SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 24, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12714-
12715 Sedina Levin, Index 400309/10
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation, (Harlem Hospital Center),
Defendant-Respondent.

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Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

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Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered February 24, 2012, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs. Order, same court and Justice entered November 30, 2012, which, upon reargument, adhered to the original determination, unanimously affirmed, without costs.

On October 10, 2008, at 11:20 p.m., plaintiff, who was 19

weeks pregnant, presented at defendant hospital with complaints of lower abdominal pain, contractions and vaginal bleeding. A physical examination revealed cervical dilation at three centimeters, with bulging, but intact membranes. There was fetal movement and a fetal heart rate of 140 beats per minute. She was given a primary diagnosis of threatened abortion and was admitted to the Labor and Delivery department for expectant management and prevention of premature delivery.

Plaintiff requested immediate cerclage[1] or transfer to another facility where that procedure could be performed. Defendant's hospital records reflect that one physician determined that cerclage could not be offered; another physician noted that the procedure could possibly be performed the following morning. No cerclage was performed, nor was plaintiff transferred to another hospital.

On October 23, 2008, at 3:40 a.m., a nurse, while tending to plaintiff, noticed that "the fetus came out moving. Defendant's records documented that, at that time, a previable female was "born via premature vaginal delivery due to incompetent cervix."

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[1]Cerclage is the placement of stitches in the cervix to hold it closed, a procedure used to keep a weak (incompetent) cervix from opening early, which can cause preterm labor and delivery.

An independent medical record was created for the infant at the time of her birth. The newborn weighed 375 grams (13 ounces), and had a heart rate of 70 to 80 beats per minute and weak movement of the extremities. She was transferred to the neonatal intensive care unit (NICU) and placed in a radiant warmer. Her Apgar scores were 1 out of a possible 10 at one and five minutes. She had no respiratory effort, a limp muscle tone, no response to stimuli and a pale or blue color. While in NICU, no resuscitation was attempted and the infant was given comfort care. At 7:06 a.m., approximately 3 ½ hours after delivery, the infant died.

On or about December 29, 2008, plaintiff, individually and as proposed administrator of the infant's estate, filed a notice of claim against defendant, alleging, inter alia, negligence and medical malpractice in the treatment and management of the labor and delivery, and in the neonatal and pediatric care provided by defendant. Among the injuries alleged were conscious pain and suffering to the infant, and mental anguish to plaintiff. On or about July 30, 2009, plaintiff, on her own behalf, brought an action against defendant, alleging malpractice and lack of informed consent. Plaintiff had not been appointed as administrator of the infant's estate and no complaint has been

filed on the estate's behalf.

In her bill of particulars, plaintiff alleged that defendant was negligent, inter alia, in failing to properly monitor her pregnancy, and in failing to order and place cervical cerclage, which resulted in miscarriage/stillbirth, all causing her to suffer depression, insomnia, conscious pain and suffering, loss of society and support of her child, emotional distress and loss of enjoyment of life.

Defendant moved pursuant to CPLR 3211(a)(7) to dismiss the complaint, arguing that, since the infant was born alive, and plaintiff has alleged no independent injury to herself, she could not recover for emotional distress under the authority of *Broadnax v Gonzalez* (2 NY3d 148 [2004]) and *Sheppard-Mobley v King* (4 NY3d 627 [2005]). In opposition, plaintiff argued that this case was distinguishable from *Broadnax* in that defendant's records characterized decedent as a "pre-viable fetus" who was never conscious, as opposed to an "infant." In reply, defendant reiterated that the infant was born alive and lived for approximately 3 ½ hours, as evidenced by her separate medical records, and her birth and death certificates, as well as plaintiff's deposition testimony, thus bringing this action squarely within the ambit of the *Broadnax* and *Sheppard-Mobley*

decisions.

The court granted defendant's motion, finding that the infant was indeed born alive and that plaintiff suffered no independent injury. Her claim was therefore precluded under the rationale of *Broadnax*.

Plaintiff moved to renew and reargue, contending that the court misapprehended the rationale in *Broadnax*, in that, although not stillborn, the infant here was never viable, never conscious and died shortly after birth. Plaintiff argued that the facts of this case were similar to those in *Mendez v Bhattacharya* (15 Misc 3d 974 [Sup Ct, Bronx County 2007]), where the court held that where "an infant dies within minutes of birth as a result of malpractice prior to or during delivery, a plaintiff mother should be able to bring a cause of action for emotional distress where there is no indication that the estate of the baby possesses a cause of action for the infant's pain and suffering" (*id.* at 983).

In support of her motion to renew, plaintiff submitted, for the first time, the expert affirmation of Chone Ken Chen, M.D., who opined that even if the baby was born alive, there was no breathing or respiratory effort. As a result, she was never conscious. Moreover, even if there were moments of

consciousness, the baby was completely without oxygenation from the time of birth and would have sustained a total loss of consciousness by 10 minutes after birth. Dr. Chen concluded that the baby was not a viable infant, was not capable of surviving outside the womb for any length of time, and was brain dead within 15 minutes after birth. Plaintiff also submitted her own affidavit and that of the baby's father, both of whom stated that the baby did show slight signs of movement after birth and that both individuals requested hospital personnel to make attempts to resuscitate the baby.

