

Christie's Fine Art Storage Services, Inc., wherein defendant was to provide secure storage for certain of Chowaiki's fine art works at its facility in the Red Hook section of Brooklyn.

Pursuant to the terms of the agreement, Chowaiki had the option to either (a) have defendant "accept liability for physical loss of, or damage to, the Goods," or to (b) "sign a loss/damage waiver," under which Chowaiki accepted that defendant "shall not be liable for any physical loss of, or damage to, the Goods." In the event Chowaiki opted to sign the waiver, it was required to "effect and maintain adequate insurance in respect of the Goods deposited." The agreement further provided for an additional limitation of liability, stating that "even if", despite the aforementioned language, defendant was found "liable for any loss of, or damage to, the Goods," liability was not to exceed the lower of \$100,000 or the market value of the goods.

Chowaiki elected to sign the waiver, which provided that Chowaiki was responsible for obtaining an "against All Risks of loss or physical damage" insurance policy covering the goods deposited with defendant. This insurance was provided by plaintiff. The waiver also absolved defendant of all responsibility for loss or damage to Chowaiki's goods, and required Chowaiki to notify its insurer of the waiver and

"arrange for them to waive any rights of subrogation" against defendant with respect to any loss or damage to Chowaiki's goods while in defendant's custody.

The agreement and waiver were renewed for a second year in February 2012. In October 2012, "Superstorm Sandy" struck the New York City metropolitan area, causing major damage throughout the region.

Prior to Sandy striking, defendant notified Chowaiki via email that "extra precautions" were being taken with respect to Chowaiki's goods, specifically, that "all property on the first floor" of the building where Chowaiki's artwork was stored would be "checked to ensure all items are raised off the floor," or, if necessary, the goods would be removed to empty rooms on the upper floors of defendant's storage facility. During a prior storm (Hurricane Irene), defendant's facility flooded; however, defendant had taken measures at that time to protect Chowaiki's goods from damage. This time, however, when the facility flooded, Chowaiki's goods were damaged, apparently because the goods were left on the first floor. Plaintiff insurer reimbursed Chowaiki for its losses and commenced this action as Chowaiki's subrogee, as the policy between plaintiff and Chowaiki did not waive plaintiff's right to subrogation against defendant.

Plaintiff's complaint asserted causes of action for gross negligence, breach of bailment, negligence, breach of contract, negligent misrepresentation and fraudulent misrepresentation. In lieu of an answer, defendant moved to dismiss pursuant to CPLR 3016(b), 3211(a)(1), (3), and (7), asserting four grounds for dismissal: (a) that the waiver signed by Chowaiki contained both a waiver of subrogation clause and a limitation of liability, both of which barred plaintiff's claims; (b) that even if its waiver of liability was deemed to be invalid, the agreement nonetheless limited plaintiff's damages to \$100,000; (c) that plaintiff's breach of bailment claim must fail because the agreement created a lessor/lessee relationship, not bailor/bailee; and (d) that Sandy was an Act of God, which, as a matter of law, excused defendant's liability.

The motion court correctly found that the agreement between Chowaiki and defendant created a bailor/bailee relationship under article 7 of the Uniform Commercial Code and that the agreement's limitation of liability was unenforceable because it purported to exempt defendant from all liability, in contravention of then UCC 7-204(2) (UCC 7-204[b], as amended by L 2014, ch 505, § 23, eff Dec. 17, 2014]).

UCC 7-204(a) provides that a "warehouse is liable for

damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances” and “is not liable for damages that could not have been avoided by the exercise of that care.” UCC 7-204(b) provides that “[d]amages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage beyond which the warehouse is not liable.” However, such limitations on liability are limited by UCC 7-202(c), which provides that such terms must not “impair its . . . duty of care under Section 7-204. Any contrary provision is ineffective.”

Here there is a question of fact concerning whether defendant, in failing to move Chowaiki’s goods to either another floor, or to a location above ground level on the floor they were on, was reasonable under the circumstances. If the trier of fact finds that defendant did not act reasonably, then defendant may be liable for damages to Chowaiki’s goods (see e.g. *Modelia v Rose Warehouse, Inc.*, 1968 WL 9201 [Sup Ct, New York County 1968], *affd* 36 AD2d 582 [1st Dept 1971]).

However, the court erred in finding that the waiver of subrogation contained in the agreement’s loss/damage waiver is

enforceable and bars this action.

Provisions purporting to exempt the bailee from liability for damage to stored goods from perils against which the bailor had secured insurance, even when caused by the bailee's negligence have been held to run afoul of the statutory scheme of UCC Article 7.

In *Kimberly-Clark Corp. v Lake Erie Warehouse, Div. of Lake Erie Rolling Mill* (49 AD2d 492 [4th Dept 1975], appeal dismissed 39 NY2d 888 [1976]), the Court found such an exculpatory clause to be invalid. In that case, the agreement between the bailee and bailor provided that the bailor "waives any and all right of recovery from the warehouseman for losses caused by the perils covered by fire and extended coverage insurance and caused by any other perils against which customer has insured" (*id.* at 493). In invalidating this clause, the Court noted that while UCC 7-204 permits a warehouseman to limit the *amount* of liability, it cannot completely exempt itself from liability as imposed by UCC Article 7 (*id.* at 494-495). Quoting *Modelia, supra*, the Court stated that a warehouseman "may not contract away or lessen his responsibility except in such manner as the statute provides . . . Any other attempted exoneration or limitation would defeat the statute and must be held void" (*id.* at 495). It should be noted

that the exoneration clause at issue in *Kimberley-Clark* was not as broad as the provisions in this case in that it did not contain an express waiver of subrogation clause or a requirement that the bailor obtain a waiver of subrogation from its insurer. The *Kimberley-Clark* Court did note that the implied waiver of subrogation in that case was nothing more than another attempt by defendant to exempt itself from all liability, which "would defeat the statute and must be held void" (see *Kimberly-Clark*, 49 AD2d at 495).

In view of the foregoing, we need not reach plaintiff's remaining arguments.

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

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

ENTERED: MARCH 17, 2016

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saw which is not provided with a saw table, except chain saws and circular brush saws, shall be equipped with a fixed guard *above the base plate* . . . and a movable self-adjusting guard below the base plate" (emphasis added). Defendant argues that while, on its face, the saw would seem to be covered by section 23-1.12, the photograph of the saw shows that no guard could be affixed above or below the base plate, because there is no base plate on that type of saw. Defendant further argues that plaintiff's own deposition testimony established that a reciprocating saw does not require guarding, since there is no place where a guard could be located.

