SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 6, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7290-
7291-
7292

Index 652619/12
653390/12

Nomura Asset Acceptance Corporation
Alternative Loan Trust, Series 2006-S3,
by HSBC Bank USA, National Association,
as Trustee,
Plaintiff-Respondent-Appellant,

-against-

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

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Nomura Asset Acceptance Corporation
Alternative Loan Trust, Series 2006-S4,
by HSBC Bank USA, National Association,
as Trustee,
Plaintiff-Respondent-Appellant,

-against-

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

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Shearman & Sterling LLP, New York (Jeffrey D. Hoschander of counsel), for appellant-respondent.

McKool Smith, P.C., New York (Zachary W. Mazin of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 26, 2014, in index no. 653390/12 (Series 2006-S4), and order, same court and Justice, entered July 18, 2014, in

index no. 652619/12 (Series 2006-S3), which, to the extent appealed from as limited by the briefs, granted defendant's motions to dismiss the claims alleging breach of § 8(xii) and (xiv) of the subject mortgage loan purchase agreements (MLPA), and denied the motions to dismiss the claims alleging breach of MLPA § 8(xxxiv), (xv), (xxxv) and (xxxvii) and section 2.03(b)(ix) of the subject pooling and service agreements (PSA), unanimously modified, on the law, to deny the motions to dismiss the claims alleging breach of MLPA § 8(xii) and (xiv), and otherwise affirmed, without costs.

While the court correctly sustained claims alleging breaches of the representations that the combined loan-to-value ratio (CLTV ratio) for each mortgage loan did not exceed 100%, and that none of the loans included in the trusts were classified as high-cost, it erred in dismissing the claims alleging breaches of representations regarding interest-only balloon loans and loans that were delinquent at the time the transaction closed, that plaintiff argues must be read to prohibit including such loans in the trusts.

CLTV representations: The court correctly determined that plaintiff sufficiently pleaded a breach of MLPA § 8(xxxiv), in which defendant represented that "[n]o Mortgage Loan had a combined loan-to-value ratio in excess of 100%" as of the closing

of the mortgage loan purchase. This representation necessarily implied that the sum of the combined mortgage loan amounts for a property did not exceed the value of the mortgaged property. Defendant does not dispute that it used appraisals made at the time of mortgage loan origination in calculating the CLTV ratio. Defendant represented in MLPA § 8 (xxvii) that those appraisals met certain minimum standards, including satisfying the requirements of Fannie Mae and Freddie Mac. Plaintiff alleged in the complaints[1] that, throughout the industry at the relevant time, brokers and loan officers "pressured" appraisers to provide "predetermined results," which led to appraisals that did not satisfy the minimum requirements of Fannie Mae and Freddie Mac. Plaintiff further alleged that application of retrospective automated valuation model calculations to the appraisals used by defendant in calculating the CLTV ratio indicates that: (1) at least some of the appraised values were improperly inflated; (2) use of accurate appraisals that met the requirements of Fannie Mae and Freddie Mac would have resulted in lower appraised values for those properties; and (3) therefore, for at least some of the properties, the mortgage loan amounts exceeded the accurate value

[1]This appeal involves two cases with separate but substantially similar pleadings filed under separate index numbers, each of which involves a MLPA containing the same terms.

of the mortgaged properties. These allegations are sufficient to satisfy the pleading requirement for breach of the representation that the combined loan-to-value ratio for each loan did not exceed 100%.

High cost loan representations: Plaintiff alleges that predatory lending laws cap the maximum allowable rate for mortgage loans at 10% above the rate for treasury securities having comparable periods of maturity, that at least two loans in Trust Series 2006-S3 had rates more than 10% above the comparable treasury rate, and that loans exceeding the legally permissible rate at origination qualify as high cost loans. Defendant argues that the specific regulation cited in the complaints (12 CFR 226.32) does not apply to loans made to purchase a home. However, defendant does not dispute that some of the loans included in the trusts are subordinate lien mortgages, which are subject to the cited regulation. Accordingly, the complaint[2] adequately states claims for breach of the representations in MLPA §§ 8[xv], [xxxv] and [xxxvii] and PSA § 2.03[b][ix] that none of the loans are classified as high cost or covered under any applicable law or regulation.

Interest only balloon loans: The court erred in dismissing

[2]Plaintiff only made this argument in the case filed under Index No. 652619/12, and has not raised it in the sister case.

the claims alleging that defendant breached MLPA § 8(xiv) by including interest-only balloon loans in the trusts. MLPA § 8(xiv) explicitly permits the inclusion of both interest-only and balloon loans in the trusts, but is silent as to loans that include both a period of interest-only payments and a balloon payment at maturity. The trial court correctly found that MLPA § 8(xiv) does not prohibit loans that include both a period of interest-only payments and a balloon payment at maturity, provided that such loans comply with the MLPA's requirements for both interest-only and balloon loans.[3] However, it is possible that some of the hundreds of loans included in the trusts that plaintiff alleges are interest-only balloon loans fail to comply with the MLPA's requirements.

For example, MLPA § 8(xiv) requires that, following the interest-only period, "the remaining Monthly Payments shall be sufficient to fully amortize the original principal balance" of an interest-only loan. This language contemplates more than one

[3] In particular, it is unclear from the record whether plaintiff argued to the motion court, as it does in its appellate reply brief, that the payments on interest-only loans after the interest-only period are required to be equal. To the extent that it did so, the motion court properly rejected that argument. The MPLA does not impose such a requirement, and we decline to read into it a contractual obligation that monthly mortgage loan payments be of equal amount (*see Wilmington Trust Co. v Morgan Stanley Mtge. Capital Holdings LLC*, 152 AD3d 421, 422 [1st Dept 2017]).

payment towards the principal of an interest-only loan.[4] Therefore, an interest-only balloon loan would violate the MLPA's requirements if it were structured so that the original principal was repaid in one final lump sum. Accordingly, the motion court erred in holding that the complaints fail to state a cause of action by identifying loans in the trusts that are interest-only balloon loans. In view of the contractual language, the fact that the offering circular disclosed that interest-only balloon loans were included in the pools is irrelevant.

