SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 5, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

15329 DRMAK Realty LLC, et al., Index 653783/13
Plaintiffs-Appellants,

-against-

Progressive Credit Union,
Defendant-Respondent.

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Kenneth J. Glassman, New York, for appellants.

Litchfield Cavo, LLP, New York (Krupa A. Shah of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 30, 2014, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), affirmed, with costs.

Plaintiff Alexander Klein, a sophisticated real estate investor, obtained a loan from defendant in the amount of $3,350,000, secured by a mortgage on a condominium owned by plaintiff DRMAK Realty LLC, an entity controlled by Klein. The loan carried an annual interest rate of 7.5% percent, with an

initial interest payment of $16,052.16, due upon execution. The failure to make a payment within 10 days after its due date constituted a default. Following any such default, the annual interest rate increased to the lower of 16% or the maximum allowed by law, and defendant could charge an additional late fee of 5% of each overdue payment. The mortgage also provided that defendant was entitled to costs and expenses, including reasonable attorneys' fees, for foreclosing on the mortgage in the event of a default or failure to make payment.

Klein defaulted on the loan several times, and defendant commenced two foreclosure actions. Defendant discontinued the first foreclosure action, reinstated the loan, and reset the interest rate to the non-default rate of 7.5% after Klein paid the arrears. Defendant commenced a second foreclosure action in November 2012, although Klein claims he was never served with a summons and complaint.

In mid-2013, Klein sought to settle the loan and refinance with a different lender. On May 1, 2013, defendant's general counsel advised him in an email that defendant was "willing to accept the amount of $3,536,580[] as settlement in exchange for a release of its mortgage lien" on the condominium. The amount included "all legal fees, delinquent fines, assignment/release

fees, May 2013 regular loan payment and all other fees, charges or expenses which are incurred or may be incurred prior to loan payoff by 5/20/2013." Klein asserts in an affidavit submitted in connection with this motion that he "immediately telephoned [defendant] and conveyed my shock at their attempt to hold me up." He did not close that month, but rescheduled for June 2013, and requested a new payoff letter from defendant. On June 3, 2013, defendant sent Klein a new payoff letter, which was substantially the same as the previous one. Klein claims that he was separately advised that defendant would only issue a satisfaction of the mortgage if he delivered a check to defendant for $18,000, representing the June 2013 interest payment. Klein did so, and a closing was held at which Klein paid defendant the entire amount demanded in the June payoff letter.

Plaintiffs thereafter commenced this action alleging that defendant extorted unlawful interest and other charges, in exchange for delivery of a satisfaction of mortgage that it was legally and contractually obligated to deliver. Plaintiffs alleged that all defaults were cured by payments of money owed, including all late payments, and that "[a]t least $186,578.24 of the total Payoff charges were improper," "manufactured charges not incurred or owed." Plaintiffs asserted causes of action

alleging breach of contract, fraud, restitution for excessive fees, unfair business practices, violation of General Business Law § 349, and breach of the implied covenant of good faith and fair dealing.

Defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), arguing that plaintiffs' causes of action were barred by the voluntary payment doctrine and that defendant was entitled to the payoff amount. In opposition, plaintiffs argued that the disputed payment was not voluntary, because Klein was under duress and had no choice but to make the payment to refinance the loan. They submitted, inter alia, the account statement showing that payments on the loan were current as of March 31, 2013, with only the principal balance outstanding, which was not due until November 2015. They also submitted Klein's affidavit, in which he stated that the account was paid in full through May 1, 2013.

The IAS court granted defendant's motion. The court held that plaintiffs' allegations "are insufficient to demonstrate that [defendant] coerced Klein into accepting the proposed payoff terms, and, instead, conclusively demonstrate that Klein voluntarily and intentionally paid the entire payoff amount that was fully disclosed and itemized in the June payoff letter,

issued several days prior to the closing." Further, relying on defendant's factual allegations, the court noted that Klein did not dispute that he is a sophisticated real estate investor who had previously obtained two $4 million loans from defendant, that approximately six weeks after closing he requested another loan from defendant, and that at closing, where he was represented by attorneys, he failed to raise any objections to the terms of the payoff.

Addressing individual components of the payoff amount, the court held that the charges of "$12,500 in fees, including attorneys' fees," was proper because Klein was obligated to pay reasonable attorneys' fees incurred by defendant to enforce the note, and defendant's counsel commenced two foreclosure actions and negotiated their settlements with him. The court further held that the interest included in the payoff amount was for May 2013 and therefore proper. The court did not specifically address the $150,000 charge for "Prepayment Settlement Amount" or $3,140.64 for "Other," unspecified fees.

The voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge of the facts, in the absence of fraud or mistake of material fact or law (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525 [2003]). The

onus is on a party that receives what it perceives as an improper demand for money to "take its position at the time of the demand, and litigate the issue before, rather than after, payment is made" (*Gimbel Bros. v Brook Shopping Ctrs.*, 118 AD2d 532, 535 [2d Dept 1986]). Here, there is no claim of fraud or mistake. Defendant was entirely aboveboard about the amount of money it expected to be paid to settle the loan. Nevertheless, Klein made the calculated decision to schedule the closing and to pay off the entire amount demanded. Nor, as discussed below, did Klein "take [his] position at the time of the demand."

Plaintiffs argue that the voluntary doctrine should not apply because Klein was deprived of a meaningful choice as to whether to pay off the loan on defendant's terms. They further claim that Klein protested the demand and that this shielded plaintiffs from any application of the doctrine. Nothing in plaintiffs' complaint or papers in opposition to the motion suggests that these are viable positions. It is assumed, of course, that plaintiffs' factual allegations are true, both in the complaint and in opposition to the motion (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). However, conclusory allegations will not serve to defeat a motion to

dismiss (*see Phillips v Trommel Constr.*, 101 AD3d 1097, 1098 [2d Dept 2012]). Nothing in the complaint or the affidavit alleges any reason why Klein had no choice but to go through with the closing; indeed, he was able to put off the closing the firstv time he received from defendant what he considered an unreasonable payoff demand. Accordingly, the dissent's reliance on Rovello v Orofino Realty Co. (40 NY2d 633 [1976]), which it claims required Supreme Court to convert the motion to one for summary judgment, is misplaced. That is because Rovello pres-supposes that "the complaint is sufficient on its face" (40 NY2d at 634). The dissent quotes Klein's allegations at length and concludes that "it is clear that he paid under protest and duress." However, this conclusion is based on nothing more than a wholesale adoption of Klein's own ipse dixit. Incidentally, we agree with the dissent that a sophisticated investor can be subject to economic duress. We simply do not find that plaintiffs adequately alleged duress in this case.

This situation contrasts starkly with that considered by the Court of Appeals in *Kilpatrick v Germania Life Ins. Co.* (183 NY 163 [1905]), relied upon by the dissent. There, the terms on which the defendant loaned money to the plaintiff entitled the plaintiff to pay the loan off early, but not until one year into

the loan's term, if he paid to the defendant a $1,000 "bonus." Before one year of the term had passed, the plaintiff defaulted on the loan, and the defendant commenced a foreclosure action. The plaintiff arranged to refinance the loan, and agreed to pay the entire amount due and owing. The defendant, however, withdrew the action and informed the plaintiff that it would only permit full payment of the balance if the plaintiff paid the $1,000 "bonus," despite the fact that the first year of the loan term had still not expired. The plaintiff paid the bonus so it could go through with the refinance closing, and then sought to recover the $1,000 from the defendant. The Court recounted that "[i]t is undisputed that before the discontinuance of the foreclosure action the plaintiff had changed his position, had obligated himself to make a new loan on the mortgaged premises, and necessarily had contracted financial obligations in that connection" (183 NY at 168). Recognizing "plaintiff's change of position and assumption of legal obligations," the Court sustained the claim, finding that "payment was made to free the property from the duress as much as if it had been a chattel and the defendant had it in his possession under a pledge, refusing to part with it until the bonus was paid" (183 NY at 168-169). The dissent accurately summarizes the facts and holding of

Kilpatrick, but fails to recognize that here, plaintiffs make no allegation that Klein was similarly deprived of any economic choice but to go forward with the closing. Because there is no such allegation, we view the complaint as merely seeking recovery of a payment that Klein admits he did not believe he was obliged to make. Accordingly, the dissent is mistaken in stating that *Gimbel Bros.* (118 AD2d 532) does not apply.

Kilpatrick is also distinguishable insofar as the Court there expressly noted that the plaintiff "submitted under protest" (183 NY at 169). Here, there is not a single allegation that Klein protested the payment in such a way that he preserved his right to later sue to recover it. To be sure, he stated in his affidavit in opposition that he complained to defendant when it presented its payoff letter in May 2013. However, by even the most liberal reading of that affidavit, there is no indication that Klein protested again in June when he received the second payoff letter. Nor is there any allegation to even suggest that Klein took steps to indicate that he was reserving his rights when he made payment to defendant at the closing and accepted satisfaction of the mortgage. Thus, *1300 Ave. P Realty Corp. v Stratigakis* (186 Misc 2d 745, 749 [Appellant Term, 2d Dept 2000]), also relied upon by the dissent, is inapposite. There,

the plaintiff, who had borrowed money from the defendant, paid the full amount demanded by the defendant, including the defendant's attorneys' fees, to refinance the loan and avoid foreclosure. The plaintiff then sought to recover the attorneys' fees, which it claimed were unreasonable. The court, citing *Kilpatrick* (183 NY 163) held that the defendant's motion to dismiss the claim was correctly denied, since "[p]laintiff's opposition papers allege that payment in satisfaction of the mortgage was made to preserve the closing to refinance the mortgage, and under protest, and thus sufficiently raise issues of fact as to whether the payment of attorneys' fees was voluntary" (186 Misc 2d at 749).

Because Klein failed to allege that his payment to defendant was made under duress and under protest, we agree with the IAS court that plaintiffs' claims are barred by the voluntary payment doctrine.

