SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 2, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

9639 Long Island Lighting Company, Index 604715/97
Plaintiff,

KeySpan Corporation,
Plaintiff-Appellant-Respondent,

-against-

American Re-Insurance Company, et al.,
Defendants-Respondents-Appellants,

Northern Assurance Company of America,
Defendant-Respondent.

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Covington & Burling LLP, New York (Jay T. Smith of counsel), for appellant-respondent.

Landman Corsi Ballaine & Ford, P.C., New York (Michael L. Gioia of counsel), for American Re-Insurance Company, respondent-appellant.

Boutin and Altieri, P.L.L.C., Carmel (Robert P. Firrolo and John A. Altieri of counsel), for Century Indemnity Company, respondent-appellant.

White and Williams LLP, New York (Robert F. Walsh of counsel), respondent.

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Upon remittitur from the Court of Appeals (23 NY3d 583 [2014]), order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 2, 2012, which, insofar as

appealed from as limited by the briefs, upon renewal, granted so much of defendants-respondents insurers' motions for summary judgment as sought a declaration that defendants-respondents have no duty to defend or indemnify plaintiffs regarding environmental damage claims against the Bay Shore manufactured gas plant site, on the ground of plaintiffs' failure to provide timely notice under the respective policies, but denied the motions as to other sites, unanimously modified, on the law, to deny the motions and vacate the declaration as to the Bay Shore site, on the ground that triable issues of fact exist as to whether the insurers waived their common-law defense of late notice, and the matter remanded to the motion court for further proceedings consistent herewith, and otherwise affirmed, without costs.

Defendant insurers issued excess comprehensive general liability policies to Long Island Lighting Company ("LILCO"). The policies require LILCO to provide notice to the insurer when an "occurrence" is "reasonably likely" to give rise to liability under the policy.

On October 28, 1994, defendant insurers were first notified of anticipated liability concerning its Bay Shore, Long Island, plant. Defendants issued reservation of rights letters specifically reserving the defense of late notice, but did not

disclaim on any grounds. The letters requested supplemental information from LILCO, including the investigative reports and feasibility studies of its consultants, as well as information regarding the settlement of the claim of a neighboring landowner, which LILCO provided.

On September 12, 1997, LILCO brought this action seeking a coverage declaration against its various insurance carriers for liabilities associated with the investigation and government-mandated cleanup of the manufactured gas plant (MGP) sites including Bay Shore. Defendant insurers disclaimed coverage based on late notice as affirmative defenses in their respective answers.

Defendant insurers thereafter moved for summary judgment for a declaration that they have no duty to defend and indemnify plaintiffs. The motion court granted summary judgment to the extent of declaring that defendant insurers have no obligation to defend and indemnify plaintiffs with respect to the Bay Shore site, but denied the motions as to the remaining six sites.

We modified the order by denying summary judgment as to the Bay Shore site and vacating the declaration, and otherwise affirmed. We held that LILCO had failed, as a matter of law, to provide timely notice under the relevant policies, but denied

summary judgment due to the existence of triable issues of fact as to whether defendant insurers had waived their right to assert a late notice defense.

On appeal, the Court of Appeals reversed and remanded the matter to this Court for a determination as to whether defendant insurers waived the defense of late notice under the common law. Even though we neither cited nor purported to rely on Section 3420(d)(2) of the Insurance Law, applicable to disclaimers in cases involving bodily injury, the Court of Appeals nonetheless believed us to have applied an incorrect standard, and remanded for a determination of whether the evidence supported the insured's defense of common-law waiver. We now hold that triable issues of fact exist concerning whether defendant insurers, under the common law, waived the defense of late notice.

Waiver is the voluntary relinquishment of a known right and must be predicated upon knowledge of the facts upon which the existence of the right depends (*see Amrep Corp. v American Home Assur. Co.*, 81 AD2d 325, 329 [1st Dept 1981] [issue of fact concerning waiver existed, where, with knowledge of pending charges against its insureds, the insurer continued to issue policy renewals and did not disclaim coverage until interposing an answer in the declaratory judgment action]). The failure to

assert a known policy defense may constitute a waiver (*see State of New York v Amro Realty Corp.*, 936 F2d 1420, 1429-1430 [2d Cir 1991] [insurer waived late notice defense in environmental coverage action where it was capable of asserting a disclaimer based on late notice before the complaint was filed]). "Whether an insurer has waived the defense of late notice is ordinarily a question of fact, which is proved by evidence that the insurer intended to abandon that defense" (*Marino v New York Tel. Co.*, 1992 WL 212184, at *7, *13-14, 1992 US Dist LEXIS 12705, *25-26, *47-49 [SD NY 1992] [internal citation and quotation marks omitted] [excess insurer waived defense of late notice under the common law by failing to issue a timely disclaimer]).

The evidence supports an inference that defendants knew of facts supporting a late notice defense long before disclaiming coverage in their answers. During the fall of 1994, LILCO notified defendants of possible occurrences at six MGP sites, including Bay Shore. In 1995, defendants sent general reservation of rights letters that reserved the defense of late notice and requested additional information about the MGP sites.

LILCO's supplemental disclosures informed defendants of numerous regulatory agency inquiries regarding the MGP sites, including various information requests and preliminary site

assessments dating back to the 1980s.

After receiving plaintiff's supplemental disclosures, an employee of defendant American Re drafted a memo in January 1996 summarizing LILCO's disclosures and detailing the history of regulatory involvement at the MGP sites. The entry for the Bay Shore site states, "LILCO was notified of contamination by USEPA in 1981, and re-notified in 1989. NY notified LILCO in 1991." The memo expressly notes the possibility of a late notice defense, stating, "There is no explanation in the reports as to why LILCO waited until 1994 to put AmRe on notice of these claims, considering it was notified in 1981." Indeed, upon receiving the same information, London market insurers formally disclaimed coverage in March 1995 based on, inter alia, late notice, stating "in light of the fact that certain groundwater studies were completed in connection with potential environmental contamination resulting from LILCO's operation of the Bay Shore site as early as 1979, it does not appear to us that LILCO's notification of claim was given to the subscribing insurers in a timely fashion." The fact that other insurers were able to promptly assert disclaimers based on late notice supports a finding of waiver (*see State of New York v Amro Realty Corp.*, 936 F2d at 1430).

A reasonable jury could infer from these actions that defendants intended to abandon their late notice defense. Our ruling is not predicated upon a failure to disclaim coverage "as soon as reasonably possible" after learning of LILCO's untimely notice, but on facts in the record indicating that defendants were aware of a potential late notice defense, yet manifested an intent not to assert one.

Because waiver is a question for a jury to resolve based on the particular circumstances of each individual site, the motion court's ruling regarding the Syosset landfill is not law of the case as to whether defendants knowingly relinquished their right to disclaim on the ground of late notice for the Bay Shore site.

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

DECEMBER 2, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13302 Cassandra Grace, Index 306882/08
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant,

The City of New York,
Defendant.

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Steve S. Efron, New York (Renee L. Cyr of counsel), for appellant.

The Law Office of Judah Z. Cohen, PLLC, Woodmere (Judah Z. Cohen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered February 1, 2013, after a jury verdict, awarding plaintiff the sum of $458,956.50, as reduced by stipulation and inclusive of interest, statutory costs and disbursements, consisting of, inter alia, awards of $20,000 for past pain and suffering, $150,000 for future pain and suffering, and separate awards of $20,000 for past loss of enjoyment of life and $25,000 for future loss of enjoyment of life, unanimously affirmed, without costs.

Plaintiff was injured when she fell due to a depression and crack in the floor tile at the bottom of a staircase at a subway

station owned and operated by defendant New York City Transit Authority (defendant).

The record reflects that the jury charge correctly advised that loss of enjoyment of life was a component of pain and suffering (*see Nussbaum v Gibstein*, 73 NY2d 912, 914 [1989]). Defendant argues that the verdict sheet was inconsistent with this instruction. However, defendant concedes that it failed to object to the verdict sheet. Thus, defendant failed to preserve the issue of the error in the verdict sheet for review by this Court (*see Klein-Bullock v North Shore Univ. Hosp. at Forest Hills*, 63 AD3d 536, 536-537 [1st Dept 2009]; *London v Lepley*, 259 AD2d 298, 299 [1st Dept 1999]).

Where a party fails to object to errors in a verdict sheet, the charge becomes the law applicable to the determination of the case, and on appeal, this Court will review only if the error was "fundamental" (*Aguilar v New York City Tr. Auth.*, 81 AD3d 509, 510 [1st Dept 2011]). We find that the alleged conflict between the jury charge and the verdict sheet was not fundamental since it did not confuse or create doubt as to the principle of law to be applied, or improperly shift fault, such that the "jury was prevented from fairly considering the issues at trial" (*Curanovic v New York Cent. Mut. Fire Ins. Co.*, 22 AD3d 975, 977 [3d Dept

2005]; *Clark v Interlaken Owners*, 2 AD3d 338, 340 [1st Dept 2003]).

