defendant alone (*see generally Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]).

The allegations made in a related action by another member of Organic do not support plaintiff's claim, as even that member did not allege that Organic breached the redemption obligation, asserting such claims only against the instant defendant.

In view of the foregoing, we need not reach the parties' arguments with respect to the adequacy of plaintiff's damages allegations.

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

ENTERED: JULY 2, 2019



CLERK

Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9795-
9795A-
9795B The People of the State of New York, Respondent,

Ind. 26/16
59745C/15
59746C/15

-against-

Jose Feliciano,
Defendant-Appellant.

Christina A. Swarns, Office of the Appellate Defender, New York (Emma L. Shreefter of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Julia L. Chriott of counsel), for respondent.

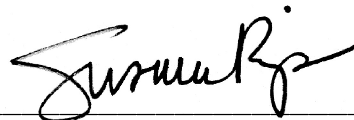
An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered March 27, 2014,

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

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

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

ENTERED: JULY 2, 2019



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

Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9796 Joel Samper, Index 26696/15E
Plaintiff-Respondent,

-against-

352 Broadway LLC, et al.,
Defendants,

A-Z Apartment Building Supply Corp.,
Defendant-Appellant.

____

Devitt Spellman Barrett LLP, Smithtown (Felicia Gross of counsel), for appellant.

Lawrence L. Kaye, P.C., Brooklyn (Lawrence L. Kaye of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered July 3, 2018, which denied the motion of defendant A-Z Apartment Building Supply Corp. (A-Z) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

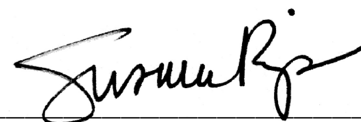
A-Z established that plaintiff's claims are precluded by the exclusivity provisions of Workers' Compensation Law §§ 11, 29(6) (*see generally Fung v Japan Airline Co., Ltd.*, 9 NY3d 351, 357 [2007]). A-Z submitted evidence showing that following his accident, plaintiff applied for, was awarded, and received

Workers' Compensation benefits under A-Z's Workers' Compensation policy (*see Mateo v 1875 Lexington, LLC*, 134 AD3d 1072 [2d Dept 2015]). The Workers' Compensation Board's finding that A-Z was plaintiff's employer at the time of the accident is implicit in the determination authorizing the payment of benefits (*see Mazzucco v Atlas Welding & Boiler Repair*, 297 AD2d 513 [1st Dept 2002]).

Plaintiff failed to raise a triable issue of fact, as his submissions do not dispute that he received Workers' Compensation benefits through A-Z's insurance policy. His submission of paychecks issued by defendant 325 Broadway LLC is insufficient to show that A-Z was not his employer, in light of the evidence that he filed for and obtained Workers' Compensation benefits through A-Z's policy (*see Zabava v 178 E. 78*, 212 AD2d 406 [1st Dept 1995]).

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

ENTERED: JULY 2, 2019



CLERK

Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9797 Hassina Ray, Index 23245/14E
Plaintiff-Respondent,

-against-

Apple Square LLC, et al.,
Defendants-Respondents,

McGuire's Service Corp,
Defendant-Appellant.

- - - - -

JPMorgan Chase Bank, N.A., sued herein as
JPMorgan Chase Bank National Association,
Third-Party Plaintiff-Respondent,

-against-

McGuire's Service Corp.,
Third-Party Defendant-Appellant.

____

Cascone & Kluepfel, LLP, Garden City (Beth L. Rogoff Gribbins of counsel), for appellant.

Bader & Yakaitis, LLP, New York (Jesse M. Young of counsel), for Hassina Ray, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Apple Square LLC, JPMorgan Chase Bank, N.A. and JPMorgan Chase National Association, respondents.

____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered June 11, 2018, which, insofar as appealed from as limited by the briefs, denied the motion of defendant McGuire's Service Corp. (McGuire's) for summary judgment dismissing the complaint, cross claims as against it, and the third-party complaint,

unanimously affirmed, without costs.