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

ACOSTA, J. (dissenting)

I dissent because I believe that a sophisticated investor can still be subjected to duress. And, although the majority seems to acknowledge this, it nonetheless affirms the dismissal of the complaint notwithstanding that the issue is raised in the context of a CPLR 3211 motion, where the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party, and "*determine only whether the facts as alleged fit within any cognizable legal theory*" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [emphasis added]). In my opinion, the motion court erred in finding as a matter of law that plaintiff Klein's payment to defendant of the disputed amount in satisfaction of the mortgage was voluntary, since plaintiffs allege in the complaint and in opposition to defendant's motion that Klein made the payment to preserve the closing so as to refinance the mortgage with another lender (*see Kilpatrick v Germania Life Ins. Co.*, 183 NY 163, 168-169 [1905]; *1300 Ave. P Realty Corp. v Stratigakis*, 186 Misc 2d 745, 748-749 [Appellant Term, 2d Dept 2000] ["Plaintiff's opposition papers allege that payment in satisfaction of the mortgage was made to preserve the closing to refinance the mortgage, and under protest, and thus sufficiently raise issues

of fact as to whether the payment of attorneys' fees was voluntary"]).

Here, dismissal was not warranted pursuant to CPLR 3211(a)(7), since a court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and plaintiff clearly met this standard (*Leon v Martinez*, 84 NY2d at 88; (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). Specifically, in his complaint, plaintiff alleged that he "was told by Defendant that if he did not agree to pay the interest and other charges, the Defendant would appear at the closing and would not issue a satisfaction. *Under the circumstances, Plaintiff had no choice but to pay the charges"* (emphasis added). In his affidavit in opposition to the motion to dismiss, plaintiff averred, among other things, that "[t]he closing letter provided for an additional $186,578.24 in unsubstantiated fees and expenses. . . I immediately telephoned Koshers and conveyed my shock at their attempt to hold me up. I demanded a breakdown." Plaintiff did not close in May, and requested a new closing statement for June, which he received on June 3, 2013. According to plaintiff, the new payoff letter provided for only $1.86 less than the May letter. He also stated, "Koshers also told me, if I wanted him to show up at the closing, I had to pay

$18,000.00 in advance representing June interest. I hand delivered to Defendant's office the $18,000.00 interest payment. . . The interest on a per diem basis should only have been $4,885.00." Thus, although plaintiff did not use the words "protest" or "duress," it is clear that he paid under protest and duress.

Moreover, the documentary evidence submitted by plaintiffs in opposition to the motion reflects an outstanding balance as of March 31, 2013 equal to the principal amount, which was not due until November 1, 2015, and defendant's sole submission in support of its contention that it is entitled to the disputed amount is an affidavit by its general counsel, which does not constitute documentary evidence for purposes of a motion to dismiss pursuant to CPLR 3211(a)(1) (*Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). Indeed, defendant's general counsel's statement, in his affidavit, that plaintiff Klein is a sophisticated real estate investor who did not show any reservation as to defendant's payoff demands to allow him to close on the refinancing with the new lender is of no moment inasmuch as affidavits are not documentary evidence within the meaning of CPLR 3211(a)(1), and are not properly considered pursuant to CPLR 3211(a)(7) (*Rovello* v *Orofino Realty Co.*, 40

NY2d 633, 636 [1976]).

As the Court held in *Rovello v Orofino Realty Co. Inc.* (40 NY2d at 636):

> "[A]ffidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims. Modern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one.' *In sum, in instances in which a motion to dismiss made under CPLR 3211 (subd [a], par 7) is not converted to a summary judgment motion, affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint*, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action. It seems that after the amendment of 1973 affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action" (internal citations omitted; emphasis added).

The majority, however, in relying on defendant's affidavits, seems to treat the motion as one for summary judgment.

In addition, I disagree with the majority that *Kilpatrick* (183 NY 163) is inapposite. In *Kilpatrick*, the plaintiff had taken out an $80,000 mortgage on property in 1899 that required him to pay interest semiannually, and allowed the defendant to declare the full outstanding balance of principal, interest, and arrears due upon default. Under the terms of the mortgage, the plaintiff also had the option to pay the mortgage off in full between August 28, 1900 and August 1, 1901 if he paid a bonus of

$1,000.

The plaintiff defaulted on his interest payment due on August 1, 1900, and the defendant instituted a foreclosure action. Thereafter, the plaintiff notified the defendant that he had arranged a new loan for $95,000, and intended to pay the entire amount of the mortgage with interest. The defendant responded by withdrawing the foreclosure action and informing the plaintiff that it would not accept the payment of principal and interest without the $1,000 bonus. The plaintiff paid the principal, interest and, under protest, the $1,000 bonus, and then sued to recover the $1,000.

The Court of Appeals held that the payment of the bonus was not voluntary. It found that by instituting the foreclosure action, the defendant had waived its right to the $1,000 bonus upon the plaintiff's early satisfaction of the mortgage. The Court further found that, because the plaintiff had changed his position by obligating himself to a new loan, due to the defendant's election to foreclose on the mortgage, the defendant was estopped from withdrawing the foreclosure action to restore the parties to their positions before the plaintiff's default. Thus, the defendant had no right to the $1,000 bonus that it demanded.

The Court further found that because the defendant had no right to the payment, which the plaintiff protested, and the "plaintiff, in view of the way business is done in giving a new mortgage to pay off the old one, could not wait to make a tender and take legal action," the payment was made to "free the property from the duress" (183 NY at 169). The plaintiff could "submit to the exaction and pay the bonus, and sue to recover it back, because such a payment is not voluntary" (*id.* at 169). The Court further explained:

> "Under these circumstances the compulsion was illegal, unjust and oppressive and the plaintiff having submitted under protest had the right to recover . . . The refusal of the defendant to accept the mortgage debt and interest unless the bonus was paid, placed the plaintiff in a position where he was compelled to submit to the exaction in order to receive a satisfaction of the defendant's mortgage and secure the money on the new loan which would protect him in the emergency" (*id.*).

I also disagree with the majority's reliance on *Gimbel Bros. v Brook Shopping Ctrs.* (118 AD2d 532 [2d Dept 1986]). The majority, as well as the motion court, seized on the statement in *Gimbel* that "[w]hen a party intends to resort to litigation in order to resist paying an unjust demand, that party should take its position at the time of the demand, and litigate the issue

before, rather than after, payment is made" (*Gimbel Bros.*, 118 AD2d at 535). However, that statement was made in the context of a mistake of fact or law, without any element of coercion.

Specifically, in *Gimbel Bros.*, the department store began opening for business on Sundays after certain laws, which prohibited public sales on Sundays, were found unconstitutional. The landlord demanded an extra payment for each Sunday that the store operated, although the lease, which was negotiated at a time when the store was not legally permitted to operate on Sundays, did not require such payments. The store acceded to the landlord's demand for a period of months before ceasing such payments and suing to recover the Sunday charges already paid.

The sole issue with respect to the voluntary payment doctrine in *Gimbel Bros.* was whether payment of the charges was due to a mistake of fact or law. *Without addressing duress or coercion*, the court concluded that there was no mistake of fact or law that would enable the store to recover the Sunday charges already paid. Explaining that the store had paid the Sunday charges for a year and one half without making any effort to determine its rights, the court stated, "When a party intends to resort to litigation in order to resist paying an unjust demand, that party should take its position at the time of the demand,

and litigate the issue before, rather than after, payment is made" (*id.*). The issue and the context for this statement were entirely different from those here, where plaintiffs claim they were coerced into making the payment by facing in only a matter of days the loss of the opportunity to refinance the mortgage.

Accordingly, I would reverse.

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

ENTERED: NOVEMBER 5, 2015

CLERK

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

14840-
14841 Index 602485/06

National Union Fire Insurance
Company of Pittsburgh, PA.,
Plaintiff-Appellant-Respondent,

-against-

Everest Reinsurance Company,
Defendant-Respondent-Appellant.

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Cahill Gordon & Reindel LLP, New York (Edward P. Krugman of counsel), for appellant-respondent.

Pitchford Law Group LLC, New York (David L. Pitchford of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 20, 2013, which, to the extent appealed and cross-appealed from as limited by the briefs, denied plaintiff National Union Fire Insurance Company of Pittsburgh, PA.'s motion for summary judgment dismissing defendant Everest Reinsurance Company's seventh and ninth defenses, and denied Everest's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs. Order, same court and Justice, entered June 16, 2014, which, to the extent appealed from, denied Everest's motion to renew its motion for summary judgment, unanimously affirmed, with costs.

This record presents numerous issues of fact regarding the

2004 settlement, none of which are susceptible to resolution on summary judgment. Thus, the court correctly denied these motions, particularly in view of our prior order finding issues of fact whether National Union settled the Anniston litigation in good faith (*see American Home Assur. Co. v Everest Reins. Co.*, 90 AD3d 580 [1st Dept 2011]).

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

ENTERED: NOVEMBER 5, 2015

CLERK

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

15822 The People of the State of New York, Ind. 1314/13
Respondent,

-against-

Tony Perry,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Tomoeh Murakami Tse of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Renee A. White, J. at suppression hearing; Daniel P. Conviser, J. at jury trial and sentencing), rendered December 3, 2013, as amended December 16, 2013, convicting defendant of robbery in the third degree and fraudulent accosting, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously reversed, on the law, defendant's motion to suppress photo and lineup identifications granted, and the matter remanded for a new trial preceded by an independent source hearing.

The complainant described the perpetrator of the alleged robbery as having one distinctive physical feature: a "deformed right eye" which "appeared to be something further into his head." At the suppression hearing, the detective who prepared a

photo array and a postarrest lineup testified that, in each instance, defendant was the only participant who had an "apparently defective eye." Under the circumstances, we find that the photo array and lineup were unduly suggestive because "only the defendant matche[d] a key aspect of the description of the perpetrator," namely, a deformed right eye (*People v Kenley*, 87 AD3d 518, 518 [1st Dept 2011], *lv dismissed* 18 NY3d 959 [2012]). While we recognize the practical difficulties in finding fillers with similarly defective eyes, or photographs of such persons, "[a] simple eye patch provided to each of the lineup participants or a hand over an eye would have sufficed to remove any undue suggestiveness of the procedure" (*People v Tatum*, 129 Misc 2d 196, 204 [Sup Ct Queens County 1985]; *see also Kenley*, 87 AD3d at 518), and similar measures could have been taken with regard to the photos.

