SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 11, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3024 Julio C. Sanchez, et al., Index 302274/12
Plaintiffs-Respondents,

-against-

Stephanie A. Steele, et al.,
Defendants-Appellants.

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Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for appellants.

Ginarte Law Firm, New York (Timothy Norton of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered October 28, 2015, which denied defendants' motion for summary judgment dismissing the complaint on the serious injury threshold of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants made a prima facie showing that plaintiff Julio Sanchez (plaintiff) did not suffer a serious injury causally related to the subject motor vehicle accident, which occurred in May 2010, but had preexisting lumbar disc herniations, for which

he received treatment after an earlier motor vehicle accident, in January 2009. Defendants' radiologist compared MRI films of plaintiff's lumbar spine taken before and after the subject accident, and concluded that there was no evidence of any injury caused by that accident or of any exacerbation of plaintiff's preexisting conditions (*see Garcia v Feigelson*, 130 AD3d 498 [1st Dept 2015]). Defendants' orthopedist reviewed plaintiff's medical records, which indicated that plaintiff complained of worsening low back pain that began in March 2010, before the subject accident, and that his physician had advised him in July 2009 to undergo a discectomy.

The motion court providently exercised its discretion in accepting plaintiffs' untimely opposition papers, since defendants did not demonstrate any prejudice and were able to submit reply papers on the motion (*see Serradilla v Lords Corp.*, 117 AD3d 648, 649 [1st Dept 2014]). However, plaintiffs' submissions were insufficient to raise a triable issue of fact as to whether the subject accident exacerbated the condition of plaintiff's lumbar spine, resulting in the need for the surgery that he underwent about two months after the accident, in July 2010.

Plaintiffs' expert orthopedist, who examined plaintiff five years after the subject accident, failed to explain, in a

specific and nonconclusory manner, how the accident exacerbated plaintiff's preexisting lumbar spine condition, for which plaintiff's own MRI reports and medical records showed that surgery had been recommended before the accident (*see Marino v Amoah*, 143 AD3d 541 [1st Dept 2016]). The expert provided no objective basis or reason, other than the history related to him by plaintiff, for his opinion that the accident exacerbated the preexisting condition of plaintiff's lumbar spine (*see id.* at 541; *Campbell v Fischetti*, 126 AD3d 472, 473 [1st Dept 2015]). Nor did he provide a basis for determining the extent of any exacerbation of plaintiff's prior injuries (*see Brand v Evangelista*, 103 AD3d 539, 540 [1st Dept 2013]).

Defendants' showing that plaintiff did not suffer any injuries causally related to the subject accident and plaintiffs' failure to raise an issue of fact as to causation require dismissal of the 90/180-day claim (*see Nakamura v Montalvo*, 137 AD3d 695 [1st Dept 2016]).

The motion court erred in considering evidence of injury to plaintiff's cervical spine in opposition to defendants' motion,

because plaintiffs did not plead a cervical spine injury in their bill of particulars (*see Boone v Elizabeth Taxi, Inc.*, 120 AD3d 1143, 1144 [1st Dept 2014]).

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Acosta, Mazzarelli, Manzanet-Daniels, Webber, JJ.

3071 Andy Mark Lindo, Index 309604/12
Plaintiff-Appellant,

-against-

Denise Bellamy Brett,
Defendant,

Metropolitan Transit Authority,
et al.,
Defendants-Respondents.

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Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for appellant.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about October 1, 2015, which, inter alia, granted the motion of defendants Metropolitan Transportation Authority (s/h/a as Metropolitan Transit Authority) and MTA Bus Company (together the moving defendants) for summary judgment dismissing the complaint as against all defendants on the threshold issue of serious injury under Insurance Law § 5102(d), and denied plaintiff's motion to, among other things, amend the complaint to plead proper compliance with Public Authorities law § 1276(1) and General Municipal Law § 50-e, unanimously modified, on the law, to reinstate the complaint as against MTA Bus Company and defendant Denise Bellamy Brett, and to grant the motion to amend

the complaint and deem the amended complaint timely served nunc pro tunc, and otherwise affirmed, without costs.

Plaintiff alleges that he sustained serious injuries to his cervical spine, lumbar spine, right shoulder, and right knee as a result of a collision, on November 4, 2011, between the car he was driving and a vehicle operated by MTA Bus Company. Metropolitan Transportation Authority and MTA Bus Company moved for summary judgment dismissing the complaint on the ground that, among other things, plaintiff could not satisfy the serious injury threshold. In support, they submitted, inter alia, the affirmed reports of neurologist Iqbal Merchant, M.D. and radiologist Lewis M. Rothman, M.D. Dr. Merchant conducted a physical examination of plaintiff on April 3, 2014. He observed normal ranges of motion in plaintiff's lumbar and cervical spines, diagnosed him with resolved sprains/strains in those areas, and opined that he was not disabled and could perform all of his daily activities. Dr. Merchant did not examine plaintiff's right shoulder or knee and offered no opinion as to those claimed injuries.

Dr. Rothman reviewed MRIs of plaintiff's cervical and lumbar spines taken within approximately one and two months of the accident, respectively. Regarding the former, he observed disc desiccation throughout, and osteophyte formations at C4-C5, C5-

C6, and C6-C7. There was a minimal disc bulge at C6-C7, but no evidence of acute disc herniation. He concluded that plaintiff suffered from "chronic degenerative disc disease." As to the lumbar spine, Dr. Rothman noted disc desiccation throughout, especially at L5-S1, as well as disc space narrowing, and a small herniation at L5-S1. He concluded that plaintiff suffered from degenerative disc disease. Dr. Rothman also reviewed an MRI of plaintiff's right shoulder taken less than one month after the accident. He noted that there was no evidence of fracture, a minimal hypertrophic change at the AC joint with impingement on the supraspinatus, an intact glenohumeral joint, and no evidence of tears to the labrum or rotator cuff. Finally, he reviewed an MRI of plaintiff's right knee taken less than two weeks after the accident, and stated that all ligaments and menisci appeared intact, and that there was no evidence of any tears.

Based on the foregoing, the moving defendants argued that they had satisfied their prima facie burden of establishing that plaintiff had not sustained a permanent consequential limitation to the parts of his body alleged in his verified bill of particulars. They further posited that plaintiff did not satisfy the 90/180-day category of Insurance Law section 5102(d), citing deposition testimony from plaintiff in which he acknowledged that he only missed two weeks of work as a barber after the accident.

In addition, the moving defendants claimed that plaintiff's claim should be barred by the fact that, at the time of his deposition, he had not treated for his injuries in two years, and had no current appointments to see a doctor.

The moving defendants cited additional grounds for dismissal. Metropolitan Transportation Authority argued that, aside from being misnamed, it did not own the vehicle that collided with plaintiff's car, and submitted an affidavit from an employee of MTA Bus Company stating that MTA Bus Company owned the vehicle and was a separate and distinct entity from Metropolitan Transportation Authority. The moving defendants also argued that the complaint failed to comply with Public Authorities Law section 1276(1), which requires a complaint against a public authority to allege that thirty days have elapsed since service of a notice of claim on the authority and that the authority has refused to pay the claim.

In opposition to the moving defendants' motion, plaintiff submitted the affirmed report of Dr. Dmitry Zhukovski, D.O., dated November 14, 2011, 10 days after the accident, the same date that Dr. Zhukovski conducted a physical examination of plaintiff. On that date, Dr. Zhukovski observed restricted ranges of motion in plaintiff's cervical spine, lumbar spine, right shoulder, and right knee. He opined that, based on the

medical history related to him by plaintiff and the results of his physical examination, "the conditions described above are solely related to and have direct cause relationship [sic] to the accident mentioned above." While his clinical assessment was of sprains and contusions to the relevant body parts, Dr. Zhukovski did allow for the possibility that "these areas may be permanently weakened for an indefinite period of time resulting in significant and permanent restricted mobility."

Plaintiff also submitted the affirmation of Dr. Vladimir Gressel, M.D., who conducted a physical examination of plaintiff on December 22, 2014. Dr. Gressel found limited ranges of motion in all of the body parts at issue. He concluded, based on the history provided by plaintiff and a review of available medical records, that plaintiff's injuries were causally related to the accident and traumatically induced. He opined that plaintiff was partially permanently disabled and that his impairments would predispose him to future difficulties. Regarding the part of the moving defendants' motion that was to dismiss as against Metropolitan Transit Authority and MTA Bus Company, plaintiff cross-moved to amend the complaint to include the allegations necessary to comply with Public Authorities Law section 1276(1).

The court granted the moving defendants' motion, and

dismissed the complaint as against them as well as against Denise Bellamy Brett, the driver of the MTA Bus Company vehicle, who had not moved for summary judgment. The court found that Dr. Zhukovski's exam did not establish permanency and that Dr. Gressel's affirmation was not probative as to causation. The court did not comment on whether the injuries themselves would qualify under any of the serious injury categories. The court also denied plaintiff's cross motion, presumably on the basis that it was academic.

The moving defendants satisfied their prima facie burden on their motion for summary judgment by presenting the affirmed reports of Dr. Merchant and Dr. Rothman. While Dr. Merchant did not address plaintiff's right knee or his right shoulder, Dr. Rothman read MRIs taken shortly after the accident, which he interpreted as showing normal conditions in the knee, minimal hypertrophic change in the shoulder, and chronic degenerative disc disease in the lumbar and cervical spines. Accordingly, the burden shifted to plaintiff to rebut the moving defendants' proof on both causation and permanence (*see Rickert v Diaz*, 112 AD3d 451, 451-452 [1st Dept 2013]; *Paduani v Rodriguez*, 101 AD3d 470, 470 [1st Dept 2012]).

