SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JANUARY 7, 2016**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

15748 G2 FMV, LLC, Index 650753/14
Plaintiff-Appellant,

-against-

Patrick J. Thomas,
Defendant-Respondent.

_____

Morgan, Lewis & Bockius LLP, Washington, DC (Bryan M. Killian of the bars of the District of Columbia and the State of Connecticut, admitted pro hac vice, of counsel), for appellant.

Meister Seelig & Fein LLP, New York (David E. Ross of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 14, 2015, which, insofar as appealed from as limited by the briefs, granted defendant's motion for partial summary judgment on liability on his counterclaim for contractual indemnification to the extent that it sought indemnification for, and advancement of, reasonable attorney's fees and expenses incurred, and to be incurred, by defendant in pursuing his personal claims against plaintiff after an October 2014 hearing on the motions, and denied plaintiff's motion for partial summary judgment dismissing that part of the

counterclaim, unanimously affirmed, with costs.

Plaintiff, a Delaware limited liability company (LLC), is the parent of a finance company of which defendant was the chief operating officer. Plaintiff's Operating Agreement provided defendant with certain membership units (the Units). After defendant's resignation, plaintiff brought this action seeking declarations as to whether the resignation was with "Good Cause," which would have triggered the vesting of the Units, whether the Units had vested, and whether plaintiff was required to purchase the Units at fair market value under the terms of its Operating Agreement. Defendant then asserted counterclaims seeking, among other things, declaratory relief mirroring plaintiff's request for such relief, breach of contract for plaintiff's failure to purchase the Units at fair market value, and indemnification. Plaintiff has since conceded that defendant resigned with "Good Cause" and may require plaintiff to repurchase the Units at fair market value. Plaintiff, however, asserts that defendant cannot recover attorney's fees and expenses that relate to his effort to force plaintiff to repurchase his membership units. According to plaintiff, such efforts arise out of counterclaims that are purely personal to defendant and Delaware law precludes indemnification for such claims. We disagree.

The Operating Agreement, which is governed by Delaware law,

contains a comprehensive indemnification provision requiring plaintiff to indemnify members of the company "from and against any and all . . . expenses . . . arising from all claims . . . in which the Indemnified Party may be involved . . . as a result of its status as" a member of the company. The provision also requires plaintiff to advance indemnified costs and fees prior to the final disposition of any such claim.

The motion court properly found that the indemnification provision at issue was broad enough to encompass claims brought by members of plaintiff, such as defendant. The indemnification provision expressly applies "regardless of whether any . . . [claim or action] is brought by a third party, a Member, or by or in the right of the Company." Where, as here, "the language of a . . . contract is clear and unequivocal, a party will be bound by its plain meaning" (*Seaford Golf & Country Club v E.I. duPont de Nemours & Co.*, 925 A2d 1255, 1261 n 14 [Del 2007] [internal quotation marks omitted][ellipsis in original]).

Indemnification for defendant's personal claims (that is, claims that solely involve defendant's personal interests) is not precluded by Delaware law, which provides LLC's with "the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever" (6 Del C § 18-108). Indemnification, in this case,

is not governed by Delaware's General Corporation Law (8 Del C § 145[a]; *compare Shearin v E.F. Hutton Group, Inc.*, 652 A2d 578, 594-595 [Del Ch 1994] [the plaintiff could not seek indemnification from a corporation since her claims served to advance only her personal interests and were not brought as part of her fiduciary duties], *and Gentile v SinglePoint Financial, Inc.*, 787 A2d 102, 108 [Del Ch 2001] [same]).

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

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

ENTERED: JANUARY 7, 2016

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz JJ.

16111 The People of the State of New York, Ind. 2249/11
Respondent,

-against-

Eugene Kindell,
Defendant-Appellant.

_____

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

Eugene Kindell, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Daniel P. Conviser, J. at suppression hearing; Rena K. Uviller, J. at jury trial and sentencing), rendered December 19, 2011, convicting defendant of burglary in the second degree, attempted burglary in the second degree and bail jumping in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 19½ years to life, held in abeyance, and the matter is remitted to Supreme Court for a reopened suppression hearing.

The existing, unexpanded record is sufficient to establish that defendant received ineffective assistance when his trial counsel failed to move to reopen the suppression hearing based on trial testimony. The court denied suppression of a tool bag and

the burglar's tools it contained, based on the suppression hearing testimony of two officers that the bag was open at defendant's feet and the tools were in plain view when the building superintendent who had chased defendant and detained him flagged down their police car. However, the superintendent testified at trial that the bag was in defendant's hand and closed when the police arrived. We agree with defendant that the failure of trial counsel – who, notably, did not represent defendant at the hearing – to move to reopen the hearing in light of the superintendent's testimony was both objectively unreasonable and prejudicial (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Under CPL 710.40(4), a suppression hearing may be reopened upon a showing that the defendant has discovered "additional pertinent facts" that "could not have [been] discovered with reasonable diligence before the determination of the motion." Here, the additional facts were "pertinent" because the superintendent's testimony, if credited, would have undermined the ruling that the tools were admissible because they were in plain view. This was not a minor or routine inconsistency; the superintendent's version was completely at odds with a plain view theory. Any issue of whose recollection was most reliable should

have been presented to the hearing court.

With regard to the "reasonable diligence" requirement, the People argue that it was not met here because defendant, who was standing several feet from the superintendent when the police arrived, was in a position to know whether the bag was closed or open at the time. Under the rule the People posit, evidence adduced for the first time from a witness at trial – no matter how reliable the witness, how unlikely he or she would have been to cooperate with the defense investigation before trial, or how conclusively his or her testimony would undermine the suppression ruling – would never entitle a defendant to a reopened hearing, so long as the defendant was in a position where he or she could have observed the same events as the witness. We reject such a narrow reading of the statute (*see e.g. People v Figliolo,* 207 AD2d 679 [1st Dept 1994]). While, as a general matter, a defendant may be presumed to have knowledge of the circumstances surrounding his or her arrest (*see People v Hankins*, 265 AD2d 572 [2d Dept 1999], *lv denied* 94 NY2d 880 [2000]), that presumption is not mandatory, and the principle does not mandate the conclusion that such knowledge existed under the particular facts of this case. However, even if such knowledge is assumed, we find that, under these circumstances, defendant satisfied the "reasonable diligence" requirement. He could not have known that

a People's witness would completely contradict the police officers on the critical suppression issue. Moreover, if at the hearing, he had taken the stand to present his account of the arrest, his credibility would have been subject to impeachment because his status as an interested witness and his lengthy criminal record.

Contrary to the dissent's suggestion, the possibility that defense counsel did not move to reopen the suppression hearing because he "legitimately" did not believe the superintendent's testimony about the bag is speculative and improbable. Indeed, to reach such a conclusion counsel would have had to disregard several compelling factors that undermine such assessment: 1) when a witness makes specific and detailed factual allegations that are helpful to a defendant, it is unreasonable to summarily reject it as incredible[1]; 2) it is unreasonable for a defense counsel to discredit an unbiased witness's testimony that is helpful to the defendant and instead assume that a police officer's testimony is the only credible testimony; 3) the suppression court would have examined the officer's testimony on this issue without hearing the superintendent's testimony to the

[1]Specifically, the superintendent testified that the officers opened the bag after they directed defendant to put it down and that he did not satisfactorily answer their questions.

contrary.

Under these circumstances, it is far more likely that counsel, who did not represent defendant at the suppression hearing, did not focus on the contradiction and gave no thought to a motion to reopen. More importantly, even if the dissent is correct about counsel's subjective belief that the superintendent was mistaken about the police opening the bag, it is difficult to comprehend how opting not to give the court the opportunity to make that credibility determination for itself can be deemed a competent strategy. Indeed, defense counsel "had everything to gain and nothing to lose" by moving to reopen the suppression hearing (see *People v Sinatra*, 89 AD2d 913, 915 [2nd Dept 1982]). A decision not to make such a motion was a decision not to contest the admissibility of critical evidence against his client.

It is difficult to take seriously the dissent's argument that counsel may have believed that reopening the suppression hearing would have been of little or no value. Indeed, as the dissenter himself points out, at trial, counsel exerted significant effort to minimize the probative value of the evidence found in defendant's possession, which the People argued constituted "burglary tools." Defense counsel argued that the tools alleged to be in defendant's possession were not described

in any detail and appeared to be typical of those used by a contractor or handyman, which was consistent with defendant's statement that he was a contractor, not a burglary. Likewise, during summation, counsel informed the jury that they would receive an adverse inference charge from the court instructing them that because the police had lost the bag and tools, they could infer that the evidence would have been unfavorable to the People. Under the circumstances, contrary to the dissent's suggestions, the suppression of this incriminating evidence - the burglary tools - would have been consistent with defense counsel's theory at trial that there was no evidence that defendant entered 336 East 71st Street unlawfully or that he intended to commit a crime.

