SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 5, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

CORRECTED ORDER - DECEMBER 14, 2017

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4033-
4034 Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

Barclays Bank PLC,
Defendant-Appellant.

- - - - -

Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

HSBC Bank USA, National Association,
Defendant-Appellant.

Index 651338/13
652001/13

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Sullivan & Cromwell LLP, New York (Jeffrey T. Scott of counsel), for Barclays Bank PLC, appellant.

Williams & Connolly LLP, New York (Nicholas J. Boyle of counsel), for HSBC Bank USA National Association, appellant.

Ropes & Gray LLP, New York (Harvey J. Wolkoff of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered November 27, 2015, which, in each of the above-

captioned actions, to the extent appealed from as limited by the briefs, denied each defendant's motion to dismiss the surviving cause of action for breach of contract on the ground of the statute of limitations, unanimously reversed, on the law, with costs, and the motion granted. In each action, the Clerk is directed to enter judgment for defendant dismissing the complaint.

In 2013, plaintiff commenced the two above-captioned actions, each solely in plaintiff's capacity as trustee of one of two trusts. In each action, plaintiff asserts, as relevant to this appeal, a cause of action for breach of contract based on each defendant's alleged breaches of the representations and warranties it had made in connection with the sale, in 2007, of the residential mortgage-backed securities that are pooled in the relevant trust. Each defendant moved to dismiss the action against it, arguing, in pertinent part, that, because plaintiff's principal place of business is in California, plaintiff's contractual claim is barred by California's four-year statute of limitations, pursuant to the borrowing statute (CPLR 202), although it is conceded that the claims would be timely under New York's six-year statute of limitations (CPLR 213[2]). Upon defendants' respective appeals from Supreme Court's denial of

this aspect of their motions, we reverse.[1]

CPLR 202 requires that an action brought by a nonresident plaintiff, "based upon a cause of action accruing without the state," be timely under the respective statutes of limitations of both New York and "the place without the state where the cause of action accrued." In *Global Fin. Corp. v Triarc Corp.* (93 NY2d 525, 529-530 [1999]), the Court of Appeals set forth the general rule that, in cases where (as here) the alleged injury is purely economic, a cause of action is deemed, for purposes of CPLR 202, to have accrued in the jurisdiction of the plaintiff's residence.

Plaintiff, a California domiciliary, argues that the plaintiff-residence rule of *Global Financial* — a case in which the plaintiff was a corporation suing to recover for an injury to itself — should not be applied here, where plaintiff is suing solely in its capacity as trustee of the subject trusts. Rather, plaintiff argues that we should apply the multi-factor test used in *Maiden v Biehl* (582 F Supp 1209 [SD NY 1984]), which also dealt with a trustee-plaintiff, to determine where the injury occurred. However, we need not decide whether the plaintiff-residence rule or the multi-factor test applies in this context because, even under the multi-factor test, we find that the

[1]Although Supreme Court dismissed certain of plaintiff's claims in each action, plaintiff has not taken an appeal.

injury/economic impact was felt in California and the claims are thus deemed to have accrued there.

Initially, it is undisputed that the domiciles of the trust beneficiaries, which are in various jurisdictions, do not provide a workable basis for determining the place of accrual. As to the New York choice-of-law clauses of the relevant agreements, because these provisions do not expressly incorporate the New York statute of limitations, they "cannot be read to encompass that limitation period" (*Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010]). By contrast, the subject trust in each action comprises a pool of mortgage loans, originated by California lenders and encumbering California properties, either exclusively (in the Barclays case) or predominantly (in the HSBC case), and, as previously discussed, administered in California by plaintiff, a California-based trustee.[2] Further, it is undisputed that the relevant pooling and servicing agreement (PSA) for each trust contemplates the payment of state taxes, if

[2]While plaintiff argues that each defendant selected the (exclusively or predominantly) California mortgages to be pooled in the trust at its New York office, such operations are irrelevant to determining where the injury to the trust corpus was sustained (*see Global Financial*, 93 NY2d at 528 ["plaintiff's cause of action accrued where it sustained its alleged injury"]).

any, in California.[3] To the extent the physical location of the notes memorializing the securitized mortgage loans has relevance to the analysis, each trust's PSA contemplates that the notes may be maintained in California, but neither contemplates maintaining the notes in New York.[4]

We agree with defendants that the claims are barred by the California's four-year statute of limitations for contract actions (Cal Code Civ Proc § 337). As previously noted, the alleged breaches of representations and warranties occurred in 2007, when allegedly nonconforming mortgage loans were deposited into the trust pools, and these actions were not commenced until 2013. Under California law, plaintiff's claims for the alleged breaches accrued "at the time of the sale" (*Mary Pickford Co. v*

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[3]Although it is undisputed that the trusts have not incurred any state tax liability, it may be inferred from plaintiff's contractual acknowledgment that each trust is subject to the tax regime of California that the situs of each trust corpus — and thus of any injury to that trust corpus — is California

[4]Specifically, the PSA in the HSBC case provides that the notes may be maintained in California, Minnesota or Utah, and the PSA in the Barclays case provides that the notes may be maintained only in California, unless the rating agencies permit them to be maintained in another state. It is undisputed that, in fact, the HSBC notes are maintained in Minnesota and the Barclays notes are maintained in California. We note that, contrary to plaintiff's argument, the certificates of interest in the trust held by its beneficiaries are irrelevant to the analysis because such certificates are not part of the trust corpus.

