SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 23, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

13255-
13256 The People of the State of New York,
Respondent,

Ind. 5795N/10

-against-

Ricky Vines,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura Ward, J.), rendered on April 1, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of 1½ years, and order, same court and Justice, entered on or about April 2, 2014, which denied defendant's CPL 440.20 motion to set aside the sentence, unanimously affirmed.

Defendant's claim that his out-of-state felony conviction was not the equivalent of a New York felony, and thus could not serve as a predicate for enhanced sentencing, is unpreserved and waived with respect to all aspects of this appeal (*see People v Smith*, 73 NY2d 961 [1989]; *People v Kelly*, 65 AD3d 886, 887 [1st Dept 2009], *lv denied* 13 NY3d 860 [2009]; *People v Polowczyk*, 157 AD2d 865 [1990], *lv denied* 75 NY2d 922 [2d Dept 1990]), and we decline to review it in the interest of justice. As an alternative holding, we conclude that the requisite equivalency has been established by such portions of the record of the foreign criminal conviction that were "necessary to the determination of guilt," and "describe[d] the particular act . . . underlying the charge" to the extent required to "isolate and identify the statutory crime" (*People v Muniz*, 74 NY2d 464, 468-469 [1989]).

We have considered and rejected defendant's ineffective assistance of counsel claim. Counsel's determination that there was no valid ground upon which to challenge the second felony

offender adjudication was within "the wide range of professionally competent assistance" (*Strickland v Washington*, 466 US 668, 690 [1984]; *see also People v Crippa*, 245 AD2d 811 [1997], *lv denied* 92 NY2d 850 [1998]).

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

ENTERED: FEBRUARY 23, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Moskowitz, JJ.

16609 The People of the State of New York, Ind. 1191/13
Respondent,

-against-

Aki Davis,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Andrew J. Dalack of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at severance motion; Juan M. Merchan, J. at suppression hearing, jury trial and sentencing), rendered February 19, 2014, convicting defendant of robbery in the second and third degrees, assault in the second degree, grand larceny in the fourth degree, and eight counts of criminal possession of stolen property in the fourth degree, and sentencing him to an aggregate term of nine years, affirmed.

Renwick, J.P. and Moskowitz, J. concur in a separate memorandum by Renwick, J.P.; Andrias and Saxe, JJ. concur in a separate memorandum by Andrias, J. as follows:

RENWICK, J.P. (concurring)

Contrary to the view taken by Justice Andrias's concurrence, defendant's present challenge to the joinder under CPL 200.20(2)(c) is preserved. Defendant's motion is understood to seek severance on discretionary grounds as an alternative to severance for improper joinder pursuant to CPL 200.20(2)(c). More importantly, in opposing defendant's motion for severance, the People argued that the subject counts were properly joined under CPL 200.20(2)(c), and the motion court explicitly denied the motion on the ground that the requirements of the subdivision were met.

Under the principles set forth in *People v Pierce* (14 NY3d 564, 573-574 [2010]), the motion court should have granted defendant's motion to sever the counts charging possession of stolen property, relating to eight stolen MetroCards, from the other counts of the indictment, relating to an assault and robbery. The counts were not properly joined under CPL 200.20(2)(c), because they were not "similar in law," except to the extent that "both offenses involve misappropriated property," which does not suffice (*id.* at 574). Although the counts at issue here are more closely connected, factually, than were the counts in *Pierce*, we reject the People's argument that this

difference warrants a different result under the statute. While factual or evidentiary connections between counts may be relevant to joinder and severance under other portions of CPL 200.20 that are not applicable here, CPL 200.20(2)(c) only involves similarity of statutory provisions defining offenses.

Although the court erred in denying defendant's motion for severance on the ground that the counts were not properly joined for trial (*see* CPL 200.20 [2][c]), the error was harmless in light of the overwhelming evidence of defendant's guilt and the lack of any prejudice to defendant as a result of the joint trial (*see People v Serrano*, 74 AD3d 1104, 1107 [2d Dept 2010], *lv denied* 15 NY3d 895 [2010]; *People v Singson*, 40 AD3d 1015, 1016 [2d Dept 2007]).

Defendant did not preserve the specific suppression claim he raises on appeal, nor did the hearing court expressly rule on that claim, and we decline to review it in the interest of justice. As an alternative holding, we find that the search was "incident to an actual arrest" (*People v Reid*, 24 NY3d 615, 619 [2014]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. We find no basis for reducing the sentence.

ANDRIAS, J. (concurring)

Defendant repeatedly punched a fellow passenger (the victim) on a subway train when the two began tussling after defendant stole his cell phone. Police officers, who had observed defendant hovering near the victim and striking him about the face, arrested defendant when the train doors opened. After defendant was arrested, eight stolen student MetroCards were found in his possession.

Defendant did not preserve the specific suppression claim he raises on appeal, nor did the hearing court expressly rule on that claim, and we decline to review it in the interest of justice. As an alternative holding, we find that the search was "incident to an actual arrest" (*People v Reid*, 24 NY3d 615, 619 [2014]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The jury could have reasonably inferred that the victim suffered injuries which caused substantial pain (*see People v English*, 118 AD3d 558, 558 [1st Dept 2014], *lv denied* 25 NY3d 989 [2015]). Although the victim, who had returned to Ireland, did not testify at trial, an eyewitness, who was also a passenger in the subway car, testified

that he saw defendant punch and kick the victim and forcibly take his phone. Two police officers testified that they saw defendant repeatedly strike the victim, who had visible injuries, including a large cut above his eyes, bruises on his face and scratches on his neck. A surveillance video showed the victim on the platform dazed and in pain, and photographs showed that the left side of his face was bruised, swollen and bloodied (*see People v Rosario*, 121 AD3d 424, 425 [1st Dept 2014], *lv denied* 25 NY3d 1170 [2015]).

Defendant's argument that the counts charging possession of stolen property, relating to the eight stolen MetroCards, are not joinable under CPL 200.20(2)(c) with the counts charging robbery and assault, is not preserved (*see* CPL 470.05[2]; *People v Watson*, 284 AD2d 212, 213 [1st Dept 2001], *lv denied* 97 NY2d 642 [2001]), and we decline to review it in the interests of justice. In his motion, defendant argued that the charges were not joinable under CPL 200.20(2)(b) because the evidence of stolen property would not be admissible in the People's case against defendant for robbery and assault. However, with respect to joinder under CPL 200.20(2)(c), his sole argument was that the "inclusion of the stolen Metro[C]ard counts in the indictment as legally similar crimes is unwarranted because the presence of the

MetroCard counts will inevitably prejudice the defendant before the jury . . . . Thus, the Metro[C]ard counts should also be severed as a matter of the court's discretion (PL [sic] [s]ection 200.20[3])." At no time did defendant argue or imply that the counts of the indictment were not legally similar under CPL 200.20(2)(c).