The trial court properly exercised its discretion in permitting plaintiff's expert witness to testify as to his opinion of the defective condition. Further, the testimony of plaintiff's expert was not speculative because it was based on evidence in the record, i.e., the testimony of plaintiff and of a witness as to the dimensions and appearance of the defective condition (*see Tarlowe v Metropolitan Ski Slopes*, 28 NY2d 410, 414 [1971]).

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

ENTERED: DECEMBER 2, 2014

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9912 Joseph W. Powers, etc., Index 102526/10
Plaintiff-Respondent,

-against-

31 E 31 LLC, et al.,
Defendants-Appellants.

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Mauro Lilling Naparty LLP, Great Neck (Timothy J. O'Shaughnessy of counsel), for appellants.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for respondent.

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Upon remittitur from the Court of Appeals for consideration of the issues raised but not determined on appeal to this Court, order, Supreme Court, New York County (Anil C. Singh, J.), entered December 24, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In the early morning hours of August 23, 2008, plaintiff was injured when, while intoxicated, he landed in the bottom of an air shaft after falling off a setback roof of a building owned and managed by defendants. The setback roof, which ran the length of the rear of the building, was five feet wide and accessible through a window of the second-floor apartment of plaintiff's friend. Although most of the setback abutted either

a wall or a setback roof of the adjacent building, a portion of it abutted a 25-foot-deep air shaft. There was no railing, fence or parapet wall around the perimeter of the air shaft, whose opening measured approximately six feet, four inches by eight feet, five inches.

On a prior appeal, we granted defendant's motion for summary judgment, which had been denied by Supreme Court (105 AD3d 657 [2013]). We dismissed plaintiff's common-law claims on the ground that the accident was unforeseeable as a matter of law. We dismissed plaintiff's statutory claims on the ground that "defendants demonstrated that the building, constructed as a loft in 1909 and converted to multiple dwelling in 1979, was grandfathered out of the 1968 and 2008 Building Codes by submission of the 1979 Certificate of Occupancy," and plaintiff failed to adduce any evidence in opposition that would create an issue of fact (105 AD3d at 657-658). The Court of Appeals reversed our order and remitted the case to this Court "for consideration of issues raised but not determined" (_ NY3d _, 2014 NY Slip Op 07084).

As an alternative ground for summary judgment, defendants argue that they cannot be held liable because the alleged hazard was an open and obvious condition that was not inherently

dangerous (*see e.g. Boyd v New York City Hous. Auth.*, 105 AD3d 542 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]; *Schulman v Old Navy/Gap, Inc.*, 45 AD3d 475 [1st Dept 2007]).

"[E]ven if a hazard qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 70 [1st Dept 2004]). However, "a court is not 'precluded from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous'" (*Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009], quoting *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]; *see e.g. Samantha R. v New York City Hous. Auth.*, 117 AD3d 600 [1st Dept 2014], *lv denied* 24 NY3d 904 [2014]; *Gonzalez v Dong Yun Corp.*, 110 AD3d 484 [1st Dept 2013]).

To establish an open and obvious condition, a defendant must prove that the hazard "could not reasonably be overlooked by anyone in the area whose eyes were open" (*Westbrook*, 5 AD3d at 72; *see also Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597 [1st Dept 2012], *lv denied* _ NY3d_, 2014 NY Slip Op 86961 [2014]).

However, "even visible hazards do not necessarily qualify as open and obvious" because the "nature or location of some hazards, while they are technically visible, make them likely to be overlooked" (*Westbrook*, 5 AD3d at 72). The burden is on the defendant to demonstrate, as a matter of law, that the condition that caused the plaintiff to sustain injury was readily observable by the plaintiff employing the reasonable use of his senses (*see e.g. Buccino v City of New York*, 84 AD3d 670, 670 [1st Dept 2011]). Furthermore, "whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case" (*Russo v Home Goods, Inc.*, 119 AD3d 924, 925-926 [2d Dept 2014]).

Viewing the evidence in the light most favorable to plaintiff, we find that a triable issue of fact exists whether the unguarded opening from the setback roof to the air shaft was an open and obvious condition that was not inherently dangerous. Plaintiff asserts that, at night, guests climbing out of the window and onto the setback roof could not see the air shaft or appreciate the drop. One of plaintiff's companions testified that she did not notice the air shaft the first time that she went out on the setback. Most of the setback was adjacent to

either the wall or the roof of the adjacent building, and only that small portion where plaintiff fell, next to the air shaft, was completely open to the surface below. There is also conflicting testimony as to the available lighting.

Defendants next argue that plaintiff's extraordinary act of climbing through the window and walking back out onto the setback ledge at night while intoxicated was the superseding or sole proximate cause of the accident. We reject this argument.

"An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant" (*Kush v City of Buffalo*, 59 NY2d 26, 33 [1983]). "[L]iability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). To establish that a plaintiff's conduct was the sole proximate cause of his or her injuries, a defendant must show that the plaintiff engaged in reckless, unforeseeable or extraordinary conduct, i.e. that the plaintiff recognized the danger and chose to disregard it (*see Alvarez v Colgate*

Scaffolding & Equip. Corp., 68 AD3d 583, 584-585 [1st Dept 2009]; *Brown v Metropolitan Tr. Auth.*, 281 AD2d 159 [1st Dept 2001]).

On the record before us, defendants have not established as a matter of law that plaintiff's act of walking out onto the setback roof was a superseding or intervening cause that severed the causal connection between his injuries and any negligence on their part. Plaintiff had never been to the building before the night in question, and defendants did not establish that plaintiff either knew, or should have known, that his conduct was dangerous, notwithstanding that he apparently fell during his second trip onto the setback roof. The fact that plaintiff was legally intoxicated does not alone render his actions a superseding cause (*see Butler v Seitelman*, 90 NY2d 987 [1997]; *Torelli v City of New York*, 176 AD2d 119 [1st Dept 1991], *lv denied* 79 NY2d 754 [1992]; *see also Canela v Audobon Gardens Realty Corp.*, 304 AD2d 702 [2d Dept 2003], *lv denied* 2 NY3d 759 [2004]).

Defendants argue that plaintiff cannot make out a case of proximate cause because the accident was unwitnessed, and plaintiff does not recall what happened, and thus there can be no showing that a parapet or railing would have prevented the accident. However, plaintiff need not exclude every possible

cause of his fall other than the premises defects alleged (*see Reed v Piran Realty Corp.*, 30 AD3d 319 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]). Regardless of whether plaintiff slipped, tripped, or fell, an issue of fact exists whether his fall down into the air shaft was, at least in part, attributable to the fact that the setback roof was open to the unguarded shaft.

The cases cited by defendant are inapposite; they present fact patterns in which there was compelling evidence of other non-negligent causes of the accident, making any finding as to cause against the defendants in those cases pure speculation (*see e.g. Jennings v 1704 Realty, L.L.C.*, 39 AD3d 392 [1st Dept 2007] [dismissal warranted where plaintiff could not recall his fall down an elevator shaft, and witnesses observed his unforeseeable act of manually opening the elevator's door to jump out]; *McNally v Sabban*, 32 AD3d 340 [1st Dept 2006] [no triable issue as to causation, given plaintiff's drinking history and recurring falls and the lack of evidence of record that any of the alleged code violations caused plaintiff's fall]). Here, the Court of Appeals has found that reasonable minds could differ as to whether plaintiff's use of the roof and his resulting fall were

foreseeable, and that defendants failed to demonstrate, as a matter of law, that the setback roof fully complied with all code mandates on the date of its issuance or the day of the accident (__ NY3d __, 2014 NY Slip Op 07084).

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

ENTERED: DECEMBER 2, 2014

CLERK

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

12552 Baby Phat Holding Company, LLC, Index 652409/13
Plaintiff-Respondent,

-against-

Kellwood Company,
Defendant-Appellant.

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Katten Muchin Rosenman LLP, New York (Jessica M. Garrett of counsel), for appellant.

Gordon, Herlands, Randolph & Cox, LLP, New York (Peter J. Vranum of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 3, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss and to compel arbitration, unanimously modified, on the law, to dismiss the claim for negligent misrepresentation, and otherwise affirmed, without costs.

