SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

November 21, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11131 The People of the State of New York, Respondent, Ind. 4779/08

-against-

Luis Galeano,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered May 26, 2011, as amended June 16, 2011, convicting defendant, after a jury trial, of murder in the second degree and two counts of robbery in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

Defendant did not preserve his claim that the court should have instructed the jury on the affirmative defense to felony murder (Penal Law § 125.25[3]), and we decline to review it in the interest of justice. The record does not establish that the court "expressly decided" the issue "in response to a protest by

a party" (CPL 470.05[2]; *see People v Turriago*, 90 NY2d 77, 83-84 [1997]; *People v Colon*, 46 AD3d 260, 263 [1st Dept 2007]). Instead, the record merely reflects that defense counsel was initially noncommittal about whether he wanted this charge, and that subsequently there was an informal, unrecorded colloquy at which the court expressed its opinion that the affirmative defense was inapplicable. Defendant did nothing to register any disagreement with that view.

As an alternate holding, we find that there was no reasonable view of the evidence, viewed in the light most favorable to defendant, to support that defense (*see People v Curet*, 99 AD3d 611 [1st Dept 2012], *lv denied* 20 NY3d 1010 [2013]). Defendant's defense was that he did not commit felony murder to begin with, in that he only intended to commit a

nonforcible larceny. There was no evidence in either the prosecution or defense case to support the elements of the affirmative defense.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11132 In re Roy T. Richter, etc., et al., Index 113520/11
Petitioners-Respondents,

-against-

Raymond Kelly, etc., et al.,
Respondents-Appellants.

_____

Michael A. Cardozo, Corporation Counsel, New York (Inga Van Eysden of counsel), for appellants.

Ungaro & Cifuni, New York (Nicholas G. Cifuni of counsel), for respondents.

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Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered August 9, 2012, annulling the determination of respondent Board of Trustees of the Police Pension Fund, Article II, dated September 14, 2011, which denied petitioner Lea C. Dann's application for accident disability retirement (ADR) benefits pursuant to General Municipal Law § 207-k (the Heart Bill), and directing respondents to grant petitioner ADR benefits under the Heart Bill, unanimously affirmed, without costs.

In the absence of credible medical evidence that petitioner's disabling heart condition is not related to her service as a police surgeon, the Board of Trustees' determination to deny her ADR benefits under the Heart Bill lacks a rational basis and is arbitrary and capricious (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760

[1996]; *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 352 [1983]).

The Heart Bill creates a presumption that any health condition caused by heart disease and resulting in disability to "a paid member of the uniformed force of a paid police department" was incurred in the performance of the member's duty (General Municipal Law § 207-k). The Police Pension Fund's Medical Board examined petitioner, a police surgeon, reviewed her medical records, identified her disability as "Arteriosclerotic Heart Disease with Significant Long Stenotic Lesion Involving the Left Anterior Descending Artery and Stents that were Placed in that Artery as Described," and certified that this disability was the result of an accidental injury received in the performance of police duty, pursuant to General Municipal Law § 207-k.

Reversing a policy established by years of practice and internal memoranda, the Board of Trustees denied petitioner's application on the ground that the Heart Bill did not apply to police surgeons. In a memorandum dated April 27, 1993, Assistant Corporation Counsel Charles L. Finke wrote to D.I. Joseph Maccone, C.O. Pensions Section, "Guided by the 1975 case of *Matter of Callas v Codd*, (N.Y. County Index No. 1682/74), *aff'd*, 47 AD2d 812 (1st Dep't 1975) [*lv denied* 37 NY2d 706 (1975)], this

office has interpreted the Heart Bill to apply to police surgeons." In *Matter of Callas*, which granted a petition for death benefits under the Heart Bill by a widow whose police surgeon husband died of a heart condition, the court rejected the argument that the Legislature intended additional benefits only for those policemen whose particular occupational hazards and stresses made them more susceptible to heart disease.

Contrary to respondents' contention, neither the title of General Municipal Law § 207-k ("Disabilities of policemen and firemen in certain cities") nor the reference in the statute to "police officers" creates ambiguity as to whether the statute applies to police surgeons. Nor have respondents shown that a literal reading of the statute would frustrate its purpose (*see Uniformed Firefighters Assn., Local 94, IAFF, AFL-CIO v Beekman*, 52 NY2d 463, 471 [1981]).

The Board of Trustees is bound by the Medical Board's determination of disability (*see Matter of Canfora*, 60 NY2d at 351; Administrative Code of City of NY § 13-352). Therefore, respondents cannot now seek "clarification" of the Medical Board's determination.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11133 In re Sareta A.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about June 1, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed an act that, if committed by an adult, would constitute attempted assault in the third degree, and placed her on probation for 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal. A term of probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The 12-month period of supervision was

warranted by the seriousness of appellant's violent attack on the victim, which outweighed the mitigating factors cited by appellant.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11134 Dianne Dewitt, Index 106481/09
Plaintiff-Respondent,

-against-

Kenneth Poovey, et al.,
Defendants-Appellants.

_____

Shafer Glazer, LLP, New York (Adam R. Dolan of counsel), for appellants.

Finkelstein & Partners, LLP, Newburgh (Andrew L. Spitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 23, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of dismissing the claims for negligent hiring/supervision and direct negligence against both defendants, and otherwise affirmed, without costs.

Applying New York's choice-of-law rules, Massachusetts law applies to this negligence action for personal injuries allegedly sustained in Massachusetts when plaintiff fell off of a rubber inflatable boat while it was being towed by a motor boat. Massachusetts has the greatest interest in regulating tortious conduct within its borders (*see Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521-523 [1994]).