Although the court did state in its decision that the counts were properly joined under CPL 200.20(2)(c), the claim is still not preserved because the court did not expressly decide the question "in re[s]ponse to a protest by a party" (CPL 470.05[2]; *People v Colon*, 46 AD3d 260, 263 [1st Dept 2007]). Rather, the court's statement was necessary to place defendant's argument that he was entitled to a discretionary severance in context, given that CPL 200.20(3) is applicable only where counts are joined under CPL 200.20(2)(c).

As an alternative holding, we find that the motion court properly exercised its discretion in denying defendant's motion to sever the counts charging possession of stolen property from the counts charging assault and robbery (*see People v Pierce*, 14 NY3d 564, 573-574 [2010]).

CPL 200.20(2)(c) authorizes the joinder of multiple charges when, "[e]ven though based upon different criminal transactions,

and even though not joinable pursuant to paragraph (b), such offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law." "Offenses will not be deemed sufficiently similar to support joinder under CPL 200.20(2)(c) if the offenses do not share any elements and the criminal conduct at the heart of each crime is not comparable" (*Pierce*, 14 NY3d at 573-574). Here, the underlying allegations demonstrate that the "the essential nature of the criminal conduct" alleged is sufficiently "similar in law" to satisfy the principles set forth in *Pierce* (*id.* at 574; *see People v Covington*, 130 AD3d 409, 409 [1st Dept 2015], *lv denied* 26 NY3d 966 [2015]). Each count involved misappropriated property and fell under the narrow rubric of theft-related offenses involving the subway system. Defendant possessed the stolen MetroCards while robbing and assaulting a subway passenger, crimes which were targeted by the specially-trained officers who arrested defendant, and all charges stemming from the incident were arraigned and indicted together. Defendant did not make a sufficient showing to warrant a discretionary severance (*People v Ford*, 11 NY3d 875, 879 [2008]).

Even if the motion court erred in denying the severance motion, the error was harmless as the evidence of defendant's

guilt with respect to each criminal transaction is overwhelming, and there is no significant probability that the jury's verdict was improperly affected by the fact that the crimes were charged together (*see People v Masaguilar*, 86 AD3d 619, 620 [2d Dept 2011], *lv denied* 17 NY3d 904 [2011]; *People v Thibeault*, 73 AD3d 1237, 1242 [3d Dept 2010], *lv denied* 15 NY3d 810 [2010], *cert denied* 562 US 1293 [2011]). The People presented clear and disinterested eyewitness testimony, as well as physical evidence, that established each of the charged crimes, and there was no "substantial likelihood that the jury would be unable to consider separately the proof as it related to each incident" (*People v Haywood*, 124 AD3d 798, 800-801 [2d Dept 2015], *lv denied* 25 NY3d 1202 [2015]; *People v Montalvo*, 34 AD3d 600, 601 [2006], *lv denied* 8 NY3d 883 [2007]).

We perceive no basis for a reduction of sentence.

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

ENTERED: FEBRUARY 23, 2016

CLERK

Mazzarelli, J.P., Friedman, Gische, Kapnick, JJ.

16639 Paramount Leasehold, L.P., Index 653668/11
Plaintiff-Respondent-Appellant,

-against-

43rd Street Deli, Inc., doing
business as Bella Vita Pizzeria,
Defendant-Appellant-Respondent.

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Cornicello, Tendler & Baumel-Cornicello, LLP, New York (Jay H. Berg of counsel), for appellant-respondent.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered February 5, 2014, which, to the extent appealed from, denied plaintiff landlord's motion for partial summary judgment, and denied defendant tenant's motion to compel arbitration, unanimously modified, on the law, to grant landlord's motion for partial summary judgment, and otherwise affirmed, without costs.

The lease at issue was entered into between plaintiff landlord's predecessor and defendant, which operates a deli in the demised premises. As concerns this appeal, the lease provided for the payment by tenant of fixed rent, additional

rent, and a "percentage rent,"[1] which was governed by article 38 of the lease. The lease required tenant to self-report percentage rent, while giving landlord a mechanism to verify, if it chose to, the sums reported by tenant. Thus, article 38E of the lease required tenant to submit statements of the percentage rent due on either an annual or quarterly basis, along with the requisite payment, if any was due. Article 38G dictated that tenant retain, for a period of three years, permanent complete records in accordance with proper accounting principles.

Article 38H provided that landlord had the right to have its own accountant audit tenant's records to "determine or verify" its gross sales for the purpose of determining the amount of percentage rent owing. In the event that the audit were to "show that Tenant's statement of [g]ross [s]ales for any period has been understated by three (3%) percent or more," tenant was required to pay landlord the cost of the audit in addition to any deficiency, plus interest. Article 38H also provided that landlord's determination as to the proper amount of percentage

[1] The "percentage rent" due was to be equal to 10% of the amount by which tenant's "gross sales" (as such term was defined in article 38B) "exceeds the product of the Fixed Rent paid for [any] such calendar year multiplied by (10) ten minus" any real estate taxes paid by tenant for such calendar year pursuant to other applicable lease provisions.

rent owed was binding and conclusive on tenant, but was subject to arbitration if tenant disputed landlord's calculations.

Article 38I set forth landlord's rights if tenant did not provide the statements required by 38E. In that event, landlord could elect to conduct an audit of whatever books and records were available to it, and to "prepare the statements which [t]enant has failed to prepare and deliver." The audit was to be performed by a certified public accountant of landlord's choosing, and was to be "conclusive," with tenant to "pay on demand" all percentage rent shown to be owing, plus expenses. In stark contrast to article 38H, article 38I did not contain an arbitration clause or otherwise afford tenant an opportunity to challenge landlord's calculations.

The lease further provided, in article 20 and article 24 respectively, that there would be no oral modification or waiver of the terms of the lease. Specifically, article 20 contained a merger clause whereby all understandings and agreements were merged into the lease, and a provision that any further agreements to change or modify the lease would be "ineffective" unless such agreement was "in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment" was sought. Article 24 also provided, in

pertinent part, that no provision of the lease was to be deemed waived by landlord unless such waiver was in writing and signed by it.