The complaint alleges that plaintiff entered into an agreement with defendant's wholly owned subsidiary, nonparty Phat Fashions, LLC (PFLLC), to purchase certain trademarks, copyrights and contractual rights. One of the key assets sold by PFLLC was a license under which a company called Intimateco paid royalties directly to defendant as compensation for its use of a PFLLC trademark. Although PFLLC is denominated as the seller under the

agreement, plaintiff alleges that all of its negotiations were exclusively with defendant and it paid the $5.35 million purchase price directly to defendant. Prior to signing the agreement, defendant provided plaintiff with a royalty schedule showing that PFLLC's license with Intimateco would yield a minimum guaranteed income stream of $1.5 million over the next three years. However, plaintiff further alleges that defendant knew that the guaranteed income from the Intimateco license was only $75,000 for that period of time. The agreement expressly requires PFLLC to cease doing business following the contract closing and provides that PFLLC shall "wind-up, liquidate, dissolve or otherwise cease its legal existence" within 30 days of the six month period following the closing.

Upon discovering the alleged misrepresentation concerning the income stream expected from Intimateco, plaintiff commenced the instant action asserting causes of action for: (1) breach of contract based upon an alter-ego theory; (2) constructive trust; (3) negligent misrepresentation; (4) restitution; and (5) abatement of the purchase price for mutual mistake. Defendant moved to dismiss the complaint for, among other things, failure to join a necessary party (PFLLC) or to stay the action and compel arbitration against nonparty PFLLC, arguing that

arbitration was plaintiff's only recourse because of an arbitration provision therein requiring the arbitration of any dispute concerning the agreement.

Defendant's effort to compel plaintiff to arbitrate its contract claim against PFLLC as the basis for having this action dismissed against it was properly rejected by the motion court. The complaint only contains claims against defendant. Although plaintiff, after it commenced this action, offered to arbitrate its claims against defendant, defendant would only agree to "backstop any arbitration award against [PFLLC] consistent with the purchase agreement." It was not until oral argument of this appeal that defendant offered to arbitrate under the terms of the agreement, and then only under certain conditions which plaintiff has not accepted.

Even if defendant is correct that PFLLC, its now defunct subsidiary, stands to be inequitably affected by any judgment rendered in plaintiff's favor in this action, dismissal is not warranted (*see* CPLR 1001), particularly since PFLLC has been dissolved and is now judgment proof, making any judgment or award plaintiff achieves against it a Pyrrhic victory. Were we to dismiss this action, plaintiff would be left with no other effective forum in which to proceed with its claims against

defendant, given the parameters of the arbitration clause in its agreement with PFLLC and the absence of a mutual agreement to proceed with arbitration of plaintiff's claims against defendant. There is no prejudice to defendant in that it can assert all of its claims and defenses in this action. In any event, even assuming defendant is prejudiced, it could have avoided such prejudice by reaching agreement with plaintiff to participate in arbitration sooner (*see* CPLR 1001[b][3]; *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 13 [1st Dept 2007]).

We also reject defendant's argument that any liability alleged in the complaint predicated on an alter-ego theory must be dismissed. In order to state a claim for alter-ego liability plaintiff is generally required to allege "complete domination of the corporation [here PFLLC] in respect to the transaction attacked" and "that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing the varying circumstances when this power may be exercised (*id.*).

If plaintiff prevails in proving that PFLLC owes it a debt (*see Matter of Morris*, 82 NY2d at 141), the further allegations in the complaint are sufficiently pleaded to support plaintiff's claim that defendant is an alter-ego of PFLLC. The complaint asserts that with respect to the transaction at issue, defendant dominated and controlled the negotiations on behalf of PFLLC and actually provided the erroneous information which persuaded plaintiff to enter into the agreement. The allegations that plaintiff paid the full purchase price directly to defendant and not PFLLC, and that before the instant transaction Intimateco directly paid defendant monies owed to PFLLC, sufficiently frame factual issues about whether defendant, as the parent company of PFLLC, commingled funds and disregarded corporate formalities (*International Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998]).

In addition, the allegations that defendant, through its domination of PFLLC, misrepresented the value of the assets sold and then caused PFLLC to become judgment proof, are also sufficient to support claims that defendant perpetrated a wrong or injustice against plaintiff, thus warranting intervention by a court of equity (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]; *Teachers Ins. Annuity Assn. of Am. v*

Cohen's Fashion Opt. of 485 Lexington Ave., Inc., 45 AD3d 317, 318 [1st Dept 2007]). Wrongdoing in this context does not necessarily require allegations of actual fraud. While fraud certainly satisfies the wrongdoing requirement, other claims of inequity or malfeasance will also suffice (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Allegations that corporate funds were purposefully diverted to make it judgment proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory (*Grammas v Rockwood Assoc., LLC*, 95 AD3d 1073 [2d Dept 2012]).

Defendant is correct, however, that the negligent misrepresentation claim asserted against it fails for lack of any special relationship between plaintiff and defendant (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]).

The Decision and Order of this Court entered herein on August 21, 2014 is hereby recalled and vacated (*see* M-4465 and M-4767 decided simultaneously herewith).

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13626 The People of the State of New York, Ind. 2860/11
Respondent,

-against-

Kenneth Siders,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Richard Joselson 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, Supreme Court, New York County (Renee A. White, J.), rendered January 3, 2012, convicting defendant, upon his plea of guilty, of criminal mischief in the third degree, and sentencing him to a term of 9 months, unanimously affirmed.

Defendant did not preserve his claim that the court should have inquired into whether his guilty plea was coerced by the court's denial of a bail reduction, and we find that his challenge to the plea does not come within the narrow exception to the preservation requirement (*see People v Peque*, 22 NY3d 168, 182 [2013]; *see also People v Toxey*, 86 NY2d 725 [1995]. We decline to review the challenge in the interest of justice. As an alternative holding, we find that the plea was knowing, intelligent and voluntary, and the mere fact that defendant

initially rejected the People's plea offer but changed his mind immediately after the court denied the bail application did not require any additional inquiry. Defendant does not contend that the denial of his bail application was improper or unwarranted by the circumstances (*compare People v Sung Min*, 249 AD2d 130, 132 [1st Dept 1998]). Furthermore, defendant was already incarcerated in lieu of bail, and there is no indication that simply maintaining the same bail conditions was being used to unduly persuade defendant to plead guilty (*compare People v Grant*, 61 AD3d 177, 184 [2d Dept 2009]).

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13627 Mohan Bhagwandas Murjani, Index 350028/12
Plaintiff-Respondent,

-against-

Guni Mohan Murjani,
Defendant-Appellant.

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Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Alan M. Pollack of counsel), for appellant.

Cohen Clair Lans Greifer and Thorpe, LLP, New York (Robert Stephan Cohen of counsel), for respondent.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered April 18, 2014, which, among other things, denied defendant's motion for summary judgment dismissing the complaint, denied her cross motion to withdraw her counterclaim, enjoined her from prosecuting an "anti-suit" Indian action, sanctioned her in the amount of $15,000, and awarded plaintiff interim counsel fees, unanimously affirmed, without costs.

The durational residency requirement set forth in Domestic Relations Law § 230(5) was satisfied by evidence that for two years before the commencement of this action, defendant, although spending a portion of the statutorily relevant period in India and various other destinations, maintained a permanent residence in New York and returned there with regularity (*see Jindal v*

Jindal, 54 AD3d 605 [1st Dept 2008]; *Wildenstein v Wildenstein*, 249 AD2d 12, 12 [1st Dept 1998]).

The court providently exercised its discretion in sanctioning defendant for proceeding with her durational-residency challenge (*cf. Parks v Leahey & Johnson*, 81 NY2d 161, 165 [1993], *and Tag 380, LLC v Ronson*, 51 AD3d 471, 471 [1st Dept 2008]). Defendant had previously represented that she would not make such a challenge, and the court had warned her that she may be subject to sanctions if she pursues the challenge. Further, defendant's position lacked merit (*cf. id.*).

The court providently exercised its discretion in granting plaintiff an award of interim counsel fees (*see* Domestic Relations Law § 237[a]). While the court was unable to determine, based on the papers submitted, which party was the monied spouse (*see id.*), it determined that defendant had unnecessarily delayed discovery in the action and had removed the parties' art collection to London in contravention of court orders. Further, defendant controlled the parties' liquid assets, including the art collection and real property in New York, and the court reasonably ordered her to sell or encumber that property in order to permit plaintiff to carry on this action. The fee award was not made solely to punish defendant

for delaying the case (*cf. Wells v Serman*, 92 AD3d 555 [1st Dept 2012]).

The court properly granted plaintiff's motion for a preliminary injunction barring defendant from prosecuting the action she had commenced in India, which sought to prevent plaintiff from prosecuting this action (*see Gliklad v Cherney*, 97 AD3d 401, 402-403 [1st Dept 2012]). Plaintiff showed, among other things, that he would be irreparably harmed if the Indian suit were to continue and that the equities balanced in his favor. Indeed, the great expenditures of time and resources spent in this action would be wasted if the Indian court prevented plaintiff from continuing this action (*id.* at 403). Further, it appears that defendant was forum shopping and attempting to prevent the New York court from resolving the issues before it.

