SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 27, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3493 Marc Verzatt, et al., Index 162036/14
Plaintiffs-Appellants,

-against-

Halstead Property, LLC, et al.,
Defendants-Respondents.

_____

Relman, Dane & Colfax, PLLC, Brooklyn (Ryan C. Downer of counsel), for appellants.

Herrick Feinstein LLP, New York (Michael Berengarten of counsel), for respondents.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 28, 2015, which, insofar as appealed from as limited by the briefs, granted the motion of defendants Halstead Property, LLC and Halstead Property Riverdale, LLC, to dismiss the second and fourth causes of action of the complaint, unanimously affirmed, without costs.

The motion court properly granted the motion to dismiss of defendant real estate brokers and their agents, who sought to facilitate, not prevent, plaintiffs' purchase of a cooperative

apartment. To the extent that the challenged statements, which suggested, but did not require, that plaintiffs submit a letter describing the "longevity" and "solidity" of their relationship, and stating that they are married, can be construed as inquiry into their sexual orientation or marital status (of which defendants already were aware, but the cooperative board might not have been), when read in context with the relevant emails, they do not express any "limitation, specification or discrimination" on the basis of the couples' sexual orientation, as opposed to financial concerns similar to any couple seeking to buy an apartment in the building (Executive Law § 296[5][c][2]; Administrative Code of City of NY § 8-107[5][c][2]; *Alexander's, Inc. v White*, 115 AD2d 424 [1st Dept 1985]; *see also Soules v United States Dept. of Hous. & Urban Dev.*, 967 F2d 817, 824 [2d Cir 1992]).

While the statements might be construed as a "limitation, specification or discrimination" on the basis of marital status, as plaintiffs acknowledged, they would not have been denied the apartment on the basis of their marital status had they disclosed

their status to the board, since they were married. Thus, they were not "aggrieved by an unlawful discriminatory practice" as required under the State and City Human Rights Laws (Executive Law § 297[1] & [9]; Administrative Code § 8-109).

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

ENTERED: APRIL 27, 2017

CLERK

Friedman, J.P., Sweeny, Renwick, Andrias, Manzanet-Daniels, JJ.

3522 The People of the State of New York, Ind. 3849/10
Respondent,

-against-

Kwamie Mitchell,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered September 16, 2011, convicting defendant of four counts of robbery in the second degree and two counts of assault in the third degree, and sentencing him to an aggregate term of 16 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing evidence established the voluntariness of defendant's statements, which followed *Miranda* warnings and waivers, and which were not accompanied by any coercive circumstances (*see generally Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). There is no

evidence that anything coercive occurred during the overnight and morning periods during which defendant was lodged at a police station before the investigating detective administered the warnings and began the interrogation. Although the People bear the burden of establishing that defendant's statements were voluntary, "[t]his does not mean . . . that [they] are mandated to produce all police officers who had contact with the defendant from arrest to the time that the challenged statements were elicited" (*People v Witherspoon*, 66 NY2d 973, 974 [1985]).

The court providently exercised its discretion in denying defendant's mistrial motion, made after a deadlock note, where the jury had only been deliberating for about seven hours in a fairly lengthy trial, and had repeatedly requested readbacks and reinstruction on elements (*see People v Hardy*, 26 NY3d 245 [2015]). Defendant did not preserve his argument that the court should have made an inquiry into the genuineness of the deadlock, or his challenge to the court's supplemental instructions, and we

decline to review these claims in the interest of justice. As an alternative holding, we reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 27, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3565 Mandy Stein, as the Sole Surviving Administrator of the Estate of Linda Stein, etc., Plaintiff-Respondent-Appellant,

-against-

Douglas Elliman, LLC, et al., Defendants-Respondents,

Axion, LLC, Defendant-Appellant-Respondent,

Natavia S. Lowery, Defendant.

Index 115373/09

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Anastasios P. Tonorezos of counsel), for appellant-respondent.

Nguyen Leftt, P.C., New York (Andrew D. Leftt of counsel), for respondent-appellant.

Law Offices of Curtis, Vasile, Mehary & Dorry, P.C., Merrick (Melissa L. Johnston of counsel), for respondents.

Order, Supreme Court, New York County (Lucy Billings, J.), entered June 2, 2016, which, inter alia, granted the motion of defendant Douglas Elliman, LLC (DE-LLC) for summary judgment dismissing the complaint as against it, and denied the motion of defendant Axion LLC (Axion) for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to grant Axion's motion, and otherwise affirmed, without costs. The

Clerk is directed to enter judgment accordingly.

Axion is a "temp" agency whose employee, defendant Natavia Lowery, was placed as an assistant to plaintiff's deceased (Stein), a realtor working as an independent contractor for DE-LLC, a real estate agency. Lowery assaulted and murdered Stein after only three months of work as her assistant.

Dismissal of the complaint alleging, inter alia, negligent hiring, supervision and retention of Lowery, as against Axion is warranted since the evidence demonstrated that Axion had no notice of Lowery's violent propensities or knowledge of facts that might prompt a reasonably prudent person to conduct an investigation of the worker's background (*see K.I. v New York City Bd. of Educ.*, 256 AD2d 189, 191-192 [1st Dept 1998]). Lowery did not have a criminal record, and her alleged past misconduct, as well as her vague comments made regarding Stein before the assault, were not disclosed until after Stein's death (*see e.g. Taylor v United Parcel Serv., Inc.*, 72 AD3d 573 [1st Dept 2010], *lv denied* 15 NY3d 705 [2010]).

DE-LLC's motion for summary judgment was properly granted since, contrary to plaintiff's contention, there exists no basis to find that Lowery worked as DE-LLC's special employee. Rather, the evidence showed that DE-LLC did not exercise supervision and

control over Lowery's work, and that it was Stein who controlled Lowery's work (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 [1991]).

