Corrected Order - March 11, 2015

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 1, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15497 The People of the State of New York, Respondent, Ind. 5646/2013

-against-

Jeffrey Bryant,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered **June 17, 2014**, convicting defendant, upon his plea of guilty, of four counts of grand larceny in the fourth degree, and sentencing him to four consecutive terms of one to three years, modified, as a matter of discretion in the interest of justice, to the extent of directing that the sentence for the conviction under count three of the indictment be served concurrently with the other sentences, and otherwise affirmed.

We first find that defendant's waiver of his right to appeal was invalid. A waiver of the right to appeal is not effective

unless it is apparent from the record that it was made knowingly, intelligently and voluntarily (*People v Lopez*, 6 NY3d 248, 256, [2006]). For a waiver to be effective, the record must demonstrate that the defendant has a full appreciation of the consequences of the waiver (*People v Bradshaw*, 18 NY3d 257 [2011]), including an understanding "that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256). Similarly, a waiver is not effective if the "trial court characterizes an appeal as one of many rights automatically extinguished upon entry of a guilty plea" (*id*.).

Here, the court never adequately explained the nature of the waiver, the rights the defendant would be waiving, or that the right to appeal was separate and distinct from the rights automatically forfeited upon a plea of guilty. Rather, the court merely stated that "as a part of this" – that is, as part of the guilty plea – defendant was waiving his right to appeal and thus, that the convictions would be final because no appellate court would review them. Despite our dissenting colleague's suggestion otherwise, the problem with the waiver's validity is not that there was "some ambiguity in the court's colloquy." Rather, by using the phrase "as a part of this," the trial court expressly undercut the principle that a defendant must understand his

waiver of appeal to be distinct from the rights forfeited upon a guilty plea (*see People v McCree*, 113 AD3d 557, 557-558 [1st Dept 2014]; *People v Williams*, 59 AD3d 339, 341 [1st Dept 2009], *lv denied* 12 NY3d 861 [2009]).

Further, the dissent places undue emphasis on the existence of the written waiver. As we have held, the written waiver that defendant signed was no substitute for an on-the-record explanation of the nature of the right to appeal (*see People v Oquendo*, 105 AD3d 447 [1st Dept 2013], *lv denied* 21 NY3d 1007 [2013]). This conclusion holds especially true here, where the record does not make clear when defendant signed the waiver. Although the waiver itself states that defendant signed the waiver only "after being advised by the Court," it is not evident from the record whether defendant signed the waiver before the colloquy regarding his right to appeal, or whether he signed it after. Accordingly, the waiver was invalid and unenforceable (*Lopez*, 6 NY3d at 256; *People v Santiago*, 119 AD3d 484, [1st Dept 2014]).

After giving due consideration to the defendant's particular circumstances, we exercise our discretion to modify the sentence

to the extent indicated (*see People v Farrar*, 52 NY2d 302, 305 [1981]; Penal Law § 1.05[6]).

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

TOM, J.P. (dissenting).

The record contradicts the majority's conclusion that defendant was not properly apprised of the implications of waiving his right to appeal. Thus, defendant's valid waiver of the right to appeal forecloses appellate review of his excessive sentence claim (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]).

The record discloses that upon accepting defendant's guilty plea, the court, in a lengthy plea allocution, engaged in the following colloquy:

> "THE COURT: All right. Sir, you understand that also as a part of this you are waiving your right to appeal. You understand that this conviction, or these convictions will be final, that a court will not review what we have done here, other than some residual rights that remain?
>
> "Do you understand that?
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: Have you gone over that with your attorney?
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: There is a document entitled waiver of appeal. I see that you executed that document. Do you have any questions about it?
>
> "THE DEFENDANT: No."

This language tracks the same colloquy that provided for a valid waiver in *People v Nicholson*, one of the cases consolidated

under *People v Lopez*, (6 NY3d 248, 254-255 [2006]), and, with the written waiver in this case, even exceeds *Nicholson*. In the written waiver, signed both by defendant and his attorney, defendant expressly acknowledges as follows: "I understand that the right to appeal is separate and distinct from other rights automatically forfeited upon a plea of guilty." Further, "I also understand that by waiving my right to appeal, I am giving up the right to raise on appeal a number of claims that I could otherwise raise even after a guilty plea. In particular, I understand that I am waiving my right to ask the Appellate Division to review the terms of the plea and reduce my sentence, and my right to appeal the denial of any suppression motion I made." Finally, "I execute and sign this waiver knowingly, intelligently and voluntarily" and "have had a full opportunity to discuss these matters with my attorney and any questions I may have had have been answered to my satisfaction." After defendant acknowledged that he had gone over the terms of the document with his attorney, the court asked if he had any questions regarding the waiver, to which defendant responded, "No." I conclude that this colloquy is clearly adequate under *Nicholson* for the enforcement of the waiver of appeal by defendant.

A defendant who has validly waived his right of appeal may not invoke this Court's interest-of-justice jurisdiction to

reduce a bargained-for sentence (*People v Lopez*, 6 NY3d 248, 255-256 [2006]), particularly where the waiver is documented by a writing. "By pleading guilty and waiving the right to appeal, a defendant has forgone review of the terms of the plea, including harshness or excessiveness of the sentence" (*id.* at 256). Waiver will be enforced "so long as the record demonstrates that it was made knowingly, intelligently and voluntarily" (*id.*, citing *People v Calvi*, 89 NY2d 868, 871 [1996]). It is essential that a defendant understand that the right to appeal is distinct from "the panoply of trial rights automatically forfeited upon pleading guilty" (6 NY3d at 257). While this explanation may be given verbally by the court, it is "even better to secure a written waiver including such explanation (as in *Lopez*)" (*id.*).

Here, defendant acknowledged before the Court that he fully understood the terms of the written waiver after consulting with his attorney. Contrary to the majority's position, even if there is some ambiguity in the court's colloquy, the waiver is still valid if defendant also executed a detailed written waiver (*People v Ramos*, 7 NY3d 737 [2006]), since "the written waiver ensured defendant understood that in addition to the rights he was giving up by pleading guilty, he was separately giving up his right to appeal as a bargained-for-condition of the plea" (*People v Carvajal*, 68 AD3d 443, 443 [1st Dept 2009], *lv denied* 14 NY3d

799 [2010]).

It is clear from the Court of Appeals' decision in *Lopez* that a written waiver incorporating the explanation that the right to appeal is a distinct right fulfills the requirement to demonstrate that waiver of such right was knowing, intelligent and voluntary. Thus, the defendant cannot "invoke the court's review power" to disturb the terms of the negotiated plea agreement (*People v Jenkins*, __ AD3d __ [1st Dept 2016] [appeal no. 16716]; *Lopez*, 6 NY3d at 256 [fairness and finality are promoted only if parties to a plea agreement are confident that "an agreed-upon sentence will not be disturbed as a discretionary matter"], citing *People v Seaberg*, 74 NY2d 1, 10 [1989] ["the public interest concerns underlying plea bargains generally are served by enforcing waivers of the right to appeal"]). Nor can we "sua sponte" reduce the sentence (*People v Jenkins, supra; see also People v Romano*, 45 AD3d 910, 913-914 [3d Dept 2007], *lv denied* 10 NY3d 770 [2008]).

In short, "[h]aving received the benefit of his bargain, defendant should be bound by its terms" (*People v Lopez*, 190 AD2d

545 [1st Dept 1993]). This record provides no compelling evidence of special circumstances to the contrary.

Accordingly, the judgment should be affirmed in all respects.

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

ENTERED: MARCH 1, 2016

CLERK

Tom, J.P., Renwick, Andrias, Moskowitz, Manzanet-Daniels, JJ.

15977 Women's Integrated Network, Inc., Index 654507/13
Plaintiff-Appellant,

-against-

Anderson Kill P.C., et al.,
Defendants-Respondents.

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Jeffrey A. Jannuzzo, New York, for appellant.

Hinshaw & Culbertson LLP, New York (Philip Touitou of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 24, 2014, which granted defendants' motion to dismiss the complaint, and denied plaintiff's cross motion, unanimously affirmed, without costs.