The dissent also posits that defense "counsel, understandably, may have thought it counterproductive to run the risk of bolstering the credibility of the only witness who claimed to have seen defendant inside the building." The dissent, however, fails to explain how defense counsel's use of a presumably unbiased prosecution witness's testimony to seek suppression of evidence would have enhanced the same witness's credibility at trial to the detriment of defendant. If at the reopened suppression hearing, the court had found the witness's testimony about the events surrounding the bag credible, then the

evidence would have been suppressed and not subject to direct or cross-examination at trial. Conversely, had the court found that suppression was not appropriate despite the conflicting testimony of the witness and the officer, that ruling would not have enhanced the witness's credibility in any way. In short, defense counsel did not have any reasonable strategy for failing to move to reopen the suppression hearing.

All concur except Andrias, J. who dissents in a memorandum as follows:

ANDRIAS, J. (dissenting)

The majority holds that the existing, unexpanded record is sufficient to establish that defendant received ineffective assistance when his trial counsel failed to move to reopen the suppression hearing based on trial testimony. However, on the record before us, this Court should not abandon the long established principle of requiring, except in rare cases, a CPL 440.10 motion to explore defense counsel's reasoning when a defendant raises an ineffective assistance of counsel claim that involves matters that are not fully explained by the record, including matters of strategy (*see generally People v Rivera*, 71 NY2d 705 [1988]; *People v Love*, 57 NY2d 998 [1982]). For this reason and those that follow, I dissent and would affirm the judgment appealed from.

Defendant was charged with (1) burglary in the second degree for the building at 336 East 71st Street; (2) burglary in the second degree for apartment 5-E at that building; (3) attempted burglary in the second degree for apartment 5-C at that building; (4) possession of burglar's tools; (5) burglary in the second degree for the building at 310 East 75th Street; (6) attempted burglary in the second degree for apartment 4-J at that building; and (7) bail jumping in the second degree.

The trial court dismissed the possession of burglar's tools

charge after the People informed the court that the police had lost the tool bag found in defendant's possession and the tools that it contained. Defendant was convicted of burglary in the second degree with respect to the building at 336 East 71st Street and the attempted burglary of apartment 5-E, and acquitted of the remaining burglary and attempted burglary charges. He was also found guilty of bail jumping in the second degree.

Prior to trial, the court denied defendant's motion to suppress the tool bag and tools on the ground that the search of the bag was justified under the plain view doctrine. The court credited the suppression hearing testimony of two police officers that the bag was open at defendant's feet, and the tools visible, when they arrived at the scene after the building superintendent at 336 East 71st Street flagged down their police car. Defendant did not testify or call any witnesses at the hearing.

Defendant argues that his trial counsel was ineffective for failing to move to reopen the suppression hearing after the superintendent testified at trial that the bag was in defendant's hand and closed when the police arrived, which conflicted with the officers' hearing testimony that the bag was open. However, "[i]n many cases, there may be strategic reasons for a lawyer's choice" to pursue or discard any particular defense strategy (*People v Nesbitt*, 20 NY3d 1080, 1081 [2013]). "For that reason,

claims of ineffective assistance based on such choices must usually be adjudicated in posttrial motions, so that evidence may be presented to show why counsel acted as he did" (id. at 1082). Thus, "unless it is clear from the record that there could not have been any legitimate trial strategy for [defense counsel's conduct], we must deny defendant relief" (*People v Evans*, 16 NY3d 571, 575 [2011], *cert denied* __ US __, 132 S Ct 325 [2011]). Here, defendant's ineffective assistance of counsel claim is unreviewable since it involves matters not reflected in or fully explained by the record (*see People v Rivera*, 71 NY2d at 709 [1988]; *People v Gillette*, 132 AD3d 572 [1st Dept 2015]; *People v Cruz*, 131 AD3d 889 [1st Dept 2015]).

Contrary to the majority, "[t]his is not one of the rare cases where the trial record itself permits review of an ineffective assistance of counsel claim challenging counsel's strategy" (*see People v Nowrang*, 120 AD3d 1112, 1113 [1st Dept 2014], *lv denied* 25 NY3d 1168 [2015]). The failure to move to reopen a suppression hearing does not in and of itself demonstrate that defendant received ineffective assistance of counsel (*see e.g. People v Charles*, 152 AD2d 593, 593 [2d Dept 1989], *lv denied* 74 NY2d 846 [1989] ["The defense counsel's failure to move to reopen the suppression hearing, following trial testimony which indicated that the defendant may have been

ordered by police to open a bag which was found to contain cocaine, did not, under the circumstances of this case, demonstrate that the defendant received the ineffective assistance of counsel"]; *People v Smith*, 128 AD3d 1434, 1434 [4th Dept 2015] ["the failure to request a particular hearing, in and of itself, does not constitute ineffective assistance of counsel"], *lv denied* 26 NY3d 1011 [2015]; *People v Perea,* 27 AD3d 960 [3rd Dept 2006] [same]). Thus, without the benefit of hearing from defense counsel, we have no basis for determining whether there was a strategic or other legitimate explanation for counsel's conduct (*see People v Raosto*, 110 AD3d 524 [1st Dept 2013], *lv denied* 22 NY3d 1090 [2014]; *People v Gordon*, 92 AD3d 580 [1st Dept 2012], *lv denied* 19 NY3d 864 [2012]).

For example, if the hearing was reopened, defense counsel would have to convince the court that the superintendent, the primary witness against defendant on the burglary charges for the building at 336 East 71st Street, was credible. Counsel, understandably, may have been reluctant to do this (*see People v Nowrang*, 120 AD3d at 1113), even though the superintendent's suppression testimony would not have been heard by the jury. Alternatively, counsel may have concluded that the superintendent's recollection of the events surrounding the bag was inconsistent and that his testimony would not have convinced

the court that the police officers had fabricated their account (*see People v Stultz*, 2 NY3d 277, 287 [2004] [assistance of trial is not rendered ineffective by counsel's failure to "make a motion or argument that has little or no chance of success"]).

The majority believes that it would have been unreasonable for defense counsel to summarily reject the possibility that the superintendent's testimony may have been credited due to factors including its specificity. However, the superintendent, a civilian witness whose trial testimony was given 4½ years after the incident, testified inconsistently that the police opened the bag while defendant was on the street and that they opened it after placing defendant in a police car. In contrast, the officers, unlike the superintendent, were trained to focus on details such as the location of the bag and whether it was open, had reviewed the case file and other documents in preparation for trial, and gave accounts that were consistent with one another. Thus, defense counsel could have reasonably believed that reopening the suppression hearing would be futile.

Furthermore, defense counsel may have believed that reopening the suppression hearing, even if successful, would not have had a significant impact on his strategy. The possession of burglar's tools charge had been dismissed, and the bag and its tools had been lost. While a suppression ruling in defendant's

favor would have barred police testimony about the search of the bag and its contents, it would not have barred the testimony of the superintendent that he discovered defendant, prior to the arrival of the police, standing in front of the door to apartment 5-E holding a small black tool bag and that defendant told him that he was a contractor who was in the building to do work.

Faced with the superintendent's testimony, the defense theory at trial was that there was no evidence that defendant entered 336 East 71st Street unlawfully or that he intended to commit a crime. Counsel stressed that no one saw defendant in the act of breaking into the building or any apartment therein, or checked to see if he was actually doing work for another tenant. Counsel also asserted that there was no fingerprint or DNA evidence implicating defendant, and that the tools alleged to be in defendant's possession had not been described in any detail and appeared to be typical of those used by a contractor or handyman, which was consistent with defendant's statement to the superintendent that he was a contractor. Further, during summation, counsel informed the jury that they would receive an adverse inference charge from the court instructing them that because the police had lost the bag and tools, they could infer that the evidence would have been unfavorable to the People. Thus, counsel may have believed that reopening the suppression

hearing would be of little or no value, and that the better course of action was to proceed with his chosen trial strategy (*see People v Satterfield*, 66 NY2d 796, 799-800 [1985] ["It is not for this court to second-guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation"]).

Additionally, during cross-examination, after the superintendent repeated his version of the events, the court had the parties approach the bench where they had an untranscribed discussion. A CPL 440.10 motion is necessary so counsel can explain what transpired during that conference, which may be relevant to his decision not to move to reopen the hearing.

Lastly, a court may reopen a hearing during trial where, inter alia, the defendant makes a showing "that additional pertinent facts have been discovered by the defendant which he [or she] could not have discovered with reasonable diligence before the determination of the [original suppression] motion" (CPL 710.40[4]). The facts elicited from the superintendent at trial pertained to circumstances that occurred in defendant's presence, of which he is presumed to have had knowledge before the suppression motion was decided (see *People v Walker*, 115 AD3d 889, 890 [2nd Dept 2014], *lv denied* 23 NY3d 969 [2014]; *People v*

*Anthony*, 114 AD3d 866, 867 [2d Dept 2014], *lv denied* 23 NY3d 1033 [2014]). Thus, defense counsel may have reasonably concluded that a request to reopen the suppression hearing would be futile (*see e.g.*, *People v Lopez*, 232 AD2d 222 [1st Dept 1996], *lv denied* 89 NY2d 865 [1996]).