We agree with the motion court that defendant failed to satisfy its burden of establishing that section 23-1.12(c) does not apply to this case. "[T]o support a claim under Labor Law § 241(6) . . . the particular [Industrial Code] provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). "The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court" (*Messina v City of New York*, 300 AD2d 121, 123

[1st Dept 2002]).

Industrial Code § 23-1.12(c)(1) is sufficiently specific to support a Labor Law § 241(6) claim and is applicable because plaintiff was using a "power-driven, hand-operated saw" at the time of his accident. Defendant sought to use plaintiff's deposition testimony that he had never seen a blade cover or guard on that type of saw as expert testimony to establish that the reciprocating saw plaintiff was given was not covered by the Industrial Code provision in question (see *Hofman v Toys "R" Us, NY Ltd. Partnership*, 272 AD2d 296, 296 [2nd Dept 2000] ["To establish the reliability of an expert's opinion, the party offering that opinion must demonstrate that the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion"]). Defendant, however, cannot avoid its duty to comply with section 23-1.12(c)(1) by asserting that the saw used by plaintiff had no base plate and could not accommodate a self adjusting guard. Section 23-1.12(c)(1) obligated defendant to ensure that the "power-driven, hand-operated saw" provided to plaintiff to perform his job was secured with guard plates to cover the saw blade. As the motion court observed, "[T]o interpret the regulation in any other manner [] would be to ineffectualize the regulation because

employers, owners and contractors would only use tools that would minimize their liability." Accordingly, we find that Industrial Code (12 NYCRR) § 23-1.12(c)(1)) is applicable to this case as a matter of law.

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Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

115 Michael Naughton, Index. 600593/10
Plaintiff-Respondent,

-against-

West Side Advisors, LLC,
Defendant-Appellant.

Jackson Lewis P.C., Melville (Marc S. Wenger of counsel), for
appellant.

Sack & Sack, LLP, New York (Eric R. Stern of counsel), for
respondent.

Order, Supreme Court, New York County (Shirley Werner
Kornreich, J.), entered May 1, 2014, which, to the extent
appealed from, denied defendant's motion for summary judgment
dismissing the claim for incentive compensation related to the
West Side 5 fund, and, upon a search of the record, sua sponte,
granted plaintiff partial summary judgment on his claim for bonus
compensation for the first two quarters of 2009, unanimously
modified, on the law, to vacate the grant of partial summary
judgment to plaintiff, and to reinstate the cause of action for
quantum meruit, and otherwise affirmed, without costs.

The motion court correctly found that plaintiff's 2007
compensation agreement, on which defendant relies in seeking the
dismissal of plaintiff's claim for incentive compensation based

on fees generated by the West Side 5 fund, is ambiguous (see *Greenfield v Philles Records*, 98 NY2d 562 [2002]), and that the parol evidence submitted by defendant to demonstrate the intent of the parties does not resolve the ambiguity. The agreement provides that plaintiff will be paid based on "all fees" earned by defendant, which "presently" include fees from various other identified funds but "do[] not include fees from West Side 5." Defendant contends that the agreement unambiguously bars compensation related to the West Side 5 fund. Plaintiff contends that the term "presently" was meant as a description of the then current state of the funds (i.e., that West Side 5 was not generating fees), and not a permanent bar to compensation based on West Side 5. Both interpretations are reasonable. However, the parol evidence, which included statements by plaintiff that he did not expect compensation from West Side 5 because it was not generating fees, is itself inconclusive.

The court erred in sua sponte granting plaintiff summary judgment as to his claim for other bonus compensation for 2009. The court assumed that defendant did not dispute that the parties had entered into an alleged oral agreement to extend the terms of the 2007 agreement. However, defendant merely argued that, even accepting the facts as alleged by plaintiff, it was entitled to

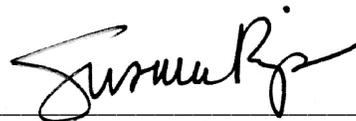
judgment on this claim under the statute of frauds. It did not concede, either in its answer or in the joint statement of undisputed material facts, the existence of the alleged oral agreement.

Contrary to defendant's argument, the oral agreement as alleged by plaintiff was not barred by the statute of frauds since it was terminable at will and therefore could possibly have been performed within one year (*Cron v Hargro Fabrics*, 91 NY2d 362, 367 [1998]).

Because there has been no determination whether there was an express contract governing plaintiff's compensation, the quantum meruit cause of action should be reinstated (see *Haythe & Curley v Harkins*, 214 AD2d 361 [1st Dept 1995]).

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Renwick, J.P., Andrias, Saxe, Richter, JJ.

263-

Index 154631/12E

264 Jonathan Ocana,
Plaintiff-Respondent,

-against-

Quasar Realty Partners L.P.,
Defendant-Appellant.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant.

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

Orders, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 15, 2015, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, and denied defendant's motion for summary judgment dismissing that claim, unanimously affirmed, without costs.

Defendant's argument that it is the alter ego of plaintiff's employer, and that the Workers' Compensation Law therefore bars the action against it, was correctly rejected by the motion court. Although plaintiff's employer was the general partner of defendant, they functioned as separate entities. Plaintiff's

employer provided janitorial services for the buildings at issue, which were owned by defendant. The two entities kept separate files and did not commingle funds (*see Amill v Lawrence Ruben Co., Inc.*, 100 AD3d 458, 459 [1st Dept 2012]; *Soodin v Fragakis*, 91 AD3d 535, 536 [1st Dept 2012]). Further, the Property Management Plan between the entities stated that defendant did not have any employees, and required plaintiff's employer to indemnify defendant for any and all liability.

Plaintiff made a prima facie showing of his entitlement to summary judgment as to liability on his Labor Law § 240(1) cause of action, by submitting his own testimony that the ladder upon which he was standing to perform his work wobbled, and that both he and the ladder fell to the ground as he descended it to figure out why it had wobbled (*see Ortiz v Burke Ave. Realty, Inc.*, 126 AD3d 577, 577 [1st Dept 2015]; *Hamill v Mutual of Am. Inv. Corp.*, 79 AD3d 478, 478 [1st Dept 2010]). Plaintiff was not required to offer proof that the ladder was defective (*Ortiz* at 577; *Hamill* at 479).

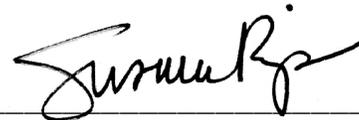
In opposition, defendant failed to show that plaintiff's conduct was the sole proximate cause of the accident (*Ortiz* at 578) and that it had provided plaintiff with adequate safety

devices to prevent his fall (see *Strojek v E. 70th St. Corp.*, 128 AD3d 490, 491 [1st Dept 2015]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]).