Plaintiff is a small provider of medical services to women seeking treatment for infertility. In 2008, an employee commenced a stock option action against plaintiff. At the time, plaintiff maintained comprehensive employment practices liability insurance with its primary carrier, U.S. Specialty Insurance Co. The insurance carrier refused to defend plaintiff in the underlying stock option action, upon which plaintiff commenced a declaratory judgment action against its carrier, seeking a declaration that its carrier had a duty to defend and indemnify plaintiff in the underlying stock option action. The carrier

moved the declaratory judgment action to a federal district court. Meanwhile, in 2009, the employee and plaintiff settled the stock option action. Subsequently, the district court granted the carrier's motion for a judgment on the pleadings in the declaratory judgment action, upon a finding that the settlement and defense costs were not insurable losses under the policy.

Rather than appealing the district court's determination, counsel for plaintiff, defendants herein, moved for reconsideration of the dismissal motion. When the district court denied the reconsideration motion, plaintiff procured new counsel, which filed an appeal to the Second Circuit, which dismissed the appeal as untimely made. In 2013, plaintiff commenced this legal malpractice action against defendant and two of its attorneys. Supreme Court granted defendants' pre-answer motion to dismiss the complaint. We now affirm

Defendants candidly concede that their failure to file a timely notice of appeal from the federal district court's order granting the insurer's motion for judgment on the pleadings in plaintiff's declaratory judgment action against the insurer constituted a breach of their duty (*see Darby & Darby v VSI Intl.*, 95 NY2d 308, 313 [2000]; *see also Ocean Ships, Inc. v Stiles*, 315 F3d 111, 117 [2d Cir 2002]). However, because

plaintiff did not show that defendants' negligence was a proximate cause of plaintiff's losses, the motion court correctly dismissed this legal malpractice action (*Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 9 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]). Plaintiff failed to establish that its insurance contract covered the loss for which plaintiff sought coverage in the federal court declaratory judgment action (*see Roundabout Theatre Co. v Continental Cas. Co.*, 302 AD2d 1, 6 [1st Dept 2002]). As the district court and the motion court found, plaintiff's settlement of its former employee's stock option action, which gave rise to the declaratory judgment action, is not a "Loss" as defined by the policy; the policy states in plain language that "Loss" does not include "payments for stock option or stock appreciation rights."

The motion court properly declined to treat plaintiff's cross motion pursuant to CPLR 3211(c) as a motion for summary judgment on the ground that the court had not given notice to the parties that it would do so.

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

The Decision and Order of this Court entered herein on November 19, 2015 is hereby recalled and vacated (*see* M-5957 and 5958 decided simultaneously herewith).

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

ENTERED: MARCH 1, 2016

CLERK

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

16033 Gregorio Hormigas, Index 101408/11
Plaintiff-Respondent,

-against-

Village East Towers, Inc., et al.,
Defendants-Appellants,

411 East 10th Street Management Association, et al.,
Defendants.

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Mauro Lilling Naparty LLP, Woodbury (Kathryn M. Beer of counsel), for Village East Towers, Inc., appellant.

Harris, King & Fodera, New York (Kevin J. McGinnis of counsel), for Command Security Corporation, appellant.

Louis Grandelli, P.C., New York (Ari R. Lieberman of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered September 26, 2014, which denied defendants Village East Towers, Inc.'s (Village East) and Command Security Corporation's (Command Security) respective motions for summary judgment dismissing the complaint and cross claims as against them, modified, on the law, to grant the motion as to defendant Village East, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendant Village East Towers, Inc. dismissing the amended complaint and all cross claims against it.

Plaintiff alleges that, while crossing a street in Queens County, he sustained personal injuries when he was struck by a vehicle owned by defendant Nicomedes Sanchez and operated by defendant Robert Hernandez. It is undisputed that Hernandez was stopped at a traffic light that was at the intersection, and that the accident happened after he placed the vehicle into reverse. It is also undisputed that on the day of the accident Hernandez was employed as a security guard by defendant Command Security, which was contracted to provide security for defendant Village East's property, including the parking garage where Sanchez kept his vehicle.

Although Sanchez denied giving Hernandez permission to take the vehicle outside of the garage, he testified that Hernandez regularly delivered messages from building management to his apartment, and that he gave his car keys directly to Hernandez so that the car could be moved within the garage while the facility was being repaired. Hernandez testified that Sanchez asked him to "look after" the vehicle and that he believed he had Sanchez's permission to operate it on the day of the accident. An incident report completed by Hernandez after the accident also states that Sanchez gave the keys to him directly and asked him to "take care of" the vehicle. In addition, Command Security's account manager testified that Hernandez told him a few weeks after the accident

that he had Sanchez's permission to use the vehicle.[1] Hernandez also testified that on the day of the accident, he took Sanchez's vehicle for an oil change, charged the battery, and had the vehicle washed.

Drawing inferences in plaintiff's favor as we must on this motion for summary judgment, the record demonstrates that there is a triable issue of fact as to whether Hernandez was acting within the scope of his employment when the accident occurred (*see Riviello v Waldron*, 47 NY2d 297 [1979]; *Schilt v New York City Tr. Auth.*, 304 AD2d 189 [1st Dept 2003]; *Baguma v Walker*, 195 AD2d 263 [1st Dept 1993]). There are unresolved questions as to the nature of the relationship between Sanchez and Hernandez, and whether Sanchez gave Hernandez permission to operate his car outside of the garage on the day of the accident. There is also an issue of fact as to whether Command Security could have reasonably anticipated that its security guards, who had access to tenants' keys and vehicles, might operate the vehicles outside of the garage and cause injury to third parties (*see Riviello*, 47 NY2d at 303). Moreover, despite Command Security's policy that guards were to remain at the security post, the company kept a

[1] This hearsay evidence may be used to oppose summary judgment, since it is not the only evidence submitted for that purpose (*see Briggs v 2244 Morris L.P.*, 30 AD3d 216 [1st Dept 2006]).

document entitled "Post Instructions" that instructed the guards to perform reasonable special requests by clients, using, as an example, leaving the security post to take a package to the post office. Although Hernandez testified that Sanchez did not ask him to perform the specific tasks of washing the vehicle, charging the battery, and changing the oil, whether Hernandez reasonably interpreted Sanchez's request to "look after" or "take care of" the car as inclusive of such tasks is a question for a jury.

In view of the disputed factual issues discussed above, the motion court erred in finding that Hernandez "basically[] st[ole] the car" and that he operated the vehicle without Sanchez's permission on the day of the accident. Therefore, although Command Security is not entitled to summary judgment, the basis for denying its motion and the issues at trial should not be limited as the concurrence suggests.

However, we find that Village East is entitled to summary judgment, because it is undisputed that it did not employ Hernandez and was neither the owner of the vehicle involved in the collision nor the accident location (*see Morales v Living Space Design*, 278 AD2d 48, 49 [1st Dept 2000]). The record shows that Village East discharged its common-law duty to take minimal security precautions to secure the premises, including vehicles

parked in its garage, against reasonably foreseeable criminal acts by third parties by hiring Command Security to secure the area 24 hours a day, 7 days a week (see *James v Jamie Towers Hous. Co.*, 99 NY2d 639, 641 [2003]). Even if Village East had not hired Command Security to secure the premises, Village East would not be liable for plaintiff's injuries, because there is no evidence it had control over Hernandez or that it could have prevented Hernandez's alleged misconduct (*see Martino v Stolzman*, 18 NY3d 905, 908 [2012]; *Pulka v Edelman*, 40 NY2d 781, 785-786 [1976]).

All concur except Sweeny, J.P. and Richter, J. who concur in a separate memorandum by Sweeny, J.P. as follows:

SWEENY, J. (concurring)

I agree, for the reasons stated, that Village East should be granted summary judgment. I also agree that Command Security was not entitled to the same relief. I write separately to clarify that the grounds upon which this case should continue against Command Security are more narrow than those proffered by the majority.

The sole basis for the motion court's denial of summary judgment to Command Security was that it allowed Mr. Hernandez to have access to the security booth so he could take Mr. Sanchez's car keys. By limiting its holding to this point, the court did not find a material question of fact whether Mr. Hernandez had permission to "borrow" Mr. Sanchez's car[1] or whether he was acting within the scope of his employment in doing so. Nor could it.