The majority states that the possibility that counsel did not move to reopen the hearing for any of these strategic reasons is "speculative and improbable," and that it is far more likely that counsel, who did not represent the defendant at the suppression hearing, did not focus on the contradictions between the testimony of the police officers and superintendent and gave no thought to a motion to reopen. However, this is precisely why a 440.10 motion was required, namely, to determine whether or not counsel had a strategic reason for his conduct. Indeed, while he did not handle the suppression hearing, it is speculative to assume that trial counsel had not been provided with the minutes of the hearing or that he did not know that the court, crediting the police testimony, had denied suppression based solely on the plain view doctrine.

Citing *People v Sinatra* (89 AD2d 913 [2d Dept 1982]), the majority states that counsel "had everything to gain and nothing to lose" by moving to reopen the suppression hearing, and that his failure to do so "was a decision not to contest the

admissibility of critical evidence against his client." However, in *Sinatra*, the weapon found under the front passenger seat of a car was the only evidence against the defendant with respect to the criminal possession of a weapon charge, and defense counsel never made a motion to suppress it. Counsel also failed to request an examination to determine his client's fitness. In stark contrast, here, the bag and its tools had been lost, the possession of burglar's tools charge had been dismissed, and the testimony concerning the bag and its tools was only a small piece of the evidence demonstrating that defendant unlawfully entered the building with the intent to commit a crime inside and that he attempted to burglarize apartment 5-E.

Among other evidence, the superintendent, who lived and worked in the building, testified that he was walking up to his 5th floor apartment when he heard three loud taps as he passed the 3rd floor. When he reached the 5th floor, he discovered defendant, who was not a tenant and did not have permission to be there, standing in front of the door to apartment 5-E. No one else was in the hallway.

When the superintendent approached defendant and asked him how he was doing, defendant, without replying, walked by him and went down the stairs. The superintendent then examined the door to 5-E and saw that it had been pried open by half an inch, that

the door frame, which had been painted three days earlier, was "dented up" and "mangled" and had paint chipped away, and that there was a dent on the bottom lock.

The superintendent chased defendant. When he caught up to him, defendant first tried to jerk away, and then told him that he was a contractor scheduled to do work in the building. However, defendant could not identify the tenant he was working for or describe the work he was hired to do.

The tenant of 5-E testified that she had never met defendant and had not given him permission to enter the building or to perform work in her apartment that day. When she returned to her apartment that evening, she noticed that her front door was "slightly ajar," that paint was chipped from the door frame, and that the doorknob was scratched. Additionally, the bottom door lock was "very wobbly." Both the superintendent and the tenant testified that the door had been in pristine condition that morning, indicating that the damage had been done recently. The People also introduced photographs showing the entrance of the building and the condition of the locks, doorknob, door opening, door jamb and the floor near apartment 5-E, as well as the testimony of police officers involved in defendant's arrest.

Furthermore, defendant made a CPL 440.10 motion on the grounds of ineffective assistance of counsel that was denied, and

failed to obtain permission from this Court to appeal the denial. "Accordingly, the merits of the ineffectiveness claims may not be addressed on appeal" (*People v Polanco*, 121 AD3d 436, 437 [1st Dept 2014], *lv denied* 24 NY3d 1221 [2015]; *see also People v Thomas*, 55 AD3d 357, 359-360 [1st Dept 2008], *lv denied* 12 NY3d 785 [2009], 13 NY3d 288 [2009]; 12 NY3d 783 [2009]; *see also People v Baron*, 133 AD3d 516 [1st Dept 2015]).

Assuming arguendo that the present record did permit review of defendant's ineffective assistance of counsel claim, I would reject that claim. Defendant has not shown that trial counsel's single error or omission in failing to move to reopen the suppression hearing was "so egregious and prejudicial as to deprive [him] of a fair trial" (*People v Cummings*, 16 NY3d 784, 785 [2011] [internal quotation marks omitted], *cert denied* _ US_, 132 S Ct 203 [2011]). As detailed above, the possession of burglar's tools count had been dismissed, and the bag and tools, which the police had lost and which were the subject of an adverse inference charge, were not the only evidence against defendant. Furthermore, viewed in their totality, the circumstances reveal that counsel pursued a credible defense strategy, made cogent opening and closing statements, vigorously cross-examined the People's witnesses, and obtained defendant's acquittal of numerous charges.

Contrary to defendant's pro se ineffectiveness claim, the superseding indictment was not defective and counsel was not ineffective for failing to move to dismiss it.

Viewing the evidence in the light most favorable to the prosecution, the evidence at trial was legally sufficient to establish that defendant failed to appear during the 30 days following his first failure to appear, that defendant unlawfully entered the building with the intent to commit a crime inside, and that defendant attempted to burglarize apartment 5-E (*see People v Danielson*, 9 NY3d 342 [2007]). On the record before us, the verdict was not against the weight of the evidence. Nor is there any basis for reducing the sentence.

Accordingly, I would affirm the judgment convicting defendant of burglary in the second degree, attempted burglary in the second degree and bail jumping in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 19½ years to life.

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

16225-
16226 Index 600309/10

Cleo Realty Associates, L.P.,
Plaintiff-Respondent-Appellant,

-against-

Uptown Birds, LLC, et al.,
Defendants-Appellants-Respondents.

_____

Kane Kessler, P.C., New York (S. Reid Kahn of counsel), for appellants-respondents.

The Abramson Law Group, PLLC, New York (Mitchell B. Shenkman of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 28, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment as to the breach of guaranty, unjust enrichment, and declaratory judgment causes of action, and denied the motion as to the successor liability, fraudulent conveyance, and piercing the corporate veil causes of action as against the individual defendants, and denied plaintiff's cross motion for partial summary judgment on the breach of guaranty cause of action, unanimously modified, on the law, to deny defendants' motion as to the cause of action for unjust enrichment against defendants Kopulos and Fauna LLC in connection with the alleged dissipation of defendant Uptown Birds, LLC's assets, and to grant the motion

as to the causes of action for successor liability, fraudulent conveyance and piercing the corporate veil as against the individual defendants, and otherwise affirmed, without costs.

The court correctly found that defendant Andreas satisfied all the relevant conditions for the revocation of her obligations under the lease guaranty, including the condition under the guaranty that she execute and deliver a written surrender agreement in a form and substance reasonably satisfactory to plaintiff landlord, merely by agreeing to accept the changes plaintiff demanded that she make to the surrender agreement she had submitted to plaintiff, and without obtaining plaintiff's execution of the agreement.

The court erred in dismissing the unjust enrichment cause of action as against Kopulos and Fauna as duplicative of the contract cause of action. The alleged dissipation of Uptown Birds's assets and the opening of the new pet store are not "events arising out of the same subject matter" as that governed by the lease or the guaranty (*see generally Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

The cause of action for piercing the corporate veil of Uptown Birds to hold the individual defendants liable should be dismissed since the evidence relied on by plaintiff, including evidence of the personal use of corporate funds, is insufficient

to raise an issue of fact as to whether the individual defendants abused the corporate form to perpetuate a wrong that warrants equitable intervention. The fraudulent conveyance cause of action insofar as it is pleaded against the individual defendants should also be dismissed, because although an individual may be liable for a fraudulent conveyance without piercing the corporate veil if it is proved that he or she participated in and benefitted from the fraudulent conveyance (*see D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 452 [1st Dept 2013]), here, plaintiff did not meet its burden on summary judgment to show that the individual defendants personally benefitted from the conveyances. The first cause of action for successor liability should also be dismissed as against the individuals because even if plaintiff proves its allegations that Fauna was created to escape Uptown Birds's obligations to plaintiff, and is the successor to, and alter ego of, Uptown Birds, that does not create liability against the individual defendants, one of whom was not even a member of the alleged successor entity. Moreover, plaintiff fails to cite any authority to support the proposition that the doctrine of successor liability may be applied against a natural person, when the doctrine developed as "an exception to the general rule that, when one corporate or other juridical person sells assets to another entity, the assets are transferred free

and clear of all but valid liens and security interests" (George W. Kuney, *Successor Liability in New York*, 79 NY St BJ 22, 22 [Sept. 2007]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: JANUARY 7, 2016

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16442 The People of the State of New York, Ind. 37560C/11
Respondent,

-against-

Christopher Rosa,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Paul B. Hershan of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Edgar G. Walker, J.), rendered May 16, 2012, convicting defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the third degree, and sentencing him to a fine of $300, unanimously affirmed.

Generally, a defendant must move to withdraw the plea or to vacate the judgment of conviction to preserve a claim that a guilty plea is invalid (*see People v Conceicao*, — NY3d —, 2015 NY Slip Op 08615, *3 [2015]). However, a narrow exception exists "where the particular circumstances of a case reveal that a defendant had no actual or practical ability to object to an alleged error in the taking of a plea that was clear from the face of the record" (*id.*, citing *People v Louree*, 8 NY3d 541, 546 [2007]). Here, defendant's claims are reviewable on direct

appeal. Defendant "faced a practical inability to move to withdraw" the plea, because he was sentenced on the same date as the plea (*Conceicao* at *3).