The negligent hiring/supervision claims should have been

dismissed. Even assuming, without deciding, that the motorboat operator hired by defendant Kenneth Poovey was an employee, and not an independent contractor, he was retained for a private party at a private residence that was attended by invited guests. Under Massachusetts law which provides that employers have a duty to exercise reasonable care in the selection, supervision, and retention of "employees who are brought in contact with members of the public," defendants cannot be held liable (*see Foster v Loft, Inc.*, 526 N.E. 2d 1309, 1310-1311 [Mass. App. Ct. 1988]).

Defendants also cannot be held liable for direct negligence under Massachusetts law. Although owners and operators of motorboats have a duty to ensure that the motorboat is operated in a reasonably safe manner (*see Magarian v Hawkins*, 321 F3d 235, 238 [1st Cir 2003]), it is undisputed that Kenneth, the sole owner of the motorboat, was not present on the date of the accident and that he hired an experienced boat operator who had safely operated his boat in the past. Thus, construing the evidence in a light most favorable to plaintiff (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105 [2006]), there is no support in the record for finding that Kenneth breached the duty he owed to plaintiff. Further, the claim for direct negligence against defendant Anne Poovey must be dismissed because she neither owned nor operated the

motorboat.

However, as the motion court properly determined, there is a question of fact as to whether Kenneth is vicariously liable, under the doctrine of respondent superior, for the operator's alleged negligence. We note that on this record we cannot determine the extent, if any, of Kenneth's right to control the operator (*see Peters v Haymarket Leasing, Inc.*,835 N.E.2d 628, 633-634 [Mass. App. Ct. 2005]).

There is also a question of fact as to whether Anne may be held vicariously liable for the operator's alleged negligence under the doctrine of agency by estoppel, or ostensible agency (*see Barron v McLellan Stores Cop.*, 39 N.E.2d 953, 954-955 [Mass. 1942]).

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11135 In re The State of New York, Index 251233/10
Petitioner-Respondent,

-against-

Robert V.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Eric T. Schneiderman, Attorney General, New York (Andrew W. Amend of counsel), for respondent.

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Order, Supreme Court, Bronx County (Colleen D. Duffy, J.), entered on or about September 25, 2012, which, upon a jury verdict finding that respondent is a detained sex offender who has committed a designated felony that was "sexually motivated" within the meaning of Mental Hygiene Law § 10.03(g)(4), and that respondent suffers from a "mental abnormality," determined that respondent is a dangerous sex offender requiring confinement, unanimously affirmed, without costs.

The jury's verdict that respondent committed a "designated felony" that was "sexually motivated" was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]; *Rose v Conte*, 107 AD3d 481, 483 [1st Dept 2013]). Expert testimony and respondent's own testimony constituted clear and convincing evidence that the acts constituting respondent's 1994

offenses of two counts of first-degree robbery and one count of attempted first-degree robbery were "committed in whole or in substantial part for the purpose of [respondent's] direct sexual gratification" (Mental Hygiene Law § 10.03[s]). Among other things, it is undisputed that when committing first-degree robbery in July 1994, respondent confronted a fourteen-year-old girl in an elevator with a knife, and forced her to expose her breasts and perform oral sex on him.

The jury's verdict that respondent suffers from a mental abnormality (*see* Mental Hygiene Law § 10.03[i]) was not against the weight of the evidence. The expert testimony offered by the State at the trial constituted clear and convincing evidence that respondent suffers from a condition known as "paraphilia NOS nonconsent" and antisocial personality disorder, which "affects [his] emotional, cognitive, or volitional capacity . . . in a manner that predisposes him . . . to the commission of conduct constituting a sex offense and that results in [respondent] having serious difficulty in controlling such conduct" (Mental Hygiene Law § 10.03[i]; *see Matter of State of New York v Shannon S.*, 20 NY3d 99, 106-107 [2012], *cert denied* __ US __, 133 S Ct 1500 [2013]; *Matter of State of New York v William W.*, 103 AD3d 521 [1st Dept 2013], *appeal dismissed* 21 NY3d 931 [2013]). Issues raised by respondent's expert over the viability and

reliability of respondent's diagnosis were properly reserved for resolution by the jury, and we find no basis to disturb its findings (*see Shannon S.*, 20 NY3d at 107). Contrary to respondent's contentions, a mental abnormality "need not necessarily be one so identified in the DSM [Diagnostic and Statistical Manual of Mental Disorders] in order to meet the statutory requirement" (*id.* at 106, quoting *United States v Carta*, 592 F3d 34, 40 [1st Cir 2010]). Furthermore, the absence of proof that respondent committed any sexual offenses while he was incarcerated "need not be treated as negating or disproving the diagnosis" (*William W.*, 103 AD3d at 521), as the jury was entitled to credit the State's expert's opinion that respondent had limited access to a "victim pool" of young, vulnerable females and the conditions that were consistently present when respondent committed his prior sexual offenses. Moreover, it is undisputed that respondent failed to complete a sex offender program during the eighteen years in which he has been imprisoned or confined to a mental health institution, and respondent's own expert acknowledged that respondent was generally evasive, vague and, in many cases, untruthful when discussing his prior sex offenses. In addition, the records of his most recent treatment showed that he was "difficult with the staff" and "verbally aggressive." Finally, the State's expert's diagnosis was

supported by respondent's own trial testimony in which he admitted to committing the acts constituting numerous sexual offenses in 1991 and 1994, at least three of which were committed against minors as young as nine years old.

We have considered respondent's remaining contentions and find them unavailing.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11137 Michael Rodgers, Index 112724/08
Plaintiff-Respondent,

-against-

Cucina & Company A - The Cellar at Macy's, et al.,
Defendants-Appellants,

Ultimate Services Inc., etc.,
Defendant.

_____

Gordon & Silber, P.C., New York (Jon D. Lichtenstein of counsel), for appellants.

