SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 17, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

386-
386A Index 651827/12

Nomura Asset Acceptance Corporation Alternative Loan Trust, etc.,
Plaintiff-Appellant,

-against-

Nomura Credit & Capital, Inc.,
Defendant-Respondent.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Christopher P. Johnson of counsel), for appellant.

Shearman & Sterling LLP, New York (Agnes Dunogué of counsel), for respondent.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 27, 2013, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 24, 2013, which granted defendant's motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court erred to the extent it found that the claims for breach of the loan representations accrued on May 1, 2006, the date of the Mortgage Loan Purchase Agreements (MLPA) containing those representations. While such claims typically accrue at the time the contract containing the representations is executed (*see ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581 [2015]), as the MLPA here specifically provides that defendant made its loan representations "as of the Closing Date," which was May 25, 2006, the claims accrued on that date and not earlier.

Nonetheless, the court correctly dismissed the complaint. The summons with notice filed by the certificate holders on May 25, 2012, while timely, was ineffective, because the certificate holders lacked standing to assert claims against defendant. Plaintiff's argument that it alleged compliance with the no-action clause, permitting the certificate holders to assert claims on behalf of the trust, is not persuasive, since the Pooling and Servicing Agreement specifically refutes this basis for the certificate holders' allegations of standing. Thus, the untimely claim brought by plaintiff on November 30, 2012 could not relate back to the defective summons, because no valid action

was commenced by the filing of that summons (*see Goldberg v Camp Mikan-Recro*, 42 NY2d 1029 [1977]; *Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 80 AD3d 505, 505-506 [1st Dept 2011]).

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

ENTERED: MAY 17, 2016

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

677 Wells Fargo Bank, N.A., doing business as America's Servicing Company,
Plaintiff-Appellant,

-against-

Raymond Jones,
Defendant-Respondent,

Andrea M. Dewar, et al.,
Defendants.

Index 17475/07

Hogan Lovells US LLP, New York (Heather R. Gushue of counsel), for appellant.

Cabanillas & Associates, P.C., White Plains (Quenten E. Gilliam of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 28, 2014, which denied plaintiff's motion to substitute, nunc pro tunc, an affidavit of merit and amount due for a prior affidavit, and granted defendant Raymond Jones's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny plaintiff's motion without prejudice, and to grant defendant's cross motion only to the extent of remanding to the motion court for a traverse hearing, and otherwise affirmed, without costs.

The motion court was correct in denying plaintiff's request to substitute the affidavit of merit by Linda Duncan dated October 24, 2013 (the 2013 Duncan Affidavit), nunc pro tunc, for the affidavit by Steven Patrick dated August 28, 2007 (the 2007 Patrick Affidavit), but for a reason different from that stated. Plaintiff sought to submit the 2013 Duncan Affidavit in order to comply with Administrative Order 548/10 of the Chief Administrative Justice, which was promulgated on October 20, 2010, as amended by Administrative Order 431/11 on March 2, 2011 (the Administrative Order).[1] Duncan states that she bases the statements in the 2013 Duncan Affidavit on "business records maintained by Wells Fargo . . . made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records." Plaintiff claims that it first acquired rights with regard to the mortgage by means of an assignment dated August 10, 2007, which purported

[1]The Administrative Order requires counsel representing plaintiff in a residential mortgage foreclosure proceeding to verify the accuracy of factual allegations set forth in the complaint and supporting affidavits, as well as the accuracy of the notarization of supporting documents. Since current counsel for plaintiff was substituted in after the 2007 Patrick Affidavit was filed, current counsel could not certify his statements. Effective August 30, 2013, CPLR 3012-b requires that counsel's certificate of merit be filed with the complaint.

to be retroactive to June 14, 2007. Therefore, there would have been no reason for Wells Fargo to make records concerning the mortgage before, at the earliest, June 14, 2007. However, the 2013 Duncan Affidavit alleges that defendant Jones failed to make mortgage payments due on and after March 1, 2007, and that a notice of default dated May 7, 2007 was sent to him. Accordingly, Duncan cannot attest to those facts based on business records made by Wells Fargo "at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR 4518[a]). Rather, her statements about events before that date must be based on records in plaintiff's possession "made . . . from information provided by[] persons with knowledge of the activity and transactions reflected in such records." We recognize that in seeking to enforce a loan, an assignee may use an original loan file prepared by its assignor, when it relies upon those records in the regular course of its business (*Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418 [1st Dept 2012]). In this case, however, Duncan does not claim to have relied on the original loan file, nor does she describe those "persons" she relied upon; presumably, Duncan is referring to "persons" employed by plaintiff's predecessor in interest. However, the 2013 Duncan Affidavit contains no factual

allegations about those "persons" to provide the court with "sufficient indicia of reliability" as to the documents prepared by plaintiff's predecessor in interest (*One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1, 11 [1st Dept 2011] [internal quotation marks omitted]; *see also People v Brown*, 13 NY3d 332,341 [2009]; *People v Cratsley*, 86 NY2d 81, 89 [1995]). Moreover, Duncan cannot rely on the 2007 Patrick Affidavit as the basis for her claims regarding events occurring before the date on which plaintiff allegedly acquired the note and mortgage, since documents prepared in connection with litigation do not qualify for the business record exception to the rule against hearsay (*National States Elec. Corp. v LFO Constr. Corp.*, 203 AD2d 49, 50 [1st Dept 1994]). Therefore, the court cannot rely on any statements in the 2013 Duncan Affidavit concerning events before the date of plaintiff's acquisition of the mortgage. Accordingly, the motion court was correct in not permitting plaintiff to substitute and rely on the 2013 Duncan Affidavit.

With regard to the cross motion, the motion court should have addressed Jones's claim of lack of personal jurisdiction over him before reaching any of the other relief he sought. Where, as here, a defendant seeks vacatur of a default under both

CPLR 5015(a)(1) (excusable default) and CPLR 5015(a)(4) (lack of jurisdiction), the court should determine whether or not it has personal jurisdiction over the defendant before reaching the 5015(a)(1) ground, since the defendant's "lack of a reasonable excuse . . . is obviated if the court is without personal jurisdiction over defendant, and all subsequent proceedings would be rendered null and void" (*Cipriano v Hank*, 197 AD2d 295, 297 [1st Dept 1994]; *see also* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:9 ["[T]he court must always rule first on the paragraph 4 jurisdictional point, which involves no discretion. Only if jurisdiction is sustained need the court go on to the paragraph 1 discretionary ground"]).