In light of this disposition, we do not reach any of defendant's other arguments, except that we find that the verdict was not against the weight of the evidence.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15865- Ind. 330/12
15866 The People of the State of New York, 867/13
Respondent,

-against-

Tamek Skinner,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Tomoeh Murakami Tse of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Rivellese 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 (Renee White, J.), rendered on or about April 23, 2013,

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 5, 2015

CLERK

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

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16029- Ind. 5436/09
16029A- 2717/10
16029B The People of the State of New York, 3018/10
Respondent,

-against-

Jacques Levasseur,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (E. Deronn Bowen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

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Judgments, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered December 9, 2010, convicting defendant, after a jury trial, of assault in the second degree, criminal possession of a weapon in the fourth degree and endangering the welfare of a child, and also convicting defendant, upon his plea of guilty, of criminal contempt in the second degree, and sentencing him to an aggregate term of three years, unanimously affirmed. Judgment, same court, Justice and date, convicting defendant, upon his plea of guilty, of criminal contempt in the second degree, and sentencing him to a concurrent term of six months, unanimously reversed, on the law, the plea vacated and indictment 2717/10 dismissed as a matter of discretion in the

interest of justice.

The court properly exercised its discretion in admitting limited evidence of uncharged crimes that was probative of defendant's motive and that tended to complete the victim's narrative, provide background information explaining the abusive relationship between defendant and the victim, and to place the behavior of both defendant and the victim in a believable context (*see People v Leeson*, 12 NY3d 823, 827 [2009]; *People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Steinberg*, 170 AD2d 50, 72-74 [1st Dept 1991], *affd* 79 NY2d 673 [1992]). Moreover, this evidence was directly relevant to refute defendant's defense, which was that the incident never happened, and that the victim told a "crazy story," as described in defense counsel's opening statement. Without background evidence, the savagery of the attack might have seemed so disproportionate to the alleged precipitating incident as to cast unfair doubt on the victim's credibility. The probative value of this evidence outweighed any prejudicial effect, which was minimized by the court's appropriate limiting instructions.

The court also correctly admitted expert testimony describing typical features of the cycle of domestic violence. The expert's testimony provided the jury with an explanation for

what would otherwise be inexplicable behavior by the victim of a violent attack, and involved matters beyond the knowledge of the average juror (*see People v Spicola*, 16 NY2d 441, 465-466 [2011], *cert denied* 565 US __, 132 S Ct 400 [2011]; *People v Carroll*, 95 NY2d 375, 387 [2000]) *People v Byrd*, 51 AD3d 267, 273-274 [1st Dept 2008], *lv denied* 10 NY3d 956 [2008]).

As the People concede, one of defendant's contempt convictions was based on a defective guilty plea, and further prosecution of that charge is unwarranted. However, there is no basis upon which to vacate the remaining contempt conviction.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16030 James V. Callaghan, Index 109246/11
Plaintiff-Appellant,

-against-

United Federation of Teachers, et al.,
Defendants-Respondents.

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Law Offices of Stewart Lee Karlin P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Stroock & Stroock & Lavan LLP, New York (Beth A. Norton of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 18, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the third cause of action, for defamation, and the fourth cause of action, for violation of the state constitutional right to free speech, unanimously affirmed, without costs.

Supreme Court properly dismissed the third cause of action, for defamation, because, even to the extent that some of the statements about plaintiff's disciplinary and professional history are assertions of fact, the statements were made by UFT officials in their official capacities, and they cannot be held liable for acts committed in their capacity as union

representatives (*see Duane Reade, Inc. v Local 338 Retail, Wholesale, Dept. Store Union, UFCW, AFL-CIO*, 17 AD3d 277 [1st Dept 2005], *lv denied* 5 NY3d 797 [2005]).

The court also properly dismissed the fourth cause of action, alleging a violation of plaintiff's free speech rights. The claim fails as a matter of law since the UFT is a private entity (*see SHAD Alliance v Smith Haven Mall*, 66 NY2d 496, 502 [1985]; *see also Engstrom v Kinney Sys.*, 241 AD2d 420, 424 [1st Dept 1997], *lv denied* 91 NY2d 801 [1997]). Courts in this State have consistently held that unions, even those representing public employees, such as the UFT, are not state actors (*see Ciambriello v County of Nassau*, 292 F3d 307, 323 [2nd Cir 2002]; *see also Driskell v New York City*, 2011 WL 6812516, *3, 2011 US Dist LEXIS 148294, *9 [ED NY 2011]). Plaintiff's conclusory allegation that the UFT acted in concert with a state actor does not suffice to state a claim against the UFT (*see Ciambriello* at 324). Nor did plaintiff allege facts that would show that the State "is so entwined with the regulation of the private conduct as to constitute State activity"; that "there is meaningful State participation in the activity"; or that "there has been a

delegation of what has traditionally been a State function to a private person" (*SHAD Alliance*, 66 NY2d at 505).

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

ENTERED: NOVEMBER 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16031 In re Shalick M.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for presentment agency.

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Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about August 28, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the second degree, attempted assault in the third degree (two counts), reckless endangerment in the second degree, criminal possession of a weapon in the fourth degree and menacing in the second degree, and placed him on probation for a period of 18 months, unanimously modified, on the law, to the extent of dismissing the finding as to attempted third-degree assault under Penal Law § 120.00(2), and otherwise affirmed, without costs.

Except as indicated, the court's finding was based on

legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The record supports the inference that when, during an argument, appellant departed and returned with a knife, with which he cut the victim in the stomach area, appellant intended to cause physical injury. The record also supports the finding as to reckless endangerment, and that finding was consistent with the court's findings as to offenses requiring intent, because the different mental states involved different results under the facts presented (*see People v Trappier*, 87 NY2d 55 [1995]). However, as the presentment agency concedes, since Penal Law § 120.00(2) involves reckless assault, it is legally impossible to attempt that crime.

An 18-month period of probation is 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]), particularly given the seriousness of the underlying conduct.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16032 The People of the State of New York, Ind. 2198/08
Respondent,

-against-

Gregory Foster,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Katherine A. Gregory of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Edward M. Davidowitz, J. at plea; Barbara F. Newman, J. at sentence), rendered August 15, 2015, convicting defendant, upon his plea of guilty, of Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]), and sentencing him to an aggregate term of two years of imprisonment with two years of post-release supervision, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16034 In re Michael R. Bloomberg, etc., Petitioners, Index 401122/13 156382/13

-against-

John C. Liu, etc., Respondent.

- - - - -

Neighborhood in the Nineties, Inc., Plaintiff-Appellant,

-against-

The City of New York, et al., Defendants-Respondents.

_____

Tane Waterman & Wurtzel, P.C., New York (Stewart Wurtzel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about March 28, 2014, which granted the petition under Index No. 401122/13 to compel respondent to register the long-term contract between petitioner Department of Homeless Services (DHS) and defendant Aguila, Inc. (in Index No. 156382/13) for the Freedom House shelter at 316 and 330 West 95th Street in Manhattan, and granted defendants' motion under Index

No. 156382/13 to dismiss the complaint, unanimously affirmed, without costs.

In siting Freedom House, DHS met its obligation to perform a "meaningful analysis" of the Fair Share Criteria, i.e., the burdens and benefits associated with the facility with due regard for its social and economic impacts on the surrounding area (*see Tribeca Community Assn. v New York City Dept. of Sanitation*, 83 AD3d 513, 515 [1st Dept 2011]; New York City Charter § 203; 62 RCNY Appendix A, "Criteria for the Location of City Facilities"]). DHS substantially tracked the Fair Share Criteria and set forth its findings in a detailed 10-page Fair Share Analysis, which concluded, inter alia, that Freedom House would neither cause an "[u]ndue concentration . . . of facilities providing similar services or serving a similar population" nor have "a significant cumulative negative impact on neighborhood character" (62 RCNY Appendix A, art 6, §§ 6.51; 6.53[a]). On this record, we find no reason to interfere with the City's siting decision.

We have considered plaintiff's various contentions as to the inadequacy of DHS's fair share analysis and find them unavailing.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16035 The People of the State of New York, Ind. 1106N/13
Respondent,

-against-

Rogerio Bentodelima,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered on or about October 11, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant'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 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16036-
16037 IG Second Generation Partners, L.P., Index 114175/11
653124/12
Plaintiff-Respondent,

-against-

Franco La Motta, etc.,
Defendant-Appellant.

- - - - -

Café Amore of NY Restaurant, Inc.,
et al.,
Plaintiffs-Appellants,

-against-

IG Second Generation Partners, L.P.,
et al.,
Defendants-Respondents.

_____

Lugara PLLC, Brooklyn (Lorenzo Lugara of counsel), for appellants.

Livoti, Bernstein & Moraco P.C., New York (Robert F. Moraco of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered December 20, 2013, in Action No. 1, which granted IG Second Generation Partners, L.P.'s motion for summary judgment against Franco La Motta, the personal guarantor of the lease between IG and Café Amore of NY Restaurant, Inc., and dismissing La Motta's affirmative defenses and counterclaims, unanimously modified, on the law, to vacate the principal sum awarded, and

remand for a new determination of the sum owed by Café Amore under the lease up through April 6, 2012, the date of the eviction, and otherwise affirmed, without costs. Order, same court and Justice, entered December 23, 2013, in Action No. 2, which granted IG and Dewar's Management Co., Inc.'s motion to dismiss the complaint, unanimously affirmed, without costs.

The judgment of Civil Court, entered December 12, 2011, awarding IG rent due cannot now be disputed, nor can the court's findings that IG is the owner and has capacity to sue, that Café Amore is the tenant, and that the lease agreement between them is valid (*Tewksbury Mgt. Group, LLC v Rogers Invs. NV LP*, 110 AD3d 546 [1st Dept 2013]). The guaranty signed by La Motta, however, limits La Motta's liability for Café Amore's obligations under the lease agreement to the time during which Café Amore is in possession of the premises, and does not apply after Café Amore's "surrender" of the possession, which occurred, by eviction, on April 6, 2012 (*see Preamble Props. v Woodard Antiques Corp.*, 293 AD2d 330 [1st Dept 2002]). Furthermore, IG failed to submit admissible evidence, such as properly authenticated business records, to substantiate the amounts it contends are due. For example, although its moving affidavit states that the "rent schedule" is maintained in the regular course of its business,

there is a discrepancy between the entries on that schedule and the entries on the "Profile History List," which details Café Amore's running balance of unpaid rent and other expenses.