On August 2, 2011, landlord delivered a letter to tenant in which it asserted that tenant had not provided the statements of gross sales and in which it informed tenant that it had elected to exercise its right to audit tenant's books and records and, pursuant to article 38I of the lease, prepare its own statements and calculation of the percentage rent. The letter advised tenant that landlord's accountant would appear at the premises 15 days later to perform the audit of tenant's books and records from 2005 through the present.

Tenant responded to landlord two days later by rejecting the audit. It noted that the parties were involved in a separate litigation, and characterized the letter as a discovery request that should be made directly to the court.[2] It further stated that tenant was required to keep records only for three years, rather than the six years of documents requested by landlord in the audit letter. On August 17, 2011, at the appointed time set forth in the audit letter, landlord's accountant arrived at the

[2] The separate action involved an attempt by tenant to renew the lease pursuant to an option contained therein.

premises but left after discovering that there was no one available to discuss tenant's revenues and no records available to review.

Landlord commenced this action, asserting three causes of action seeking judgment and permitting it to conduct an audit pursuant to article 38 of the lease. It also moved for a preliminary injunction enjoining tenant from destroying the relevant books and records, an order directing it to turn over its books and records to landlord's accountants, and a judgment declaring that landlord was entitled to an accounting of tenant's gross sales. Tenant opposed the motion and cross-moved to dismiss the complaint or, in the alternative, to quash a subpoena for documents that landlord had served on its accountants. The court denied the cross motion, and granted landlord's motion to the extent of directing tenant to maintain its records and comply with the subpoena, as limited by the court. The court denied the remainder of the relief sought by landlord on the basis that such would amount to a grant of summary judgment before tenant had even had an opportunity to answer the complaint.

In response to the order, tenant's accountants turned over copies of its tax returns from December 1, 2004 through November 30, 2010. Landlord's accountants performed an audit based on

these tax returns and determined that the amount of percentage rent due to it under the lease was $263,114.55, with interest. Landlord then moved for partial summary judgment in the amount determined by the audit, plus expenses, contending that the percentage rent it sought was "incontrovertible" pursuant to article 38I's own terms. Landlord supported the motion with its accountant's computations and the backup documentation supporting those figures. The motion was further supported by the affidavit of the vice president of an affiliated entity of landlord, who averred that the amount owing was calculated based on the gross sales figures set forth in the tax returns provided by tenant.

Upon receipt of the motion, John Pappas, tenant's principal, served landlord with a letter disputing the results of the audit and demanding arbitration. Tenant also opposed the summary judgment motion with an affidavit from Pappas. Pappas asserted that, even if landlord was entitled to percentage rent, it had improperly calculated the amount due. Specifically, he claimed that landlord had omitted deductions from gross rent, including deductions for tips made to employees and fees for credit card charges, and had also miscalculated real estate tax deductions. Further, Pappas stated, landlord had misstated the amount of fixed rent due under the lease, which was to be deducted from any

percentage rent. In any event, Pappas claimed, no percentage rent was due at all because landlord had waived it. Pappas explained as follows:

> "37. I was advised by Plaintiff's principal, Arthur Cohen, on numerous occasions during the lease term, that Defendant did not have to pay percentage rent to Plaintiff pursuant to the Lease; therefore Plaintiff is now precluded from seeking reimbursement of percentage rent.
>
> "38. I remember at least one conversation with Mr. Cohen on this topic took place shortly after I received the improperly inflated water bills.[3] I remember that the conversation took place late in 2005 or early 2006.
>
> "39. At the time this cost him nothing since no percentage rent was owed for the year 2005. However, after I expressed my exasperation upon receiving a water bill that was too high by a factor of ten, he attempted to placate me."

Tenant moved separately to compel arbitration pursuant to article 38H of the lease.

Supreme Court denied tenant's cross motion to compel arbitration and to stay all proceedings. It found that tenant had "conflate[d] Article 38(H) and 38(I)," and that the operative provision of the lease, article 38I, did not provide for arbitration. The court also denied landlord's motion for partial

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[3] The separate action also involved landlord's claim that tenant had failed to pay water bills for which it was responsible pursuant to the lease.

summary judgment. First, the court found that there were several "accounting discrepancies," and thus issues of fact existed with respect to whether the figures arrived at by landlord's accountants had been accurate. Specifically, the court found that there was "at least one glaring mathematical error in calendar year 2009" whereby real estate taxes of $1,278.95 should have been subtracted, rather than added, to the total amount due. Because landlord's accountant had not specifically documented his computations, the court found that it was left to the court to decipher these discrepancies and that it could not do so "without the benefit of further explanation."

With respect to the alleged oral waiver by landlord of the percentage rent provision, the court noted that landlord had not responded to Pappas's allegation that Arthur Cohen had told him that tenant did not have to pay it. Landlord's sole reliance on the lease's no-waiver provision in opposition, the court found, was not dispositive because "a contract . . . can be unmade, and a contractual prohibition against oral modification may itself be waived" [internal quotation marks omitted]. Moreover, the court found that where a party's conduct induces another's "significant and substantial" reliance on an oral agreement to modify a contract, that party may be estopped from disputing a

modification of the contractual terms [internal quotation marks omitted]. Applying these principles, the court found that a hearing was required to determine whether landlord had waived its right to percentage rent by way of Cohen's alleged oral representations as set forth in the Pappas affidavit.

A court will not order a party to submit to arbitration "absent evidence of that party's unequivocal intent to arbitrate the relevant dispute and unless the dispute falls clearly within that class of claims which the parties agreed to refer to arbitration" (*Eiseman Levine Lehrhaupt & Kakoyiannis P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007] [internal quotation marks omitted]). Tenant contends that the parties agreed to arbitrate this dispute pursuant to article 38H of the lease, and that such article applies because the issue is whether tenant properly accounted to landlord for its gross sales. It argues that, since its accountants ultimately responded to landlord's subpoena and provided tenant's tax returns, permitting landlord to perform an audit, 38H was implicated, with its concomitant arbitration clause.