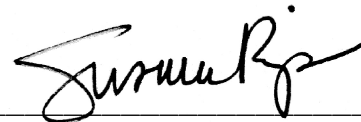
McGuire's failed to establish prima facie entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when, after exiting her vehicle, she slipped on a patch of black ice that was present in the parking lot that McGuire's had plowed. McGuire's failed to demonstrate that its snow removal efforts did not create or exacerbate a dangerous condition (*see Barrett v Aero Snow Removal Corp.*, 167 AD3d 519, 520-521 [1st Dept 2018]; *Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 337-338 [1st Dept 2004]; *see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). Neither the president of McGuire's nor its painting supervisor provided evidence based on personal knowledge as to the work that was actually performed in the parking lot two days before the accident and as to its condition after the work was completed. The logbook entries were too general and did not specifically

refer to the accident site, and the painting supervisor did not know if he inspected the area after the work was done.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JULY 2, 2019



CLERK

Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9798- Index 20207/13E
9798A Debose, Premeire, etc., et al.,
Plaintiffs-Appellants-Respondents,

-against-

Francois Lacour-Gayet, M.D., et al.,
Defendants-Respondents-Appellants,

____

Jonah Grossman, Jamaica (Lawrence B. Lame of counsel), for appellants-respondents.

McAloon & Friedman, PC, New York (Gina Bernardi Di Folco of counsel), for Francois Lacour-Gayet, M.D., respondent-appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Sean B. Maraynes of counsel), for Montefiore Medical Center, respondent-appellant.

____

Order, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered July 6, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment as to liability for medical malpractice, unanimously affirmed, without costs. Order, same court and Justice, entered January 23, 2019, which granted plaintiffs' motion to reargue their own motion and so much of defendants' cross motions for summary judgment as sought to dismiss the claim that a second procedure to remove a broken needle caused psychiatric or emotional injury to the infant plaintiff, and, upon reargument,

denied the cross motions as to that claim, unanimously affirmed, without costs.

In the first order on appeal, the court denied plaintiffs' motion for summary judgment as to liability upon the finding that, while plaintiffs demonstrated as a matter of law that defendants departed from good and accepted medical practice when they unintentionally left a portion of a surgical needle in the infant plaintiff's chest during surgery, they failed to demonstrate that that departure was a proximate cause of injury to the infant. In the order upon reargument, the court found that it had erred in granting defendants' motions for summary judgment dismissing the claim that the second surgery, during which defendants removed the portion of the needle that had been left in the infant's chest during the first surgery, proximately caused psychiatric or emotional injury to the infant, and denied defendants' motions as to that claim.

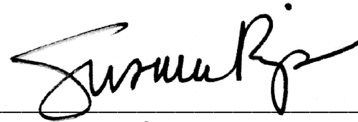
We find that the conflicting factual testimony and medical opinion in the record present issues of fact as to whether any departures were a proximate cause of any physical, psychiatric or emotional injury to the infant (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *Severino v Weller*, 148 AD3d 272

[1st Dept 2017]).

We have considered the parties' remaining arguments for affirmative relief, to the extent preserved for our review, and find them unavailing.

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

ENTERED: JULY 2, 2019



CLERK

Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9799 The People of the State of New York, Ind. 2138/15
Respondent,

-against-

Kamesh Budhu,
Defendant-Appellant.

Law Offices of Randall D. Unger, Bayside (Randall D. Unger of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Judgment, Supreme Court, New York County (Gilbert C. Hong, J.), rendered October 23, 2017, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first and second degrees and three counts of criminal sale of a controlled substance in the third degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they generally involve matters not reflected in, or fully explained by, the record, regarding counsel's strategic choices (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Therefore, because defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent

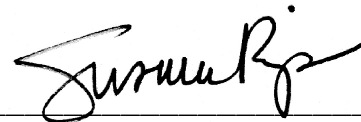
the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

The court properly declined to instruct the jury on the affirmative defense of duress (Penal Law § 40.00[1]), because it was not supported by a reasonable view of the evidence. Defendant was not entitled to a duress charge based on threats allegedly made by an undercover police officer days or weeks before defendant repeatedly made sales of cocaine, because defendant "did not show that the threat of harm was imminent, nor did he promptly seek the assistance of law enforcement authorities" (*People v Moreno*, 58 AD3d 516, 518 [1st Dept 2009], *lv denied* 12 NY3d 819 [2009]). Even viewed most favorably to defendant, the evidence indicated, at most, a continuing or long-term threat of harm, rather than an imminent threat. To the extent that defendant is raising a constitutional claim, that

claim is unpreserved and we decline to review it in the interest of justice (*see People v Thompson*, 34 AD3d 325, 326 [1st Dept 2006], *lv denied* 8 NY3d 885 [2007]). As an alternative holding, we reject it on the merits.