Plaintiff argues that Jones waived any challenge to personal jurisdiction by appearing in this action "without objection." We disagree. Jones first appeared by filing a pro se order to show cause dated February 25, 2010, in which he sought, inter alia, an interim stay of the foreclosure sale,[2] but did not address his default. When Jones obtained counsel soon thereafter, the motion court permitted his counsel to file a supplemental affidavit and

[2] It appears that the motion court issued the default judgment of foreclosure and sale on December 1, 2008, before Administrative Order 548/10 was issued.

attorney's affirmation, on or about April 10, 2010, which raised the issue of improper service. The motion court appears to have treated counsel's affirmation as an amended order to show cause raising the issue of service.[3] Accordingly, Jones objected to personal jurisdiction over him in the motion that constituted his first appearance in this action. He also raised it in the cross motion that is the subject of the instant appeal. The fact that the motion court did not address that argument does not constitute a waiver by Jones.

Plaintiff alleges that it effectuated substitute service upon Jones by serving a copy of the summons and complaint upon his daughter, Samantha Jones, at a specified address in the Bronx. However, CPLR 308(2) requires that substitute service be performed "at the actual place of business, dwelling place or usual place of abode of the person to be served." In his affidavit, Jones denied that he lived at that address and stated that he resided in Texas at the time of the alleged service. In further support of his motion, he submitted an affidavit by his daughter, who swore that her father did not live there and that

[3] Although it appears that Jones's order to show cause was disposed of on April 2, 2014, the decision is not part of the record on this appeal, and does not appear to be available on the Bronx County Clerk's website.

the summons and complaint were not served on her. Accordingly, contrary to plaintiff's characterization of these factual submissions as "bare-bones," Jones submitted sufficient facts to rebut plaintiff's affidavit of service, entitling him to a traverse hearing on this issue (*Johnson v Deas*, 32 AD3d 253 [1st Dept 2006]; *see also Ortiz v Santiago*, 303 AD2d 1, 4 [1st Dept 2003]).

Should Jones prevail at the traverse hearing, the action must be dismissed. Where there is "a defense of lack of personal jurisdiction, a defendant need not show a reasonable excuse and meritorious defense" (*Johnson v Deas*, 32 AD3d at 254).

On the other hand, if the motion court finds that service was properly effectuated on Jones, then it will have to address whether Jones has demonstrated a reasonable excuse and a meritorious defense under CPLR 5015(a)(1) (*see 60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d 511 [1st Dept 2013]).

A plaintiff proves it has standing to commence a mortgage foreclosure action by showing that it was "both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action was commenced" (*Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d 695, 695 [1st Dept 2012]). The assignment in this case, dated August 10, 2007,

after plaintiff commenced the mortgage foreclosure action on July 17, 2007, stated that it was effective June 14, 2007. However, "a retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of the assignment" (*Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 210 [2d Dept 2009]). Moreover, "[c]onclusory boiler plate statements such as '[p]laintiff is the holder and is in possession of the original note,' or '[p]laintiff is the holder and is in possession, or is otherwise entitled to enforce the note . . .' will not suffice when standing is raised as a defense" (*Deutsche Bank Natl. Trust Co. v Maio*, 2013 NY Slip Op 30858[U] [Sup Ct, Suffolk County 2013] [citing *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636 [2d Dept 2011]; *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]; *see also HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]). Here, even if plaintiff were permitted to substitute the 2013 Duncan Affidavit, the affiant's bare claim that plaintiff "was in possession of the Promissory Note prior to July 17, 2007" would not be sufficient to establish plaintiff's standing. Similarly, the undated endorsement of the note to plaintiff is insufficient to establish that plaintiff was the holder or asignee of the note

prior to commencement of the foreclosure action (*Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680 [2d Dept 2012]). Accordingly, it appears that Jones may have a meritorious defense.

Plaintiff argues that Jones has waived a defense based on standing, citing CPLR 3211(e) (defense of lack of standing waived if not asserted in an answer or pre-answer motion to dismiss), and citing this Court's decision in *Wells Fargo Bank, NA v Edwards* (95 AD3d 692 [1st Dept 2012]) for the proposition that a defaulting defendant waives a defense based on standing. However, in *Edwards*, defendant had failed to rebut plaintiff's prima facie showing of proper service. Here, since defendant sought in his cross motion to vacate the default judgment and interpose an answer, if he shows that he has a reasonable excuse for default, he will not have waived a defense based on standing (*see Wells Fargo Bank, N.A. v Riley*, 23 Misc 3d 1107[A], 2009 Slip Op 50616[u] [Sup Ct, Westchester County 2009] [defendants who never appeared and whose default was vacated had not waived standing defense]; *Citigroup Global Mkts. Realty Corp. v Randolph Bowling*, 25 Misc 3d 1244[A], 2007 NY Slip Op 52567[u] [Sup Ct, Kings County 2007] [where defendant was not personally served and

had not appeared, standing defense not waived]; *see also U.S. Bank, N.A. v Sharif*, 89 AD3d 723, 724 [2d Dept 2011] ["defenses waived under CPLR 3211(e) can nevertheless be interposed in an answer amended by leave of court"]).

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

ENTERED: MAY 17, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

906-
906A

Index 105539/11

Patricia German, et al.,
Plaintiffs,

Masoud Arabian,
Plaintiff-Appellant,

-against-

S&P Associates of New York, LLC,
Defendant-Respondent,

PMF Properties LLC, et al.,
Defendants.

_____

Claude Castro & Associates PLLC, New York (Claude Castro of counsel), for appellant.

Law Office of Jeffrey A. Oppenheim, New York (Jeffrey A. Oppenheim of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered December 12, 2014, which, insofar as appealed from as limited by the briefs, granted defendant S&P Associates of New York, LLC's motion to dismiss the second cause of action pursuant to CPLR 3211, unanimously affirmed, without costs. Order, same court and Justice, entered August 24, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff Masoud Arabian's motion for summary judgment on the first cause of action and dismissing defendant's affirmative defense of mutual

mistake, unanimously modified, on the law, to grant the motion as to the defense, and otherwise affirmed, without costs.