We disagree. The critical difference between articles 38H and 38I is that the former contemplates voluntary production by tenant of periodic statements, which landlord has the right to

verify through an audit, while the latter involves a compulsory audit by landlord to occur upon tenant's failure to produce the statements of its own volition. Tenant undisputedly failed to furnish to landlord the statements required by the lease. Accordingly, landlord resorted to its rights under article 38I. That provision unquestionably does not provide for arbitration if tenant disputes the results of landlord's audit. Accordingly, the court properly denied tenant's motion to compel arbitration. With respect to its cross appeal, landlord claims that the court should have awarded partial summary judgment on its percentage rent claim because the amount was based on tenant's own tax returns and computed by landlord's accountants in accordance with article 38I of the lease, which provided that the audit was to be conclusive and binding. At a minimum, landlord argues, it was entitled to partial summary judgment as to tenant's liability, with the issue of the exact amount of damages to be determined at trial. Landlord contends that the court should have enforced the lease provisions precluding oral modifications and waiver, and rejected tenant's waiver arguments as a matter of law.

According to the express terms of article 38I of the lease, the amount of percentage rent that landlord calculated upon reviewing tenant's books and records became "conclusive" upon

tenant. This was sufficient for landlord to satisfy its prima facie burden that it was entitled to judgment as a matter of law (*see Home Ins. Co. v Olympia & York Maiden Lane Co.*, 219 AD2d 469 [1st Dept 1995] [landlord's operating statements became conclusive and binding on tenant pursuant to express provision in lease]). Tenant contends that, even if landlord shifted its burden, it created two separate issues of fact. The first is based on the waiver of the percentage rent provision alleged to have occurred in conversations between Pappas and Cohen. The second arises out of a challenge to the accuracy of the audit itself.

An agreement in a lease providing that no waiver of a term shall be inferred absent a writing to that effect is enforceable (*see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]; *Community Counseling & Mediation Servs. v Chera*, 95 AD3d 639, 640 [1st Dept 2012]). Thus, "if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls" (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]). Tenant correctly notes that the parties to a contract may, by mutual agreement, disregard a no-waiver clause. However, some performance confirming the modification must be present, and it

must be "unequivocally referable to the oral modification" (*id.*) As stated by this Court, in the context of a lease dispute, there must be "sufficient indicia that the reasonable expectations of both parties under the original lease were supplanted by subsequent actions" (*Simon & Son Upholstery v 601 W. Assoc.*, 268 AD2d 359, 360 [1st Dept 2000]). Thus, there, a new landlord could not, notwithstanding a no waiver clause, enforce a provision in a lease limiting the tenant's use of the premises to upholstery manufacturing, where the prior landlord had not only told the tenant it could create a photography studio in the space, but was actively involved in the modifications necessary to create the studio (*id.*).

Here, tenant has attempted to establish that it did not pay percentage rent over the years because landlord had orally waived the requirement. However, tenant has failed to establish that nonpayment of the percentage rent was unequivocally referable to the alleged statement (*Rose v Spa Realty Assoc.*, 42 NY2d at 343; *see also Gansevoort 69 Realty LLC v Laba*, 130 AD3d 521 [1st Dept 2015]). To be sure, where a party orally waives a contract provision requiring the other party to perform an affirmative act, it may be difficult for the other party to establish the waiver other than by demonstrating that it did not do the thing

it was originally required to do. Nevertheless, a nonbreaching party should not have to litigate the issue based only on the breaching party's unsupported and uncorroborated representation that it orally waived a provision. This is the very reason why many contracts require waivers to be in writing. Such a bald representation is all tenant presents here. Accordingly, it has failed to raise an issue of fact.

Nor has tenant raised an issue of fact regarding the accuracy of the audit. As contemplated by article 38I of the lease, landlord's claim for percentage rent is based on the tax returns provided to it by the tenant, and tenant does not dispute the accuracy of those documents. Again, article 38I provides that landlord's computation of percentage rent "shall be conclusive" on tenant and that tenant "shall" pay the amount owing upon demand. Landlord was entitled to rely on this express provision of the lease (*see Home Ins. Co. v Olympia & York Maiden Lane Co.*, 219 AD2d at 469). In addition, article 38I omitted the dispute resolution mechanism available in 38H, indicating that the parties, in negotiating the lease, consciously meant that tenant's failure to voluntarily provide statements of its gross sales would deprive it of the opportunity to challenge landlord's findings if it was compelled to create the statements itself. We

note that nowhere does tenant accuse landlord of operating in bad faith in performing its audit of tenant's revenues. For these reasons, landlord should have been awarded summary judgment on its claim for percentage rent.

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

ENTERED: FEBRUARY 23, 2016

CLERK

Friedman, J.P., Acosta, Andrias, Saxe, Feinman, JJ.

183 New Hampshire Insurance Company, et al.,
Plaintiffs-Respondents,

-against-

Fresh Direct Holdings, Inc.,
Defendant-Appellant.

Index 651320/10

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Anil S. Singh, J.), entered on or about August 6, 2015,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 5, 2016,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

284 The People of the State of New York Ind. 9544/89
Respondent,

-against-

Emanuel Johnson,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (James Wen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered March 18, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law Article 6-C), unanimously affirmed, without costs.

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

or outweighed by aggravating factors, including the seriousness of underlying offense and defendant's violent criminal history.

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

286 Country Wide Home Loans, Inc., Index 381387/08
Plaintiff-Appellant,

-against-

Darek J. Harris, et al.,
Defendants.
- - - - -
Gonzalo Dunia,
Intervenor-Respondent.

_____

David M. Namm, P.C., Mineola (David M. Namm of counsel), for appellant.

Charles Wallshein, Melville, for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered September 5, 2014, which, to the extent appealed from as limited by the briefs, sua sponte granted intervention to Gonzalo Dunia, and granted his motion to vacate the judgment of foreclosure and sale and to dismiss this action for failure to join a necessary party, unanimously modified, on the law, to deny the motion to dismiss this action, and otherwise affirmed, without costs.

The motion court providently exercised its discretion in considering Dunia's motion to be, in part, a motion for intervention (*see Clair v Fitzgerald*, 63 AD3d 979, 980 [2d Dept 2009]). In addition, the motion court correctly granted

intervention, because Dunia, a fee owner of the property that plaintiff seeks to foreclose upon and sell, may be adversely affected by a judgment in this action (*see* CPLR 1012[a][3]; *see also New Falls Corp. v Board of Mgrs. of Parkchester N. Condominium, Inc.*, 10 AD3d 574, 576 [1st Dept 2004]).

The motion court properly granted Dunia's motion to vacate pursuant to CPLR 5015(a)(3), even though Dunia only referenced CPLR 5015 and did not specify subdivision (a)(3) in his motion papers (*see e.g. Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 143 [1986]). The motion was made within a reasonable time (*see Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 225 [2013]), given that Dunia moved less than three months after entry of the judgment of foreclosure and sale, and there is no indication that he had actual notice of this action before entry of the judgment. Given that plaintiff knew of Dunia's fee interest since at least 2009, but neither joined him nor gave him notice of the instant action, the motion court properly vacated the judgment on the ground of extrinsic fraud (*Tamimi v Tamimi*, 38 AD2d 197, 199-200 [2d Dept 1972]).