Mr. Sanchez never gave permission for Mr. Hernandez to take the car out of the garage. On the day of the accident, Mr. Hernandez was off duty, in civilian clothes, and, as also found by the motion court, engaging in personal errands. Therefore, he

[1]In her decision, the judge said: "Someone was supposed to be in the booth at the time the keys were taken[,] . . . so either the booth was unmanned or a co-worker allowed Mr. Hernandez to, basically, steal the car." Contrary to the implication by the majority, there is no basis to conclude that Mr. Hernandez had permission to use the car.

was not in any way acting within the scope of his employment (*see Hacker v New York*, 26 AD2d 400 [1966], *affd* 20 NY2d 722 [1967], *cert denied* 390 US 1036 [1968]; *Reilly v Connable*, 214 NY 586, 590 [1915]). The majority's reference to the phrase "look after" the car by Mr. Sanchez is no more than pure speculation to support the argument that Mr. Hernandez had permission to take the car for his personal use. Mr. Sanchez's deposition testimony is clear and unequivocal that he only gave Mr. Hernandez the keys to move his car from one parking spot in the garage to another. Couple this with Mr. Hernandez's own deposition testimony that to take the car was "wrong" and that by doing so he "made a mistake," and it is apparent that the act of taking the car was completely unauthorized.

As Mr. Sanchez never consented to Mr. Hernandez using his car, it cannot be inferred that Mr. Hernandez's actions were allowed by Command Security as a permitted favor for a tenant, as plaintiff alleges in an attempt to show that Mr. Hernandez acted with the permission of Command Security.[2]

As Command Security could not be found liable under the principle of respondeat superior, so also it could it not be

[2]Regarding the so-called oil change the majority references, Mr. Hernandez did not say why he decided to get it, had no receipt for it, and admitted it was not done at the request of Mr. Sanchez.

found liable for negligent hiring or supervision (*see Cardona v Cray*, 271 AD2d 221 [1st Dept 2000]; *Seymour v Gateway Prods.*, 295 AD2d 278, [1st Dept 2002]).[3]

However, as Mr. Hernandez testified at his deposition, he removed the car keys from the unlocked and unmanned security booth. Therefore, this case should proceed to trial only on the question of Command Security's direct negligence. That is, was it negligent in keeping Mr. Sanchez's car keys in the security booth where anyone could have had access, and was this a substantial factor in the ensuing accident?

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

ENTERED: MARCH 1, 2016

CLERK

[3] There being no non-hearsay support for the majority's position, the remaining "evidence" it relied on, i.e., the hearsay statement of the Command Security account manager, cannot be considered, for the reason admitted by the majority.

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

16093-
16094 Index 451463/13

In re The People of the State of
New York by Eric T. Schneiderman, etc.,
Petitioner-Appellant-Respondent,

-against-

The Trump Entrepreneur Initiative
LLC, formerly known as Trump University
LLC, et al.,
Respondents-appellants.

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Eric T. Schneiderman, Attorney General, New York (Steven C. Wu of counsel), for appellant-respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Jeffrey L. Goldman of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 15, 2014, which, to the extent appealed from as limited by the briefs, granted respondents' motions for summary dismissal of the first cause of action, alleging fraud under Executive Law § 63(12), denied petitioner's motion for a summary determination as to its common-law fraud claim, denied respondents' motion to convert this special proceeding into a plenary action or for leave to conduct additional discovery as to the remaining causes of action, and granted petitioner's motion to strike certain of the Trump respondents' affirmative defenses, unanimously modified, on the law, to deny the motion to dismiss

the first cause of action, and otherwise affirmed, without costs. Appeals from order, same court and Justice, entered January 31, 2014, unanimously dismissed, without costs, as moot.

The New York State Attorney General brings this proceeding against Donald J. Trump individually and against several business entities bearing his name: The Trump Entrepreneur Initiative LLC, DJT Entrepreneur Member LLC, DJT Entrepreneur Managing Member LLC, The Trump Organization, Inc., Trump Organization LLC, (collectively, the Trump respondents). Trump is the Chief Executive Officer of The Trump Organization, Inc. and Trump Organziation LLC. He was also the chairman of Trump University, later known as Trump Entrepreneur Initiative LLC (TEI).

In 2004, Trump, along with respondent Michael Sexton and a nonparty individual, incorporated Trump University LLC as a New York limited liability company. Trump University purported, by way of seminars and mentoring programs, to instruct small business owners and individual entrepreneurs in real estate investing.

By letter dated May 27, 2005, the New York State Department of Education (SED) notified Donald Trump individually, Sexton, and Trump University that they were violating the New York Education Law by using the word "University" when it was not actually chartered as one. Likewise, SED notified these

respondents that Trump University was also violating the Education law because it lacked a license to offer student instruction or training in New York State. SED stated, however, that Trump University would not be subject to the license requirement if it had no physical presence in New York State, moved the business organization outside of New York, and ceased running live programs in the State. In June 2005, Sexton informed SED that Trump University would merge its operation into a new Delaware LLC, and would indeed cease holding live programming in New York State.

However, the Attorney General alleges, Trump University failed to abide by any of these conditions. To the contrary, it is alleged that, despite Sexton's assurances to the Attorney General, SED learned in 2009 through newspaper advertisements and a student complaint to the New York State Attorney General that Trump University was continuing to provide live programming and instruction in New York without obtaining proper licensing or moving its operations out of New York. In March 2010, SED sent Trump University another letter demanding that it cease using the word "University" in its name. In May 2010, five years after SED had informed respondents that they were obliged to drop the word "University," Trump University filed a certificate of amendment to its Articles of Organization, thus formally changing its name

to TEI.

In August and September 2010, SED once again informed TEI that the company needed a license to operate, which it still did not have despite having been notified in 2005 that its failure to obtain a license violated New York State law. On October 7, 2010, Sexton informed SED that TEI had ceased operations.

In early 2011, the Attorney General commenced an investigation into for-profit universities and trade schools operating in New York, and in May 2011, issued TEI a subpoena seeking information pertaining to its business practices.

In August 2013, the Attorney General commenced this special proceeding under Executive Law § 63(12) for injunctive relief, restitution, disgorgement, damages, and civil penalties. In its supporting affirmation, the Attorney General alleged that between 2005 and 2011, respondents operated an unlicensed, illegal educational institution. Further, the Attorney General stated, through various fraudulent practices, respondents intentionally misled more than 5,000 students nationwide, including over 600 New York residents, into paying as much as $35,000 each to participate in live seminars and mentor programs that the students thought were part of a licensed university.

According to the Attorney General's affirmation, respondents represented in advertising that real estate experts handpicked by

Trump himself would teach his strategies and techniques for real estate investing, and that these strategies would lead to success. One advertisement offered a free workshop and referred to "Donald Trump's handpicked experts." The same advertisement bore a quotation attributed to Trump, stating, "I can turn anyone into a successful real estate investor, including you." Similarly, a direct mail solicitation sent to prospective students read, "In just 90 minutes, my hand-picked instructors will share my techniques, which took my entire career to develop" and went on to state, "Then just copy exactly what I've done and get rich." The Attorney General noted that at the free seminars, instructors played a video featuring Donald Trump telling prospective students, "We're going to have professors that are absolutely terrific – terrific people, terrific brains, successful, the best" and noted that they were "all people that are handpicked by me."

However, the Attorney General averred, Trump did not handpick the instructors; indeed, only one of the live event speakers for Trump University had even ever met Donald Trump. Nonetheless, some students purchased seminars on the basis of their belief that Trump had approved each instructor. In an affidavit submitted to the Attorney General, one student stated that he "had some trust in the program because it was run by

Donald Trump" and was "led to believe that...based on Trump's marketing materials, the course professors had been handpicked by Donald Trump." Similarly, the Attorney General stated, Donald Trump never participated in the creation of any instructional content and never reviewed any curricula. The Attorney General further maintained that the instructors had been inadequately vetted and in fact had little or no experience in real estate investing, instead having prior work experience such as food service management and graphic design.

What is more, according to the Attorney General, the free seminars were merely an instrument through which instructors would induce students to enroll in increasingly expensive seminars, starting with a three-day $1,495 seminar. The Attorney General averred that although Trump University speakers represented that the three-day seminar would teach students all they needed to know to be successful real estate investors, the instructors at those three-day seminars then engaged in a "bait and switch," telling students that they needed to attend yet another seminar for an additional $5,000 in order to learn more about particular lenders. Instructors at the three-day seminars are also alleged to have engaged in a bait-and-switch by urging students to sign up for "Trump mentorship packages, which ranged anywhere from $10,000 to $35,000" and supposedly provided "the

only way to succeed in real estate investment."