The court granted reargument and adhered to its original decision. We now affirm.

Defendant showed that plaintiff has no cause of action because the infant was born alive and plaintiff alleged no injury independent of the infant (*see Sheppard-Mobley*, 4 NY3d at 637-638). The hospital records demonstrated that the infant was born, had a heartbeat, and remained alive without life support for several hours. Further, the death certificate provided prima facie evidence of the infant's birth and death (Public Health Law § 4103[3]; CPLR 4520; *Fiorentino v TEC Holdings, LLC*, 78 AD3d 766, 767 [2d Dept 2010]).

In opposition to defendant's motion to dismiss, plaintiff

mother failed to show that she had a cause of action (*cf. Sheppard*, 4 NY3d at 637-638). Further, the evidence plaintiff submitted in support of her motion to renew did not state new facts that would change the court's original determination (CPLR 2221 [e][2]). Indeed, Dr. Chen noted the infant's Apgar scores were low, indicating a heart rate of between 70 to 80 beats per minute. Although he opined that because she was not breathing she was not conscious, he also opined that "even if there were some moments of consciousness," there would have been a loss of consciousness after 10 minutes. Despite his conclusory opinion that the infant would have been "brain dead" within 15 minutes after birth, he presented no evidence to contradict defendant's showing that the infant was born alive and remained so for some 3 ½ hours. Additionally, as noted, both plaintiff and the infant's father stated that the infant demonstrated some spontaneous movement and both requested hospital personnel to attempt to resuscitate her.

Amin v Soliman (67 AD3d 835 [2d Dept 2009]), a case where plaintiff successfully raised an issue of fact as to whether the deceased infant had been born alive, is instructive. In *Amin*, defendants claimed there had been a live birth. However, there was no respiratory response, the Apgar score was zero at one,

five and ten minutes after birth and the infant died within ten minutes after being removed from a ventilator upon which she had been placed (67 AD3d at 836). Here, the infant had a heartbeat and lived on her own without any means of life support for approximately 3 1/2 hours. This is a sufficient period to support a claim for wrongful death (*see Ramos v La Montana Moving & Stor.*, 247 AD2d 333 [1st Dept 1998]).

Plaintiff argues that the rationale of *Mendez v Bhattacharya* (15 Misc 3d 974) should be applied to this case. In *Mendez*, the infant had an Apgar score of one at one minute and zero at five minutes (15 Misc 3d at 981). It was uncontroverted that "even if there was a technical sign of life due to the lingering heartbeat, the child was not viable, since there was no other sign of life besides the momentary heartbeat" (*id.* at 982). The infant had no respiration and efforts to resuscitate by mechanical ventilation and CPR were unsuccessful (*id.* at 981). The court found that under those facts, the presence of a "momentary heartbeat" did not rise to the level of a live birth within the purview of the *Broadnax* and *Sheppard-Mobley* decisions, and therefore the plaintiff mother had a viable cause of action for emotional distress (*id.* at 983).

That is clearly not the situation before us. To accept

plaintiff's contention that, where there is a live birth but the infant never attains consciousness, a mother should be permitted to maintain a cause of action for emotional distress would impermissibly expand the narrow holdings in *Broadnax* and *Sheppard-Mobley*. Plaintiff was entitled to bring a wrongful death action on behalf of the estate of the person who was injured, i.e., the infant who survived, albeit briefly (cf. *Mendez*, 15 Misc 3d at 983). Plaintiff tacitly acknowledged this by serving a notice of claim as the proposed administrator on behalf of the infant's estate.

Accordingly, since the infant was born alive and plaintiff did not sustain any independent injury, she may not maintain a cause of action to recover damages for emotional harm.

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

ENTERED: JULY 24, 2014

CLERK

Acosta, J.P., Moskowitz, Freedman, Feinman, JJ.

12019 The People of the State of New York, SCI. 1021/12
Respondent,

-against-

Natalia Santiago,
Defendant-appellant.

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

Robert T. Johnson, District Attorney's Office, Bronx (Diane A. Shearer of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered May 10, 2012, convicting defendant, upon her plea of guilty, of two counts of attempted robbery in the second degree, and sentencing her to concurrent terms of three years, to be followed by three years of postrelease supervision, unanimously affirmed.

We find that defendant's purported waiver of her right to appeal was invalid inasmuch as the court did not tell defendant that her right to appeal was separate and distinct from her trial rights, which were automatically forfeited upon her plea of guilty (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]; *People v Williams*, 59 AD3d 339, 341 [1st Dept 2009], *lv denied* 12 NY3d 861 [2009]). Rather, the court asserted that "in the specific

circumstances of this particular case" she was agreeing "not to make an appeal" (*see People v Oquendo*, 105 AD3d 447 [1st Dept 2013], *lv denied* 21 NY3d 1007 [2013] [the defendant's purported waiver of right to appeal was invalid where the court failed to ensure adequately that he understood that the right to appeal was separate and distinct from those rights automatically forfeited upon a guilty plea]).