However, the motion court erred in granting Dunia's motion to dismiss this action pursuant to CPLR 3211(a)(10) for failure to join him as a necessary party. To the extent that Dunia is a

necessary party, he was made a party when the court, sua sponte, granted his intervention (*see Matter of Crabtree v New York State Div. of Hous. & Community Renewal*, 294 AD2d 287, 290 [1st Dept 2002], *affd* 99 NY2d 606 [2003]).

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

287 US Bank National Association Index 382371/09
as Trustee, etc.,
Plaintiff-Appellant,

-against-

Engels Rafael Gutierrez,
Defendant-Respondent,

Francis X. Mortimer et al.,
Defendants.

_____

Hogan Lovells US LLP, New York (David Dunn of counsel), for appellant.

Law Offices of Francis M. DeCaro, Bronx (Richard G. Monaco of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered September 17, 2014, which granted the motion of defendant Engels Rafael Gutierrez for summary judgment dismissing the complaint as against him and denied plaintiff's cross motion for summary judgment, unanimously modified, on the law, to deny defendant's motion, and otherwise affirmed, without costs.

Plaintiff contends that it should have been granted summary judgment because, even if the note on which it sues was forged, defendant ratified it as a matter of law. This argument is unavailing. "[R]atification is a question of fact unless the evidence is undisputed and different inferences cannot reasonably

be drawn from it, and a necessary element of ratification is intent" (*Robinson v Day*, 103 AD3d 584, 586 [1st Dept 2013] [internal quotation marks and citation omitted]; *see also Cashel v Cashel*, 15 NY3d 794 [2010]; *Montes v Manufacturers Hanover Trust Co.*, 82 AD2d 751 [1st Dept 1981]).

However, because there are issues of fact as to whether defendant ratified the note and mortgage, the court should have denied defendant's motion for summary judgment dismissing the complaint. Defendant's motion should also have been denied because there are triable issues as to whether the note, mortgage and other documents were forged. In this regard, it is noted that the mortgage was notarized (*see Albany County Sav. Bank v McCarty*, 149 NY 71, 83 [1896]).

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

288 The People of the State of New York, Ind. 4377/10
Respondent,

-against-

David Cruzado,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (April A. Newbauer, J.), rendered November 9, 2012, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of five years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). The evidence supports the conclusion that when defendant used force against a store employee, at least one of his objectives was to overcome the employee's resistance to defendant's retention of stolen merchandise (*see People v Gordon*, 23 NY3d 643, 649-651 [2014]). The record establishes that defendant still had the merchandise at the time he punched the employee and that he lost possession

of it only in the midst of the altercation (*see People v Colon*, 129 AD3d 597, 597 [1st Dept 2015], *lv denied* 26 NY3d 966 [2015]). Thus, defendant's statement that he would surrender the merchandise was negated by his actions.

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

289 In re Barbara Hultay, et al., Index 500153/12
Petitioners-Respondents,

For the Appointment of a Guardian
for Ronald P. S.,
An Alleged Incapacitated Person.
- - - - -
Minor Children of Ronald P. S., etc.,
Interested Parties-Appellants.

_____

Robert Rosenthal, New York, for appellants.

Schulte Roth & Zabel LLP, New York (Marcy Ressler Harris of counsel), for respondents.

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Order (denominated order and judgment), Supreme Court, New York County (Laura Visitación-Lewis, J.), entered on or about December 22, 2014, which, to the extent appealed from as limited by the briefs, denied legal fees and disbursements to the minor children's attorney, Clifford Meirowitz, unanimously reversed, on the law, without costs, and the matter remanded for hearing and determination by the court or a referee, together with findings and recommendations as to the necessity and benefit inuring to the guardianship estate as the result of Mr. Meirowitz's efforts, and the reasonable value, if any, of his services.

In this guardianship proceeding, attorney Clifford Meirowitz, on behalf of the alleged incapacitated person's minor

children, appearing through their mother, petitioned the court so that the children could receive notice of the proceedings and to appoint an "independent guardian of the person and property" of their father. The court granted the children's petition to the extent of providing for notice to them and the appointment of a co-guardian for their father, to manage matters affecting them.

However, the court denied Meirowitz's request for attorneys' fees and disbursements, and failed to give a reason for its denial (*see Matter of Moriarty*, 119 AD3d 445 [1st Dept 2014]), without which no "proper appellate review" may take place (*see Matter of Verdejo*, 5 AD3d 307, 308 [1st Dept 2004]). On appeal, none of the parties opposed counsel's request for fees and costs. In light of the sub silentio denial, we remand to the Supreme Court for a calculation of the amount of counsel fees and disbursements to be awarded, if any, based upon a consideration of the relevant factors and supported by adequate documentation (*see Matter of Freeman*, 34 NY2d 1, 9-10 [1974]; *Matter of Catherine K.*, 22 AD3d 850, 851-852 [2nd Dept 2005]). After the court determines the minor children's fee request, it is to

provide a "concise but clear explanation of its reasons for the fee award or the lack thereof" (*Matter of Moriarty*, 119 AD3d at 445 [internal quotation marks omitted]).

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

292 The People of the State of New York, Ind. 2545/12
Respondent,

-against-

Brandon Griffith,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Samuel J. Mendez of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered October 4, 2013, convicting defendant, upon his plea of guilty, of burglary in the third degree and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of 3 to 6 years, unanimously affirmed.

Defendant knowingly, intelligently and voluntarily pleaded guilty, and the court properly exercised its discretion in denying his motion to withdraw his plea (*see People v Alexander*, 97 NY2d 482, 486 [2002]]). The court accorded defendant a suitable opportunity to be heard on the plea withdrawal motion. There is no indication that defendant's mental illness impaired the voluntariness of his plea. At the time of the plea, the court was in possession of reports on defendant's mental health

issues, and it carefully ascertained that medication would not affect defendant's ability to understand the proceedings. Defendant was clearly aware of the consequences of the plea, including the risk that, if he failed to comply with the plea conditions, he would forfeit the opportunity to have his conviction replaced with a misdemeanor.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248 [2006]). The court did not conflate the right to appeal with the rights automatically forfeited by pleading guilty, but separately explained to defendant that, as part of his plea bargain, he was agreeing to waive his right to appeal, specifically including the right to make an excessive sentence claim, and defendant acknowledged that he understood this. Defendant also signed a written waiver.