The Attorney General also averred that individual respondents Donald Trump and Michael Sexton were each personally involved with the founding of Trump University. Trump, the Attorney General maintains, conceded that he had "significant involvement with both the operation and overall business strategy of Trump University," including "attending frequent meetings" with Sexton to "discuss Trump University operations." Further, Trump's photographs and signature appeared on all of Trump University's advertising; according to testimony from Sexton, Trump personally reviewed and approved all the ads that were in the newspapers. Sexton oversaw all operations, including but not limited to Trump University's finances, curriculum development, scheduling and execution of the seminars and mentorship programs, and reporting to the employees of The Trump Organization and Donald Trump.

On the basis of these allegations, the Attorney General interposed causes of action for fraud under Executive Law § 63(12) (first cause of action); fraudulent and deceptive practices under General Business Law § 349 (second cause of action); false advertising under GBL § 350 (third cause of action); violating Education Law § 224 by calling the business "Trump University" when it was not, in fact, chartered as a

university (fourth cause of action); violating Education Law § 5000 *et seq*. by operating an unlicensed school that did not meet State standards (fifth cause of action); and violating 16 CFR § 429, which, in connection with a contract of sale, obliges a seller to include the buyer's right to cancel the transaction within three days (sixth cause of action).

Respondents moved to dismiss the petition, arguing, among other things, that the first cause of action under Executive Law § 63(12) was untimely under CPLR 214(2), which imposes a three-year statute of limitations to recover on wrongs "created or imposed by statute." In addition, respondents argued, the Attorney General did not adequately plead the elements of common-law fraud, so could not proceed under the six-year statute of limitations governing that action.

In its January 2014 order, the court dismissed the fourth cause of action (the Education Law § 224 violation) in its entirety, and held that the Attorney General was bound by a three-year statute of limitations on all the statutory claims in the petition. However, the court also held that the Attorney General's general fraud claims were sufficiently pleaded, and therefore were viable and subject to the six-year statute of limitations governing fraud actions.

Respondents then filed verified answers and the Trump

respondents asserted 17 affirmative defenses. Respondents also moved to convert the special proceeding to a plenary action, or, in the alternative, for leave to conduct discovery on the remaining causes of action. For its part, the Attorney General re-noticed the petition and sought a summary determination on its remaining causes of action for violations of Executive Law § 63(12), General Business Law §§ 349 and 350, Education Law §§ 5001-5010, and 16 CFR § 429.

By order entered October 15, 2014, the IAS court denied respondents' motion for an order converting the special proceeding to a plenary action. Further, the IAS court granted respondents' motion to dismiss the first cause of action, the fraud claim under Executive Law § 63(12) (as opposed to the common law fraud), stating that the statute does not provide a standalone cause of action for fraud, citing *People v Charles Schwab & Co., Inc.*, 109 AD3d 445, 449 [1st Dept 2013]). The court also denied the Attorney General's request for a summary determination against the Trump respondents, except with respect to the fifth cause of action for violation of Education Law §§ 5001-5010. Likewise, the court granted respondents' motion to dismiss the sixth cause of action for violation of 16 CFR § 429. Finally, the court granted respondents' motion for discovery to a limited extent, and granted the Attorney General's motion to

strike the affirmative defenses to a limited extent.

Before reaching the issue of whether a fraud claim under Executive Law § 63(12) is subject to the three-year statute of limitations imposed under CPLR 214(2), we must address an apparent anomaly in our case law – specifically, *People v Charles Schwab & Co., Inc.* (109 AD3d 445, 449 [1st Dept 2013], *supra*). First of all, Executive Law § 63(12) states, in relevant part:

> "Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts [and] directing restitution and damages . . . and the court may award the relief applied for or so much thereof as it may deem proper."

Moreover, the provision defines "fraud" as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions" (*id.*).

In *Charles Schwab*, the Attorney General had brought an enforcement action asserting claims under § 63(12) and the Martin Act (General Business Law article 23-A), alleging that Charles Schwab had misrepresented the risks of certain securities when offering them to investors. The IAS court allowed the Martin Act

claim to proceed. But the court dismissed the § 63(12) claim, not on the ground that § 63(12) foreclosed a standalone action, but rather, on the ground that the cause of action alleging violation of that section "d[id] not adequately state a violation of the Executive Law" (*People v Charles Schwab & Co., Inc.*, 33 Misc 3d 1221[A], 2011 NY Slip Op 50242[U], *9 [Sup Ct, NY County 2011], *affd in part, mod in part* 109 AD3d 445).

On appeal to this Court, neither party raised or briefed the issue of whether the Attorney General could bring a standalone action under § 63(12), and, as noted, the IAS court had not dismissed the claim on that basis. Nonetheless, in a memorandum decision, we found that the IAS court had properly dismissed that claim, stating that the section "does not create independent claims, but merely authorizes the Attorney General to seek injunctive and other relief on notice prescribed by the statute in cases involving persistent fraud or illegality" (*People v Charles Schwab & Co.*, 109 AD3d at 449, citing *State of New York v Cortelle Corp.*, 38 NY2d 83, 86 [1975]).

Although the holding of *Charles Schwab* purported to be based on the Court of Appeals' ruling in *Cortelle*, *Cortelle* does not, in fact, hold that the Attorney General cannot bring a standalone cause of action for fraud under Executive Law § 63(12).

Instead, *Cortelle* addressed the statute of limitations for a

§ 63(12) claim – namely, the applicability of CPLR 214(2), which provides a three-year statute of limitations for "an action to recover upon a liability, penalty or forfeiture created or imposed by statute."

In *Cortelle*, the Attorney General, alleging that the defendants had engaged in fraudulent loan practices, sought restitution for defrauded persons and an injunction against certain practices under § 63(12), among other remedies. The trial court found that the action was one to recover upon a "liability, penalty or forfeiture created or imposed by statute" and therefore was subject to CPLR 214(2)'s three-year statute of limitations; on that basis, the trial court dismissed several causes of action, including the one brought under § 63(12) (*see State of New York v Cortelle Corp.*, 73 Misc 2d 352, 355 [Sup Ct. Nassau County 1972]). The Second Department affirmed without an opinion (*see* 43 AD2d 668 [2nd Dept 1973]).

The Court of Appeals reversed the statute of limitations ruling and reinstated the dismissed causes of action, including the cause of action for restitution under § 63(12), finding that the causes of action addressing the defendant's allegedly fraudulent practices did not rely on liabilities, penalties, or forfeitures created or imposed by statute. Specifically, the Court noted, § 63(12) "did not 'make' unlawful the alleged

fraudulent practices, but *only provided standing in the Attorney General to seek redress and additional remedies for recognized wrongs which pre-existed the statute*[]" (*Cortelle*, 38 NY2d at 85 [emphasis added]).

The disagreement over *Cortelle*'s holding apparently arises from the Court of Appeals' statement that the statute "only provided standing in the Attorney General to seek redress and additional remedies for recognized wrongs which pre-existed the statute[]." However, in using this language, the Court of Appeals did not suggest that the Attorney General had no power to commence a standalone action under Executive Law § 63(12). Rather, the Court's statement was directed to a specific issue – that is, whether the Attorney General was pursuing a claim that existed only under § 63(12). This question was relevant because the answer would determine whether the Court was obliged to dismiss the action on statute of limitations grounds.

The Court answered the question in the negative, finding that in fact, the allegations of the Attorney General's § 63(12) cause of action amounted essentially to a common-law claim of promissory fraud – a cause of action that had certainly existed before § 63(12) was implemented. Framing the issue in this light, the Court found that the Attorney General sought redress for a wrong that had long been actionable under the common law;

thus, the cause of action did not depend on a *new* liability "created or imposed by statute" within the meaning of CPLR 214(2). Accordingly, the Court concluded, given the allegations in the case, the Attorney General had standing under § 63(12) to bring the fraud action and could rely on the statute's particular remedies without being subject to the three-year time limitation set forth in CPLR 214(2).