The court properly dismissed the second cause of action, which sought specific performance of the renovations to plaintiff's apartment set forth in the rider, since money damages would be an adequate remedy (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001]). The cost of installing specific GE appliances, specific types of cabinets, etc., is readily ascertainable (*see generally Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 193 [1986]).

The court properly denied plaintiff's motion for summary judgment on his first cause of action, which sought specific performance of his contract to purchase his unit. Triable issues of fact exist as to whether plaintiff repudiated the agreement and whether defendant was prejudiced by plaintiff's delay in seeking specific performance (*see Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 182 [1982]). In addition, as of the time of plaintiff's motion, defendant had not yet had an opportunity to depose plaintiff.

Defendant, on appeal, admits it is not alleging the defense of mutual mistake, and this affirmative defense is therefore dismissed.

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1037 The People of the State of New York, Ind. 7870/98
Respondent,

-against-

Aaron Ennis,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Roger S. Hayes, J.), rendered October 4, 2013, resentencing defendant to an aggregate term of 19½ to 39 years, unanimously affirmed.

Following defendant's successful CPL 440.20 motion to set aside his original sentence on grounds not at issue on appeal, the resentencing court imposed a lawful combination of concurrent and consecutive sentences. The court properly imposed consecutive sentences for separate and distinct acts committed against different victims at different times, notwithstanding that the court ordered all of these consecutive sentences to run concurrently with defendant's sentence on his conviction of conspiracy in the second degree, as was required by law given

that the nonconspiracy crimes were among the overt acts supporting the conspiracy conviction (*see People v Parks*, 95 NY2d 811, 814 [2000]). However, defendant's assertion that the sentences for the nonconspiracy convictions are effectively consecutive to the conspiracy sentence is without merit. "[S]entences may run consecutively to each other even though each of those sentences is required to run concurrently with the same third sentence" (*People v Rodriguez*, 112 AD3d 488, 489 [1st Dept 2013] *affd* 25 NY3d 238 [2015]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1147 William Hartnett, Index 110868/11
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

Black Seal Realty Corp.,
Defendant-Respondent.

_____

LaRock & Perez, LLP, New York (Lawrence B. Goodman of counsel), for appellant.

Fiden & Norris, LLP, New York (Austin Jacobson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 15, 2015, which granted the motion of defendant Black Seal Realty Corp. (Black Seal) to compel plaintiff to appear for an orthopedic physical examination, unanimously affirmed, without costs.

Plaintiff's service of an expert disclosure statement after the filing of the note of issue presented new and unanticipated claims that plaintiff's ankle condition might warrant further aggressive medical intervention, including ankle fusion or ankle replacement procedures, resulting in appreciably greater medical and economic costs than initially alleged, as well as potentially

greater disability and attendant restrictions on every day living. This constituted the requisite "unusual or unanticipated circumstances," as well as "substantial prejudice," needed to be shown to warrant the court, in a provident exercise of discretion, to grant of Black Seal's post-note of issue discovery request (*see* 22 NYCRR 202.21[d]; CPLR 3101[d][1][i]; *Bermel v Dagostino*, 50 AD3d 303 [1st Dept 2008]; *Esteva v Catsimatidis*, 4 AD3d 210 [1st Dept 2004]; *Karakostas v Avis Rent A Car Sys.*, 306 AD2d 381 [2d Dept 2003]).

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1148-
1149-
1149A In re Nadiya Marie S., and Another,

Children Under the Age of Eighteen Years, etc.,

Virgilio David O.,
Respondent-Appellant,

Kimberly F.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the children.

_____

Order of disposition, Family Court, Bronx County (Alma M. Gomez, J.), entered on or about April 21, 2015, to the extent it brings up for review a fact-finding order, same court (Erik S. Pitchal, J.), entered on or about February 20, 2015, which found that respondent Virgilio David O. (respondent) had abused the subject children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as

subsumed in the appeal from the order of disposition. Appeal from orders of protection, same court (Alma M. Gomez, J.), entered on or about April 21, 2015, unanimously dismissed, without costs, as abandoned.

The record supports Family Court's determination that when the sexual abuse occurred, respondent was a person legally responsible for the children's care; therefore, the finding of abuse against him is sustainable (*see* Family Ct Act § 1012[a], [e][iii]; [g]; *Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]; *Matter of Keoni Daquan A. [Brandon W.—April A.]*, 91 AD3d 414, 415 [1st Dept 2012]). The discussion in the fact-finding order that respondent had severely abused the children is tantamount to dicta, because Family Court ultimately determined that respondent had abused the children pursuant to Family Court Act § 1012.

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1150 Luz Chapman, Index 103882/10
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 (Melanie T. West of counsel), for respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered October 16, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff's notice of claim and complaint, as amplified by her bill of particulars, made clear that she was alleging that there were at least two separate dangerous conditions that caused or contributed to her fall, namely, the presence of a dirty, dark, somewhat dry liquid on the stairs and the defective condition of the stairs themselves, which plaintiff alleges were worn, uneven and slippery. Defendant's motion addressed the former condition but not the latter, thereby failing to

demonstrate its entitlement to judgment as a matter of law (*see e.g. Breitman v Dennett*, 77 AD3d 498 [1st Dept 2010]; *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008-1009 [2d Dept 2012]).

In view of defendant's failure to meet its initial burden, it is unnecessary to address the sufficiency of plaintiff's opposition to the motion (*see Simantov v Kipps Taxi, Inc.*, 68 AD3d 661 [1st Dept 2009]).

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1151 In re Broadway Worldwide, Inc., Index 100631/14
Petitioner,

-against-

New York State Department of
Economic Development,
Respondent.

_____

Rappaport, Hertz, Cherson & Rosenthal, P.C., Forest Hills (Howard Levine of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Judith Vale of counsel), for respondent.

_____

Determination of respondent, New York State Department of Economic Development (DED), dated February 21, 2014, affirming the decision of an administrative law judge, dated December 31, 2013, which, following a hearing, had denied petitioner production company an additional tax credit under Tax Law § 24, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Carol E. Huff, J.], entered January 23, 2015), dismissed, without costs.