As to the validity of the plea, a failure to recite the *Boykin* rights does not automatically invalidate an otherwise voluntary and intelligent plea (*Conceicao* at *4). The record here shows that defendant knowingly, intelligently, and voluntarily waived his constitutional rights (*see People v Harris*, 61 NY2d 9, 17-19 [1983]). The plea occurred 10 months after defendant had been arrested and charged, and he had counsel on the case. On the date of the plea, at the beginning of the plea proceeding, without the need for additional discussion with defendant or the prosecutor, defendant's attorney stated that defendant had decided to plead guilty. This further supports the argument that defendant had made the decision to plead guilty after consulting with counsel before the start of the plea proceeding (*see Conceicao* at *4). Additionally, defendant, through his attorney, waived a more detailed allocution. While

the plea allocution could have been more robust, the record here establishes a knowing, intelligent, and voluntary waiver (*id.*).

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16544 The People of the State of New York, Case 62324C/11
Respondent,

-against-

Bemory Drame,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc I. Eida of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Denis Boyle, J.), rendered March 28, 2012, convicting defendant, upon his plea of guilty, of making false statements in connection with an examination, and sentencing him to a fine of $300 or 90 days in jail, unanimously affirmed.

Since defendant waived prosecution by information, the accusatory instrument only had to satisfy the reasonable cause requirement (*see People v Dumay*, 23 NY3d 518, 522 [2014]). The accusatory instrument sufficiently alerted defendant to the charged crimes, specified information from which his knowledge and intent could be inferred and provided reasonable cause to

believe that he submitted a license application to the Department of Motor Vehicles containing false information (*id.* at 524-526).

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16546-
16547 In re Clarence S., Jr., and Others,

Children Under the Age of Eighteen Years, etc.,

Anthony H.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Bruce A. Young, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about July 17, 2014, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about July 10, 2014, which found that respondent neglected the subject children, unanimously affirmed, without costs. Appeal from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence at the fact-finding hearing establishes that respondent neglected the subject children by

committing an act of domestic violence against their mother in the children's presence and hitting the oldest child in the head with an iron during the incident (*see Nicholson v Scoppetta*, 3 NY3d 357, 372 [2004]; Family Court Act § 1046[b]). Family Court appropriately credited the testimony of an agency caseworker that she interviewed the two oldest children separately and that one of them described the fight between his mother and respondent and his brother's getting hit by the iron while trying to "save" his mother (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536, 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]). The caseworker further testified that she observed a wound covered in transparent medical tape on the forehead of the oldest child and that he responded affirmatively when she told him that she had been informed that respondent caused the wound. The children's out-of-court statements were sufficiently corroborated by each other's statements, the caseworker's personal observation of the oldest child's injury, and the Domestic Incident Report, which demonstrated that an incident involving domestic violence had been reported to the police on the day in question (*see Matter of Christina F.*, 74 NY2d 532, 535-536 [1989]; *Matter of Genesis F. [Xiomaris S.]*, 121 AD3d 526 [1st Dept 2014]).

The court properly denied respondent's counsel's request for an adjournment of the fact-finding hearing at which respondent

did not appear and for which he failed to request an adjournment in advance (*Matter of Steven B.*, 6 NY3d 888 [2006]; *see also Matter of Isaac Howard M. [Fatima M.]*, 90 AD3d 559, 560 [1st Dept 2011], *lv dismissed in part, denied in part* 18 NY3d 975 [2012]). Respondent's proffered excuse for his absence, that his attendance was required at a family reunion in North Carolina, was not sufficient to establish "good cause" for an adjournment (Family Court Act § 1048[a]).

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

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick JJ.

16548-
16549 The People of the State of New York,
Respondent,

-against-

Joseph Gonzalez,
Defendant-Appellant.

Ind. 3305/10
1118/12

_____

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

Robert T. Johnson, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Patricia DiMango, J.), rendered March 8, 2013, convicting defendant, upon his pleas of guilty, of assault in the first degree and robbery in the third degree, and sentencing him to concurrent terms of 5 years and 1 year, respectively, unanimously modified, on the law, to the extent of vacating the sentence on the assault conviction and remanding for a youthful offender determination on that conviction, and otherwise affirmed.

As the People concede, defendant is entitled to resentencing for an express youthful offender determination as to the assault conviction (*see People v Rudolph*, 21 NY3d 497 [2013]).

Application by defendant's counsel to withdraw as counsel as to the robbery conviction 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 nonfrivolous points which could be raised on this appeal, except perhaps for arguments that defendant has not authorized counsel to pursue which would expose him to significant risks.

Pursuant to Criminal Procedure Law 460.20, defendant may apply for leave to appeal to the Court of Appeals from our grant of the motion to withdraw 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 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: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16551 The People of the State of New York, Respondent, Ind. 2309/12

-against-

Christopher Belliard, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Clara Salzberg of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, Bronx County (William I. Mogulescu, J. at plea; George R. Villegas, J. at sentencing), rendered March 1, 2013, convicting defendant of robbery in the third degree, and sentencing him to a term of 1½ to 4½ years, held in abeyance, and the matter remitted for further proceedings in accordance herewith.

During the plea proceeding, the court asked defense counsel if he had discussed with defendant the "immigration consequences of this guilty plea." Defense counsel replied, "Yes. It's not applicable in this case." Despite an additional reference to "immigration consequences," the court did not advise defendant that if he was not a United States citizen, he could be deported as a result of his plea, as required under *People v Peque* (22 NY3d 168 [2013], *cert denied* __ US __, 135 S Ct 90 [2014], which

applies to cases on direct appeal (*People v Brazil*, 123 AD3d 466 [1st Dept 2014], *lv denied* 25 NY3d 1198 [2015]). Therefore, defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation (*Peque*, 22 NY3d at 198).

Accordingly, we remit for the remedy set forth in *Peque* (22 NY3d at 200-201), and we hold the appeal in abeyance for that purpose.

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16552 In re Naethael Makai A.,

A Dependent Child Under Eighteen
Years of Age, etc.,

Adwoa A., etc.,
Respondent-Appellant,

Catholic Guardian Society
& Home Bureau,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Joseph T. Gatti, New York, for respondent.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about April 28, 2014, which, upon a finding, after a hearing, that respondent mother violated the terms of a suspended judgment, terminated respondent's parental rights to the subject child and committed the child's custody and guardianship to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that respondent violated the terms of the suspended judgment (*see Matter of Serenity A. [Katrina A.]*, 117 AD3d 600 [1st Dept

2014]). She failed to move to New York, to obtain suitable housing, to maintain a steady income, and to visit the child regularly.

A preponderance of the evidence supports the determination that it was in the child's best interest to be freed for adoption by the foster mother, who has cared for him for more than three years (*see Matter of Mykle Andrew P.*, 55 AD3d 305 [1st Dept 2008]).

The court properly denied respondent's request, through her attorney, for an adjournment of the dispositional hearing since her explanation for not being present, that she missed her train, was unsupported by any additional detail, and she had a history of failing to appear at visitations and other meetings connected with the proceedings (*see Matter of VanSkiver v Clancy*, 128 AD3d 1408 [4th Dept 2015]; *Matter of Jaynices D. [Yesenia Del V.]*, 67 AD3d 518, 519 [1st Dept 2009]).

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16553- Index 603556/09
16554-
16555-
16556-
16557

Lane Altschuler,
Plaintiff-Respondent,

—against—

Jobman 478/480, LLC.,
Defendant-Appellant.

_____

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for appellant.

Bernstein Liebhard LLP, New York (Christian Siebott of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 18, 2013, which, to the extent appealed from as limited by the briefs, denied defendant landlord's motion for summary judgment dismissing plaintiff tenant's rent overcharge claim, and granted plaintiff's cross motion for summary judgment as to liability on that claim; order, same court and Justice, entered April 14, 2015, which, to the extent appealable, denied defendant's motion to renew the prior motions for summary judgment and plaintiff's motion for a so-ordered subpoena; order, same court (Geoffrey D. Wright, J.), entered June 8, 2015, which granted plaintiff's motion for summary judgment in the amount of $818,157.30 on his rent overcharge claim; and order, same court

and Justice, entered August 20, 2015, which, among other things, directed the entry of judgment in plaintiff's favor in the amount of $876,619.10, plus interest, unanimously affirmed, with costs. Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 1, 2013, which, among other things, granted plaintiff's motion for a so-ordered subpoena directing the Division of Housing and Community Renewal (DHCR) to produce documents sufficient to determine the apartment's proper base rent, unanimously dismissed, without costs, as abandoned and moot.

Supreme Court correctly found that defendant improperly deregulated the apartment while it was receiving J-51 tax benefits, entitling plaintiff to rent-stabilized status for the duration of his tenancy and to collect any rent overcharges (*see 72A Realty Assoc. v Lucas*, 101 AD3d 401, 401-402 [1st Dept 2012]). We reject defendant's contention that it properly deregulated the apartment in reliance on a 1996 DHCR advisory opinion. The Court of Appeals rejected that opinion in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]). In any event, defendant failed to show that its deregulation of the apartment was proper under the advisory opinion, as the record indicates that the apartment was rent stabilized solely because of the receipt of J-51 tax benefits (*see id.* at 281). Defendant's

arguments otherwise are improperly raised for the first time on appeal, and we decline to consider them (*see DiLeo v Blumberg*, 250 AD2d 364, 366 [1st Dept 1998]). As an alternative holding, we reject them on the merits.