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 27, 2017

CLERK

Tom, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

3574-
3575 Index 162372/14

Dwight P. Bostwick, etc.,
Plaintiff-Appellant,

-against-

Credit Agricole Corporate and Investment Bank New York Branch, formerly known as Calyon New York Branch, et al.,
Defendants-Respondents.

_____

Zuckerman Spaeder LLP, New York (Andrew N. Goldfarb of counsel), for appellant.

White & Case LLP, New York (John Christopher Shore of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered September 28, 2016, dismissing the amended complaint, unanimously reversed, on the law, without costs, and the amended complaint reinstated to the extent indicated herein. Appeal from order, same court and Justice, entered on or about April 28, 2016, which granted defendants' motion to dismiss the amended complaint for failure to state a cause of action, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

This action stems from defendants' conduct in a bankruptcy proceeding involving plaintiff's entities, which are the debtors

in that proceeding. Plaintiff is the successor trustee of the GSC Liquidating Trust, which is composed of a group of affiliated entities (GSC entities), some of which borrowed substantial sums of money from lenders, including defendants, which held a minority position in the main secured loan. In order to secure the loan, the GSC entities pledged collateral composed of almost all of their assets, and entered into a credit agreement and a security agreement with the creditors; defendants are among the secured creditors.

Section 6.1 of the security agreement states:

> "[T]his Agreement may be enforced only by the action of the Collateral Agent . . . acting upon the instructions of the Required Banks[1] . . . [N]o other Secured Creditor [i.e., no Secured Creditor other than the Collateral Agent acting on the instructions of the Required Banks] shall have any right individually to seek to enforce or to enforce this Agreement or to realize upon the security to be granted hereby."

Section 7.1(a) of the Security Agreement provides in pertinent part:

> "Each Grantor[2] . . . agrees to (i) pay all reasonable out-of-pocket costs and expenses of the Collateral Agent and each other Secured Creditor in connection with the enforcement of this Agreement, and, after an Event of Default shall have occurred and be continuing,

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[1] "Required Banks" means, essentially, the majority lender.

[2] "Grantor" refers to each GSC entity.

> the protection of the rights of the Collateral Agent and each other Secured Creditor hereunder . . . and (ii) . . . indemnify . . . and hold the Collateral Agent [and] each other Secured Creditor . . . harmless from any and all liabilities, obligations, damages, . . . claims, . . . actions, suits, judgments and any and all costs, expenses or disbursements . . . of whatsoever kind and nature . . . in any way relating to or arising out of this Agreement . . . or any other document executed in connection herewith . . . or in any way connected with the administration of the transactions contemplated hereby . . . or the enforcement of any of the terms of, or the preservation of any rights under any thereof, or in any way relating to or arising out of the . . . sale . . . or other disposition . . . of the Collateral . . .; provided that . . . no Secured Creditor . . . shall be indemnified . . . for losses, damages or liabilities to the extent caused by the bad faith . . . or willful misconduct of any such Indemnitee."

In 2009 the GSC entities defaulted on the loan, and in 2010 they filed for bankruptcy. At the time the GSC entities filed for bankruptcy, the defendants as minority lenders acknowledged that any disputes they had with the majority lender - nonparty Black Diamond Capital Management, LLC - were intercreditor issues that did not belong in bankruptcy court (*see In re GSC, Inc.*, 453 BR 132, 185 [Bankr SD NY 2011]).

Following an unsuccessful attempt at reorganization, an auction of the assets was planned. The GSC entities and the collateral agent then agreed on bidding procedures for the auction that would allow for individual lenders to place bids.

Defendants objected to the auction and bidding procedures and asked the bankruptcy court to delay the sale. Although the objections were ultimately resolved without court intervention after the parties engaged in discovery and negotiations, plaintiff alleges that defendants' objection caused them to incur substantial attorney and financial advisor fees.

After the bankruptcy court approved the final bidding procedures, a financial advisor hired by the GSC entities determined that allowing certain bidders - especially Black Diamond and the collateral agent - to submit joint bids on the assets would provide for more competitive bids. At the same time, the advisor recognized that there was a risk that such a joint bid could result in the allocation of a greater percentage of assets to Black Diamond, which would be to defendants' detriment.

For that reason, before the court permitted any such joint bids, the issue was discussed with defendants, who on October 27, 2010 executed a letter agreement consenting to the modification of the bidding procedures to include joint bidding. In the letter agreement, defendants reserved all claims and causes of action that they might have against the collateral agent and Black Diamond.

On October 29, 2010, the GSC entities determined that the joint Black Diamond/collateral agent bid was the winning bid, as it provided the greatest value to the bankruptcy estates.

That same day, defendants filed an emergency motion in bankruptcy court to disqualify Black Diamond's bids. The bankruptcy court denied the motion, noting that the intercreditor disputes should be heard in state court.

Not long thereafter, defendants filed multiple objections to the sale of assets in bankruptcy court, complaining again of the bid procedures, including the permitting of joint bids. Further discovery was conducted in connection with the objections, delaying the approval of the sale of assets and allegedly causing the GSC entities to incur significant expenses.

In 2012, the GSC Liquidating Trust, created under a plan of reorganization, was confirmed by the bankruptcy court; it is the successor to the GSC entities' interests.

Defendants separately moved for the appointment of a Chapter 11 trustee, which the bankruptcy court granted. The trustee's fees and his counsel's fees were paid from the GSC entities' estates.

The Chapter 11 trustee also concluded that the joint bid was the best offer. However, defendants filed their own plan of

reorganization, to which the Chapter 11 trustee objected. This resulted in additional discovery, briefing, and a hearing, after which the bankruptcy court approved the trustee's plan to sell the assets.