Given that the court denied defendant's motion for summary judgment, the court correctly denied as moot defendant's cross motion to withdraw her counterclaim for divorce in the event the court granted her motion for summary judgment. Moreover, the

court properly determined that a discontinuance of defendant's counterclaim would be unfairly prejudicial to plaintiff, given the amount of time and resources expended in this action (*Tucker v Tucker*, 55 NY2d 378, 383-384 [1982]).

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13628 Ryan J. Coutu, Index 106327/11
Plaintiff-Respondent-Appellant,

-against-

Andres Santo Domingo,
Defendant-Appellant-Respondent.

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Wade Clark Mulcahy, New York (Brian Gibbons of counsel), for appellant-respondent.

Pollack, Pollack, Isaac & DeCicco, New York, (Brian J. Isaac of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered August 26, 2013, which granted plaintiff's motion for partial summary judgment on the issue of liability and granted defendant's cross motion for partial summary judgment dismissing the claims for punitive and/or exemplary damages, unanimously affirmed, without costs.

Plaintiff established entitlement to partial summary judgment on the issue of liability by demonstrating that he was crossing the street, within the crosswalk, with the light in his favor, and had crossed two lanes of travel, when he was struck by defendant's car, which was making a right turn and moving at a fast rate of speed (*see Gonzalez v ARC Interior Constr.*, 83 AD3d 418 [1st Dept 2011]). Defendant's speculation that plaintiff may

have been comparatively negligent does not raise a triable issue of fact (*see Beamud v Gray*, 45 AD3d 257 [1st Dept 2007]). Furthermore, even assuming that plaintiff failed to look for traffic before crossing the street, defendant denied any recollection of the accident and thus, is unable to provide any "evidence upon which to determine the extent to which such [alleged] negligence contributed to the accident" (*Zhenfan Zhang v Yellow Tr. Corp.*, 5 AD3d 337, 337 [1st Dept 2004]).

The circumstances presented do not warrant the imposition of punitive damages (*see e.g. Hale v Saltamacchia*, 28 AD3d 715 [2d Dept 2006]). While defendant's flight from the scene was illegal, it occurred only after plaintiff had stood up and was in the process of obtaining assistance, and there is no indication that defendant's conduct was motivated by an intent to inflict injury (*compare Rahn v Carkner*, 241 AD2d 585 [3d Dept 1997]).

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13629 The People of the State of New York, Ind. 3974/12
Respondent,

-against-

Victor Tavarez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Ellen Dille of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about May 1, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: DECEMBER 2, 2014

CLERK

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

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13631 In re Lionel Allen, Index 102624/12
Petitioner-Respondent,

-against-

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

_____

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for appellants.

Robin Roach, New York (Aaron S. Amaral of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Alexander W. Hunter, J.), entered May 23, 2013, granting petitioner's Article 78 petition to annul respondent's determination, dated January 6, 2012, terminating his employment, declaring that respondents' termination of petitioner's employment pursuant to Section 71 of the New York State Civil Service Law violated due process, the Civil Service Law, and New York City Rules and Regulations, and reinstating petitioner to his position, unanimously affirmed, without costs.

We agree with the Article 78 court that respondent violated due process when it terminated petitioner's employment pursuant to Civil Service Law § 73, which pertains to disabilities resulting from non-occupational injuries, then rescinded the

termination under that section, and terminated petitioner pursuant to Civil Service Law § 71, pertaining to disabilities resulting from occupational injuries, retroactive to the original termination date, without providing petitioner any further opportunity to be heard.

Respondents argue that the requirements for notice and opportunity to be heard are substantively identical with regard to the two sections and that petitioner failed to make the requisite showing of mental and physical fitness for his position in response to the initial notice of intent to terminate. Even assuming that this is true, certain differences between the two provisions -- including that "section 71 affords greater procedural protections and opportunities for reinstatement" (*Matter of Allen v Howe*, 84 NY2d 665, 673 [1994])-- as well as practical differences in petitioner's position at the time he was notified pursuant to each section, dictate that the process provided failed to satisfy basic requirements of fairness.

That petitioner's non-response to the original notice of intent to terminate may have been for "strategic" reasons -- either to avoid "conceding" non-occupational injury while a parallel Worker's Compensation proceeding unfolded, or to obtain a later termination date, based on DEP's mistake, at which time

petitioner may have been better able to demonstrate fitness -- does not alter our conclusion that he did not receive the process that was due. Notably, in view of the court's finding that DEP was "admittedly aware all along that petitioner's injuries were occupational," it appears that its approach to petitioner's termination may have been strategic as well.

We reject respondents' suggestion that even if petitioner's due process rights were violated, the court should still have ordered a hearing to determine whether petitioner was fit to return to duty on the originally designated date of termination. Doing so would have effectively nullified the court's due process holding. Having vacated respondent's determination terminating petitioner's employment, there is no basis for the medical examination, pursuant to Civil Service Law § 71, for an employee seeking reinstatement after being "separated from the service by reason of a disability."

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13632 The People of the State of New York, Ind. 4284/12
Respondent,

-against-

Reginald Primus,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about December 11, 2012,

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: DECEMBER 2, 2014

CLERK

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

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13633 In re Jose R.,
Petitioner-Appellant,

-against-

Yvette-Ortiz M.,
Respondent-Respondent.

_____

Robert Litwack, Forest Hills, for appellant.

_____

Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about April 19, 2013, which denied petitioner father's objection to the Support Magistrate's January 18, 2013 order dismissing his petition seeking child support from respondent mother, unanimously affirmed, without costs.

The mother met her burden of showing that she should be relieved of her support obligation, because the parties' 18-year-old son was constructively emancipated (*see Matter of Jurgielewicz v Johnston*, 114 AD3d 945 [2d Dept 2014]; *cf Schneider v Schneider*, 116 AD2d 714 [2d Dept 1986]). The record shows that in the months before this proceeding was commenced, and throughout the following year, the son refused to speak with the mother without explanation. During the same period, the mother made efforts to maintain a relationship with him, calling him and sending letters and cards, but he would not respond.

There is no evidence that it was the mother that caused the deterioration in the relationship (*see Matter of Roe v Doe*, 29 NY2d 188, 194 [1971]; *Matter of Chamberlin v Chamberlin*, 305 AD2d 595 [3d Dept 1997]; *compare O'Sullivan v Katz*, 81 AD3d 480 [1st Dept 2011]).

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13634 The People of the State of New York, Ind. 2448/11
Respondent,

-against-

Shatasia Brown,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about February 8, 2012,

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: DECEMBER 2, 2014

CLERK

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

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13636- Index 651785/12
13636A-
13636B-
13637 Loreley Financing (Jersey)
No. 4 Limited, et al.,
Plaintiffs-Appellants,

-against-

UBS Limited, et al.,
Defendants-Respondents,

Draco 2007-1, Ltd., et al.,
Defendants.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Sheron Korpus of counsel), for appellants.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Richard A. Rosen of counsel), for UBS Ltd., UBS Securities LLC, and UBS AG respondents.

Debevoise & Plimpton LLP, New York (Edwin G. Schallert of counsel), for Declaration Management & Research LLC, respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 30, 2013, dismissing the complaint with prejudice as against defendants UBS Limited, UBS Securities LLC, and UBS AG (collectively UBS) and Declaration Management & Research LLC (Declaration), unanimously modified, on the law, to reinstate the fraud claim, and otherwise affirmed, without costs. Appeal from orders, same court and Justice, entered April 8,

2013, which granted the motions of UBS and Declaration to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered December 24, 2013, which, to the extent appealed from as limited by the briefs, denied, sub silentio, plaintiffs' motion for leave to amend their fraud and unjust enrichment causes of action, unanimously affirmed as to the unjust enrichment cause of action, and the appeal therefrom otherwise dismissed as academic, without costs.

The motion court did not have the benefit of our decisions in *Loreley Fin. (Jersey) No. 3 Ltd. v Citigroup Global Mkts., Inc.* (119 AD3d 136 [1st Dept 2014]) and *Loreley Fin. (Jersey) No. 28, Ltd. v Merrill Lynch, Pierce, Fenner & Smith Inc.* (117 AD3d 463 [1st Dept 2014]), which are very similar to the case at bar. In light of *Citigroup* and *Merrill Lynch,* the fraud claim should be reinstated, but the causes of action for rescission, unjust enrichment, conspiracy to defraud, and aiding and abetting fraud were properly dismissed.

Because plaintiffs are only limited-recourse creditors, their fraudulent conveyance claim was properly dismissed (*see Loreley Fin. [Jersey] No. 3 Ltd. v Wells Fargo Sec., LLC,* 2013 WL 1294668, *15, 2013 US Dist LEXIS 49665, *47-48 [SD NY 2013]).