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

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firing two shots (see *People v Townes*, 41 NY2d 97, 101-102 [1976]; *People v Cameron*, 209 AD2d 159 [1st Dept 1994] appeal withdrawn 85 NY2d 936 [1995]).

We perceive no basis for reducing the sentence.

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Friedman, J.P., Andrias, Saxe, Kapnick, JJ.

533 Terrapin Industries, LLC, Index 152289/14
Plaintiff-Respondent,

-against-

The Bank of New York, etc.,
Defendant-Appellant.

Akerman LLP, New York (Jordan M. Smith of counsel), for
appellant.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of
counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.),
entered May 29, 2015, which denied defendant's motion seeking to
vacate a default judgment and dismiss the complaint, unanimously
reversed, on the law, without costs, the default judgment
vacated, and the complaint dismissed. The Clerk is directed to
enter judgment accordingly.

Plaintiff, a limited liability company whose managing member
is Colin D. Rath, was granted a default judgment on its action to
discharge and cancel a mortgage concerning property located at
121 West 15th St., New York, New York. Defendant, the holder of
the mortgage, moved to vacate the default judgment.

To vacate a default, a party must demonstrate both a
reasonable excuse and the existence of a meritorious defense;

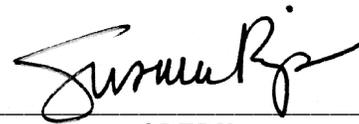
“certain law office failures may constitute reasonable excuses” (*Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]). Defendant, through an affidavit of a person with personal knowledge, established that the delay in responding was due to clerical oversight. Since plaintiff suffered no prejudice and there is no evidence of willfulness, defendant established a reasonable excuse for its delay (*see Marine v Montefiore Health Sys., Inc.*, 129 AD3d 428 [1st Dept 2015]; *Mutual Mar. Off., Inc.* at 419).

Defendant also presented a meritorious defense through documents establishing that plaintiff had transferred the property at issue, along with the mortgage at issue, to Mr. Rath and his wife in 2007, and therefore had no standing to bring the action to discharge the mortgage (*see Aerovias De Mexico, S.A. De C.V. v Malerba, Downes & Frankel*, 265 AD2d 214 [1st Dept 1999]; *Guccione v Estate of Guccione*, 84 AD3d 867, 869-870 [2d Dept 2011]; *Albino v New York City Hous. Auth.*, 78 AD3d 485, 490 [1st

Dept 2010], citing *Matter of Hearst Corp. v Clyne*, 50 NY2d 707,
713-14 [1980]).

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Friedman, J.P., Andrias, Saxe, Kapnick, JJ.

534-

535 In re Kaliek G.,

A Person Alleged to
be a Juvenile Delinquent,
Respondent.

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Presentment Agency

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In re Luis Z.,

A Person Alleged to
be a Juvenile Delinquent,
Respondent.

- - - - -

Presentment Agency

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for appellant.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for Kaliek G., respondent.

Aleza Ross, Patchogue, for Luis Z., respondent.

Orders of dismissal, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about December 6, 2013, which dismissed, on speedy trial grounds, juvenile delinquency petitions filed against respondents, unanimously reversed, on the law and as an exercise of discretion, without costs, the petitions reinstated, and the matters remanded for further proceedings.

The court improvidently exercised its discretion in

dismissing the petitions instead of finding special circumstances and adjourning the proceedings to the following morning, after granting an adjournment for good cause to day 90 (see Family Court Act § 340.1[2],[6]; *Matter of Frank C.*, 70 NY2d 408, 414 [1987]; *Matter of David W.*, 241 AD2d 388, 391 [1st Dept 1997]). The court had allotted only two hours to complete the suppression hearing, hold an independent source hearing if needed, and commence fact-finding on December 5, 2013. Among other things, the presentment agency could not have anticipated respondents' attorneys' prior need to cut the proceedings short on September 16, 2013 due to their hearings in other parts. Nor could it have anticipated that the court, upon granting the motion to suppress, would not allow the independent source hearing to proceed at 4:00 p.m. on December 5, 2013, where the presentment agency noted that the complainant was available, and that it was ready to proceed with the independent source hearing at that time (see *Matter of Lawrence C.*, 152 AD2d 693 [2d Dept 1989]; *Matter of Carlton E.*, 204 AD2d 108, 109 [1st Dept 1994]; see also *Matter of Pierre B.*, 210 AD2d 3 [1st Dept 1994]).

The presentment agency also argues that, by entertaining respondents' untimely suppression motions, the court prevented it from commencing a timely fact-finding hearing. However, we find that the court properly exercised its discretion in entertaining

the motions. Therefore, we find it unnecessary to decide whether the presentment agency's request for additional relief regarding the court's suppression orders is properly encompassed within this appeal from the dismissal orders. Accordingly, the matters are remanded for an independent source hearing, to be followed by a fact-finding hearing.

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Friedman, J.P., Andrias, Saxe, Kapnick, JJ.

536 Samuel Alan Spearin,
Plaintiff-Appellant,

Index 155561/12

-against-

Linmar, L.P., et al.,
Defendants-Respondents.

David M. Schwarz, Dix Hills, for appellant.

Cascone & Kluepfel, LLP, Garden City (Howard B. Altman of
counsel), for Linmar, L.P., respondent.

Traub Lieberman Straus & Shrewsbury LLP, Hawthorne (Gerard
Benvenuto of counsel), for United Woodtank Corporation,
respondent.

Order, Supreme Court, New York County (Cynthia S. Kern, J.),
entered December 24, 2014, which, insofar as appealed from,
denied plaintiff's motion for summary judgment, unanimously
affirmed, without costs.

Plaintiff was not entitled to summary judgment against
defendant United Woodtank Corporation under a *res ipsa loquitur*
theory of negligence. The record presents triable issues of fact
as to whether the piece of wood that allegedly struck plaintiff
was within United's exclusive control (*see Morejon v Rais Constr.*
Co., 7 NY3d 203, 209 [2006]; *Galue v Independence 270 Madison*
LLC, 119 AD3d 403 [1st Dept 2014]). "[P]laintiff's

circumstantial proof [was not] so convincing and the defendant's response so weak that the inference of defendant's negligence [wa]s inescapable" (*Morejon*, 7 NY3d at 209).