In addition, we agree with defendant that the clause in the waiver agreement that purportedly treats the filing of a notice of appeal by defendant as a motion to vacate the judgment to be unenforceable. Specifically, the waiver form included the following clause:

> "If the defendant or the defendant's attorney files a notice of appeal that is not limited by a statement to the effect that the appeal is solely with respect to a constitutional speedy trial claim or legality of the sentence, they agree that the District Attorney and or Court may deemed such filing to be a motion by the defendant to vacate the conviction and sentence, and will result, upon the application and consent of the District Attorney, in the plea and sentence being vacated and this indictment being restored to its pre-pleading status."

This clause is unenforceable because there is no statutory authority to vacate a judgment under these circumstances (CPL 440.10; *People v Moquin*, 77 NY2d 449, 452 [1991]; *see also Matter of Kisloff v Covington*, 73 NY2d 445, 450 [1989] [confining the

court's authority to vacate a plea or sentence after judgment has been entered over the defendant's objection to clerical errors and fraud]).

Further, this language discourages defendants from filing notices of appeal even when they have claims that cannot be waived, such as one concerning the lawfulness of the waiver or the plea agreement itself. "[A]n agreement to waive appeal does not foreclose appellate review in all situations" (*People v Callahan*, 80 NY2d 273, 284 [1992]). If the agreement to waive were itself sufficient to foreclose appellate review, "the court would then be deprived of the very jurisdictional predicate it needs as a vehicle for reviewing the issues that survive the waiver" (*id.*). The language in the written waiver, in essence, purports to prevent appellate claims that have been found by the courts to be "unwaivable" precisely because of their constitutional import (*see People v Seaberg*, 74 NY2d 1, 9 [1989] [finding unwaivable interests implicating "society's interest in the integrity of the criminal process," such as the defendant's competency or the knowing nature of the plea]).

Although we find that defendant's waiver of the right to appeal was invalid, we perceive no basis for reducing the sentence.

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

ENTERED: JULY 24, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12673 Anna DiVetri, Index 114938/08
Plaintiff-Respondent,

-against-

ABM Janitorial Service, Inc., et al.,
Defendants-Appellants.

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Gallo Vitucci Klar, LLP, New York (Kimberly A. Ricciardi of counsel), for appellants.

Eaton & Torrenzano, LLP, Brooklyn (Jay Torrenzano of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered August 9, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

After tracking in water used by defendants to clean the sidewalk adjacent to their office building, plaintiff slipped on the marble lobby floor, injuring herself. On appeal, defendants 575 Lexington Avenue Acquisition, LLC, the owner of the building; Silverstein Properties, Inc., the owner's managing agent; and ABM Janitorial Service, Inc., the outside contractor providing cleaning services to the building, argue that they are entitled to dismissal of the complaint. Since there are genuine issues of fact about whether defendants created a dangerous condition, the

motion court properly denied summary judgment. Further, because ABM's employee was the individual actually hosing the sidewalk, thereby creating the watery condition that was tracked by plaintiff into the building lobby, ABM owed her a duty of care, notwithstanding that plaintiff was not a party to ABM's janitorial contract (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

At 7:30 a.m., on the day of the accident plaintiff was walking to work, when she noticed a porter, employed by ABM, using a hose to clean the sidewalk near the building entrance. The worker spent about 30 to 45 minutes completing the cleaning and acknowledged that it was a heavily trafficked time because people were arriving for work. As plaintiff entered the building through the revolving doors, she noticed that her toes were wet (she was wearing open-toe shoes), but thought nothing of it. She proceeded through the lobby towards the elevator and managed to take several steps before she slipped and fell on the marble lobby floor. According to the ABM worker who actually hosed down the sidewalk that morning, although there were mats used at the building when it was raining outside, no mats were in place on the lobby floor while he was cleaning the sidewalk that morning. Plaintiff also testified that she did not see any mats in the

lobby when she fell. Although the building property manager factually disputes the evidence that no mats were placed in the lobby at the time of the accident, he also testified that ABM's normal procedure was to place runners in the lobby when the sidewalk outside was being cleaned. Plaintiff contends, and circumstantial evidence supports the conclusion, that she slipped and fell on water she tracked into the lobby from the wet sidewalk on what was an otherwise dry and sunny day. The circumstantial evidence provides a nonspeculative basis for plaintiff's version of the accident (*see Healy v ARP Cable, Inc.*, 299 AD2d 152, 154-155 [1st Dept 2002])

In this case a jury could reasonably conclude that the defendants created a dangerous condition in the course of cleaning the sidewalk by hosing down the perimeter of the building without taking precautions to keep water from being tracked onto the marble lobby floor. Slippery conditions created by defendants in the course of cleaning a premises can give rise to liability (*see Velez v New York City Hous. Auth.*, 91 AD3d 422 [1st Dept 2012]; *Brown v Simone Dev. Co., L.L.C.*, 83 AD3d 544 [1st Dept 2011]; *Healy*, 299 AD2d at 154-155. Tracked-in water that creates a slippery floor can be a dangerous condition (*Santiago v JP Morgan Chase Co.*, 96 AD3d 642 [1st Dept 2012]).