The valid waiver forecloses review of defendant's excessive sentence claim. As an alternative holding, we find no basis for reducing the sentence.

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

293 In re Nwakibi F.,
Petitioner-Appellant,

-against-

Sanora W.,
Respondent-Respondent.

_____

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

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Susan M. Cordaro of counsel), attorney for the child.

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Order, Family Court, Bronx County (Lauren Norton Lerner, Referee), entered on or about November 6, 2014, which, after examination and inquiry, granted respondent mother's motion to dismiss petitioner father's petition to hold respondent in contempt, unanimously affirmed, without costs.

The Referee properly dismissed the petition, without holding a full evidentiary hearing, because petitioner failed to state a claim that respondent had violated a 2008 visitation order (*see Matter of Jean v Washington*, 71 AD3d 1145, 1146 [2d Dept 2010]). Petitioner alleged that respondent had violated the terms of the visitation order by moving to Yonkers without letting him know

the subject child's new address. However, nothing in the visitation order prohibited respondent from moving with the child or required her to notify petitioner of their address, and he did not allege how the move impeded his ability to visit the child (*see Matter of Miller v Miller*, 77 AD3d 1064, 1065-1066 [3d Dept 2010], *lv dismissed in part and denied in part* 16 NY3d 737 [2011]). Moreover, petitioner did not allege that he had complied with his own obligations under the visitation order — namely, to contact respondent at the beginning of the month to arrange visits. Further, he acknowledged that he knew where the child was living by 2011, three years before filing the contempt petition. He also acknowledged that an order of protection against him precluded his contact with respondent and the child for a two-year period beginning in 2011.

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

294 Mark L. Weiss, Index 21372/12
Plaintiff-Respondent,

-against-

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

The New Fulton Fish Market Cooperative
at Hunts Point, Inc., et al.,
Defendants.

_____

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

Stefano A. Filippazzo, P.C., Brooklyn (Stefano A. Filippazzo of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered January 23, 2014, which, inter alia, denied the motion of defendants City of New York, New York City Department of Correction and New York City Department of Environmental Protection (collectively City) to dismiss the complaint and cross claims as against them pursuant to CPLR 3211(a)(7) and/or CPLR 3212, and granted plaintiff's cross motion for leave to amend the notice of claim, unanimously affirmed, without costs.

The motion court properly determined that the original notice of claim, together with the photographs provided by plaintiff showing broken cement barriers strewn over the sidewalk

and roadway at the accident location, sufficiently set forth the location and manner of his accident to satisfy the requirements of General Municipal Law § 50-e(2), since they provided "information sufficient to enable the city to investigate the claim" (*O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]; *see also Green v City of New York*, 106 AD3d 453 [1st Dept 2013]). The amended notice of claim, clarifying the location and manner of the alleged accident, was properly permitted pursuant to General Municipal Law § 50-e(6), since the City did not show any prejudice, or assert that plaintiff acted in bad faith (*see Goodwin v New York City Hous. Auth.*, 42 AD3d 63 [1st Dept 2007]).

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

296 Michael Katz, Index 154865/13
Plaintiff-Appellant,

-against-

Howard Essner, et al.,
Defendants-Respondents.

_____

Michael Katz, Katonah, for appellant.

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 20, 2014, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action for legal malpractice and for violations of Judiciary Law § 487, unanimously affirmed, without costs.

Even if defendants' alleged acts or omissions rose to the level of negligence, plaintiff's allegations in support of his legal malpractice claim and Judiciary Law claims remain conclusory, speculative and contradicted by the documentary evidence submitted on the motion to dismiss (*see Schloss v Steinberg*, 100 AD3d 476 [1st Dept 2012]). Plaintiff failed to show that he was actually injured by defendants' alleged neglect, or meet the "case within a case" requirement, demonstrating that

"but for" defendants' conduct he would have obtained a better settlement (*see Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 106 AD3d 536 [1st Dept 2013], *lv dismissed* 21 NY3d 1059 [2013] [internal quotation marks omitted]).

Furthermore, in response to questions from defendant Essner, plaintiff stated on the record of the stipulation of settlement that he was satisfied with the services that defendants provided. Under the circumstances presented, including that plaintiff is an attorney, the motion court properly dismissed the complaint (*see Harvey v Greenberg*, 82 AD3d 683 [1st Dept 2011]).

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

298 70 West 45th Street Holding LLC, Index 651670/14
Plaintiff-Respondent,

-against-

Waterscape Resort, LLC,
Defendant-Appellant,

First American Title Insurance Company,
Defendant.

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Law Office of Richard J. Migliaccio, New York (Richard J. Migliaccio of counsel), for appellant.

Kennedy Berg LLP, New York (Meital Waibsnaider of counsel), for respondent.

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Judgment (denominated decision and order), Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 17, 2015, inter alia, granting plaintiff's motion for summary judgment and denying defendant Waterscape Resort, LLC's (Waterscape) cross motion for summary judgment and to amend its answer, declaring that plaintiff was entitled to release of an escrow deposit in the amount of $501,249.12 and directing the New York City Department of Finance to release said deposit plus any interest accrued since deposit, less the Department's fees, and referring the matter of plaintiff's costs and reasonable attorneys' fees to a special referee to hear and report,

unanimously affirmed, with costs.

The Court properly enforced the written guaranty executed by Waterscape. The agreement entered into by Waterscape, purporting to be a "Guaranty" of Waterscape's obligation to obtain a Temporary Certificate of Occupancy (TCO) for the restaurant located within the building to be purchased by plaintiff, by a date certain, was enforceable. We reject Waterscape's contention that a party may not "guaranty" its own performance. As Waterscape itself notes, the label the parties chose to put on the document is irrelevant (*see Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 425 [1977]). It is clear that the agreement was more in the nature of liquidated damages which Waterscape agreed to pay, by way of forfeiture of the Escrow Deposit in the event of its breach. It is uncontested that Waterscape failed to obtain the TCO in the requisite time. Moreover, at the time of the making of the agreement, plaintiff's actual damages could not be calculated, not in the least because the parties could not know in advance how long past the deadline it would be before the TCO would be obtained, or the lost revenue in the interim. Plaintiff has failed to demonstrate that, at the time of the making of the agreement, the damages were reasonably calculable, or that the liquidated amount was grossly disproportionate to the

foreseeable actual damages (*see id.* at 423-425; *L&L Wings, Inc. v Marco-Destin Inc.*, 756 F Supp 2d 359, 363 [SD NY 2010]; *see also Addressing Sys. & Prods., Inc. v Friedman*, 59 AD3d 359 [1st Dept 2009]).