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

ENTERED: JULY 2, 2019



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Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9800N BML Properties Ltd., Index 657550/17
Plaintiff-Respondent,

-against-

China Construction America Inc.,
etc., et al.,
Defendants-Appellants,

Does 1-10, et al.,
Defendants.

____

Squire Patton Boggs (US) LLP, New York (Mitchell R. Berger of counsel), for appellants.

Morrison Cohen LLP, New York (Malcolm I. Lewin of counsel), for respondent.

____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about January 24, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motion to compel arbitration, or, alternatively, to dismiss the causes of action for fraud, unanimously affirmed, without costs.

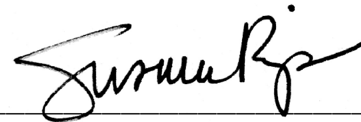
The court correctly denied the branch of defendants' motion seeking to compel arbitration because plaintiff was not a party to the agreement containing the arbitration clause and the claims at issue were, by separate agreement, required to be litigated in New York (*see Matter of Cammarata v InfoExchange, Inc.*, 122 AD3d 459, 460 [1st Dept 2014]; *Oxbow Calcining USA Inc. v American*

Indus. Partners, 96 AD3d 646, 649-650 [1st Dept 2012]).

Plaintiff adequately stated a claim for fraud, by asserting justifiable reliance upon assurances, alleged to have been false when made, regarding the project's status, and the workforce and resources available to meet the deadline for completion of the project, which were collateral to, and not duplicative of plaintiff's claims for breach of contract (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 294 [1st Dept 2011]; *GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]).

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

ENTERED: JULY 2, 2019



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

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

9002-
9002A-
9002B
Index 650887/18

______________________________________x

In re Mark Steyn, et al.,
Petitioners-Appellants-Respondents,

-against-

CRTV, LLC,
Respondent-Respondent-Appellant.

______________________________________x

Petitioners appeal from a judgment of the Supreme Court, New York County, (Eileen Bransten, J.), entered November 2, 2018, which, to the extent appealed from, vacated the arbitration awards of attorneys' fees to petitioners and entered a money judgment against respondent in favor of petitioner Oak Hill Media, Inc.

Ervin Cohen & Jessup LLP, Beverly Hills, CA (Michael D. Murphy of the bar of the State of California, admitted pro hac vice, of counsel), and Fishkin Lucks LLP, New York (Erin C. O'Leary of counsel), for appellants-respondents.

Browne George Ross LLP, New York (Jeffrey A. Mitchell and Judith R. Cohen of counsel), for respondent-appellant.

RENWICK, J.P.

This appeal stems from an article 75 proceeding seeking to confirm an arbitration award rendered in favor of petitioners, Mark Steyn, Mark Steyn Enterprises,[1] and Oak Hill Media (OHM), and against respondent CRTV, LLC (CRTV). The arbitrator found that respondent CRTV breached the respective contracts it had entered with Steyn and OHM, and awarded petitioners breach of contract damages, as well as attorneys' fees. Supreme Court confirmed the breach of contract damages awards, but vacated the attorneys' fees award. On appeal, petitioners challenge the vacatur of the arbitrator's award of attorneys' fees, while respondent challenges only the breach of contract damages awards rendered in favor of petitioner OHM.[2]

The primary issues presented on this appeal are 1) whether the arbitrator manifestly disregarded the law when she awarded attorney's fees in favor of Steyn as the prevailing party;

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[1] Petitioners Mark Steyn and Mark Steyn Enterprises together will be referred to as Steyn.