While reasonable care does not require an owner to completely cover a lobby floor with mats to prevent injury from tracked-in water (*see Pomhac v TrizecHahn* 1065 Ave. of Am., L.L.C., 65 AD3d 462, 465 [1st Dept 2009]), it may require the placement of at least some mats (*Santiago v JP Morgan Chase and Company*, *supra*). Since there is evidence supporting a conclusion that there were no mats on the floor near the entrance, there is an issue for the jury concerning whether the defendants exercised reasonable care, including whether they took reasonable precautions against foreseeable risks of an accident while cleaning the sidewalk during a busy work morning.

Defendants' contention that the water on the sidewalk was open and obvious does not warrant summary judgment dismssing the complaint. An open and obvious condition relieves the owner of a duty to warn about the danger, but not of the duty to maintain the premises in a reasonably safe condition (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2004]). Plaintiff makes no arguments on appeal that liability is based upon defendants violating any duty to warn, only that they created an unsafe condition.

ABM has no separate basis for the dismissal of the complaint. While an outside contractor like ABM generally does

not owe a noncontracting party a duty of care, an exception applies when a contractor fails to exercise reasonable care in the performance of its duties, thereby launching a force or instrument of harm that causes injuries (*Espinal v Melville Snow Contrs.*, 98 NY2d at 140). There are triable issues of fact whether ABM, whose employee was responsible for cleaning the sidewalk that morning, launched a force of harm causing plaintiff's injuries (*Brown v Simone Dev. Co.*, 83 AD3d at 545).

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

ENTERED: JULY 24, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12689 Idania Siero, Index 302746/11
Plaintiff-Respondent,

-against-

Western Beef Properties Inc., et al.,
Defendants-Appellants.

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Law Offices of Albert W. Cornachio, P.C., Rye Brook (Albert W. Cornachio III of counsel) for appellants.

Ginarte O'Dwyer Gonzalez Gallardo & Winograd, LLP, New York (Stuart L. Kitchner of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered October 3, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff testified at her deposition that, on July 10, 2009, she slipped and fell on liquid spilling from a bottle of Pine-Sol that had been knocked over on the bottom shelf of a rack at defendants' supermarket. Defendants' motion for summary judgment should have been granted. Defendants made a prima facie showing that they lacked actual or constructive notice of the hazardous condition by submitting the deposition testimony of Walter Hernandez, the assistant manager on duty at the time of

plaintiff's fall, as well as his affidavit in which he stated that he routinely inspects the store, and "had just passed" the area where the accident is alleged to have occurred approximately five to ten minutes earlier, and did not observe a spill or liquid of any type on the floor (*see Gautier v 941 Intervale Realty LLC,* 108 AD3d 4815 [1st Dept 2013]).

In opposition, plaintiff failed to raise an issue of fact. Contrary to plaintiff's argument that the affidavit was feigned, there is no inconsistency between Hernandez's deposition and his affidavit. Nor are any facts presented to support a conclusion that defendants had notice, actual or constructive, of the claimed condition and a reasonable time to correct same (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *see also Grant v Radamar Meat,* 294 AD2d 398 [2d Dept 2002]).

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

ENTERED: JULY 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12851 21st Century Diamond, L.L.C., Index 650331/09
Plaintiff,

-against-

Allfield Trading, L.L.C., et al.,
Defendants.

- - - - -

Allfield Trading, L.L.C., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Exelco North America, Inc., et al.,
Third-Party Defendants,

Exelco NV, etc., et al.,
Third-Party Defendants-Appellants.

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The Law Offices of James A. A. Kirk PLLC, New York (James A.A. Kirk of counsel) for appellants.

Judd Burstein, P.C. New York (Judd Burstein of counsel), for respondents.

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Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered December 24, 2013, which to the extent appealed from as limited by the briefs, denied the motions of third-party defendants Exelco NV, FTK Worldwide Manufacturing and Exelco International to dismiss the cause of action for aiding and abetting breach of fiduciary duty as against them, unanimously reversed, on the law, and the motions to dismiss granted with

leave to replead within 30 days from the date of service of this order with notice of entry, otherwise affirmed without costs.

In this third-party action alleging the usurpation of plaintiff's business opportunity by its majority owner, third-party defendant Exelco North America, Inc., third-party plaintiffs, who are former managers and minority owners of plaintiff, allege that the majority owner's breach of fiduciary duty was aided and abetted by the other third-party defendants. However, the third-party complaint fails to sufficiently state the requisite substantial assistance, which is one of the required elements of a claim for aiding and abetting breach of fiduciary duty (*Kaufman v Cohen*, 307 AD2d 113, 125-126 [1st Dept 2003]), since the other third-party defendants are alleged to have done nothing more than engage in their routine business of dealing in diamonds (*see Willis Re Inc. v Hudson*, 29 AD3d 489, 490 [1st Dept 2006]).

A final opportunity to replead the aiding and abetting breach of fiduciary duty cause of action, however, is warranted.

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

ENTERED: JULY 24, 2014

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Clark, JJ.

12899-
12899A Arie Genger, et al., Index 651089/10
Plaintiffs-Appellants-Respondents,

-against-

Sagi Genger, et al.,
Defendants-Respondents-Appellants,

Dalia Genger, et al.,
Defendants-Respondents.