DED's determination has a rational basis in the record and is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-182 [1978]). With respect to the five contracts at issue, DED rationally concluded that petitioner, despite ample opportunity, failed to differentiate between payments for services, which qualifies for a tax credit under Tax Law § 24, and payments for intellectual property rights, which does not, and failed to establish that the services referenced in the contracts were actually performed (*see* Tax Law § 24[b][2]).

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1152 Kimberlee M., etc., Index 800131/10
Plaintiff-Respondent,

-against-

Ira Jaffe, et al.,
Defendants-Appellants,

Hudson Valley Women's Health Center,
et al.,
Defendants.

_____

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for appellants.

Meagher & Meagher, P.C., White Plains (Christopher B. Meagher of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered March 23, 2015, which, to the extent appealed from as limited by the briefs, denied defendants Ira Jaffe and Health Quest Medical Practice, P.C.'s (defendants) motion for summary judgment dismissing the claims asserted on behalf of infant plaintiff BK, unanimously affirmed, without costs.

In this medical malpractice action, Dr. Jaffe and Health Quest Medical Practice, P.C.'s submission on the motion of, inter alia, the affirmation of their pediatric expert and BK's hospital records, which revealed normal Apgar scores and a prompt discharge, established a prima facie defense entitling them to

summary judgment, if not rebutted (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In opposition, plaintiffs raised a triable issue of fact as to the existence of developmental delays. Plaintiff's expert pediatric neurologist's opinion that BK has experienced developmental delays and dyspraxia is appropriately "based on facts in the record or personally known to the witness" (*Park v Kovachevich*, 116 AD3d 182, 192 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014], quoting *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]). The opinion is supported by, inter alia, BK's treating pediatrician's records, which reflect a concern about walking development, BK's parents' deposition testimony as to their observations, and the expert's finding upon a neurological examination of BK.

While certain of plaintiff's expert's opinions were conclusory, such as those relating to causation, the Jaffe defendants moved solely on the ground that BK was not injured, and thus, causation was not at issue on the motion.

The motion court did not improvidently exercise its discretion in considering the affirmation of plaintiff's

previously undisclosed expert (*see Gallo v Linkow*, 255 AD2d 113, 117 [1st Dept 1998]). CPLR 3101(d) "does not require a party to retain an expert at any particular time" (*LaMasa v Bachman*, 56 AD3d 340, 341 [1st Dept 2008]), plaintiff promptly served the expert's affirmation within 45 days of the examination of BK (*see* 22 NYCRR 202.17 [c]), and the preliminary conference order only required plaintiff to serve expert disclosures at least 60 days before trial. Moreover, the trial judge cured any possible prejudice by granting defendants permission to perform an independent medical examination of BK.

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

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1155 Credit Suisse Financial Corporation, Index 651528/13
Plaintiff-Respondent,

-against-

Dean Reskakis,
Defendant-Respondent,

Toninno Sacco, et al.,
Defendants-Appellants.

_____

Sacco & Fillas, LLP, Astoria (Donald N. Rizzuto of counsel), for appellants.

McGlinchey Stafford PLLC, New York (Victor L. Matthews II of counsel), for Credit Suisse Financial Corporation, respondent.

Furman Kornfeld & Brennan LLP, New York (Jessica Serrano of counsel), for Dean Reskakis, respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered May 29, 2015, which, to the extent appealed from as limited by the briefs, denied defendants Tonino Sacco and Elias Fillas's motion to dismiss plaintiff's complaint as against them, unanimously affirmed, with costs.

Sacco and Fillas are named partners of a law firm, and their former associate, defendant Dean Reskakis, allegedly defrauded plaintiff, the firm's client, during a mortgage closing, by failing to follow express and implied instructions, permitting the contract of sale to list a nonexistent lawyer, and disbursing

loan proceeds to unauthorized individuals who were later indicted for bank and wire fraud.

On a pre-answer motion to dismiss for lack of standing, the burden lies with the defendant to establish prima facie that plaintiff has no standing to sue (*Brunner v Estate of Lax*, 137 AD3d 553, 2016 NY Slip Op 01782, *1 [1st Dept 2016]; *Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59-60 [2d Dept 2015]). Sacco and Fillas failed to meet this burden, since they did not provide any evidence in support of their allegation that plaintiff's assignment of a note to a nonparty resulted in the extinguishment of its right to pursue its fraud claims. In particular, there is no evidence regarding the compensation plaintiff received for the assignment (*see State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 436 [2000]).

The allegations set forth in the complaint, in conjunction with the affidavit of plaintiff's executive vice president and the affirmation of plaintiff's counsel (*see Rovello v Orofino Realty Corp.*, 40 NY2d 633, 636 [1976]), state a cause of action for fraud with sufficient particularity (*see* CPLR 3016[b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]).

The aforementioned documents provide sufficient facts to reasonably infer that defendants engaged in the alleged misconduct (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

The documentary evidence does not conclusively establish that defendants did not commit fraud (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). The mortgage is the only piece of documentary evidence that conclusively refutes any allegation made by plaintiff. Although plaintiff alleges that the buyer did not execute a mortgage, it submitted a mortgage executed by the buyer. However, rejection of this allegation has no effect on the viability of plaintiff's fraud claims.

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

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1157 Eastern Concrete Materials, Inc./ Index 303005/12
NYC Concrete Materials,
Plaintiff-Respondent,

-against-

DeRosa Tennis Contractors, Inc.,
et al.,
Defendants,

DeRosa Sports Construction, Inc.,
Defendant-Appellant.

_____

Rafferty & Redlisky, Pelham (Robert G. Rafferty of counsel), for appellant.

Craig W. Miller, Brooklyn, for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about November 12, 2015, which denied defendant DeRosa Sports Construction, Inc.'s (DeRosa Sports) motion for summary judgment dismissing the complaint and all cross claims against it, unanimously modified, on the law, to grant the motion as to plaintiff's claim to the extent it is based on alter ego liability and the exceptions to successor liability for express or implied assumption of liability, mere continuation of the

purchased corporation, and de facto merger, and otherwise affirmed, without costs.