[2] CRTV also asserts that Supreme Court failed to dismiss the claim against nonparty Cary Katz. Although Steyn asserted a counterclaim against Cary Katz, the arbitrator found that Steyn failed to pursue the claim in arbitration and deemed it abandoned. In any event, Cary Katz was never added to the article 75 proceedings, nor did he seek to intervene. Moreover, CRTV lacks standing to demand relief on Katz's behalf (*see Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772 [1991]).

and 2) whether the arbitrator exceeded her power by addressing OHM's counterclaims against CRTV when CRTV never agreed to arbitrate any dispute with OHM. For the reasons explained below, we reject CRTV's argument on the first issue, that the arbitrator manifestly disregarded the law when she awarded attorney's fees, but, we agree with CRTV on the second issue, regarding the threshold question of arbitrability, because CRTV objected, at the inception of the proceedings, to the arbitrator's jurisdiction over OHM's counterclaims.

Procedural and Factual Background

This appeal stems from a dispute between Mark Steyn, a renowned author and television and radio personality, and CRTV, an online television network, currently known as BlazeTV, which features conservative commentators such as Glenn Beck and Phil Robertson. In 2016, CRTV and Steyn entered into a "Binding Term Sheet" (Term Sheet) for the production and distribution of a television show to be produced in Vermont. In the Term Sheet, the parties promised to cooperate and work with each other, but their ultimate responsibilities were divided. CRTV retained control over business decisions for "hiring a production staff and building a set in Burlington, Vermont." Steyn was responsible for delivering 200 shows a year, each 48 minutes long. His responsibilities to deliver content were to begin as

soon as the Burlington studio was "fully functioning."

The Term Sheet provides that the document "shall be governed by the laws of the United States and the State of New York, without reference to conflict of law principles." The Term Sheet further provides that the parties agree that any unresolved disputes "shall be settled exclusively by confidential binding agreement in accordance with the Federal Arbitration Act" and "[r]ules of the American Arbitration Association (AAA) applicable to general commercial disputes."

In a separate letter memorandum, an entity related to Mark Steyn, OHM, was retained to provide services to Steyn. Under the letter memorandum, which did not contain any arbitration clause requiring binding arbitration, OHM agreed to procure guests for the show, as well as hire third parties such as makeup artists and public relations firms. OHM principal Melissa Howe, who was also a business partner of Mark Steyn and his manager, executed the letter memorandum agreement.

In February 2017, CRTV abruptly cancelled the show after just two months on the air. The network claims cancellation was due to poor performance by its host. Mark Steyn, however, claims that he performed his obligations under the Term Sheet, but that "extraordinary personnel problems, construction delays, and technical shortcomings in the Steyn studio largely prevented

content production." On February 20, 2017, CRTV served Steyn with a demand to arbitrate their dispute, alleging, among other things, breach of contract by Steyn. On March 14, 2017, CRTV filed an amended demand for arbitration that pleaded its claim with specificity. On March 22, 2017, Steyn and OHM served an answering statement and counterclaims. The counterclaims asserted various claims, including breach of contract, and sought breach of contract damages, as well as punitive damages and attorney's fees. CRTV answered Steyn's counterclaim, denying the allegations wholesale and seeking dismissal and "an award of attorneys' fees and costs." On August 18, 2017, Steyn filed a second amended answer and counterclaim, again seeking attorneys fees. On September 1, 2017, CRTV answered Steyn's second amended answer with counterclaims, again denying all material allegations, and demanding, inter alia, attorneys' fees.

Before the arbitration commenced, CRTV objected to the arbitrator's jurisdiction over OHM's counterclaim. On January 22, 2018, after the conclusion of the hearing and submission of posthearing briefs, the arbitrator issued an interim award, finding that CRTV failed to meet its contractual obligation to provide a fully functional studio, did not have the right to declare a breach, and was in breach of its obligations to Steyn and OHM. Conversely, the arbitrator found that petitioners Steyn

and OHM had performed their obligations under the contract, and thus Steyn was entitled to $1.8 million in damages, and OHM was entitled to $908,124 in damages and unreimbursed expenses. Regarding attorneys' fees, the arbitrator observed that petitioners Steyn and OHM had requested fees in their counterclaim, CRTV had requested fees in its answer to the counterclaim, and Rule 47(d) of AAA provides for attorneys' fees where all parties request it, or where it is authorized by law or agreement. Nevertheless, the arbitrator declined to award attorneys' fees at the time of the interim award, requesting that the parties "set forth their claims and positions regarding an award of counsel fees. If counsel fees are to be considered, a fee affidavit shall be submitted and argument may be requested."