Delinquent status representation: The motion court also erred in dismissing the claims alleging that defendant breached MLPA § 8(xii) by including some number of loans that were in delinquent status at the time of the transaction closings. MLPA § 8(xii) warranties that

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[4]The MLPAs at issue do not include the common boilerplate language to the effect that capitalized terms include the plural as well as the singular. Accordingly, the parties' use of the pluralized term "Monthly Payments" in reference to payments after the interest-only period expires requires that the loan repayment include multiple payments of principal. Indeed, plaintiff attached to its reply affirmation presented to the motion court a copy of a similar agreement in another case, *MASTR Asset Backed Sec. Trust v WMC Mtge. Corp.* (983 F Supp Ed 1104 [D Minn 2013], *appeal dismissed* 2017 WL 5178954 [8th Cir 2017] [No. 11-cv-02542]), which did include this language. Had the sophisticated parties in this case intended for the term "Monthly Payments" to include a loan in which all principal was paid in a single payment made after the interest-only payment ends, they could have so stated.

> "[t]here is no material default, breach, violation event or event of acceleration existing under the Mortgage or the Mortgage Note and no event which, with the passage of time or with notice and the expiration of any grace or cure period, would constitute a material default, breach, violation or event of acceleration. . . ."

It is unclear whether this language prohibits the securitization of loans that, at the time of closing, were not in default but were in a delinquent status and could enter into default "with the passage of time" if the delinquency were not cured. Plaintiff argues that, under PSA § 3.09[a][ii], a delinquent payment not remedied for 120 days constitutes a material default that allows the loan servicer to commence foreclosure proceedings or take other actions adverse to the interests of the trusts. Defendant contends that a delinquency does not constitute a default by the "passage of time" alone, but also requires that the borrower miss subsequent payments. Plaintiff contends that a single missed payment not remedied over 120 days could constitute a default, and that, in any event, a borrower's continued failure to make monthly payments is the absence of an action or event, so that, in effect, the passage of time alone can transform a delinquency into a default.

"A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and

concerning which there is no reasonable basis for a difference of opinion" (*Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002] [internal quotation marks omitted]). Since the contractual language at issue in this case is ambiguous, and there is no extrinsic evidence in the record that sheds light on the meaning of the provision, the claims based on alleged breaches of MLPA § 8(xii) should not have been dismissed at this stage of the proceedings (*see Almah LLC v AIG Empl. Servs., Inc.*, 157 AD3d 416, 416 [1st Dept 2018] ["(i)f a contract is ambiguous, the complaint(s) should not be 'dismissed pre-answer before the development of a full factual record as to the parties' intent'"]).

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

ENTERED: DECEMBER 6, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Gische, Tom, JJ.

7532 Republic Realty Services, Inc., Index 652280/16
Plaintiff-Respondent,

-against-

Kuafu Properties LLC, et al.,
Defendants-Appellants.

- - - - -

[And A Third-Party Action]

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Dai & Associates, P.C., New York (Amiad Kushner and Jacob Chen of counsel), for Kuafu Properties LLC and SCG Mima Towers, LLC, appellants.

Offit Kurman, P.A., New York (Richard G. Menaker of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 20, 2018, which granted plaintiff's motion for partial summary judgment as to liability and denied defendants Kuafu Properties LLC and SCG MiMa Towers LLC's (together Kuafu)cross motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs to deny plaintiff's motion, and to grant Kuafu's cross motion dismissing the complaint. The Clerk is directed to enter judgment accordingly. Defendant Myles J. Horn's appeal from the foregoing order, unanimously withdrawn, pursuant to the parties' stipulation dated October 5, 2018.

Plaintiff only dealt with Myles J. Horn, not Kuafu. Horn's

dealings with Kuafu did not provide a basis for plaintiff to recover against Kuafu. Horn and Kuafu's term sheet established that the two were never joint venturers, refuting plaintiff's claim that Horn was a participant in Kuafu's subsequent acquisition of the property. Moreover, Horn's settlement with Kuafu of his claim that Kuafu stole his opportunity to make the purchase did not grant him an interest in the property so as to make him a successful or partially successful bidder (*see Abraham Glanzer, Inc. v Bailey*, 254 AD2d 91 [1st Dept 1998]).

Plaintiff's claims against Kuafu for express breach of plaintiff's contract with Horn must be dismissed, because there was no privity between plaintiff and Kuafu (*see Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2d Dept 2011]). The claim of breach of a confidentiality agreement between Horn and the property sellers fails because, contrary to plaintiff's contention, there is no evidence that plaintiff was an intended third-party beneficiary of that agreement (*see Artwear, Inc. v Hughes*, 202 AD2d 76, 81-82 [1st Dept 1994]).

Plaintiff's implied contract claim, which alleges that Kuafu appropriated plaintiff's labor when it entered and then cut Horn (and therefore plaintiff) out of the deal must also be dismissed (*see generally Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 153 [1st Dept 2003]). Plaintiff, which was excluded from the

transaction almost from the outset, was not a procuring cause of Kuafu's purchase (*see SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 97-98 [1st Dept 2014]). Moreover, there is no independent claim of bad faith against Kuafu, because Horn, not Kuafu, excluded plaintiff from the transaction as plaintiff's services were not needed. Plaintiff's exclusion occurred well before negotiations between Horn and sellers (and perforce Kuafu and sellers) were plainly and evidently reaching success (*see Sibbald v Bethlehem Iron Co.*, 83 NY 378,385 [1881]; *Aegis Prop. Servs. Corp. v Hotel Empire Corp.*, 106 AD2d 66, 75 [1st Dept 1985]).

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, JJ.

7698 Emel Dilek, et al., Index 652956/11
Plaintiffs-Appellants,

-against-

David Rozenholc, et al.,
Defendants-Respondents.
- - - - -
[And A Third-Party Action]

Rosenberg Feldman Smith, LLP, New York (Michael H. Smith of counsel), for Emel Dilek, appellant.

Nicholas J. Damadeo, P.C., Huntington (Nicholas J. Damadeo of counsel), for Louis A. Russo, appellant.

Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for David Rozenholc and David Rozenholc & Associates, respondents.

Roberts & Roberts, New York (Michael J. Roberts of counsel), for Mahesh Agashiwala, Loma Agashiwala, John C. Alexander, Theodore Baer, Bertina Baer, Nolan Baer, Judy Becker, Johanna Bennett, Mariel Bennett, Jack Biderman, Isabel Barnard Biderman, Barbara E. Bishop, Terry Chabrowe, Paula Chabrowe, Amy R. Cousins, Cathy Marshall, Lori Metz, Brigid O'Connor, Lucille Petino, Debra Lyn Schinasi, Hyman Schinasi, Jean Schinasi, Kalia Shalleck and Jean Shimotake, respondents.

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered November 8, 2017, which, insofar as appealed from as limited by the briefs, granted defendants David Rozenholc and David Rozenholc & Associates' (the Rozenholc defendants) motion for summary judgment dismissing the complaints as against them, granted the tenant defendants' cross motion for summary judgment

dismissing the complaints as against them, and denied plaintiff Louis A. Russo's motion for summary judgment on his complaint, unanimously affirmed, without costs.