Plaintiff had a contract with defendant DeRosa Tennis Contractors, Inc. (DeRosa Tennis), which is owned 50% by defendant Thomas DeRosa (Thomas) and 50% by nonparty Angelo Pugliese. DeRosa Tennis failed to pay the amount due plaintiff, whereupon plaintiff sued not only DeRosa Tennis, but also – as relevant to this appeal – Thomas and DeRosa Sports. DeRosa Sports is wholly owned by nonparty Mathew DeRosa (Mathew), Thomas's son. Neither Thomas nor Pugliese is an officer of DeRosa Sports, but Thomas is an employee. DeRosa Sports is in the same line of business as DeRosa Tennis. At the time Mathew formed DeRosa Sports (in January 2011), he was a full-time college student.

On March 8, 2011, DeRosa Tennis sold 21 vehicles and pieces of equipment (approximately half of its equipment) to DeRosa Sports, ostensibly for $221,785. However, the six checks from DeRosa Sports to DeRosa Tennis that were specifically identified as payment on the March 8, 2011 contract totaled only $42,306.60. Thomas signed the contract on behalf of DeRosa Tennis, and Mathew signed it on behalf of DeRosa Sports.

Insofar as plaintiff's claim against DeRosa Tennis and DeRosa Sports is based on Debtor and Creditor Law § 274 ("Every conveyance made without fair consideration when the person making it is engaged . . . in a business . . . for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to the creditors"), issues of fact exist as to the fairness of the consideration (*see Madison Hudson Assoc. v Neumann*, 4 AD3d 257 [1st Dept 2004]; *see also Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]). "A conveyance between family members is subject to enhanced scrutiny" (*Sardis v Frankel*, 113 AD3d 135, 145 [1st Dept 2014]; *see also Wall St.*, 257 AD2d at 528).

DeRosa Sports's claim that it actually issued 22 checks totaling $221,785 is improperly made for the first time in its appellate reply brief (*see e.g. Shia v McFarlane*, 46 AD3d 320, 321 [1st Dept 2007]) and improperly relies on matter outside the record. We note that we denied DeRosa Sports's motion to enlarge the record (2016 NY Slip Op 67317[U] [March 17, 2016]).

An issue of fact as to whether DeRosa Tennis's conveyance of vehicles and equipment to DeRosa Sports left DeRosa Tennis with "an unreasonably small capital" (Debtor and Creditor Law § 274) is presented by Thomas's testimony that DeRosa Tennis was choking

with debt and "dying" and that "there was no money to pay anybody" (*see In re CNB Intl., Inc.*, 393 BR 306, 327 [Bankr WD NY 2008], *affd in part, vacated in part on other grounds* 440 BR 31 [WD NY 2010]).

Insofar as plaintiff's claim against DeRosa Tennis and DeRosa Sports is based on Debtor and Creditor Law § 276 ("Every conveyance made . . . with actual intent . . . to hinder, delay, or defraud . . . is fraudulent"), an issue of fact exists as to whether there was actual intent to defraud (*see Shisgal v Brown*, 21 AD3d 845, 847 [1st Dept 2005]). The sale of approximately half of DeRosa Tennis's equipment to DeRosa Sports bears some "badges of fraud" (*Wall St.*, 257 AD2d at 529), such as "the close relationship among the parties to the transaction" (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006]) and the fact that the transfer was not made in the usual course of business. In addition, an issue of fact exists as to the adequacy of the consideration.

Insofar as plaintiff's claim against DeRosa Sports is based on alter ego liability (i.e., piercing DeRosa Tennis's corporate veil to reach DeRosa Sports), the claim should be dismissed. DeRosa Sports is not even a shareholder of DeRosa Tennis. Even

if, arguendo, alter ego liability could apply to a non-owner, plaintiff has not met the other elements thereof (*see e.g. Lowendahl v Baltimore & Ohio R.R. Co.*, 247 App Div 144, 157 [1st Dept 1936], *affd* 272 NY 360 [1936]).

Plaintiff claims that DeRosa Sports is liable as DeRosa Tennis's successor in interest because it purchased approximately half of DeRosa Tennis's assets. In general, a corporation that acquires another corporation's assets is not liable for its predecessor's contract liabilities (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]; *Kretzmer v Firesafe Prods. Corp.*, 24 AD3d 158 [1st Dept 2005]). The first three exceptions to the rule do not avail plaintiff (*see Schumacher*, 59 NY2d at 245): Nothing in the March 8, 2011 contract indicates that DeRosa Sports agreed to assume DeRosa Tennis's liabilities. There was no de facto merger, because there was no continuity of ownership between DeRosa Tennis and DeRosa Sports (*see Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]). DeRosa Sports is not the mere continuation of DeRosa Tennis, because DeRosa Tennis still exists (*see Schumacher*, 59 NY2d at 245). However, by raising issues of fact as to its claims under the Debtor and Creditor Law, plaintiff raised an issue of fact as

to the fraud exception to successor liability (*see* *Staudiger+Franke GmbH v Casey*, 2015 WL 3561409, *14, 2015 US Dist LEXIS 73912, *39 [SD NY, June 8, 2015, No. 13 Cv. 6124 (JGK)]).

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1158 In re Shaquana Michelle M.-L. (Anonymous),
Petitioner-Appellant,

-against-

Leake and Watts, et al.,
Respondents-Respondents,

Administration for Children's Services,
Respondent.

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Larry S. Bachner, Jamaica, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for Leake and Watts, respondent.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for Valentina S., respondent.

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Order, Family Court, Bronx County (Linda Tally, J.), entered on or about October 20, 2015, which, following a hearing, denied petitioner mother's motions and petitions for visitation and other contact with her children, unanimously affirmed, without costs.

Family Court's determination that it would not be in the children's best interests to have visitation or any other form of contact with the mother has a sound and substantial basis in the record (Domestic Relations Law § 112-b[4]; Family Ct Act § 1055-a[b]), as she has exhibited irrational, unstable and often

violent behavior (*Matter of Maxamillian*, 6 AD3d 349, 351-352 [1st Dept 2004]; *Matter of Rueben D.R.*, 302 AD2d 234, 234-235 [1st Dept 2003]). As Family Court found, visitation, or even limited contact granted to the mother, would likely have an adverse impact on the children's relationship with their adoptive families (*Matter of Daijuanna Priscilla M.*, 290 AD2d 298, 298-299 [1st Dept 2002], *lv denied* 98 NY2d 612 [2002]). This is particularly true in light of the mother's admitted hostility toward the children's adoptive parents, and her inability to appreciate the significance or finality of the surrender agreements she entered into (*see* Social Services Law § 383-c).