By post-interim award briefing, CRTV argued that attorneys' fees should not be awarded because it did not demand such fees in its initial or amended demand, prehearing briefs, or posthearing briefs, and thus there was no "unmistakably clear" intention to seek such fees. CRTV noted that while petitioners requested fees in their initial demand, they did not request them in their briefs or at the hearing. In response, petitioners argued that the Term Sheet, which provided that any disputes would be resolved by arbitration in accordance with AAA rules, thus incorporated AAA Rule 47(d) into the agreement, meaning that the

parties agreed that attorneys' fees could be awarded.

In the final award, the arbitrator discussed the issue of jurisdiction over OHM, noting that the letter memorandum, unlike the Binding Term Sheet, did not have an arbitration provision. The arbitrator observed that CRTV had only raised the jurisdictional issue twice, in its answer to the counterclaim and in its posthearing reply brief. Substantively, CRTV participated in defending against OHM's claim, by submitting exhibits and offering testimony to rebut its damages. Ultimately, the arbitrator found that since CRTV did not seek a stay of arbitration as to OHM, and instead participated, it waived any jurisdictional objection. Therefore, the arbitrator awarded OHM $908,124 in contractual damages against CRTV.

Regarding attorneys' fees, the arbitrator found that both parties requested such relief in their pleadings. The arbitrator disagreed with CRTV's contention that the answers to the first and second counterclaims, as well as the AAA cover sheet, did not represent a request. Thus, after a reduction for overhead and other nonrecoverable costs, the arbitrator awarded petitioners Steyn and OHM $1,012,729 in attorneys' fees.

On February 28, 2018, Steyn and OHM commenced this article 75 special petition to confirm the awards that were granted in their favor and against CRTV. CRTV cross-moved to vacate the

awards. Initially, Supreme Court affirmed all awards. With regard to attorneys fees, Supreme Court found, the case was similar to *Matter of Warner Bros Records [PPX Enters.]* (7 AD3d 330 [1st Dept 2014]), where the First Department found that the winning party in arbitration was entitled to attorneys fees where both parties had requested fees in their pleadings. However, upon reargument, Supreme Court reversed itself and vacated the award of attorneys' fees, relying upon the First Department decision in *Matter of Matza v Oshman, Helfenstein & Matza* (33 AD3d 493, 494 [1st Dept 2006]), which found that a boilerplate demand for attorneys fees was insufficient evidence of the parties intent to waive the American Rule[3] on attorneys' fees.

Discussion

We first address the award of attorneys' fees. We are mindful that courts possess very limited authority to review an arbitration award (*see Matter of Goldfinger v Lisker*, 68 NY2d 225, 230-231 [1986]; *see also Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.,* 4 NY3d 247 [2005]). Indeed, the parties agree that manifest disregard of the law is the only

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[3] The American Rule rule on attorney fees requires each party to pay its attorney, win or lose; the English rule (applicable in most of the world) requires the losing party to pay the winner's reasonable attorney fees. New York law follows the American rule.

appropriate ground to vacate the arbitrator's award of attorneys' fees (*see generally Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471 [2006]).

For an award to be set aside for manifest disregard, the arbitrator must understand and correctly state the law, but proceed to disregard the same (*McLaughlin, Piven, Vogel Sec., Inc. v Ferrucci*, 67 AD3d 405, 406 [1st Dept 2009]). Application of the "manifest disregard of law" standard requires the court to make, in essence, three inquiries: (1) whether the legal principle allegedly ignored by the arbitrator was well defined, explicit, and clearly applicable; (2) whether the arbitrators knew of the governing legal principle; and, (3) whether knowing that principle, the arbitrators refused to apply it or ignored it (*id.; see also Bear, Stearns & Co. v Ontario*, Inc., 409 F3d 87 [2d Cir 2005]; *Wallace v Buttar*, 378 F3d 182 [2d Cir 2004]). A court may not vacate an arbitration award because it thinks the arbitrators made the wrong decision (*Wallace*, 378 F3d at 190). Indeed, even if the court thinks that the arbitrator reached the wrong result or applied the law incorrectly, the court should nevertheless confirm the award, "despite [the] court's disagreement with it on the merits, if there is a barely *colorable* justification for the outcome reached" (*id.* [internal quotation marks omitted]).