Plaintiff Dilek was neither a signatory nor an intended third-party beneficiary of the 2009 agreement, and therefore lacks standing to sue for breach of that contract. On plaintiff Russo's prior appeal, we found that the estate of Ronald Pecunies "stepped into decedent's shoes" for purposes of Russo's breach of contract claim (*Russo v Rozenholc*, 130 AD3d 492, 496 [1st Dept 2015]). Russo – the estate's representative – and Dilek – decedent's girlfriend – cannot *both* step into decedent's shoes.

On Russo's prior appeal, we found that the agreement neither unambiguously provided for pooling nor unambiguously foreclosed pooling (*see Russo*, 130 AD3d at 495-496). However, extrinsic evidence submitted by the Rozenholc defendants in support of their motion for summary judgment resolved any previous ambiguities and eliminated any factual issues (*see James v Jamie Towers Hous. Co., Inc.*, 294 AD2d 268, 270 [1st Dept 2002], *affd* 99 NY2d 639 [2003]). Specifically, defendants submitted affidavits of several signatories to the agreement attesting that it did not require any of them to "pool" settlement proceeds together and that each signatory intended to settle individually with the owner. Additionally, the president of the Home Owners

Association and Rozenholc, who drafted the agreement, both testified that the amounts of the payments to be made by the owner to the tenants would be settled on a unit-by-unit basis, and both rejected the notion that settlement proceeds had been intended to be "pooled." This evidence concerning the manner in which the agreement was intended to operate is entirely uncontradicted on the record. Therefore, the motion court correctly determined that the agreement did not create any pooling arrangement and granted the Rozenholc defendants' motion for summary judgment.

As plaintiff Russo's malpractice claims are intertwined with his breach of contract claim, and there is no issue of fact as to whether defendants can be held liable for such breach, plaintiff Russo's claim for malpractice was correctly dismissed by the court.

Dilek's malpractice claim was also properly dismissed as she cannot establish damages or proximate cause. Dilek did not have any rights under the 2009 agreement because she was neither a signatory nor an intended third-party beneficiary of that contract. Additionally, Dilek has failed to establish that the motion court erred in deciding that she was not entitled to succession rights to the unit under the Rent Stabilization Law. Thus, but for the Rozenholc defendants' representation of Dilek,

Dilek would not have received any money under the 2009 agreement, and certainly not the amount she did receive from the owner to settle the matter.

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: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7807 The People of the State of New York, Ind. 969/15
Respondent,

-against-

Timothy McMillan,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Caitlin Glass of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Laura A. Ward, J.), rendered July 6, 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.

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

ENTERED: DECEMBER 6, 2018

CLERK

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

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7808 Delores Person, Index 21171/12E
Plaintiff-Respondent,

-against-

The New York City Housing Authority,
Defendant-Appellant.

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

Frekhtman & Associates, Brooklyn (Eileen Kaplan of counsel), for respondent.

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Order, Supreme Court, Bronx County (Llinèt M. Rosado, J.), entered December 15, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish prima facie that it did not have constructive notice of the condition that caused plaintiff's trip and fall accident. Its caretaker testified inconsistently as to whether, and to what extent, she cleaned the subject building in accordance with the applicable janitorial schedule, and an affidavit from her supervisor similarly contradicts her testimony. Because defendant failed to present competent evidence that the janitorial schedule was followed on the day of the accident, the motion court correctly denied the motion

regardless of the sufficiency of plaintiff's papers in opposition (*see Williams v New York City Hous. Auth.*, 99 AD3d 613 [1st Dept 2012]).

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7809-
7810 In re Kahlisha K.J.,
Petitioner-Respondent,

-against-

Eddie R.,
Respondent-Appellant.

- - - - -

In re Kahlisha K.J.,
Petitioner-Appellant,

-against-

Eddie R.,
Respondent-Respondent.

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Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for Eddie R., appellant/respondent.

Leslie S. Lowenstein, Woodmere, for Kalisha K.J., respondent/appellant.

Dawne A. Mitchell, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Brenda Rivera, J.), entered on or about March 2, 2017, which ordered the mother's petition for modification of custody of the parties' child, Khloe R., to proceed to a best interests hearing, unanimously reversed, on the law and the facts, without costs, the petition denied, and the proceeding dismissed. Appeal from order, same court (Aija M. Tingling, J.), entered on or about September 6, 2017, which stayed the underlying proceedings pending appeal from the March

2, 2017 order, unanimously dismissed, without costs, as academic.

Although an appeal as of right does not lie from the nonfinal March 2, 2017 order, given the significance of the issues, we, nostra sponte, treat the notice of appeal as an application for leave to appeal and grant the father leave (Family Ct Act 1112[a]; *Matter of Sharon H. v Terry P.*, 232 AD2d 335 [1st Dept 1996]).

When a parent seeks a change of custody based on the best interests of the child, that parent must first make an evidentiary showing that there has been a sufficient change in circumstances to warrant a hearing (*David W. v Julia W.*, 158 AD2d 1, 7 [1st Dept 1990]; *see also Matter of Benjamin Sze-Bin W. v Kerry S.W.*, 122 AD3d 473 [1st Dept 2014]).

Family Court failed to apply this standard. Instead of determining whether the mother had made an evidentiary showing that there had been a sufficient change in circumstances, Family Court held a hearing at which testimony from both the mother and the father was adduced, and Family Court accepted as true the mother's proof and afforded her every favorable inference that reasonably could be drawn therefrom. However, that standard applies where a respondent moves to dismiss a modification proceeding at the conclusion of the petitioner's proof, which was not the case here. The father did not move to dismiss at the

conclusion of the mother's case and instead proceeded with his own testimony, which evidence the court did not address in the order under review.

Since the court, in issuing the March 2, 2017 order, applied the wrong standard in reviewing the hearing evidence, we reverse. We further find, after reviewing all of the evidence introduced at the hearing held by the Family Court, that the petition should be denied on the ground that the mother has failed to make an evidentiary showing that there has been a sufficient change in circumstances to warrant a hearing as to the child's best interests. The mere fact that the mother voluntarily moved from the Bronx to Middletown, New York does not constitute a change in circumstances. Further, the evidence introduced at the hearing did not establish that the father's conduct constituted parental alienation.

The mother's appeal from the order granting a stay of the Family Court proceedings is moot, as any stay expires with this decision.