Bayly Bros., Inc., 12 Cal 2d 501, 521, 86 P2d 102, 112 [1939]). Although plaintiff seeks to enforce the repurchase protocol under the relevant agreements, its failure to demand cure or repurchase until after the expiration of four years from the original breach did not serve to extend the statute of limitations (*Meherin v S.F. Produce Exch.*, 117 Cal 215, 217, 48 P 1074, 1075 [1897]; *Taketa v State Bd. of Equalization*, 104 Cal App 2d 455, 460, 231 P2d 873, 875 [Cal Ct App 1951]). Moreover, under New York law, which, pursuant to the choice-of-law clauses, governs substantive matters, the contractual provisions for demand under the repurchase protocol are not conditions precedent to suit for a preexisting breach (*see ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 597 [2015]). Nor do any of the relevant agreements expressly waive or extend the statute of limitations. Plaintiff's claims are not saved by California's discovery rule, inasmuch as the record establishes that plaintiff reasonably could have discovered the alleged breaches within the limitation period, based on information in the prospectuses, the underwriting and default information it received after the closing (*cf. April Enters., Inc. v KTTV*, 147 Cal App 3d 805, 832 [Cal Ct App 1983] [a discovery rule may apply in contract cases where "breaches will not be *reasonably* discoverable by plaintiffs until a future

time”] [emphasis added]). Finally, whether a California court would apply New York’s statute of limitations is irrelevant to the analysis under CPLR 202, which demands application of the shorter of the two limitation periods at issue (*see Ledwith v Sears, Roebuck & Co.*, 231 AD2d 17, 24 [1st Dept 1997] [“CPLR 202 is to be applied as written, without recourse to a conflict of law analysis”]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Manzanet-Daniels, J.P., Andrias, Gische, Kern, Singh, JJ.

4907 John J. Clavin, Index 20292/15E
Plaintiff,

-against-

CAP Equipment Leasing Corporation, et al.,
Defendants-Respondents.

- - - - -

CAP Equipment Leasing Corporation, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Schiavone Construction Corporation, et al.,
Third-Party Defendants-Appellants.

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Newman Myers kreines Gross Harris, P.C., New York (Stephen N. Shapiro of counsel), for appellants.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered December 14, 2015, which, to the extent appealed from, denied third-party defendants' cross motion for summary judgment dismissing the third-party complaint, unanimously reversed, on the law, without costs, and the third-party claims dismissed in their entirety. The Clerk is directed to enter judgment accordingly.

The third-party claims for common law indemnification and contribution cannot be sustained against plaintiff's employer,

since plaintiff's medical records clearly show that he did not sustain a "grave injury" as defined in Workers' Compensation Law § 11 (*see Castro v United Container Mach. Group*, 96 NY2d 398, 400 [2001]; *Nunez v Park Plus, Inc.*, 146 AD3d 488, 489 [1st Dept 2017]).

The motion court should have dismissed CAP Rents' third-party claim for contractual indemnification. General Obligations Law § 5-322.1 prohibits "indemnity agreements in which owners or contractors sought to pass along the risks for their own negligent actions to other contractors or subcontractors..." *(Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], quoting *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 180 (1990)]).

The sole potential basis for liability against the contractual indemnitee CAP Rents is for common-law negligence. If CAP Rents was found to be negligent at trial, the indemnification clause would become unenforceable under GOL § 5-322.1, since it would indemnify CAP Rents for its own negligence (*Itri Brick*, 89 NY2d at 794). Alternatively, if CAP Rents were found not negligent, there would be no basis to seek contractual indemnification. Because there is no outcome that would entitle CAP Rents to contractual indemnification, summary judgment is

warranted (*Williams v 7-31 Ltd. Partnership*, 54 AD3d 586 [1st Dept 2008]).

The motion court erred in sustaining CAP Rents' third-party claim for failure to procure insurance as against Schiavone. A reservation contract for the lease of construction equipment will not require the procurement of additional insured coverage "unless such a requirement is expressly and specifically stated" (*Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647 [2d Dept 2003]; *see also Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 701 [2d Dept 2016]). Schiavone has met its burden on summary judgment of showing that the reservation contract did not require Schiavone to name CAP Rents as an additional insured. The insurance procurement provision at issue states that Schiavone is to procure insurance "for the benefit of" CAP Rents. There is no other provision in the reservation contract naming CAP Rents as an additional insured. Absent any express and specific language requiring that CAP Rents be named as an additional insured, the reservation contract at issue does not require that Schiavone

procure additional insured coverage.

CAP Equipment Leasing Corporation lacks standing to enforce the contract, to which it is not a party.

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

ENTERED: DECEMBER 5, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Kahn, Moulton, JJ.

5087-
5088 The People of the State of New York,
Respondent,

-against-

Titus Halteman,
Defendant-Appellant.

Ind. 4220/10

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

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

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered August 18, 2011, convicting defendant, after a jury trial, of sexual abuse in the first degree, and sentencing him to a term of two years, unanimously modified, as an exercise of discretion in the interest of justice, to reduce the prison component of the sentence to 364 days, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations.

The verdict was not legally repugnant, and the court properly denied defendant's application to resubmit the case to

the jury for further deliberations. Under the court's charge, the jury could have found defendant guilty of first-degree sexual abuse but not guilty of first-degree rape (*see People v Muhammad*, 17 NY3d 532, 540 [2011]). The court followed the statutory definitions in charging the jury that rape required penetration, while sexual abuse only required touching. Even though, at defendant's request, the court gave the jury a dictionary definition of the vagina, it never instructed the jury that a touching of the victim's vagina by defendant's penis would necessarily constitute penetration. This remained a factual question, which the jury apparently resolved by finding a touching, but not a penetration.

We find, however, that defendant's sentence was excessive to the extent indicated and modify accordingly.

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5103-
5104 The People of the State of New York, Ind. 1306/13
Respondent,

-against-

Alfredo Lopez-Suazo,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered March 7, 2014, as amended April 18, 2014, convicting defendant, after a jury trial, of operating a motor vehicle while intoxicated, and sentencing him to a term of one to three years, unanimously affirmed.

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for

reversal. To the extent there were isolated improprieties, they were not so egregious as to deprive defendant of a fair trial, and any error was harmless in light of the overwhelming evidence of defendant's guilt (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5105 Aurea Colon, Index 306398/11
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Nwokoro & Scola, New York (Chukwuemeka Nwokoro of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered September 15, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she suffered injuries when the elevator in a building owned by defendant fell from the 20th to the 11th floor. While defendant demonstrated a lack of actual or constructive notice of an elevator defect that would cause such a malfunction (*see Meza v 509 Owners LLC*, 82 AD3d 426, 427 [1st Dept 2011]), it is not entitled to dismissal of the action because plaintiff can rely on the doctrine of res ipsa loquitur to prove negligence (*see Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 162-163 [1st Dept 2015]; *Stewart v World El.*

Co, Inc, 84 AD3d 491 [1st Dept 2011]).