Plaintiff's motion was properly denied as against defendant Linmar, L.P., because there are triable issues as to whether Linmar had violated its nondelegable duty of care to pedestrians passing by its premises by failing to erect any safety devices for the duration of United's work. Furthermore, plaintiff did not establish, as a matter of law, that the work performed by the independent contractor was inherently dangerous (see *Kopinska v Metal Bright Maintenance Co.*, 309 AD2d 633 [1st Dept 2003]; see generally *Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 381 [1995]).

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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Friedman, J.P., Andrias, Saxe, Kapnick, JJ.

537 In re RSL 53-55 E. 95th LLC,
Petitioner-Appellant,

Index 100550/14

-against-

New York State Division of
Housing and Community Renewal,
Respondent-Respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda Cruz of
counsel), for appellant.

Jeffrey G. Kelly, New York, for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower,
J.), entered April 10, 2015, denying the petition brought
pursuant to CPLR article 78 to vacate the determination of
respondent New York State Division of Housing and Community
Renewal (DHCR), dated September 5, 2014, which found that
Bernadette Campbell was entitled to succeed to the rent-
controlled apartment formerly occupied by her late father,
unanimously affirmed, without costs.

DHCR's determination that Bernadette Campbell was entitled
to succession rights was not arbitrary and capricious, and did
not lack a rational basis (*see generally Flacke v Onondaga
Landfill Sys.*, 69 NY2d 355, 363 [1987]). Campbell established

her right to succeed to the apartment as a family member (see NY City Rent and Eviction Regulations [9 NYCRR] § 2204.6[d][1]). Campbell's primary residency and cohabitation with her father for the requisite two-year period were established by her evidentiary submissions, including driver's licenses, tax returns and bank statements. DHCR's finding that the tenant of record, who died in a nursing home, only permanently vacated the apartment upon his death, as he intended to return to the apartment, had a rational basis.

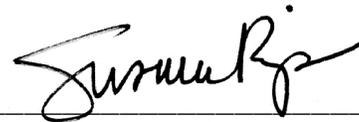
It is undisputed that the courts and DHCR have concurrent jurisdiction to consider succession rights claims (see *Cox v J.D. Realty Assoc.*, 217 AD2d 179, 181 [1st Dept 1995]). It cannot be said that DHCR's retention of jurisdiction here was improper, where petitioner did not commence a holdover proceeding until more than a year after Campbell's filing of her application for succession rights, which application was being actively processed (see *Matter of Gardner v Division of Hous. & Community Renewal of State of N.Y.*, 166 Misc 2d 290, 294 [Sup Ct, Bronx County 1995]).

Petitioner's due process rights were not violated by DHCR's failure to hold a hearing. The record shows that petitioner was given a reasonable opportunity to be heard and took advantage of

it by making its own evidentiary submissions (see e.g. *Matter of Bauer v New York State Div. of Hous. and Community Renewal*, 225 AD2d 410 [1st Dept 1996], *lv denied* 88 NY2d 805 [1996]).

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Friedman, J.P., Andrias, Saxe, Kapnick, JJ.

539 Jeffrey Wald,
Plaintiff-Appellant,

Index 652461/13

-against-

Lawrence G. Graev, et al.,
Defendants-Respondents.

Behren & Sobel, Great Neck (Barton Sobel of counsel), for
appellant.

Mandel Bhandari LLP, New York (Rishi Bhandari of counsel), for
respondents.

Order, Supreme Court, New York County (Saliann Scarpulla,
J.), entered on September 18, 2014, which granted defendants'
CPLR 3211(a)(7) motion to dismiss the complaint, unanimously
modified, on the law, the complaint reinstated only to the extent
it asserts a cause of action for breach of contract against
defendant GlenRock Group LLC based upon an alleged promise to
vest 100,000 stock warrants on March 31, 2008, and otherwise
affirmed, without costs.

The July 12, 2013 complaint alleges breach of an April 12,
2006 agreement promising the immediate vesting of 120,000 stock
warrants, the vesting of an additional 100,000 warrants on March
31, 2007, and the vesting of a final 100,000 warrants on March
31, 2008. Accepting these allegations as true, affording the

pleading a liberal construction, and giving plaintiff the benefit of every possible inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that Supreme Court properly held that the claim was barred by the applicable six year statute of limitations (CPLR 213[2]) to the extent it was based on the promise to immediately vest warrants on April 12, 2006, and to vest an additional 100,000 warrants on March 31, 2007. However, the right to sue on an obligation does not accrue until an amount is due and payable (see *Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 141 [1993]; *Cadlerock, L.L.C. v Renner*, 72 AD3d 454 [1st Dept 2010]). To the extent plaintiff alleges breach of an agreement to vest a final 100,000 warrants on March 31, 2008, the claim did not accrue until approximately April 2008; hence, the July 2013 complaint was timely as to that particular claim.

To the extent the complaint alleges breach of a May 26, 2011 proposed letter agreement, the facts alleged show there was no meeting of the minds as to the agreement, but rather that plaintiff rejected the agreement's terms by making a counteroffer, which was never accepted by defendants (*Thor Props., LLC v Willspring Holdings LLC*, 118 AD3d 505, 507-508 [1st Dept 2014]).

The claims for unjust enrichment, quantum meruit, and promissory estoppel were properly dismissed as duplicative (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), and as untimely (CPLR 213[2]).

The complaint fails to set forth allegations sufficient to state a claim against the individual defendant, as the "director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's promise being broken" (*Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978] [internal quotation marks and citation omitted]).

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additional insured endorsement to the policy issued to St. Vincent's by National Catholic Risk Retention Group limits coverage for additional insureds to liability that arises out of St. Vincent's operations. Because the underlying complaint alleges that St. Vincent's acted wrongfully in connection with the removal, and because the underlying claims against plaintiff arise out of a placement made upon the recommendation of St. Vincent's, plaintiff is entitled to a defense under the policy (see *Federal Ins. Co. v Koslowski*, 18 AD3d 33, 40 [1st Dept 2005]).

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ENTERED: MARCH 17, 2016

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Friedman, J.P., Andrias, Saxe, Kapnick, JJ.

542 Michael Koulermos, et al., Index 190406/14
Plaintiffs,

-against-

A.O. Smith Water Products,
Defendant,

National Grid USA,
Defendant-Respondent,

Courter & Company, et al.,
Defendants-Appellants.

McGivney & Kluger, P.C., New York (Kerryann M. Cook of counsel),
for appellants.

Cullen & Dykman LLP, New York (John J. Burbridge of counsel), for
respondent.