Café Amore and La Motta's action against IG on the lease is precluded by the doctrine of respondent judicata and the November 30, 2009 stipulation between Café Amore and IG. Café Amore could have raised its claims in Action No. 2 against IG in the Civil Court proceeding (RPAPL 743). The doctrine of respondent judicata also bars Café Amore from proceeding on other claims arising out of the same transaction upon which the Civil Court judgment was based (*Matter of Hunter*, 4 NY3d 260, 269 [2005]; *North Am. Van Lines, Inc. v American Intl. Cos.*, 38 AD3d 450, 451 [1st Dept 2007]). La Motta is also prohibited from proceeding with Action No. 2 because he was in privity with Café Amore (*All Terrain Props. v Hoy*, 265 AD2d 87, 93-94 [1st Dept 2000]; *Shire Realty Corp. v Schorr*, 55 AD2d 356 [2d Dept 1977]).

We have considered Café Amore and La Motta's remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16038 The People of the State of New York, Ind. 3104/02
Respondent,

-against-

Eric Poole,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered September 11, 2012, resentencing defendant, as a second violent felony offender, to an aggregate term of 25 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (see *People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: NOVEMBER 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16039- Ind. 4392/10
16040- 3342/11
16441- 3343/11
16042- 3344/11
16043 The People of the State of New York, 3346/11
Respondent,

-against-

Davaughnte Williams,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (William Mogulescu, J.), rendered March 21, 2013, convicting defendant, upon his plea of guilty, of robbery in the first degree (three counts), robbery in the second degree, attempted assault in the first degree, criminal possession of a weapon in the second degree, and menacing in the second degree, and sentencing him to an aggregate term of ten years of incarceration and five years of post-release supervision, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16044 Express Elevator Construction Co., Inc., Plaintiff-Respondent, Index 109212/11

-against-

Rashti Construction Corp., et al., Defendants-Appellants.

_____

Ferris Turner, East Elmhurst, for appellants.

Howard Blum, P.C., New York (Howard Blum of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered July 11, 2014, after a nonjury trial, in favor of plaintiff in the total amount of $104,158.31, and declaring that (1) plaintiff had a good, valid, and subsisting mechanic's lien against defendants' building; and (2) the building be sold and plaintiff receive the amount of the judgment from the proceeds of the sale, plus the expenses of the sale, unanimously affirmed, with costs.

The trial court's findings that defendants unjustifiably canceled their contract with plaintiff, locked plaintiff out of the work site, and refused to pay the remainder of the contract price, is supported by a fair interpretation of the evidence (*see Claridge Gardens v Menotti*, 160 AD2d 544, 545 [1st Dept 1990];

409-411 Sixth St., LLC v Mogi, 22 NY3d 875, 876-877 [2013]). Defendants failed to establish that plaintiff breached the contract by using "used," rather than new, elevator parts. Defendants' challenges to the trial court's "findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*id.*), and we find no basis to disturb those findings (*see Horsford v Bacott*, 32 AD3d 310, 312 [1st Dept 2006], *affd* 8 NY3d 874 [2007]).

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16046 The People of the State of New York, Ind. 3326/12
Respondent,

-against-

Dennis Rivera,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Sam Mendez of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey 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 (Jill Konviser, J.), rendered on or about December 20, 2012,

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 5, 2015

CLERK

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

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16047 In re Martha B.,
Petitioner-Respondent,

-against-

Julian P.,
Respondent-Appellant.

_____

Law Offices of Randall S. Carmel, Syosset (Randall Carmel of counsel), for appellant.

Bruce A. Young, New York, for respondent.

_____

Order, Family Court, New York County (Fiordaliza A. Rodriguez, Referee), entered on or about January 9, 2015, which, upon a finding that respondent committed the family offenses of disorderly conduct and assault in the third degree, granted the petition for an order of protection against him for two years, and ordered him to complete an anger management program, unanimously affirmed, without costs.

A fair preponderance of the evidence supports Family Court's finding that respondent committed the offenses of disorderly conduct and assault in the third degree. The court's credibility determinations are supported by the record and therefore entitled to deference (*Matter of Winfield v Gammons*, 105 AD3d 753 [2d Dept 2013]; *Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept

2009]). Evidence that on one occasion the husband attacked and threatened petitioner in the superintendent's office in the apartment building where they lived supports the finding that he committed the family offense of disorderly conduct by recklessly creating a risk of public inconvenience, annoyance or alarm (Penal Law § 240.20[1], [3]; *see Matter of William M. v Elba Q.*, 121 AD3d 489 [1st Dept 2014]; *Matter of Cassie v Cassie*, 109 AD3d 337, 342-343 [2d Dept 2013]). The evidence that respondent's attack caused bad bruising supports the determination that respondent committed the family offense of assault in the third degree. The "physical injury" element of that offense may be satisfied by relatively minor injuries causing "'more than slight or trivial pain'" (*People v Mercado*, 94 AD3d 502 [1st Dept 2012], *lv denied* 19 NY3d 999 [2012]; *People v Martinez*, 90 AD3d 409, 410 [1st Dept 2011], *lv denied* 18 NY3d 960 [2012]).

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

ENTERED: NOVEMBER 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16049 The Marion Blumenthal Trust, et al., Index 600693/08
Plaintiffs,

-against-

Arbor Commercial Mortgage, LLC, et al.,
Defendants.

- - - - -

Arbor Commercial Mortgage, LLC, et al.,
Defendants/Third-Party
Plaintiffs-Respondents,

-against-

Herbert Meadow, et al.,
Third-Party Defendants,

Amy Hochfelder,
Third-Party Defendant-Appellant.

_____

Cohen & Marderosian, New York (Mark D. Marderosian of counsel), for appellant.

Greenberg Traurig, LLP, New York (Daniel R. Milstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 10, 2013, which, to the extent appealed from, granted defendants-third party plaintiffs partial summary judgment on the first counterclaim and declared that they have a valid security interest in a one-half beneficial interest in the apartment, unanimously affirmed, with costs.

This litigation involves Adam C. Hochfelder's receipt of a

$1.1 million loan from defendants Arbor Commercial Mortgage, LLC, Arbor Realty SR, Inc. (Arbor). As collateral for the loan, Hochfelder purported to pledge to Arbor the interest in the shares and related proprietary lease in a certain cooperative apartment located at 1025 Fifth Avenue, in Manhattan. Hochfelder, however, only held a partial beneficial interest in the apartment and, unbeknownst to Arbor, forged those signatures on the loan documents purporting to convey the legal interest and the remaining beneficial interest in the apartment.

Hochfelder was subsequently indicted on numerous charges, to which he pleaded guilty, and was sentenced to serve time in prison and to pay restitution, including $1.3 million to be paid to Arbor in connection with the loan.

We reject appellant Amy Hochfelder's argument that, given the restitution order in Arbor's favor, it is precluded from pursuing its civil claims in this litigation. Penal Law § 60.27 (6) provides in pertinent part that "[a]ny payment made as restitution or reparation pursuant to this section shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment." This Court has recognized that Penal Law § 60.27 "secures a victim's independent, parallel right also to pursue a defendant

civilly should there be a deficiency in the restitution amount" (*People v Wein*, 294 AD2d 78, 85 [1st Dept 2002]; *see also City of New York v College Point Sports Assn., Inc.*, 61 AD3d 33, 46 [2d Dept 2009]).

Hence, contrary to appellant's contentions, Arbor's claims are not precluded by the doctrines of respondent judicata, collateral estoppel, "election of remedies" or judicial estoppel; nor should they be precluded because Arbor's testimony in the criminal proceeding was voluntary, since Arbor testified pursuant to a subpoena.

The loan was not usurious since the shares and related lease in the coop apartment are not "real property improved by a one or two family residence" (General Obligations Law § 5-501[6][a]; *see also Matter of State Tax Commn. v Shor*, 43 NY2d 151, 157-158 [1977] [for purposes of enforcing a loan secured by a cooperative apartment, the apartment is considered personal property, not real property]). Moreover, section 4.3 of the Banking Regulations (3 NYCRR 4.3) expressly excludes from "interest" reasonable fees, charges and costs for title insurance and legal services actually rendered, resulting in a total interest rate here less than the 25% maximum rate imposed by law (Penal Law § 190.40).

Appellant cannot rely on the defense of unclean hands because Arbor did not owe a duty to her to prevent Adam Hochfelder's forgery (*Banque Nationale de Paris v 1567 Broadway Ownership Assoc.*, 214 AD2d 359 [1st Dept 1995]; *Money Store/Empire State v Lenke*, 151 AD2d 256, 257 [1st Dept 1989]).

Finally, appellant's reading of the nominee agreement is not supported by the record. We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16050 The People of the State of New York, Ind. 3878/12
Respondent,

-against-

Jose Perez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Gregory Carro, J.), rendered on or about October 17, 2012,

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 5, 2015

CLERK

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

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16052 The People of the State of New York, Ind. 1030/05
Respondent,

-against-

Alvin Raysor,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Charles H. Solomon, J.), rendered on or about February 18, 2014,

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

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

ENTERED: NOVEMBER 5, 2015

CLERK

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

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16054N In re Lindsay Warren Baker, et al., Index 651664/15
Petitioners-Appellants,

-against-

Lori Bajorek, et al.,
Respondents-Respondents.

_____

Peter M. Levine, New York, for appellants.

The Glennon Law Firm P.C., Rochester (Peter J. Glennon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered July 1, 2015, which, to the extent appealed from as limited by the briefs, denied petitioners' petition to stay an arbitration proceeding, unanimously affirmed, with costs.