To be sure, *Cortelle* does not directly address whether § 63(12) provides for an independent cause of action under the broad definition of fraud. Other New York courts addressing that issue, however, do give us guidance as to how we should proceed here. New York courts have generally allowed for independent causes of action for fraud under § 63(12) (*see e.g. People v Greenberg*, 21 NY3d 439 [2013], *affg* 95 AD3d 474 [1st Dept 2012] [in a case involving claims for violation of § 63(12) and the Martin Act, as well as common-law fraud, the Court of Appeals did not dismiss the § 63(12) fraud claim or otherwise limit it to a common-law fraud claim]).

Likewise, before *Schwab*, other decisions from this Court have allowed for independent causes of action for fraud under § 63(12) (*see People v Wells Fargo Ins. Servs., Inc.*, 62 AD3d 404 [1st Dept 2009], *affd* 16 NY3d 166 [2011] [dismissing cause of action for fraud under § 63(12) because complaint failed to state

it with sufficient particularity, not because no such claim is allowed]; *People v Coventry First LLC*, 52 AD3d 345, 346 [1st Dept 2008], *affd* 13 NY3d 108 [2009] [finding that a "cause of action" under § 63(12) was "sufficiently stated" even though the elements of common-law fraud "need not be alleged," where case also involved a separate common law fraud claim]; *People v Apple Health & Sports Clubs*, 206 AD2d 266, 267 [1st Dept 1994], *lv dismissed in part and denied in part* 84 NY2d 1004 [1994] [special proceeding alleging repeated fraudulent and deceptive conduct brought under § 63(12) alone]; *accord State of New York v Grecco*, 21 AD3d 470 [2d Dept 2005]; *Matter of People v JAG NY, LLC*, 18 AD3d 950 [3d Dept 2005]; *but see Matter of People v Frink Am.*, 2 AD3d 1379 [4th Dept 2003]).

Further, one decision from this Court has held that fraud under § 63(12) may be established without proof of scienter or reliance (*People v American Motor Club*, 179 AD2d 277, 283 [1st Dept 1992], *appeal dismissed* 80 NY2d 893 [1992] [reinstating a § 63(12) claim "as a cause of action," where the AG had pleaded facts amounting to fraud under that provision, as under the statute, "scienter is not required and false promises are sufficient"]). This case, which concluded that fraud under § 63(12) may be established without proof of scienter or reliance, further indicates that the Attorney General may rely on

§ 63(12) for a cause of action and need not limit itself to claims for common-law fraud only.

Thus, *Charles Schwab* does not comport with prevailing authority, and in fact, acts to limit the power that the Attorney General has long been exercising under § 63(12). And even apart from prevailing authority, the language of the statute itself appears to authorize a cause of action; like similar statutes that authorize causes of action, § 63(12) defines the fraudulent conduct that it prohibits, authorizes the Attorney General to commence an action or proceeding to foreclose that conduct, and specifies the relief, including equitable relief, that the Attorney General may seek. Indeed, the language of § 63(12) parallels the language of the Martin Act,[1] under which the

[1] The Martin Act reads, in relevant part:
"Whenever the attorney-general shall believe from evidence satisfactory to him that any person, partnership, corporation, company, trust or association has engaged in, is engaged or is about to engage in any of the practices or transactions heretofore referred to as and declared to be fraudulent practices, he may bring an action in the name and on behalf of the people of the state of New York against such person, partnership, corporation, company, trust or association . . . to enjoin such person, partnership, corporation, company, trust or association . . . from continuing such fraudulent practices or engaging therein or doing any act or acts in furtherance thereof or, if the attorney-general should believe from such evidence that such person, partnership, corporation, company, trust or association actually has or is engaged in any such fraudulent practice, he may include in such action an

Attorney General is undisputedly authorized to bring a standalone cause of action for fraudulent conduct in the securities context (*compare* General Business Law § 353[1] *with* Executive Law § 63[12]; *see Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 350 [2011]).

As one jurist has observed, "[T]here is no requirement that a patent judicial mistake be allowed to 'age' before it may be corrected" (*Doerr v Goldsmith*, 25 NY3d 1114, 1154 [2015] [Fahey, J., dissenting]). Hence, we hold that the Attorney General is, in fact, authorized to bring a cause of action for fraud under Executive Law § 63(12).

Turning now to the statute of limitations issue, we find, for the reasons already stated, that the fraud claim under § 63(12) is not subject to the three-year statute of limitations imposed by CPLR 214(2), but rather, is subject to the residual six-year statute of limitations in CPLR 213(1) (see *Morelli v Weider Nutrition Group*, 275 AD2d 607, 608 [1st Dept 2000]). As

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> application to enjoin permanently such person, partnership, corporation, company, trust or association, and such other person or persons as may have been or may be concerned with or in any way participating in such fraudulent practice, from selling or offering for sale to the public . . . In said action an order or a judgment may be entered awarding the relief applied for or so much thereof as the court may deem proper." (General Business Law § 353[1]).

concluded above, § 63(12) does not create any liability nonexistent at common law, at least under the court's equitable powers. As also concluded above, § 63(12) does not encompass a significantly wider range of fraudulent activities than were legally cognizable before the section's enactment (*see State of New York v Bronxville Glen I Assoc.*, 181 AD2d 516 [1st Dept 1992]; *cf. Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 209 [2001]; *but see State of New York v Daicel Chem. Indus., Ltd.*, 42 AD3d 301 [1st Dept 2007]).

Nevertheless, petitioner is not entitled to summary determination of its fraud claims, under either the common law or the statute, because material issues of fact exist as to those claims.

Contrary to respondents' arguments, the IAS court correctly dismissed the seven affirmative defenses at issue. This conclusion holds particularly true because the court should have considered the allegations of post-May 31, 2010 conduct included in petitioner's reply submission (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381-382 [1st Dept 2006]; *State of New York v Metz*, 241 AD2d 192, 198-199 [1st Dept 1998]).

Finally, the IAS court correctly denied respondents' motion to convert the special proceeding into a plenary action, and the court's discovery rulings were well within its broad discretionary power to control the special proceeding.

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

346 The People of the State of New York, Respondent, Ind. 2295/12

-against-

Fabian Faulkner, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Arlene Goldberg, J.), rendered September 4, 2013, as amended September 13, 2013, convicting defendant, upon his plea of guilty, of conspiracy in the second degree, and sentencing him to a term of one to three years, unanimously affirmed.

Although this appeal is not technically moot, defendant's sole argument is that his plea should be vacated in the event his

Bronx convictions are reversed; that claim is academic because those convictions have been affirmed. Accordingly, there is no basis for reversal.

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

347 Mario Martinez, as Administrator of the Estate of Margarita Martinez, Deceased, etc., Plaintiff-Appellant, Index 304226/12

-against-

Premium Laundry Corporation, Defendant-Respondent.

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Pollack, Pollack, Isaac & DeCicco, LLP, New York (Beth S. Gereg of counsel), for appellant.

Martin Fallon & Mullé, LLP, Huntington (Stephen P. Burke of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about August 15, 2014, which granted defendant's oral application to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff's failure to assemble a proper record (*see* CPLR 5526), does not warrant dismissal of the appeal. Defendant has not identified any material information omitted from the record on appeal that is relevant to a determination of the issues presented, and the record on appeal is sufficiently complete to address the merits (*see Sanacore v Sanacore*, 74 AD3d 1468, 1469 [3d Dept 2010]; *see also Bennett v Gordon*, 99 AD3d 539 [1st Dept 2012]).

Contrary to defendant's contention, its oral application was

not a motion to dismiss pursuant to CPLR 3211(a)(5) on the ground of release, but was, in effect, an untimely motion for summary judgment (*see Samuels v Consolidated Edison Co. of N.Y., Inc.*, 96 AD3d 685 [1st Dept 2012]). The court should not have entertained the oral application, since it was not supported by any motion papers, no formal motion was made on notice to plaintiff, and the application was made after jury selection had been completed (*see Williams v Naylor*, 64 AD3d 588 [2d Dept 2009]). The oral application, which was made more than seven months after the 120-day statutory deadline, was also made without any showing of "good cause" for the delay (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]).