Plaintiff commenced this action seeking money damages for defendants' alleged breach of the security agreement and letter agreement, which it is alleged caused plaintiff to incur millions of dollars in additional costs for the administration of the bankruptcy, including fees and costs for his counsel, for the Chapter 11 trustee and his counsel, and for the fees and expenses of a financial consultant. Defendants moved to dismiss the amended complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7).

The first cause of action alleges that defendants violated section 6.1 of the security agreement by seeking to enforce the agreement during the bankruptcy case because that section allows only the collateral agent to enforce the agreement. Defendants' contention that they did not seek to enforce the agreement during the bankruptcy proceedings is unavailing (*see In re Am. Rds LLC*, 496 BR 727, 731 [Bankr SD NY 2013]).

Further, section 7.1(a) of the agreement bars only part of plaintiff's first cause of action. That section provides, in

relevant part, that defendants will be held harmless for losses, damages or liabilities unless such liabilities are caused by their "bad faith" or "willful misconduct." This Court can consider plaintiff's argument that defendants acted in bad faith, even though it was not raised before the motion court, because "[w]hether the amended complaint pleads a necessary element of [a] claim is a pure issue of law appearing on the face of the record that may be considered for the first time on appeal" (*see Basis Yield Alpha Fund Master v Morgan Stanley*, 136 AD3d 136, 141 n 4 [1st Dept 2015]). Here, the amended complaint sufficiently alleges that defendants acted in bad faith by trying to block the collateral agent's sale of GSC's assets (*see Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 242, 245 [1st Dept 2007]; *appeal withdrawn* 16 NY3d 796 [2011]).

However, the motion court correctly dismissed the remaining portions of the first cause of action. The documentary evidence shows that defendants had a good faith basis to object to the original bidding procedures, i.e., that the procedures were contrary to the security agreement. In addition, the decision in the bankruptcy case shows that defendants had a good faith basis to move for the appointment of a Chapter 11 trustee (*see In re GSC*, 453 BR at 147, 185).

To the extent defendants breached in bad faith, damages can include the attorneys' fees plaintiff's predecessors incurred in the bankruptcy case (*see Cefali v Buffalo Brass Co., Inc.*, 748 F Supp 1011, 1027 [WD NY 1990]; *see also In re Ion Media Networks, Inc.*, 419 BR 585, 590 n 4 [Bankr SD NY 2009], *appeal dismissed* 480 BR 494 [SD NY 2012]; *McMahan & Co. v Bass*, 250 AD2d 460, 461 [1st Dept 1998], *lv dismissed in part, denied in part* 92 NY2d 1013 [1998]).

Plaintiff is not barred from proceeding in this action, because section 6.1 of the security agreement is best characterized as a collective enforcement scheme and not a covenant not to sue. In any event, allowing plaintiff to sue will not exculpate him[3] or his predecessors from wrongdoing. Neither plaintiff nor his predecessors are being accused of wrongdoing (*cf. Collins & Aikman Prods. Co. v Sermatech Eng'g Group*, 297 AD2d 248, 249-250 [1st Dept 2002] [contract causes of action dismissed where, among other things, the documents contained no express covenant not to sue, and such covenants are to be narrowly construed because they have the effect of exculpating a party from its own wrongdoing]). Nor would public

[3]Effective May 28, 2016, Dwight P. Bostwick succeeded Barbara S. Jones as trustee of the GSC Liquidating Trust.

policy be violated by allowing plaintiff to sue (*see Ion Media*, 419 BR at 595).

Plaintiff's second cause of action states a claim that defendants breached the covenant of good faith and fair dealing implied in the October 27, 2010 letter agreement by, among things, injuring GSC's right to receive the fruits of that agreement (*see generally 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). A reasonable person would be justified in understanding that the letter agreement included an implied promise that defendants would bring any claims against the collateral agent and Black Diamond in state court rather than bankruptcy court (*see id.*). Defendants had acknowledged from the outset of the bankruptcy proceedings that intercreditor disputes did not belong in bankruptcy court. Further, implying such a covenant would not be inconsistent with other terms of the letter agreement (*see id.*).

Section 7.1(a) of the security agreement does not bar plaintiff's claim for breach of the implied covenant. The

amended complaint explicitly alleges that defendants acted in bad faith in connection with the letter agreement.

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

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3846 The People of the State of New York, Ind. 3606/09
Respondent,

-against-

Cesar Zuniga,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia B. Heeger of counsel), and Zuckerman Spaeder LLP, New York (Anant Kumar of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J. at nonjury trial and sentencing; Melissa C. Jackson, J. at reconstruction hearing), rendered October 13, 2010, convicting defendant of predatory sexual assault against a child, and sentencing him to a term of 15 years to life, unanimously affirmed.

After an inquiry that was sufficient under the circumstances, the court providently exercised its discretion in denying defendant's eve-of-trial request to substitute counsel. Contrary to defendant's argument, the fact that the attorney was retained is relevant, because "[t]he remedy available to a defendant who is dissatisfied with his *retained* counsel is to

discharge that attorney and hire another" (*People v Wilburn*, 40 AD3d 508, 509 [1st Dept 2007], *lv denied* 9 NY3d 883 [2007]), using refunded unearned fees where applicable (*see People v Wall*, 56 AD3d 361 [1st Dept 2008], *lv denied* 12 NY3d 763 [2009]). While defendant said he wanted a new attorney, he did not tell the court he was seeking to hire new counsel, that he was in a position to do so without undue delay (*see People v Arroyave*, 49 NY2d 264, 271 [1980]), or that he needed or wanted assigned counsel. In any event, the court permitted defendant to voice his complaints against the attorney, and there was no basis for substitution of counsel or for further inquiry (*see People v Porto*, 16 NY3d 93, 99-100 [2010]; *People v Linares*, 2 NY3d 507, 511 [2004]). Moreover, the timing and circumstances of defendant's complaint strongly suggest that it was a delaying tactic (*see People v Medina*, 44 NY2d 199, 206 [1978]).