Koss & Schonfeld LLP, New York (Jacob J. Schindelheim of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered May 10, 2013, which denied defendants Cucina & Company A-The Cellar at Macy's, Cucina and Company, and RA Patina Restaurant Group, LLC's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants failed to establish prima facie that they did not cause or create the greasy condition of the stairs on which

plaintiff slipped and fell (*see Fragale v City of New York*, 88 AD3d 488, 489 [1st Dept 2011]; *Zaher v Shopwell, Inc.*, 18 AD3d 339, 340-341 [1st Dept 2005]; *Montalvo v Western Estates*, 240 AD2d 45, 48 [1st Dept 1998]).

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11138 The People of the State of New York, Ind. 1133/10
Respondent,

-against-

Mayra Perez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Samantha L. Stern of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Marcy L. Kahn, J.), rendered on or about June 28, 2011,

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

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

ENTERED: NOVEMBER 21, 2013

CLERK

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

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11139-
11140-
11141 Index 601660/09

Greenwich Insurance Company
as subrogee of Vital Equities, LLC,
Plaintiff-Appellant,

-against-

New Amsterdam Associates, et al.,
Defendants-Respondents.

_____

Gennet, Kallmann, Antin & Robinson, P.C., New York (Brian J. Bolan of counsel), for appellant.

Ryan & Conlon, LLP, New York (Elizabeth E. Malang of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 23, 2012, which denied plaintiff's motion to amend the complaint to substitute the name of the subrogor Vital Equities, LLC with the name Vintage Realty LLC, unanimously reversed, on the law, without costs, the motion granted, and Vintage Realty LLC substituted as subrogor. Order, same court and Justice, entered November 8, 2012, which, to the extent appealable, granted defendant's cross motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion to dismiss the complaint denied. Appeal from order, same court and Justice, entered April 18, 2013, which denied plaintiff's motion denominated as one to renew and reargue the

November 8, 2012 order, unanimously dismissed, without costs, as academic.

Plaintiff subrogee's failure to name the correct subrogor "is not fatal" to its claim since the subrogee is the real party in interest, it timely instituted this action after it paid the fire damage claims for the loss incurred at the premises, and there is no prejudice to defendants (*Continental Ins. Co. v Marx Co.*, 220 AD2d 343, 344 [1995]). Consequently, pursuant to the courts' power to correct errors (CPLR 2001), plaintiff's motion should have been granted.

From the commencement of this litigation, defendants were provided with documentation identifying both Vintage Realty LLC and Vital Equities LLC as named insureds, including an insurance policy that was specifically amended to show that Vintage Realty was a named insured with respect to the damaged property. Moreover, all relevant facts, including the damage calculation to the subject property, remained unchanged.

Defendants claim that they have the right to "investigate or depose Vintage's manager or other person's with knowledge of Vintage's procedures and responsibilities of maintaining the damaged premises, yet they deposed the building's superintendent who was admittedly responsible for the building's maintenance. If defendants now need to question Vintage's manager, it is

difficult to see how this will substantially delay the litigation or cause any prejudice.

Dismissal of the complaint was improper since Greenwich is the true party in interest (*see Continental Ins. Co.*, 220 AD2d at 344), and Vintage Realty LLC and Vital Equities, LLC, operating under the same managing member, are related (*see Manti v New York City Tr. Auth.*, 146 AD2d 551, 552 [1st Dept 1989]).

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11142 In re David H.,
Petitioner-Appellant,

-against-

Khalima H.,
Respondent-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

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

_____

Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about August 27, 2012, which, after a hearing, granted joint legal custody of the subject child to the parties, with primary residential custody to respondent mother, unanimously affirmed, without costs.

A sound and substantial basis in the record supports the determination that it is in the child's best interests to remain in the custody of respondent mother, who has been the child's primary care giver for all but two years of his life. The court reached this determination after a full evidentiary hearing at which it heard testimony from, inter alia, both parents and interviewed the child in camera (*see Matter of Ricardo S. v Carron C.*, 91 AD3d 556 [1st Dept 2012]).

The evidence established that although both parties provide loving, nurturing homes, the child is doing well in respondent mother's care and is succeeding academically. Although respondent's boyfriend engaged in inappropriate corporal punishment when the child was younger, there is no indication of a continuing problem or any countervailing circumstances warranting a change in the custody arrangement (*see Friederwitzer v Friederwitzer*, 55 NY2d 89, 95 [1982]). To the extent the child wishes to spend more time with petitioner father, the court expressly stated that petitioner "is to have extensive parenting time" and directed that respondent not relocate with the child absent the father's consent or permission of the court. Given the "cooperative nature of the parenting relationship" as noted by the Family Court, it is not in the child's best interests to disturb the current custody arrangement.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11146-
11146A In re Stanley Feldman,
Petitioner-Appellant,

-against-

New York City Board/Department of Education,
Respondent-Respondent.

Index 109150/11

Stanley Feldman, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert E. Torres, J.), entered August 21, 2012, dismissing the proceeding and confirming an arbitration award, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 7, 2012, which denied the article 75 petition seeking to vacate and annul the hearing officer's award imposing a $1,500 fine for violations of Chancellor's Regulation A-421, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Adequate evidence in the record supported the hearing officer's determination that petitioner violated Chancellor's Regulation A-421 when he made statements such as "hey, baby," "how you doing baby?," and "you good baby" on multiple occasions

to his underage female student (*see Lackow v Department of Educ. [or "Board'] of City of N.Y.*, 51 AD3d 563 [1st Dept 2008]). Although petitioner asserts that the complaining witness's testimony was inconsistent with respect to the specific comments at issue, the hearing officer explicitly found the student credible and found petitioner to be not credible, and such determinations are "largely unreviewable" (*see id*).