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7811-
7812 Index 109882/09

Wilmington Savings Fund Society, FSB,
As Trustee For Normandy Mortgage
Loan Trust, etc.,
Plaintiff-Respondent,

-against-

Sharay Hayes,
Defendant-Appellant,

New York City Environmental Control
Board, et al.,
Defendants.

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Rozario & Associates, P.C., New York (Rovin R. Rozario of counsel), for appellant.

Knuckles, Komosinski & Manfro LLP, Elmsford (Louis A. Levithan of counsel), for respondent.

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Judgment of foreclosure and sale, Supreme Court, New York County (Gerald Lebovits, J.), entered April 30, 2018, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered November 14, 2017, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff failed to prove that the 90-day notice required by RPAPL 1304 and the 30-day notice required by defendant Hayes's mortgage were actually mailed to defendant (*see American Tr. Ins. Co. v Lucas*, 111 AD3d 423 [1st Dept 2013]). The sole documentary proof of actual mailing was a printout that was never admitted at

trial; rather, the trial court erroneously allowed plaintiff's witness to read from the unadmitted document (*see Jemmott v Lazofsky*, 5 AD3d 558, 560 [2d Dept 2004]; *Chase Bank USA, N.A. v Hershkovits*, 28 Misc 3d 1202[A], 2010 NY Slip Op 51122[U] [Civ Ct, Kings County 2010]).

However, plaintiff established a rebuttable presumption of mailing through its witness Eric Wheeler's detailed testimony about how the 90- and 30-day notices were generated, addressed, and mailed, and how their mailing was documented (*see American Tr. Ins. Co.*, 111 at 424). At the time of trial, Wheeler was an employee of the servicer for the loan, and had reviewed the documents because they had been "boarded" over to the servicer as part of its regular business. Moreover, he had been employed at JPMorgan Chase, plaintiff's assignor of the note and mortgage, at the time of the mailings, and thus had full knowledge of the relevant office procedures (*see HSBC Bank USA v Rice*, 155 AD3d 443, 443-44 [1st Dept 2017]).

Defendant argues that plaintiff lacked standing to commence this foreclosure action because it failed to show that Mortgage Electronic Registration Systems, Inc. (MERS) had authority to assign the underlying mortgage note (citing *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]). However, MERS is irrelevant here. The consolidated note upon which plaintiff sued

was given by defendant directly to Washington Mutual (the assets of which were acquired by JPMorgan Chase in 2008) (*see Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856 [2d Dept 2009]). Defendant does not challenge the authority of Washington Mutual and later JPMorgan Chase to assign the consolidated note to plaintiff.

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7814 James Burgund, Index 155887/14
Plaintiff-Respondent,

-against-

Cushman & Wakefield, Inc.,
Defendant-Appellant,

JT&T Air Conditioning Corp.,
Defendant.

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McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for appellant.

Marder, Eskesen & Nass, New York (Joseph B. Parise of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered on or about April 25, 2017, which, to the extent appealed from as limited by the briefs, denied the motion of defendant property manager Cushman & Wakefield, Inc. (C & W) for summary judgment dismissing the Labor Law claims as against it, unanimously modified, on the law, to dismiss the Labor Law § 240(1) claim as against C & W, and otherwise affirmed, without costs.

The record demonstrates that defendant property manager C & W was a statutory agent of the property owner (Verizon) and general contractor with respect to plaintiff's claims under Labor Law §§ 200 and 241(6), but not as to the Labor Law § 240(1) cause

of action. C & W's manager testified that he oversaw general operations in Verizon's building, including offering managerial aid to Verizon's employees, like plaintiff, in relation to building issues, roofs, and other repairs, and this evidence was sufficient to raise factual issues regarding C & W's duty to keep the premises, including the areas of the building where renovation of hardware systems upgrades were being performed at the time plaintiff was injured, safe (*see DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015]).

However, C & W's manager testified that he lacked knowledge of the internet installation work plaintiff was performing when injured, that he did not direct or supervise such work, and that the focus of his office was centered on unrelated air conditioning upgrade work on the second floor of the building at the time in question. This, together, with plaintiff's testimony, inter alia, that he supervised his own work and was not supervised by C & W, undermines plaintiff's Labor Law § 240(1) claim and it should be dismissed (*see Betancur v Lincoln Ctr. for the Performing Arts, Inc.*, 101 AD3d 429 [1st Dept 2012]).

We have considered C & W's remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7815 Nijo Mills, Claim 128405
Plaintiff-Appellant,

-against-

City University of New York,
Defendant-Respondent.

_____

Nijo Mills, appellant pro se.

Barbara D. Underwood, Attorney General, New York (Matthew William Grieco of counsel), for respondent.

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Order, Court of Claims (Judith A. Hard, J.), entered January 11, 2017, which granted defendant The City University of New York's (CUNY) motion to dismiss the complaint as untimely, unanimously affirmed, without costs.

The Court of Claims properly granted defendant's motion to dismiss the claim as untimely. For purposes of the Court of Claims Act, a claim accrues when damages are reasonably ascertainable (*Prisco v State of New York*, 62 AD3d 978 [2d Dept 2009], *lv denied* 13 NY3d 706 [2009]; *Waters of Saratoga Springs v State of New York*, 116 AD2d 875, 877 [3d Dept 1986], *affd* 68 NY2d 777 [1986]). Here, claimant's damages were reasonably ascertainable in January 2016. Since claimant did not serve his claim upon the Attorney General until August 19, 2016, and did not file it with the Clerk of the Court until August 24, 2016,

the claim was untimely. Compliance with the filing deadlines set forth in Court of Claims Act § 10 is jurisdictional in nature and must be strictly construed (*see Park v State of New York*, 226 AD2d 153, 153 [1st Dept 1996]). Contrary to claimant's contention, the limitations period was not extended by the continuing violation doctrine (*see Bullard v State of New York*, 307 AD2d 676, 678 [3d Dept 2003]; *Selkirk v State of New York*, 249 AD2d 818, 819 [3d Dept 1998]).

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7816-
7817 The People of the State of New York,
Respondent,

-against-

Arthur Jones also known as
Malik Mustafa,
Defendant-Appellant.

Ind. 2200/14

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered December 17, 2014, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously reversed, on the law, and the matter remanded for a new trial. Appeal from order, same court and Justice, entered on or about March 3, 2017, which denied defendant's CPL 440.10 motion to vacate the judgment of conviction, unanimously dismissed, as academic.