Whether manifest disregard of the law occurred here depends on whether New York law on attorneys' fees controlled the arbitration. It is well established under New York procedural rules and substantive law that arbitrators are not permitted to award attorneys' fees in arbitration (*see e.g.* CPLR 7513). New York courts only recognize three limited exceptions to New York's special arbitration provision barring the award of attorneys' fees: (1) where a statute provides for such an award, (2) where it was authorized by an express provision in the agreement; or (3) where it is "unmistakably clear" that both parties intended such an award (*see Matter of Matza*, 33 AD3d at 494-495; *Emery Roth & Sons v M & B Oxford 41*, 298 AD2d 320 [1st Dept 2002], *lv denied* 99 NY2d 509 [2003]).

In this case, Supreme Court found that the arbitrator was neither authorized to award attorneys' fees by statute (first exception), nor by the parties' agreement (second exception), but concluded that the third exception might apply. Supreme Court found, however, that it was not unmistakably clear that the parties intended that attorneys' fees be awarded. Specifically, relying on this Court's precedent (*Matza,* 33 AD3d at 493; *Matter of Stewart Tabori & Chang [Stewart]*, 282 AD2d 385 [1st Dept 2006]), Supreme Court found that the parties' requests for attorneys' fees, in their respective pleadings, constituted mere

“boilerplate requests” that did not satisfy an “unmistakably clear” intent to agree that attorneys' fees be awarded (*Matza*, 33 AD3d at 494-495).

We find, however, that the arbitrator did not manifestly disregard the law because it was not unreasonable for the arbitrator to conclude that the “unmistakably clear intent” requirement did not apply. It appears that the arbitrator believed the requirement did not apply because here the parties’ arbitration clause incorporated the rules of the AAA as controlling, and Rule 47(d) of the AAA explicitly provides that an award of attorneys’ fees may be made “if all parties have requested such an award or it is authorized by law or [the] arbitration agreement.” Rule 47(d) of the AAA does not require any specific language to be used in making a request for attorneys’ fees. Thus, under Rule 47(d) of the AAA, an arbitrator would be empowered to award attorneys’ fees provided, as here, “all parties have requested . . . [it]” even if the “unmistakably clear” standard for requesting attorneys’ fees under New York law was not met.

The arbitrator’s conclusion under the AAA rules that a party may receive attorneys’ fees, although not otherwise entitled to attorneys’ fees under New York’s “unmistakably clear” standard, was not unreasonable. Therefore, it cannot be overturned by this

Court under the manifest disregard of the law standard. In fact, there is support for the arbitrator's conclusion in this Court's prior holdings. We have held that the power to award attorneys' fees can arise from the submission of the dispute under the rules of a given organization, like the AAA, if the rules themselves authorize the fees *(Matter of Goldberg v Thelen Reid Brown Raysman & Steiner LLP*, 52 AD3d 392, 392-393 [1st Dept 2008] ["mutual demands for counsel fees in an arbitration proceeding constitute, in effect, an agreement to submit the issue to arbitration, with the resultant award being valid and enforceable"]; *Emery Roth & Sons,* 298 AD2d at 321 [noting that attorneys' fees could be awarded in arbitration if requested by the parties pursuant to the Commercial Arbitration Rules of the American Arbitration Association]). For example, in *Matter of Warner Bros. Records [PPX Enters.]* (7 AD3d at 330-331), this Court upheld the arbitrators' award of attorneys' fees because the arbitration in question was governed by the AAA, which permits an award of attorney fees and where, like here, both parties so requested it in their respective pleadings (*id.*).

Even if this Court were of the view that the AAA rules did not grant the arbitrator broader authority to award attorneys' fees than New York's "unmistakably clear" standard, that the arbitrator gave the AAA Rule 47(a) a broader interpretation does

not evidence a manifest disregard of the law (*see Wien & Malkin*, 6 NY3d at 480). Indeed, this Court previously held in *McLaughlin, Piven, Vogel Sec., Inc. v Ferrucci* (67 AD3d at 405) that an arbitrator's award of attorneys' fees was not a manifest disregard of the law, even though the parties' agreement was governed by New York law, because it did not appear that the "arbitrators knew that New York law was controlling on the question of their authority to award attorneys' fees" (*id.* at 406). Similarly, here, just as Supreme Court initially held before changing its decision upon reargument, the arbitrator was under the impression that it is possible under the AAA rules for a party not otherwise entitled to attorneys' fees under New York's "unmistakably clear intent" standard, to be entitled to such fees under the AAA rules. This was a reasonable interpretation not based on manifest disregard of the law, and thus should not be vacated.