Although the stenographic notes of the last day of the trial and the sentencing proceeding have been lost and no transcript is available for those dates, a reconstruction hearing sufficed to protect defendant's right to appeal. The judge's notes from the last day of trial, the prosecutor's detailed outline of her summation and trial counsel's affirmation, which were placed in the record at the hearing, provided an adequate basis to

determine whether appealable issues existed (*see People v Glass*, 43 NY2d 283, 286 [1977]). The fact that this was a nonjury trial, where the factfinder is presumed to have disregarded prejudicial matter (*see People v Moreno*, 70 NY2d 403, 406 [1987]), weighs strongly against the concern that the missing minutes may have revealed appealable issues. We have considered and rejected defendant's remaining arguments regarding the lost minutes and the reconstruction hearing.

In introducing evidence of the child victim's prompt outcry, the People appropriately elicited brief and limited details of the sexual conduct reported by the child (*see People v McDaniel*, 81 NY2d 10, 18 [1993]), and there was no prejudice to defendant in any event. Defendant did not preserve his other challenges to the scope of the prompt outcry testimony and to testimony about an uncharged crime (*see People v Graves*, 85 NY2d 1024, 1026-1027 [1995] [appellate claim on different ground from trial objection was unpreserved]), or to his duly executed, open-court jury waiver (*see People v Johnson*, 51 NY2d 986 [1980]), and we decline

to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3848 In re Michael C.,
Petitioner-Respondent,

-against-

Marie-Perle R.,
Respondent-Appellant.

_____

Larry S. Bachner, Jamaica, for appellant.

George E. Reed, Jr., White Plains, for respondent.

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Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about May 10, 2016, which awarded custody of the subject children to petitioner father with respondent mother having unsupervised visitation for three hours every other Saturday, unanimously affirmed, without costs.

The Family Court properly awarded custody of the subject children to the father with visitation to the mother. The court's finding that it was in the children's best interests to award the father custody has a sound and substantial basis in the record.

The court properly exercised its discretion in determining that the mother would have three hours of visitation every other Saturday with the children having the option of extending the visit.

The mother's arguments regarding the violation petition are unpreserved because the record shows that her counsel remained silent after the court agreed that the parties had resolved the violation petition and never sought a hearing regarding the father's alleged failure to timely produce the children for visitation on one occasion (*see Matter of Jamel Isaiah R.*, 18 AD3d 558 [2d Dept 2005]).

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3849-
3850 Index 150474/15

Bank Leumi USA,
Plaintiff-Respondent,

-against-

GM Diamonds, Inc., et al.,
Defendants-Appellants,

GM Ideal, Inc., et al.,
Defendants.

_____

Weir & Partners LLP, New York (Bonnie R. Golub and Walter Weir, Jr. of the bar of the State of New Jersey, the Commonwealth of Pennsylvania and the District of Columbia, admitted pro hac vice, of counsel), for appellants.

Hahn & Hessen LLP, New York (Steven J. Mandelsberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about February 9, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its claims for breach of contract against defendant GM Diamonds, Inc. and to enforce a guaranty against defendant Geula Mesica, unanimously affirmed, with costs. Appeal from so-ordered stipulation, same court and Justice, entered April 12, 2016, unanimously dismissed, without costs, as abandoned.

With respect to appellants' contention that plaintiff's

disposition of GM Diamonds' collateral was commercially unreasonable, plaintiff presented prima facie evidence that it disposed of the diamond collateral in a commercially reasonable manner (NY UCC § 9-627[b]; *Merchants Bank of N.Y. v Gold Lane Corp.*, 28 AD3d 266, 268-269 [1st Dept 2006]). Prior to putting the goods up for auction, plaintiff had at least two persons with expertise appraise the value of the diamond security. It then reached out to four potential bidders, three of which submitted bids, and plaintiff accepted the highest bid made, which was reasonably close to the appraised value and also represented the market value at the time of the auction as numerous bidders submitted offers.

In opposition, defendants failed to raise a triable issue of fact, relying on defendant Gilad's disagreement with plaintiff's expert concerning the valuation of the inventory and his assertion that plaintiff had unreasonably rejected a better offer made to GM Diamonds for only a portion of the inventory before plaintiff took possession of the collateral. However, even if such an offer were made, "[t]he fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to

preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner" (UCC § 9-627[a]).

While defendants argue that the collateral had a book value over twice as high as the accepted offer, it is well settled that "a significant discrepancy between the original purchase price and the sales price does not, by itself, create a triable issue of fact" (*First Fed. Sav. & Loan Assn. v Romano*, 253 AD2d 363, 364 [1st Dept 1998]; *see Dougherty v 425 Dev. Assoc.*, 93 AD2d 438, 446 [1st Dept 1983]; *see e.g. DeRosa v Chase Manhattan Mtge. Corp.*, 10 AD3d 317, 322 [1st Dept 2004]).

With respect to defendant Geula Mesica's guaranty, the Bank submitted prima facie evidence in the form of the executed Unlimited Guaranty and the affidavit of its vice president attesting to GM Diamond, Inc.'s default. Defendant Geula, like the other guarantors on the unlimited Guarantees, executed an "irrevocable" and "unconditional" guaranty to the Bank which waived her right to "interpose any defense, . . . setoff or claim, deduction or counterclaim of any nature or description" in any action or proceeding instituted by the Bank with respect to the Unlimited Guarantees. Subsequently, at the time of the execution of the Forbearance Agreement, defendant Geula and the

other gurantors ratified and reconfirmed the Unlimited Guarantees, and again waived any defenses, setoffs or counterclaims against the Bank regarding all prior notes and the Unlimited Guarantees. We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3851 In re John Demas, Index 100346/15
Petitioner-Appellant,

-against-

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

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered November 27, 2015, which denied the petition seeking to annul the unsatisfactory rating (U-Rating) for the 2012-2013 school year given to petitioner by respondents, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that petitioner's performance was unsatisfactory has a rational basis in the record (*see Matter of Andersen v Klein*, 50 AD3d 296, 297 [1st Dept 2008]). While under his coaching and supervision, petitioner's basketball players engaged in a pattern of profane and uncontrollable conduct, on and off the court, which included yelling profanities, making offensive hand gestures and aggressively interacting with the

crowd during basketball games, such that, on at least one occasion, security agents had to escort the opposing team from the premises.