Furthermore, Declaration is not a proper defendant on the fraudulent conveyance claim, since plaintiffs merely allege that it assisted UBS in making a fraudulent conveyance, without being a transferee or beneficiary thereof (*see e.g. Federal Deposit Ins. Corp. v Porco,* 75 NY2d 840, 841-842 [1990]).

Plaintiffs' proposed amended complaint changed only the allegations relating to the fraud and unjust enrichment claims. We have reinstated the fraud claim, and the repleading of the unjust enrichment claim is still insufficient in light of *Citigroup, Merrill Lynch,* and *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.* (115 AD3d 128, 141 [1st Dept 2014]).

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13638- Ind. 3425/09
13638A The People of the State of New York, 160/10
Respondent,

-against-

Damian Silva,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Eve Kessler of counsel) for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas A. Farber, J.), rendered January 24, 2011, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree, and sentencing him to a term of 3½ years, with 5 years' postrelease supervision, unanimously affirmed. Appeal from judgment (same date, court and Justice), convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him to a concurrent term of one to three years, held in abeyance, motion by assigned counsel to be relieved denied without prejudice to renewal, and counsel directed to communicate with defendant forthwith concerning any issues that may be raised on appeal and the possible consequences of pursuing an appeal raising such

issues, and advising defendant that he has 60 days from the date of this order to file a pro se supplemental brief.

Defendant pleaded guilty under two indictments, which were apparently consolidated for purposes of disposition, and defendant filed a single notice of appeal, which this Court deemed timely. Nevertheless, assigned appellate counsel requests permission to withdraw as counsel regarding the appeal from the burglary conviction only, asserting that there are no nonfrivolous points which could be raised as to that conviction. (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). Having chosen to treat the convictions separately, and to invoke the *Anders/Saunders* procedure as to the burglary conviction, counsel is obligated to demonstrate to this Court that defendant was provided with a copy of the appellate brief and was informed of counsel's intention to seek withdrawal and defendant's right to file a pro se brief.

Appellate counsel does not seek permission to withdraw regarding the attempted robbery conviction. We conclude that defendant made a valid waiver of his right to appeal (see *People*

v Lopez, 6 NY3d 248 [2006]), which forecloses his excessive sentence claim. Regardless of whether defendant made a valid waiver of his right to appeal, we perceive no basis for reducing defendant's period of postrelease supervision.

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13641 The People of the State of New York, Ind. 1220/07
Respondent,

-against-

Ovidio Rodriguez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about March 1, 2012, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although there is an insufficient basis for the assessment of points under the risk factor for drug or alcohol abuse, defendant remains a presumptive level two offender, and we find that a downward departure is not warranted (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited

by defendant were adequately taken into account by the risk assessment instrument, and were in any event outweighed by the viciousness of the underlying sex crime.

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13642 Margit Frenk, Index 650298/13
Plaintiff-Respondent,

-against-

Yris Rabenou Solomon, etc., et al.,
Defendants-Appellants.

_____

Andrews Kurth LLP, New York (Joseph A. Patella of counsel), for appellants.

Tarter Krinsky & Drogin LLP, New York (Debra Bodian Bernstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 23, 2013, on the record of a hearing dated December 18, 2013, so-ordered by the court on January 17, 2014, and corrected by stipulation entered January 27, 2014, which, insofar as appealed from, denied defendants' motion to dismiss the declaratory judgment, replevin, conversion, bailment, constructive trust, accounting, and unjust enrichment causes of action, unanimously affirmed, without costs.

Given plaintiff's allegations raising the inference that the stipulation of discontinuance with prejudice and the general release of claims in a prior action were not intended to encompass the instant claims, and her allegations of fraudulent inducement raising equitable considerations, the court correctly

declined to grant defendants' motion to dismiss the causes of action indicated above at this pre-answer stage based on the doctrine of res judicata or enforcement of the general release (*see Mangini v McClurg*, 24 NY2d 556, 562 [1969]; *Singleton Mgt. v Compere*, 243 AD2d 213, 216 n * [1st Dept 1998]; *Dolitsky's Dry Cleaners v YL Jericho Dry Cleaners*, 203 AD2d 322 [2d Dept 1994]). Given the outstanding issues as to the viability and scope of the instant claims, the court correctly declined to dismiss the claims of replevin and conversion on statute of limitations grounds.

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13643 The People of the State of New York, Ind. 3279/12
Respondent,

-against-

Bashir Lewis,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about October 24, 2012, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13644 The People of the State of New York, Ind. 344/06
Respondent,

-against-

Jose Mendoza,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about January 16, 2013, which adjudicated defendant a level two sexually violent sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's admissions provided clear and convincing evidence that supported a 15-point assessment against him under the risk factor for drug or alcohol abuse (*see People v Watson*, 112 AD3d 501, 502 [1st Dept 2013], *lv denied* 22 NY3d 563 [2014]).

The court properly exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument,

and were in any event outweighed by the seriousness of the underlying pattern of sex crimes against a child. There was no overassessment of points under the risk factor for sexual contact with victim. Although he describes his relationship with the victim as consensual, we note that it began when defendant was 23 years old and the victim was only 12 (*see People v James*, 103 AD3d 588, 589 [2013], *lv denied* 21 NY3d 856 [2013]). Moreover, defendant continued to engage in sexual intercourse with the victim after he was released on bail and was under an order of protection, thereby demonstrating the risk that he posed to the public.

The court properly determined that it lacked discretion to decline to designate defendant a sexually violent offender (*see People v Bullock*, __ AD3d __, 2014 NY Slip Op __ [1st Dept 2014]; *People v Williams*, 96 AD3d 421 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]).

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13645 Kathryn Kester, Index 101807/11
Plaintiff-Appellant,

-against-

Luis Sendoya, et al.,
Defendants-Respondents.

_____

Lisa M. Comeau, Garden City, for appellant.

Law Firm of Marjorie E. Bornes, Brooklyn (Marjorie E. Bornes of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered September 6, 2013, which, in this action for personal injuries sustained in a motor vehicle accident, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law. Defendants submitted evidence, including the affirmed findings of an orthopedist and a radiologist, of preexisting degenerative changes and absence of evidence of recent traumatic or causally related injury to plaintiff's right shoulder (*see Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]; *Paduani v Rodriguez*, 101 AD3d 470 [1st Dept 2012]).

In opposition, plaintiff failed to raise an issue of fact to

establish that her shoulder injuries are causally linked to the subject accident (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]). While plaintiff's certified medical records may be referenced to show her complaints and the doctor's referral for treatment (*see Salman v Rosario*, 87 AD3d 482, 483 n [1st Dept 2011]), those records demonstrate that in the months following the February 2010 accident plaintiff sought treatment for other conditions but made no complaint of shoulder pain until June 2010. She was then referred to an orthopedist, but did not seek medical treatment for her shoulder injury until August 2010, some six months after the accident, and had an MRI performed the next month. Absent any evidence of contemporaneous, postaccident treatment or evaluation of plaintiff's shoulder, she failed to raise an issue of fact as to whether her shoulder condition was causally related to the accident (*see Henchy v VAS Express Corp.*, 115 AD3d 478, 479 [1st Dept 2014]; *Rosa v Mejia*, 95 AD3d 402 [1st Dept 2012]).

Furthermore, the affirmed report of her orthopedic surgeon, who first examined plaintiff a year after the accident, was insufficient to raise an issue of fact (*see Linton v Gonzales*, 110 AD3d 534 [1st Dept 2013]).

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13646-
13647 The People of the State of New York,
Respondent,

-against-

Darren Bracey,
Defendant-Appellant.

Ind. 6265/07

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Wachtell, Lipton, Rosen & Katz, New York (Molly K. Grovak of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered March 23, 2010, convicting defendant, after a jury trial, of burglary in the first degree (two counts), robbery in the first degree (two counts), robbery in the second degree, criminal possession of a weapon in the second degree (two counts) and criminal possession of a controlled substance in the third and fourth degrees, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed. Order, same court and Justice, entered on or about April 30, 2013, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The motion court properly denied defendant's CPL 440.10

motion, based on his claim of ineffective assistance of counsel. Defendant has not established that his trial counsel's alleged errors resulted in prejudice under the state or federal standards (*see People v Benevento*, 91 NY2d 708 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Regardless of whether counsel should have obtained the victim's medical records earlier, and regardless of whether counsel should have consulted an expert or called one to testify about the victim's mental health, defendant has not shown a reasonable possibility that such an impeachment of the victim would have been any more successful than the impeachment devices counsel did employ at trial (*see e.g. People v Carmichael*, 118 AD3d 603 [1st Dept 2014]).