The moving defendants argue that plaintiff failed to raise an issue of fact as to causation because Dr. Gressel failed to

rebut Dr. Rothman's findings of degenerative changes in plaintiff's spine. In making this claim, the moving defendants, like the motion court, ignore that Dr. Zhukovski gave a very clear opinion as to causation, having examined plaintiff only 10 days after the accident, observed his injuries, and heard from plaintiff that he had no medical history suggesting that the injuries were due to a cause separate and apart from the motor vehicle accident. This was sufficient to raise an issue of fact (*see Williams v Tatham*, 92 AD3d 472, 473 [1st Dept 2012]).

The moving defendants further argue that Dr. Zhukovski's report was insufficient to raise an issue of fact as to permanency. Again like the motion court, this ignores the findings of permanency in Dr. Gressel's report. Indeed, it would have been difficult, only 10 days after the accident, for Dr. Zhukovski to have concluded, within a reasonable degree of medical certainty, that the injuries sustained by plaintiff were permanent. In any event, Dr. Zhukovski expressly stated that he could not rule out that plaintiff's condition would ultimately prove to be permanent. As for Dr. Gressel's report, it was sufficient to raise an issue of fact as to permanency, insofar as it noted recent restricted ranges of motion in the affected body parts, and was based on objective testing such as a positive finding for the straight leg raising test, which this Court has

found to be sufficient to defeat summary judgment (*see Osborne v Diaz*, 104 AD3d 486, 487 [1st Dept 2013]).

We reject the moving defendants' argument regarding a so-called unexplained gap in treatment. The moving defendants failed to shift the burden on this issue, because they submitted no evidence that, at the time plaintiff stopped treatment, his doctor continued to believe that plaintiff would actually benefit from any further treatment (*compare Nicholas v Cable Vision Sys. Corp.*, 116 AD3d 567, 568 [1st Dept 2014] ["plaintiff failed to offer a reasonable explanation for ceasing treatment, despite her physicians' recommendations of further treatment"]). In fact, plaintiff testified at his General Municipal law section 50-h hearing that at his last appointment his doctor had told him he was not "doing too good" and that there was a possibility he would need surgery to make his pain "stop for good." Accordingly, there is a question whether plaintiff was justified in ceasing treatment because it was no longer efficacious, which makes irrelevant whether plaintiff's wife's insurance would have paid for further treatment.

Plaintiff's deposition testimony that he missed two weeks of work after the accident defeats his 90/180-day claim (*see Roldan v Conti*, 137 AD3d 507, 508 [1st Dept 2016]).

Although plaintiff raised an issue of fact on the threshold

ground discussed above, the moving defendants' motion was properly granted as to Metropolitan Transportation Authority. The affidavit from the MTA Bus Company employee established that the vehicle involved in the accident was owned by it, and that MTA Bus Company is a separate and distinct entity from Metropolitan Transportation Authority. Accordingly, the latter could not be liable for the accident (*see Towbin v City of New York*, 309 AD2d 505, 505-506 [1st Dept 2003]).

However, plaintiff is entitled to amend his complaint to include language pleading compliance with the notice of claim requirements of Public Authorities Law § 1276(1) and General Municipal Law § 50-e. Leave to amend a pleading "'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]; CPLR 3025[b]). "To establish prejudice, which must be significant, there must be some indication that the opposing party will have been hindered in the preparation of its case or prevented from taking some measure to support its position" (*Spitzer v Schussel*, 48 AD3d 233, 233 [1st Dept 2008] [internal citation omitted]).

Here, allowing plaintiff to amend the complaint to allege that he filed a notice of claim and that no payment was made would not prejudice MTA Bus Company and its driver. The record

conclusively shows that MTA Bus Company had notice of plaintiff's claim prior to the commencement of the action due to its appearance at a 50-h hearing (*see D'Alessandro v New York City Tr. Auth.*, 83 NY2d 891, 893 [1994]).

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

ENTERED: APRIL 11, 2017

CLERK

Friedman, J.P., Andrias, Feinman, Kapnick, Gesmer, JJ.

3318 The People of the State of New York, Respondent, Ind. 5578/10

-against-

Bernard Rodriguez, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered February 7, 2014, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 3½ years, unanimously affirmed.

Defendant and his nephew Joshua Flores were originally charged with criminal possession of marijuana in the second degree, four counts of criminal possession of a weapon in the second degree (two charging intent to use unlawfully, and two charging possession outside the defendant's home or place of business), and criminal possession of a weapon in the fourth degree, based on the presence of marijuana and firearms in an apartment when the police executed a search warrant there on August 10, 2010. At defendant's first trial, the court dismissed

the two counts that charged defendant with possessing a weapon outside his home or place of business, and the jury found defendant guilty of criminal possession of a weapon in the fourth degree and possession of marijuana in the second degree. The jury deadlocked on the two remaining counts of criminal possession of a weapon in the second degree (intent to use unlawfully). While defendant's appeal of the conviction from the first trial was pending, he was retried before another justice and a jury and convicted of the two remaining counts.

In his appeal from the first conviction, defendant argued, inter alia, that the trial court's preclusion of several text message conversations retrieved from his nephew's cell phone denied him the right to present his defense that it was his codefendant nephew who had a drug business and possessed the weapons in furtherance of the business. In unanimously affirming his conviction, we found that the prosecution had proven defendant's knowing constructive possession of the contraband, (110 AD3d 456, 457 [1st Dept 2013], *lv denied* 23 NY3d 1066 [2014]). Although we agreed with defendant that a number of the text messages were nonhearsay and were admissible, we held that their preclusion was harmless error, because the two messages that were admitted were "similar" to the others, and the additional messages would not have affected the verdict (110 AD3d

at 458). We held that the error "did not rise to the level of depriving defendant of his right to present a defense" (*id.*).

In this appeal, defendant contends that he was deprived of his federal and state due process rights to a fair trial and to present a defense (*see generally Chambers v Mississippi*, 410 US 284 [1973]). Here, the trial court denied him permission to present any of the many text messages to the jury. It also precluded introduction of a photograph from his nephew's cell phone showing the nephew holding one of the firearms at issue. Additionally, it did not allow the jury to hear of the nephew's guilty plea to attempted possession of one of the firearms. During a colloquy between the court and the parties' counsel, before the jury entered, the court was informed that the first trial court had allowed two text messages and the photograph to be presented to the jury. The judge indicated his disagreement with that earlier ruling, finding that none of this evidence was relevant to refuting the charges, nor was it exculpatory; at best, it showed that the nephew was involved in the drug business, but it did not show that defendant was not involved. Because this trial took place while the first appeal was still pending, neither the parties nor the second trial court had the benefit of our ruling that the text messages were nonhearsay.

In light of our decision in the earlier appeal, defendant

now contends it was error for the trial court to preclude introduction of the text messages at the second trial. Defendant contends that the text messages, the photograph, and the nephew's admission, were critical to his defense that his nephew was running the marijuana operation, not he. He seeks reversal of his conviction on the basis that he was denied his right to present a defense, in violation of his due process rights to a fair trial.

Evidence purporting to show third-party culpability is reviewed "in accordance with ordinary evidentiary principles" requiring a defendant to establish that the probative value of the evidence outweighs the potential for undue prejudice, delay, or confusion (*see People v Powell*, 27 NY3d 523, 526 [2016]). A trial court has wide latitude to admit or preclude evidence after weighing its probative value against any danger of confusing the main issues, unfairly prejudicing the other side, or being cumulative (*People v Halter*, 19 NY3d 1046, 1051 [2012]; *People v Petty*, 7 NY3d 277, 286 [2006]). The court examines the "particular circumstances" of each case when making its rulings (*People v Aska*, 91 NY2d 979, 981 [1998]). It has the discretion to exclude relevant evidence upon finding it has insufficient probative value (*see People v Primo*, 96 NY2d 351, 355 [2001]). Evidence must be more than of "slight, remote or conjectural

significance" (*id.* at 355-356 [internal quotation marks omitted]).

Evidence of third-party culpability will be excluded where it has slight probative value but has "strong potential" for undue prejudice, trial delay and jury confusion (*Primo*, 96 NY2d at 357). Upon a retrial, the evidentiary rulings of a court of coordinate jurisdiction are not binding on the court conducting the second trial (*see People v Nieves*, 67 NY2d 125, 136 [1986]).

At the second trial, the trial court's ruling was not based on a finding of whether the texts were hearsay, but rather on an evaluation of their relevance and probative value, an issue not addressed in defendant's earlier appeal. The court explicitly reasoned that the text messages and photograph only supported the claim that the nephew was a marijuana dealer, but did not exclude defendant from culpability. It reasonably found that none of the evidence was relevant. Evidence of "conjectural significance" has generally been held to be insufficiently probative to outweigh the risks of undue prejudice to the opposing party, confusing the issues or misleading the jury (*People v Primo*, 96 NY2d at 355 [internal quotation marks omitted]; *see also People v Boatwright*, 297 AD2d 603 [1st Dept 2002], *lv denied* 99 NY2d 533 [2002] [proper to exclude evidence that was irrelevant or collateral to the issues presented at trial]). In short, the

evidentiary rulings did not constitute an improvident exercise of discretion (*see People v Davidson*, 121 AD3d 612, 613 [1st Dept 2014], *lv denied* 25 NY3d 988 [2015]).