To the extent argued, the hearing officer was entitled to rely on hearsay (*see Matter of Paul v New York City Dept. of Educ.*, 146 AD3d 705 [1st Dept 2017]).

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

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3854-
3855 The People of the State of New York,
Respondent,

Ind. 3287/13
3288/13
SCI 4407/13

-against-

Meceo McEaddy,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Renee A. White, J. at plea; Melissa C. Jackson, J. at sentencing), rendered July 29, 2014, as amended June 22, 2016) convicting defendant, upon his plea of guilty, of grand larceny in the second degree (two counts), grand larceny in the third degree (13 counts), scheme to defraud in the first degree, criminal tax fraud in the second and fifth degrees (two counts each) and resisting arrest, and sentencing him, as a second felony offender, to an aggregate term of 5 to 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentences on the second-degree grand larceny and second-degree

tax fraud convictions to 4 to 8 years, resulting in a new aggregate term of 4 to 8 years, and otherwise affirmed.

We do not find that defendant make a valid waiver of his right to appeal, and we find the sentence excessive to the extent indicated.

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3856 J.A.D., an Infant by His Mother and Natural Guardian, etc., et al., Plaintiffs-Respondents,

-against-

Ronald Paul Arevalo, M.D., Defendant-Appellant,

St. Barnabas Hospital, et al., Defendants.

Index 20922/13E

_____

Mauro Lilling Naparty, LLP, Woodbury (Gregory A. Cascino of counsel), for appellant.

The Fitzgerald Law Firm, P.C., Yonkers (John M. Daly of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered September 3, 2015, which, insofar as appealed from, denied the motion of defendant Ronald Paul Arevalo, M.D. for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

The record, which includes conflicting expert affidavits, presents triable issues as to whether defendant Arevalo deviated from good and accepted medical practice, and whether such alleged

deviation proximately caused the infant plaintiff's injuries (*see generally Dallas-Stephenson v Waisman*, 39 AD3d 303, 306-307 [1st Dept 2007]). Plaintiff's expert neonatologist sufficiently raised questions as to whether Arevalo failed to timely diagnose the infant plaintiff's abdominal condition and obtain a surgical consult (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Cregan v Sachs*, 65 AD3d 101, 108-109 [1st Dept 2009]). Although surgery on the infant plaintiff did not occur for 36 hours following the infant's transfer to another facility, this does not warrant a different determination (*see Bradley v Soundview Healthcenter*, 4 AD3d 194 [1st Dept 2004]).

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3857 In re John P. Licciardi, etc., Index 101333/15
Petitioner-Appellant,

-against-

Vicki Been, etc., et al.,
Respondents-Respondents,

Esplanade Gardens, Inc.,
Respondent.

_____

John P. Licciardi, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for Vicki Been and the City of New York, respondents.

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Judgment, Supreme Court, New York County (Shlomo S. Hagler, J.), entered November 18, 2015, denying the petition to annul the determination of respondent, Department of Housing Preservation and Development (HPD), dated April 7, 2015, that petitioner was not entitled to succeed to the tenancy of his deceased aunt's Mitchell-Lama apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination denying petitioner succession rights to the subject apartment has a rational basis (*see Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406 [1st Dept 2007]). To succeed to the leasehold rights of a Mitchell-Lama apartment, a petitioner who is a senior citizen

is required to make a three-part showing that he or she (1) is a member of the tenant's family; (2) resided with the tenant in the apartment as a primary residence for a period of not less than one year immediately prior to the tenant's permanent vacating of the apartment; and (3) has appeared on income documentation submitted by such tenant, i.e., income affidavits, recertifications or Section 8 forms, for at least the reporting period immediately prior to the permanent vacating of the apartment by the tenant (28 RCNY 3-02[p][3]).

Petitioner is unable to establish the second and third prongs of this standard. There are two relevant time periods: the time frame prior to petitioner's aunt (the tenant) vacating the subject apartment for a nursing home in 2009, and the time frame prior to her husband's vacating the apartment for a nursing home in 2011. The fact that petitioner did not appear on any income affidavits or other pertinent income documentation during these time periods, and that another address was listed on his 2010 and 2011 tax returns precludes a finding that he was entitled to succession rights (28 RCNY 3-02[n][4][iv]; *Matter of Studley v New York City Dept. of Hous. Preserv. & Dev.*, 277 AD2d 101 [1st Dept 2000]). Even if petitioner were able to satisfy the income affidavit requirement, he was still unable to prove

that he was a co-resident of the subject apartment for the one-year period prior to vacatur (*cf. Shadick v 430 Realty Co.*, 250 AD2d 417, 418 [1st Dept 1998]).

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

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3858-
3859 The People of the State of New York,
Respondent,

-against-

Tory Bell,
Defendant-Appellant.

Ind. 5860/13

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

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

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered May 13, 2014, convicting defendant, upon his plea of guilty, of promoting a sexual performance by a child as a sexually motivated felony, and sentencing him to a term of one year, unanimously modified, on the law, to reflect that defendant was sentenced to a definite term of one year, and otherwise affirmed. Order, Supreme Court, New York County (same court and Justice), entered on or about January 7, 2015, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's assessment of 30 and 20 points, respectively, under the risk factors for having three or more victims and being a stranger to the victim, based on defendant's viewing of over 80 images and videos of child pornography on his computer, despite the fact that defendant did not have any contact with the victims (*see People v Labarbera*, 140 AD3d 463, 464 [1st Dept 2016] *lv denied* 28 NY3d 902 [2016]).