There is no indication that psychiatric records and testimony would have supported a conclusion that the victim's account of the incident was the product of mental illness, or would have supported defendant's defense. As the result of a suppression ruling, the victim's ability to identify defendant was not at issue. The victim's account of the crime was extensively corroborated by, among other things, a 911 call by another tenant in the apartment building and police observations of defendant's incriminating behavior when he was found dropping a loaded firearm. Accordingly, the absence of additional

psychiatric evidence did not deprive defendant of a fair trial or undermine confidence in the result. Contrary to defendant's argument, *People v Oliveras* (21 NY3d 339 [2013]) is distinguishable, since that case involved a "total failure" to obtain psychiatric records that had a far greater potential to undermine the People's case (*id.* at 348).

The court properly denied defendant's motion to suppress his statements to the police. The officer's pre-*Miranda* questions constituted improper custodial interrogation, because even though these questions purported to inquire only about unrelated criminal activity for intelligence-gathering purposes, they were "reasonably likely to elicit an incriminating response" under the particular circumstances of the case (*Rhode Island v Innis*, 446 US 291, 302 [1980]; *compare People v Arroyo*, 88 AD3d 495 [1st Dept 2011], *lv denied* 18 NY3d 955 [2011]). However, the post-*Miranda* statements were admissible because "the circumstances presented here do not constitute a single continuous chain of events" (*People v White*, 10 NY3d 286, 292 [2008], *cert denied* 555 US 897 [2008]; *see also People v Paulman*, 5 NY3d 122, 131 [2005]) in light of, among other things, the limited extent of the

Miranda violation, the officer's statement clarifying that the "first part" of the interview would be unrelated to defendant's case, and the lack of any other indication of coercive police conduct.

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

ENTERED: DECEMBER 2, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13648N Tri-Tec Design, Inc., Index 401496/11
Plaintiff-Appellant,

-against-

Zatek Corporation,
Defendant-Respondent.

_____

Meyers, Saxon & Cole, Brooklyn (Margaret J. Leszkiewicz of counsel), for appellant.

Thomas Torto, New York, for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 28, 2013, which granted defendant's motion to amend its answer to include two counterclaims, unanimously affirmed, without costs.

"Leave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983][citations omitted]). Mere delay in seeking to amend a pleading does not warrant denial of the motion, in the absence of prejudice (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). The type of prejudice necessary to warrant denial of the motion "requires some indication that the [opposing party] has been hindered in

the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). Plaintiff has failed to demonstrate any such prejudice or surprise. Plaintiff's assertion of additional costs for discovery associated with the counterclaims is insufficient, as such costs would have been necessary even if the counterclaims were asserted with the initial answer.

Defendant's counterclaims for breach of contract and consequential damages associated with the alleged breach are not "'palpably insufficient or clearly devoid of merit'" (*Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012]; *see also MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

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

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

ENTERED: DECEMBER 2, 2014

CLERK

Tom, J.P., Moskowitz, DeGrasse, Richter, Kapnick, JJ.

12605 The People of the State of New York, Ind. 5216/09
Respondent,

-against-

Lawrence Watson,
Defendant-Appellant.

_____

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Olshan Frome Wolosky, LLP, New York (Renee M. Zaytsev of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at substitution of counsel ruling; Juan M. Merchan, J. at jury trial and sentencing), rendered October 29, 2010, reversed, on the law, and the matter remanded for a new trial.

Opinion by Kapnick, J. All concur except Tom, J.P. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Karla Moskowitz
Leland G. DeGrasse
Rosalyn H. Richter
Barbara R. Kapnick, JJ.

12605
Ind. 5216/09

_____x

The People of the State of New York
Respondent,

-against-

Lawrence Watson,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J. at substitution of counsel ruling; Juan M. Merchan, J. at jury trial and sentencing), rendered October 29, 2010, convicting defendant of criminal possession of a weapon in the second degree (two counts) and resisting arrest, and imposing sentence.

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Olshan Frome Wolosky LLP, New York (Renee M. Zaytsev of counsel), for appellant.

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

KAPNICK, J.

In 2010, defendant was convicted of two counts of criminal possession of a weapon in the second degree and one count of resisting arrest, and was sentenced to an aggregate term of 20 years to life. On appeal, he raises three issues: (1) whether the trial court violated defendant's right to counsel by disqualifying defense counsel; (2) whether the trial court violated defendant's rights under the Confrontation Clause by precluding defense counsel from cross-examining a key witness regarding his past activities as a paid police informant; and (3) whether defendant's sentence is excessive.

Sixth Amendment Right to Counsel

At a pretrial calendar call on June 17, 2010, before the Honorable Richard D. Carruthers, attorney Robert Fisher of the New York County Defender Services (NYCDS), who had been representing defendant for eight months, alerted the court that he had learned from reviewing *Rosario* material turned over that day, that Toi Stephens,[1] who was arrested with defendant, and whom Fisher had been trying to locate, was represented by another attorney at NYCDS with respect to the same incident. Fisher took the position that this created a conflict, and although defendant expressed that he wanted to keep Fisher as his attorney, Fisher

[1] Stephens's first name also appears in the record as "Toy" and "Troy," and his last name also appears as "Stevens."

was not sure whether that would be appropriate. The court agreed that there seemed to be a conflict, and adjourned the case to the following Monday to resolve the matter.

On June 21, 2010, a discussion of the representation issue took place, the relevant portion of which is recounted below:

> "THE COURT: Good afternoon. This is on today with respect to the difficulty concerning representation at this point. Have you looked into the matter any further?
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> "MR. FISHER: Yes, Judge. I was told by my supervisors that I couldn't examine the file that we have on Toy Stephens . . . I'm forbidden to send an investigator out to find Mr. Stephens. The investigator looked at the CJA sheet and saw the address on the CJA sheet on file by the court personnel which is different than the address that the prosecutor gave me when I searched for Mr. Stephens in May. At that point, I had to call off everything else per the instructions of my office. *They were, after they discussed it for a while, they thought Mr. Watson could probably waive just about anything he wants as a defendant and if he is willing to waive the conflict, they wouldn't have a problem. There seemed to be an interim step in there. I think for my own protection, he would have to waive any attempt to call Toy Stevens as a witness.* If we did call Toy Stephens, there could be a problem because Mr. Stephens hasn't waived confidentiality of our representation with him and assigning a new lawyer, there may become issues with that. Everybody was cavalier about a mistrial at that stage and I'm sure the Court wouldn't find that acceptable. So I spoke to my client briefly inside . . . . *I told him if I were going to continue to represent him, that he would have to waive even the attempt to call Toy Stephens as a witness because I don't want that to come up . . . either.* I didn't try

hard enough to find Troy Stephens or I didn't question him hard enough; any issues with respect to Mr. Stephens. I would also indicate People shouldn't be able to call Toy Stephens as a witness. It would seem inappropriate for them to call Toy Stephens now as a witness given the situation I'm placed in at this juncture. *Under those conditions, if Mr. Watson continues to wish to waive those conflicts, my office's position is that I can represent him.* That's the position of my authorities in my office.

"THE COURT: Mr. Watson, you have the right to be represented by an attorney who has strictly your interests are concerned [sic]. Your attorney is employed in the same office as counsel who represented Mr. Stephens. So that brings up a conflict of interest since his office has an interest in Mr. Stephens and you in your case. It conflicts. Is the representation [of] Mr. Stephens completed?

"MR. FISHER: Yes. Mr. Stephens pled shortly after his arraignment.

"THE COURT: Nonetheless, it puts the attorney and it puts you in a difficult position in the event that Mr. Stephens has relevant information about the case, it might serve to be favorable to you. *Your current attorney could not call that person to the witness stand ethically because his office already represents him. Could not technically cross-examine him.* Couldn't have access to the file to [sic] his own office that might reveal information about Mr. Stephens that would be helpful for cross-examination. Do you understand that?

"THE DEFENDANT: Yes.

* * *

"[ASSISTANT DISTRICT ATTORNEY]: Your honor, if I may. It is the People's position that Mr. Fisher should be relieved from this case. Although the People have no intention right

now of calling Toy Stephens on their direct case, if the defense is going to be that someone other than Mr. Watson had the gun, we would try to find him and put him on the stand. If it is Mr. Fisher's position he cannot cross-examine him.[2]

"THE COURT: I couldn't preclude the People from calling the person as a witness if the person has relevant information. I can't do that.

"MR. FISHER: *Well, Judge, then what position do you leave me in? If I can't cross examine the witness.*

"THE COURT: *That's the problem.*

"MR. FISHER: I understand. That's why I believe we are here today is because when we first learned of this, we had some initial reaction but my client indicated he wanted to waive the conflict. *The problem is, I think, the conflict on his part may be waivable but there is a bigger conflict, it will put me in a bad position if the prosecution calls Toy Stephens which they hadn't planned on.* They may decide and now I'm in a terrible position.