Defendant was deprived of effective assistance of counsel by trial counsel's failure to request a jury charge on the lesser

included offense of petit larceny (*see generally People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Under both the state and federal standards, a single, prejudicial error may constitute ineffective assistance, regardless of whether counsel's overall performance "bespoke of general competency" (*Rosario v Ercole*, 601 F3d 118, 124 (2d Cir 2010], *cert denied* 563 US 1016 [2011]).

At trial, it was undisputed that defendant wrongfully took money from the victims, and defense counsel's strategy was to avoid a felony conviction by challenging the prosecution's proof on the element of force (*see* Penal Law § 160.05). The defense theory was that, rather than using force, defendant tricked the victims out of 20 dollars by pretending they had accidentally broken his liquor bottle. In furtherance of this strategy, defense counsel sought a misdemeanor charge that encompassed a wrongful but nonforcible taking. However, instead of seeking the misdemeanor charge of petit larceny (Penal Law § 155.25), defense counsel requested the misdemeanor charge of fraudulent accosting (Penal Law § 165.30[1]), to which defendant was not entitled because it is not a lesser included offense of robbery in the third degree (*see People v Bonaparte*, 170 AD2d 688 [2d Dept 1991]).

Contrary to the prosecution's claim, petit larceny, which is

defined as "steal[ing] property," qualifies in the abstract as a lesser included offense of robbery in the third degree, which is defined as "forcibly steal[ing] property" (*see* Penal Law §§ 155.25, 160.05; *People v Tate*, 170 AD2d 291, 292 [1st Dept 1991]). There is no separate crime of petit larceny "by false pretenses," and the fact that a nonforcible taking is committed by fraud does not disqualify it as a lesser included offense of robbery.

It is clear that defense counsel's failure to seek a petit larceny charge was not strategic. The defense strategy was to concede that a nonforcible theft occurred and seek a misdemeanor conviction. There is no merit to the People's suggestion that counsel may have had a strategic reason for requesting fraudulent accosting but not petit larceny.

We also find that counsel's failure to request a petit larceny charge was prejudicial. There was plainly a reasonable view of the evidence to support petit larceny. Furthermore, the evidence that the theft was forcible rather than a scam was not so overwhelming as to render a request for petit larceny futile. The victims were tourists who returned to their home country and did not testify, and the sole eyewitness's ability to establish the element of force was in question.

We find that the verdict was not against the weight of the

evidence, and accordingly find no basis for dismissal. Since we are ordering a new trial, we find it unnecessary to reach any other issues.

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7818 In re Edward M. Thornton, et al., Index 156571/16
Petitioners-Plaintiffs-Appellants,

-against-

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

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Lyman & Ash, Philadelphia, PA (Cletus P. Lyman, of the bar of the State of Pennsylvania, admitted pro hac vice, of counsel), and The Law Offices of Jeffrey Goldman, New York (Thomas H. Andrykovitz of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondents.

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Judgment, Supreme Court, New York County (Debra A. James, J.), entered on or about May 9, 2017, which denied the petition and dismissed the hybrid proceeding brought pursuant to CPLR article 78 and 42 USC § 1983 seeking, inter alia, to order respondent New York City Department of Education (DOE) to (1) vacate its determination dated April 8, 2016 finding that petitioner-plaintiff Thornton's Classic Studio (TCS) is a nonresponsible vendor, (2) re-activate TCS's listing on DOE's Financial Accounting and Management System (FAMIS), (3) monetary damages for loss of business and reputational harm, or, alternatively, to remand for a plenary hearing before a neutral and impartial decision-maker, and granted respondents' cross

motion to dismiss, unanimously affirmed, without costs.

In a prior decision (*Thornton v New York City Bd./Dept of Educ.*, 125 AD3d 444 [1st Dept 2015]), we determined that respondent Department of Education's (DOE) placement of TCS on de-active status in FAMIS was rationally based upon the admission of petitioner Edward Thornton, president of TCS, that for years the company continued to employ a photographer after he pleaded guilty to endangering the welfare of a child for groping a student's breast while taking her yearbook photograph. However, because the DOE acted arbitrarily and capriciously by failing to provide notice to petitioners and afford them an opportunity to protest the DOE's apparent determination of nonresponsibility, as required by its own Procurement Policy and Procedures (PPP) (Sections 2-05(g)(1) and 2-06), we remanded to the DOE for the issuance of a determination whether TCS is a responsible vendor. The proceeding with respect to the 42 USC § 1983 claims was severed and converted into a plenary action, and those claims were reinstated without prejudice to a motion to dismiss.

Upon remand, petitioners failed to establish that the nonresponsibility determination was not warranted. Contrary to petitioners' contention, the DOE acted within its discretion by giving greater weight to TCS's lack of judgment in retaining a photographer with a criminal record stemming from his conduct

while in a DOE school over the company's post hoc remedial measures (*see Matter of Dempsey v New York City Dept. of Educ.*, 25 NY3d 291, 300 [2015]), particularly in light of TCS's refusal to fully accept responsibility for its actions (*see e.g. Brooklyn Community Mgt. LLC v New York City Dept. of Educ.*, 67 AD3d 404, 404 [1st Dept 2009]).

Petitioners' additional claims of bias and violations of due process are unsupported by the record. The DOE followed the procedure set forth in the PPP, as directed by this Court, and issued detailed reports explaining with specificity the non-responsibility determination and subsequent denial of TCS's protest (*see* PPP §§ 2-05, 2-06). Although TCS may object to the findings, disagreement does not amount to bias (*Matter of Phillips v Lee*, 115 AD3d 957, 958 [2d Dept 2014]). Moreover, the review of written submissions, rather than holding an evidentiary hearing, did not deny petitioners due process (*Matter of Tully Constr. Co. v Hevesi*, 214 AD2d 465, 466 [1st Dept 1995], *appeal withdrawn* 87 NY2d 969 [1996]).

The Supreme Court properly dismissed the proceeding with respect to the 42 USC § 1983 claims as duplicative of the severed plenary action, which was pending at that time, and involved the same parties, sought essentially the same relief, and alleged the

same actionable wrongs (*see GSL Enters. v Citibank*, 155 AD2d 247, 247 [1st Dept 1989]).

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

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7819 The People of the State of New York, Respondent, Ind. 5449/14

-against-

Carlos Rodriguez,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Orrick Herrington & Sutcliffe, LLP, New York (Alyssa Barnard of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at hearing; Mark Dwyer, J. at jury trial and sentencing), rendered August 1, 2016, convicting defendant of persistent sexual abuse and sentencing him, as a persistent violent felony offender, to a term of three years to life, unanimously affirmed.