"[A]bsent a clear manifestation of contrary intent," a broad arbitration clause, like the one at issue here, survives and remains enforceable after the termination of the agreement (*Remco Maintenance, LLC v CC Mgt. & Consulting, Inc.*, 85 AD3d 477, 479 [1st Dept 2011]; *see also Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 598-599 [1997]). The option agreement between petitioners and the corporate defendant does not evince a contrary intent.

Whether respondents' underlying claims are arbitrable is an issue for the arbitrator to resolve (*see Remco*, 85 AD3d at 479-480; *see also Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]).

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16055-
16056 The People of the State of New York,
Respondent,

-against-

Ranfis Perez,
Defendant-Appellant.

Ind. 9755/99

_____

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about June 26, 2013, which denied defendant's CPL 440.10 motion to vacate a March 22, 2001 judgment of conviction, unanimously affirmed. Judgment of resentence (same court and Justice), rendered July 25, 2012, resentencing defendant to an aggregate term of 25 years to life, and imposing an aggregate term of 2½ years' postrelease supervision for certain convictions, unanimously affirmed.

The motion court correctly determined that the results of new DNA testing performed on three beer bottles recovered at the scene of the crime would not have raised a reasonable probability of a more favorable verdict (*see* CPL 440.10[1][g-1]; *People v*

Hicks, 114 AD3d 599 [1st Dept 2014}. The record supports the motion court's conclusion that the new DNA results neither excluded defendant as a perpetrator nor established the presence of unknown persons at the time and place of the crime. Thus, even without reference to the trial evidence, a new trial was not warranted. Moreover, the People presented powerful evidence at the trial, including a detailed eyewitness identification by the victim, circumstantial evidence linking defendant to the murder weapon, and compelling evidence of defendant's consciousness of guilt.

Defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). He was not deprived of effective assistance by his attorney's decision not to use the limited DNA results available at the time of the trial. Counsel expressly stated at trial that this was a strategic choice, and defendant has not shown that counsel's strategy fell below an objective standard of reasonableness, or that it deprived defendant of a fair trial or affected the outcome of the case.

There was no unreasonable delay in resentencing defendant to add a term of postrelease supervision (*see People v Williams*, 14 NY3d 198, 213 [2010]; *People v Florio*, 125 AD3d 451 [1st Dept 2015], *lv denied* 25 NY3d 1071 [2015]).

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16059- Ind. 2075/12
16060 The People of the State of New York,
Respondent,

-against-

Alvin Jennette,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Miriam Best, J.), rendered on or about June 13, 2014,

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

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

ENTERED: NOVEMBER 5, 2015

CLERK

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

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16061 The People of the State of New York, Ind. 530/13
Respondent,

-against-

Kiomar Santiago,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Paul Hershan of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Troy Webber, J.), rendered on or about November 22, 2013 ,

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 5, 2015

CLERK

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

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16062 Michael Ferrante, Index 102765/11
Plaintiff, 590817/11

-against-

Metropolitan Transportation Authority, et al.,
Defendants,

- - - - -

Metropolitan Transportation Authority, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Kelley Engineered Equipment, LLC.,
Third-Party Defendant-Appellant.

_____

Carroll, McNulty & Kull, LLC, New York (Frank J. Wenick of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas Hurzeler of counsel), for respondents.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 13, 2015, which, to the extent appealed from as limited by the briefs, granted the motion of defendants-third-party plaintiffs (MTA) seeking summary judgment on their contractual indemnity claim against Kelley Engineered Equipment (Kelley), and denied Kelley's motion to dismiss that claim, unanimously modified, on the law, to deny MTA's motion, and

otherwise affirmed, without costs.

Third party defendant Kelley designed specialized equipment to be used on the MTA's project creating a tunnel connecting Metro North Station with Pennsylvania Station, including designing the transporter involved in this matter. Plaintiff's employer, nonparty Dragados-Judlaw, had loaded the transporter with a roadheader, the machine used to mine the tunnel, and plaintiff was directed to remain atop the roadheader while it was moved to check for clearances. The roadheader began to tip over, causing plaintiff to be injured.

The contract between Dragados-Judlaw and Kelley provides that MTA is to be indemnified for claims "arising out of" Kelley's work unless the accident arises out of the sole negligence of Dragados-Judlaw or MTA. Here, the accident arose out of Kelley's work (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 175-178 [1990]). However, questions of fact exist as to whether Dragados-Judlaw's supervisors were aware that the roadheader would be unstable unless loaded with its boom arm configured to offset any off-side on the load, making them knowledgeable users (*see Public Adm'r of Bronx County v 485 E. 188th St. Realty Corp.*, 116 AD3d 1, 10 [1st Dept 2014]). Such a finding would defeat any claim of failure to warn against Kelley,

rendering the negligence of Dragados-Judlaw the sole cause of the accident, and the indemnity clause in the contract inapplicable. Thus, summary judgment is not warranted to either party.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16063 Julio Anthony Lopez, Index 302558/10
Plaintiff-Appellant,

-against-

Vincent Gramuglia, DPM,
Defendant-Respondent.

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Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Brown, Gruttadaro, Gaujean & Prato, LLC, White Plains (Katherine W. Dandy of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered July 23, 2014, which granted defendant Vincent Gramuglia DPM's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this medical malpractice action, plaintiff claims that defendant, a podiatrist, ignored certain of plaintiff's risk factors for deep vein thrombosis (DVT) during the treatment of plaintiff's ankle injury, and thus failed to diagnose DVT, which developed into a pulmonary embolism.

At the outset, defendant's expert affirmation was properly considered. Dr. Robbins, an orthopedist, was qualified to render an opinion as to the standard of care in podiatry, since a medical expert need not be a specialist in a particular field in

order to testify regarding accepted practices in that field (*see Fuller v Preis*, 35 NY2d 425, 431-433 [1974]; *and see Limmer v Rosenfeld*, 92 AD3d 609 [1st Dept 2012]). Although, Dr. Robbins' affirmation, which recited his credentials as including, inter alia, board certification as an orthopedic surgeon, and graduation from Columbia University College of Physicians and Surgeons, with the completion of a residency in New York City, did not specifically state that he was a "duly licensed physician," or that he was "duly licensed in the State of New York" (*see e.g.* CPLR 2106), plaintiff failed to raise this argument before the motion court and, as such, it is unpreserved for appellate review (*see Shinn v Catanzaro*, 1 AD3d 195, 197-198 [1st Dept 2003]; *see also Scudera v Mahbubur*, 299 AD2d 535 [2d Dept 2002]).

As to the merits, defendant met his initial burden through the affirmed report of his expert, who opined that defendant appropriately treated plaintiff, and observed that plaintiff had no signs or symptoms of DVT during his treatment with defendant, since he never complained of calf pain, but only of ankle pain and swelling, which were not indicative of a DVT, especially since plaintiff had sustained an ankle sprain. Moreover, there was no indicia that plaintiff was taking any medication which ran

the risk of clotting, nor was there evidence that plaintiff was obese (*see Perez v Edwards*, 107 AD3d 565, 566 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff's expert's opinion was based on the assumption that defendant deviated from care in failing to account for plaintiff's risk factors for developing DVT, including hormone use, obesity and smoking, which led to his pulmonary embolism. However, since the record contains no evidence of such risk factors, other than plaintiff's smoking habit, which plaintiff conceded was light, plaintiff's theory was without "expert or record support" (*Sassen v Lazar*, 105 AD3d 410, 411 [1st Dept 2013]).

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16064-
16065 The People of the State of New York, Respondent,

Ind. 3491/12
SCI 546/13

-against-

Victor Hernandez,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

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

_____

Appeals having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about May 8, 2013,

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

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

ENTERED: NOVEMBER 5, 2015

CLERK

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

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16066-
16067 Loreley Financing (Jersey) No. 3, Ltd., et al.,
Plaintiffs-Appellants,

-against-

Morgan Stanley & Co. Inc., et al.,
Defendants-Respondents,

Alpha Mezz CDO 2007-1, Ltd.,
Defendant.

Index 651633/14
653316/12

Meister Seelig & Fein LLP, New York (James M. Ringer of counsel), for appellants.

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 9, 2014, which granted defendants' motions in index no. 653316/12 (the 2012 action) to dismiss the amended complaint and denied plaintiffs' cross motion to vacate a judgment, entered August 22, 2013, dismissing the action, and to consolidate the 2012 action with index no. 651633/14 (the 2014 action), unanimously dismissed, without costs, as academic. Order, same court, Justice, and entry date, which granted the motion of defendants Morgan Stanley & Co. Inc., Morgan Stanley & Co. International Ltd., and Morgan Stanley Capital Services, Inc.

(the Morgan Stanley defendants) to dismiss the complaint in the 2014 action and denied plaintiffs' cross motion to consolidate the 2012 and 2014 actions, unanimously modified, on the law, to deny the Morgan Stanley defendants' motion, and otherwise affirmed, without costs.

In the 2014 action, the motion court did not have the benefit of *Malay v City of Syracuse* (25 NY3d 323 [2015]). By analogy to *Malay,* the 2012 action terminated for purposes of CPLR 205(a) when plaintiffs withdrew their appeals from the so-ordered transcript and the judgment in the 2012 action on April 24, 2014, not when the so-ordered transcript was entered on July 1, 2013. Since plaintiffs commenced the 2014 action on May 28, 2014 (*i.e.*, within six months of April 24, 2014), the 2014 action is timely.

Because we find that the 2014 action is timely, we dismiss the appeal from the order in the 2102 action as academic.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16068 The People of the State of New York, Ind. 3303/07
Respondent,

-against-

Pedro Pantaleon,
Defendant-Appellant.

_____

Goldstein & Weinsten, Bronx (David J. Goldstein of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered November 29, 2011, convicting defendant, after a nonjury trial, of criminal possession of a weapon in the fourth degree, and sentencing him to three years' probation, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence supports the conclusion that defendant was a possessor of a pistol found in his immediate vicinity, at his work station in his long-term place of employment (*see e.g. People v Mojica*, 81 AD3d 506 [1st Dept 2011] *lv denied* 17 NY3d 808 [2011]).

None of defendant's challenges to the prosecutor's summation warrant 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]), especially because this was a nonjury trial, where the trier of fact is presumably capable of disregarding improper arguments. Moreover, despite the purportedly unfair summation, the court acquitted defendant of the felony charges and only convicted him on one misdemeanor count.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16069 In re Ali S.,

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

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Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for presentment agency.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), for respondent.