Plaintiff claimed that defendant engaged in a "fraudulent scheme" to deregulate the apartment by increasing the 1995 rent of $422.04 to over $2,000 in subsequent years, executing market rent leases during a time it was receiving J-51 tax benefits, failing to provide him with a lease rider, and failing to file the required annual registrations with DHCR during his tenancy. Defendant failed to refute these allegations of fraud. Its argument that the apartment was deregulated because it was renovated in 1995 is unavailing, as it fails to support it with sufficient evidence. The affidavit of its lease administrator, stating that at least $6,296.14 of individual apartment capital improvements were performed prior to plaintiff's first lease, is insufficient, as it was unsupported by "bills from a contractor, an agreement or contract for work in the apartment, or records of payments for the [claimed improvements]" (*Lucas*, 101 AD3d at 402-403).

Because plaintiff established a colorable claim of fraud, Supreme Court properly disregarded the rent charged four years prior to the filing of the rent overcharge claim, and properly

examined the entire rent history to determine the legality of the base rent (*see Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366 [2010]). Further, the application of DHCR's default formula was warranted, given the unreliability of the rental history since 1995, due to defendant's failure to file a number of the annual rent registrations prior to the commencement of this action (*see Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d 397, 400-401 [1st Dept 2005]).

Supreme Court properly imposed a rent freeze on the apartment, since defendant collected the unlawful rent overcharges before filing late rent registrations (*see Matter of Hargrove v Division of Hous. & Community Renewal*, 244 AD2d 241 [1st Dept 1997]). Supreme Court also properly awarded treble damages, because defendant failed to establish, by a preponderance of the evidence, that the overcharge was not willful (*id.*).

A trial is not required, as there are no undisputed facts or unresolved issues (*see Adria Realty Inv. Assoc. v New York State Div. of Hous. & Community Renewal*, 270 AD2d 46 [1st Dept 2000]).

To the extent the issue has not been abandoned on appeal (*see McHale v Anthony*, 41 AD3d 265, 266-267 [1st Dept 2007]), Supreme Court properly denied defendant's motion to renew, since

defendant did not provide a reasonable justification for its failure to present the new affidavit on the earlier motions (*see* CPLR 2221[e][3]; *Whalen v New York City Dept. of Envtl. Protection*, 89 AD3d 416, 417 [1st Dept 2011]).

Defendant's appeal from the order granting plaintiff's motion for a so-ordered subpoena is deemed abandoned, as defendant failed to raise any arguments on appeal with respect that order (*see McHale*, 41 AD3d at 266-267). Alternatively, the appeal has been rendered moot by DHCR's subsequent submission of the requested documents to plaintiff (*see Nathanson v Tri-State Constr. LLC*, 48 AD3d 373, 374 [1st Dept 2008]).

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

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16559 In re Clarissa Goldsmith, etc., Index 2697/13
Petitioner-Appellant,

-against-

The Office of the Attorney General
of the State of New York, et al.,
Respondents-Respondents.

_____

Clarissa Goldsmith, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Philip V. Tisne of counsel), for respondents.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about March 19, 2015, which dismissed the petition for a turnover of certain funds held by respondent Office of the Comptroller of the State of New York, unanimously affirmed, without costs.

The Surrogate correctly determined that she had no jurisdiction to review the petition. The comptroller's final determination of a claim for certain abandoned property "shall be reviewable by application to the supreme court, Albany county" (Abandoned Property Law § 1406[1][b]), except in limited circumstances not present in this case (*id.* subd [3]).

Petitioner cannot evade this provision by commencing a turnover proceeding in the Surrogate's Court.

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16560- Ind. 1046/06
16560A- 1992/06
16561- 2356/08
16561B-
16562 The People of the State of New York,
Respondent,

-against-

Jamall Simmons,
Defendant-Appellant.

_____

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

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

_____

Appeals having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, Bronx County (Troy Webber, J.), rendered on or about December 13, 2010, and judgments of resentence, same court and Justice, rendered on February 15, 2011, and from a judgment, same court (Robert Torres, J., at plea; Troy Webber, J. at sentencing), rendered December 13, 2010.

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

It is unanimously ordered that the judgments so appealed from be and the same are hereby affirmed

ENTERED: JANUARY 7, 2016

CLERK

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

Acosta, J.P., Andrias, Richter, Manzanet-Daniels, JJ.

16563-
16564 Index 653407/11

Sea Trade Maritime Corporation,
Plaintiff-Respondent,

-against-

Stylianos Coutsodontis,
Defendant-Appellant.

_____

Poles Tublin Stratakis & Gonzalez, LLP, New York (Scott R. Johnston of counsel), for appellant.

Cardillo & Corbett, New York (James P. Rau of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered October 21, 2014, against defendant in plaintiff's favor, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 26, 2014, which granted plaintiff's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The Spanish decree upon which the court granted summary judgment was "enforceable where rendered" (CPLR 5302); indeed, the clerk of the Spanish court certified that it "ha[d] the necessary definitiveness and enforceability." *Overseas Dev. Bank in Liquidation v Nothmann* (103 AD2d 534 [2d Dept 1984], *revd on other grounds* 64 NY2d 927 [1985]), on which defendant relies, is distinguishable. Unlike the foreign judgment in *Overseas*, the

foreign judgment in the case at bar was not time-barred when plaintiff commenced its action.

Defendant failed to argue to the motion court that the Spanish judgment contravenes New York public policy. Therefore, the argument is waived. As we said in a prior appeal in this case, "In any event, the argument is unavailing, as the cause of action on which the damages award is based is not 'repugnant to the public policy of this state'" (111 AD3d 483, 486 [1st Dept 2013], quoting CPLR 5304[b][4]).

We have considered defendant's other remaining arguments, including those concerning the papers from which he filed a notice of appeal (e.g. that discovery was necessary) and find them unavailing.

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16565-
16566 In re Corine G.,

A Child Under Eighteen Years of Age,
etc.,

William G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about June 9, 2014, which found that respondent father neglected the subject child and denied his Family Court Act § 1028 request to have the child released to him, unanimously affirmed, without costs, as to the finding of neglect, and the appeal otherwise dismissed as academic.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]; *see also Matter of Syed I.*, 61 AD3d 580, 580 [1st Dept 2009]). The record shows that the child was subject to actual or imminent danger of injury or impairment of her emotional and mental condition from exposure

to repeated incidents of domestic violence committed by respondent against the child's mother, occurring in respondent's home, in close proximity to the child, and which was exacerbated by his excessive alcohol use (*see* FCA § 1012[f][i][B]; *Matter of Enrique V. [Jose U.V.]*, 68 AD3d 427 [1st Dept 2009]*; Matter of Daphne G.*, 308 AD2d 132, 135 [1st Dept 2003]; *Matter of Honesti H. [Ted H.]*, 126 AD3d 972, 973 [2d Dept 2015]; *Matter of Francis S.*, 296 AD2d 507, 508 [2d Dept 2002]; *see also e.g. Matter of Madison M. [Nathan M.]*, 123 AD3d 616, 616-617 [1st Dept 2014]; *Matter of Carmine G. [Franklin G.]*, 115 AD3d 594, 594 [1st Dept 2014]).

The record also shows imminent danger to the child's care and well-being was attributable to respondent's inability to exercise a minimum degree of care in that the child appeared unkempt, smelled and had not been bathed, for a period, in early January 2012, when the mother had been forced from the apartment in order to seek help from the father's abusive and violent behavior, and the home appeared to be in disarray when left in the father's hands (*see Matter of Joele Z.F. [Jacqueline M-F.]*, 127 AD3d 641, 641 [1st Dept 2015], *lv denied* 25 NY3d 914 [2015]).

Contrary to respondent's contention, there exists no basis to disturb the court's credibility determinations, which were

amply supported by the record (*see e.g. Omarion T. [Isha M.]*, 128 AD3d 583, 583-584 [1st Dept 2015]).

Finally, it is settled that an appeal from a denial of an application for return of a child removed as a result of the initiation of a proceeding pursuant to Family Ct Act article 10 becomes moot at the point a decision is made on the charges of neglect or abuse (*see e.g. Matter of Jabez F. [Martha L.- Bernard F.]*, 92 AD3d 448, 448 [1st Dept 2012]). Moreover, respondent's argument to the extent that there is persisting stigma arising from a denial of a parent's FCA § 1028 motion is misplaced (*cf. Matter of C. Children*, 249 AD2d 540, 540 [2d Dept 1998]).

In any event, even assuming the issue is not academic, the evidence overwhelmingly demonstrates that the denial of respondent's request to parole the child was warranted under the circumstances.

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16567 Neal Lewis, Index 156611/12
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Pollack, Pollack, Isaac & DeCiccio, LLP, New York (Brian J. Isaac of counsel), for appellant.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Christine Gasser of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered October 17, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motion to strike certain allegations from the supplemental bill of particulars as constituting new theories of liability not set forth in the notice of claim and to preclude plaintiff's expert from testifying regarding those matters, unanimously affirmed, without costs.