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

348-
349 In re Joseph R., Jr., and Another,

Children Under Eighteen Years of Age,
etc.,

Jasmine M.G.,
Respondent-Appellant,

Administration for Children's Services
of the City of New York,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about February 2, 2015, which, upon a fact-finding determination that the respondent mother neglected Joseph R., Jr., and derivatively neglected Kaitlyn L.R., released them to the custody of the nonrespondent father, with supervision by petitioner Administration for Children's Services, unanimously affirmed, without costs. Appeal from order of fact-finding, same court and Judge, entered on or about July 25, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence, including testimony by the child Joseph Jr., supports Family Court's determination that respondent inflicted excessive corporal punishment upon her son (Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). There was a history of "struggles" between the mother and son, resulting in punishments ranging from use of a belt to strike him, to forcing him to kneel on rice while naked, and resulting in prior ACS intervention. The mother was arrested after an altercation in which she scratched the child, drawing blood, and kneed him in the groin, causing pain (*see Matter of Joseph C. [Anthony C.]*, 88 AD3d 478, 479 [1st Dept 2011]). This evidence, as well as the evidence that the mother had subjected Kaitlyn to excessive corporal punishment in the past, supports the finding of derivative neglect of Kaitlyn (*see Matter of Naomi J. [Damon R.]*, 84 AD3d 594 [1st Dept 2011]). There is no basis to disturb the Family Court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776 [1975]).

The evidence also supported the court's determination that the best interests of the children would be served by releasing them to the custody of their father, notwithstanding that his

apartment was overcrowded, since he was ably attending to their educational, medical and psychological needs (*see Matter of Nichelle McF.*, 23 AD3d 209 [1st Dept 2005]).

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

350 Arnica Acupuncture PC as Assignee of Palmer Marjorie, Plaintiff-Respondent, Index 570015/14

-against-

Interboard Insurance Company, Defendant-Appellant.

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The Law Office Of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Law Offices of Melissa Betancourt, P.C., Brooklyn (David M. Landfair of counsel), for respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered April 17, 2014, which, to the extent appealed from as limited by the briefs, affirmed the part of an order of the Civil Court, Bronx County (Joseph E. Capella, J.), entered September 5, 2013, denying defendant's motion for summary judgment dismissing the complaint or, in the alternative, to compel plaintiff to produce its principal for deposition, unanimously reversed, on the law, without costs, and defendant's motion for summary judgment granted. The Clerk is directed to enter judgment dismissing the complaint.

Contrary to the Appellate Term's finding, plaintiff's supervising acupuncturist's affidavit failed to raise a triable issue since it was not based on an examination of the patient,

nor did it address or rebut the findings of objective medical tests detailed in the sworn report of defendant's medical expert. The insured's subjective complaints of pain cannot overcome objective medical tests (*see Rummel G. Mendoza, D.C., P.C. v Chubb Indem. Ins. Co.*, 47 Misc 3d 156[A], 2015 NY Slip Op 50900[U] [App Term, 1st Dept 2015]; *see generally Munoz v Hollingsworth*, 18 AD3d 278 [1st Dept 2005]).

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

351 Paulo Saavedra, Index 309136/11
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danzinger, J.), entered August 7, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing that it neither created nor had actual or constructive notice of the specific icy condition alleged to have caused plaintiff's slip and fall. In support of its motion, defendant submitted deposition testimony showing its substantial snow and ice removal efforts in the area of the accident in the days preceding the accident. Defendant also submitted climatological data showing temperature fluctuations above and below freezing in the two days before the date of the accident, as well as freezing temperatures in the hours immediately preceding the accident. Taken together,

defendant's evidence shows that it would be speculative to conclude that it caused or had sufficient time to remedy the icy condition at issue (*see Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972, 973-974 [1994]; *Katz v City of New York*, 11 AD3d 391 [1st Dept 2004]; *see also Otero v City of New York*, 248 AD2d 689, 690 [2d Dept 1998]). Defendant was not required to submit an expert's opinion in support of its motion (*see e.g. Katz*, 11 AD3d at 391-392; *Riviere v City of New York*, 127 AD3d 720, 724 [2d Dept 2015]).

In opposition, plaintiff failed to raise triable issues of fact (*Katz*, 11 AD3d at 392).

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

352-
352A The People of the State of New York, Respondent,

Ind. 302/13
1802/13

-against-

Eric Hollis,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Claudia B. Flores of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 14, 2014, convicting defendant, upon his pleas of guilty, of robbery in the first degree and tampering with physical evidence, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's request for new counsel at sentencing, and defendant was not deprived of his right to conflict-free counsel. Defendant, who received a suitable opportunity to be heard both orally and in writing, did not establish good cause for a substitution. Instead, defendant expressed disagreement with counsel's strategy at a suppression hearing, and generalized,

unfounded complaints about counsel's representation (*see People v Smith*, 18 NY3d 588, 592-593 [2012]; *People v Hopkins*, 67 AD3d 471 [1st Dept 2009] *lv denied* 14 NY3d 771 [2010]; *People v Walton*, 14 AD3d 419 [1st Dept 2005] *lv denied* 5 NY3d 796 [2005]). Defendant never claimed that his attorney coerced him into pleading guilty; in any event, his appellate claim of coercion is without merit. To the extent the record permits review, it establishes that defendant received effective assistance (*see generally People v Ford*, 86 NY2d 397, 404 [1995]).

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

353 Thomas Gass, Index 302536/08
Plaintiff-Appellant,

-against-

Susan Gass,
Defendant-Respondent.

_____

Tamir Law Group, P.C., New York (Alexander Markus of counsel), for appellant.

Albert PLLC, New York (Craig J. Albert of counsel), for respondent.

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Supplemental order, Supreme Court, New York County (Lancelot B. Hewitt, Special Referee), entered July 30, 2014, to the extent it granted defendant wife lifetime spousal maintenance of $1,500 per month, unanimously affirmed, without costs.

The Special Referee providently exercised his discretion in awarding defendant maintenance after citing the relevant statutory factors and considering the parties' pre-divorce standard of living (see Domestic Relations Law § 236[B][6][a]; *Cohen v Cohen*, 120 AD3d 1060, 1064 [1st Dept 2014], *lv denied* 24 NY3d 909 [2014]). In particular, the Special Referee cited defendant's limited income from her part-time teaching position, which paid no benefits and was not guaranteed to continue, the fact that defendant had not worked while she raised the parties' child, and the fact that she had to borrow money for more than

eight years to cover her living expenses. In addition, while the Special Referee noted that defendant had not obtained certification to work as a New York City public school teacher, he noted that there was no evidence that such a teaching position would allow her to become self-supporting (*see Silverman v Silverman*, 304 AD2d 41, 51 [1st Dept 2003]).

These proceedings were remanded for clarification of the duration of the maintenance award in the Special Referee's order entered June 4, 2012, and to allow for appellate review of any lifetime maintenance award (113 AD3d 488 [1st Dept 2014]). The Special Referee sufficiently complied with this Court's directives by clarifying that his prior order awarded defendant lifetime maintenance and by elaborating on the reasons for that award. To the extent plaintiff, an attorney, argues that the Special Referee should have held a hearing at which plaintiff could have presented evidence that his financial circumstances

have changed for the worse since issuance of the order entered June 4, 2012, this argument is unavailing, since plaintiff did not request such a hearing.

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

354 Arleen Gunzburg, Index 115910/09
Plaintiff-Appellant-Respondent,

-against-

Quality Building Services Corp.,
Defendant-Respondent,

A/R Retail LLC, et al.,
Defendants-Respondents-Appellants,

Quality Protection Services, Inc.,
Defendant.

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Michael Gunzburg, P.C., New York (Michael Gunzburg of counsel), for appellant-respondent.

McGaw, Alventosa & Zajaz, Jericho (Joseph Horowitz of counsel), for respondents-appellants.

Law Office Of James J. Toomey, New York (Eric P. Tosca of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered June 27, 2014, which granted defendants Quality Building Services Corp.'s (QBS) and A/R Retail LLC, Related Urban Development LP and Related Urban Management Company's (the Related defendants) motions for summary judgment dismissing the complaint as against them, denied plaintiff's cross motion for partial summary judgment, and denied the Related defendants' cross motion for summary judgment on their cross claim against defendant QBS for contractual indemnification, unanimously

modified, on the law, to grant the Related defendants' motion as to contractual indemnification, and otherwise affirmed, without costs.