We conclude, based on a record that includes a hearing on defendant's motion to dismiss the indictment in furtherance of justice, that defendant has not established that his attorney's allegedly deficient advice regarding plea negotiations caused prejudice to the extent required under the applicable federal and state standards (*see Lafler v Cooper*, 566 US 156, 164 [2012]; *Missouri v Frye*, 566 US 134, 147 [2012]; *People v Bank*, 28 NY3d 131, 137-138 [2016]). Before defendant's criminal court

arraignment on charges of forcible touching and sexual abuse in the third degree, the prosecutor proposed a misdemeanor disposition. Assuming, without deciding, that counsel should have warned defendant that he could be indicted for persistent sexual abuse, and, if convicted, sentenced to a term of three years to life as a persistent violent felony offender, defendant has not established that the misdemeanor disposition would have actually been accepted by the court.

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7820- Ind. 5117/08
7821-
7822-
7823-
7824-
7825 The People of the State of New York,
Respondent/Appellant,

-against-

Jason Lara,
Defendant-Appellant/Respondent.

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

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

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Judgment of resentence, Supreme Court, New York County (Laura A. Ward, J.), rendered September 8, 2017, as amended September 28, 2017, resentencing defendant, as a persistent violent felony offender, to a term of 16 years to life, unanimously reversed, on the law, the judgment of resentence vacated, and the sentence of 18 years to life imposed on July 31, 2012 reinstated.

On a prior appeal from the 2012 judgment of conviction (130 AD3d 463 [1st Dept 2015]), this Court found that defendant was entitled to have his persistent felony offender status litigated with proper assistance of counsel at a new adjudication and

sentencing because of counsel's failure to ascertain that, in violation of *People v Catu* (4 NY3d 242 [2005]), defendant was not advised about postrelease supervision at the time of a 2001 plea, and by failing to litigate whether the *Catu* violation rendered that conviction unconstitutional for predicate felony purposes. We found defendant's excessive sentence claim to be academic because we were ordering a plenary sentencing proceeding.

On remand, the sentencing court determined that defendant no longer qualified as a persistent violent felony offender because his 2001 predicate conviction violated *Catu*. Defendant was resentenced accordingly.

The Court of Appeals thereafter held that *Catu* does not apply retroactively in enhanced sentencing proceedings (*People v Smith*, 28 NY3d 191 [2016]). Based on the Court of Appeals' decision in *Smith*, the sentencing court granted the People's CPL 440.40 motion to set aside defendant's resentence, and at the subsequent resentencing, the court reduced defendant's original 18-to-life sentence to 16 years to life. Defendant also made an unsuccessful challenge to the constitutionality of his 2001 predicate conviction on the ground that, notwithstanding the nonretroactivity of *Catu*'s automatic vacatur rule, he was actually prejudiced by the lack of a warning about postrelease supervision.

On defendant's appeal, he claims that he was entitled to a hearing on his prejudice-based claim that his 2001 plea was unconstitutionally obtained, and that 16-to-life resentence (the minimum permitted by law) constituted unconstitutional cruel and unusual punishment. On the People's appeal, they claim that the resentencing court was required to reimpose the original 18-to-life sentence. On these cross-appeals from the same judgment of resentence, albeit from different aspects thereof, each party is an "appellant" within the meaning of CPL 470.15(1), and we may thus review errors adversely affecting either party.

As for defendant's appeal, we find that his present challenge to the constitutionality of his 2001 conviction is barred by CPL 400.15(7)(b) because of his failure to raise this claim at the time of the 2012 sentencing proceedings. Furthermore, the 2017 resentencing court correctly determined that defendant's pre-*Catu* prejudice claim was refuted by the record of the 2001 proceedings and did not warrant an evidentiary hearing. We also find that sentencing defendant as a persistent violent felony offender was not unconstitutionally severe *(see People v Thompson*, 83 NY2d 477, 480 [1994]; *People v Broadie*, 37 NY2d 100 [1975], *cert denied* 423 US 950 [1975]).

As for the People's appeal, we conclude that the resentencing court should have reinstated defendant's original,

lawful prison sentence of 18 years to life instead of revisiting its own exercise of discretion and imposing a lesser prison sentence of 16 years to life, which it had no statutory authority to do (*see* CPL 430.10; *People v Williams*, 14 NY3d 198, 212 [2010]). When, in 2015, this Court ordered a plenary resentencing, it did so on grounds subsequently rejected by the Court of Appeals in *Smith*, leaving no other basis for revisiting the sentence. Furthermore, CPL 440.40(5) required the court, after granting the People's motion to set aside the resentence that violated *Smith*, to "resentence the defendant in accordance with the law," which in this case means to reimpose the lawful 18-to-life term without a de novo exercise of discretion.

We have considered defendant's request to reduce the sentence in the interest of justice and see no basis to do so.

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7826 Cash4Cases, Inc., Index 655131/16
Plaintiff-Respondent,

-against-

Arthur Brunetti,
Defendant-Appellant.

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Law Office of Michael P. Chenel, Albany (Michael P. Chenel of counsel), for appellant.

Law Offices of Raul J. Sloezen, Yonkers (Raul J. Sloezen of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Gerald Lebovits, J.), entered July 27, 2017, which granted plaintiff's motion for summary judgment in lieu of complaint, deemed appeal from judgment, same court and Justice, entered August 22, 2017 (*see* CPLR 5520[c]), and, so considered, said judgment unanimously affirmed, without costs.

Pursuant to an "Agreement for Purchase of Claim," plaintiff, as purchaser of an interest in defendant's pending personal injury litigation, agreed to "advance" to defendant, as seller, $76,930 at a "Compounded Monthly Carrying Charge" of 3.2% and an "Annual Percentage Rate" of 45.93%, in exchange for defendant's agreement that repayment would be made from the proceeds of the personal injury action. The agreement provided that repayment was contingent on defendant's "successful recovery of proceeds"

from the action. Pursuant to the agreement, $60,000 of the advance was used to purchase and pay off an advance previously made to defendant by an entity called Fast Trak Legal.

After receiving settlement proceeds, defendant refused to pay plaintiff the amount called for in the agreement. He argues that, given the excessive interest rate, the agreement is usurious and unconscionable. We conclude that the agreement is neither usurious nor unconscionable.