The hearing officer declined to impose respondent's requested penalty of termination, in favor of a $1,500 fine to be withdrawn in equal installments from petitioner's paychecks over a twelve month period. Under the circumstances here, we conclude that the penalty is not so excessive and disproportionate to the offense as to be shocking to one's sense of fairness (*see Matter of Principe v New York City Dept. of Educ.*, 94 AD3d 431, 433, 434 [1st Dept 2012], *affd* 20 NY3d 963 [2012]).

We have considered the remainder of petitioner's arguments and find them unavailing.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11147- Index 653494/12
11147A Thomas C. Wyckoff, et al.,
Plaintiffs-Appellants,

-against-

Searle Holdings Inc., et al.,
Defendants-Respondents,

N'Take Inc., et al.,
Nominal Defendants.

_____

Satterlee Stephens Burke & Burke LLP, New York (Richard C. Schoenstein of counsel), for appellants.

Dorsey & Whitney, LLP, New York (David C. Singer of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 16, 2013, which, insofar as appealed from, granted defendants' motion dismissing the second through fifteenth causes of action, and denied plaintiffs' motion for advancement of legal fees and expenses, unanimously modified, on the law, to declare that plaintiff is not entitled to a rescission of the settlement agreement, and otherwise affirmed, without costs.

In the course of a prior litigation, the parties entered into a settlement agreement obliging defendants to pay $160,000, in monthly installments of $5,000, to plaintiffs, with plaintiffs agreeing to transfer to defendants certain equity interests in

defendants' entities, and the parties agreeing to mutually release each other with respect to any obligations and claims up to the date of agreement. After defendants paid only $55,000, plaintiffs initiated this lawsuit, seeking to rescind the settlement agreement and revive their original claims.

The motion court properly determined that plaintiffs are not entitled to rescission of the settlement agreement. It correctly found that the agreement was not intended to be an executory accord, but a substitute agreement (*see Goldbard v Empire State Mut. Life Ins. Co.*, 5 AD2d 230, 233 [1st Dept 1958]), that money damages are an adequate remedy, and that restoration of the status quo is impracticable (*see Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]; *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 71 [1st Dept 2002]).

The court properly denied plaintiffs' motion for an advancement of legal fees and indemnification since there is no

basis for such claims given the releases in the settlement agreement, which, as discussed above, remain in effect, and which extinguished any such preexisting obligations.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11148 The People of the State of New York, Respondent, Ind. 1113/11

-against-

Oscar Fuller, Defendant-Appellant.

_____

Mischel & Horn, P.C., New York (Richard E. Mischel of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 22, 2012, convicting defendant, after a jury trial, of assault in the third degree, and sentencing him to a term of one year, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

Defendant did not preserve his claim that the evidence was legally insufficient to disprove his justification defense and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence was overwhelming. There is no basis for disturbing the jury's credibility determinations. The testimony

of numerous witnesses, most of whom were disinterested bystanders, completely refuted defendant's justification defense.

The evidentiary rulings challenged by defendant were proper exercises of the court's discretion that weighed appropriate considerations of probative value and prejudicial effect. To the extent that any of these rulings could be viewed as erroneous, we find them harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's challenges to the People's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11149 Emilio Cuomo, Index 111329/10
Plaintiff, 590603/11

-against-

53rd and 2nd Associates, LLC, et al.,
Defendants.

- - - - -

53rd & 2nd Associates, LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Sage Electrical Contracting,
Third-Party Defendant-Respondent.

_____

London Fischer LLP, New York (Gregg D. Minkin of counsel), for appellants.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Kevin Murtagh of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 8, 2013, which denied third-party plaintiffs' motion for summary judgment declaring their entitlement to contractual defense and indemnification from third-party defendant (Sage) in the underlying personal injury action, unanimously modified, on the law, to grant the motion to the extent of declaring that 53rd and 2nd Associates, LLC (the owner) is entitled to indemnification and to the present payment of its defense costs, and that Plaza Construction Corp. is entitled to conditional indemnification to the extent it is found free from negligence in the underlying accident, and otherwise affirmed,

without costs.

As Sage concedes, there is no issue of fact as to the owner's active culpability in the underlying accident, and therefore the owner is entitled to summary judgment on its claim for contractual indemnification (*see Fiorentino v Atlas Park LLC*, 95 AD3d 424, 426-427 [1st Dept 2012]; *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510-11 [1st Dept 2009]).

Although, as third-party plaintiffs concede, there are issues of fact as to Plaza's active negligence, Plaza is entitled to conditional summary judgment on its claim for contractual indemnification; the extent of its indemnification depends on the extent to which any negligence on its part is found to have contributed to the accident (*see Hernandez v Argo Corp.*, 95 AD3d 782, 783 [1st Dept 2012]; *Burton v CW Equities, LLC*, 97 AD3d 462, 463 [1st Dept 2012]).

However, Plaza's motion for an order requiring Sage to defend it must be denied as premature, since Sage is a non-insurer, and its duty to defend is not broader than its duty to indemnify (*see JPMorgan Chase Bank, N.A. v Luxor Capital, LLC*, 101 AD3d 575, 575-576 [1st Dept 2012]).

The owner being without fault and therefore unconditionally entitled to indemnification, Sage's express contractual duty to defend the owner also imposes upon it a present obligation to pay

the costs of the owner's defense (*see State of New York v Travelers Prop. Cas. Ins. Co.*, 280 AD2d 756, 758 [3d Dept 2001]; *see also State of New York v Travelers Prop. Cas. Ins. Co.*, 2002 NY Slip Op 50139[U] [Sup Ct, Broome County 2002]).