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Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about December 12, 2013, which dismissed the petition and brings up for review an order (same court, Judge and date), which granted respondent's motion to suppress physical evidence, unanimously reversed, on the law, without costs, the motion to suppress denied, the petition reinstated and the matter remanded for further proceedings.

The presentment agency's appeal from the final written order of dismissal brings up for review the court's oral suppression ruling (*see* CPLR 5501[a][1]; *Matter of Shariff H.*, 112 AD3d 827 [2d Dept 2013]).

The court erred in granting respondent's suppression motion. Probable cause was established by an officer's observation in

plain view of what appeared to be khat, a plant likely to contain a controlled substance. The officer, who was of Middle Eastern background, had encountered khat on several occasions as a child, had received police training regarding khat, had been involved in arrests relating to khat, and had even instructed on the subject at the police academy. She specified her ability to identify khat by its dried green leaves and odor of "rotten vegetables" or "rotten grass." The record fails to support the court's conclusion that the officer's ability to recognize khat was insufficient to establish probable cause.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16070 The People of the State of New York, Ind. 99047/13
Respondent,

-against-

Inderjeet Lalji,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne Gantt of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered November 6, 2013, which adjudicated defendant a level two sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant committed a pattern of sexual acts against a child, and, after his conviction, he repeatedly violated his probation. The 50-year-old defendant's claim that his age minimizes his risk of reoffense is unpersuasive, and there were

no other mitigating factors that were not adequately taken into account by the guidelines.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16072 Heritage Partners, LLC, et al., Index 159713/13
Plaintiffs-Appellants,

-against-

Stroock & Stroock & Lavan LLP,
Defendant-Respondent.

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Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for appellants.

Stroock & Stroock & Lavan LLP, New York (Bruce H. Schneider of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 9, 2014, which granted defendant's motion to dismiss the complaint alleging legal malpractice, unanimously affirmed, with costs.

The court applied the correct standard and properly dismissed the complaint. Its unsupported factual allegations, speculation and conclusory statements failed to sufficiently show that but for defendant's alleged failure to advise plaintiffs to pursue Chapter 11 bankruptcy upon their default on a $47 million loan, plaintiffs would not have lost approximately $80 million in equity in the underlying condominium project in Tribeca (*Dweck Law Firm v Mann*, 283 AD2d 292, 293 [1st Dept 2001]; *see also David v Hack*, 97 AD3d 437, 438 [1st Dept 2012]; *O'Callaghan v*

Brunelle, 84 AD3d 581 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]).

Plaintiffs, who defaulted on the loan in May 2009, alleged damages of approximately $80 million in lost equity based on sales figures of units that sold after the lender assumed ownership of the underlying property in 2010. While plaintiffs argue that the amount was also based on an expert appraisal, no basis for the amount is apparent, other than later sales in 2010 and 2011, after the lender took over, and after the market had improved. Plaintiffs' calculation also ignores that the Attorney General would not, as of December 2009, allow the sponsor, plaintiff 415 Greenwich LLC, to sell any units because it had failed to submit a plan that sufficiently stated how it would pay its arrears and other financial obligations in connection with the condominium units. Thus, plaintiffs' speculative and conclusory allegations do not suffice to show actual ascertainable damages (*Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002], *lv denied* 98 NY2d 606 [2002]).

Moreover, plaintiffs failed to allege sufficient facts to show that but for defendant's failure to advise them to pursue a Chapter 11 reorganization, they would have retained the building

and thus preserved their owner equity (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Dweck Law Firm* at 293). Among other things, plaintiffs speculate that the individual plaintiffs would agree to trigger the "bad boy" guarantees in the loan agreement, which would hold them personally liable for the debt if the borrowing company pursued the bankruptcy option. Plaintiffs further speculate that a bankruptcy court might agree to enjoin or stay any such proceeding to enforce those carveout guarantees. Plaintiffs also fail to allege facts sufficient to establish that they had funds to even initiate bankruptcy proceedings, and speculate that they would have obtained debtor-in-possession financing in a troubled economic climate. Plaintiffs argue that they would overcome these and other hurdles to obtaining Chapter 11 reorganization because their alleged $80 million "equity cushion" exceeded its roughly $63 million in total debt, but as noted above, this does not suffice. In light of the numerous obstacles to pursuing, let alone successfully achieving, Chapter 11 reorganization, plaintiffs' allegations were "couched in terms of gross speculations on future events and point[ed] to the speculative

nature of plaintiffs' claim" (*Sherwood Group v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292, 294 [1st Dept 1993]; *see also Perkins v Norwick*, 257 AD2d 48, 50-51 [1st Dept 1999]).

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16073 Mortgage Electronic Registration Systems, Inc., Plaintiff-Respondent, Index 15295/00

-against-

Orinthia Gifford, Defendant-Appellant,

The New York State Commissioner of Taxation, et al., Defendants.

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Stephen C. Silverberg, PLLC, Uniondale (Stephen C. Silverberg of counsel), for appellant.

Knuckles, Komosinski & Elliott, LLP, Elmsford (Robert T. Yusko of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered April 24, 2013, which denied defendant Gifford's motion to vacate, inter alia, a judgment of foreclosure, and, thereupon, to permit her to answer or to dismiss the complaint, unanimously affirmed, without costs.

The instant foreclosure proceeding was commenced by plaintiff, Mortgage Electronic Registration Systems, Inc. (MERS), in 2000, and judgment of foreclosure was eventually entered in April 2006 after Gifford defaulted. Gifford brought two motions to vacate the judgment, which were denied. MERS acquired title

to the premises by sheriff's sale on December 12, 2007, and assigned its bid to Aurora Loan Services Inc. (Aurora) in February 2009. Aurora then commenced a holdover proceeding in Civil Court, which the parties settled in May 2010, with Gifford consenting to a judgment of possession and a warrant in favor of Aurora.

In February 2012, Gifford brought a motion by order to show cause seeking dismissal of the foreclosure action on the ground, inter alia, that MERS lacked standing to maintain the action. By order entered May 21, 2012, the court denied the motion, holding that Gifford had waived the defense of lack of standing by failing to raise it in an answer or pre-answer motion to dismiss (CPLR 3211[e], [a][3]), and that she had failed to establish a basis for vacating the judgment.

Gifford did not appeal that order, but moved in October 2012 to vacate the judgment on the ground that MERS lacked standing to sue since it did not own the note and mortgage, based on an affidavit submitted during the mortgage proceeding that asserted that Aurora owned the note and mortgage (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]). Gifford argued that, since MERS lacked standing to sue, the Supreme Court lacked subject matter jurisdiction.

The Supreme Court properly denied the motion on the ground that essentially the same issue of lack of standing had been resolved in the May 2012 order, which Gifford did not appeal. The May 2012 order therefore became "a valid and conclusive adjudication of the parties' substantive rights" (*Da Silva v Musso*, 76 NY2d 436, 440 [1990]), absent a ground for vacatur pursuant to CPLR 5015 (*see Matter of Huie [Furman]*, 20 NY2d 568, 572 [1967]; *see Citizens Bank of Appleton City, Mo. v C.L.R. Brooklyn Realty Corp.*, 5 AD3d 528 [2d Dept 2004]).

Defendant's additional contention that MERS' lack of standing deprived the court of subject matter jurisdiction did not warrant a different result. The defenses of standing and capacity to sue are both subject to the same waiver rule under CPLR 3211(e) (*Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007]). "Whether the action is being pursued by the proper party is an issue separate from the subject matter of the action or proceeding, and does not affect the court's power to entertain the case before it" (*id.* at 243; *see Security Pac. Natl. Bank v Evans*, 31 AD3d 278 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007]). The Supreme Court is a court of general jurisdiction, and indisputably has the power to entertain mortgage foreclosure actions, including "issues regarding the

defense of lack of capacity or standing and waiver, had those issues been timely raised" (*id.* at 280; *Wells Fargo Bank*, 42 AD3d at 244). Thus, the foreclosure judgment is not subject to vacatur for lack of subject matter jurisdiction pursuant to CPLR 5015(a)(4).

Gifford also did not demonstrate entitlement to vacatur pursuant to CPLR 5015(a)(1), since she did not demonstrate a reasonable excuse for her default or move within one year. Nor did she demonstrate grounds for vacatur based on fraud or misrepresentation, since the alleged wrongdoing was not "extrinsic fraud," or "a fraud on the defaulting party that induces them not to defend the case" (*Matter of Renaissance Economic Dev. Corp. v Jin Hua Lin*, 126 AD3d 465, 465 [1st Dept 2015]; CPLR 5015[a][3]). The circumstances do not warrant vacatur in the interests of justice (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16074 The People of the State of New York, Ind. 5729/12
Respondent,

-against-

Alejandro Rosa,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Michael Sonberg, J.), rendered on or about January 7, 2014,

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

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

ENTERED: NOVEMBER 5, 2015

CLERK

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

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16075 In re Frank Mestecky, Index No. 100106/14
Petitioner,

-against-

City of New York, et al.,
Respondents.

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Guercio & Guercio LLP, Farmingdale (Christopher F. Mestecky of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Michael Pastor of counsel), for respondents.

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Determinations of respondent Environmental Control Board (ECB), dated September 26, 2013, January 30, 2014, March 4, 2014, and March 4, 2014, which, collectively, sustained seven notices of violation (NOVs) against petitioner, and denied petitioner's applications to vacate default judgments regarding two other NOVs, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court [Cynthia S. Kern, J.], entered June 16, 2014), dismissed, without costs.

Respondents' determinations are supported by substantial evidence, are not affected by an error of law, and are not arbitrary and capricious (*see* CPLR 7803[3], [4]). As to each of the nine NOVs at issue here, an inspector from respondent

Department of Buildings (DOB) made one attempt at personally serving the NOV at the premises where the violation occurred, before availing himself of the "affix and mail" method of service prescribed in New York City Charter § 1049-a(d)(2)(b). We find that the inspector's one attempt at personal service satisfies the "reasonable attempt" requirement set forth in section 1049-a(d)(2)(b).