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Mitchell Silberberg & Knupp LLP, New York (Paul D. Montclare of counsel), for Arie Genger, appellant-respondent.

Zeichner Ellman & Krause LLP, New York (Yoav M. Griver of counsel), for Orly Genger, appellant-respondent.

Morgan, Lewis & Bockius LLP, New York (John Dellaportas of counsel), for Sagi Genger and TPR Investment Associates, Inc, respondents-appellants and The Sagi Genger 1993 Trust, respondent.

Pedowitz & Meister, LLP, New York (Robert A. Meister of counsel), for Dalia Genger, respondent.

Judith Lisa Bachman, New City (Judith Bachman of counsel), for Rochelle Fang, respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered January 2, 2013, modified, on the law, to dismiss the breach of fiduciary duty claim against Sagi and the unjust enrichment claims against Sagi and TPR, and otherwise affirmed, without costs. The Clerk is directed to enter judgment

dismissing all claims against Sagi. Purported appeal from order, same court and Justice, entered July 11, 2013, dismissed, without costs.

Opinion by Freedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
Helen E. Freedman
Rosalyn H. Richter
Darcel D. Clark, JJ.

12899-12899A
Index 651089/10

_____x

Arie Genger, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Sagi Genger, et al.,
Defendants-Respondents-Appellants,

Dalia Genger, et al.,
Defendants-Respondents.

_____x

Cross appeals from the order of the Supreme Court, New York County (Barbara Jaffe, J.), entered January 2, 2013, which, to the extent appealed from as limited by the briefs, granted in part and denied in part the motions of defendants Sagi Genger, TPR Investment Associates, Inc. (TPR), the Sagi Genger 1993 Trust (the Sagi Trust), Dalia Genger, and Rochelle Fang to dismiss the third amended and supplemental complaint pursuant to CPLR 3211 and 1003, and purported appeal from the order of the same court and Justice, entered July 11, 2013, which declined to sign the order to show cause of plaintiff Arie Genger.

Mitchell Silberberg & Knupp LLP, New York (Paul D. Montclare and Lauren J. Wachtler of counsel), for Arie Genger, appellant-respondent.

Zeichner Ellman & Krause LLP, New York (Yoav M. Griver and Bryan D. Leinbach of counsel), and Wachtel Missry LLP, New York (William Wachtel and Elliot Silverman of counsel), for Orly Genger, appellant-respondent.

Morgan, Lewis & Bockius LLP, New York (John Dellaportas, Nicholas Schretzman and Mary C. Pennisi of counsel), for Sagi Genger and TPR Investment Associates, Inc, respondents-appellants and The Sagi Genger 1993 Trust, respondent.

Pedowitz & Meister, LLP, New York (Robert A. Meister and Marisa Warren of counsel), for Dalia Genger, respondent.

Judith Lisa Bachman, New City (Judith Bachman of counsel), for Rochelle Fang, respondent.

FREEDMAN, J.

This case is one of a number arising from the protracted battle between plaintiff Arie Genger (Arie) and a group of investors for control of Trans-Resources, Inc. (TRI), a Delaware corporation that manufactures and distributes fertilizer. The facts have been set forth in detail in prior opinions (*see e.g. Glencova Inv. Co. v Trans-Resources, Inc.*, 874 F Supp 2d 292, 295-300 [SD NY 2012]*; Genger v TR Invs., LLC*, 26 A3d 180, 182-189 [Del 2011]). A summary of the relevant facts is as follows: In 1985, Arie founded TRI, which until 2001 was a wholly-owned subsidiary of a holding company, TPR, all of whose stock was directly owned by or held in trust for Arie, his wife Dalia, his son Sagi, and his daughter Orly. Arie owned 51% of the TPR stock and thereby controlled TRI. The remainder of TPR's stock was held by a limited partnership, the interests in which were divided between Dalia and separate trusts established for Sagi and Orly.

By 2001, TRI was facing insolvency, and Arie approached a close friend, defendant Jules Trump, about a capital investment. Trump and his brother, defendant Eddie Trump, organized a group of investors which are collectively known in this litigation as the "Trump Group." In a transaction which closed in March 2001, two Trump Group entities purchased most of TRI's debt

obligations, and in exchange received 47.15% of TRI's stock from TPR. Arie remained the majority shareholder of TPR, which still held 52.85% of the TRI stock, and accordingly Arie still controlled TRI.

The Stockholders Agreement among the investors, TPR, and TRI, which governed the March 2001 transaction, contained provisions to protect the Trump Group's investment, including representation on TRI's board and veto rights. Most important, the Stockholders Agreement restricted any future transfer of TRI stock. Under the agreement, a party could only transfer TRI stock to a designated list of persons and entities, unless the transferor first gave prior written notice to the other TRI shareholders, along with a right of first refusal. A share transfer that violated those conditions would be void, the shares would revert to TPR, and the non-selling TRI shareholders would have the right to purchase the invalidly transferred shares at their fair market value on the transfer date.