The defense of usury is applicable only where the underlying transaction constitutes a loan (*Siedel v 18 E. 17th St. Owners*, 79 NY2d 735, 744 [1992]; *see* General Obligations Law § 5-501[2]). To constitute a loan, the agreement must "provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard" (*Rubenstein v Small*, 273 App Div 102, 104 [1st Dept 1947]. Assignment agreements such as the agreement at issue here are not loans, because the repayment of principal is entirely contingent on the success of the underlying lawsuit (*see id.*; *Matter of Lynx Strategies, LLC v Ferreira*, 28 Misc 3d 1205[A], 2010 NY Slip Op 51159[U], *2 [Sup Ct, NY County 2010]; *Kelly, Grossman & Flanagan, LLP v Quick Cash, Inc.*, 35 Misc 3d 1205[A], 2012 NY Slip Op 50560[U], *5-6 [Sup Ct, Suffolk County 2012]; *Lawsuit Funding, LLC v Lessoff*, 2013 NY Slip Op 33066[U], *10-11 [Sup Ct, NY County 2013]).

Defendant failed to demonstrate that the agreement was unconscionable with a showing that he did not have a meaningful choice in entering into the agreement and that the terms of the agreement were unreasonably favorable to plaintiff (*see Warburg, Pincus Equity Partners, L.P. v Keane*, 22 AD3d 321, 322 [1st Dept 2005], *lv denied* 6 NY3d 707 [2006]). It is undisputed that defendant sought a cash advance from plaintiff, was represented by counsel, and acknowledged the terms of the agreement, which showed the impact of the interest rate in six-month increments, by initialing every page. Moreover, defendant received funds with no guaranteed obligation to repay, except from the proceeds, if any, recovered in his personal injury action. Although the interest rate was high, given the contingent nature of the transaction, the agreement was not overly unfavorable to defendant (*see e.g. Lawsuit Funding, LLC*, 2013 NY Slip Op 33066[U] at *14-15).

Contrary to defendant's argument, there are no issues of fact as to the amount that plaintiff overpaid to Fast Trak. Based on the clear terms of the Fast Trak agreement, the court correctly found that the overpayment was only $100, not $5,600, as defendant claimed, and adjusted the amount awarded to

plaintiff accordingly. This insubstantial discrepancy does not render the agreement void based on mutual mistake (*see Jerome M. Eisenberg, Inc. v Hall*, 147 AD3d 602 [1st Dept 2017]).

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: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7827 The People of the State of New York, SCI. 3472/13
Respondent,

-against-

Devin D.,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen 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, Bronx County (Judith S. Lieb, J.), rendered January 27, 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.

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

ENTERED: DECEMBER 6, 2018

CLERK

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

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7828 The People of the State of New York, Respondent, Ind. 3716/15

-against-

Ken Goodwin, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (M. Callagee O'Brien of counsel), for respondent.

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Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered May 13, 2016, convicting defendant, after a jury trial, of two counts of attempted assault in the first degree, and two counts of assault in the second degree, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

The court providently exercised its discretion in permitting a witness with extensive experience regarding the presence of weapons in correctional facilities to provide background testimony about how weapons are smuggled into, or created or hidden in, such places. One of the contested issues at trial was whether the victim's injury had been inflicted by means of a dangerous instrument, and the testimony at issue was helpful to the jury in explaining how defendant was able to have a weapon in jail and why it was not recovered. This evidence was analogous to background testimony on methods used by drug dealers to avoid

being caught with drugs and buy money, and such testimony has long been accepted by courts (*see People v Brown*, 97 NY2d 500, 505-507 [2002]). Furthermore, there was nothing unduly prejudicial about this evidence.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7829 The People of the State of New York, Respondent, Ind. 3679/15

-against-

Michael Robertson, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered January 21, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to a term of three to six years, unanimously affirmed.

The court properly denied defendant's suppression motion, without granting a hearing, regarding items recovered by a department store security guard. Defendant failed to allege facts supporting a finding that the store employee was a state actor (*see People v Cates*, 139 AD3d 455 [1st Dept 2016]; *People v Manrique*, 57 AD3d 265 [1st Dept 2008], *lv denied* 12 NY3d 760 [2009]), and the People responded that the store employee was merely a private security guard. In the felony complaint and voluntary disclosure form, the People disclosed sufficient information about the guard, including his specific job title

("loss prevention associate"), the name and location of the store, and the precise date and hour at which the guard encountered defendant, to have enabled defendant to subpoena records and ascertain the guard's status (*see Cates*, 139 AD3d at 456; *Manrique*, 57 AD3d at 265). Instead, defendant did not even attempt to ascertain whether the store employed anyone with any kind of official police status.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7830 The People of the State of New York, Ind. 2398/12
Respondent,

-against-

Willis Febo,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Justine M. Luongo and Amy Donner of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered February 25, 2013, convicting him, upon his plea of guilty, of two counts of attempted criminal possession of a weapon in the second degree and three counts of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to an aggregate term of four years, unanimously affirmed.

Defendant's suppression motion was properly denied. Defendant lacked standing to challenge the search of a backpack, which contained a revolver and ammunition, because he did not establish that he retained a reasonable expectation of privacy in the bag. As the police lawfully approached defendant, he opened the front passenger door of a driver-occupied parked car, threw the backpack inside, closed the door, and stepped away from the car. Defendant did not meet his burden of proof with respect to

standing as he failed to establish any connection with the car and he could not reasonably expect that the driver and others would not have access to the bag (*see People v Dingle*, 254 AD2d 131 [1st Dept 1998], *lv denied* 93 NY2d 852 [1999]; *People v DeLaCruz*, 242 AD2d 410, 413 [1st Dept 1997]). Defendant's suggestion that the driver's failure to react negatively to the deposit of the bag implies some sort of bailment is speculative, and in any event would not establish a reasonable expectation of privacy.

In any event, even if defendant had standing to challenge the search, he abandoned the bag by divesting himself of it and disclaiming ownership (*see People v Nobles*, 63 AD3d 528 [1st Dept 2009], *lv denied* 13 NY3d 798 [2009]; *People v Flynn*, 15 AD3d 177, 178-179 [1st Dept 2005], *lv denied* 4 NY3d 853 [2005]), and the abandonment was not precipitated by unlawful police activity (*see People v Ramirez-Portoreal*, 88 NY2d 99, 110 [1996]).

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7831-
7832N Index 652460/12

Suzanne Mangold Zacharius,
Plaintiff-Appellant,

-against-

Kensington Publishing Corporation,
et al.,
Defendants-Respondents.

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William S. Beslow, New York, for appellant.

Fox Rothschild LLP, New York (Daniel A. Schnapp and Stephanie Resnick of counsel), for respondents.

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Judgment, Supreme Court, New York County (Steven E. Liebman, Special Referee, J.), entered March 27, 2017, awarding defendants sanctions against plaintiff, unanimously affirmed, with costs. Order, same court (Eileen Bransten, J.), entered June 27, 2017, which denied plaintiff's motion to amend the complaint, unanimously affirmed, with costs.