Order, Supreme Court, New York County (Peter H. Moulton,
J.), entered August 17, 2015, which, inter alia, denied
defendants Courter & Company's and Treadwell Corporation's
motions for summary judgment dismissing defendant National Grid
USA's cross claims against them, unanimously affirmed, without
costs.

Courter and Treadwell failed to establish prima facie that
plaintiff Michael Koulermos was not at the facility in question
alongside their employees. Their contention rested on evidence
of plaintiff's inability to remember precisely when he worked at

the facility. However, pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment; Courter and Treadwell failed to present evidence, such as affidavits establishing when their employees were present at the facility and whether or not those employees used asbestos-containing products, to "affirmatively demonstrate the merit of [their] . . . defense" (*Dalton v Educational Testing Serv.*, 294 AD2d 462, 463 [2d Dept 2002]).

In any event, in opposition, defendant National Grid produced evidence showing when the facility was under construction and that during the construction Courter and Treadwell's employees were at the site for the installation of boilers and related equipment, a process that involved the use of asbestos-containing products and that occurred in plaintiff's vicinity.

We have considered Courter and Treadwell's remaining

arguments and find them unavailing.

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

ENTERED: MARCH 17, 2016

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(see *People v Fratello*, 92 NY2d 565, 574-575 [1998], cert denied 526 US 1068 [1999]). The accomplice corroboration requirement was satisfied by evidence that was essentially the same as at defendant's first trial. On the resulting appeal (86 AD3d 147, 161-162 [1st Dept 2011], *affd in part and revd in part on other grounds* 20 NY3d 240 [2012]), we found the corroborating evidence to be sufficient, and there is nothing in the evidence adduced at the retrial to warrant a different conclusion.

The court properly exercised its discretion in declining to expand upon the Criminal Jury Instructions regarding accessorial liability, and the additional language proposed by defendant was unnecessary (see generally *People v Samuels*, 99 NY2d 20, 25-26 [2002]). The standard instruction made clear that to find defendant criminally liable for the conduct of another, the jurors had to find that he acted with the state of mind required to commit the offense, and intentionally aided the other person to engage in such conduct.

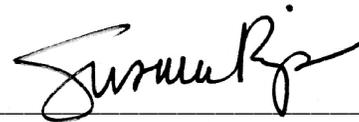
Defendant did not preserve his challenges to the court's responses to notes from the deliberating jury, and we decline to review them in the interest of justice. Defendant agreed to the court's responses, and did nothing to alert the court that he wanted these responses to include the language he had

unsuccessfully requested with regard to the main charge (see *People v Lewis*, 5 NY3d 546, 551 [2005]; *People v Whalen*, 59 NY2d 273, 280 [1983]). The circumstances do not warrant application of the futility exception to the preservation requirement (see *People v Mezon*, 80 NY2d 155, 160-161 [1992]). As an alternative holding, we find that the court provided meaningful responses when it reiterated the standard principles of accessorial liability (see *People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 301-302 [1982], *cert denied* 459 US 847 [1982]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 17, 2016

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CLERK

Friedman, J.P., Andrias, Saxe, Kapnick, JJ.

544 Z. Justin Management Co., Inc., Index 650859/13
 Plaintiff-Appellant,

-against-

Metro Outdoor, LLC, et al.,
Defendants-Respondents.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of
counsel), for appellant.

Balber Pickard Maldonado & Van Der Tuin, P.C., New York (Roger J.
Maldonado of counsel), for Metro Outdoor, LLC, respondent.

Rosenberg & Estis, P.C., New York (Bradley S. Silverbush of
counsel), for 860 Sign, LLC, respondent.

Order, Supreme Court, New York County (Saliann Scarpulla,
J.), entered on or about December 16, 2014, which, to the extent
appealed from, granted the motions of defendants Metro Outdoor,
LLC (Metro) and 860 Sign, LLC (860 Sign) to dismiss the second
amended complaint, unanimously affirmed, with costs.

This case involves a purported wrongful assignment of an
outdoor advertising agreement by defendant Metro to defendant 860
Sign. The agreement, which was originally entered into between
plaintiff and defendant Metro, was assigned by Metro to 860 Sign
for an assignment fee of \$1.6 million. On appeal, plaintiff
contends that the agreement, despite being labeled a "sublease,"

was actually a non-assignable licensing agreement as a matter of law, or, in the alternative, that plaintiff was entitled to a portion of the assignment fee.

Plaintiff's arguments are unavailing. "The nature of the transfer of absolute control and possession is what differentiates a lease from a license . . . [w]hereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant, subject to rights specifically reserved by the lessor. The former is cancellable at will, and without cause" (*American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1st Dept 1994]). The "critical question in determining the existence of a lease . . . is whether exclusive control of the premises has passed to the tenant" (*Women's Interart Ctr. Inc. v New York City Economic Dev. Corporation[EDC]*, 97 AD3d 17, 21 [1st Dept 2012], *lv dismissed* 20 NY3d 1034 [2013]).

Under the relevant standard, the plain language of the agreement at issue reveals that the agreement is a lease and not a license. In the first paragraph of the agreement the property is unambiguously granted to Metro outright, providing that plaintiff "[s]ubleases and grants exclusively to [Metro]" the property, without restriction. In addition to granting exclusive

possession of the property to Metro and the exclusive use and right to install advertising upon it, the agreement, characteristic of a lease, is not revocable at will (see *Williams v Hylan*, 223 Appellant Div 48, 52 [1st Dept 1928], *affd* 248 NY 616 [1928]). The agreement is a lease according to its plain terms, in both form and substance (see *Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7-8 [1st Dept 2012]).

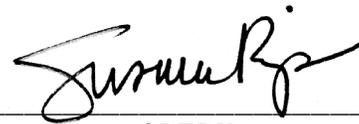
Finally, even accepting plaintiff's argument that the agreement is somehow not a lease, it does not follow that the agreement is necessarily a non-assignable license. While plaintiff argues the agreement is a license for the purpose of establishing that it is not assignable, the clear language of the agreement is to the contrary, providing that it would inure to the benefit of Metro's successors and "assigns."

The IAS Court properly relied upon *Ashwood Capital, Inc. v*

OTG Mgt., Inc., supra, to dismiss the remaining causes of action in the second amended complaint.

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

ENTERED: MARCH 17, 2016

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Friedman, J.P., Andrias, Saxe, Kapnick, JJ.

545 In re Grand Imperial, LLC,
Petitioner-Respondent,

Index 100704/14

-against-

The New York City Board of Standards
and Appeals, et al.,
Respondents-Appellants.