Plaintiff submitted evidence to support each of the elements of res ipsa loquitur, namely "(1) that the occurrence would not ordinarily occur in the absence of negligence, (2) that the injury was caused by an agent or instrumentality within the exclusive control of defendant, and (3) that no act or negligence on the plaintiff's part contributed to the happening of the event" (*Miller v Schindler El. Corp.*, 308 AD2d 312, 313 [1st Dept 2003]; *see also Rodriguez v Serge Els. Co.*, 99 NY2d 587 [2003]). The testimony of plaintiff, together with that of a witness who was in the elevator with her when the elevator allegedly dropped, is sufficient to raise an issue of fact as to whether the elevator did in fact drop suddenly (*see Stewart v World El. Co., Inc.*, 84 AD3d 491 [1st Dept 2011]). A free-fall or sudden drop of an elevator does not ordinarily happen in the absence of negligence (*id.*). We reject, as we have previously, defendant's argument that it lacked exclusive control of the elevator because a passenger in the elevator activated the emergency stop button and jumped to try to stop the free fall once the elevator suddenly dropped (*see Miller* at 314). Although it is not necessary to consider the affidavit of plaintiff's expert witness, we note that plaintiff's testimony is also supported by

the opinion of her expert, who explained how the accident could have occurred as plaintiff described. The expert affidavit is properly part of the appellate record since it was submitted by defendant and expressly incorporated by plaintiff into her opposition papers.

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: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5106-
5107 In re Julio A.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Bruce A. Young, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about April 4, 2016, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree (two counts), grand larceny in the fourth degree (two counts), criminal possession of stolen property in the fourth degree, assault in the third degree, and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 15 months, unanimously affirmed, without costs. Appeal from fact-finding order, same court and Judge, entered on or about February 4, 2016, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Appellant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations regarding identification and credibility.

To the extent that appellant argues that a showup identification should have been suppressed as unduly suggestive and that it tainted the victim's in-court identification of him, he never moved to suppress that evidence, and he thus failed to present a sufficient factual record for review (*see* Family Ct Act § 330.2). To the extent that appellant argues that the showup rendered the identification evidence unreliable, that claim is unavailing, because the evidence at the fact-finding hearing

established that there was a reliable identification, in very close temporal and geographic proximity to the crime (*see generally People v Howard*, 22 NY3d 388, 402-03 [2013]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5109 Daryl Wiley, Jr., Index 22443/13E
Plaintiff,

-against-

ESI New York Inc. also known
as IESI NY, et al.,
Defendants-Respondents.
- - - - -
ESI New York Inc. also known
as IESI NY, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Verizon New York Inc.,
Third-Party Defendant-Appellant.
- - - - -
ESI New York Inc. also known
as IESI NY, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

Granite Avenue Utility Corp.,
Second Third-Party Defendant-Appellant.

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Milbert Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered on or about February 22, 2017, which, insofar as appealed from as limited by the briefs, denied third-party defendant

Verizon New York Inc. and second third-party defendant Granite Avenue Utility Corp.'s motion for summary judgment dismissing the third-party complaints, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was injured when the motorcycle he was driving collided with a truck owned by defendant ESI New York, Inc., and operated by defendant Krzysztof M. Hajnos. Defendants contend that the cause of the accident was Granite's negligent performance of road work, pursuant to a contract with Verizon, which had left the road in a hazardous condition.

Verizon and Granite established prima facie that Granite's road work was not a proximate cause of the accident. Plaintiff testified that he was forced to stop abruptly when a truck cut him off and that the condition of the road was smooth and did not impede his ability to control his dirt bike. Hajnos, the driver of the truck, testified that he saw no potholes or cracks or other defects in the road.

In opposition, defendants failed to raise an issue of fact as to the condition of the road (*see Santiago v City of New York*, 61 AD3d 574 [1st Dept 2009]). None of their eyewitnesses said that they saw plaintiff's motorcycle hit a defect in the road,

and the police report, which described the accident in terms of "probably" and "likely," is speculative (*see id.*). Moreover defendants' expert failed to opine that the road condition was a factor in causing the accident. Defendants also failed to demonstrate that additional discovery could lead to evidence sufficient to defeat the motion (*see* CPLR 3212[f]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5110 The People of the State of New York, Ind. 2687/12
Respondent,

-against-

Thomas Cordero,
Defendant-Appellant.

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

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 11, 2013, convicting defendant, after a jury trial, of attempted robbery in the second and third degrees and assault in the third degree, and sentencing him,, as a second felony offender, to an aggregate term of 5 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the jury's credibility determinations. The jury reasonably believed that defendant intended to forcibly take the victim's property when he hit the victim in the head and immediately grabbed at his pocket (*see People Gordon*, 23 NY3d

643, 650 [2014]; *Matter of Vere C.*, 183 AD2d 428, 429 [1st Dept 1992]).

There was also ample proof of physical injury, because the victim testified that due to the severe pain in his mouth, it was difficult for him to open his mouth for two days, and he could not eat during that time (*see e.g. People v Medina*, 139 AD3d 460, 460 [1st Dept 2016], *lv denied* 28 NY3d 933 [2016]; *People v Mullings*, 105 AD3d 407, 408 [1st Dept 2013], *lv denied* 21 NY3d 945 [2013]). The statutory element of "substantial pain" may be satisfied by relatively minor injuries causing moderate, but "more than slight or trivial pain" (*see People v Chiddick*, 8 NY3d 445, 447 [2007]), even in the absence of any medical treatment (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5111 Hilarion Torres, Index 308396/08
Plaintiff-Appellant-Respondent, 83783/09

-against-

Love Lane Mews, LLC, et al.,
Defendants-Respondents,

Love Lane Pooh, LLC,
Defendant.

- - - - -

Love Lane Mews, LLC, et al.,
Third-Party Plaintiffs-Respondents,

Love Lane Pooh, LLC,
Third-Party Plaintiff,

-against-

Galaxy General Contracting Corp.,
Third-Party Defendant-Respondent-Appellant.

_____

Oresky & Associates, PLLC, Bronx (John J. Nonnenmacher of counsel), for appellant-respondent.

Doyle & Broumand, LLP, Bronx (Michael B. Doyle of counsel), for Galaxy General Contracting Corp., respondent-appellant.