In this action for negligence arising from plaintiff's slip and fall on liquid that was allegedly present on the third step of a staircase owned and maintained by defendant, the Supreme Court properly dismissed the allegations made in the supplemental bill of particulars regarding defendant's failure to provide a

skid or slip-resistance surface on the staircases's stair treads, with listed regulatory violations, and that defendant's employees were improperly trained. Indeed, the notice of claim states that the accident was caused "as a result of a liquid substance" being on the third step of the subject staircase and that NYCHA was reckless and/or negligent in its ownership, operation, design, creation, management, maintenance, contracting, subcontracting, supervision, authorization, use and control. It cannot be fairly inferred from the aforementioned language that plaintiff would later assert that the third step itself was in a defective condition or that the building's porter was improperly trained (*see Rodriguez v Board of Educ. of the City of N.Y.*, 107 AD3d 651 [1st Dept 2013]; *Melendez v New York City Hous. Auth.*, 294 AD2d 243 [1st Dept 2002]).

Contrary to plaintiff's contention, he may not rely on his testimony at his General Municipal Law § 50-h hearing to rectify any deficiencies in the notice of claim, because he never testified that there was an issue with the step itself and traditionally such testimony has only been "permitted to clarify the location of an accident or the nature of injuries[;] '[it] may not be used to amend the theory of liability set forth in the notice of claim where, as here, amendment would change the nature

of the claim'" (*Scott v City of New York*, 40 AD3d 408, 410 [1st Dept 2007] [citation omitted]).

Accordingly, the motion court properly struck the allegations from the supplemental bill of particulars, as new theories of liability that cannot be fairly implied from the notice of claim, and precluded plaintiff's expert from testifying with regard to them (*see DeJesus v New York City Hous. Auth.*, 46 AD3d 474 [1st Dept 2007], *affd* 11 NY3d 889 [2008]; *Barksdale v New York City Tr. Auth.*, 294 AD2d 210, 211 [1st Dept 2002]; *Rojas v City of New York*, 208 AD2d 416, 416-417 [1st Dept 1994], *lv denied* 86 NY2d 705 [1995]).

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16568- Ind. 534/10
16568A The People of the State of New York, 1095/10
Respondent,

-against-

Alexander Villegas,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Tomoeh Murakami Tse of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Rena K. Uviller, J.), rendered July 27, 2011, convicting defendant, upon his plea of guilty, of three counts of criminal contempt in the first degree, and sentencing him to an aggregate term of 2⅔ to 8 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be served concurrently, resulting in a new an aggregate term of 1⅓ to 4 years, and otherwise affirmed. We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16569-
16569A The Lansco Corporation, Index 601089/10
Plaintiff-Respondent,

-against-

Strike Holdings LLC,
Defendant-Appellant,

GFI Realty Services, Inc.,
Defendant.

_____

Pryor Cashman LLP, New York (Todd E. Soloway and Lisa Buckley of counsel), for appellant.

Law Office of Lionel A. Barasch, New York (Lionel A. Barasch of counsel, for respondent.

_____

Judgment, Supreme Court, New York County (Arthur F. Engoran, J.), entered January 7, 2015, against defendant Strike Holdings LLC in favor of plaintiff, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered December 29, 2014, after a nonjury trial, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court's determination that plaintiff is entitled to a broker's commission from defendant Strike is supported by the trial evidence (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). The evidence establishes that plaintiff was the procuring cause of the lease and that, even if it were not, Strike breached its agreement to protect plaintiff with respect

to the property, terminating plaintiff's activities in bad faith and as a mere device to escape the payment of the commission (*see SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 99, 100 [1st Dept 2014]).

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16570 The People of the State of New York, Ind. 1123/14
Respondent,

-against-

E.J. McPherson, etc.,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Larry Stephens, J.), rendered April 23, 2014, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree, and sentencing him to a term of five years' probation, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of three years' probation, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16571 Oberon Securities LLC, Index 653654/13
Plaintiff-Respondent,

-against-

Paul Parmar, et al.,
Defendants-Appellants.

_____

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (Andrew T. Lolli of counsel), for appellants.

Sher Tremonte LLP, New York (Robert N. Knuts of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 13, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion for a default judgment on their counterclaim, unanimously affirmed, with costs

The court exercised its discretion in a provident manner in denying defendants' motion for a default judgment. Plaintiff's counsel asserted that the delay was due to counsel's error, and there was no evidence of prejudice to defendants (*see Smoke v Windermere Owners, LLC*, 109 AD3d 742 [1st Dept 2013]; *Spira v New York City Tr. Auth.*, 49 AD3d 478 [1st Dept 2008]; CPLR 3012[d]). Furthermore, there is a strong public policy of resolving

controversies on the merits (*see e.g. Myers v City of New York*, 110 AD3d 652 [1st Dept 2013]). We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16572 The People of the State of New York, Respondent, Ind. 3971/13

-against-

Christopher Carter, 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 (Richard D. Carruthers, J.), rendered on or about December 18, 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: JANUARY 7, 2016

CLERK

Acosta, J.P., Andrias, Manzanet-Daniels, Kapnick, JJ.

16573N Michael Tuzzolino, Index 156755/13
Plaintiff-Respondent,

-against-

Consolidated Edison Company
of New York,
Defendant-Appellant.

_____

Amabile & Erman, P.C., Staten Island (Anthony A. Lenza, Jr. Of counsel), for appellant.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 21, 2015, which, to the extent appealed from, granted plaintiff's motion to quash subpoenas served by defendant on three of plaintiff's nonparty treating health care providers, and for a protective order staying the depositions of those providers, unanimously affirmed, without costs.

In July 2013, the 23-year-old plaintiff was injured at a plant owned by defendant when the extension ladder on which he was standing "slipped out from beneath" him, causing him to fall onto a concrete floor. Plaintiff sustained a hairline fracture of the left wrist, as well as injuries to the lower back, right leg and foot. He sought treatment from, among others, a spinal

surgeon, a physiatrist, and a licensed clinical social worker. Plaintiff underwent lumbar laminectomy surgery in April 2014.

Plaintiff commenced this action alleging violations of the Labor Law. The providers' treatment notes and medical records were furnished to defendant as part of discovery. Nonetheless, defendant served nonparty subpoenas on the providers. As justification for the disclosure, defendant asserted that "the witness is more likely than not to have information unavailable to defendants through any other source concerning the medical care and treatment at issue in this case." No other justification was offered for the disclosure sought.

Plaintiff moved to quash the subpoenas and sought a protective order pursuant to CPLR 3103 staying the depositions. Defendant opposed, asserting that the depositions were necessary because of alleged inconsistencies in the records of the treating physicians and discrepancies between their records and plaintiff's deposition testimony. The motion court granted plaintiff's motion to quash the subpoenas and granted a protective order as to depositions. We now affirm.

Defendant has failed to show that the testimony sought is unrelated to diagnosis and treatment and is the only method of discovering the information sought (*see Carson v Hutch Metro Center, LLC*, 110 AD3d 468 [1st Dept 2013]; *Ramsey v New York*

*Univ. Hosp. Ctr.*, 14 AD3d 349, 350 [1st Dept 2005]). Defendant seeks testimony from plaintiff's physicians regarding, inter alia, whether the spinal surgery Dr. Merola performed on plaintiff was premature or unwarranted. This information "relates directly to diagnosis and treatment" (*Carson*, 110 AD3d at 468; *see also In re New York City Asbestos Litig.*, 87 AD3d 467 [1st Dept 2011]). If defendant is of the view that the surgery was unwarranted, the treating providers' records are available for review by defendant's experts, who can offer their own testimony as to whether the surgery was warranted[1] (*see In re New York City Asbestos Litig.*, 87 AD3d at 468). We note that the information sought is available from the physician's records (*see id.*).

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

ENTERED: JANUARY 7, 2016

CLERK

[1]The reluctance to perform surgery until conservative options had been exhausted hardly suggests a nefarious or fraudulent motive, as defendant asserts. Physical therapy and epidural injections having failed to alleviate plaintiff's pain, it is understandable that surgery would be considered.

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16575 Edwina Forrester, Index 300166/13
Plaintiff-Appellant,

-against-

Riverbay Corporation,
Defendant-Respondent.

_____

Harris Law, New York (Anna Kull of counsel), for appellant.

Malapero & Prisco, LLP, New York (Mark A. Bethmann of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 5, 2014, which granted defendant's motion for summary judgment dismissing the complaint, and denied, as moot, plaintiff's motion for an expedited trial, unanimously affirmed, without costs.

Defendant established its entitlement to summary judgment by submitting evidence showing that the allegedly uneven floor on which the fur from plaintiff's slippers got caught was a trivial defect and not actionable as a matter of law (*see e.g. Hutchinson v Sheridan Hill House Corp.*, NY3d , 2015 NY Slip Op 07578 [2015]; *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). In opposition, plaintiff failed to raise a triable issue of fact. She did not identify any measurements of the condition, which was not visible in photographs, or submit other evidence showing that

the condition could have been a snare or a trap (*compare Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept2000]).