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant did not demonstrate any mitigating factors not already taken into account in the risk assessment instrument that would warrant a downward departure, given the egregiousness of the underlying offense, which included not only the possession but the dissemination of child pornography.

The sentence should be modified to the extent indicated in order to effectuate the intent of the plea agreement, which provided that defendant would receive a one-year definite term of incarceration.

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3860 In re Aliyah B.,
Petitioner-Appellant,

-against-

Taliby K., et al.,
Respondents-Respondents.

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Geoffrey P. Berman, Larchmont, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondents.

Douglas H. Reiniger, New York, attorney for the child.

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Appeal from order, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about February 8, 2016, which dismissed the petition for guardianship brought pursuant to article 6 of the Family Court Act, unanimously dismissed, without costs, as moot.

Petitioner's request for guardianship is now moot as the child's adoption by his maternal aunt and foster parent was finalized in November 2016 (*see Matter of Alexis C. [Jacqueline A.]*, 99 AD3d 542, 543 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013]; *Matter of Iyanna KK. [Edward KK.]*, 141 AD3d 885, 886 [3d Dept 2016]). In any event, under the circumstances, the petition was properly dismissed where the petitioner's parental rights had

been terminated (*see Matter of Mandju S.K. [Aliyah B.D.]*, 120 AD3d 1133 [1st Dept 2014], *lv denied* 24 NY3d 911 [2014]), the child freed for adoption, and both the Administration for Children's Services and the attorney for the child opposed the petition.

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3861 STS Partners Fund, LP, et al., Index 653216/14
Plaintiffs-Appellants-Respondents,

-against-

Deutsche Bank Securities, Inc., et al.,
Defendants-Respondents,

Wells Fargo Bank, N.A., etc.,
Defendant-Respondent-Appellant.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Michael A. Hanin of counsel), for appellants-respondents.

Alston & Bird LLP, New York (John F. Cambria of counsel), for respondent-appellant.

Jones Day, New York (Jayant W. Tambe of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 24, 2016, which, to the extent appealed from, granted the motion of defendants Deutsche Bank Securities, Inc. (DB Securities) and Deutsche Mortgage Securities, Inc. (DB Mortgage; together with DB Securities, the DB defendants) to dismiss the supplemental complaint as against them, and granted defendant Wells Fargo Bank, N.A.'s motion to dismiss all claims except the third cause of action as against it, unanimously modified, on the law, to grant Wells Fargo's motion to dismiss the third cause of action to the extent it is not based on the

IRR Threshold, and otherwise affirmed, without costs.

All claims against the DB defendants were correctly dismissed based on the no-action clause in the trust agreements. *Quadrant Structured Prods. Co., Ltd. v Vertin* (23 NY3d 549 [2014]), which plaintiffs cite, did not involve the termination of a trust. Read in context, the sentence on which plaintiffs rely ("[T]he no-action clause applies when the Trustee is authorized to decide whether to act; it cannot serve as an outright prohibition on a suit filed by a securityholder in the case where the Trustee is without authorization to act" [*id.* at 567]) means that a no-action clause does not bar claims – such as breach of fiduciary duty against a corporation's board of directors – that an indenture trustee cannot bring. Notably, the Court of Appeals ruled that "those claims sounding in breach of contract and arising from the indenture are barred – requiring the majority securityholders to bring those actions through the Trustee" (*id.* at 569). The claims that were dismissed included breach of the implied covenant of good faith and fair dealing and tortious interference with that covenant (*id.* at 558 n 10). Unlike the claims in *Quadrant* that were not dismissed, plaintiffs' claims all arise out of the trust agreements and the amendments thereto.

Even if, arguendo, plaintiffs were third-party beneficiaries of the trust agreements (*see Walnut Place LLC v Countrywide Home Loans, Inc.*, 35 Misc 3d 1207[A], 2012 NY Slip Op 50601[U], *1 n 2 [Sup Ct, NY County 2012], *affd* 96 AD3d 684 [1st Dept 2012]), the no-action clause would still apply (*see* 96 AD3d at 684).

So much of the third cause of action as alleged that Wells Fargo breached the trust agreements by executing the amendments made by it and DB Mortgage was correctly dismissed, because the plain language of section 9.01(a)(v) of the trust agreements permitted those amendments (*see generally Quadrant*, 25 NY3d at 559-560).

So much of the third cause of action as alleges that certificateholder consent was required to terminate the RS6 trust should also be dismissed, because, as sections 7.01 and 7.03 show, certificateholder consent was not the only way in which the trust could terminate.

The third cause of action should also be dismissed as against Wells Fargo based on anything other than the IRR Threshold. Both the original and amended trust agreements provide that an auction of the underlying certificates must yield at least the Minimum Auction Call Amount. Of the five components of "Minimum Auction Call Amount," only one – the IRR Threshold –

relates to the certificates held by plaintiffs (the Class A-X Certificates).

Plaintiffs contend that, in addition to the IRR Threshold, they had the right to receive a Principal Distribution Amount, a payment under the Cap Agreements, and the Class A-X Distribution Amount for the final month of the RS6 trust's existence. However, the documentary evidence submitted by defendants shows that, as early as December 31, 2007, the Class A-X Certificateholders had received their principal back. The supplemental complaint does not allege that plaintiffs were entitled to any amounts under the Cap Agreements, and plaintiffs may not raise this issue for the first time on appeal, because "the issue might have been obviated by the submission of documentary evidence" (*Ta-Chotani v Doubleclick, Inc.*, 276 AD2d 313 [1st Dept 2000]).