Nicoletti Gonson Spinner LLP, New York (Benjamin N. Gonson of counsel), for Love Lane Mews, LLC, respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for Red Hook Construction Group-1, LLC, respondent.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.),

entered August 18, 2016, which, insofar as appealed from as

limited by the briefs, denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim against defendant Love Lane Mews, LLC (Love Lane) and defendant Red Hook Construction Group-I, LLC (Red Hook) (collectively, defendants), granted Red Hook's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against it, granted the motion of Red Hook and Love Lane for summary judgment dismissing the Labor Law § 241(6) claim as against them insofar as predicated on a violation of Industrial Code (12 NYCRR) § 23-3.3(g), granted Love Lane's motion for summary judgment on its contractual indemnification claim against third-party defendant Galaxy General Contracting Corp. (Galaxy), and denied Galaxy's cross motion for summary judgment dismissing the contractual indemnification claim, unanimously modified, on the law, to deny Red Hook's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against it, and otherwise affirmed, without costs.

Plaintiff was allegedly struck by falling bricks while working near one of four connected buildings on a construction site. The motion court correctly denied both plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim and defendants' motion for summary judgment dismissing that claim, as

there are issues of fact about whether the bricks fell accidently or were deliberately dropped by demolition workers. If the latter, then the bricks did not constitute falling objects pursuant to Labor Law § 240(1) (*see Solano v City of New York*, 77 AD3d 571, 572 [1st Dept 2010]; *cf. Hill v Acies Group, LLC*, 122 AD3d 428 [1st Dept 2014] [the plaintiff established Labor Law § 240(1) claim where the defendants' witnesses confirmed that a brick fell out of the hands of a masonry worker]).

The motion court erred in granting Red Hook's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against it, in light of issues of fact about whether Red Hook had the authority to control the injury-producing work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [1st Dept 2008]).

The motion court correctly dismissed the Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code (12 NYCRR) § 23-3.3(g), based on plaintiff's testimony that his accident occurred outside rather than "within [a] building" (12 NYCRR 23-3.3[g]).

The motion court correctly granted Love Lane's motion for summary judgment on its contractual indemnification claim against

Galaxy, conditional on a finding of Galaxy's negligence. Since plaintiff's only remaining claim against Love Lane, the owner of the buildings, is the Labor Law § 240(1) claim, its liability, if any, will be purely vicarious, and Love Lane is accordingly entitled to indemnification to the extent of Galaxy's negligence, as provided in the contract (*see Crimi v Neves Assoc.*, 306 AD2d 152, 153-154 [1st Dept 2003]). Galaxy's argument that it was not negligent as a matter of law is unpersuasive, in light of evidence that plaintiff, a Galaxy employee, was working in an area where he had been prohibited from working, allegedly in accordance with instructions given to him by a Galaxy foreman.

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5112 Anonymous, Index 305863/14
Plaintiff-Appellant,

-against-

Anonymous,
Defendant-Respondent.

_____

Alter, Wolff & Foley LLP, New York (Eleanor B. Alter of counsel), for appellant.

Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Bernard E. Clair of counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered February 9, 2017, which, to the extent appealed from as limited by the briefs, granted defendant wife's application for a declaratory judgment that she is entitled to retain as her separate property the insurance proceeds issued to replace the loss of her separate property jewelry, and directed plaintiff husband to cooperate so that such proceeds are paid directly to the wife, unanimously affirmed, without costs.

The motion court properly determined that the wife was entitled to the insurance proceeds paid to the parties by joint check, notwithstanding that the claim was filed under a joint insurance policy. The proceeds were indisputably to compensate her for the loss of her separate property, as defined by the

parties' prenuptial agreement. Contrary to the husband's contention, the wife was not judicially estopped from asserting a separate property claim on the insurance proceeds check based on her position during a prior motion sequence that joint tax refund checks were joint property under the parties' prenuptial agreement. The judicial estoppel doctrine "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (*Dhamoon v 230 Park S. Apts., Inc.*, 48 AD3d 103, 112 [1st Dept 2007]; *see also Maas v Cornell Univ.*, 253 AD2d 1, 5 [3d Dept 1999] *affd*. 94 NY2d 87 [1999]). Judicial estoppel does not apply where, as here, the prior action does not result in a judgment *(see Douglas v Dashevsky*, 62 AD3d 937, 938 [2d Dept 2009]). The prior tax refund order only determined that the husband did not demonstrate, as a matter of law, that tax refund checks issued in both parties' names in connection with jointly filed tax returns were not martial property because husband had paid the taxes. The court determined that there were issues of fact, and reserved decision on, whether the wife knowingly signed the checks over to the husband, allowing him to deposit the joint tax refunds into his separate account, or he did so without her

knowledge.

Regarding the husband's further argument that the motion court abused its discretion by disregarding the "law of the case," the doctrine has no binding force on appeal (*see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]; *Lipsztein v Donovan*, 289 AD2d 51, 52 [1st Dept 2001]). The court properly determined that the wife is entitled to retain the insurance proceeds received for missing jewelry as her separate property because it is in accordance with the intent and reasonable expectations of the parties. The prenuptial agreement expressly provided that any jewelry gifted by the husband to the wife constitutes the wife's separate property and not marital property (*see e.g. Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 54 [1st Dept 2015]; *Strong v Dubin*, 75 AD3d 66, 68 [1st Dept 2010]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5115 The People of the State of New York, Respondent, Ind. 3158/14 3462/14

-against-

Davon Black, Defendant-Appellant.

_____

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered April 14, 2015, convicting defendant, after a jury trial, of burglary in the first degree and robbery in the second and third degrees, and sentencing him to an aggregate term of eight years, unanimously affirmed.

There was legally sufficient evidence to support the element of physical injury (*see e.g. People v Medina*, 139 AD3d 460, 460 [1st Dept 2016], *lv denied* 28 NY3d 933 [2016]). In a struggle over the victim's phone, defendant slammed her against a wall and hurled her down a flight of stairs, causing bruises on her legs and face that were visible in photographs taken four days later. The victim also felt pain for several days while chewing her food. The statutory element of "substantial pain" may be

satisfied by relatively minor injuries causing moderate, but "more than slight or trivial pain" (*see People v Chiddick*, 8 NY3d 445, 447 [2007]), even in the absence of any medical treatment (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5116-
5116A In re Andrea L. P., and Others,

Dependent Children under the Age
of Eighteen, etc.,

Cassandra M.P.,
Respondent-Appellant,

Cardinal McCloskey Community Services,
Petitioner-Respondent.