- - - - -

Congressmember Jerrold Nadler, New
York State Senator Liz Krueger, New
York State Assembly Member Richard N.
Gottfried, New York State Assembly
Member Daniel O'Donnell, New York State
Assembly Member Linda Rosenthal,
Manhattan Borough President Gale A. Brewer,
New York City Public Advocate Letitia James,
New York City Council Member Helen
Rosenthal, Goddard Riverside Law Project,
Housing Conservation Coordinators, Inc.,
and MFY Legal Services, Inc.,
Amici Curiae.

Zachary W. Carter, Corporation Counsel, New York (Richard Dearing
of counsel), for appellants.

Chehebar Deveney & Phillips, New York (Cornelius P. McCarthy of
counsel), for respondent.

Jeanette Zelhof, MFY Legal Services, New York (Martha Weithman of
counsel), for amici curiae.

Judgment, Supreme Court, New York County (Alexander W.
Hunter, J.), entered April 22, 2015, granting the petition to
annul a resolution of respondent Board of Standards and Appeals,
adopted June 10, 2014, as amended July 2, 2014, which affirmed

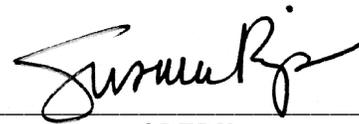
the Department of Buildings' denial of petitioner's request for a Letter of No Objection regarding petitioner's rental of units in its class A residential building for a minimum of seven days, unanimously reversed, on the law, the petition denied, and the proceeding brought pursuant to CPLR article 78, dismissed, without costs.

As Supreme Court found, based on the former Multiple Dwelling Law § 248(16), which permitted single room occupancy owners to rent their rooms for periods as short as seven days, petitioner had an accrued right, within the meaning of the Multiple Dwelling Law saving clauses (see Multiple Dwelling Law § 366[1]), at the time the legislature amended provisions related to occupancy in class A multiple dwellings in 2010. However, in enacting the amendments, the legislature's intent that a 30-day minimum occupancy requirement would apply to all, with only narrow, specified exceptions, was sufficiently clear that petitioner's saving clause right to continue renting for the shorter period was extinguished (see L 2010, ch 225, § 8, as amended by L 2010, ch 566, § 3 [providing in pertinent part that the relevant act amending the Multiple Dwelling Law and the Administrative Code of the City of New York "shall take effect May 1, 2011 and shall apply to all buildings in existence on such

effective date and to buildings constructed after such effective date" (emphasis added)]; *Kellogg v Travis*, 100 NY2d 407 [2003]).

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

ENTERED: MARCH 17, 2016

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

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Friedman, J.P., Andrias, Saxe, Kapnick, JJ.

547 Chanel McKenzie, Index 302274/09
Plaintiff-Respondent,

-against-

New York City Transit Authority,
et al.,
Defendants-Appellants.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel),
for appellants.

Law Office of William A. Gallina, PLLC, Bronx (Frank V. Kelly of
counsel), for respondent.

Judgment, Supreme Court, Bronx County (Alison Tuitt, J.),
entered April 8, 2014, upon a jury verdict in plaintiff's favor,
unanimously reversed, on the law and the facts, without costs,
the judgment vacated, and the matter remanded for a new trial on
the issue of liability.

Plaintiff sustained a fractured ankle when she tripped and
fell on "cracks" in a cobblestone crosswalk while attempting to
board a bus. The bus was away from the bus stop, with its front
doors in the crosswalk, and about five feet from the curb. The
jury found defendants and plaintiff negligent, but that only
defendants' negligence was a proximate cause of the accident.

Contrary to defendants' contention, plaintiff made a prima

facie showing that defendants were negligent in positioning the bus as they did. Plaintiff's testimony that she observed her friend pay her fare immediately before she fell, and the friend's testimony that she saw plaintiff on the ground upon looking back after she paid her fare, permits a rational jury to conclude that the defective condition was in a direct path to the door, compelling plaintiff to board the bus via a treacherous path (see *Blye v Manhattan & Bronx Surface Tr. Operating Auth.*, 124 AD2d 106, 111-112 [1st Dept 1987], *affd* 72 NY2d 888 [1988]).

However, defendants are correct in arguing that the evidence does not support a finding that the driver's violation of 34 RCNY 4-10(c)(1), which requires buses to pick up and discharge passengers at bus stops and within 12 inches of the curb and parallel thereto, was a proximate cause of the accident. It was the positioning of the bus adjacent to the defective condition, and not the rule violation, that proximately caused the accident. The violation merely furnished the occasion for the accident (see *Sheehan v City of New York*, 40 NY2d 496 [1976]; *Pagan v Ouattara*, 115 AD3d 605 [1st Dept 2014]). Nevertheless, dismissal of the complaint is unwarranted, given that the evidence supports a finding that defendants negligently positioned the bus, and defendants do not argue that such negligence was not a proximate

cause of plaintiff's injuries.

The jury's finding that plaintiff was negligent, but that such negligence was not the proximate cause of her injuries, is inconsistent and against the weight of the evidence. The issues "are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Lora v City of New York*, 305 AD2d 171, 172 [1st Dept 2003]). Accordingly, a new trial on the issue of liability is required.

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

ENTERED: MARCH 17, 2016

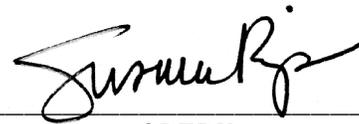
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were outweighed by defendant's criminal history and the gravity of the underlying crime, committed against a child.

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

ENTERED: MARCH 17, 2016

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prejudicial to the good order, efficiency and discipline of the NYPD (see generally *Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). An adverse inference was not warranted, because there was no evidence that the NYPD possessed, destroyed, or withheld the audio recording and in-house reports at issue (*Cordero v Mirecle Cab Corp.*, 51 AD3d 707, 709 [2d Dept 2008]), nor did petitioner demonstrate that the audio recording ever existed (*Cuevas v 1738 Assoc., LLC*, 96 AD3d 637, 638 [1st Dept 2012]). In addition, petitioner did not seek the admission of the video recording, and, in any event, petitioner's counsel, who had viewed the video, stipulated to its contents.

The penalty imposed does not shock our sense of fairness (*Matter of Waldren v Town of Islip*, 6 NY3d 735, 736-737 [2005]).

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

ENTERED: MARCH 17, 2016

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Friedman, J.P., Andrias, Saxe, Kapnick, JJ.

551 Encompass Insurance Company,
Plaintiff-Appellant,

Index 151707/14

-against-

Rockaway Family Medical
Care, P.C., as assignee
of Sarah Obas.,
Defendant-Respondent.