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11150 The People of the State of New York, Ind. 4206/10
Respondent,

-against-

Cindy Fletcher,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about December 8, 2010,

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

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

ENTERED: NOVEMBER 21, 2013

CLERK

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

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11151N Harlem Real Estate LLC, et al., Index 111768/06
Plaintiffs-Appellants,

-against-

New York City Economic Development Corporation, et al.,
Defendants-Respondents.

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Gleich, Siegel & Farkas LLP, Great Neck (Stephan B. Gleich of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Alan H. Kleinman of counsel), for respondents.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 11, 2012, which granted defendants' motion to amend their answer to assert several counterclaims and denied plaintiffs' cross motion seeking, inter alia, to dismiss defendants' counterclaims and to preclude defendants from offering evidence in support of their counterclaim alleging breach of contract, unanimously affirmed, without costs.

The motion court properly granted defendants' request for leave to amend the answer to add counterclaims seeking, inter alia, repayment for work performed to maintain the property in a safe condition while plaintiffs remained in possession of the property after the time of the original answer. Plaintiffs' argument that the alleged damages occurred after defendants had issued a default notice to plaintiff and thus title had reverted

to defendants is unavailing. During that relevant time period, plaintiffs had posted an undertaking, obtained a stay, remained in possession and contested defendants' right to retake title in this action. Plaintiffs failed to demonstrate prejudice or otherwise show that the proposed amendment is palpably improper or insufficient as a matter of law (*see McGhee v Odell*, 96 AD3d 449 [1st Dept 2012]).

The court also properly denied plaintiffs' cross motion to dismiss defendants' original counterclaim for breach of contract and to preclude defendants from offering evidence in support of that claim not already produced. Plaintiffs did not show that the production of additional documents in support of the claim would be improper, or that the subsequent sale of the property was sufficient to cover the alleged damages.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

10322 The People of the State of New York, Respondent, Ind. 2724/10

-against-

Damien Calderon, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about December 21, 2010, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Acosta, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

10805 The People of the State of New York, Respondent, Ind. 1190/11

-against-

Carashane Bradford, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 24, 2012, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him to a term of 3½ years, with three years' postrelease supervision, unanimously reversed, on the law, the plea vacated, and the matter remanded for further proceedings on the indictment.

At the time of defendant's plea, the court promised defendant a sentence of youthful offender treatment and probation if he completed the CASES program, had no new arrests and met certain other conditions. However, if defendant did not complete the program or violated any of the conditions, the court apprised him he would be "facing any lawful sentence which could be jail or prison." When defendant violated the conditions and was rearrested, the court declined to adjudicate him a youthful

offender and sentenced him to 3½ years in state prison, plus three years postrelease supervision.

In *People v McAlpin* (17 NY3d 936 [2011]), the Court of Appeals vacated the plea and sentence where the court advised the defendant that the consequences of violating a youthful offender agreement would be a prison sentence of at least 3½ years, with a potential maximum sentence of 15 years, but did not mention that postrelease supervision would be imposed. The Court concluded that the mention of a specific prison term without also noting the possibility of postrelease supervision conveyed an inaccurate impression concerning the sentencing options. Similarly, by noting that the sentence could include jail or prison, without also mentioning postrelease supervision, the court here gave defendant an incomplete picture of the sentence he faced if he failed the conditions.

The People's argument that this case can be distinguished from *McAlpin* because the court told defendant he could be facing "any lawful sentence" is not persuasive. The court's reference to "jail or prison," which followed the phrase "any lawful sentence," may have conveyed an inaccurate impression that

defendant's sentence would only include a jail or prison term. Thus, defendant's plea was not knowingly made and must be vacated (*see People v Rivera*, 91 AD3d 498 [1st Dept 2012]). Because we are vacating the plea, we need not address defendant's claim that the court should have adjudicated him a youthful offender.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10861 Betty Luna, Index 300764/09
Plaintiff-Appellant,

-against-

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

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Michael Gunzburg, P.C., New York (Susan Nudelman of counsel), for appellant.

Gruvman, Giordano & Glaws, LLP, New York (Charles T. Glaws of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered September 18, 2012, which, inter alia, granted defendants' motion to set aside the jury's award of $500,000 for past pain and suffering and $500,000 for future pain and suffering over 34 years to the extent of ordering a new trial on those damages unless plaintiff stipulated to a reduced award of $100,000 for past pain and suffering and $250,000 for future pain and suffering, unanimously reversed, on the facts, without costs, the motion denied, and the jury's verdict reinstated.

We find that the jury's award for past and future pain and suffering is fully supported by the trial record and is consistent with what constitutes reasonable compensation under the circumstances presented. The record shows that the time between the date of the incident and the date of verdict is 7 years and 7 seven months, and plaintiff's life expectancy is 34.5

years. The evidence at trial established that as a result of the fall on defendants' bus, the 47-year-old plaintiff suffered a torn meniscus in her right knee, underwent arthroscopic surgery, was unable to work for three months, used a cane for more than one month, underwent 12 extremely painful sessions of physical therapy, continues to experience significant pain requiring her to take medication and limit her activities, and has permanently aggravated and activated arthritis in her knee that is progressive. In addition, her doctor explained that she sustained a permanent partial disability and that it is "most probable" that she will require a future knee replacement. Given the severity of plaintiff's injury, ongoing problems and expected future limitations, the jury's award for past and future pain and suffering cannot be said to deviate materially from what is reasonable compensation (*see* CPLR 5501[c]; *see e.g. Diaz v City of New York*, 80 AD3d 425 [1st Dept 2011]; *Harris v City of N.Y. Health & Hosps. Corp.*, 49 AD3d 321 [1st Dept 2008]; *Calzado v New*

York City Tr. Auth., 304 AD2d 385 [lst Dept 2003]). Thus, the trial court should not have reduced the jury's estimation of damages and we reinstate the original awards for those categories of damages.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

11016N Queens Unit Venture, LLC, Index 111568/11
Plaintiff-Appellant,

-against-

Tyson Court Owners Corp.,
Defendant-Respondent,

All Area Realty Services, Inc.,
Defendant.