The Special Referee's determination of defendants' reasonable attorneys' fees and costs to be paid by plaintiff as a sanction for discovery abuses is supported by the record (*see Kaplan v Einy*, 209 AD2d 248, 250-251 [1st Dept 1994]). The evidence includes the testimony of the experienced attorneys who performed the relevant services and the invoices sent to the clients, which describe the services in detail and the time spent each day, and which, the attorneys testified, were prepared

contemporaneously with the services rendered (*see generally Matter of Freeman*, 34 NY2d 1, 9 [1974]). Plaintiff failed to present any evidence that the time spent by defendants' attorneys was duplicative or unreasonable.

Contrary to plaintiff's contention that the Special Referee failed to analyze the evidence or cite the reasons for his determination, the Special Referee made it clear that, while defendants' attorneys' hourly rates were reasonable, not all of the claimed time spent was reasonable, and accordingly he awarded an amount significantly less than the amount requested.

Plaintiff contends, based on the Special Referee's statements concerning her prior conduct, that the Special Referee improperly imposed a punitive element in determining the amount of the sanction. This contention is belied by the record. The Special Referee's comments about plaintiff's misconduct were part of his general discussion of the background of the matter before him. As indicated, he significantly cut defendants' attorneys' request because he was skeptical of the claimed amount of time spent.

Plaintiff's contention that certain specific entries in defendants' time records are excessive is improperly raised for the first time on appeal (*see 1199 Hous. Corp. v Jimco Restoration Corp.*, 77 AD3d 502, 502-503 [1st Dept 2010]). In any

event, as indicated, the Special Referee did not award defendants' attorneys 100% of the fees they requested.

The court properly declined to grant plaintiff leave to amend the amended complaint, because the proposed second amended complaint is devoid of merit (*see Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]). Despite extensive discovery, plaintiff presented no evidence that the signature page of the challenged voting agreement was attached to a different document at the time it was signed by Walter Zacharius. There are many other possible explanations for the presence of two sets of staple holes; it may be that the document was unstapled to facilitate copying and then restapled. Indeed, the chief financial officer of defendant Kensington Publishing Corp. testified that Walter and defendant Steven Zacharius called him into Walter's office and asked him to sign the agreement and that he saw that both of them had already executed it. Thus, the signature page was attached to the agreement when the chief financial officer signed it on behalf of Kensington.

The court properly declined to consider parol evidence as to the parties' intent (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Plaintiff failed to overcome the "heavy presumption" that a deliberately prepared and executed contract

manifests the true intent of the parties (*see Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986]).

Plaintiff contends that testimony as to Walter's mistaken understanding of the legal effect of the agreement demonstrates that there was a mutual mistake and no meeting of the minds (*see Resort Sports Network Inc. v PH Ventures III, LLC*, 67 AD3d 132, 135 [1st Dept 2009]). However, Walter's alleged statements as to his after-the-fact understanding of the agreement are insufficient to invalidate the agreement, because there is no evidence that the parties had reached a different agreement concerning their mutual voting rights. In any event, there is no evidence that, at the time the parties signed the agreement, they did not understand its terms, only that years later they had a different understanding of its legal effect.

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

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

ENTERED: DECEMBER 6, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7833N In re L&M Bus Corp., et al., Index 152673/18
Petitioners-Respondents-Appellants,

-against-

New York City Dept. of Education, et al.,
Respondents-Appellants-Respondents.

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Reliant Transportation, Inc. and
Local 1181-1061, Amalgamated Transit
Union, AFL-CIO,
Amici Curiae.

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Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for appellants-respondents.

Wasserman Grubin & Rogers, LLP, New York (John F. Grubin of counsel), for respondents-appellants.

Hunton Andrews & Kurth LLP, New York (Joseph J. Saltarelli of counsel), for Reliant Transportation, Inc., amicus curiae.

Meyer, Suozzi, English & Klein, P.C., New York (Richard A. Brook of counsel), for Local 1181-1061, Amalgamated Transit Union, AFL-CIO, amicus curiae.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 14, 2018, which granted the petition brought pursuant to CPLR article 78 to the extent of enjoining respondents from soliciting, accepting, opening, or awarding any contracts pursuant to the bid solicitation that included certain employee protection provisions, unanimously affirmed, without costs.

The court correctly granted the petition to the extent of enjoining respondents from soliciting, accepting, opening, or

awarding any contracts pursuant to the challenged 2017 request for a bid that includes certain employee protection provisions (EPPs).

As in *Matter of L&M Bus Corp. v New York City Dept. of Educ.* (17 NY3d 149 [2011]), given the inclusion in the bid solicitation of the EPPs, which are atypical, patently restrictive, comprehensive prebid specifications with a potential for anticompetitive consequences, the court applied a heightened standard requiring the assessment of whether DOE met its burden of demonstrating "proof that [the EPPs] are designed to save the public money by causing contracts to be performed at smaller cost or without disruption" (*Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 392 [2006]; *Matter of New York State Ch., Inc., Associated Gen. Contrs. of Am. v New York State Thruway Auth.*, 88 NY2d 56 [1996]). The court correctly found that DOE did not meet this burden. Respondents cannot show that the bids for EPP contracts were designed to save the public money by resulting in contracts that are less expensive than contracts without EPPs. Even if they are correct that the bid requests including EPPs would avoid the high costs to the public fisc from likely labor unrest in the absence of EPPs, they did not undertake any analysis showing that the inclusion of the EPPs and the avoidance of the costs of a strike would, on balance, save

the public money in comparison to the costs of putting out bid requests without EPPs. It is not enough for DOE to simply show the likelihood of disruptive labor strife without offering some plausible demonstration that the costs of such strife to the public fisc necessitate the EPPs by providing evidence that preventing the strike would save more money than the EPPs would cost.

The other reasons provided by DOE for including the EPPs, including the development and retention of a skilled workforce, were either considered and rejected in the above cited cases, or have not been shown to satisfy the cost-saving interests embodied in the applicable competitive bidding law.

The relief sought in petitioners' cross appeal to modify the order to the extent it did not expressly declare that the EPPs in the 2017 RFB are unlawful and made in excess of DOE's authority is denied. While DOE did not meet its burden in support of the EPPs on the record here, there is no basis to hold that such EPPs

could never be lawful under the competitive bidding laws upon a proper demonstration that the EPPs would save the public money.

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

ENTERED: DECEMBER 6, 2018

CLERK