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1159 Bernice Dingle, Index 108785/08
Plaintiff-Respondent,

-against-

The New York City Transit Authority, et al.,
Defendants,

Tomas R. Reyes,
Defendant-Appellant.

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Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Colin F. Morrissey of counsel), for appellant.

Kramer & Pollack, LLP, Mineola (Lisa O'Connor of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered September 26, 2014, which, to the extent appealed from, denied defendant Tomas R. Reyes's motion for summary judgment dismissing the complaint based on plaintiff's inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion as to plaintiff's claims of permanent consequential and significant limitation of use of the lumbar spine and left knee, and the 90/180-day claim, and otherwise affirmed, without costs.

Defendant met his prima facie burden by submitting the affirmations of a radiologist who found that the MRIs of the

claimed injured body parts showed degenerative changes unrelated to the accident, and of an orthopedist who found full ranges of motion in all planes as to each claimed body part (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350, 352-353 [2002]). In opposition, plaintiff raised a triable issue of fact as to whether she sustained a serious injury to her right knee through the affirmed report of her treating surgeon, who set forth limitations in right knee range of motion found on recent examination, and opined that plaintiff's right knee injuries, including a torn medial meniscus and a partial tear of the ACL, observed by him during arthroscopic surgery, were caused by the accident (*see Vargas v Moses Taxi, Inc.*, 117 AD3d 560 [1st Dept 2014]).

Plaintiff failed to raise an issue of fact with respect to her claims of serious injury to her left knee and lumbar spine, since she submitted no evidence that any injuries to those parts resulted in any significant or permanent limitation in use (*see Valdez v Benjamin*, 101 AD3d 622, 623 [1st Dept 2012]).

However, if the trier of fact determines that plaintiff sustained a serious injury to her right knee, she can recover for any other injuries shown to be causally related to the accident,

even those that do not meet the serious injury threshold (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Plaintiff's deposition testimony that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" refutes her 90/180-day claim (*see Tsamos v Diaz*, 81 AD3d 546, 547 [1st Dept 2011]).

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1163 The People of the State of New York, Ind. 2392/13
Respondent,

-against-

Melvin Santiago,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (James Wen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered October 24, 2014, convicting defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree, and sentencing him to a term of 5 years, with 15 years' postrelease supervision, unanimously affirmed.

The sentencing court had no discretion to waive or defer defendant's mandatory surcharge (*see People v Jones*, 26 NY3d 730, 732 [2016]).

Defendant did not make a valid waiver of his right to appeal, because the court stated that the waiver was in exchange for receiving the "minimum sentence," when in fact, the term of postrelease supervision was greater than the minimum. However, we perceive no basis for reducing the term.

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1164 Nevco Contracting Inc., Index 152934/15
Plaintiff-Appellant,

-against-

R.P. Brennan General Contractors
& Builders, Inc., etc.,
Defendant-Respondent.
- - - - -
[And a Third-Party Action]

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Joseph P. Dineen, Garden City, for appellant.

Foreht Associates, LLP, New York (Stephen R. Foreht of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered October 14, 2015, which denied plaintiff's motion for summary judgment on its breach of contract cause of action seeking the principal amount of $46,960, plus interest pursuant to CPLR 5001(a), unanimously reversed, on the law, with costs, the motion granted, and the matter remanded for further proceedings regarding interest in accordance with this decision.

Plaintiff subcontractor made a prima facie showing of the existence of the parties' agreement, its performance thereunder, and defendant general contractor's failure to perform, resulting in harm to plaintiff (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiff established the amount

due from defendant by submitting an email exchange between the parties, reflecting their agreement on the amount due, and defendant's representation that payment would be made as soon as it received payment from third-party defendant owner.

The "pay-when-paid" provision in the subcontract is not an effective condition precedent to defendant's duty to perform, since such provisions are "void and unenforceable as contrary to public policy" (*West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 158 [1995]; *Hugh O'Kane Elec. Co., LLC v MasTec N. Am., Inc.*, 19 AD3d 126, 126 [1st Dept 2005]). Moreover, defendant did not dispute the evidence that the parties had reached agreement on the amount due to plaintiff, and failed to submit any admissible evidence sufficient to preclude summary judgment. Although defendant's president submitted an affidavit stating that the owner has not paid defendant because the owner is dissatisfied with plaintiff's work, his statement is supported only by an unsworn spreadsheet which, as hearsay, is alone insufficient to defeat summary judgment (*Rugova v Davis*, 112 AD3d 404, 404-405 [1st Dept 2013]). In any event, the spreadsheet shows only that the owner had rejected a demand for payment, but does not indicate why the demand was rejected.

Because the parties on appeal have not addressed the date from which interest shall be computed pursuant to CPLR 5001, we remand for further proceedings and a determination regarding interest (*see Peachy v Rosenzweig*, 215 AD2d 301 [1st Dept 1995]; *see also Delulio v 320-57 Corp.*, 99 AD2d 253 [1st Dept 1984]). Upon such determination, the Clerk shall calculate the amount of interest and enter judgment accordingly (*see* CPLR 5001[c]).

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1165 In re Sara Salerno, Index 100213/12
Petitioner-Appellant,

-against-

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

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Law Firm of Jeffrey L. Goldberg, Port Washington (Eileen J. Goggin of counsel), for appellant.

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

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Order, Supreme Court, New York County (Paul Wooten, J.), entered December 20, 2013, which, inter alia, denied the petition to annul respondents' determination, dated September 14, 2011, denying petitioner's application for World Trade Center accidental disability retirement benefits, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents' determination that petitioner failed to establish that she was present at the World Trade Center (WTC) site during the statutorily required time period is supported by credible evidence and is not arbitrary and capricious (*see* Retirement and Social Security Law [RSSL] § 2[36][a], [e], [f], [g]; *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept.*,

Art. 1-B Pension Fund, 90 NY2d 139, 145 [1997]). Respondents' investigation revealed no contemporaneous records indicating that petitioner was present at the WTC site (*see Matter of Brennan v Kelly*, 111 AD3d 407 [1st Dept 2013], *lv denied* 23 NY3d 907 [2014]). Rather, it established that petitioner was assigned to and present at her command and control, located at 315 Hudson Street, during the relevant period.