_____

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

Geoffrey P. Berman, Larchmont, for respondent.

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

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Orders, Family Court, New York County (Stewart Weinstein, J.), entered on or about October 13, 2016, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

This Court previously determined that the agency met its burden of establishing permanent neglect (140 AD3d 477 [1st Dept 2016]). On remittitur, the Family Court properly determined that

a preponderance of the evidence established that termination of the mother's parental rights was in the children's best interests (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1983]).

A suspended judgment was not warranted under the circumstances, because there was no evidence that respondent had a realistic and feasible plan to provide an adequate and stable home for the children, all of whom have special needs (*see Matter of Charles Jahmel M. [Charles E.M.]*, 124 AD3d 496 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]; *Matter of Jesus Michael P. [Sonia R.]*, 122 AD3d 520 [1st Dept 2014]). There is also no evidence that further delay will result in a different outcome, and the children, having been in foster care since 2012, deserve permanency after this extended period of uncertainty ((*see Matter of Selvin Adolph F. [Thelma Lynn W.]*, 146 AD3d 418 [1st Dept 2017]; *Matter of Autumn P. [Alisa R.]*, 129 AD3d 519 [1st Dept

2015]). Furthermore, it is noted that the evidence at the hearing showed that respondent will be able to continue to see the children after the adoption (*Selvin Adolph F.* at 419]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5117 The People of the State of New York, Respondent, SCI 2779/09

-against-

Anonymous,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Sharmeen Mazumder of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert G. Seewald, J. at plea; Steven L. Barrett, J. at sentencing), rendered October 31, 2014, as amended, February 20, 2015, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 10 years, unanimously affirmed.

Defendant's plea was not rendered invalid by the court's erroneous advice that the term of postrelease supervision would be five years, when in fact it was actually three years, because "warning defendant of a *greater* term of postrelease supervision than he actually faced. . . [did not] deprive defendant of the information he needed to knowingly, voluntarily and intelligently

choose among alternative courses of action" (*People v Carter*, 67 AD3d 603, 604 [1st Dept 2009] [internal quotation marks omitted], *lv denied* 14 NY3d 886 [2010]; *see also People v Collier*, 22 NY3d 429, 434 [2013]). Defendant's related claim of ineffective assistance of counsel is without merit.

The record fails to support defendant's contention that the sentencing court misapprehended the extent of its discretion to impose a lower sentence than called for under the plea agreement. In any event, there is no reason to remand for resentencing, because there is no indication that any such error resulted in harm to defendant (*see People v Barzge*, 244 AD2d 213, 214 [1st Dept 1997], *lv denied* 91 NY2d 888 [1998]). Given the court's lengthy admonishment of defendant for failing to take responsibility for his actions, "there is no indication in the record that the sentencing court expressed any inclination,

desire or basis for imposing a lesser sentence but refrained from imposing such a sentence due to its mistaken belief" (*id.*).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5120 Martin Flynn, Index 113859/11
Plaintiff-Respondent, 590270/13

-against-

Turner Construction Company, et al.,
Defendants-Respondents,

LVI Services, Inc.,
Defendant-Appellant.

- - - - -

Turner Construction Company, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Five Star Electric Corp.,
Third-Party Defendant,

LVI Services, Inc.,
Third-Party Defendant-Appellant.

_____

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for appellant.

Law Office of Barry M. Sweeney, New Suffolk (Barry M. Sweeney of counsel), for Martin Flynn, respondent.

Mound Cotton Wollan & Greengrass LLP, New York (Steven A. Torrini of counsel), for Turner Construction Company and MSG Holdings, L.P., respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 13, 2016, which, to the extent appealed from as limited by the briefs, denied defendant/third-party defendant LVI Services, Inc.'s motion for summary judgment dismissing the Labor

Law § 200 and common-law negligence claims and all third-party and cross claims against it, and granted defendants/third-party plaintiffs' motion for conditional summary judgment on their contractual indemnification claim against LVI, unanimously affirmed, without costs.

LVI failed to establish prima facie that plaintiff was not exposed to toxins at sufficient levels to cause his claimed respiratory illness (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]). The record contains ample evidence of plaintiff's exposure to toxins at the construction site, and LVI's expert did not opine that those toxins were not capable of causing plaintiff's respiratory illness. Nor did LVI establish prima facie that it was not responsible for the release into the air of toxins that allegedly caused plaintiff's respiratory illness. LVI was responsible for asbestos abatement, lead abatement, and concrete demolition on the job site. The record shows that there was demolition going on throughout the building generating dust clouds thick enough to be visible in progress photographs and that there were widespread complaints about the air quality, including the presence of silica dust, which occurs naturally during concrete demolition. In view of LVI's failure to make its prima facie showing, we need not examine plaintiff's opposition

to LVI's motion (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Under its subcontract with defendant/third-party defendant Turner Construction Company, LVI must defend and indemnify Turner and defendant/third-party defendant MSG Holdings, L.P., for liability and loss, including legal fees, merely claimed to have resulted from injury arising out of or in connection with LVI's work, unless and until the injury is determined to have been caused by the negligence or willful misconduct of Turner, MSG, or another of Turner's subcontractors. Since there has not yet been a determination of that issue, Turner and MSG are entitled to conditional summary judgment on their claim against LVI for contractual indemnification (*see Rainer v Gray-Line Dev. Co., LLC*, 117 AD3d 634 [1st Dept 2014]; *Cerverizzo v City of New York*, 116 AD3d 469, 471-472 [1st Dept 2014]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5122 The People of the State of New York, Ind. 3132/14
Respondent,

-against-

Raybon C.,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Marc J. Whiten, J.), rendered September 10, 2015, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5123 Feivel Funding Associates, Index 21911/12E
Plaintiff-Respondent,

-against-

Zhanna Bender,
Defendant-Appellant,

John Doe No. 1 through
John Doe No. 100, etc.,
Defendants.

_____

Law Offices of Edmond J. Pryor, Bronx (Edmond J. Pryor of counsel), for appellant.