The reference to CPLR article 3 in the City Charter's affix and mail provision merely prescribes the class of individuals whom respondents must try to personally serve, and does not import the "due diligence" requirement of CPLR article 3 (*see Matter of Gallow v City of New York*, 36 Misc 3d 1204[A], 2012 NY Slip Op 51188[U], *8 [Sup Ct, Queens County 2012]). This interpretation of the City Charter is supported by the statutory language as a whole, and by the legislative history showing a legislative intent to make service under section 1049-a(d)(2) of the City Charter less onerous than service under CPLR article 3 (*see id.; see also* Governor's Mem approving L 1979, ch 623, 1979 McKinney's Session Laws of NY at 1816-1817).

Petitioner's reliance on this Court's decision in *Matter of Wilner v Beddoe* (102 AD3d 582 [1st Dept 2013]) is misplaced because, in that case, the respondents made no attempt to

personally serve three of the four petitioners (*id.* at 584). We also reject petitioner's reliance on case law interpreting the "reasonable application" standard set forth in RPAPL 735 (*see e.g. Eight Assoc. v Hynes*, 102 AD2d 746 [1st Dept 1984], *affd* 65 NY2d 739 [1985]). That provision serves a very different purpose, in a different context, from the City Charter provision at issue in this case.

We agree with respondents that petitioner's article 78 challenges to ECB's decisions denying his motions to vacate default judgments as to two of the NOVs at issue are time-barred under the applicable four-month statute of limitations (*see* CPLR 217[1]; *see also Matter of Rocco v Kelly*, 20 AD3d 364, 365-366 [1st Dept 2005]).

We have considered petitioner's remaining arguments regarding alleged procedural defects and find them unavailing.

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16076 The People of the State of New York, Ind. 2035/02
Respondent,

-against-

George Hyde,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), for appellant.

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Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered on or about February 5, 2010, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant'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 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16077 Jorge DaSilva, Index 305435/10
Plaintiff-Appellant,

-against-

KS Realty, L.P., et al.,
Defendants-Respondents,

3223 Johnson Avenue Services, Inc.,
Defendant.

_____

Ogen & Sedaghati, P.C., New York (Eitan Alexander Ogen of counsel), for appellant.

Ryan & Conlon, LLP, New York (Kaitlin Rogan of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered May 20, 2014, which granted the motion of defendants KS Realty, L.P., and Steven Klein for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff alleges that he fell in his apartment because of the sloping condition of the hallway floor, which caused his desk chair to roll. Defendants made a prima facie showing that the slope of the apartment floor was a trivial defect, not a trap or dangerous condition (*see Leon v Alcor Assoc., L.P.*, 96 AD3d 635, 635 [1st Dept 2012]; *Marcus v Namdor, Inc.*, 46 AD3d 373, 374 [1st

Dept 2007]). Defendants submitted photographs showing the floor to be in good condition, and an expert affidavit of an engineer who opined that the 4% slope in the area where plaintiff allegedly fell was not a dangerous condition and was not a proximate cause of the accident (*see Leon*, 96 AD3d at 635). Defendants' failure to provide the certificate required by CPLR 2309© with the expert's report was a "mere irregularity," which the court properly excused, especially since defendants provided a corrected copy (*Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]).

In opposition, plaintiff failed to raise an issue of fact. While his expert engineer opined that the overall condition of the floor, which sloped as much as 5% in some areas, was dangerous, the engineer did not address how the slope was a proximate cause of plaintiff's fall from his chair (*see Stylianou v Ansonia Condominium*, 49 AD3d 399, 399 [1st Dept 2008]). Although plaintiff need not identify precisely what caused him to fall, "mere speculation about causation is inadequate to sustain

[a] cause of action" (*Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 631-632 [1st Dept 2009]).

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

ENTERED: NOVEMBER 5, 2015

CLERK

Tom, J.P., Friedman, Andrias, Gische, Kapnick, JJ.

16078N Rosemarie A. Herman, etc., et al., Index 650205/11
Plaintiffs-Appellants,

-against-

Julian Maurice Herman, et al.,
Defendants-Respondents,

Mayfair York LLC, et al.,
Defendants.

_____

Law Offices of Craig Avedisian, P.C., New York (Craig Avedisian of counsel) and Jaspan Schlesinger, LLP, Garden City (Steven R. Schlesinger of counsel), for appellants.

Akerman LLP, New York (M. Darren Traub of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 23, 2014, which denied plaintiffs' motion to extend a notice of pendency, unanimously reversed, on the law, with costs, and the motion granted.

In their complaint, plaintiffs seek, among other things, the conveyance of title to real property located at 952 Fifth Avenue in Manhattan to either plaintiff Herman or a trust of which she is the sole beneficiary. According to the complaint, defendants, through a series of fraudulent transactions, deprived the trust of its title to the property.

Because "the judgment demanded would affect the title to

. . . real property," the filing of a notice of pendency was proper and the notice should be extended (CPLR 6501).

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

ENTERED: NOVEMBER 5, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Richter, Manzanet-Daniels, JJ.

15118- Ind. 514/08
15119 The People of the State of New York,
Respondent,

-against-

Mark Nonni,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Lawrence Parker,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Nicolas Schumann-Ortega of counsel), for Mark Nonni, appellant.

Steven Banks, The Legal Aid Society, New York (Lorraine Maddalo of counsel), for Lawrence Parker, appellant.

Mark Nonni, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (John S. Moore, J. at suppression hearing; David Stadtmauer, J. at jury trial and sentencing), rendered November 4, 2010 as to defendant Parker and November 23, 2010 as to defendant Nonni, affirmed.

Opinion by Friedman, J.P. All concur except Richter and Manzanet-Daniels, JJ. who dissent in an Opinion by Manzanet-Daniels, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Richard T. Andrias
David B. Saxe
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

15118-15119
Ind. 514/08

_____x

The People of the State of New York,
Respondent,

-against-

Mark Nonni,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Lawrence Parker,
Defendant-Appellant.

_____x

Defendants appeal from the judgments of the Supreme Court, Bronx County (John S. Moore, J. at suppression hearing; David Stadtmauer, J. at jury trial and sentencing), rendered November 4, 2010 as to defendant Parker, and November 23, 2010 as to defendant Nonni, convicting each defendant of robbery in the second degree, and imposing sentence.

Robert S. Dean, Center for Appellate Litigation, New York (Nicolas Schumann-Ortega of counsel), for Mark Nonni, appellant.

Steven Banks, The Legal Aid Society, New York (Lorraine Maddalo of counsel), for Lawrence Parker, appellant.

Mark Nonni, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen and Nancy D. Killian of counsel), for respondent.

FRIEDMAN, J.P.

Police saw defendants leaving the property of a private country club at which a burglary had been reported just five minutes before. When the police approached defendants to make inquiries, defendants fled, leading to their apprehension and arrest. The country club's live-in caretaker subsequently identified defendants as the men who, after obtaining entry to the clubhouse on a business pretext, pulled out knives, threatened to kill the caretaker, pressed a knife against his kidney area, took $3,000 in cash, and left the caretaker bound up with duct tape.

Having been convicted by a jury after trial, defendants appeal, not challenging their convictions on legal sufficiency or weight-of-the-evidence grounds, but contending that certain evidence used against them at trial was improperly obtained through the police actions that led to their arrest. This argument, like the remainder of defendants' appellate contentions, is without merit. The court properly denied defendants' suppression motions. We conclude that each of the successive police actions at issue was justified by the requisite level of suspicion.

Five minutes after receiving a radio run reporting a burglary in progress, the police responded to the location. This

was a private, gated country club, and the police were aware that it was the specific location mentioned in the radio message; to the extent defendants are contending otherwise, those arguments are unsupported by the record. The police saw defendants on the club's private driveway, walking toward the street, while carrying bags, and no one else was present. At this point, the police had at least a founded suspicion that defendants were involved with the burglary, warranting a level-two common-law inquiry (*People v De Bour*, 40 NY2d 210, 223 [1976]). In contrast to a level-one inquiry, which merely seeks information based on objective, credible reasons not necessarily indicative of criminality (*id.*), a level-two inquiry entails "more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation" (*People v Hollman*, 79 NY2d 181, 185 [1992]). Here, the police, when they first saw the two defendants alone on gated private property in a secluded residential area, at the precise location at which a burglary had been reported minutes before, had a founded suspicion of criminality that permitted them to make a level-two inquiry. Again, defendants were not walking on a public thoroughfare in the vicinity of the reported burglary. Instead, when first observed by the police, they were walking down the private

driveway leading to the street from the premises reported just minutes before to have been burglarized, with no one else in sight.

In arguing that only a level-one request for information was warranted when the police first saw defendants, the partial dissent mischaracterizes the record in asserting that defendants, when first sighted, "were observed to be *in the vicinity* of a country club" (emphasis added). In fact, the officers testified that defendants were first observed on the private property of the country club, walking down the driveway leading from the club's building to the street. For example, one of the police witnesses testified as follows:

> "THE COURT: . . . [W]as [defendant Nonni] on the property in question or was he on a public property?
>
> "THE WITNESS: He was on private property."

Shortly thereafter, the same witness testified as follows:

> "Q. The judge asked you, did you see Mr. Nonni on private property?
>
> "A. Yes.
>
> "Q. Did you see him on private property?
>
> "A. He was on private property, yes."

A few lines later, the witness testified that defendant Nonni "was on a private driveway" when the police first saw him. Thus, the record is clear that defendants, when first observed by the

police, were not somewhere in the club's general "vicinity," as implied by the dissent, but on the private grounds of the country club itself.[1]

While the dissent objects to our describing the area in which defendants were apprehended as "secluded," our use of that word is not original. One of the police witnesses, upon cross examination at the hearing, described the area as "secluded":

> "Q. And this is, it's fair to say, like a residential, like suburban, Country Club; am I correct?
>
> "A. Yes.
>
> "Q. As contrast, as opposed to the busyness of East Tremont or Westchester Avenue, correct?
>
> "A. Right. It's a pretty secluded area of residential houses."[2]

In sum, defendants were first seen on private property where a burglary had just been reported, in a suburban area, with nobody else visible anywhere in the vicinity. This gave rise to

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[1]Although the dissent asserts that the events in question took place "during normal business hours," the date of the arrest — January 21, 2008 — was, in fact, Martin Luther King Day. Also, the dissent's reference to the country club as a "commercial establishment," while perhaps technically correct, is misleading.