On October 26, 2004, after a lengthy and contentious divorce proceeding, Arie and Dalia Genger entered into a final marital settlement agreement in New York. In connection with the division of the Gengers' marital property, the settlement agreement provided that the TRI stock owned by TPR would be transferred to Genger family members and their trust instruments.

In connection with the contemplated transfer, Arie represented in the settlement agreement that, except for TPR, no party's consent was required to transfer the TRI stock. As the Supreme Court of Delaware pointedly held in *Genger*, "That representation [in the settlement agreement] was false" because under the 2001 Shareholders Agreement the consent of the Trump Group signatories was needed (26 A3d at 184).

The marital settlement agreement also required the trustees of the children's trusts to give Arie irrevocable lifetime proxies to vote the TRI shares transferred to those trusts. It was intended that, through the proxies, Arie would remain in charge of TRI through his control of the majority of the company's stock.

On October 29, 2004, in accordance with the divorce settlement, Arie transferred the TPR stock to Dalia, Sagi became TPR's president and chief executive officer, and TPR transferred the TRI shares among Arie and the children's trusts. In violation of the 2001 Shareholders Agreement, Arie failed to notify the Trump Group parties of the TRI transfers and obtain their consent.

In 2008, TRI again ran into financial difficulties and approached the Trump Group for additional financing. During negotiations, the Trump Group for the first time learned of the

2004 TRI stock transfers. After negotiations broke down, the Trump Group sued TPR in federal court, claiming that the 2004 transfers violated the 2001 Shareholders Agreement and seeking to enforce their right to purchase the invalidly transferred TRI shares (*see Glencova Inv. Co.*, 874 F Supp 2d at 292). Thereafter, Sagi, on behalf of TPR, reached a two-part settlement with the Trump Group. In the main agreement, TPR and the Sagi Trust agreed to sell the TRI shares the trust held (19.5% of the company's stock) to the Trump Group whether or not the 2004 transfers ultimately were judicially determined to be void. By acquiring the Sagi Trust shares, the Trump Group, which already owned 47.15% of TRI's shares, obtained a majority of TRI's stock and control over the company.

The Trump Group and TPR also entered into a "Side Letter Agreement" giving the Trump Group the option to buy the TRI shares purportedly transferred to Arie and the Orly Trust in 2004. The Trump Group's rights under the side letter would be triggered only if the 2004 transfers were judicially determined to be void, and as a result the legal and beneficial ownership of the TRI shares reverted to TPR. The agreed-on purchase price per share for Arie's and the Orly Trust's stock, which the Trump Group did not need to gain control of TRI, was about 60% less than the price the Trump Group paid for the Sagi Trust stock.

In August 2008, the Trump Group, now TRI's majority shareholders, removed Arie as the company's director and took control of its board by designating and electing a majority of its members. Arie refused to recognize the Trump Group's authority, and thereafter the Trump Group filed suit against Arie in the Delaware Chancery Court for a determination pursuant to 8 Del Code § 225 as to which stockholder group controlled TRI.

In a July 2010 opinion issued after trial, the Chancery Court found that, contrary to Arie's claim, the Trump Group had never "ratified" the 2004 transfers, and that they had acquired the Sagi Trust TRI shares free of Arie's proxy, in accordance with the 2001 Shareholders Agreement. Accordingly, the Trump Group had obtained majority control over TRI (*TR Invs., LLC v Genger*, 2010 WL 2901704, 2010 Del Ch LEXIS 153 [Del Ch Ct, July 23, 2010, C.A. No. 3994-VCS]). In August 2010, the court issued a "Side Letter Opinion" holding that the 2004 transfers of TRI stock to Arie and the Orly Trust also were invalid, the stock had reverted to TPR, and, under the 2008 agreement between the Trump Group and TPR, the Trump Group had the option to buy the stock (*TR Invs., LLC v Genger*, 2010 WL 3279385, 2010 Del Ch LEXIS 170 [Del Ch Ct, Aug. 9, 2010, C.A. No. 3994-VCS]).

On Arie's appeal from the Chancery Court rulings, the Delaware Supreme Court affirmed that the Sagi Trust shares that

the Trump Group had purchased from TPR in 2008 were not subject to Arie's proxy (*Genger*, 26 A3d at 196). The court also affirmed the Chancery Court's finding that TPR was the record owner of the TRI shares invalidly transferred to Arie and the Orly Trust (*id.* at 200). However, the Delaware Supreme Court found that the Chancery Court lacked the power to declare who beneficially owned the shares transferred to Arie and the Orly Trust because it lacked personal jurisdiction over those parties (*id.* at 201-203).

Before the Delaware Supreme Court issued its decision, Arie and Orly, in her individual capacity and on behalf of the Orly Trust, brought this action against Sagi, the Sagi Trust, TPR, the Trump Group, Dalia, and Rochelle Fang, the trustee of the Sagi Trust. The gravamen of the claims is whether, as plaintiffs claim, Arie and the Orly Trust have a beneficial interest in the TRI shares that were invalidly transferred to them in 2004. Insofar as relevant to this appeal, plaintiffs assert the following claims:

The first cause of action, on behalf of Arie as against Dalia, seeks a declaratory judgment reforming the stipulation of settlement, apparently on the ground that Dalia received more of the marital assets than contemplated because Arie has been stripped of the TRI shares that were to transferred to him.