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16576 The People of the State of New York, Ind. 2228/12
Respondent,

-against-

Donovan Ferguson,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about December 13, 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.

Clear and convincing evidence supported the assessment of points for the victim's physical helplessness and for defendant's infliction of physical injury. The grand jury minutes established that the victim was asleep when approached by defendant, who thereupon used forcible compulsion (*see People v Howell*, 82 AD3d 857 [2d Dept 2011], *lv denied* 16 NY3d 713 [2011]). Defendant did not challenge the court's summarization of the grand jury testimony, or raise any issue regarding disclosure of the minutes (*see People v Baxin*, 26 NY3d 6 [2015]).

Furthermore, defendant conceded that the victim sustained physical injury.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the guidelines, and the record does not establish any basis for a downward departure.

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16577 Ilico Jewelry, Inc., Index 157168/12
Plaintiff-Respondent,

-against-

The Hanover Insurance Company,
Defendant-Appellant.

_____

Camacho Mauro Mulholland, LLP, New York (Gregory G. Vetter of counsel), for appellant.

Wimpfheimer & Wimpfheimer, New York (Michael Wimpfheimer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.) entered August 25, 2014, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly denied defendant insurance company's motion, in this action where plaintiff seeks coverage under its policy with defendant for jewels that were allegedly stolen from plaintiff's principal. Questions of fact exist as to the meaning of all the terms contained within the "Personal Conveyance Clause" exclusion that must be resolved by a trier of fact (*see e.g. Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311-312

[1984]; *cf. DMP Contr. Corp. v Essex Ins. Co.*, 76 AD3d 844 [1st Dept 2010])

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

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16578 The People of the State of New York, Ind. 484/99
Respondent,

-against-

Camillo Douglas, etc.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Paul B. Hershan of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (Richard Lee Price, J.), rendered April 16, 2012, resentencing defendant to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621 [2011]). We perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16579 Gerald Chambers, et al., Index 157781/13
Plaintiffs-Respondents,

-against-

Eliyahu Weinstein, et al.,
Defendants,

121 Park Realty LLC, et al.,
Defendants-Appellants.

_____

Lipsius-BenHaim Law LLP, Kew Gardens (Ira S. Lipsius of counsel), for appellants.

Law Office of Daniel H. Richland, PLLC, Lindenhurst (Daniel H. Richland of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 22, 2014, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' (defendants) motion to dismiss the aiding and abetting fraud claims against them, unanimously affirmed, without costs.

To state a claim for aiding and abetting fraud, a plaintiff must allege "the existence of the underlying fraud, actual knowledge, and substantial assistance" (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). Here, the existence of an underlying fraud is sufficiently stated in the complaint, which alleges, among other things, that defendants aided and abetted a fraudulent Ponzi scheme involving the purchase of Facebook shares

(*id.*). Plaintiffs have sufficiently stated "substantial assistance," because the complaint alleges that defendants assisted in the fraud by assigning property to codefendants and by placing the proceeds of the fraud beyond the reach of plaintiffs, thereby causing plaintiffs harm (*see e.g. Rostuca Holdings v Polo*, 231 AD2d 402, 403 [1st Dept 1996]; *see generally Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [2009], *lv denied* 13 NY3d 709 [2009]). Plaintiffs have sufficiently pleaded "actual knowledge" of the underlying fraud, which "need only be pleaded generally" (*Oster*, 77 AD3d at 55).

The documentary evidence submitted to the motion court does not "flatly contradict[]" the allegations of the complaint (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001], *mod on other grounds* 98 NY2d 314 [2002]).

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

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16580 The People of the State of New York, Ind. 2221/11
Respondent,

-against-

Yvette Ward,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christine DiDomenico 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 (Daniel P. FitzGerald, J.), rendered September 23, 2011,

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: JANUARY 7, 2016

CLERK

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

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16581 Jang Ho Choi, Index 654484/13
Plaintiff-Appellant,

-against-

Beautri Realty Corp.,
Defendant-Respondent.

_____

Cole Schotz P.C., New York (Nolan E. Shanahan of counsel), for appellant.

Vishnick McGovern Milizio, LLP, Lake Success (Jordan M. Freundlich of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 23, 2014, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(5), unanimously affirmed, with costs.

The motion court erred in finding plaintiff's claim barred by the provision of the parties' agreements that required the closing of a real property sale within 90 days of defendant's default or "from the date of the Contract." A reasonable interpretation of the agreements is that they require closing within 90 days of the contracts of sale becoming effective, i.e., following plaintiff's exercise of his option to purchase the property and the parties' entering into a separate agreement to adjust the price.

Nevertheless, we affirm the dismissal of the action on the ground that it is barred by the statute of limitations on breach of contract actions. More than six years have elapsed since plaintiff exercised his option and defendant refused to comply, in June 2007 (*see* CPLR 213[2]; *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399 [1993]).

Plaintiff contends that the statute of limitations was "equitably tolled" during the pendency of another New York action concerning another party's right to purchase the same property and of his own action in South Korea. However, the doctrine of equitable tolling is not available in state causes of action in New York (*see Ari v Cohen*, 107 AD3d 516, 517 [1st Dept 2013]; *Shared Communications Servs. of ESR, Inc. v Goldman, Sachs & Co.*, 38 Ad3d 325 [1st Dept 2007]). In any event, plaintiff did not demonstrate that he was prevented in "some extraordinary way" from timely commencing an action for specific performance (*O'Hara v Bayliner,* 89 NY2d 636, 646 [1997], *cert denied* 522 US 822 [1997]). Plaintiff had sufficient knowledge of the facts and of a basis for a cause of action within the limitations period, and yet he failed to bring a timely suit (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 554 [2006]; *see also Pahlad v Brustman*, 8 NY3d 901 [2007]). Nor does plaintiff contend that defendant wrongfully induced him to refrain from asserting his specific

performance claim and therefore should be equitably estopped to rely on the statute of limitations (*see Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]).

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16582-
16583 In re Sahairah J., and Others,

Children Under the Age of
Eighteen Years, etc.,

Rosemarie R., et al.,
Respondents-Appellants,

-against-

Administration for Children's
Services,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for Rosemarie R., appellant.

Steven N. Feinman, White Plains, for Travis J., appellant.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for respondent.

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

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 16, 2014, which, after a fact-finding hearing, determined that respondent parents had medically neglected the middle child, that both parents had neglected the subject children by failing to supply them with adequate shelter, and that respondent father had neglected the subject children by misusing drugs, unanimously affirmed, without costs.

Petitioner agency proved by a preponderance of the evidence that the parents medically neglected the middle child (*see* Family Ct Act §§ 1012[f][i][A]; 1046[b]). The evidence shows that the parents failed to provide or obtain prompt and proper treatment for the child's full-body rash, which was ultimately diagnosed as scabies, despite being advised by a doctor to return to the hospital if the child's rash did not improve in one week (*see Matter of Faridah W.*, 180 AD2d 451, 452 [1st Dept 1992], *lv denied* 80 NY2d 751 [1992]).

A preponderance of the evidence also supports Family Court's finding of neglect based on inadequate shelter (*see* Family Ct Act § 1012[f][i][A]). The evidence shows that the parents' home was dirty, malodorous, and infested with roaches and bed bugs, and that it had a gaping hole in the wall. Although the parents complained to the Housing Authority about the insect infestation and hole, they failed to take steps to address the odor and dirt (*see Commissioner of Social Servs.*, 212 AD2d 400 [1st Dept 1995]).

A preponderance of the evidence supports Family Court's finding of neglect based on the father's misuse of drugs (Family Ct Act § 1012[f][i][B]). The father admitted that he used K2, a synthetic form of marijuana, every other day, and the expert's testimony established that the active ingredient in K2 was a

Schedule 1 controlled substance, like marijuana. Under these circumstances, there is a statutory presumption of neglect, which the father failed to refute, as there is no evidence that he was participating in a rehabilitative program (*see* Family Ct Act § 1046[a][iii]; *Matter of Keoni Daquan A.* [*Brandon W.—April A.*], 91 AD3d 414, 415 [1st Dept 2012]).

We have considered the parents' remaining contentions and find them unavailing.

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16584 The People of the State of New York, Respondent, Ind. 2063/10

-against-

Reginald Siler, Defendant-Appellant.

---

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

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

---

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered July 25, 2012, as amended August 22, 2012, convicting defendant, after a jury trial, of attempted rape in the first degree and sexual abuse in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 12 years, unanimously affirmed.

The court properly granted the People's request for submission of attempted rape in the first degree as a lesser included offense of first-degree rape. There was ample evidence to support a reasonable view that defendant's conduct only constituted an attempt (*see generally* CPL 300.50[1]; *People v Glover*, 57 NY2d 61 [1982]). When the reasonable view test is satisfied, the court is required to submit a qualifying lesser included offense at the request of either party (CPL 300.50[2]).