Respondents were entitled to reject petitioner's statements and the letters by her two superior officers, which neither established that petitioner performed the statutorily required "rescue, recovery or clean-up" work nor identified a specific location within the statutorily defined area (RSSL § 2[36][a], [f]; *see Matter of Velez v Kelly*, 84 AD3d 693 [1st Dept 2011]). Additional documentation submitted by petitioner, including undated photographs in which she did not appear and the photographer was not identified, as well as a letter from a colleague, the contents of which, among other things, were contradicted by Police Department records, failed to establish her presence at the WTC site.

We decline to consider evidence outside of the administrative record (*see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]).

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

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1167N In re 44 Lexington Associates, LLC, Index 156467/15
Petitioner-Appellant,

-against-

Supreme Security Systems, Ltd.,
Respondent-Respondent.

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Peckar & Abramson, P.C., New York (Bradley M. Sussman of counsel), for appellant.

Kirschenbaum & Kirschenbaum, P.C., Garden City (Gene W. Rosen of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered October 22, 2015, which denied the petition to stay arbitration, unanimously reversed, on the law, without costs, and the matter remanded to Supreme Court for a hearing on the validity of the 2014 agreement.

Petitioner, who argued that its representative was defrauded into signing, or lacked authority to sign, the contract purportedly signed by the parties in 2014 (2014 Agreement), raised a threshold question regarding the validity of that agreement, which is for the court, rather than an arbitrator, to

determine (*Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 6 [1980]; *M.I.F. Sec. Co. v Stamm & Co.*, 94 AD2d 211, 213 [1st Dept 1983], *affd in part* 60 NY2d 936 [1983]; *see also* CPLR 7503[a],[b]).

To the extent that respondent relies on an arbitration clause in a contract the parties signed in 2009 (2009 Agreement), the 2009 Agreement, even if valid, is unrelated to the instant dispute. Respondent's services, in installing and maintaining additional security equipment in 2014, were rendered in connection with the 2014 Agreement, which is the contract underlying the breach of contract claim that respondent seeks to arbitrate.

Finally, we perceive no basis to dismiss the petition. Petitioner filed the petition within the required 20 days after service of the notice of demand for arbitration, and served the petition and order to show cause by the deadline the court directed in the order to show cause, which the court deemed "good and sufficient service" (*see* CPLR 306-b, 7503[c]). Petitioner's mere failure to serve a Notice of Commencement of Action Subject to Mandatory Electronic Filing (22 NYCRR § 202.5-bb[a]) along

with its petition and supporting papers does not warrant dismissal here, as respondent had notice of the electronic filing, electronically filed its cross motion to dismiss, and did not cite any prejudice resulting from this omission.

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1168N Anthony Petracca, Index 152353/13
Plaintiff-Respondent,

-against-

Hudson Tower Owners LLC, et al.,
Defendants,

Niall Lawlor,
Defendant-Appellant.

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Quirk and Bakalor, P.C., Garden City (Timothy J. Keane of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered November 20, 2014, which granted plaintiff's motion for an order extending his time to effectuate service on defendant Niall Lawlor, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting plaintiff's motion for an extension. Although plaintiff delayed in moving for an extension, other relevant factors weighed in favor of granting plaintiff's motion, including plaintiff's diligence, the expiration of the statute of limitations on plaintiff's intentional tort claims, and the absence of any prejudice to defendant, given his actual notice of

the summons and complaint (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]).

Moreover, where "some factors weigh in favor of granting an interest of justice extension and some do not, we should not disturb Supreme Court's discretion-laden determination" (*Sutter v Reyes*, 60 AD3d 448, 449 [1st Dept 2009]).

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

ENTERED: MAY 17, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1169N VR Capital Group Ltd., Index 653259/15
Plaintiff-Appellant,

-against-

Broadridge Financial Solutions, Inc.,
Defendant-Respondent.

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O'Hare Parnagian LLP, New York (Robert A. O'Hare, Jr. of counsel), for appellant.

Drinker Biddle & Reath LLP, New York (Michael O. Adelman of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 29, 2016, which granted defendant's motion to compel arbitration, unanimously affirmed, with costs.

The motion court correctly found that there was a valid agreement to arbitrate and that the issue sought to be submitted to arbitration fell within the scope of the agreement's broad arbitration clause (*see Edgewater Growth Capital Partners, L.P. v Greenstar N. Am. Holdings, Inc.*, 69 AD3d 439, 439 [1st Dept 2010]).

Defendant's failure to provide plaintiff with the requisite notice that it intended to rely on the agreement's automatic renewal provision rendered that provision unenforceable, but, contrary to plaintiff's contention, it did not invalidate the

agreement (*see* General Obligation Law § 5-903[2]; *Ovitz v Bloomberg L.P.*, 77 AD3d 515 [1st Dept 2010]), *affd* 18 NY3d 753 [2012]).

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

ENTERED: MAY 17, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

756 Cowen and Company, LLC, Index 650846/13
Plaintiff-Respondent,

-against-

Fiserv, Inc.,
Defendant-Appellant.

_____

Bryan Cave LLP, New York (Erick Rieder of counsel), for appellant.

Herbert Smith Freehills New York LLP, New York (Scott S. Balber of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 5, 2015, affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
Sallie Manzanet-Daniels
Barbara R. Kapnick
Troy K. Webber, JJ.

756
Index 650846/13

_____x

Cowen and Company, LLC,
Plaintiff-Respondent,

-against-

Fiserv, Inc.,
Defendant-Appellant.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 5, 2015, which denied defendant's motion for summary judgment dismissing the complaint.

Bryan Cave LLP, New York (Erick Rieder and Scott H. Kaiser of counsel), for appellant.

Herbert Smith Freehills New York LLP, New York (Scott S. Balber, Emily Abrahams and Justin A. Schenck of counsel), for respondent.

MANZANET-DANIELS, J.

Plaintiff, an investment bank, was retained by defendant to provide financial advisory services in connection with defendant's potential acquisition of another company. On October 6, 2010, the parties entered into an engagement letter pursuant to which plaintiff was "engaged to act as lead financial advisor to [defendant] in connection with a proposed Transaction . . . involving the possible acquisition or other business combination by [defendant] or an affiliate thereof or with CashEdge Inc. (The 'Target')." Defendant agreed to pay plaintiff a "Transaction Fee" and to reimburse it for reasonable expenses. Defendant also agreed to pay a "Break-Up Fee" in the event of a failed transaction.