"THE COURT: *You have a very difficult ethical problem if you were to stay on the case and they call him.*

"THE DEFENDANT: I don't want to relieve Mr. Fisher because he's been my lawyer through the whole case and I feel that if I was to obtain another attorney, I want to go to trial, it pushes back time and I'm ready to proceed and get this matter over with as soon

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[2] Although the dissent asserts that the People asked that Mr. Fisher be relieved as counsel, I note that the People did not make a written motion to disqualify counsel, or otherwise initiate the disqualification; they merely stated that it was their position that Fisher should be relieved *if* he could not cross-examine Stephens.

as possible.

"THE COURT: Believe me, I sympathize with that but we want to get it done correctly. Trials can take turns that no one can anticipate and it might happen that Mr. Stephens will become a relevant witness, will be found, will be brought to court by the prosecution and then that would put you in a very difficult position. Certainly it would put your lawyer in a very difficult position and these are things that can happen. No one can predict with certitude that it will happen but it could happen. So the best thing to do as a matter of caution is to relieve Mr. Fisher and to appoint new counsel to represent you.

* * *

"THE DEFENDANT: One more question.

"THE COURT: Sure.

"THE DEFENDANT: I'm not sure but [is it] up to my discretion if I really want to relieve Mr. Fisher?

"THE COURT: You see, we are in a difficult position now where I see him being placed in a position where he just would not be able to effectively represent you. I have, ultimately, the responsibility to see that trials are conducted fairly and without any impediments to either side.

"THE DEFENDANT: Even if I waive the conflict?

"THE COURT: Even then, when I see there is a real conflict that might not be able to be overcome, you see. I would like to keep Mr. Fisher on but at this point, I just don't see how I can do it. I sympathize with you being put in this position. There will be some delay. We will try to get an attorney who will represent you who will be able to take up the matter quickly." (Emphasis added.)

Following this ruling, the matter was adjourned until June 23, 2010, when a new attorney appeared for the defendant.[3]

Defendant now contends that the trial court deprived him of his constitutional right to counsel of his choosing by disqualifying Fisher. Defendant argues that the disqualification was erroneous because there was no conflict in the first place, and even if there was, it was too remote to warrant disqualification and could have been cured by a knowing and intelligent waiver.[4]

As both the United States Supreme Court and the Court of Appeals have explained, the Sixth Amendment encompasses a right to select and be represented by one's preferred counsel. However, that right is not absolute (*see Wheat v United States*, 486 US 153, 159 [1988]; *People v Carncross*, 14 NY3d 319, 327 [2010]), and it must be balanced with the right to effective

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[3] Although defendant does not specifically argue that there was ineffective assistance of counsel on the part of the new attorney, defendant does make clear that he was unhappy with the new attorney and contends that he failed to meet or speak with him, discuss strategies or adequately prepare for trial.

[4] The People do not squarely address the merits of this issue in their respondent's brief. Instead, they argue that the trial court's decision should be upheld because Fisher never objected to being relieved as counsel and so he acquiesced in the court's conclusion that replacing him with another attorney was required. The People also argue that defendant never indicated a clear willingness to waive his ability to call Stephens. To the extent the People suggest that analysis of the merits of the court's determination can be avoided based on hesitation expressed by defendant or counsel, they are incorrect.

assistance of counsel (*Carncross*, 14 NY3d at 329). Thus, trial courts are given

> "substantial latitude in refusing waivers of conflicts of interests not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses" (*Wheat*, 486 US at 163).

In *Wheat* and its progeny, the issue before the Court was whether the trial court's decision to accept or deny a defendant's waiver of an actual or potential conflict of interest was proper in light of the competing concerns that the trial court is charged with balancing. Here, however, defendant not only challenges the trial court's refusal to accept his waiver of the potential conflict of interest, but also questions whether there was even a potential conflict of interest, in the first instance, where Fisher, who is a staff attorney at an institutional defense organization, never personally represented Stephens. It is crucial to recognize that here, unlike in other right to counsel cases, the proper initial inquiry is not whether defendant's waiver should have been accepted, but whether there was even a conflict or potential conflict of interest to waive in the first place. The court need only reach the issue of whether the waiver was properly accepted or denied after it has been established that there was a conflict or potential conflict of

interest to waive. I find that on this record,[5] no conflict or potential conflict of interest existed.

"A conflict of interest exists when an attorney's current representation is impaired by the loyalty he owes to a former client" (*People v McLaughlin*, 174 Misc 2d 181, 185 [Sup Ct, NY County 1997], citing *United States v Moscony*, 927 F2d 742, 749-750 [3d Cir 1991]). "An attorney's decision whether and how best to impeach the credibility of a witness to whom he . . . owe[s] a duty of loyalty necessarily place[s] the attorney in a very awkward position" (*Carncross*, 14 NY3d at 328 [internal quotation marks omitted] [ellipsis and alterations in original]). In *People v Hall* (46 NY2d 873, 874-875 [1979], *cert denied* 444 US 848 [1979]), a potential conflict of interest existed where the defense attorney previously represented an important identification witness and was "intimately involved" with the witness's family and personal history and background. In *McLaughlin*, the People moved for disqualification of defense counsel and the trial court found that a conflict existed where the Legal Aid Society (LAS) represented the defendant and

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[5] We note that the record on this issue was underdeveloped in that there was no briefing or formal motion practice and little inquiry made by the trial court as to why Fisher or his supervisors thought he was not allowed to search for or cross-examine Stephens. Moreover, the trial court never probed the attorneys as to the status of the search for Stephens or whether the defense intended to pursue a theory that would necessitate Stephens's testimony.

previously represented (although via different LAS attorneys) a primary witness against the defendant (174 Misc 2d at 183-186). The court reasoned that LAS could not continue its representation of the defendant, because the witness's testimony was crucial, the defense intended to raise the issue of the witness's guilt during the trial, and the witness was unwilling to waive any rights or privileges (*id*. at 182, 185-186). Importantly, however, in *McLaughlin*, there was evidence before the court that LAS had used or was using confidential information about its former client while interviewing prosecution witnesses and preparing for trial (*id.* at 183).

Here, there was no indication or allegation that Fisher ever used or was privy to any confidential information regarding Stephens.[6] It is undisputed that Fisher never personally represented Stephens and was not involved in the adjudication of his case; nor was he even aware that another NYCDS attorney represented Stephens until he viewed pretrial disclosures made by the prosecution. Had Fisher continued his representation of the defendant, he would thus not have been placed in the "awkward position," discussed by the Court of Appeals in *Carncross* (14 NY3d at 328 [internal quotation marks omitted]), of having to

[6] The dissent states that this conclusion is based on hindsight; however, it is clear from the record that was before the trial court at the time of its decision that Fisher was not familiar with Stephens or his criminal case in any capacity.

balance a duty of confidentiality while conducting either a cross-examination or direct examination. There was no risk that Fisher could disclose Stephens's confidences since he did not have any knowledge of them, and, therefore, no potential conflict of interest could have arisen as a result of Fisher representing Watson. Accordingly, there was no conflict of interest or potential conflict of interest upon which to base Fisher's disqualification.[7]

As to whether the knowledge of NYCDS was imputed to Fisher, thereby creating a conflict of interest via the imputation rules, the Court of Appeals has distinguished between representation by the same lawyer and the same attorney of record:

> "The thrust of defendant's argument, as we view it, is not that there was dual representation of conflicting interests by the same lawyer, but that the mere dual representation by the same *attorney of*

[7] While both the trial court and the dissent reason that the disqualification was warranted based on the conflict created by the "fact" that Fisher could not cross-examine or search for Stephens, this reasoning remains legally unsupported. The only basis in the record for this conclusion is that Fisher simply told the trial court that his supervisors told him that if he were to continue his representation of defendant, he would not be allowed to search for or cross-examine Stephens. I agree that *if* Fisher had a conflict that would have prevented him from conducting any cross-examination of a prosecution witness, then he would have to be relieved as counsel. The problem is that here Fisher and the trial court were mistaken in their belief that there was such a conflict. To the extent Fisher and his supervisors were correct that Fisher would not be allowed to see the office file on Stephens, this alone cannot create a conflict when no other attorney, such as his replacement counsel, would have access to these NYCDS files either.

> *record*, designated on behalf of the Legal Aid Society, raises a presumption of deprivation of effective representation of counsel.
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> "While it is true that for the purpose of disqualification of counsel, knowledge of one member of a law firm will be imputed by inference to all members of that law firm, we do not believe the same rationale should apply to a large public-defense organization such as the Legal Aid Society. The premise upon which disqualification of law partners is based is that there is within the law partnership a free flow of information, so that knowledge of one member of the firm is knowledge to all.
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> * * *
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> "In view of the nature of the organization and the scope of its activities, we cannot presume that complete and full flow of "client" information between staff attorneys exists, in order to impute knowledge to each staff attorney within the office" (*People v Wilkins*, 28 NY2d 53, 56 [1971] [internal citation omitted]).