"Since the indictment necessarily contained the lesser included offense, there is no merit to defendant's arguments that the court constructively amended the indictment or that the People impermissibly changed their theory of prosecution" (*People v Basciano*, 54 AD3d 637, 637 [1st Dept 2008]). To the extent that defendant sought to establish at trial that the crime was only an attempt, he assumed the risk that the People would exercise their statutory right to submission of an attempt charge (*cf. People v Spann*, 56 NY2d 469, 474 [1982] [defendant properly convicted on alternative version of facts he supplied at trial]).

There was no reasonable view of the evidence upon which defendant committed attempted first-degree sexual abuse, but not the completed crime. Thus, the court properly denied defendant's request for submission of the attempt as a lesser included offense.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16585 Arie Genger, et al., Index 651089/10E
Plaintiffs,

-against-

Sagi Genger, et al.,
Defendants.
- - - - -
Sagi Genger, etc., et al.,
Cross-Claimants, CounterClaimants
and Third-Party Claimants,

Sagi Genger, etc.,
Cross-Claimant, Counterclaimant and
Third-Party Claimant-Appellant,

-against-

Arie Genger, et al.,
Cross-Claim, Counterclaim and/or
Third Party Defendants,

Trans-Resources, Inc.,
Cross-Claim, Counterclaim and/or
Third-Party Defendant-Respondent.

_____

Morgan Lewis & Bockius LLP, New York (John Dellaportas of counsel), for appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Thomas J. Allingham II of the bar of the State of Delaware, admitted pro hac vice, and John Boyle of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered January 8, 2015, which, insofar as appealed from as limited by the briefs, granted the motion by cross claim defendant Trans-Resources, Inc. to dismiss the cross claims of

the Sagi Genger 1993 Trust, and denied the cross claimant's request to replead, unanimously affirmed, with costs.

The court properly dismissed the fraud and tortious interference with prospective economic relations cross claims as inadequately pled and based on conjecture.

The aiding and abetting a breach of fiduciary duty cross claim was also properly dismissed. Even assuming there was some basis for a relevant fiduciary relationship here, appellant could not assert a claim that respondent aided and abetted any breach of fiduciary duty committed by its own officer (*see Buttonwood Tree Value Partners, L.P. v R.L Polk & Co.*, 2014 WL 3954987, *5, 2014 Del Ch LEXIS 141, *14-15 [Del Ch Aug 7, 2014]).

The 2004 agreement that transferred stock to appellant cannot be the basis for a tortious interference with contract claim. The stock transfer in that agreement was void ab initio because it violated the notice provisions of a 2001 stockholders agreement, which provided that any attempt to transfer shares in violation of the notice provision "shall be void."

Leave to replead was properly denied, in light of the flaws at the heart of appellant's claims, and its failure to submit any arguments indicating that it would be able to state any viable

causes of action upon repleading (*see Gold Mech. Contrs. v Lloyds Bank P.L.C.*, 197 AD2d 384, 385 [1st Dept 1993]).

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16586 The People of the State of New York, Ind. 7685/00
Respondent,

-against-

Mitchell Texidor,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Michael J. Obus, J.), entered June 25, 2013, 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.

The court's upward departure was a provident exercise of discretion. Clear and convincing evidence established aggravating factors that were not otherwise adequately taken into account by the risk assessment guidelines (*see e.g. People v Poole*, 105 AD3d 654 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]). The underlying sex crime was committed, under egregious circumstances, during a burglary, and defendant's background includes prior convictions for both a sex crime and a residential

burglary. Defendant's pattern of misconduct displays a likelihood of recidivism that outweighs the mitigating factors he cites.

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16587 In re Technology Insurance Company, as subrogee of Glenn Wharton, Petitioner-Respondent, Index 651688/14

-against-

Countrywide Insurance Company, Respondent-Appellant.

_____

Jaffe & Koumourdas, LLP, New York (Jean H. Kang of counsel), for appellant.

Feldman & Feldman, LLP, Smithtown (Gwenn E. Haesler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about August 27, 2014, which granted petitioner's motion to confirm an arbitration award, and denied respondent's cross motion to dismiss the petition, unanimously affirmed, without costs.

The arbitration award is supported by the "reasonable hypothesis," drawn from petitioner's unrefuted evidence and the reasonable inferences arising therefrom, that the vehicle insured by petitioner was used principally for the transportation of persons for hire, and therefore satisfied the threshold requirements of Insurance Law § 5105(a) (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 224

[1996]; *Matter of Tri State Consumer Ins. Co. v High Point Prop. & Cas. Co.*, 127 AD3d 980 [2d Dept 2015]).

Respondent's contention that the award was procured by arbitrator misconduct, i.e., the failure to hold petitioner to its threshold burden of showing that the minimum requirements of Insurance Law § 5105(a) were met, is undermined by the record.

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16589-
16590 The People of the State of New York,
Respondent,

-against-

Juan Rodriguez,
Defendant-Appellant.

Ind. 2108/11

_____

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

Robert T. Johnson, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Patricia DiMango, J. at plea and sentencing; John Moore, J. at resentencing), rendered September 23, 2013, as amended November 21, 2013, convicting defendant of attempted sexual abuse in the first degree, and sentencing him, as a second felony offender, to a term of three years, unanimously affirmed. Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about April 9, 2014, 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.

As to the appeal from the judgment of conviction, we find that defendant did not make a valid waiver of his right to appeal, but we perceive no basis for reducing the sentence.

As to defendant's civil appeal from his sex offender adjudication, we find that clear and convincing evidence supports the 15-point assessment under the risk factor for drug or alcohol abuse. Defendant committed the instant offense while under the influence of marijuana, which alone supports the assessment (*see People v Watson*, 112 AD3d 501, 502 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]; *People v Birch*, 99 AD3d 422 [1st Dept 2012], *lv denied* 20 NY3d 854 [2012]). Thus, his claimed abstinence from marijuana use since he was released from incarceration in approximately 2003, after admittedly abusing it from approximately 1992 to 2003, does not warrant a contrary conclusion, particularly where the instant offense was committed more recently in 2011, and after at least one prior occasion where he and the victim smoked marijuana together. Nor do we perceive any basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]).

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16591-
16592 The People of the State of New York,
Respondent,

-against-

Mark Russell,
Defendant-Appellant.

Ind. 3258/01

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered April 15, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 20 points under the risk factor for the victim's physical helplessness (*see People v Winbush*, 123 AD3d 490 [1st Dept 2014], *lv denied* 24 NY3d 916 [2015]; *People v Howell*, 82 AD3d 857, 858 [2d Dept 2011] *lv denied* 16 NY3d 713 [2011]). In any event, regardless of whether defendant's correct point score is 130 or 110, we find no basis for a downward departure to level two (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant did not demonstrate any mitigating factors

not already taken into account in the risk assessment instrument that would warrant a downward departure, given the egregiousness of defendant's sexual offense.

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

ENTERED: JANUARY 7, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Gische, JJ.

16593N- Index 20272/12E
16593NA Ronny Marte,
Plaintiff-Respondent,

-against-

102-06 43 Avenue, LLC,
Defendant-Appellant,

Pasion Bar Restaurant, Inc., etc., et al.,
Defendants.

_____

Farber Brocks & Zane L.L.P., Garden City (Tracy L. Frankel of counsel), for appellant.

Asher & Associates, P.C., New York (Robert J. Poblete of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered April 4, 2014, which denied defendant 102-06 43 Avenue, LLC's (LLC) motion to vacate an order, same court and Justice, entered May 15, 2013, which had granted plaintiff's motion for a default judgment against defendants and for an award of costs, disbursements and attorneys' fees, unanimously reversed, on the law and the facts, without costs, and the LLC's motion granted. Appeal from order, same court and Justice, entered March 18, 2015, which denied the LLC's motion to renew, unanimously dismissed, without costs, as academic.

Given "the strong public policy of this State to dispose of cases on their merits," the motion court improvidently exercised

its discretion in denying the LLC's motion to vacate the order entered upon its default (*Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633 [1st Dept 2009]). Although the LLC is not entitled to vacatur under CPLR 5015(a)(1), as it did not show a reasonable excuse for its default (*see Olivaria v Lin & Son Realty Corp.*, 84 AD3d 423, 424 [1st Dept 2011]), it is entitled to vacatur under CPLR 317, as it moved to vacate within a year after it learned of the default and just five months after entry of the default order, it showed that it did not personally receive the summons and complaint in time to defend it, and it presented a meritorious defense to the action (*see* CPLR 317; *Olivaria*, 84 AD3d at 424-425). The affidavit the LLC submitted in support of its motion was sufficient to show a meritorious defense (*see Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]) — namely, that it is an out-of-possession landlord that bears no liability for the injuries that allegedly occurred in its tenant's bar due to the criminal acts of third parties (*see DeJesus v New York City Health & Hosps. Corp.*, 309 AD2d 729, 729 [2d Dept 2003]).

Given the foregoing determination, plaintiff is not entitled to attorneys' fees, costs and disbursements, and defendant's

appeal from the denial of the motion to renew is academic (*Mejia v Ramos*, 113 AD3d 429, 430 [1st Dept 2014]).

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

ENTERED: JANUARY 7, 2016

CLERK