With respect to the Class A-X Distribution Amount, plaintiffs admit that they received distributions from the RS6 trust through August 2014. The trust was terminated on or about September 12, 2014. Hence, there was no Distribution Date on September 28, 2014; by definition, a Class A-X Distribution Amount depends on a Distribution Date. The Final Distribution Date depends on a notice pursuant to section 7.01, which was

never delivered.

With respect to the IRR Threshold, Wells Fargo submitted documentary evidence that, as of August 15, 2013, the internal rate of return (IRR) for the RS6 Class A-X Certificates was more than 128% and the IRR for the RS5 Class A-X Certificates was more than 137%. However, the underlying certificates for the RS6 trust were auctioned on September 12, 2014, and the underlying certificates for the RS5 trust were auctioned on October 9, 2015. Since the trust agreements define IRR as an *annual* rate, the 2013 reports from PricewaterhouseCoopers do not utterly refute plaintiffs' factual allegations or conclusively establish a defense as a matter of law (*see e.g. Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

The claim for breach of the implied covenant of good faith and fair dealing was correctly dismissed as against Wells Fargo, because section 6.01(e)(i) of the trust agreements states, "[N]o implied covenants or obligations shall be read into this Agreement against the Trustee" (*see Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 [1st Dept 2009]).

Wells Fargo's failure to exercise due care in performing ministerial tasks does not constitute a breach of fiduciary duty

(*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 157-158 [2008]). Nor does the supplemental complaint state a cause of action for fiduciary duty based on conflict of interest. While an indenture trustee's "pre-default duty to avoid conflicts of interest . . . is a fiduciary duty" (*Commerce Bank v Bank of N.Y. Mellon*, 141 AD3d 413, 416 [1st Dept 2016]), plaintiffs made only conclusory allegations that Wells Fargo received more under the RS6 amendment than it would have received under the original trust agreement (*see id.*). With respect to RS5, defendants explained the amendment's 30 basis points in their opening letter brief, and, as the court noted, plaintiffs failed to respond to this in their opposition letter brief. In any event, the fiduciary duty claim is duplicative of the contract claim (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 40 AD3d 392, 394 [1st Dept 2007], *mod on other grounds* 11 NY3d 146 [2008]).

We have considered plaintiffs' and Wells Fargo's remaining arguments and find that they do not warrant relief beyond the extent indicated.

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3862 The People of the State of New York, Ind. 30110/15
Respondent,

-against-

Kenneth McMichael,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered September 8, 2015, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed points for defendant's continuing course of sexual abuse against his daughters. In any event, regardless of whether defendant's correct point score is 105 or 85 points, he remains a level two offender, and we find no

basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument or outweighed by aggravating factors, including defendant's criminal history and failure to register as a sex offender in the state where the underlying crimes were committed.

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3863 The People of the State of New York, Ind. 84N/12
Respondent,

-against-

Felipe Carmona,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Siobhan C. Atkins of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered April 24, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 3½ years, followed by 3 years of postrelease supervision, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Testimony credited by the court established that an officer observed defendant engaging in what reasonably appeared to be a drug transaction, and that as

the officer approached, he detected the odor of PCP (*see People v Darby*, 263 AD2d 112, 114 [1st Dept 2000], *lv denied* 95 NY2d 795 [2000]). The officer sufficiently explained his ability to smell the PCP at a distance, and defendant's arguments to the contrary rest on speculation and factual assertions unsupported by the record.

We perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3864 In re The State of New York, Index 251403/13
Petitioner-Respondent,

-against-

Keith F.,
Respondent-Appellant.

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Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Zea Ishee of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (James W. Hubert, J.), entered on or about February 19, 2016, as amended by orders entered February 29, 2016, and June 20, 2016, which, upon a determination that respondent is a dangerous sex offender requiring confinement, committed him to a secure treatment facility, unanimously affirmed.

The 60-day deadline by which a trial "shall" be commenced, pursuant to Mental Hygiene Law § 10.07(a), is not a "strict time limit[]" (*Matter of State of New York v Enrique T.*, 93 AD3d 158, 173 [1st Dept 2012], *lv dismissed* 18 NY3d 976 [2012]). As there is no clear legislative intent to make compliance with that time frame a prerequisite to continued jurisdiction (*compare* CPL 30.30[1]; 18 USC § 3162[a][2]), the failure to commence a trial

within 60 days does not mandate dismissal of the petition (*see Matter of Grossman v Rankin*, 43 NY2d 493, 501 [1977]; *see also Dolan v United States*, 560 US 605, 611 [2010]). Article 10 of the Mental Hygiene Law (MHL) states repeatedly that failure to comply with various deadlines does not affect the validity of the petition or the various actions subject to those deadlines (*see* MHL §§ 10.05[b], [g]; 10.06[h]; 10.08[f]; 10.11[d][2], [4]).

As the Fourth Circuit recognized in addressing a delay in the context of a federal sex-offender management program, "[T]he proper remedy would not be release, but to conduct the hearing and adjudicate whether he is a 'sexually dangerous person' under the statute" (*United States v Timms*, 664 F3d 436, 455 n 19 [4th Cir 2012], *cert denied* __ US __, 133 S Ct 189 [2012]; *see also Levy v Davis*, 302 AD2d 309, 312 [1st Dept 2003]).

Respondent's due process rights were not violated by the 15-month delay between his declaration of readiness for trial, after the probable cause determination, made upon his waiver of a probable cause hearing, and the start of the trial. Under the four-factor balancing test set forth in *Barker v Wingo* (407 US 514 [1972]; *see also Mathews v Eldridge*, 424 US 319, 335 [1976]), the length of the delay may be considered presumptively prejudicial (*id.* at 530). The second factor, the reason given

for the delay (*id.* at 531), weighs only slightly against petitioner, because a considerable portion of the delay is attributable to respondent, the unavailability of the experts, and circumstances beyond petitioner's control.