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Gallet Dreyer & Berkey, LLP, New York (Jerry A. Weiss of counsel), for appellant.

Robert L. Gordon, Palisades, for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered August 21, 2012, which to the extent appealed from as limited by the briefs, granted defendant Tyson Court Owners Corp.'s motion to renew, and upon renewal, denied plaintiff's motion for summary judgment to the extent it sought a declaration that the shares associated with Units C1 and C5 in the subject building constituted "unsold shares" pursuant to the cooperative's proprietary lease, unanimously reversed, on the law, without costs, and the motion to renew denied.

The motion court improvidently exercised its discretion in granting the motion to renew. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on

the prior motion" (CPLR 2221[e][2],[3]). "A motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Sobin v Tylutki*, 59 AD3d 701, 702 [2d Dept 2009] [internal quotation marks omitted]). The purported new facts set forth in defendant's motion were presented in affidavits which had been previously rejected as an impermissible surreply on the original motion for summary judgment (*see Coleman v Korn*, 92 AD3d 595 [1st Dept 2012]). The affidavits were executed approximately four weeks before the original summary judgment motion was submitted and defendant failed to demonstrate a reasonable justification for failing to submit them in a timely fashion at that time (*see James v 1620 Westchester Ave., LLC*, 105 AD3d 1, 7 [1st Dept 2013]; *Chelsea Piers Mgmt v Forest Elec. Corp.*, 281 AD2d 252 [1st Dept 2001]). In any event, the affidavits were conclusory.

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

ENTERED: NOVEMBER 21, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Renwick, JJ.

10600 Gloria Miller-Francis, Index 1805/07
Plaintiff-Respondent,

-against-

Maryann Smith-Jackson, et al.,
Defendants,

Mortgage Electronic Registration
Systems, Inc., et al.,
Defendants-Appellants.

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Belowich & Walsh LLP, White Plains (Daniel G. Walsh of counsel), for appellants.

Legal Services NYC-Bronx, Bronx (Nicole Woods of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about April 27, 2012, modified, on the law, to deny that portion of plaintiff's motion to extend the notice of pendency, and otherwise affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Angela M. Mazzarelli
Rolando T. Acosta
Dianne T. Renwick, JJ.

10600
Index 1805/07

_____x

Gloria Miller-Francis,
Plaintiff-Respondent,

-against-

Maryann Smith-Jackson, et al.,
Defendants,

Mortgage Electronic Registration
Systems, Inc., et al.,
Defendants-Appellants.

_____x

Defendants Mortgage Electronic Registration Systems, Inc. and Accredited Home Lenders, Inc. appeal from the order of the Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about April 27, 2012, which denied their motion for summary judgment dismissing the first, sixth and seventh causes of action as against them, and granted plaintiff's cross motion to lift the automatic stay of discovery resulting from defendants' motion, extend the deadline to file the note of issue, and extend the duration of the notice of pendency through August 31, 2013.

Delbello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Daniel G. Walsh of counsel), and Belowich & Walsh LLP, White Plains (Daniel G. Walsh of counsel) for appellants.

Legal Services NYC-Bronx, Bronx (Nicole Woods of counsel), for respondent.

ACOSTA, J.

The primary issue in this case is whether a mortgage lender can ignore signs of a "foreclosure rescue" scheme simply because the title to the subject property appears to be in order.[1] The issue arose in the context of a motion by defendants Mortgage Electronic Registration Systems, Inc. (MERS) and Accredited Home

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[1] Foreclosure rescue scams, plaintiff alleges, are often perpetrated by self-described "experts" who prey upon vulnerable homeowners as foreclosure looms. The "expert," who offers to assist the homeowner in refinancing to avert foreclosure, instead dupes the owner into transferring to the expert the deed to his or her home. Eventually, the "expert" sells the property to a "straw buyer" in order to reap a profit. This a significant problem in New York, exacerbated by the subprime mortgage crisis of recent years (*see* Press Release, *Statewide "Loan Modification Scam Alert" Campaign Launched As Part of NYS Consumer Protection Board's Annual Consumer Action Day* [Mar. 4, 2010], *available at* http://www.dfs.ny.gov/about/press/pr100304.htm ["With the national foreclosure rate at an all-time high of 8.85 percent, and the rate in New York near 7.78 percent, many homeowners have turned to loan modification or foreclosure 'rescue' companies for help – only to realize that they've been scammed. These scam artists . . . bilk homeowners out of money, and often times their homes."]). Some reports indicate that foreclosure rates are again on the rise in New York, underscoring New Yorkers' continued susceptibility to the phenomenon of foreclosure rescue fraud (*see e.g.* Orlando Lee Rodriguez, *New York, New Jersey Emerge as Foreclosure Leaders*, Real Estate Weekly [June 26, 2013], *available at* http://www.rew-online.com/2013/06/26/new-york-new-jersey-emerge-as-foreclosure-leaders ["(T)he New York City region now has one of the country's highest foreclosure rates. . . . The rate now hovers around eight percent, double the national average."] [internal quotation marks omitted]; Daren Blomquist, *Five Local Market Snapshots Show Erratic Housing Recovery*, Forbes [Aug. 26, 2013], *available at* http://www.forbes.com/sites/darenblomquist/2013/08/26/five-local-market-snapshots-show-erratic-housing-recovery).