QBS and the Related defendants established prima facie that they did not have constructive notice of the alleged dangerous condition on which plaintiff slipped and fell. "The fact that it was raining and water was being tracked in does not constitute notice of a dangerous situation"; QBS and the Related defendants "were under no obligation . . . to continuously mop up all tracked-in water" (*see Garcia v Delgado Travel Agency*, 4 AD3d 204, 204 [1st Dept 2004]; *see also Thomas v Boston Props.*, 76 AD3d 460, 461 [1st Dept 2010]). Moreover, plaintiff's own testimony established that the water on which she slipped was not visible and apparent and therefore could not provide constructive notice (*see Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 572 [1st Dept 2014]). Plaintiff testified that, despite looking at the floor where she was walking, it was not until after she fell that she was able to discern the wet spots on the floor, which she described as clear droplets in a small area less than two feet in diameter that were "hard to have seen . . . when I was standing up." Plaintiff failed to raise a triable issue of fact whether the accumulating rain water was a recurrent condition (*see Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373 [1st Dept

2005]). Plaintiff is not entitled to spoliation sanctions, since she failed to show that she was prejudiced by the lack of any of the items allegedly lost or destroyed (*see Lane v Fisher Park Lane Co.*, 276 AD2d 136, 138-139 [1st Dept 2000]).

The indemnification clause in QBS's contract with the Related defendants required it to indemnify the Related defendants for any claims, losses, proceedings, etc., "arising from, related to or in connection with," inter alia, QBS's services or failure to provide the services. Thus, the Related defendants are entitled to contractual indemnification from QBS. QBS's argument that the indemnification provision was superseded by a more restrictive provision that applies here is unpreserved (*see Gyabaah v Rivlab Transp. Corp.*, 129 AD3d 447 [1st Dept 2015]).

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

355-
356-
356A Five Mile Capital SPE B LLC,
Plaintiff-Appellant,

-against-

Fillmore West JPM Finance Subsidiary,
et al.,
Defendants-Respondents.

Index 651463/13

Haynes and Boone LLP, New York (David M. Siegal of counsel), for appellant.

Dechert LLP, New York (Joseph F. Donley of counsel), for Fillmore West JPM Finance Subsidiary, FWF PHOV Equity LLC, FWF PHOV Mezzanine LLC, PHF New Orleans L.L.C., PHF Metairie L.L.C., PHF FL LLC, PHF Somerset LLC, PHF East Brunswick LLC, PHF Ruby LLC, PHF Oak Brook LLC, PHF Oceanfront LP and PHF Plantation LP, respondents.

Katsky Korins, LLP, New York (Joel S. Weiss of counsel), for GSREA, LLC, respondent.

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered May 28, 2014, dismissing plaintiff's complaint, based on orders, same court and Justice, entered May 16, 2014, which granted defendants' motions to dismiss the complaint in its entirety with prejudice, unanimously affirmed, with costs. Appeals from the orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court properly dismissed the complaint in its entirety. The special servicer, defendant GSREA, acted within its authority

and discretion, and did not breach its obligations under the pooling and servicing agreement to act in accordance with the accepted servicing standards by executing a series of transactions in which the value of the syndicated loan was written down so that its outstanding balance matched the appraised value of the collateral, and defendant FWF PHOV Equity LLC took over ownership interests of the collateral from the property owner defendants, who were released from liability on the loan. The court correctly found that the transactions here did not implicate the obligations of a special servicer where a loan in default is resolved by providing the lenders a deed in lieu of foreclosure. The allegations that GSREA acted in bad faith, such as by accepting substantial fees and other consideration in connection with executing these transactions, are conclusory and insufficient to state any breach claim, and absent any viable claim of breach by GSREA, plaintiff's remaining

causes of actions for a declaration and imposition of a constructive trust, as well as the claims against the other defendants, are without basis.

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

358 Jean Azor, Index 21026/13
Plaintiff-Appellant,

-against-

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

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Tracie A. Sundack & Associates, L.L.C., White Plains (Albert Pizzirusso of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about September 5, 2014, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's claim for alleged civil rights violations during disciplinary hearing proceedings, under 42 USC § 1983, is barred by the three-year statute of limitations (*see* CPLR 214[5]; *Owens v Okure*, 488 US 235, 250 [1989]; *423 S. Salina St. v City of Syracuse*, 68 NY2d 474, 486 [1986], *cert denied* 481 US 1008 [1987]). Plaintiff's time to commence the section 1983 action began to accrue on the date of the disciplinary hearing determination, as it impliedly challenged the conditions of his confinement, namely, punitive segregation, and not the fact or duration of his confinement (*see Jenkins v Haubert*, 179 F3d 19

[2d Cir 1999]; *cf. Edwards v Balisok*, 520 US 641 [1997]; *Heck v Humphrey*, 512 US 477 [1994]). That plaintiff was a pretrial detainee, at the time, does not bring this claim outside of the purview of *Jenkins*.

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

361-
362-
362A Index 6839/07

Michael Robinson,
Plaintiff-Appellant,

-against-

1528 White Plains Road Realty, Inc.,
et al.,
Defendants-Respondents,

Helen & Sons Movers, Inc.,
Defendant.

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Law Offices of Alana Barran, P.C., New York (Alana Barran of counsel), for appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (Edward J. Guardaro, Jr. of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Lucindo Suarez, J.), entered September 19, 2013, dismissing the complaint as against defendants 1528 White Plains Road Realty, Inc. and Harry Balsamo (defendants), unanimously affirmed, without costs. Appeal from order, same court and Justice, entered August 16, 2013, which, to the extent appealed from, granted defendants' motion to dismiss the complaint against them, and appeal from order, same court and Justice, entered on or about November 6, 2013, which, to the extent appealable, denied plaintiff's motion to renew defendants' cross motion to dismiss, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly dismissed the complaint against defendants as barred by the doctrine of collateral estoppel. The issues raised in this action were fully litigated and decided against plaintiff in a Civil Court proceeding (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501 [1984]; *see also Bell v Alden Owners*, 299 AD2d 207, 208 [1st Dept 2002], *lv denied* 100 NY2d 506 [2003]). Plaintiff had a full and fair opportunity to litigate in the Civil Court (62 NY2d at 501). To the extent any issue in this action was not raised and decided in the Civil Court proceeding, plaintiff's claims in this action are barred by the doctrine of res judicata, as his claims arise out of the same transaction or series of transactions as the claims raised and brought to a final conclusion in the Civil Court proceeding (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

The motion court correctly denied plaintiff's motion to renew, because he did not proffer a reasonable excuse for his failure to submit the new evidence when initially opposing defendants' cross motion (*see 225 Fifth Ave. Retail LLC v 225*

5th, LLC, 92 AD3d 471, 472 [1st Dept 2012]). In any event, as noted by the motion court, the new evidence would not have changed the motion court's original determination.

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

363 Greystone Funding Corp., Index 651926/13
Plaintiff-Appellant, 652210/13
590926/13

-against-

Ephraim Kutner, et al.,
Defendants-Respondents.

- - - - -

Ephraim Kutner,
Plaintiff,

-against-

Greystone Funding Corporation, et al.,
Defendants.

- - - - -

[And a Third Party Action]

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Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellant.

Dechert LLP, New York (Andrew J. Levander of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 26, 2015, which, to the extent appealed from, granted defendants' motion for summary judgment dismissing the claims for breach of the non-competition and non-solicitation covenants in defendant Ephraim Kutner's (Ephraim) employment agreement and for tortious interference with employment contact as against defendant Jonathan Kutner, unanimously reversed, on the law, without costs, and the motion denied.

Assuming, arguendo, that *Post v Merrill Lynch, Pierce,*

Fenner & Smith (48 NY2d 84 [1979]) mandates the invalidation of all restrictive covenants in an employment agreement upon the termination of the employee without cause (*compare e.g. Grassi & Co., CPAs, P.C. v Janover Rubinroit, LLC*, 82 AD3d 700 [2d Dept 2011], *with Wise v Transco, Inc.*, 73 AD2d 1039 [4th Dept 1980]), the record before us still does not demonstrate conclusively that defendant Ephraim Kutner was terminated without cause. In a prior appeal in this case, in which we reversed an order granting defendants' motion to dismiss pursuant to CPLR 3211 on the ground of "the uncertainty of the record as presently developed," we observed that "[i]t is possible that the dispute may be amenable to resolution on a more developed record and exploratory motion for summary judgment" (121 AD3d 581, 583-584 [1st Dept 2014]). Defendants moved for summary judgment shortly after our order was issued. However, their argument that Ephraim was terminated without cause was based on the same letters and emails as were submitted on the motion to dismiss. Thus, defendants failed to meet their burden on the motion for summary judgment of "tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Similarly, issues of fact still exist as to the reasonableness and enforceability of the restrictive covenants

(*see Brown & Brown, Inc. v Johnson*, 25 NY3d 364, 372 [2015]).