The verdict was neither against the weight of the evidence nor based on legally insufficient evidence (see *People v Danielson*, 9 NY3d 342 [2007]). As in the earlier appeal, the evidence in this case was sufficient to support the inference that defendant had dominion and control of the apartment, and in particular over the specific room where the contraband was found (*see People v Roque*, 99 NY2d 50, 54 [2002]). Accordingly, the evidence of constructive possession was legally sufficient. The jury rationally found, beyond a reasonable doubt, and based on the evidence at trial, that defendant was in constructive possession of the two firearms.

We have considered defendant's other arguments and find them unavailing.

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, JJ.

3408 Steven Goldin, etc., et al., Index 651021/13
Plaintiffs-Appellants,

-against-

TAG Virgin Islands, Inc. formerly known as Taurus Advisory Group, Inc.,
Defendant,

James S. Tagliaferri, et al.,
Defendants-Respondents.

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Lax & Neville LLP, New York (Barry R. Lax of counsel), for appellants.

James Tagliaferri, respondent pro se.

Patricia J. Cornell, respondent pro se.

Schulte Roth & Zabel LLP, New York (Michael G. Cutini of counsel), for IEAH Corporation, IEAH Stables, Inc., International Equine Acquisition Holdings, Inc. and Michael Iavarone, respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 13, 2015, which granted defendants-respondents' motions to dismiss the complaint as against them, unanimously modified, on the law, to deny the motions as to the fraud, breach of fiduciary duty, negligent misrepresentation, constructive fraud, and aiding and abetting breach of fiduciary duty claims as against Tagliaferri and Cornell, the breach of contract claim against IEAH Corporation, IEAH Stables, Inc., International Equine Acquisitions Holdings, Inc. (collectively, IEAH), the

aiding and abetting fraud and breach of fiduciary duty claims against IEAH and Iavarone, and the unjust enrichment claim against IEAH and Iavarone, and otherwise affirmed, without costs.

In light of the principles that, on a motion to dismiss pursuant to CPLR 3211, the facts alleged in the complaint must be accepted as true and the plaintiff afforded every favorable inference and that, in the absence of a conclusive document, neither the lack of evidentiary submissions to support the plaintiff's claims nor the defendant's denials are dispositive (*see Leon v Martinez*, 84 NY2d 83 [1994]), the motion court erred in dismissing the complaint in its entirety.

The fraud, negligent misrepresentation, and constructive fraud claims (the fraud claims) as against Tagliaferri and Cornell, even absent details of time and place, allege facts sufficient to permit a reasonable inference of the alleged misconduct, thereby meeting the heightened pleading requirement of CPLR 3016(b) (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]; *Board of Mgrs. of 411 E. 53rd St. Condominium v Dylan Carpet*, 182 AD2d 551 [1st Dept 1992]). The breach of fiduciary duty and aiding and abetting claims, while alleging a part of the entire alleged scheme, are based on particular acts different from the alleged fraudulent acts and are not duplicative of the fraud claims (*see Bullmore v Ernst &*

Young Cayman Is., 45 AD3d 461, 463 [1st Dept 2007]).

The fraud claim was correctly dismissed as against IEAH and Iavarone. The complaint does not allege facts from which it could be found that IEAH had a duty to disclose material information to plaintiffs (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011]).

The complaint states a cause of action against IEAH and Iavarone for aiding and abetting fraud and breaches of fiduciary duty (*see Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]). Plaintiffs have adequately pleaded actual knowledge and substantial assistance via allegations, inter alia, that IEAH and Iavarone paid undisclosed and illegal kickbacks and fees to the TAG defendants for "investment advisory services" that were never provided, and that IEAH and Iavarone paid commissions that were not a term of certain convertible notes at issue. The complaint further alleges that the TAG defendants created backdated invoices and threatened to cut off IEAH's funding if it did not allow TAG access to its books and records.

The complaint states a cause of action for breach of contract against IEAH. Contrary to IEAH's contention, the complaint identifies the contract as the convertible notes, to which plaintiffs claim they are third-party beneficiaries (*see NYAHSA Servs., Inc., Self-Ins. Trust v Recco Home Care Servs.*,

Inc., 141 AD3d 792, 797 [3d Dept 2016]). The motion court erred in finding that this claim was self-defeating since the conflicting statement was a quote from an email, not an allegation.

As there is a genuine dispute over the existence of the contract, the unjust enrichment claim was properly pleaded in the alternative to the contract claim (*see Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438-439 [1st Dept 2012]).

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

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3661 The People of the State of New York, Respondent, Ind. 442/13 1304/13

-against-

Isam Henry, Defendant-Appellant.

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Office of The Appellate Defender, New York (Rosemary Herbert of counsel, for appellant.

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Judgment, Supreme Court, Bronx County (William Mogulescu, J.), rendered March 14, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3663 Genesis Merchant Partners, LP, et al., Plaintiffs-Appellants, Index 653145/14

-against-

Gilbride, Tusa, Last & Spellane LLC, et al., Defendants-Respondents.

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Law Office of Wallace Neel, P.C., New York (Wallace Neel of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Thomas A. Leghorn of counsel), for respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about June 23, 2015, which to the extent appealed from as limited by the briefs, upon defendants' motion to dismiss, dismissed plaintiffs' breach of fiduciary duty cause of action as duplicative of their legal malpractice cause of action, unanimously affirmed, with costs.

Defendants' alleged failure to disclose their legal malpractice does not give rise to a separate action for breach of fiduciary duty (*Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435, 436 [1st Dept 2011]). Plaintiffs have not sufficiently alleged defendants' overbilling to support a separate cause of action (*cf. Cherry Hill Mkt. Corp. v Cozen O'Connor P.C.*, 118 AD3d 514, 514 [1st Dept 2014] [breach of fiduciary duty claim was

not duplicative where, among other things, the plaintiffs alleged that the defendants had overbilled the plaintiffs]).

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

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3664-
3665 In re Angelise, L., and Others,

Children Under the Age of Eighteen Years, etc.,

Hunter L.,
Respondent-Appellant,

-against-

The Administration for Children's Services,
Petitioner-Respondent.

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Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (Linda Tally, J.), entered on or about March 26, 2016, which to the extent appealed from, brings up for review a fact-finding order, same court and Judge, entered on or about March 4, 2015, which found that the respondent father neglected 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.

A preponderance of the evidence supports the finding that

the father neglected the subject children by reason of his mental illness (*see Matter of Immanuel C.-S. [Debra C.]*, 104 AD3d 615 [1st Dept 2013]). The father's failure to comply with mental health treatment and his continued use of marijuana have directly impacted the subject children's development.

The father's failure to properly toilet train Angel, which left him in diapers at age five, resulted in the child's inability to be enrolled in school. The father also failed to obtain services or alternate educational services to address the children's developmental delays (*see Matter of Isaiha M. [Atavia M.]*, 115 AD3d 575 [1st Dept 2014]; *Matter of Aliyah B. [Denise J.]*, 87 AD3d 943 [1st Dept 2011]; *Matter of Annalize P. [Angie D.]*, 78 AD3d 413, 414 [1st Dept 2010]). As such, a preponderance of the evidence supports the finding that the father educationally neglected the children. The record also supports the finding of medical neglect, in that the father failed to follow through on referrals to medical professionals to address the children's serious developmental problems, obesity, and one

child's extensive tooth decay or "bottle rot" (*see Matter of Michael P. [Orthensia H.]*, 137 AD3d 499 [1st Dept 2016]).

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3666 Paulus Brown, Index 303527/15
Plaintiff-Appellant,

-against-

Deborah Nocella, et al.,
Defendants-Respondents.

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Burns & Harris, New York (Blake G. Goldfarb of counsel), for appellant.

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Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered February 24, 2016, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established entitlement to judgment as a matter of law in this action for personal injuries sustained when plaintiff's vehicle was struck from behind by defendants' vehicle (*see e.g. Santana v Tic-Tak Limo Corp.*, 106 AD3d 572, 573-574 [1st Dept 2013]). In opposition, defendants failed to provide a nonnegligent explanation for the accident. Defendants' response to the motion consisted of an affirmation of their attorney, who had no personal knowledge, and who argued only that the motion

was premature, since discovery was outstanding (*see McCarthy v Art Van Lines USA Inc.*, 144 AD3d 483 [1st Dept 2016]; *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: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3667-
3668 Index 651329/15

Hill Dickinson LLP,
Plaintiff-Respondent,

-against-

Il Sole Limited,
Defendant,

Michael Hirtenstein,
Defendant-Appellant.

_____

Law Office of Michael F. Schwartz, New York (Michael F. Schwartz of counsel), for appellant.

Vedder Price P.C., New York (Charles J. Nerko of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 5, 2016, which, inter alia, granted plaintiff an extension of time nunc pro tunc to re-serve defendant Michael Hirtenstein with the summons and motion for summary judgment in lieu of complaint, unanimously dismissed, without costs. Appeal from order and judgment (one paper), same court and Justice, entered August 29, 2016, which granted plaintiff's motion for summary judgment in lieu of complaint to recognize and domesticate a British money judgment against Hirtenstein, and awarded plaintiff a total of $584,929.13, unanimously dismissed, without costs.

The right of direct appeal from the April 2016 order

terminated upon entry of a final judgment, and the order may only be reviewed upon appeal from the final judgment (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). As the notice of appeal from the order and judgment was served more than 30 days after service of the order and judgment, with notice of entry, it was untimely (CPLR 5513[a]). This is a jurisdictional defect that cannot be waived (*see id.; Matter of Haverstraw Park v Runcible Props. Corp.*, 33 NY2d 637 [1973]).