[2]Consistent with this testimony, the aerial photograph of the area received into evidence at the suppression hearing shows that the area is suburban in nature, with wide spaces between buildings. The suburban character of the area is also evident from the ground-level photographs of the scene submitted by defendant Nonni in a pro se post-hearing submission.

a founded suspicion of criminality, justifying a level-two common-law inquiry under the *De Bour* analysis.

The police did not exceed the bounds of a common-law inquiry when they requested defendants to stop so that the police could "ask them a question," because such a direction does not constitute a seizure (*see e.g. People v Bora*, 83 NY2d 531, 532-535 [1994]; *People v Francois*, 61 AD3d 524, 525 [1st Dept 2009], *affd* 14 732 [2010]). Instead of stopping, defendant Nonni immediately ran, and defendant Parker immediately made what officers described as a "hurried" and "evasive" departure.[3] Under all the circumstances, the record supports the conclusion that both defendants "actively fled from the police," rather than exercising their "right to be let alone" (*People v Moore*, 6 NY3d 496, 500-501 [2006]). Defendants' flight elevated the existing level of suspicion to reasonable suspicion, justifying pursuit and an investigative detention (*see People v Pines*, 99 NY2d 525, 526 [2002]; *People v Martinez*, 80 NY2d 444, 448 [1992]). Here, "[f]light, combined with other specific circumstances indicating

[3]We disagree with the apparent view of the partial dissent that, even if the pursuit of defendant Nonni was justifiable, the pursuit of defendant Parker was not. Although Parker did not break into a full-blown run, his evasive, "brisk" walking away from the officers, coupled with the headlong flight of Nonni, with whom he had been walking, gave rise to reasonable suspicion of Parker, and justified the police in pursuing and forcibly stopping him.

that the suspect[s] . . . [might have been] engaged in criminal activity, . . . provide[d] the predicate necessary to justify pursuit" (*People v Holmes*, 81 NY2d 1056, 1058 [1993]).

Contrary to the partial dissent's assertion, the circumstances that prompted the initial police approach, from which defendants took flight (escalating the situation to one of reasonable suspicion warranting a level-three forcible stop and detention), went well beyond "equivocal circumstances that might justify a [level-one] police request for information" (*Holmes*, 81 NY2d at 1058). The cases on which the dissent relies, in which flight from police was held insufficient to give rise to reasonable suspicion, are inapposite because the circumstances prompting the initial police approach in those cases — unlike the circumstances that prompted the police approach here (i.e., defendants' presence by themselves on gated private property at which a burglary had just been reported) — did not give rise to a founded suspicion of criminality. In *Holmes*, the police had "merely observed [the defendant] . . . talking with a group of men on a New York City street" (*id.*). In *People v Reyes* (69 AD3d 523 [1st Dept 2010], *appeal dismissed* 15 NY3d 863 [2010]), when the police arrived at a public location in response to a report of "'a dispute with a knife,'" two unidentified men "pointed at [the] defendant, who was walking away from them down the middle

of the street, and said, 'That's him, that's him'" (*id.* at 524). As the *Reyes* decision notes, the two unidentified men did not make a specific accusation against the defendant, who "was not engaged in any suspicious activity" (*id.* at 526) when the officers first saw him. Finally, in *Matter of Manuel D.* (19 AD3d 128 [1st Dept 2005], *lv denied* 5 NY3d 714 [2005]), the suspect "had no burglary tools and was merely standing on the street when the police approached" (*id.* at 130).

These circumstances justifying the officers' initial approach and subsequent pursuit of defendants, along with the facts that Nonni had a knife protruding from his bag, which cut the finger of an officer who assisted in subduing him, and that Parker had a sledgehammer visible in his unzipped bag, justified an immediate protective search of each defendant's bag and person (*see People v Batista*, 88 NY2d 650, 654 [1996]). The circumstances, including defendants' resistance to being detained, justified the use of handcuffs to secure them while the police completed their investigation into the reported burglary, and this did not transform the forcible stop into an arrest requiring probable cause (*see People v Foster*, 85 NY2d 1012 [1995]; *People v Allen*, 73 NY2d 378 [1989]). We have considered and rejected defendants' remaining suppression arguments.

Nonni's ineffective assistance of counsel claims are

unreviewable on direct appeal because they involve matters of strategy not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Although trial counsel made remarks on the record that gave some explanation of his reasoning, the unexpanded record falls far short of permitting review. Accordingly, since Nonni has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that Nonni received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Nonni has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness (*see People v Hendricks*, 243 AD2d 396 [1st Dept 1997], *lv denied* 91 NY2d 941 [1998]), or that, viewed individually or collectively, they deprived Nonni of a fair trial or affected the outcome of the case.

Parker's challenge to the court's *Sandoval* ruling is unavailing. The ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). Parker's prior robbery convictions were probative of his credibility, and their age did not reduce their probative value, given that Parker

had been incarcerated for most of the intervening time period (*see People v Zillinger*, 179 AD2d 382 [1st Dept 1992], *lv denied* 79 NY2d 955 [1992]).

We have considered and rejected Nonni's excessive sentence claim, and his pro se arguments.

Accordingly, the judgments of the Supreme Court, Bronx County (John S. Moore, J. at suppression hearing; David Stadtmauer, J. at jury trial and sentencing), rendered November 4, 2010 as to defendant Parker and November 23, 2010 as to defendant Nonni, convicting each defendant of robbery in the second degree, and sentencing each defendant, as a persistent violent felony offender, to a term of 20 years to life, should be affirmed.

All concur except Richter and Manzanet-Daniels, JJ. who dissent in an Opinion by Manzanet-Daniels, J.

MANZANET-DANIELS, J. (dissenting)

The officers in this case responded to a radio run of a burglary in progress at 3341 Country Club Road, a commercial establishment. Before stopping defendants, the only information the officers possessed was that a burglary had occurred in the vicinity. The radio run provided no information concerning the number or description of the perpetrators (*compare People v Michimani*, 115 AD3d 528 [1st Dept 2014], *lv denied* 23 NY3d 1036, 23 NY3d 1040 [2014]; *People v Cintron*, 304 AD2d 454 [1st Dept 2003], *lv denied* 100 NY2d 579 [2003]). It provided no details regarding the identity or reliability of the 911 caller. When the officers observed defendants, on a weekday morning at 9:30 a.m., there was no indication that they were engaged in illegal or suspicious activity. Given the extremely limited information possessed by the officers, they were justified, at most, in conducting a level one request for information. They did not have the requisite level of suspicion to order defendants to stop, or to pursue Nonni after he fled. I would accordingly grant defendants' respective suppression motions and order a new trial.

To evaluate whether police conduct was proper, we must consider whether the action was justified at its inception and whether the intrusion was reasonably related in scope to the

circumstances that rendered its initiation permissible (*see People v DeBour*, 40 NY2d 210, 223 [1976]). The most minimal intrusion, level one, is a request for information "when there is some objective credible reason for that interference not necessarily indicative of criminality" (*id.*). Level two, a common-law inquiry, is "activated by a founded suspicion that criminal activity is afoot" (*id.*).

The majority's contention that the officers had a founded suspicion of criminality that permitted them to make a level-two inquiry is untenable. The officers had no description of the alleged suspects and no information concerning the 911 caller. Defendants were observed to be in the vicinity of a country club, a commercial establishment in a residential area in the Bronx – hardly the "secluded" area described by the majority – during the daytime. Specifically, they were observed leaving the driveway of the club and walking down the street at an unhurried pace. The entry and exit of individuals from a commercial establishment during normal business hours cannot be deemed out of the ordinary, as the majority would appear to suggest. Given the limited information conveyed by the radio run, the officers had, at best, sufficient cause to conduct a level-one request for information (*see e.g. Matter of Manuel D.*, 19 AD3d 128, 129 [1st Dept 2005] [where the police had no description of the

perpetrators and no information regarding the initial call to police, and the only information the officers possessed was the fact that a burglary was in progress at a certain location, the officers had no more than "an objective credible reason to request information"], *lv denied* 5 NY3d 714 [2005]).

Nonni's flight, under the circumstances, did not escalate the level of suspicion so as to justify the ensuing police pursuit. "Flight alone . . ., or even in conjunction with equivocal circumstances that might justify a police request for information, is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry" (*People v Holmes*, 81 NY2d 1056, 1058 [1993] [internal citations omitted]; *People v Reyes*, 69 AD3d 523, 524 [1st Dept 2010] [where the officers arrived knowing only that a 911 call had been received about a "dispute with a knife," and lacked a description of the subject, and upon arriving at the scene were informed by bystanders "That's him," pointing to defendant, the pursuit of the suspects was not justified], *appeal dismissed* 15 NY3d 863 [2010]).

The officers were unjustified in pursuing Parker, who did not even flee but merely walked at a "hurried pace" across Country Club Road (*see People v Moore*, 6 NY3d 496, 500 [2006] [merely walking away from approaching police does not raise the

level of suspicion]). The majority's conclusion that the police were justified in pursuing defendants is based on the faulty premise that the circumstances gave rise to a founded suspicion of criminality.

In my view, the fruits of the unlawful pursuits should be suppressed. Since the officer did not have authority to chase Parker, the fact that the officer claimed to have later seen a sledgehammer in Parker's unzipped backpack does not furnish probable cause. The officer testified that he did not see the sledgehammer until *after* he caught up to Parker. He did not observe the sledgehammer or any other weapon prior to pursuing and detaining Parker. The observation of the sledgehammer after the pursuit cannot validate an encounter that was not justified at its inception (*see People v De Bour*, 40 NY2d at 215]).

Without the illegally obtained evidence, there is no proof beyond a reasonable doubt that defendants committed the crimes

charged. I would grant defendants' respective motions to suppress, reverse their respective convictions, and order a new trial to be preceded by an independent source hearing.

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

ENTERED: NOVEMBER 5, 2015

CLERK