Bruno, Gerbino & Soriano, LLP, Melville (Matthew Lavoie of
counsel), for appellant.

Law Office of George T. Lewis, Jr., P.C., Syosset (George T.
Lewis, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.),
entered on or about September 17, 2014, which denied plaintiff's
motion for a de novo review of a master arbitrator's findings
dated December 17, 2013, and for summary judgment declaring in
its favor, and sua sponte dismissed the complaint, unanimously
modified, on the law, to reinstate the complaint and grant the
part of the motion seeking a de novo review of the arbitrator's
findings, and otherwise affirmed, without costs.

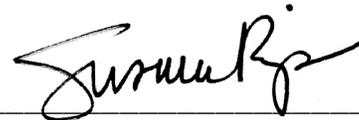
Plaintiff satisfied the requirements for a de novo
adjudication of this dispute pursuant to Insurance Law § 5106(c).

Plaintiff's second follow-up request for an examination
under oath was sent 11 days after defendant failed to appear on

the date set in the first request; the 10th day fell on a Sunday (see 11 NYCRR 65-3.6[b]). Plaintiff correctly argues that it was entitled to an extension of time to the next business day to send its second follow-up request (see General Construction Law § 25-a).

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

ENTERED: MARCH 17, 2016

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Friedman, J.P., Andrias, Saxe, Kapnick, JJ.

552N Encompass Insurance Company,
Petitioner-Respondent,

Index 650569/14

-against-

Rockaway Family Medical
Care, P.C., as assignee
of Farah Obas,
Respondent-Appellant.

Law Office of George T. Lewis, Jr., Syosset (George T. Lewis, Jr.
Of counsel), for appellant.

Bruno, Gerbino & Soriano LLP, Melville (Mitchell L. Kaufman of
counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York
County (Eileen A. Rakower, J.), entered August 25, 2014, vacating
the master arbitration decision of Frank G. Godson dated December
17, 2013, and reinstating the award of arbitrator Laura Yantsos
dated September 25, 2013, unanimously affirmed.

It is undisputed that petitioner's second follow-up request
for an examination under oath was sent 11 days after respondent
failed to appear on the date set in the first request and that
the 10th day fell on a Sunday (see 11 NYCRR 65-3.6[b]).

Plaintiff was entitled to an extension of time to the next

business day to send its second follow-up request (see General Construction Law § 25-a).

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

ENTERED: MARCH 17, 2016



CLERK

Tom, J.P., Renwick, Saxe, Moskowitz, JJ.

24 In re Leodegario D. Salvador,
Petitioner-Respondent,

Index 102913/12

-against-

Touro College, et al.,
Respondents-Appellants.

Michael Newman, New York, for appellants.

Stewart Lee Karlin Law Group PC, New York (Stewart Karlin of
counsel), for respondents.

Order Supreme Court, New York County (Eileen A. Rakower,
J.), entered October 20, 2014, reversed, on the law, without
costs, and respondents' motion to dismiss the causes of action
for breach of contract, fraudulent inducement and negligent
misrepresentation, granted.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
David B. Saxe
Karla Moskowitz, JJ.

24
Index 102913/12

x

In re Leodegario D. Salvador,
Petitioner-Respondent,

-against-

Touro College, et al.,
Respondents-Appellants.

x

Respondents appeal from an order of the Supreme Court,
New York County (Eileen A. Rakower, J.),
entered October 20, 2014, which, insofar as
appealed from as limited by the briefs,
denied their motion to dismiss the causes of
action for breach of contract, fraudulent
inducement and negligent misrepresentation.

Michael Newman, New York, for appellants.

Stewart Lee Karlin Law Group PC, New York
(Stewart Karlin and Daniel E. Dugan of
counsel), for respondent.

SAXE, J.

Petitioner commenced this hybrid proceeding seeking a judgment pursuant to CPLR article 78 compelling Touro College Jacob B. Fuchsberg Law Center (Touro Law) to confer upon him an LL.M. degree; he also seeks an award of money damages based on the school's refusal to grant him a degree, claiming breach of contract, fraudulent inducement, negligence and negligent misrepresentation. Supreme Court denied respondents' motion to dismiss, except to the extent of dismissing the negligence claim. On appeal, respondents contend that petitioner's claims for breach of contract, fraudulent inducement and negligent misrepresentation must also be dismissed. We agree, and reverse the motion court's order in those respects.

Touro Law offers two Master of Laws (LL.M.) programs. Its website explains that its General LL.M. program is open to applicants holding law degrees from ABA accredited U.S. law schools, while its LL.M. in U.S. Legal Studies program is open to applicants holding law degrees from foreign universities. The school's application form for its LL.M. programs included the following statement, below the signature line:

"By signing above, I certify that the statements made in this Application . . . are complete, accurate, and are subject to the rules and regulations contained in the Touro Law Center Code of Conduct. . . . I understand that omission or misrepresentation of facts

on this Application may be cause for denial of my admission or for dismissal after enrollment."

On January 21, 2011, petitioner submitted his application for admission to Touro's LL.M. program for the spring 2011 semester, and was accepted on the basis of the information provided in his application and an interview with school administrators on that day. Petitioner's application indicated that he had obtained a J.D. degree from Novus University School of Law, where he studied from 2009 to 2011. The application also indicated that petitioner was born in the Philippines and obtained a B.A. degree from Northeastern College in 1974.

During the admission interview, according to petitioner's affidavit, Professor Daniel Derby, who was the director of the LL.M. program, observed to him that "both the LLB and the JD taken in Philippine universities are acceptable in the United States" (emphasis added). At that time, petitioner did not submit his law school transcript; his Novus transcript was not supplied to Touro until April 4, 2011, by which time petitioner had been accepted into, and begun, Touro Law's LL.M. in U.S. Legal Studies program. He took classes during the spring 2011, summer 2011 and fall 2011 semesters, reaching the 27-credit graduation requirement in time for January 2012 graduation.

According to the petition, he was not informed until January

26, 2012 that Touro would not award him an LL.M. The Registrar of Touro Law, Paula Kutch, explains in her affidavit that petitioner had been admitted based upon the erroneous belief that Novus University School of Law was a foreign law school physically located in the Philippines, petitioner's home country, when in fact, Novus is solely an online school. Consequently, Touro's Registrar explains, petitioner had not been eligible to be admitted to Touro's LL.M. program at the time he applied and was accepted, and is not eligible to receive an LL.M. degree.