Lenders, Inc. (Accredited) for summary judgment dismissing the complaint as against them; the complaint seeks, among other things, to quiet title. Because defendants' evidence is not in admissible form, they fail to establish prima facie that they are bona fide encumbrancers. In any event, plaintiff raised triable issues of fact as to defendants' notice of the alleged fraud. Further, discovery has not been completed, and plaintiff may be able to raise additional issues of fact upon gaining access to evidence that remains in defendants' exclusive possession. Thus, Supreme Court correctly denied defendants' motion. However, the court improperly granted plaintiff's cross motion to extend her notice of pendency, because an expired notice of pendency cannot be revived.

Facts and Procedural Background

Plaintiff and her mother owned their home outright until September 2004, when a tax lien of more than $23,000 was recorded against the property. In late 2004 or early 2005, plaintiff was approached by her neighbor, defendant Kathy Dukes, who said she was aware of the tax lien and knew someone who could help. Dukes introduced plaintiff to defendant Maryann Smith-Jackson, who persuaded plaintiff to transfer ownership of the property to her. Plaintiff, under the impression that she was merely acquiring a loan to help her pay the tax arrears and improve her credit,

conveyed title to Smith-Jackson in September 2005. The transfer was recorded in the Office of the City Register of the City of New York on June 8, 2006.

Plaintiff made monthly mortgage payments to Smith-Jackson until late 2006, when she unexpectedly received mail addressed to defendant George Henry, followed by foreclosure papers. Unbeknownst to plaintiff, Smith-Jackson had conveyed title to Henry – a man who apparently had no intention of purchasing a house, and who plaintiff alleges was the "straw buyer" in the scam – on December 29, 2006 (the Henry closing). At the closing, Henry applied for and obtained a loan from Accredited for the entire purchase price of $500,000. Accredited thereby acquired a security interest in the form of a purchase money mortgage on the property; MERS was named on the mortgage as Accredited's nominee and the mortgagee for purposes of the recording.

Henry's deposition testimony suggests that even he may have been a victim of the scheme, since he was unwittingly coerced into purchasing plaintiff's house with a loan he claimed he could not afford. At least one representative of Accredited was present at the Henry closing, in addition to Smith-Jackson and several other (non-appealing) defendants. Henry had never met anyone from Accredited and did not fully understand that he was purchasing a home. In fact, he had not even seen the house

before the closing and was unaware that plaintiff was living there. Instead, Henry believed that Smith-Jackson and others were, for some unexplained reason, helping him "sign for" a house despite his repeated statements that he did not earn enough money to pay a mortgage.

An appraisal of plaintiff's home, provided at the Henry closing by nonparty Your Home Appraisal Corp., was rife with errors indicative of fraud. For example, the appraiser significantly reduced the square footage of comparable properties as a means to inflate the value of plaintiff's house. Accredited recognized these errors, and its employee-reviewer noted that "the estimated value d[id] not appear to be supported" by the appraisal. Consequently, Accredited reduced the amount from $580,000 to $500,000 before approving Henry's loan.

Henry signed Accredited's loan application for the first time at the closing. Although the application states that he earned $10,500 per month, Accredited's loan file does not contain proof of Henry's income or credit history; there is no indication that Accredited requested or examined Henry's paystubs, tax returns, or credit report. Despite the dearth of financial information, Accredited approved a loan to Henry in the amount of $500,000.

In April 2007, Accredited filed a foreclosure action against

Henry for failure to make mortgage payments. After learning of the conveyance to Henry and Accredited's mortgage, plaintiff commenced this action on August 13, 2007, against defendants and several other parties purportedly involved in the plot. Of the seven causes of action asserted by plaintiff in the complaint, three are relevant to this appeal: the claims sounding in equitable mortgage, article 15 of New York Real Property Actions and Proceedings Law (to quiet title by compelling determination of claims to the subject property), and Real Property Law § 329 (to have Smith-Jackson's and Henry's deeds, and defendants' mortgage, declared void).

Plaintiff served discovery on Accredited, which only partially complied under threat of a motion to compel. As discovery was under way, defendants moved for summary judgment, arguing that Accredited was a good faith encumbrancer for value and that, therefore, they maintained a valid mortgage on the subject property.

The motion court denied defendants' motion, finding material issues of fact related to Accredited's actual or constructive knowledge of the fraud underlying Smith-Jackson's conveyance of the property to Henry. In addition, the court granted plaintiff's cross motion to lift the stay of discovery that was triggered by defendants' summary judgment motion, to extend the

deadline for filing the note of issue and to extend the duration of plaintiff's notice of pendency, which was originally filed in 2007 and had expired nearly a year before. Some time after the notice of appeal was filed, nonparty West Coast Servicing, Inc. (West Coast) acquired the mortgage as Accredited's successor in interest.

Discussion

Accredited's Status as a Bona Fide Encumbrancer

The rights of an encumbrancer for value are protected "unless it appears that [the encumbrancer] had previous notice of the fraudulent intent of [its] immediate grantor, or of the fraud rendering void the title of such grantor" (Real Property Law § 266; *Fleming-Jackson v Fleming*, 41 AD3d 175 [1st Dept 2007]). A mortgagee will be charged with constructive notice if it is "aware of facts that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue" *(Mortgage Elec. Registration Sys., Inc. v Rambaran*, 97 AD3d 802, 804 [2d Dept 2012] [internal quotation marks omitted]; *Anderson v Blood*, 152 NY 285, 293 [1897] [purchaser on notice if facts would "excite the suspicion of an ordinarily prudent person"]). If a "reasonable inquiry" would reveal some evidence of fraud, then failure to "make some investigation" will divest the mortgagee of bona fide encumbrancer status (*see Anderson*, 152 NY at 293; *see*

also Rambaran, 97 AD3d at 804).