Windels Marx Lane & Mittendorf, LLP, New York (Sean K. Monahan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered March 10, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment foreclosing on a note and mortgage given by defendant Zhanna Bender and dismissing defendant's defense and counterclaim alleging usury, unanimously reversed, on the law, without costs, and the motion denied.

Defendant borrowed $350,000 from plaintiff, giving a two-year note secured by a mortgage on the home she was buying. On its face, the note required payment of 10% annual interest rate, which is lower than the maximum legal rate for such loans, which

is 16 percent (General Obligations Law § 5-501[1]; Banking Law § 14-a[1]). However, in her verified answer, defendant alleged that, as a condition for making the loan, defendant's principal required her to make a cash payment of $57,000 to the attorney representing her in the transaction, who was also the principal's brother, as well as other cash payments totaling $22,000. She alleged that she made the payments, which brought the effective rate of interest on the note to over 18%, rendering it usurious (*see* General Obligations Law § 5-501[2]) and unenforceable (*see* General Obligations Law §§ 5-521, 5-511; Penal Law § 190.40).

In light of the harsh sanction of forfeiture, a borrower asserting a usury defense bears the burden of establishing the defense by clear and convincing evidence as to all its elements (*Freitas v Geddes Sav. & Loan Assn.*, 63 NY2d 254, 261 [1984]). However, "in the context of a summary judgment motion, the burden is on a [plaintiff] to establish, prima facie, that the transaction was not usurious" (*Abir v Malky, Inc.*, 59 AD3d 646, 649 [2d Dept 2009]).

In support of its motion for summary judgment, plaintiff made a prima facie showing that defendant had defaulted on the note and that the note was not usurious, through the affidavit of its principal who averred that defendant had defaulted and denied

that plaintiff required or received any cash payment in connection with the loan.

In opposition, defendant submitted her own affidavit averring that she delivered $57,000 in cash, and subsequent payments of $22,000, to the attorney because plaintiff's principal required it as condition for making the loan. She also submitted her friend's affidavit averring that she helped count the $57,000 cash, went with defendant when she delivered the money to the attorney, and saw her enter the attorney's office with the money and exit without it. Although the absence of documentary evidence is contrary to common experience in such a large cash transaction, we cannot say that defendant's allegations concerning the $57,000 cash payment, which are partly corroborated by a witness's affidavit, are incredible as a matter of law, particularly in the absence of any affidavit from the attorney denying these allegations. The issues of credibility presented on both sides should be left to the trier of facts (*see Best v 1482 Montgomery Estates, LLC*, 114 AD3d 555 [1st Dept 2014]; *cf. Espinal v Trezechahn 1065 Ave. Of the Ams., LLC*, 94 AD3d 611 [1st Dept 2012]).

Contrary to plaintiff's argument that parol evidence cannot be used to raise an issue of fact as to whether a note legal on

its face is usurious, usury may be established by extrinsic facts concerning the "real character" of the transaction (*O'Donovan v Galinski*, 62 AD3d 769, 769 [2d Dept 2009]; see *Greenfield v Skydell*, 186 AD2d 391 [1st Dept 1992]; *Freitas v Geddes Sav. & Loan Assn.*, 63 NY2d at 262).

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5124 Pedro Gutierrez, Index 305823/13
Plaintiff-Appellant, 83954/14

-against-

451 Lexington Realty LLC, et al.,
Defendants-Respondents.

- - - - -

451 Lexington Realty LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Vortex Electric Co. Inc., et al.,
Third-Party Defendants-Respondents.

_____

Jacob Oresky & Associates, PLLC, Bronx (John J. Nonnenmacher counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for 451 Lexington Realty LLC and Flintlock Construction Services, LLC, respondents.

Russo & Toner LLP, New York (Catherine J. Fiorentino of counsel), for Vortex Electric CO., Inc. and Sigma Electric Inc., respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about March 2, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established entitlement to judgment as a matter of

law on the issue of liability where he was injured during the course of his employment when a reel of electrical wire weighing 500 to 1,000 pounds fell and struck his foot. Workers were rolling the reel up two wooden planks for loading onto a van when it fell, and although there are questions as to whether plaintiff was actually involved in moving the reel, plaintiff demonstrated that he sustained injuries from the falling reel due to absence of an adequate safety device (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]; *Aramburu v Midtown W.B., LLC*, 126 AD3d 498 [1st Dept 2015]).

Defendants and third-party defendants (collectively defendants) fail to raise a triable issue of fact. They contend that issues exist as to whether a forklift was available onsite, and whether plaintiff was a recalcitrant worker for failing to use it despite being aware of it (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]). However, even if a forklift was available and plaintiff was aware of it, defendants have not offered evidence showing that he was actually instructed to use it (*see Noor v City of New York*, 130 Ad3d 536, 540 [1st Dept 2015], *lv dismissed* 27 NY3d 975 [2016]; *Vacca v Landau Indus.*, 5 AD3d 119 [1st Dept 2004]). Rather, it is undisputed that plaintiff's foreman had instructed the workers to move the reel

as they did, and to the extent defendants rely on the testimony of plaintiff's employer that plaintiff was not to blindly follow the foreman's instructions, such overlooks the realities of construction work (see *DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]).

Nor is there a triable issue as to whether plaintiff was the sole proximate cause of the accident. Even assuming that plaintiff did assist in moving the reel and in the course of doing so, removed his hand from the reel, such was not the sole proximate cause of the accident, as he was not provided with an adequate safety device to hoist the reel in the first instance (*see Serowik v Leardon Boiler Works Inc.*, 129 AD3d 471 [1st Dept 2015]).

The contention that Labor Law § 240(1) is inapplicable because the loading of the reel did not fall within the scope of construction work, is unavailing. Although it was not actual construction work, and occurred in the loading area of the construction site, it was still part of the construction project (*see Campisi v Epos Contr. Corp.*, 299 AD2d 4, 6-7 [1st Dept 2002]; *see also Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]).

Furthermore, plaintiff's motion was not premature.