Finally, contrary to CRTV's argument, a New York choice of law provision in the agreement to arbitrate, without greater specificity, does not bar damages permitted under the FAA and AAA rules, but barred by New York law. For example, an arbitrator is empowered to award punitive damages, in accordance with FAA rules, despite the fact that a contract contains a New York choice of law provision and punitive damages would be precluded

under New York law (*Mastrobuono v Shearson Lehman Hutton, Inc*., 514 US 52 [1995]; *see also PaineWebber Inc. v Bybyk*, 81 F3d 1193 [2d Cir 1996]). This Court has recognized that the FAA has a preemptive effect on New York's restrictions on arbitral awards of punitive damages and attorneys' fees (*see Matter of Americorp Sec. v Sager*, 239 AD2d 115 [1st Dept 1997], *lv denied* 90 NY2d 808 [1997]*; Merrill Lynch, Pierce, Fenner & Smith v Adler*, 234 AD2d 139 [1st Dept 1996]). Thus, although attorneys' fees are generally barred under New York law, pursuant to the "American Rule," they are not barred in arbitration when the agreement contains a New York choice of law provision.

We next examine whether the arbitration award against CRTV and in favor of OHM should be vacated. CRTV argues that the court erred in confirming the arbitrator's award as to OHM because there was no agreement to arbitrate between OHM and CRTV. OHM, however, argues that CRTV does not have the right to contest arbitrability, since it manifested its clear and unmistakable intent to subject itself to the arbitration process, waiving any objection thereto. We find OHM's argument unpersuasive and the award for OHM should be vacated.

Under established law, "[t]he question whether the parties have submitted a particular dispute to arbitration, i.e., the question of *arbitrability*, is an issue for judicial determination

[u]nless the parties clearly and unmistakably provide otherwise" *(Howsam v Dean Witter Reynolds, Inc.*, 537 US 79, 83 [2002] [internal quotation marks omitted]); *First Options of Chicago, Inc. v Kaplan*, 514 US 938, 943 [1995] ["Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question who has the primary power to decide arbitrability turns upon what the parties agreed about that matter"] [internal quotation marks omitted]; *AT & T Tech., Inc. v Communications Workers of Am.*, 475 US 643, 649 [1986] ["Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator"]).

Arbitration is a matter of contract, and a party cannot be forced to arbitrate a dispute that it did not expressly agree to submit to arbitration *(AT & T Tech., Inc. v Communication Workers of America [Goldberg]*, 475 US at 648; *Matter of Waldron [Goddess]*, 61 NY2d 181 [1984]). "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable evidence that they did so . . . . In this manner the law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is

arbitrable because it is within the scope of a valid arbitration agreement' for in respect to this latter question the law reverses the presumption" (*First Options of Chicago, Inc. v Kaplan*, 514 US at 944-945; *see also Howsam v Dean Witter Reynolds, Inc.*, 537 US at 83-84; *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 45-46 [1997]; *Bell v Cendant Corp.*, 293 F3d 563, 566 [2d Cir 2002]). An arbitrator's decision to assert jurisdiction, over objection, is subject to a much broader and more rigorous judicial review than an arbitral decision on the merits, and because it is "a question for the court to decide," it is subject to de novo judicial review (*Kaplan v First Options of Chicago, Inc.*, 19 F3d 1503, 1512 [3d Cir 1994], *affd* 514 US 938 [1995], quoting *International Brotherhood of Teamsters, Chauffeurs, Warehouseman & Helpers of AM, Local 249 v Western PA. Motor Carriers Assn.*, 574 F2d 783, 787 [3d Cir 1978], *cert denied* 439 US 828 [1978]).