The second, third, and fourth causes of action sound in

equity. The second cause of action, on behalf of Arie, seeks a constructive trust against Sagi, TPR, and Sagi's Trust in connection with the TRI shares that were transferred to him in 2004 but then reverted to TPR in 2008. The third cause of action, on behalf of both plaintiffs, asserts claims for breach of fiduciary duty against Sagi and aiding and abetting breach of fiduciary duty against TPR, Sagi's Trust, and Fang, in connection with their implementation of the 2008 settlement with the Trump Group. The fourth cause of action, also on behalf of both plaintiffs, is for unjust enrichment against Sagi, TPR, Dalia, and Sagi's Trust with respect to any money or other benefit they received from the reversion of the TRI shares to TPR in 2008.

Finally, the sixth cause of action, by both plaintiffs, is against TPR for breaching its 2004 agreement to transfer TRI shares to plaintiffs, and the seventh cause of action, by Arie, is against Sagi's Trust for breaching the 2004 agreement to provide Arie with an irrevocable proxy with respect to the trust's TRI shares.

Arie's claim for reformation of the divorce settlement is barred by Arie's unclean hands (*see generally National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1966]). Arie's loss of the TRI shares included in the marital assets was the result of his false representation that TPR could transfer the

shares without the Trump Group's consent. Contrary to Arie's contention, unclean hands may be determined as a matter of law (*see e.g. Levy v Braverman,* 24 AD2d 430 [1st Dept 1965]).

Arie's claim for a constructive trust against Sagi, TPR, and Sagi's Trust fails because "the purpose of [a] constructive trust is prevention of unjust enrichment" (*Simonds v Simonds,* 45 NY2d 233, 242 [1978]), and, for the reasons set forth below, we are dismissing Arie's unjust enrichment claims.

The third cause of action, as narrowed on appeal, is for (1) breach of fiduciary duty against Sagi and (2) aiding and abetting breach of fiduciary duty against TPR and Fang (by both plaintiffs) and Sagi's Trust (by Orly). The court properly dismissed the aiding and abetting claims, but it should also have dismissed the claims against Sagi because he was not a fiduciary of Arie and Orly Genger. According to plaintiffs, Sagi breached his fiduciary duty to them by causing TPR to sell Arie's, the Orly Trust's, and the Sagi Trust's TRI shares to the Trump Group. However, by then Sagi was already embroiled in litigation with his family members. While "[f]amily members stand in a fiduciary relationship toward one another in a co-owned business venture" (*Braddock v Braddock*, 60 AD3d 84, 88 [1st Dept 2009]), "a fiduciary relationship ceases once the parties thereto become adversaries" (*EBC I, Inc. v Goldman Sachs & Co.,* 91 AD3d 211, 215

[1st Dept 2011], *lv granted* 19 NY3d 810 [2012]).

Plaintiffs also contended that Sagi owed them a fiduciary duty as TPR's chief executive officer. However, as an officer of TPR, Sagi's fiduciary duty was to the corporation and its stockholders (*see Foley v D'Agostino,* 21 AD2d 60, 66-67 [1st Dept 1964]). Arie has not owned TPR stock since he transferred his shares to Dalia in 2004. Orly's Trust never owned TPR stock; rather, the trust owned an interest in the limited partnership which held the stock.

Since Sagi did not owe a fiduciary duty to plaintiffs, the claims for aiding and abetting Sagi's purported breach are unavailing (*see Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 594 [2012]; *Kaufman v Cohen,* 307 AD2d 113, 125 [1st Dept 2003]).

In the fourth cause of action, as narrowed on appeal, both plaintiffs allege that Sagi's Trust and TPR were unjustly enriched, Orly alleges that Dalia was unjustly enriched, and Arie alleges that Sagi was unjustly enriched. Supreme Court properly dismissed the claims against Sagi's Trust and Dalia, but it should also have dismissed the claims against TPR and Sagi.

Plaintiffs contend that Sagi's Trust was unjustly enriched because the per-share price it obtained from selling its TRI stock to the Trump Group was about 60% higher than the per-share price Arie and Orly's Trust received. However, the complaint

explains the price difference: the Sagi Trust's TRI shares were worth more to the Trump Group because their purchase immediately gave them majority control of TRI. Moreover, the sale of the Sagi Trust's shares was guaranteed, whereas the sale of the Arie's and the Orly Trust's shares was conditioned on the judicial determination that the 2004 transfers were invalid. Since Sagi did not owe a fiduciary duty to plaintiffs, he was not obligated to ensure Arie and the Orly Trust received the same per-share price as the Sagi Trust.

Orly fails to state an unjust enrichment claim against Dalia. Orly claims in her opening brief that her mother received "a disproportionate amount of the Genger family wealth," but even if that allegation is true, the amount Dalia received was the result of the stipulation of settlement in the divorce action, followed by the Delaware courts' holdings.