Defendants have not demonstrated how the testimony of plaintiff's coworker would present facts that would "justify opposition to the motion" (*Aburto v City of New York*, 94 AD3d 640, 641 [1st Dept 2012]; CPLR 3212[f]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5125 The People of the State of New York, Ind. 1293/07
Respondent,

-against-

Angel Santiago,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Thomas Farber, J.), entered on or about January 17, 2013, which adjudicated defendant a level one sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's challenge to his designation as a sexually violent offender is unpreserved and we decline to review it in the interest of justice. In any event, the court properly designated defendant a sexually violent offender because he was

convicted of an enumerated sexually violent offense, and the court lacked discretion to do otherwise (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). We decline to revisit our prior holdings on this issue. Defendant's due process argument is similarly unpreserved and unavailing.

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5126 The People of the State of New York, Ind. 3279/13
Respondent,

-against-

Joseline Rivera,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Anokhi A. Shah of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Emily Chalela of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J., at plea and sentence), rendered May 10, 2016, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5127N Reed Smith LLP,
Plaintiff,

-against-

LEED HR, LLC,
Defendant-Appellant,

Big Red Investments Partnership, Ltd., et al.,
Defendants,

Sands Brothers Venture Capital II, LLC, et al.,
Defendants-Respondents.

Index 654213/12

Law Office of Michael R. Horenstein, New York (Michael R. Horenstein of counsel), for appellant.

Law Office of Wallace Neel, PC, New York (Wallace Neel of counsel), for respondents.

Order, Supreme Court, New York (Charles E. Ramos, J.), entered June 13, 2016, which granted defendants-respondents' motion to attach certain stock certificates deposited with the court in this interpleader action, unanimously modified, on the law and the facts and in the exercise of discretion, to the extent of increasing the amount of the undertaking to $100,000, and otherwise affirmed, without costs.

A plaintiff seeking an order of attachment must show the probability of its success on the merits of its cause of action,

that one or more grounds for attachment provided for in CPLR 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff (CPLR 6212[a]).

Defendants-respondents demonstrated their probability of success on the merits of their fraudulent conveyance cross claim, by submitting considerable evidence of a far-reaching fraudulent scheme, whereby the assets of their debtor, O2HR LLC, were moved through a series of entities before being used to purchase the shares at issue (*see DLJ Mtge. Capital, Inc. v Kontogiannis*, 110 AD3d 522 [1st Dept 2013]; Debtor and Creditor Law §§ 276, 278; *see also* Kentucky Revised Statutes § 378A.040). Fair consideration was not given in exchange for the shares (*see Commodity Futures Trading Commn. v Walsh*, 17 NY3d 162, 175 [2011]; *Sardis v Frankel*, 113 AD3d 135, 141-142 [1st Dept 2014]; Debtor and Creditor Law § 272[a]). Defendant LEED HR, LLC has not shown that it actually paid for the shares; even if it did pay all or part of the recited purchase price, it paid far below the market price for the shares. The prior transfers of O2HR's assets and of the shares were supported by either no consideration or insufficient consideration.

Respondents have also shown their likelihood of success on the merits of their claims for unjust enrichment and equitable

restitution (*Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]["the essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered"]).

Two grounds under CPLR 6201 are met here. First, LEED is a Kentucky limited liability company not qualified to do business in New York (*see Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 310 [2010]; *Considar, Inc. v Redi Corp. Establishment*, 238 AD2d 111 [1st Dept 1997]; CPLR 6201[1]). Second, respondents have established that, through a fraudulent scheme, O2HR's assets have been secreted in a concerted effort to defraud them or to frustrate the enforcement of a judgment that might be rendered in their favor (*see e.g. DLJ Mtge. Capital, Inc.*, 110 AD3d at 522; CPLR 6201[3]).

The remaining elements for an attachment have been met. However in the exercise of our discretion we increase the amount of the undertaking as noted (CPLR 6212[b]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Gische, J.P., Kapnick, Oing, Moulton, JJ.

5128 Index 250243/16
[5514] In re Albert C., OP 126/17
Petitioner,

-against-

Hon. Michael A. Gross, etc.,
Respondent.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane G. Temkin of counsel), for petitioner.

_____

The CPLR article 78 application seeking relief in the nature of a writ of mandamus is denied and the proceeding dismissed, without costs.

Pursuant to Mental Hygiene Law § 10.07(a), a trial shall be commenced within 60 days of the court's probable cause determination. However, this deadline is not strictly construed (*Matter of State of New York v Keith F.*, 149 AD3d 671 [1st Dept 2017], *lv denied* 29 NY3d 917 [2017]). The State's failure to comply with the deadline does not affect the validity of the article 10 petition or actions subject to deadlines (*id.; see also Matter of Grossman v Rankin*, 43 NY2d 493, 501 [1977]). The 32-day delay of trial did not otherwise violate petitioner's due process rights where it was done to accommodate a family medical emergency of a crucial expert witness.

Accordingly we deny a writ of mandamus compelling the respondent to restore the jury trial.

Justice Michael A. Gross has elected, pursuant to CPLR 7804(i), not to appear in this proceeding.

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5129 The People of the State of New York, Ind. 1013/12
Respondent,

-against-

Yvette Alexander,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J. at mistrial; Daniel P. FitzGerald, J. at plea and sentencing), rendered September 22, 2014, convicting defendant of aggravated harassment in the second degree, and sentencing her to a conditional discharge, unanimously affirmed.

The court providently exercised its discretion when, after accepting a partial verdict acquitting defendant of another charge, it declared a mistrial as to the remaining charge based on an implied finding of manifest necessity. In this brief trial, the jury sent out notes indicating it was deadlocked on the count at issue, before and after the court delivered an *Allen* charge in accordance with defendant's wishes (*see Matter of Rivera v Firetog*, 11 NY3d 501 [2008], *cert denied* 556 US 1193

[2009]; *People v Baptiste*, 72 NY2d 356 [1988]; *Matter of Plummer v Rothwax*, 63 NY2d 243 [1984]). The court sufficiently inquired into the jury's inability to reach a verdict, and it properly considered but rejected alternatives to a mistrial.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5130-
5130A Index 151515/14

Eve Demian,
Plaintiff-Appellant,

-against-

Stephanie Calmenson,
Defendant-Respondent.

_____

Jeffrey M. Rosenblum, P.C., Great Neck (Vincent Chirico of counsel), for appellant.