Even if the orders were deemed reviewable, Hirtenstein's appeal of the jurisdictional issue would still be waived, as he is bound by the limitations placed on his notices of appeal (*see D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 453 [1st Dept 2013]). Hirtenstein's challenge to jurisdiction also lacks merit. An extension of time to re-serve was warranted as Hill Dickinson showed diligence by effectuating service at an address later challenged, and duly served Hirtenstein at his place of residence upon the ordering of a traverse hearing and being granted an extension, with no resulting prejudice (*see* CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]). Substitute service on the doorman was proper (see CPLR 308[2]; *F.I. duPont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 797 [1977]).

Were we to review Hirtenstein's challenge to the recognition of the British judgment, we would find it unavailing. It is

undisputed that the foreign money judgment is "final, conclusive and enforceable" (CPLR 5302) and the grounds for non-recognition are inapplicable (*see* CPLR 5304). The English court's award of costs to compensate Hill Dickinson for having to defend an action by defendants does not constitute a penalty (*see e.g. Harvardsky Prumyslovy Holding, AS.-V Likvidaci v Kozeny*, 117 AD3d 77, 81 [1st Dept 2014]).

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3669 The People of the State of New York, Respondent, Ind. 3124/11

-against-

Leshawn Clinkscales, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Meaghan L. Powers of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered March 9, 2012, as amended March 28, 2012, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of four years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of his right to appeal, we find, after our in camera view of the sealed search warrant and accompanying materials, that the warrant was supported by probable cause and that the confidential

materials cannot be redacted sufficiently to protect the identity of an informant (*see People v Castillo*, 80 NY2d 578 [1992]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3670 Board of Managers of 325 Fifth Avenue Condominium, et al., Plaintiffs-Respondents-Appellants, Index 154764/12

-against-

Continental Residential Holdings LLC, et al., Defendants-Appellants-Respondents,

Douglaston Development LLC, et al., Defendants-Respondents,

Wolf Haldenstein Adler Freeman & Herz LLP, et al., Defendants.

_____

Katsky Korins, LLP, New York (Mark Walfish of counsel), for Continental Residential Holdings LLC, appellant-respondent, and Douglaston Development LLC, 325 Fifth Ave, LLC, 325 Fifth Avenue Commercial LLC, 325 Fifth Avenue Investors, LLC, Continental Properties LLC, Clinton Management LLC, Jelb 5th Avenue LLC, Mark Fisch, Steven Fisch, Steven R. Charno, Jeffrey E. Levine, J.E. Levine Builder Inc, Wolf Haldenstein Adler Freeman & Herz LLP, FS Project Management, LLC, and First Service Residential New York, LLC, respondents.

Byrne & O'Neill, LLP, New York (Kevin O'Neill of counsel), for Cantor Seinuk Group, P.C., WSP Cantor Seinuk and Silvian Marcus, appellants-respondents.

Kasowitz, Benson, Torres & Friedman LLP, New York (Michael J. Bowe and Lauren Tabaksblat of counsel), for the Board of Managers of 325 Fifth Avenue Condominium and 325 Fifth Avenue Condominium, respondents-appellants.

_____

Amended order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered on or about July 28, 2016, which, to the extent appealed and cross-appealed from as limited by the briefs,

denied the motion of defendant Continental Residential Holdings, LLC (Sponsor) to dismiss the first, second, sixth, and fifteenth causes of action, denied the motion of defendants WSP Cantor Seinuk Group, Cantor Seinuk Group, P.C., and Silvian Marcus, P.E. (the Cantor Seinuk Defendants) to dismiss the seventh cause of action, granted the motion of defendants Continental Properties, LLC, Douglaston Development LLC, 325 Fifth Avenue LLC, 325 Fifth Avenue Investors LLC, Clinton Management LLC, JELB 5th Avenue LLC, Mark Fisch, Steven Fisch, Steven R. Charno, Jeffrey E. Levine, and J.E. Levine Building Inc. d/b/a Levine Builders (the Sponsor-Related Defendants) to dismiss the first, second, and sixth causes of action, and granted defendants' motions to dismiss the fourth and fifth causes of action, unanimously modified, on the law, to grant (1) the Sponsor Defendants'[1] and WSP Cantor Seinuk's motions to dismiss all balcony-related claims against them based on the release, (2) Sponsor's motion to dismiss the sixth and fifteenth causes of action (fraudulent inducement of the release and declaratory judgment, respectively), and (3) the Cantor Seinuk Defendants' motion to dismiss the seventh cause of action (aiding and abetting fraudulent inducement of the release), and otherwise affirmed,

[1] The Sponsor-Related Defendants and Sponsor are the Sponsor Defendants.

without costs. The Clerk is directed to enter judgment dismissing the complaint as to the Cantor Seinuk Defendants[2].

The Sponsor Defendants contend that all claims against them should be dismissed because the notice attached to the summons failed to comply with CPLR 305(b). This argument is unavailing (*see Pilla v La Flor De Mayo Express,* 191 AD2d 224 [1st Dept 1993]).

In May 2011, plaintiff board executed a release that released Sponsor, Douglaston Development, 325 Fifth Avenue LLC, 325 Fifth Avenue Commercial, 325 Fifth Avenue Investors, Clinton Management, JELB, the Fisches, Mr. Levine, Levine Builders, WSP Cantor Seinuk, and their "heirs, executors, administrators, successors and assigns" from all claims it ever had or thereafter might have against the releasees for anything "relating to or arising solely from the construction, design, manufacture, maintenance, use or abuse, [or] installation of the balconies, balcony glass, railing and support frames/attachments, and the connection of the foregoing assemblies to the building structure."

Since plaintiffs are trying to hold the Sponsor-Related Defendants liable as alter egos of the Sponsor, the release

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[2] Plaintiff did not contest on appeal the dismissal of the breach of fiduciary duty claim.

applies to them even though it does not mention all of them (*see Bailon v Guane Coach Corp.,* 78 AD3d 608 [1st Dept 2010]). However, plaintiffs do not assert an alter ego theory against the Cantor Seinuk Defendants, and Cantor Seinuk Group and Marcus are not WSP Cantor Seinuk's heirs, executors, administrators, successors, or assigns.

The release bars plaintiffs' balcony-related claims against the Sponsor Defendants and WSP Cantor Seinuk, even though plaintiffs allege that it was fraudulently induced, as they do not allege "a separate fraud from the subject of the release" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.,* 17 NY3d 269, 276 [2011]; *see also Pappas v Tzolis,* 20 NY3d 228, 233 [2012]).

The motion court properly dismissed the sixth cause of action (fraudulent inducement of the release) as against the Sponsor-Related Defendants, but it should also have dismissed it as against Sponsor for lack of reasonable reliance (*see e.g. Arfa v Zamir,* 76 AD3d 56, 59 [1st Dept 2010], *affd* 17 NY3d 737 [2011]). Unlike the plaintiff in *TIAA Global Invs., LLC v One Astoria Sq. LLC* (127 AD3d 75 [1st Dept 2015]), plaintiffs were in possession of the building. Furthermore, an adversarial relationship "negates as a matter of law any inference that" sophisticated business people are relying on their adversary's

representation (*Arfa*, 76 AD3d at 60 [brackets and internal quotation marks omitted]). As far back as October 2009, plaintiff board, through counsel, placed defendants on notice that it might sue them.

Contrary to plaintiffs' claim, the June 2010 letter from Marcus/WSP Cantor Seinuk to nonparty John Foley, which the complaint alleges was going to be delivered to nonparty New York City Department of Buildings, does not satisfy the requirement of reliance. It is not like the representations and warranties in a loan agreement in *DDJ Mgt., LLC v Rhone Group L.L.C.* (15 NY3d 147 [2010]). The May 2011 release is not conditioned on the truth of the statements in the June 2010 letter.

In light of the above, it is unnecessary to reach the Cantor Seinuk Defendants' argument that the letter constituted nonactionable opinion. Their argument that plaintiffs ratified the release is improperly raised for the first time in a footnote in their reply brief.

Since we are dismissing the sixth cause of action (fraudulent inducement of the release) against all Sponsor Defendants, the seventh cause of action (against the Cantor Seinuk Defendants for aiding and abetting the Sponsor Defendants' fraudulent inducement of the release) must also be dismissed (*see e.g. Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010] [element

of aiding and abetting fraud is "the existence of the underlying fraud"]).

Plaintiffs contend that the first and second causes of action (breach of contract) should be reinstated against the Sponsor-Related Defendants. This argument is unavailing. "A member of a limited liability company cannot be held liable for the company's obligations by virtue of his or her status as a member thereof" (*Matias v Mondo Props., LLC,* 43 AD3d 367, 367-368 [1st Dept 2007] [brackets and internal quotation marks omitted]). The unit owners whom plaintiffs represent bought their units by signing contracts with Sponsor, an LLC.

To be sure, veil-piercing applies to LLCs (*see e.g. id.* at 368). However, "[t]he party seeking to pierce the corporate veil must establish that the *owners,* through their domination, abused . . . the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*ABN AMRO Bank, N.V. v MBIA Inc.,* 17 NY3d 208, 229 [2011] [emphasis added; internal quotation marks omitted]). The complaint does not allege that Continental Properties, Douglaston Development, 325 Fifth Avenue Commercial, Levine Builders, Clinton Management, and Charno have any ownership interest in Sponsor or any of its parents, grandparents, etc.