Respondent is responsible for a five-month period of delay, when he chose to wait for his counsel to return from leave before proceeding to trial. Respondent also delayed the proceedings twice by refusing to appear, on June 12, 2014 and 2015. The delays for which respondent is responsible are not chargeable to petitioner (*see e.g. People v Wiggins*, 143 AD3d 451, 455 [1st Dept 2016], *lv granted* 28 NY3d 1152 [Jan. 3, 2017]). An additional six weeks of delay, based upon petitioner's request for time to finalize its expert report, is not attributable to petitioner, because respondent did not object to the adjournment (*see e.g. People v Abbatiello*, 30 AD2d 11, 15-16 [1st Dept 1968]). Approximately three months of the delay are attributable to the reassignment of the proceeding to a new judge whose docket was full. While *Barker* instructs that neutral reasons such as overcrowding should be chargeable to petitioner, though not weighted heavily (407 US at 531), this delay is not necessarily chargeable to petitioner because the reassignment occurred only after a long delay caused by respondent.

The remainder of the delay was not "substantial" and is "satisfactorily explained" in the record (*People v Mack*, 126 AD3d 657, 657 [1st Dept 2015], *lv denied* 25 NY3d 1167 [2015]; *see also People v Guerrero*, 126 AD3d 613 [1st Dept 2015], *affd* 28 NY3d 110 [2016]). These delays were occasioned primarily by the need of one of petitioner's experts for additional time to finalize his report, the unavailability of the expert witnesses, and technical difficulty in redacting the victim's image from the videotape of the most recent offense. Petitioner "should not be faulted for trying to develop the strongest case possible against" respondent, especially given the serious conduct to which respondent pleaded guilty and the undisputed existence of probable cause to believe that he required confinement (*see People v Wiggins*, 143 AD3d at 457; MHL § 10.06[g]).

The third *Barker* factor, respondent's assertion of his rights (407 US at 531-532), weighs in respondent's favor with respect to those adjournments to which he objected. However, his failure to retain any experts for, or to testify in, the article 10 proceedings, his consent to delays, his refusal to appear in court twice, and his engagement in abusive conduct directed against those associated with the proceeding suggest that

respondent "did not desire an early judicial hearing" (*United States v Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 US 555, 569 [1983]).

The fourth *Barker* factor, prejudice to respondent (407 US 532), weighs in petitioner's favor. There was no oppressive pretrial incarceration, since respondent chose to be confined at Rikers Island, rather than at a secure mental health facility, during the proceedings (*see Matter of Commitment of Villegas*, 342 Wis 2d 248, 616 NW 2d 350, *11 [Wis Ct App 2012]; *review denied* 344 Wis 2d 302 [Wis 2012]), and respondent's ability to put on a defense was not affected by the delay.

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

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

ENTERED: APRIL 27, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3865 The People of the State of New York, Ind. 3223/14
Respondent,

-against-

Lancine Conde,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Rebecca Hausner 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 (Neil Ross, J.), rendered July 7, 2015,

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 27, 2017

CLERK

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

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3866N Jamal Hyde as subrogee of Tilletha Hyde,
Plaintiff-Appellant,

-against-

Jewish Home Lifecare,
Defendant-Respondent.

Index 22119/16E

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Rodney R. Austin PLLC, Fresh Meadows (Rodney R. Austin of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 27, 2016, which granted the branch of defendant's motion seeking to compel arbitration and to dismiss the action, unanimously reversed, on the law, without costs, the motion to compel and to dismiss denied, and the matter remanded for determination of the branch of defendant's motion seeking to change venue.

Plaintiff, on behalf of his grandmother, Tilletha Hyde, entered into an agreement to arbitrate disputes with defendant nursing home, when the grandmother was admitted there in 2015. The agreement specified arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration

Association (AAA). After the grandmother fell and broke her hip, plaintiff attempted to commence an arbitration by filing a demand for arbitration with the AAA. The AAA then sent email correspondence to the parties, notifying defendant of plaintiff's demand and asking the parties to return the form to indicate their agreement to AAA administration of the dispute under the Consumer Arbitration Rules. After receiving no response from defendant by the deadline set in the first letter, the AAA sent a second letter notifying the parties that it was closing its file on the matter because the required submission had not been received from defendant, and inviting any questions.

Plaintiff then commenced this action in Supreme Court. Defendant answered, asserting fifteen affirmative defenses (none related to the arbitration agreement), appeared for and participated in a preliminary conference, and served a demand for authorizations, before moving to compel arbitration approximately four months after the commencement of plaintiff's action.

Defendant's failure to participate in arbitration after being notified of plaintiff's demand, followed by its participation in litigation without raising the issue of

arbitration, "manifested a preference 'clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration'" (*Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272 [1985]; *compare Byrnes v Castaldi*, 72 AD3d 718, 720 [2d Dept 2010] [no waiver where, among other things, the appellants repeatedly raised the issue of arbitration before the assigned justice and moved to compel arbitration pursuant to the time frame directed by the court]). Defendant's unequivocal, prior waiver of the right to arbitrate "may not be unilaterally recalled" (*Rusch Factors v Fairview Mfg. Co.*, 34 AD2d 635, 635 [1st Dept 1970]).

The affidavit of defendant's associate general counsel, which was proffered in reply, claimed that he had overlooked the AAA's letters until some unspecified time after the deadline for returning the form had passed. However, he offered no coherent or credible explanation for defendant's continued failure to raise the issue of arbitration, even after he learned of plaintiff's demand for arbitration. As defendant's conduct has caused unnecessary delay and expense in resolving the parties'

dispute, it would be unfair to now require plaintiff to return to the arbitration forum.

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

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

ENTERED: APRIL 27, 2017

CLERK