Here, it is uncontested that there was no agreement to arbitrate between OHM and CRTV. OHM was not even a named party in CRTV's original demand for arbitration; OHM's appearance was made on a counterclaim. CRTV did not sign a submission agreement with respect to OHM's counterclaim, and CRTV answered the counterclaim with an objection to jurisdiction. OHM's reliance on *Matter of Arbitration between Halcot Navigation Ltd.*

Partnership v Stolt-Nielsen Transp. Group, BV (491 F Supp 2d 413, 417-419 [SD NY 2007]), is misplaced, since in that case, Halcot, the party denying arbitrability of its claim, requested that the arbitrator decide that objection as a "preliminary issue." After discovery and briefings, the three arbitrator panel decided against Halcot. Thus, the court found Halcot's attempt to vacate the arbitration on jurisdictional grounds to be a "second bite at the apple."

Here, however, as with the Kaplans in *First Options*, *supra*, no request was made for the arbitrator to decide arbitrability. Only after objecting did the arbitration proceed, and the Kaplans participate. The Third Circuit, whose reasoning was approved by the US Supreme Court, observed that a party does not have to try to enjoin or stay an arbitration proceeding in order to preserve its objection to jurisdiction, and that a jurisdictional objection, once stated, remains preserved for judicial review absent a clear and unequivocal waiver (*Kaplan*, *19* F3d at 1510). That the Kaplans participated in the arbitration did not waive their objection (*id*. at 1512).

Cases cited by OHM dealing with whether parties disagreed on the scope of arbitration are not comparable to this matter, where the issue is whether a party had the right to arbitrate at all (*see e.g. T.Co Metals, LLC v Dempsey Pipe & Supply, Inc.*, 592 F3d

329 [2d Cir 2010]). Indeed, the court in *T.Co Metals* noted that its decision was based, in part, on the fact that the arbitrator was empowered by a broadly worded arbitration agreement between the parties.

OHM's argument that the Term Sheet, which incorporated AAA Rules, thus left the issue of arbitrability to the arbitrator, is also unpersuasive. OHM was not a party to the Term Sheet, and is thus not entitled to invoke it (*compare Lapina v Men Women N.Y. Model Mgt., Inc.*, 86 F Supp 3d 277 [SD NY 2015]). OHM has not shown that a "sufficient relationship" existed between it and CRTV such that CRTV is obligated to arbitrate claims with OHM (*compare Contec Corp. v Remote Sol., Co.*, 398 F3d 205 [2d Cir 2005] [arbitration appropriate for nonsignatory where parties conducted themselves as subject to the agreement at issue regardless of change in corporate form]).

Nor were the issues between OHM and CRTV so intertwined with those between CRTV and Steyn, such that CRTV would be estopped from avoiding arbitration (*compare Choctaw Generation Ltd. Partnership v American Home Assur. Co.*, 271 F3d 403, 404-405 [2d Cir 2001] [where owner signed arbitration agreement with general contractor containing an arbitration provision, owner was estopped from avoiding arbitration of the related claims of the surety bondholder, with which it also had an agreement]; *Astra*

Oil Co., Inc. v Rover Nav., Ltd., 344 F3d 276 [2d Cir 2003] [where both Astra and its affiliate AOT brought claims against Rover arising from delay in cargo shipment, Rover was estopped from refusing to arbitrate Astra's claims under an arbitration clause in a contract between Rover and AOT]). Here, the services under the OHM letter agreement arose, but differed, from the work created by the Term Sheet. The Term Sheet did not depend upon the viability of the OHM letter agreement in any way; a different company could have been easily hired as a guest booker.

We have considered the parties' remaining contentions and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County, (Eileen Bransten, J.), entered November 2, 2018, which, to the extent appealed from, vacated the arbitration awards of attorneys' fees to petitioners and entered a money judgment against respondent in favor of petitioner Oak Hill Media, Inc. should be reversed, on the law and the facts, without costs, the money judgment award in favor of OHM vacated, and the arbitration awards of attorneys' fees to Steyn reinstated. The appeals from the orders, same court and Justice, entered July 16, 2018 and

July 23, 2018, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

Judgment, Supreme Court, New York County, (Eileen Bransten, J.), entered November 2, 2018, reversed, on the law and the facts, without costs, the money judgment award in favor of OHM vacated, and the arbitration awards of attorneys' fees to Steyn reinstated. Appeals from orders, same court and Justice, entered July 16, 2018 and July 23, 2018, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Renwick, J.P. All concur.

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

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

ENTERED: JULY 2, 2019

CLERK