Even as to 325 Fifth Avenue, LLC (Sponsor's sole member),

325 Fifth Avenue Investors and JELB (the members of 325 Fifth Avenue, LLC), the Fisches (the principals of 325 Fifth Avenue Investors), and Mr. Levine (the principal of JELB), the court properly deemed plaintiffs' veil-piercing allegations insufficient as too conclusory (*see e.g. Board of Mgrs. of the Gansevoort Condominium v 325 W. 13th, LLC,* 121 AD3d 554, 554-555 [1st Dept 2014]; *20 Pine St. Homeowners Assn. v 20 Pine St., LLC,* 109 AD3d 733, 735 [1st Dept 2013]).

Plaintiffs complain that the Sponsor Defendants created various LLCs for the sole purpose of insulating themselves from liability. However, "[t]he law permits the incorporation of a business for the very purpose of escaping personal liability" (*Bartle v Home Owners Coop.,* 309 NY 103, 106 [1955]; *see also East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.,* 66 AD3d 122, 126 [2d Dept 2009], *affd* 16 NY3d 775 [2011]).

Plaintiffs' contention that it was improper to dismiss their alter ego claims without giving them an opportunity to conduct discovery is unavailing (*see East Hampton,* 66 AD3d at 128-129).

Since plaintiffs' balcony-related claims are barred by the release, what is left in the contract and fraud claims is the allegation that the building suffers from lack of fire-stopping and a host of other defects. However, the complaint fails to identify any misrepresentations about these non-balcony defects.

Thus, the fraud claims were properly dismissed (*see 20 Pine St.*, 109 AD3d at 735). In addition, the fact that plaintiffs seek "the same compensatory damages for both claims" indicates that they are duplicative (*Triad Intl. Corp. v Cameron Indus., Inc.*, 122 AD3d 531 [1st Dept 2014]). Finally, the fifth cause of action (constructive fraud) requires a "fiduciary or special relationship between plaintiffs and defendants" (*Gregor v Rossi*, 120 AD3d 447, 448 [1st Dept 2014]). The motion court dismissed plaintiffs' breach of fiduciary duty claim; on their cross appeal, they do not argue for reinstatement of that claim.

The fifteenth cause of action seeks a declaratory judgment regarding the commercial units of the condominium. Since the complaint itself alleges that Sponsor conveyed the commercial units to 325 Fifth Avenue Commercial on August 5, 2007, the fifteenth cause of action should have been dismissed as against Sponsor.

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3671 Nina Tokhtaman, etc., Index 151268/16
Plaintiff-Respondent,

-against-

Human Care, LLC,
Defendant-Appellant,

County Agency, Inc., et al.,
etc.,
Defendants.

_____

Cohen, Labarbera & Landrigan, LLP, Goshen (Joshua A. Scerbo of counsel), for appellant.

Virginia & Ambinder, LLP, New York (Ladonna M. Lusher of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 23, 2016, which denied defendant Human Care, LLC's motion to dismiss the complaint, unanimously affirmed, without costs.

Defendants are not entitled to dismissal of the minimum wage, overtime, and failure to pay wages claims. The merit of these claims depends on whether plaintiff, who was employed by defendants as a home health care attendant, falls within the category of employees who need only be paid for 13 hours of every 24-hour shift. We find that plaintiff has sufficiently alleged that she does not fall within that category.

Department of Labor Regulations (12 NYCRR) § 142-2.1(b)

provides that the minimum wage must be paid for each hour an employee is "required to be available for work at a place prescribed by the employer," except that a "residential employee -- one who lives on the premises of the employer" need not be paid "during his or her normal sleeping hours solely because he is required to be on call" or "at any other time when he or she is free to leave the place of employment" (12 NYCRR 142-2.1[b][1], [2]). A March 11, 2010 Department of Labor (DOL) opinion letter provides further guidance regarding this regulation, advising that "live-in employees," whether or not they are "residential employees," "must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals" (NY St Dept of Labor, Op No. RO-09-0169 at 4 [Mar. 11, 2010]).

"[C]ourts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language" (*Matter of Visiting Nurse Serv. of N.Y. Home Care v New York State Dept. of Health*, 5 NY3d 499, 506 [2005]), or that is "irrational or unreasonable" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008] [internal quotation marks omitted]).

We find that the DOL opinion conflicts with 12 NYCRR 142-2.1(b) insofar as the opinion fails to distinguish between "residential" and "nonresidential" employees, and should thus not be followed in this respect (*see Lai Chan v Chinese-American Planning Council Home Attendant Program, Inc.*, 50 Misc 3d 201, 213-216 [Sup Ct, NY County 2015]; *Andryeyeva v New York Health Care, Inc.*, 45 Misc 3d 820, 826-833 [Sup Ct, Kings County 2014]; *see also Kodirov v Community Home Care Referral Serv., Inc.*, 35 Misc 3d 1221[A], 2012 NY Slip Op 50808[U], *2 [Sup Ct, Kings County 2012]). As such, if plaintiff can demonstrate that she is a nonresidential employee, she may recover unpaid wages for the hours worked in excess of 13 hours a day.

Plaintiff alleges that she "maintained her own residence, and did not 'live in' the homes of Defendants' clients." Although plaintiff admitted that she "generally worked approximately 168 hours per week" (or 24 hours a day, 7 days a week), it cannot be said at this early stage, prior to any discovery, that she lived on her employers' premises as a matter of law.

Because the viability of plaintiff's "spread of hours" claim (*see* Department of Labor Regulations [12 NYCRR] § 142-2.4[a]) likewise turns on whether plaintiff is entitled to be paid for the full 24 hours worked or only 13 of those hours, the motion

court correctly denied the motion to dismiss as to that claim.

Defendants are not entitled to dismissal of the breach of contract claim. Plaintiff has standing to sue as a third-party beneficiary of the alleged contracts requiring defendants to pay plaintiff certain wages pursuant to Public Health Law § 3614-c (*see Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 601-603 [2008]; *Moreno v Future Care Health Servs., Inc.*, 43 Misc 3d 1202[A], 2014 NY Slip Op 50449[U], *23-25 [Sup Ct, Kings County 2014]). The breach of contract allegations give sufficient notice of the nature of the claim (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *see also Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 446 [1st Dept 2016]). Although the complaint does not specifically identify the contracts or government agencies at issue, its citation to Public Health Law § 3614-c makes clear that the contracts referenced are those required for every company providing health care services that seek reimbursement from Medicaid or Medicare (*see* Public Health Law § 3614-c; *Matter of Concerned Home Care Providers, Inc. v State of New York*, 108 AD3d 151, 153-154 [3d

Dept 2013], *appeal dismissed* 22 NY3d 946 [2013], *lv denied* 22 NY3d 859 [2014]; *Moreno*, 43 Misc 3d 1202[A], 2014 NY Slip Op 50449[U], *23-25).

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3672 The People of the State of New York, Ind. 3051/12
Respondent,

-against-

Roderick Reyes,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 9, 2013, as amended September 27, 2013, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, criminal sale of a controlled substance in the second degree, criminal sale of a firearm in the third degree, attempted criminal possession of a weapon in the second and third degrees and attempted criminal sale of a firearm in the third degree, and sentencing him, as a second violent felony offender, to concurrent terms aggregating 15 years, consecutive to a term of 2 to 4 years, unanimously affirmed.

The trial court correctly declined to issue an adverse inference charge for the undisputedly nonnegligent destruction of *Rosario* material (*see* CPL 240.45) due to the flooding of a police

facility during Hurricane Sandy in 2012. Even assuming that the loss of this material prejudiced the defense, "[t]he loss of evidence as the result of a natural disaster cannot be attributed to the People" (*People v Thompson*, 143 AD3d 430 [1st Dept 2016]). Moreover, it would be illogical for a jury to draw an adverse inference against a party resulting from an event beyond that party's reasonable ability to control.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting the convictions for attempted crimes, relating to a particular transaction involving an inoperable weapon (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant claims there was a failure of proof of his intent that the weapon at issue be operable. However, the evidence, including defendant's overall conduct in a series of transactions, supports the inference that he intended that the codefendant's representations of operability, made to the undercover purchaser, would be true, so as to satisfy the customer and promote additional sales.

The court properly delivered a charge on constructive possession, because such an instruction was supported by the evidence and the reasonable inferences to be drawn therefrom. In addition to controlling the car in which the firearms transactions took place, the evidence showed that defendant and

the codefendant were in joint control of the contraband (*see People v Tirado*, 38 NY2d 955 [1976]), because they were engaged in joint criminal activity, and regardless of each participant's physical proximity to any particular weapon (*see People v Ramos*, 59 AD3d 269 [1st Dept 2009], *lv denied* 12 NY3d 858 [2009]). Furthermore, the constructive possession charge was applicable to attempted possession under the facts presented, given the underlying weapons-trafficking conduct.

The court properly denied, without granting a hearing, defendant's motion to suppress the undercover officer's identification of defendant. Over the course of the series of transactions, the officer developed a familiarity with defendant that rendered the identification confirmatory (*see People v Baret*, 43 AD3d 648, 649 [1st Dept 2007], *affd* 11 NY3d 31 [2008]).