The parties did not define the "Transaction Fee" by a dollar amount or percentage value. Instead, they agreed to a provision which referenced "investment banking industry practice" for comparable transactions. The provision required the parties to "work in good faith to determine the amount of the Transaction Fee" to be paid to plaintiff "after reviewing additional information" about the potential transaction, and they "agree[d] that such Transaction Fee shall be consistent with investment banking industry practice for transactions of comparable complexity, level of analysis and size."

By November 2010, the parameters of a potential acquisition of CashEdge by defendant were becoming clear. Matthew Epstein, of plaintiff, and Jim Cox, of defendant, were in regular communication concerning the terms of the deal. Plaintiff assisted in the preparation of proposals to CashEdge, including valuation analyses, projections and revisions.

On November 6, 2010, defendant made an initial offer to acquire CashEdge at total consideration of up to $425 million, which was rejected. Plaintiff thereafter assisted defendant in drafting an indication of interest letter more specifically describing the purchase price and structure for the potential acquisition. The indication of interest, submitted to CashEdge on December 20, 2010, proposed that defendant "pay total consideration of up to $450 million" to acquire CashEdge.

The parties' principals began to discuss the Transaction Fee payable pursuant to the agreement. Epstein proposed a fee equal to 1% of the value of the potential transaction. He sent Cox surveys of "M&A Acquiror Advisor Fees" and "M&A Target Advisor Fees" sourced by a Thomson Reuters entity. These surveys, referred to as "fee runs," reflect publicly-reported investment banking fees for comparable transactions. The surveys reflected a mean fee of .95 of one percent for deals valued between $300 and $500 million. Witnesses confirmed that the use of these

surveys is standard practice for investment banks and their clients. Kevin Raidy, a 24-year veteran of the investment banking industry, testified that fee runs "are the data sources that both purveyor and consumers of financial – the financial advisory services rely upon as the basis for such fees." David Stowell, a professor of finance at Northwestern University's Kellogg School of Management, opined that use of the Thomson Reuters survey is standard practice in the calculation of investment banking fees. He further opined that it was standard practice to determine the fee at some time after an engagement letter had been signed, noting that the structure, size and complexity of a transaction are often not clear at the time the letter is signed.

The indication of interest was not signed, and negotiations stalled in or around February 2011. Defendant thereafter resumed negotiations with CashEdge, and on May 25, 2011 engaged another investment bank to complete the acquisition. On September 14, 2011, the deal closed.

After learning of the acquisition, plaintiff tendered an invoice to defendant reflecting a Transaction Fee in the amount of $4,650,000 (i.e., 1% of the CashEdge acquisition price) plus out-of-pocket expenses. The invoice was accompanied by the Thomson Reuters survey. Defendant maintained that plaintiff was

not entitled to compensation for a transaction in which it had not been involved. Cox sent a letter to plaintiff claiming that plaintiff "withdrew" from the engagement in December 2010 after the contemplated transaction had been "abandoned." It is undisputed that the agreement was never terminated by either party upon 10 days notice, as required by the agreement.

This litigation ensued. The motion court denied defendant's motion for summary judgment after oral argument, finding an issue of fact as to whether the 1% fee plaintiff requested was supported by the industry practice of conducting fee runs.

We agree and now affirm. The doctrine of definiteness "assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]). It is to be sparingly used, as a "last resort," and only when an agreement "cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear" (*id.* at 483).

The Court of Appeals has cautioned that if applied with too "heavy [a] hand," the doctrine may negate the reasonable expectations of the parties in entering into the contract (*id.*).

The "Transaction Fee" provision explicitly references the type of "commercial practice, or trade usage" New York courts routinely rely upon to render a price term sufficiently definite (*see e.g. Basu v Alphabet Mgt., LLC*, 127 AD3d 450 [1st Dept 2015] ["(t)he court correctly found that the claimed oral agreements are not as a matter of law unenforceable for indefiniteness, since there may exist an objective method for supplying the missing terms needed to calculate the alleged compensation owed plaintiff"]; *Interoil LNG Holdings, Inc. v Merrill Lynch PNG LNG Corp.*, 60 AD3d 403 [1st Dept 2009] ["(w)hile the price term in th(e) agreement is not definite on its face, we find defendant has made a sufficient showing that the term can be supplied from public price indices and industry practice"]; *Bernstein v 1995 Assoc.*, 185 AD2d 160 [1st Dept 1992] [price term reference to "fair market value" sufficiently definite under New York law

since it could be determined objectively]).[1] The fee enforceable inasmuch as it may be ascertained from public price indices and industry practice, i.e., the Thomson Reuters surveys.

Where, as here, the record demonstrates that sophisticated parties intended to be bound by an agreement, the doctrine of definiteness should not be used to defeat the bargain of the parties (*see e.g. Abrams Realty Corp. v Elo*, 279 AD2d 261 [1st Dept 2001], *lv denied* 96 NY2d 715 [2001] [agreement not rendered unenforceable because of its failure to specify the rate at which the plaintiff's commission would be computed "since it is clear that plaintiff did not agree to work without compensation and that the parties understood that plaintiff would be compensated at the prevailing, normal and accepted rates"]).

The parties' pre-litigation course of dealing is also consistent with an intent to be bound by the Transaction Fee provision. After defendant sent CashEdge the indication of

[1]In arguing to the contrary, defendant relies on two federal lower court decisions. *Benevento v RJR Nabisco, Inc.* (1993 WL 126424, 1993 US Dist LEXIS 6226 [SD NY Apr 1, 1993]), has never been cited, let alone relied on, by a New York court. *GEM Advisors, Inc. v Corporacion Sidenor, S.A.* (667 F Supp2d 308 [SD NY 2009]), has been cited by us once on an unrelated point. These lower court decisions are of course not binding on this Court.

interest on or about December 20, 2010, the parties began discussing plaintiff's transaction fee. Plaintiff sent fee runs to defendant, and the parties discussed the materials. At no time did defendant object to plaintiff's approach.

Accordingly, the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 5, 2015, which denied defendant's motion for summary judgment dismissing the complaint, should be affirmed, without costs.

All concur.

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

ENTERED: May 17, 2016

CLERK