As we are reinstating the claim for breach of the non-competition and non-solicitation covenants in Ephraim's employment agreement, the tortious interference claim, which was dismissed on the ground that the restrictive covenants were invalid, must also be reinstated.

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

364 Anthony Bayne, Index 23599/13
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Tracie A. Sundeck & Associates, LLC, White Plains (Tracie A. Sundack of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered September 4, 2014, which granted defendant City's motion to dismiss the complaint for plaintiff's failure to comply with General Municipal Law § 50-i(1), and denied plaintiff's cross motion for leave to amend the complaint, unanimously affirmed, without costs.

Thirteen days before the expiration of the one-year-and-ninety-day statute of limitations for commencing a personal injury action against the City (General Municipal Law § 50-i[1]), plaintiff sought leave to file a late notice of claim. The City did not oppose the petition, which was initially denied on procedural grounds. In an order entered September 13, 2013, Supreme Court (Schachner, J.) granted plaintiff leave to serve a late notice of claim within 30 days of the date of the order.

Plaintiff served a notice of claim within that time period, and commenced this action on September 30, 2013.

Assuming, without deciding, that the statute of limitations was tolled during the pendency of plaintiff's petition (*see Giblin v Nassau County Med. Ctr.*, 61 NY2d 67, 72-74 [1984]; CPLR 204[a]), it began running anew on September 13, 2013, when Supreme Court granted plaintiff leave to serve a late notice of claim (*Doddy v City of New York*, 45 AD3d 431, 432 [1st Dept 2007]). Accordingly, plaintiff was required to commence an action against the City within 13 days, on or before September 26, 2013, which he failed to do (*id.*). The order granting plaintiff leave to serve a late notice of claim within 30 days of the order could not extend the statute of limitations (*see Baez v New York City Health & Hosps. Corp.*, 80 NY2d 571, 577 [1992]; *Ahnor v City of New York*, 101 AD3d 581, 582 [1st Dept 2012]). Plaintiff could have filed a complaint within the limitations period, or even before receiving leave to serve a late notice of claim (*see Ahnor*, 101 AD3d at 582; *see also Matter of Shannon v*

Westchester County Health Care Corp., 76 AD3d 680, 682 [2d Dept 2010]; General Municipal Law § 50-e[5]).

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

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

365 The People of the State of New York, Ind. 4904/09
Respondent,

-against-

Roxanne Williams,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

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Judgment of resentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered October 11, 2012, convicting defendant, upon her plea of guilty, of violation of probation, revoking her sentence of probation and resentencing her to a term of one year, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 364 days, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

367 The People of the State of New York, Ind. 1635N/12
Respondent,

-against-

Javon Andrews,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Jeffrey Dellheim 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 (Robert M. Stolz, J.), rendered on or about April 17, 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: MARCH 1, 2016

CLERK

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

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

368 In re Rafeak Muhammad, M.D., Index 101138/14
Petitioner-Appellant,

-against-

Howard A. Zucker, M.D., J.D., etc., et al.,
Respondents-Respondents.

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Ralph A. Erbaio, Jr., Lake Carmel, for appellant.

Eric T. Schneiderman, Attorney General, New York (Bradford S. Glick of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered March 11, 2015, which denied the petition pursuant to CPLR article 78 seeking to annul the September 4, 2014 determination of respondent Director of the Office of Professional Medical Conduct (DOPMC), who declined to join petitioner in his application to further modify the consent order limiting his license to practice medicine, and dismissed the proceeding, unanimously affirmed, without costs.

The test for whether an administrative agency's determination is arbitrary and capricious is whether the determination "is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter*

of Mankarios v New York City Taxi & Limousine Commn., 49 AD3d 316, 317 [1st Dept 2008]). Upon review of the record, DOPMC's decision not to join in petitioner's application was rational and based on the facts.

Public Health Law § 230(10)(q) provides only two grounds for modifying the consent order: (1) if there is new, material evidence that was not previously available at the time the consent order was executed that, had it been available, would have led to a different result; or (2) circumstances subsequent to the consent order warrant a reconsideration of the measure of discipline. DOPMC's September 4, 2014 letter considered both of petitioner's proposed modifications - (1) that petitioner be permitted to treat workers' compensation patients in the Jamaica Hospital Ophthalmology Clinic, and (2) that petitioner be permitted to treat workers' compensation patients in his private practice. DOPMC concluded that the circumstances described in petitioner's letters of support from the chief financial officer of the hospital and the head of the opthalmology department warranted only the first proposed modification.

Further, the fact that DOPMC's rejoinder to petitioner's modification request was a limited second modification order that would entail a more gradual release of the license restriction, demonstrates that the facts of this matter were considered, and

that DOPMC exercised his discretion in advocating an incremental approach.

Despite DOPMC's elaboration of his rationale in the affidavit submitted to the article 78 court, this is not a case that would require this Court to "surmise or speculate as to how or why an agency reached a particular conclusion" (*Matter of Liguori v Weiss*, 24 Misc 3d 1217[A], 2009 NY Slip Op 51508[U] [Sup Ct, Albany County 2009]). It is clear, based on the September 4, 2014 letter, as amplified by the affidavit, that petitioner, who had been disciplined for falsifying workers' compensation forms and treating workers' compensation patients when it was no longer medically indicated in his private practice, provided no evidence as to his performance while working in an unsupervised setting.

Petitioner's remaining arguments have been considered and found unavailing.

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

ENTERED: MARCH 1, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

369N Petition to Unseal the Record of Adoption of Robert, Adoptee — Index 3225/13

Kenneth Rose,
Petitioner-Appellant.

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Law Offices of Fred L. Seeman, New York (Fred L. Seeman of counsel), for appellant.

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Order, Surrogate's Court, New York County (Rita Mella, S.), entered January 10, 2014, which denied the petition to unseal the adoption records of petitioner's late father, unanimously reversed, on the law, without costs, and the matter remanded for notice and a hearing consistent with this decision.

Petitioner seeks certified copies of his late father's, the adoptee's, original birth certificate so that he and his children can obtain Italian citizenship. Petitioner asserts that the adoptee would have been 96 years old at the time of the filing of the petition, that the adoptee has no siblings, and that the adoptee's biological and adoptive parents are deceased.

Domestic Relations Law § 114, which has retroactive effect (*see Juman v Louise Wise Servs.*, 211 AD2d 446, 447-448 [1st Dept 1995]), provides that access and inspection of adoption records shall not be granted "except on good cause shown and on due notice to the adoptive parents and to such additional persons as

the court may direct" (§ 114[2]). Although petitioner has made a prima facie showing of good cause (*see Matter of S.P.*, 27 Misc 3d 1217[A], 2010 NY Slip Op 50783[U], *1 [Sur Ct, Bronx County 2010]), he failed to provide nonhearsay evidence that his sister and his mother, who are purportedly the adoptee's only other living relatives, were notified of the petition and support it (*cf.* 2010 NY Slip Op 50783[U], *1-2 [petition to unseal adoption records granted where, among other things, the biological mother submitted an affidavit supporting the petition and the court concluded that no other interested persons were entitled to notice of the petition]). Moreover, the New York City Department of Health and Mental Hygiene (DHMH), which purportedly has access to the adoptee's original birth certificate, claims that it was never served with the petition and did not appear before Surrogate's Court. Accordingly, the matter is remanded for notice to petitioner's mother, sister, and the DHMH, and for a

hearing at which these interested persons may appear and present evidence with respect to the petition (*see Golan v Louise Wise Servs.*, 69 NY2d 343, 347-348 [1987]).

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

ENTERED: MARCH 1, 2016:

CLERK