Defendant's *Batson* claim (*see Batson v Kentucky*, 476 US 79 [1986]) is unpreserved, as it was raised only by the codefendant, and the record does not establish that there was a joint *Batson* application (*see People v Sadler*, 281 AD2d 152, 153 [1st Dept 2001], *lv denied* 96 NY2d 867 [2001]); *see also People v Greene*, 49 AD3d 275 [1st Dept 2008], *lv denied* 10 NY3d 934 [2008]). We decline to review this claim in the interest of justice. As an

alternative holding, we find that the record fails to support the codefendant's application in any event.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3674 E.W. Howell Co., LLC, et al., Index 653551/15
Plaintiffs-Appellants,

-against-

The City University Construction Fund, et al.,
Defendants-Respondents.

_____

Gibbons P.C., New York (Robert J. MacPherson of counsel), for appellants.

Holland & Knight LLP, New York (Timothy B. Froessel of counsel), for the City University Construction Fund, Philip A. Berry, Wellington Z. Chen, Noel N. Hankin, Robert Megna, Benno C. Schmidt, Jr., Michael M. Walsh and Dr. Marcella Maxwell, respondents.

Cohen Seglias Pallas Greenhall & Furman, P.C., New York (Kathleen M. Morley of counsel), for Hill International, Inc. and Westchester Fire Insurance Company, respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about May 9, 2016, which granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

This case involves the bidding process on public works contracts associated with the construction of a new performing arts center at Brooklyn College. Defendant City University Construction Fund (CUCF), a public benefit corporation under Education Law § 6273, was responsible for providing the City University of New York (CUNY) with facilities in support of the

latter's educational mission. In 2008 CUCF issued a request for proposals to provide construction management services for the planned performing arts center. Plaintiff E.W. Howell Co. and defendant Hill International, Inc. (Hill) bid on this contract, which was ultimately awarded to Hill. As construction neared in 2012, Hill put out a public solicitation for bids on performing the general construction. It awarded the resulting subcontract to plaintiffs which performed under it during the three years preceding the commencement of the instant action.

The complaint was properly dismissed because plaintiffs lacked citizen taxpayer standing to pursue their claim against CUCF and the individually named board of trustees defendants. State Finance Law § 123-b may not be used against public benefit corporations such as CUCF, which "enjoy[] an existence separate and apart from the State, even though it [may] exercise[] a governmental function" (*Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn. v New York State Thruway Auth.*, 5 NY2d 420, 424 [1959]; *see John Grace & Co. v State Univ. Constr. Fund*, 44 NY2d 84, 87 [1978]; *Matter of Madison Sq. Garden, L.P. v New York Metro. Transp. Auth.*, 19 AD3d 284, 286 [1st Dept 2005], *appeal dismissed* 5 NY3d 878 [2005]).

Even if State Finance Law § 123-b did apply to public benefit corporations, it would not encompass plaintiffs' claim

against the CUCF defendants because "the essence of the ... lawsuit concerns how the procurement was conducted" and did not challenge the actual expenditure of money (*Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 589 [1998] [internal quotation marks omitted]; *see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 813 [2003]). Plaintiffs could not establish common-law taxpayer standing because they did not show that "the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of" the challenged contract (*Matter of Colella v Board of Assessors of County of Nassau*, 95 NY2d 401, 410 [2000] [internal quotation marks omitted]).

The court did not err in dismissing plaintiffs' claim seeking to invalidate the alternate dispute provision of the subcontract because Hill's dual role as arbiter and Lien Law article 3A trustee did not present an inherent conflict. Hill was not the sole arbiter of all disputes, which were also subject to review by officials from the CUNY, and ultimately to a proceeding under CPLR article 78 (*see Westinghouse Elec. Corp. v New York City Tr. Auth.*, 82 NY2d 47, 54 [1993]; *American Architectural, Inc. v Marino*, 109 AD3d 773, 775 [2d Dept 2013]).

In light of the foregoing, because plaintiffs have not fully availed themselves of the valid alternate dispute procedures,

their remaining claims, all of which were predicated on Hill's alleged breach of the subcontract, should also be dismissed (*see MCC Dev. Corp. v Perla*, 81 AD3d 474 [1st Dept 2011], *lv denied* 17 NY3d 715 [2011]; *M.H. Kane Constr. Corp. v URS Corp. Group Consultants*, 42 AD3d 512, 513 [2d Dept 2007]).

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

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3675-
3676 In re Danny Rossi,
Petitioner-Appellant,

-against-

New York City Department of Parks
and Recreation,
Respondent-Respondent.

- - - - -

In re Barbara Morris
Petitioner-Appellant,

-against-

New York City Department of Health
and Mental Hygiene,
Respondent-Respondent.

Index 100635/14
100845/13

_____

Danny Rossi, petitioner pro se.

Barbara Morris, petitioner pro se.

Zachary W. Carter, Corporation Counsel, New York (Kathy C. Park of counsel), for respondents.

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Judgment, Supreme Court, New York County (Joan B. Lobis), entered May 2, 2016, denying petitioner Morris's petition to compel respondent New York City Department of Health and Mental Hygiene (DOHMH) to issue Morris a restricted area mobile food cart permit, and granting DOHMH's cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered May 13, 2016,

which denied petitioner Rossi's petition to compel respondent New York City Department of Parks and Recreation (DPR) to provide Rossi written authorization to operate a mobile food vending cart on land under its jurisdiction, and granted DPR's cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Contrary to petitioners' contentions, requiring them to obtain special vending licenses pursuant to General Business Law (GBL) § 35-a to vend on property under DPR's jurisdiction does not divest DOHMH of its powers to regulate mobile food vendors. DOHMH licenses mobile food vendors and food vending carts in New York City. Vendors, including food vendors, seeking to avail themselves of the vending terms available to disabled veterans must comply with the additional licensing requirements applicable to disabled veterans, which in New York City are set forth in GBL 35-a (*see Matter of Rossi v New York City Dept. of Parks & Recreation*, 127 AD3d 463 [1st Dept 2015]).

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

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3677 The People of the State of New York, Ind. 2924/15
Respondent,

-against-

Richard Gonzalez,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Jill Konviser, J.), rendered January 19, 2016,

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: APRIL 11, 2017

CLERK

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

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3678-
3679 Index 654321/13

Sherman Originator, LLC,
Plaintiff-Appellant,

-against-

HSBC Taxpayer Financial
Services Inc., et al.,
Defendants-Respondents.

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Foley & Lardner LLP, Milwaukee WI(Andrew Wronski of the bar of the State of Wisconsin, admitted pro hac vice, of counsel), for appellant.

Arnold & Porter Kaye Scholer LLP, New York (David B. Bergman of the bar of the District of Columbia, admitted pro hac vice, of counsel), for respondents.

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Orders, Supreme Court, New York County (Jeffrey Oing, J.), both entered on or about May 2, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the claim for breach of a purchase agreement, and denied plaintiff's motion for summary judgment as to defendants' liability on that claim, unanimously affirmed, with costs.

In this case involving a contract dispute between the originator (HSBC) of a certain portfolio of "refund anticipation loans" and the subsequent purchaser (Sherman) of a partial interest in that portfolio, based on the relevant contractual language, as informed by the clarifying extrinsic evidence (*see*

e.g. Federal Ins. Co. v Americas Ins. Co., 258 AD2d 39, 43 [1st Dept 1999], we affirm the lower court's conclusion that HSBC's unilateral decision not to enforce "cross-collection agreements" was not a termination that could reasonably be expected to adversely affect the collection of the overdue, in default, and charged-off refund anticipation loans that Sherman had purchased from defendants in a disproportionate manner as compared to collections on account of other refund anticipation loans originated by HSBC so as to require Sherman's prior consent. This construction of the contract does not implicate the "longstanding principle of New York law that a construction of a contract that would give one party an unfair and unreasonable advantage over the other, or that would place one party at the mercy of the other, should, if at all possible, be avoided" (*ERC 16W Ltd. Partnership v Xanadu Mezz Holdings LLC*, 95 AD3d 498, 503 [1st Dept 2012]).

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3682-
3683N Index 305811/15

Bruce T. Davis,
Plaintiff-Appellant,

-against-

Pamala Davis,
Defendant-Respondent.

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Chemtob Moss & Forman, LLP, New York (Susan M. Moss of counsel), for appellant.

Blank Rome LLP, New York (Brett S. Ward of counsel), for respondent.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered October 16, 2015, which, to the extent appealed from as limited by the briefs, determined, upon defendant wife's motion, that the wife did not waive her right to pendente lite relief; and order, same court and Justice, entered August 12, 2016, which, to the extent appealed from as limited by the briefs, granted the wife's motion insofar as she sought financial discovery and a hearing to determine whether the parties' postnuptial agreements are valid and enforceable, and denied plaintiff husband's cross motion for summary judgment, unanimously affirmed, without costs.

The motion court correctly determined that the wife did not waive pendente lite relief. While, in the parties' 2005

postnuptial agreement, the husband explicitly waived his right "to permanent or temporary maintenance . . . or other permanent or temporary support," the wife's waiver provision does not contain the same language, and does not clearly reflect the parties' intent that she waive any temporary relief (*see Lennox v Weberman*, 109 AD3d 703, 704 [1st Dept 2013]; *Strong v Dubin*, 75 AD3d 66, 68 [1st Dept 2010]; *cf. Anonymous v Anonymous*, 137 AD3d 583 [1st Dept 2016] [the husband waived temporary support, where, among other things, the parties agreed to "waive any and all claims for spousal support and/or maintenance" "both now and in the future"]).