A mortgagee may make a prima facie showing that it is a bona fide encumbrancer by presenting a title search showing a clear chain of title (*see Fleming*, 41 AD3d at 176; *see also Fan-Dorf Props., Inc. v Classic Brownstones Unlimited, LLC*, 103 AD3d 589 [1st Dept 2013]; *Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc. v 31 Mount Morris Park, LLC*, 76 AD3d 465 [1st Dept 2010]). To raise an issue of fact in response, the opposing party must offer evidence to justify requiring the mortgagee to engage in an inquiry regarding title or fraud (*see id.*), for example, evidence that the moving party possessed documents indicating that the opposing party was in possession of the property (*see Maiorano v Garson*, 65 AD3d 1300, 1302 [2d Dept 2009]).

Here, defendants failed to make a prima facie showing that they are entitled to bona fide encumbrancer status because their proffered title search was neither an official search nor "certified" by the searching company (CPLR 4523). While the party opposing summary judgment "may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form," the movant is not accorded that luxury; its evidence *must* be in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, because defendants'

title search is not in admissible form, it cannot be considered in support of their argument that Accredited was a bona fide encumbrancer.

Even assuming that defendants had established bona fide encumbrancer status, they would not be entitled to summary judgment because plaintiff has set forth evidence that defendants had notice of the underlying fraud. For example, Henry applied for the loan for the first time at the December 29 closing. In an attempt to dismiss the significance of this, defendants' attorney states that "the re-signing of the mortgage application by the borrower is standard practice at a real estate closing." This overlooks the fact that Henry did not *re-sign* the application but, instead, signed it for the first time at the closing. If an initial submission and signing of a mortgage application at a real estate closing is not standard practice, then defendants must explain why this unconventional method did not excite Accredited's suspicion that some nefarious activity tainted the transaction.

In addition, Accredited approved a $500,000 loan to Henry – a "buyer" who had no intention of purchasing a home and appears to have been coerced into attending the closing – without any proof that he had an ability to repay it. Indeed, the record is devoid of evidence to suggest that Accredited examined Henry's

paystubs, tax returns, or credit history before approving his loan application. These suspicious aspects of the transaction present issues of fact pertaining to Accredited's knowledge of the foreclosure rescue scam.

The faulty appraisal also raises an inference that Accredited had notice of the underlying fraud. Although Accredited reduced the loan amount after becoming aware of the overstated appraisal, the fact that the initial appraisal was overstated would lead a reasonably prudent lender to investigate further to determine whether the prospective borrower was involved in a transaction free of fraud.

Had Accredited conducted a reasonable inquiry into the legitimacy of the sale by Smith-Jackson to Henry, it could have discovered plaintiff's competing claim. Therefore, we cannot rule as a matter of law that defendants are entitled to summary judgment.

Moreover, denial of summary judgment is warranted because defendants' motion curtailed the discovery process, and there may be evidence in their exclusive possession that would enable plaintiff to present other triable issues of fact (CPLR 3212[f]). For instance, plaintiff served interrogatories upon Accredited, asking for the names of employees who were involved in the Henry closing. These interrogatories remain unanswered, and plaintiff

would likely seek to depose any of Accredited's employees who approved Henry's loan. Those employees' impressions of the transaction, and how they became involved in it, would indicate whether they knew or suspected fraud to have been present. In addition, Henry's demeanor and statements, and those of the other defendants who were present during the closing, might have suggested that the transaction was part of a larger fraudulent scheme. For example, it is unclear whether Henry's statements of his inability to pay a mortgage were also made at the closing while Accredited was present. Further discovery would provide needed clarification.

Plaintiff also demanded production of documents relating to Accredited's underwriting policies and involvement in the Henry closing that may present issues of material fact. However, those documents have not been produced. In particular, the underwriting policies would be elucidative of whether Accredited would customarily approve a $500,000 loan without verifying the intended borrower's financial condition. If the company would ordinarily deny such a loan application, then its approval of the loan to Henry would indicate that it had at least an inkling that the conveyance was illegitimate.

Insofar as Accredited lacked knowledge of plaintiff's particular claim to the property, the presence of fraud alone –

even absent knowledge of the ultimate victim's identity – ought to counsel a lender against proceeding with a transaction without conducting a reasonable inquiry. If Accredited had actual or constructive knowledge that the Henry closing was blighted by fraud, its knowledge would be enough to render the protection of Real Property Law § 266 inapplicable. That is an issue of fact that merits denial of summary judgment here. At the very least, plaintiff should be entitled to conclude discovery so that these questions may be answered. Plaintiff seeks specific evidence that would justify opposition to defendants' motion, and thus the prospective disclosure would not be a mere "fishing expedition" (*see Auerbach v Bennett*, 47 NY2d 619, 636 [1979]).

Plaintiff's Notice of Pendency

The motion court lacked the authority to extend plaintiff's notice of pendency, because plaintiff did not move for an extension until after the notice had expired (*see Matter of Sakow*, 97 NY2d 436, 442 [2002]). Although defendants did not raise this issue before the motion court, we may consider a legal argument that appears on the face of the record and could not have been avoided if it had been raised *(see Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]). A notice of pendency is effective for three years from the date of filing, and a court may grant a three-year

extension upon a plaintiff's motion "[b]efore expiration of a period or extended period" (CPLR 6513). Plaintiff's notice of pendency was originally filed in 2007 and thus expired in 2010. She did not move to extend it until 2011.

Accordingly, the order of the Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about April 27, 2012, which denied defendants' motion for summary judgment dismissing the first, sixth and seventh causes of action as against them, and granted plaintiff's cross motion to lift the automatic stay of discovery resulting from defendants' motion, extend the deadline to file the note of issue, and extend the duration of the notice of pendency through August 31, 2013, should be modified, on the law, to deny that portion of plaintiff's motion to extend the notice of pendency, and otherwise affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 21, 2013

CLERK