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

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

299 The People of the State of New York, Ind. 1781/10
Respondent,

-against-

Euniya Morales,
Defendant-Appellant.

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

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Judgment, Supreme Court, Bronx County (John S. Moore, J.), rendered on or about May 13, 2013, unanimously affirmed.

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

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

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

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

300 Minerva Garcia, Index 109951/11
Plaintiff-Appellant,

-against-

The City University of New York,
et al.,
Defendants-Respondents.

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Law Offices of Stewart Lee Karlin, P.C., New York (Daniel E. Dugan of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Karen W. Lin of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Donna M. Mills, J.), entered September 26, 2014, which granted defendants' motion for summary judgment dismissing the amended complaint and denied plaintiff's cross motion for leave to serve a second amended complaint, deemed an appeal from judgment, same court and Justice, entered October 15, 2014, and so considered, said judgment unanimously affirmed, without costs.

The motion court correctly dismissed plaintiff's disability discrimination claims sounding under Executive Law § 296(4) of the New York State Human Rights Law (HRL). Defendants are public educational institutions (*see* Education Law § 6201 *et seq.*), and therefore are not "education corporation[s] or association[s]"

under Executive Law § 296(4) (*see Matter of North Syracuse Cent. School Dist. v New York State Div. of Human Rights*, 19 NY3d 481 [2012]; *Kelly G. v Board of Educ. of City of Yonkers*, 99 AD3d 756, 758 [2d Dept 2012]).

Even if plaintiff could assert her claims under the State HRL, she has failed to make out a prima facie case of disability discrimination (*see Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]). Among other things, plaintiff has failed to point to any medical evidence showing that she suffered from bipolar disorder, depression, or any other cognizable disability.

Plaintiff's proposed disability discrimination claims under the Americans with Disabilities Act (ADA) are similarly without merit, as ADA claims "are governed by the same legal standards" as disability discrimination claims under the State HRL (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 147 n 2 [1st Dept 2006], *lv denied* 7 NY3d 707 [2006]). Accordingly, the motion court providently

exercised its discretion in denying plaintiff's cross motion for leave to assert those claims in a second amended complaint (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]).

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

301 The People of the State of New York, Ind. 963/12
Respondent,

-against-

Martin Concepcion,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered November 21, 2012, convicting defendant, after a jury trial, of two counts each of criminal possession of a controlled substance in the third degree and criminal use of drug paraphernalia in the second degree and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of seven years, unanimously affirmed.

The verdict was based on legally sufficient evidence and not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). Moreover, the evidence was overwhelming. There is no basis for disturbing the jury's credibility determinations. Defendant's dominion and control over the

contraband found in an apartment during the execution of a search warrant was established by, among other things, evidence that he admitted residing in the apartment, and that the clothes he put on during the arrest came from the same drawer where the contraband was found. The absence of documentary evidence of defendant's residency in the apartment may be readily explained by, for example, the possibility that the nominal tenants may have been violating New York City Housing Authority regulations regarding residency.

Defendant did not preserve his arguments that the admission at trial of a search warrant's description of the targeted suspect constituted inadmissible hearsay and violated the Confrontation Clause, and we decline to review them in the interest of justice. When the People offered this evidence to complete the narrative and explain police actions, defendant tacitly conceded that theory of admissibility, but objected on completely different grounds not pursued on appeal. Thus, the court did not "expressly decide[ ]" the same issue raised on appeal "in response to a protest by a party" (CPL 470.05 [2]; *see People v Turriago*, 90 NY2d 77, 83-84 [1997]; *People v Colon*, 46 AD3d 260, 263 [1st Dept 2007]). In any event, any error regarding this evidence was harmless (*see People v Crimmins*, 36

NY2d 230 [1975]). Defendant's claim that the court should have given a limiting instruction is also unpreserved, and likewise does not warrant reversal.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of these claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 23, 2016

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15392-
15393 Index 153150/14

Board of Managers of the
Soundings Condominium,
Plaintiff-Respondent,

-against-

Sonja Foerster,
Defendant-Appellant,

Colleen Moran, et al.,
Counterclaim and
Third-Party Defendants.

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A.M. Richardson, P.C., New York (Ambrose M. Richardson, III of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Robert T. Holland of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about August 12, 2014, modified, on the law, the motion granted in part, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about November 10, 2014, dismissed, without costs, as academic.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Richard T. Andrias
Sallie Manzanet-Daniels
Barbara R. Kapnick, JJ.

15392-15393
Index 153150/14

_____x

Board of Managers of the
Soundings Condominium,
Plaintiff-Respondent,

-against-

Sonja Foerster,
Defendant-Appellant,

Colleen Moran, et al.,
Counterclaim and
Third-Party Defendants.

_____x

Defendant appeals from the order of the Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about August 12, 2014, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint, and from the order, same court and Justice, entered on or about November 10, 2014, which denied defendant's motion to renew.

A.M. Richardson, P.C., New York (Ambrose M. Richardson, III of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Robert T. Holland, Sherwin Belkin, Magda L. Cruz and Michael A. Battema of counsel), for respondent.

TOM, J.P.

This is an action to rescind the conveyance of a condominium apartment (fourth cause of action) on the ground that defendant purchaser misrepresented to plaintiff, the condominium's board of managers, that she would use the unit as a private residence and, instead, established a professional day care business at the premises. The remaining causes of action of the complaint are either duplicative of the rescission claim or superfluous in seeking relief that is well within the power of a court of equity upon restoring the status quo ante. Supreme Court denied defendant's motion for summary judgment dismissing the complaint, finding, inter alia, that a triable issue is raised with respect to whether defendant made any misrepresentation that might impact the validity of the purchase agreement. In seeking reversal, defendant argues, inter alia, that "fraud cannot be established because an essential element, injury, does not exist." However pecuniary damages are unnecessary in an action for equitable rescission. Thus, defendant's arguments are unavailing.

On or about March 1, 2013, defendant entered into a contract to buy residential unit 1G from owners, William and Ana Waung, at the Soundings Condominium. Pursuant to the Soundings' bylaws, the contract between defendant and the prior owners of the unit gave plaintiff a right of first refusal, i.e., the right to buy

the seller's unit for the price offered by defendant.