The motion court correctly denied the husband's cross motion for summary judgment, and properly ordered financial discovery and a hearing to determine whether the parties' 2001 and 2005 postnuptial agreements are valid and enforceable. The wife, a person of limited education, did not have independent legal counsel for the 2001 agreement, which was drafted by the husband's real estate lawyer, whom the parties jointly retained. Further, the wife alleges that she was "represented" in the 2005 agreement by the husband's friend and "drinking buddy," who had little to no matrimonial experience. She does not recall ever being advised of the contents of the agreements, or having a clear understanding of the rights she was waiving by signing the

agreements. Based on the record, the wife's counsel was in direct contact with the husband, a lawyer and successful businessman, and was influenced by the husband's impatience to move the 2005 agreement forward. The wife further alleges that she was the victim of emotional and physical abuse throughout the marriage, and developed an addiction to alcohol. Under these circumstances, the wife's allegations raise an issue of fact as to whether the agreements were the product of the husband's overreaching (*Christian v Christian*, 42 NY2d 63, 72-73 [1977]; *see Petracca v Petracca*, 101 AD3d 695 [2d Dept 2012]; *cf. Gottlieb v Gottlieb*, 138 AD3d 30, 37 [1st Dept 2016], *lv dismissed* 27 NY3d 1125 [2016] [no issue raised as to the husband's overreaching where, among other things, the wife retained the services of a partner in a prominent matrimonial firm, the parties exchanged draft agreements, and the wife was an active participant in the negotiations and pushed to get the agreement signed]).

In addition, the terms of the agreements raise an issue of fact as to overreaching and the manifest fairness of the agreements (*Christian*, 42 NY2d at 73; *Petraca*, 101 AD3d at 698-699; *see Gottlieb*, 138 AD3d at 37). The wife, who never worked during the parties' marriage and had a net worth of approximately $75,000 in 2005, waived substantial rights, including the right

to maintenance and equitable distribution of approximately $24,000,000 in assets. In exchange for such waiver, the wife received $1,000,000, a $300,000 "signing bonus," a $4,000 monthly housing allowance, and $750 monthly child support per unemancipated child.

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

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3684N Citibank, N.A., et al., Index 651075/12
Plaintiffs-Appellants,

-against-

Keenan Powers & Andrews PC, et al.,
Defendants,

Secure Title Agency Inc.
Defendant-Respondent.

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Bryan Cave LLP, New York (Noah M. Weissman of counsel), for appellants.

David H. Eisenberg, Smithtown, for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 22, 2015, which granted defendant Secure Title Agency, Inc.'s (Secure Title) motion, pursuant to CPLR 6212(e), for an award of $491,134.46 in attorneys' fees and related litigation costs, plus interest, as the result of the wrongful attachment of its property, unanimously affirmed, with costs.

A stipulation modifying an order of attachment does *not* negate an attachment or eliminate the attached party's right to damages under CPLR 6212(e). Here, the wrongful attachment did not flow from the parties' stipulations but from an order of attachment itself, which was sought and obtained by plaintiffs

against Secure Title and other defendants when they commenced the case. Plaintiffs are also incorrect in asserting that there was no underlying attachment because the sheriff did not levy on Secure Title's accounts (*First Merchant Bank OSH, Ltd. v Village Roadshow Pictures [U.S.A.], Inc.*, 2002 US Dist LEXIS 11769, *27-31 [SD NY June 28, 2002]). Even if one were to accept this argument, Secure Title's accounts were in fact frozen and/or levied upon on at least two occasions.

Thus, Secure Title is entitled to the damages it suffered as a result of the wrongful attachment (CPLR 6212[e]). A finding of fault is not required to recover damages under this provision, as plaintiffs are "strictly liable" for the damages they caused (*Bank of N.Y. v Norilsk Nickel*, 14 AD3d 140, 149 [1st Dept 2004], *appeal dismissed* 4 NY3d 846 [2005]). Under the circumstances, we find that the full amount of defense costs incurred by Secure Title in the underlying litigation was recoverable as damages for plaintiffs' wrongful attachment under CPLR 6212(e) (*A.C. Israel Commodity Co. v Banco Do Brasil, S.A.* , 50 Misc 2d 362, 366 [Sup Ct, NY County 1966], citing *Thropp v Erb*, 255 NY 75, 80 [1930]); *Correspondent Servs. Corp. v J.V.W. Inv. Ltd.*, 524 F Supp 2d 412, 417-419 [SD NY 2007]).

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

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

ENTERED: APRIL 11, 2017

CLERK

Sweeny, J.P., Acosta, Mazzarelli, Manzanet-Daniels, Webber, JJ.

3050 The People of the State of New York, Ind. 1430/12
Respondent,

-against-

Blondine Destin,
Defendant-Appellant.

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

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

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Judgment Supreme Court, New York County (Gregory Carro, J.), rendered January 21, 2014, modified, on the law, to the extent of vacating the identity theft conviction and dismissing that count of the indictment, and otherwise affirmed.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Rolando T. Acosta
Angela M. Mazzarelli
Sallie Manzanet-Daniels
Troy K. Webber, JJ.

3050
Ind. 1430/12

_____x

The People of the State of New York, Ind. 1430/12
Respondent,

-against-

Blondine Destin,
Defendant-Appellant.
_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered January 21, 2014, convicting her, after a jury trial, of criminal possession of a forged instrument in the second degree, identity theft in the first degree and four counts of attempted grand larceny in the third degree, and imposing sentence.

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow and Christopher P. Marinelli of counsel), for respondent.

ACOSTA, J.

This appeal calls for us to revisit the assumption-of-identity element of the crime of identity theft in the context of a defendant's attempt to cash a counterfeit check payable to her, by submitting personal identification showing her name and by signing her name on the back of the check when asked to endorse it. As this Court has held, the assumption of another's identity "is a separate and essential element of the offense of identity theft which must be proven beyond a reasonable doubt" (*People v Barden*, 117 AD3d 216, 227 [1st Dept 2014], *revd on other grounds* 27 NY3d 550 [2016]). The People argue that, by presenting for payment a check that showed the apparent issuing bank's routing number and account number, i.e., the bank's "personal identifying information" (*see* Penal Law § 190.80), the defendant implicitly assumed the identity of the bank (*see Barden*, 117 AD3d at 220). Assuming without deciding that in this context a bank is a "person" whose identity could be stolen (*see* Penal Law § 190.77), we nevertheless hold that the evidence in this case was legally insufficient to support the verdict of guilty of identity theft in the first degree.

At approximately 4:30 p.m. on March 30, 2012, defendant entered a TD Bank branch in Manhattan and attempted to cash a check, which was payable to "Blondine Destin" and appeared to

have been issued by H&R Block Bank.[1] Because the value of the check was over $1,000 (it was $4,521), the bank teller could not cash the check and was required to verify whether defendant had a TD Bank account. The teller gave the check to a supervisor and asked defendant to wait.

The TD Bank supervisor noticed several discrepancies when he compared defendant's check to images of previously cashed H&R Block tax refund checks that were stored in the bank's computer system. For example, defendant's check was missing an H&R Block logo in the middle of the check and a telephone number that, ordinarily, would connect the caller to an automated system that would provide a four-digit confirmation after the caller entered the check number and amount.[2] The supervisor alerted his

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[1] H&R Block Bank supports H&R Block tax offices for its tax customers who wish to receive their tax refunds by check. To process a customer's return, H&R Block opens a temporary bank account for the customer and closes it after issuing the refund check. Only an H&R tax customer could receive an H&R Block tax return check.

[2] H&R Block's Director of Risk and Compliance later testified that there were several apparent differences between defendant's check and a real H&R Block check. For example, there was an abnormally large gap between the check number and the "minor digits" on the top right of defendant's check; the text on defendant's check was not in the correct font; the amount was not written in the correct format on defendant's check; and the date on defendant's check was not written exclusively in numbers. In addition, defendant's check was missing the required statement that H&R Block Bank was a member of the FDIC, the "plus four" zip code digits for the payee's address, and the district and office

regional operations officer and sent an email to notify the remainder of the region that "fraudulent checks were being passed around." In the email, the supervisor included a scanned copy of defendant's check and a sample image of a legitimate check.

Defendant, apparently having grown tired of waiting, returned to the teller's station to find out what was happening. Somehow, she was able to recover the check and walk out of the branch. Within the next hour, defendant attempted to cash a check at two other TD Bank branches, but the tellers noticed that defendant's check resembled the fraudulent one in the email alert. At both locations, defendant left after being told that the bank could not cash the check.

Around 6:20 p.m. that same day, defendant entered a fourth TD Bank location and tried again to cash a tax refund check that was purportedly issued by H&R Block Bank. The bank teller, who had read the email alert regarding the earlier attempts to cash fraudulent checks, noticed that defendant's check "looked a little funny." The teller took defendant's check and identification to determine the check's authenticity. She then called the regional operations officer to alert him that

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code identifying the particular office that issued the check.

The director also discovered that defendant's name did not appear in H&R Block Bank's system, indicating that she was not a customer and that the check payable to her was fake.

defendant was trying to cash a counterfeit check, and asked a uniformed police officer who was working at the bank to call other officers and have defendant arrested. To stall defendant until the police arrived, the teller had her endorse the back of the check, suggesting that it could be cashed. When a police car pulled up in front of the bank, defendant "tried to rush out," leaving behind the check and her identification.