The doctrine of res judicata bars Arie's unjust enrichment claim against TPR. On March 1, 2013, the Delaware Chancery Court's entered the final judgment order in *TR Invs., LLC v Genger*, (2013 WL 787117, [Del Ch Ct, March 1, 2013 No. 6697-CS]) a plenary action in which Arie was a defendant. The court ruled that the Trump Group had the right to buy, from TPR, the TRI shares that had been improperly transferred to Arie in 2004 and that Arie was not a record or beneficial TRI stockholder. The

court also held that the escrowed proceeds of the Trump Group's purchase were to be released to TPR. Arie did not appeal from the final judgment order, which has preclusive effect on Arie's claims here.

Orly's unjust enrichment claim against TPR is dismissed. The complaint acknowledges that, after the Orly Trust's TRI shares reverted to TPR and were sold to the Trump Group, the sale proceeds were placed in escrow. Accordingly, Orly does not allege that TPR was unjustly enriched by receiving or retaining a benefit from selling the TRI shares (*see Mandarin Trading Ltd. v Wildenstein,* 16 NY3d 173, 182 [2011]).

Moreover, under the 2008 agreement between TPR and the Trump Group, the sale could only take place after a judicial determination that TPR is the record and beneficial owner of the Orly Trust's TRI shares. When the complaint was filed, it had only been determined that TPR was the shares' record owner, but the Delaware Chancery Court has now also ruled that TPR is the shares' beneficial owner (Stipulation & Proposed Order of Dismissal, *Dalia Genger v TR Invs., LLC* [Del Ch Ct, Aug. 30, 2013] [C.A. No. 6906-CS]).

Arie's unjust enrichment claim against Sagi fails because Sagi's Trust, and not Sagi personally, received the proceeds of the sale of the Sagi Trust's TRI shares. While Arie contends

that Sagi is the alter ego of the trust, "[t]here is no authority for applying, by analogy, a theory of 'piercing the corporate veil' to disregard the form of a trust when the trust was not formed for an illegal purpose and there is the requisite separation between beneficiary and trustee" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Eagle Equip. Trust,* 221 AD2d 212, 212 [1st Dept 1995]).

In the sixth cause of action, both plaintiffs allege that, by settling with the Trump Group in 2008, TPR breached the 2004 agreement that governed the transfer of its TRI shares to Arie, Orly's Trust, and Sagi's Trust. Arie contends that the agreement's purpose was to ensure that he would maintain voting control over the TRI Shares for the rest of his life. But nothing TPR did or did not do caused Arie to lose his voting rights in the TRI shares. Rather, Arie lost the voting rights by causing TPR to transfer the TRI shares without obtaining the Trump Group's consent, which, as the Delaware courts have found, made the proxies unenforceable.

Orly contends that TPR's 2008 sale of the Orly Trust's TRI shares violated its contractual duty under the 2004 transfer agreement to take necessary actions "to carry out the purpose" of the transfer to the trust. However, Orly fails to state a claim for breach of contract because she does not allege that TPR's

nonperformance caused damages (*see Elisa Dreier Reporting Corp. v Global NAPS Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]). Any damage that the Orly Trust incurred was the result of Arie's invalid transfer of the TRI stock without the Trump Group's consent. Orly cannot identify any action TPR could have taken to carry out the purpose of the 2004 agreement once the Trump Group declared a breach of the 2001 Stockholders Agreement and successfully sued TPR to set aside the transfer to the Orly Trust.

Finally, on appeal, Arie claims that the seventh cause of action alleges that Sagi's Trust breached a so-called Back-Up Voting Trust Agreement. However, the seventh cause of action actually alleges that Sagi's Trust breached a separate agreement, the so-called 2004 Voting Trust Agreement. Arie may not amend his complaint via his appellate brief. Even if we were to consider this new claim, we would find it unavailing. There is no evidence that Arie and Sagi's Trust ever executed the Back-Up Voting Trust Agreement; the record contains only an unsigned form of the agreement.

We have considered the parties' remaining arguments, including that *Genger v TR Invs., LLC* should not be given preclusive effect as against Arie, that Orly lacks standing to bring claims on behalf of her trust, that all claims against

Sagi's Trust should have been dismissed because plaintiffs did not sue its current trustee, and that plaintiffs' unjust enrichment claims are barred by the existence of express contracts, and find that they do not warrant further modification of the January order.

Accordingly, the order, of the Supreme Court, New York County (Barbara Jaffe, J.), entered January 2, 2013, which, to the extent appealed from as limited by the briefs, granted in part and denied in part the motions of defendants Sagi Genger, TPR Investment Associates, Inc. (TPR), the Sagi Genger 1993 Trust (the Sagi Trust), Dalia Genger, and Rochelle Fang to dismiss the third amended and supplemental complaint pursuant to CPLR 3211 and 1003, should be modified, on the law, to dismiss the breach of fiduciary duty claim against Sagi and the unjust enrichment claims against Sagi and TPR, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing all claims against Sagi. The purported appeal from the order of the same court and Justice, entered July 11, 2013, which declined to sign the order to show cause of plaintiff Arie Genger, should be dismissed, without costs, as taken from a nonappealable order,

and as the pertinent issues therein were previously decided in the context of a motion made to this Court (2013 NY Slip Op 82559[U] [Aug. 20, 2013]).

All concur.

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

ENTERED: JULY 24, 2014

CLERK