In late February or early March 2013, defendant submitted a purchase application to plaintiff's managing agent. In response to questions on the application, defendant stated that no "business or profession" would be conducted at the unit. She also expressly advised in the application that she was "purchasing [the] apartment for [her] nanny/nurse so she can live in close proximity to my current home." She listed her nanny's name in response to a requests for "[n]ames and numbers of all persons who will reside in the apartment."

Meanwhile, on or about March 27, 2013, defendant submitted an application to the New York State Office of Children and Family Services for a license to operate a group family day care center at unit 1G. The application indicated that the hours of operation were Monday-Friday, 8 a.m.-6 p.m., with German being taught in the morning and Spanish in the afternoon. The application also indicated that the subject condominium unit would be one large open space.

On April 11, 2013, before she closed on unit 1G, defendant told Anna Seddio – an employee of Milford Management, which manages the Soundings – that she (defendant) was planning to "[r]emove the wall (including the closet) separating the living room and the bedroom." It is apparent that defendant sought this

alteration to configure the unit in the manner indicated in defendant's application filed with the New York State Office of Children and Family Services for a day care license.

On April 19, 2013, defendant took title to the unit, and on May 4, 2013, she submitted an alteration agreement for the unit. On June 16, 2013, defendant wrote to Seddio advising her that over the past few years she had "run a language program for kids from [her] apartment," and that she planned to move the program, which she insisted was consistent with residential use and did not require approval by management or plaintiff, to unit 1G.

On or about July 29, 2013, the New York State Office of Children and Family Services issued a Group Family Day Care License to defendant's entity, Kinderspiel LLC.

In April 2014, plaintiff commenced this action setting forth causes of action for, inter alia, fraud, breach of contract, and rescission. The complaint alleges that defendant submitted an application to purchase the subject condominium unit representing that it was to be used as a residence for the "nanny/nurse" of her children. Because defendant hid her true intention to operate a business at the premises, the complaint alleges plaintiff was induced to refrain from exercising the preemptive right of first refusal to purchase the unit as conferred by the condominium's bylaws, in furtherance of the bylaw that units

"shall be used only as a residence" (with a limited exception not applicable herein). Rescission is sought on the ground that defendant intentionally misrepresented a material fact, thereby inducing plaintiff to forgo exercising its right of first refusal.

On this appeal, defendant also maintains that the court should have dismissed the complaint on the ground that it violates Social Services Law § 390(12) in that "it seeks to prohibit the use of a licensed group family day care facility and therefore fails to state a cause of action." The statute provides in pertinent part: "No village, town . . ., city or county shall prohibit or restrict use of a . . . multiple dwelling for . . . group family day care where a license . . . for such use has been issued in accordance with regulations issued pursuant to this section." The gravamen of the defense is that because the Second Department has expanded the scope of the statute to encompass a condominium unit (*see Quinones v Board of Mgrs. of Regalwalk Condominium I*, 242 AD2d 52, 57 [2d Dept 1998]), plaintiff cannot contest the use to which the premises were ultimately put. Thus, it is asserted that plaintiff sustained no damage as a result of misrepresentations on defendant's application to purchase the unit, and an essential element of plaintiff's fraud claim is absent, requiring

dismissal.

The obvious defect in defendant's reasoning is that damages are not necessary to sustain a cause of action for equitable rescission. Fraud sufficient to support the rescission requires only a misrepresentation that induces a party to enter into a contract resulting in some detriment, and "unlike a cause of action in damages on the same ground, proof of scienter and pecuniary loss is not needed" (*D'Angelo v Bob Hastings Oldsmobile, Inc.*, 89 AD2d 785, 785 [4th Dept 1982], *affd* 59 NY2d 773 [1983]). Even an innocent misrepresentation will support rescission (*see Seneca Wire & Mfg. Co. v Leach & Co.*, 247 NY 1, 8 [1928]). Thus, the fourth cause of action alleging that misrepresentations in defendant's purchase application induced plaintiff to forgo exercise of its right of first refusal has a sound basis in the record, and Supreme Court properly concluded that a triable issue is presented.

However, the various remaining causes of action for, inter alia, breach of contract and fraud should be dismissed as duplicative. Apart from seeking $1 million in consequential damages, plaintiff's first cause of action for fraud is virtually identical to its fourth cause of action for rescission, and is founded upon the same facts. A tort claim based upon the same facts underlying a contract claim is properly dismissed as merely

a duplication of the contract cause of action (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 305 [1st Dept 2003]). The remainder of the complaint seeks various forms of injunctive, declaratory and monetary relief that a court of equity would provide in restoring the parties to status quo ante and duplicates the claim for rescission.

The court was also correct to ignore defendant's demand to assess the effect of Social Services Law § 390(12) on the respective rights of the parties. First, there is nothing in the statute that indicates an intent to abolish a claim for equitable rescission in circumstances such as those presented here. Moreover, defendant asked the court to decide a hypothetical question: if she had revealed her intention to use the condominium unit as a group family day care home and if plaintiff had exercised its right of first refusal, would plaintiff's conduct contravene the policy expressed in the statute? Manifestly, this issue is not before us. On the current record, ownership of the condominium unit is alleged to have been obtained by deception, and the only question presented is whether such misrepresentation warrants rescission. The owner took no action to exercise the right of first refusal to purportedly trigger the application of Social Services Law § 390(12).

Entertaining the question posed by defendant will have to

await a proper case in which a seller is afforded the opportunity to exercise the right of first refusal and the issue of whether it is precluded by the statute arises. Had defendant wished to contest the issue, the proper procedure would have been to submit an honest application and, if plaintiff exercised its preemptive right, challenge the decision by way of an article 78 proceeding or a declaratory judgment action, as in *Quinones*.

In short, entertaining the question on the present record is prohibited because it would involve the Court in the rendering of an advisory opinion which this Court is constrained to decline (*Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354-355 [1988]; *American Ins. Assn. v Chu*, 64 NY2d 379, 385-386 [1985], *cert denied and appeal dismissed* 474 US 803 [1985]).

Accordingly, the order of the Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about August 12, 2014, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint, should be modified, on the law, to grant the motion to the extent of dismissing all but the fourth cause of action for rescission, and otherwise affirmed, and the appeal from the order, same court and Justice,

entered on or about November 10, 2014, which, to the extent appealable, denied defendant's motion to renew, should be dismissed, without costs, as academic.

All concur.

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

ENTERED: FEBRUARY 23, 2016

CLERK