The bank's police officer stopped defendant in the vestibule. At about 6:50 p.m., two other police officers entered the bank. A bank employee gave the officers what appeared to be an H&R Block Bank tax refund check in the amount of $4,521, payable to Blondine Destin. The officers arrested defendant after one of them contacted an H&R Block representative and determined that the check was fraudulent. The check number was the only difference between the check that defendant presented at the first bank branch, which the supervisor scanned and emailed, and the one that was recovered during defendant's arrest at the fourth location.

After a jury trial, defendant was convicted of identity theft in the first degree, criminal possession of a forged instrument in the second degree, and four counts of attempted grand larceny in the third degree, and was sentenced as a second felony offender to concurrent prison terms of two to four years

on each count. Defendant has served her sentence and now appeals, arguing that the evidence was legally insufficient to support her identity theft conviction and that the verdict on that count was against the weight of the evidence. In addition, she contends that the trial court's evidentiary rulings denied her a fair trial.

A person commits identity theft in the first degree "when he or she knowingly and with intent to defraud assumes the identity of another person by [inter alia] . . . using personal identifying information of that other person, and thereby . . . commits or attempts to commit a class D felony or higher level crime" (Penal Law § 190.80[3]). The term "personal identifying information" includes a "financial services account number or code" and a "checking account number or code" (Penal Law § 190.77[1]).

This Court has held that evidence is legally sufficient to support an identity theft conviction only if the People prove that the defendant (1) engaged in one of the enumerated methods by which one can assume the identity of another (e.g., using the victim's personal identifying information), and (2) consequently assumed the victim's identity (*People v Barden*, 117 AD3d 216 [1st Dept 2014], *revd on other grounds* 27 NY3d 550 [2016], *supra*; *see also People v Roberts*, 138 AD3d 461 [1st Dept 2016], *lv granted*

28 NY3d 1075 [2016]). In *Barden*, the defendant used his business associate's credit card to charge hotel expenses by falsely indicating that he had the cardholder's continued authorization to charge the card. This Court found that the statute was ambiguous, and interpreted it in accordance with the rule of lenity, determining that assumption of a victim's identity is a discrete element of the crime of identity theft (*id.* at 226-227). The Court noted that although a defendant's use of another person's credit card will ordinarily result in "an implicit assumption of identity, . . . [t]he implication falls away . . . when the person accepting the credit card knows that the card user is, in fact, someone other than the cardholder" (*id.* at 227-228). Because the hotel employees were aware that the credit card did not belong to the defendant, the *Barden* Court concluded that the defendant had not assumed the identity of the cardholder and, thus, could not be found guilty of identity theft (*id.* at 228).

The Fourth Department declined to follow *Barden* in *People v Yuson*, which upheld an identity theft conviction where the defendant deposited forged checks into his bank account (133 AD3d 1221 [4th Dept 2015], *lv denied* 27 NY3d 1157 [2016]). The *Yuson* Court concluded that "the statute is unambiguous and defines the phrase 'assumes the identity of another person' by the phrase

that immediately follows it, i.e., by, inter alia, using the personal identifying information of that other person" (133 AD3d at 1222). However, we explained in *Barden* that

> "the [identity theft] statute is facially ambiguous, because it is unclear whether the words that follow the phrase 'assumes the identity of another person' are intended to define that phrase — in which case, committing one of the described acts would constitute an assumption of identity — or whether they serve as various means by which assumption of identity *can*, but does not necessarily, take place. The statute's definitional section (Penal Law § 190.77) . . . clearly defines, inter alia, 'personal identifying information,' . . . [but] the phrase 'assumes the identity of another' does not appear in the list of definitions . . . .
>
> "[T]he legislative intent remains nebulous. On one hand, the legislature may have intended to define [the phrase] in the wording of the statute itself, implying that a person necessarily assumes the identity of another simply by engaging in one of the listed methods. On the other hand, by excluding the phrase from the list of definitions [in Penal Law § 190.77], the legislature may have intended that the methods provided in the body of the statute are ways by which a person *can* assume another's identity, but that assumption of identity must be the result of the method used.
>
> "Because the statute is susceptible to these two reasonable interpretations and the legislative history is inconclusive, we decide this issue in accordance with the rule of lenity and sanction the interpretation more favorable to defendant" (117 AD3d at 226).

Thus, we are not persuaded by the *Yuson* Court's determination that the statute is unambiguous.

Indeed, if the legislature had intended that assumption of

identity not be considered an element of the crime, it could have omitted the phrase "assumes the identity of another" entirely. For example, the statute could have been modified in the following way: A person commits identity theft in the first degree "when he or she knowingly and with intent to defraud . . . present[s] himself or herself as [another] person, . . . act[s] as another person or . . . us[es] personal identifying information of [another] person, and thereby [inter alia] . . . attempts to commit a class D felony or higher level crime" (Penal Law § 190.80[1]). There is no material difference between this modified version of the statute and the Fourth Department's reading of the current statute, both of which render the phrase "assumes the identity of another" meaningless. It is axiomatic, however, that "meaning and effect should be given to every word of a statute" (*Criscione v City of New York*, 97 NY2d 152, 157 [2001] [internal quotation marks omitted]; *see also* McKinney's Statutes § 231; *People v Dethloff*, 283 NY 309, 315 [1940] [reviewing court must proceed "upon the assumption that the Legislature did not deliberately place in the statute a phrase which was intended to serve no purpose"]). Therefore, we will continue to follow *Barden*'s instruction that assumption identity is a discrete element of the crime of identity theft and that the People must prove that element beyond a reasonable doubt.

Applying those principles to the facts of this case, we find that, as in *Barden*, the People failed to prove beyond a reasonable doubt that defendant assumed the identity of another person. The People argue that defendant assumed the identity of H&R Block Bank when she attempted to cash a check that contained the bank's personal identifying information (the company's name, address, account number, and routing number). However, the People did not demonstrate that the result of defendant's use of that information was that she assumed the bank's identity. To be sure, defendant presented a check containing the personal identifying information of H&R Block. However, the check was made payable to defendant, in her real name. Defendant presented her own identification establishing her identity as Blondine Destin, and signed her own name on the back of the check when the bank teller asked her to endorse it. None of the TD Bank employees were under the impression that defendant was anyone other than herself (*cf. Barden*, 117 AD3d at 229 [hotel employees knew the defendant was not using his own credit card]). Thus, as in *Barden*, the evidence was legally insufficient to establish that defendant committed identity theft, because she did not assume the identity of the victim (*see id.* at 225-226).

The People misplace reliance on *People v Sabouni* (61 AD3d 447 [1st Dept 2009], *lv denied* 12 NY3d 929 [2009]), in which this

Court upheld the identity theft conviction of a defendant who "used a check routing number and bank account number of her former [labor] union to steal money from the union and use that money to pay her bills" (*id.*). *Sabouni* is a pre-*Barden*, short memorandum decision in which the Court had no occasion to decide whether the defendant assumed the identity of another, because the parties had not raised that issue (*see People v Louree*, 8 NY3d 541, 547 n [2007]). Moreover, *Sabouni* does not contain facts from which it can be inferred whether the defendant's use of her union's banking information constituted an assumption of identity.

In light of our determination that the verdict of guilty of identity theft in the first degree is not supported by legally sufficient evidence, we need not consider defendant's argument that the verdict is against the weight of the evidence.

Finally, the evidentiary rulings challenged by defendant were provident exercises of discretion that did not deprive her of a fair trial. The court's pretrial ruling pursuant to *People v Sandoval* (34 NY2d 371 [1974]) appropriately permitted inquiry into defendant's prior grand larceny conviction, notwithstanding some degree of similarity with the charged crime, because the prior crime and its facts were highly relevant to defendant's credibility (*see id.* at 377; *see also People v Hayes*, 97 NY2d 203

[2002]). Any prejudicial effect of that inquiry would have been minimal and outweighed by its probative value, since the inquiry would have been limited to one prior crime and the court would have instructed the jury to consider the prior conviction only to evaluate defendant's truthfulness, not as evidence of any criminal propensity. In addition, evidence of defendant's nearly contemporaneous attempt to cash a fraudulent check (at the fourth TD Bank branch), in addition to the fraudulent check on which the charges were based (the check defendant attempted to cash at the first TD Bank branch), was probative of her intent and the absence of mistake (*see generally People v Molineux*, 168 NY 264 [1901]; *see also People v Alvino*, 71 NY2d 233, 242-243 [1987]). The volume of evidence relating to the "uncharged" check did not cause undue prejudice, because the court instructed the jury that the check should be considered only as evidence of defendant's knowledge and intent, and could not be considered as evidence that defendant had a propensity to commit the charged crimes. Lastly, the court did not abuse its discretion in permitting a witness – one of the bank's employees who later became a police officer – to testify in his police uniform, be addressed as "Officer," and mention his current employment. This was not unduly prejudicial to defendant, particularly since the court instructed the jury to scrutinize a police officer's testimony by

the same standards by which it would evaluate that of any other witness (*see People v Simms*, 124 AD2d 349 [3d Dept 1986], *lv denied* 69 NY2d 886 [1987]; *cf. People v Gadsden*, 80 AD2d 508 [1st Dept 1981] [court erred in failing to instruct jury that police witnesses should not be regarded as more or less credible than any other witness]).

Accordingly, the judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered January 21, 2014, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree, identity theft in the first degree and four counts of attempted grand larceny in the third degree, and sentencing her, as a second felony offender, to concurrent terms of two to four years, should be modified, on the law, to the extent of vacating the identity theft conviction and dismissing that count of the indictment, and otherwise affirmed.

All concur.

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

ENTERED: APRIL 11, 2017

CLERK