Moreover, in *People v Hunter*, this Court declined to find a conflict of interest where a LAS attorney represented a defendant in his trial for criminal sale of a controlled substance, while another LAS attorney represented an individual who allegedly resembled the defendant and was arrested for selling marijuana in "close temporal and spatial proximity" to the defendant's alleged sale, and the defendant sought to attribute his alleged sale to the other LAS client (283 AD2d 248, 248 [1st Dpt 2001], *lv denied* 96 NY2d 919 [2001]).

Here, defendant and Stephens were arrested in connection

with the same incident, but Stephens's case was already concluded by the time of Fisher's disqualification and, again, there was no evidence or suggestion that information concerning Stephens was ever shared with Fisher. Indeed, Fisher acknowledged that he would be barred from viewing his office's file on Stephens or using the address on file to try to locate Stephens; similarly no other attorney would have had access to NYCDS's file either. Thus, in light of *Wilkins* and *Hunter*, it cannot be said that the prior representation of Stephens by the same public defense organization created a potential conflict of interest. Although this Court is aware that the trial court's "discretion is especially broad" when balancing the right to counsel of a criminal defendant's choosing and the right to effective assistance of counsel free of conflicts (*Carncross*, 14 NY3d at 330 [internal quotation marks omitted]), under the specific circumstances here, we find that the trial court abused its discretion in disqualifying defendant's counsel. Since we are vacating the judgment, this Court will not reach the remaining two issues raised by this appeal.

Accordingly, the judgment of the Supreme Court, New York County (Richard D. Carruthers, J., at substitution of counsel ruling; Juan M. Merchan, J., at jury trial and sentencing), rendered October 29, 2010, convicting defendant of criminal possession of a weapon in the second degree (two counts) and

resisting arrest, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, should be reversed, on the law, and the matter remanded for a new trial.

All concur except Tom, J.P. who dissents in an Opinion:

TOM, J.P. (dissenting)

The Sixth Amendment affords a criminal defendant the right to representation by counsel; it does not guarantee the absolute right to representation by a particular attorney (*Wheat v United States*, 486 US 153, 159 [1988]). Where, as here, the chosen attorney is prohibited by a conflict of interest from conducting a thorough investigation, including interviewing a potential favorable witness, and would be prohibited from cross-examining that witness if called by the People, the attorney is unable to ensure that he will provide his client with an effective defense. Under these circumstances, even though the defendant expresses a willingness to waive any conflict, the exercise of the trial court's broad discretion to disqualify the attorney, to preserve the defendant's right to effective representation, will not be disturbed (*People v Carncross*, 14 NY3d 319, 329-330 [2010]).

Defendant was charged with two counts of criminal possession of a weapon in the second degree and one count of resisting arrest. The weapon possession counts alleged, respectively, that he possessed a loaded firearm outside of his home or business and that he possessed a loaded firearm with the intent to use it against another. Both defendant and one Toi Stephens ran away from the scene at the approach of police, and both were stopped and arrested. After defendant had been represented by attorney Robert Fisher of the New York County Defender Services (NYCDS)

for eight months, counsel alerted the court that he had learned from reviewing *Rosario* material that his office had represented "the witness I had been looking for since May, Mr. Toi Stephens." The NYCDS had represented Stephens in connection with the same incident from which the charges against defendant arose, presenting counsel with a conflict of interest. The court adjourned the matter for a few days to allow Mr. Fisher an opportunity to resolve the matter.

On the return date, counsel advised the court that Stephens had entered a guilty plea "shortly after his arraignment," but had not waived confidentiality with respect to his representation by the NYCDS local defender. As a result, counsel had been forbidden by his supervisor to examine the file on Stephens or even to send an investigator to locate him. To continue with his attorney's representation, defendant would have to waive any attempt by counsel to either locate Stephens or cross-examine him.

The People informed the court that they presently had no intention of calling Stephens on their case in chief; however, should it be claimed that someone other than defendant had possession of the gun, they would attempt to find Stephens and call him to testify. In view of defense counsel's inability to conduct any cross-examination of Stephens, the People asked that Mr. Fisher be relieved.

The court explained the conflict of interest resulting from the same office representing parties whose charges both arose out of the same incident. Though doubtful that he would be able to locate Stephens, defendant stated that he had been present when Stephens made a statement to police and that he "would want to have him called as a witness." Nevertheless, defendant expressed his desire to continue being represented by Mr. Fisher because obtaining another attorney would delay trial and defendant wanted to "get this matter over with as soon as possible."

The court explained that Stephens's testimony might be considered relevant and that the witness might be located and called to the stand by the People. In that event, Mr. Fisher would be placed "in a very difficult position" where he would not be able to provide effective representation. Counsel also reiterated that he would be placed in a "terrible position" if Stephens testified, because he would be unable to cross-examine him. At trial, the People had the open option of calling Stephens as a witness. Thus, despite defendant's professed willingness to waive counsel's potential conflict of interest, there might still exist "a real conflict that [the court] might not be able to . . . overcome." Noting its responsibility to assure a fair trial without any impediment to either party, the court directed a substitution of counsel (*see Carncross*, 14 NY3d at 328 ["the trial court had the independent obligation to ensure

that defendant's right to effective representation was not impaired"]).

The majority proceeds from the advantage of hindsight to conclude that Mr. Fisher was never "privy to any confidential information regarding Stephens." The propriety of the court's ruling, however, must be examined in the context of the information available at the time it was made and the harm to be avoided, not with the luxury of certainty after the fact. As the United States Supreme Court observed, a trial "court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly" (*Wheat*, 486 US at 162). Since counsel could not examine the file that had been assembled by the local defender during its representation of Stephens, there was no information available to enable the court to assess whether Stephens might be able to offer any testimony favorable to defendant. The person with the most insight into what Stephens knew was defendant, who heard the statement Stephens made after his arrest, based upon which defendant indicated that he wanted Stephens called as a witness on his behalf. Given all the indications – that defendant regarded Stephens as a desirable witness and that the People would call him to testify should defendant suggest the gun

was not his - it would have been improvident in the extreme to permit a conflicted attorney to proceed with his representation of defendant without any hope of being able to find out what Stephens knew or said so as to prepare an adequate defense, or without the ability to cross-examine him were he to be called by the People. Without the ability to ascertain possible exculpatory evidence within Stephens's knowledge or the ability to cross examine Stephens if called and present incriminating evidence against defendant, due to the conflict of interest, counsel could not properly represent defendant. Yet, the majority, with the benefit of hindsight, remarkably finds no conflict of interest with counsel's representation of defendant. Substitute counsel faced no such limitations and was not ethically obliged to avoid locating and interviewing Stephens or to refrain from calling him to testify on defendant's behalf should his testimony prove beneficial. Thus, the trial court properly concluded that "had counsel not been disqualified under these circumstances, counsel's ability to objectively assess the best strategy for defendant to pursue may have been impaired" (*Carncross*, 14 NY3d at 328; *see Wheat*, 486 US at 163 [trial court must be afforded substantial latitude with respect to disqualification "where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses"]).

People v Wilkins (28 NY2d 53 [1971]), relied upon by the majority, stands only for the proposition that unknowing dual representation of conflicting interests by the same attorney of record does not raise a presumption of ineffective assistance of counsel "without some showing of a conflict of interest or prejudice" (*id.* at 55). Prejudice results from factors that "deter[] . . . counsel from presenting an effective defense" (*id.* at 57), factors that are very much in evidence in the matter at bar. Here, the record indicates that "the particular staff attorney who defended the defendant knew of a potential conflict [of interest] and [would have been] inhibited or restrained thereby during trial" (*id.*). Clearly, *Wilkins* supports disqualification under the circumstances confronting the trial court in this matter.

Finally, it should be noted that the majority's disposition places trial judges in a position where any ruling made on disqualification of counsel is subject to reversal. Had defendant's attorney not been relieved by the court, defendant would be contending that counsel's inability to conduct a thorough investigation by locating and interviewing Stephens, who may be a favorable witness, deprived him of effective representation. It is not the function of appellate review to saddle the trial court with a Hobson's choice but rather to respect its broad discretion "when the defendant's actions with

respect to counsel place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide the defendant with a basis for appellate review" (*People v Tineo*, 64 NY2d 531, 536 [1985]; *see also Wheat*, 486 US at 161-163).

Accordingly, the judgment should be affirmed.

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

ENTERED: DECEMBER 2, 2014

CLERK