Petitioner acknowledged, in his affidavit on the motion, that a conversation took place between him and Professor Derby in early September 2011, in which some question was raised with him regarding his status. However, he asserted that it was only later that he was informed that he would not be eligible for a degree because Novus Law School is an online school rather than a foreign law school.

According to Kutch, petitioner was first informed in September 2011 by Professor Derby, that his admission had been in error due to this misunderstanding, and that he was not eligible for an LL.M. degree. Kutch stated that according to a memorandum written by Professor Derby in September 2011,¹ petitioner was at

¹ The Kutch affidavit refers to a memorandum by Prof. Derby being attached as an exhibit; however, no such exhibit was

that time offered the option of a tuition refund, but opted to continue with the program as a non-matriculated student so that he could qualify to take the District of Columbia bar exam. She further explained that had the school's admissions personnel seen petitioner's official Novus transcript at the time his application was considered, or had petitioner corrected Professor Derby's affirmatively-stated misunderstanding at his interview, they would have known at the outset that petitioner was not eligible for admission to Touro's LL.M. program, and would not have admitted him.

On January 19, 2012, the date that petitioner was scheduled for his graduation interview, the Registrar first discovered that petitioner's admission to Touro Law was based on a factual error, and, after speaking to Professor Derby, changed petitioner's status to "non-matriculated per Dan Derby." Petitioner was thereafter notified. Petitioner protested that Novus Law School should be considered a foreign law school, but Touro rejected that argument.

Petitioner then brought this proceeding. In the motion now before us, respondents moved to compel arbitration and, in the alternative, for dismissal. At issue on this appeal is the

included in the submitted record.

denial of respondents' motion to dismiss the petition.²

Initially, schools are entitled to set the academic eligibility requirements for those seeking to attend their programs (see *e.g. Matter of Fulton-Montgomery Community Coll. v County of Saratoga*, 80 AD3d 217 [3d Dept 2010], *lv denied* 16 NY3d 708 [2011]). If a school discovers that an admitted student does not meet those prerequisites, the school must have the right to deny a degree to that student, even if the discovery is made after the student has already completed the course work (see *Owens v Parrinello*, 365 F Supp 2d 353 [WD NY 2005]). In *Owens*, a change in governing regulations caused a Community College to be unable to award an Associate's degree to the plaintiff student although he had completed all the requisite course work, because he lacked either a high school diploma or a G.E.D.

Here, while there was no regulatory change as there was in *Owens*, eligibility requirements existed from the outset, that petitioner either knew or should have known, regarding the types of schools an applicant must have attended for purposes of each LL.M. program; notably, those requirements were apparent from even a cursory reading of the school's website regarding those

² The denial of the branch of the motion to compel arbitration, and the grant of dismissal of petitioner's negligence cause of action, are not challenged here.

programs. While online schooling is becoming more prevalent, and it may, in the future, become an acceptable alternative to a degree from a so-called "brick and mortar" school, we are bound by the eligibility rules and prerequisite requirements established by the educational institution.

Not only was petitioner ineligible to attend the program he attended, but two acts on his part prevented that fact from coming to the school's attention at the time of his admission. First, his official law school transcript was not supplied until months after his admission, preventing the school from discerning from the outset the true nature of that institution. Second, he did not correct Professor Derby's apparent misapprehension that Novus was located in the Philippines, thereby knowingly allowing the admissions officials to admit him on the basis of inaccurate information.

With regard to the contract cause of action, petitioner relies on case law holding that "[t]here exists an implied contract between the institution and its students such that if the student complies with the terms prescribed by the institution, he will obtain the degree which he sought" (*Eidlisz v New York Univ.*, 61 AD3d 473, 475 [1st Dept 2009] [internal quotation marks omitted], *affd as mod* 15 NY3d 730 [2010]; see also *Vought v Teachers Coll., Columbia Univ.*, 127 AD2d 654 [2d

Dept 1987])). However, even assuming that such an implied contract might have been formed here, a school has the authority to rescind a student's admission or to dismiss a student from the school, even after course work has begun or been completed, where there were material misrepresentations or omissions in the student's application (see *Matter of Powers v St. John's Univ. Sch. of Law*, 25 NY3d 210 [2015]; *Matter of Mitchell v New York Med. Coll.*, 208 AD2d 929 [2d Dept 1994], *lv dismissed* 85 NY2d 856 [1995])). In *Mitchell*, the student had misrepresented the grades he previously received at another school; in *Powers*, the student had both omitted and misrepresented information in his school application regarding whether he had ever been charged with or found guilty of any crime. Although petitioner here did not affirmatively or explicitly misrepresent facts on his application, he omitted the critical fact that the school from which he had received his J.D. degree was not a foreign law school, which fact disqualified him from eligibility for entry into the LL.M. program. By submitting the application, petitioner was implicitly stating that he satisfied the program's prerequisites for attendance, in particular, the requirement that he had attended a foreign law school. Indeed, he did more than omit that information; he allowed respondents to proceed with his admission knowing that they harbored a misconception regarding

the nature of the institution that had awarded him a J.D. degree.

Petitioner knew or should have known from the outset that (1) to be eligible for the program to which he applied, he had to have graduated from a foreign law school, and (2) on the date he was admitted, Touro's administrators had incorrectly concluded that Novus was a law school located in the Philippines. Since petitioner's admission was based upon an omission of a material fact of which petitioner was aware, petitioner's conditional admission was falsely obtained. Pursuant to the school's code of conduct, the terms of the application and the law the school had no contractual obligation to award a degree under these circumstances.

Petitioner's tort claims should have been dismissed as well. "To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]; see also *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]). Further, the elements of the claim must be pleaded in detail (see CPLR 3016[b]). Petitioner's fraudulent inducement claim fails as his allegations do not give rise to a reasonable inference that Touro Law was aware of the falsity of any implied agreement to

confer an LL.M. degree (see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; see also *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 180). Petitioner's negligent misrepresentation claim fails in the absence of a "special relationship ... requiring a duty of full and complete disclosure" (*Gomez-Jimenez v New York Law Sch.*, 103 AD3d 13, 18 [1st Dept 2012], *lv denied* 20 NY3d 1093 [2013]).

Accordingly, the order of the Supreme Court, New York County (Eileen A. Rakower), entered October 20, 2014, which, insofar as appealed from as limited by the briefs, denied respondents' motion to dismiss the causes of action for breach of contract,

fraudulent inducement and negligent misrepresentation, should be reversed, on the law, without costs, and the motion granted.

All concur.

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

ENTERED: MARCH 17, 2016


CLERK