Bruce Somerstein & Associates, P.C., New York (Donald J. Kavanagh, Jr. of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Robert R. Reed, J.), entered August 1, 2016, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about April 14, 2016, which, among other things, granted defendant's cross motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly ruled that plaintiff's claims, brought in 2014, are time-barred. Any claim for breach of contract or breach of the covenant of good faith and fair dealing accrued on the date of the breach — that is, the date the book was published, March 21, 2007 (*see Ely-Cruikshank Co. v Bank of*

Montreal, 81 NY2d 399, 402, 403 [1993] [breach of contract and breach of covenant]). Those claims are subject to a six-year statute of limitations, and thus they, along with the claim for an accounting, would need to have been made by March 2013 to have been timely (CPLR 213[1]; 213[2]).

Plaintiff's claims arising from fraud or negligent misrepresentation would be untimely either under the six-year statute of limitations or the two-year discovery rule, since the latest possible fraud, and its discovery, also occurred upon publication (CPLR 213[8]). Plaintiff's claims of breach of fiduciary duty and prima facie tort are also untimely, as those claims, both based upon economic loss, are subject to a three-year statute of limitations (*see Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012] [prima facie tort]; *Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003] [breach of fiduciary duty]).

Further, plaintiff's claims sounding in quasi-contract, for unjust enrichment or quantum meruit, are also untimely as they are subject to a six-year statute of limitations and they accrued upon publication when any alleged benefit could have been conferred by plaintiff (*see* CPLR 213[1]; *see also Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013] [unjust enrichment];

Eisen v Feder, 307 AD2d 817, 818 [1st Dept 2003] [quantum meruit]).

Plaintiff's claim that the breach or tort did not occur until 2012, because that was the first time defendant told her that she would not honor any alleged agreement is without merit, since the publication was a prior communication to the same effect. Further, continuing damages did not extend the statutes of limitations (*see Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017]).

Given the untimeliness of plaintiff's claims, we do not reach the merit of her claims, or defendant's argument that plaintiff's claims are copyright claims subject to a three-year statute of limitations.

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: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, J.J.

5131 In re Edward B.,
Petitioner-Respondent,

-against-

Elizabeth T.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Stephen Bilkis & Associates, PLLC, Baldwin (Hilary I. Nat of counsel), for respondent.

_____

Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about April 7, 2016, which, upon a fact-finding determination that respondent committed the family offense of harassment in the second degree against petitioner, granted a two-year order of protection in favor of petitioner, unanimously affirmed, without costs.

A fair preponderance of the evidence supports Family Court's finding that respondent committed the family offense of harassment in the second degree (*Matter of Marcela H-A. v Azouhouni A.*, 132 AD3d 566 [1st Dept 2015]; Penal Law § 240.26(3)). Petitioner was shocked, embarrassed and alarmed to be the subject of several emails sent by respondent, which placed his job in jeopardy and served no legitimate purpose,

particularly considering that they were sent years after the parties' relationship had ended (*compare Donna C. v Kuni C.*, 148 AD3d 586 [1st Dept 2017]).

The Family Court's determination that respondent was not a credible or plausible witness is entitled to great deference, and should not be disturbed on appeal (*Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5132 Margot Head, etc. Index 161536/14
Plaintiff-Appellant,

-against-

Emblem Health, et al.,
Defendants-Respondents.

_____

Law Offices of David L. Trueman, P.C., New York (David L. Trueman of counsel), for appellant.

Christian & Barton, LLP, Richmond, VA (Henry I. Willett, III of the bar of the State of Virginia, admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered October 11, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action for fraud and bad faith breach of insurance contract, unanimously affirmed, without costs.

In support of the fraud causes of action, the complaint fails to allege sufficient facts to establish the element of a material misrepresentation (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). While the Attorney General's investigation documented numerous instances of defendants' misconduct, contrary to plaintiff's contention, it did not detail instances of fraud. Plaintiff's allegation that

defendants entered into the insurance contract with an undisclosed intention not to perform in accordance with the contract's terms is insufficient to establish a misrepresentation or a material omission (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). The fraud causes of action were correctly dismissed as duplicative of the breach of contract cause of action (*see Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [1st Dept 2001]).

There is no independent cause of action for bad faith breach of insurance contract arising from an insurer's failure to perform its obligations under an insurance contract (*see Orient Overseas Assoc. v XL Ins. Am., Inc.*, 132 AD3d 574 [1st Dept 2015]; *McGowan v Great N. Ins. Co.*, 78 AD3d 1137 [2d Dept 2010]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5133 Richard Ferguson, Index 159376/15
Plaintiff-Appellant,

-against-

Gregory F. Hauser, et al.,
Defendants-Respondents.

_____

Andrew Lavoott Bluestone, New York, for appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Lisa L. Shrewsberry of counsel), for respondents.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered June 2, 2016, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff alleges that his attorney committed legal malpractice, when he failed to advise plaintiff at the outset of the second arbitration proceeding that dissolution was the only viable option. The complaint shows that opposition to the second arbitration, rather than dissolution of the company, was one of several reasonable courses of action; thus, defendants' conduct in opting to defend the claims in the second arbitration, which included breach of fiduciary duty, misappropriation, and conversion of the company's assets, and which would affect plaintiff's share, if any, of the distribution of the company's

assets, does not constitute malpractice (*Rosner v Paley*, 65 NY2d 736 [1985]; *Rodriguez v Lipsig, Shapey, Manus & Moverman, P.C.*, 81 AD3d 551 [1st Dept 2011]). Similarly, defendants' decision to assert as counterclaims in the second arbitration claims similar to those that plaintiff had unsuccessfully pursued in the first arbitration was a reasonable course of action, because it was merely an attempt to prevail on those issues before different arbitrators.

Moreover, plaintiff's claim requires speculation about future events, and does not sufficiently establish that defendants proximately caused him ascertainable damages (*Brooks v Lewin*, 21 AD3d 731, 734-735 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). An earlier dissolution of the company would not in itself have averted the delays that plaintiff alleges caused his losses, since plaintiff still would have had to await the arbitration ruling. Although plaintiff suggests that dissolution of the company and sale of the underlying property need not have awaited a determination by the arbitrators, given the nature of

his disputes with the co-owner of the company, it is unlikely that he and the co-owner would have agreed to a swift dissolution and sale.

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5134 The People of the State of New York, Ind. 5691/12
Respondent,

-against-

Leonardo Mora-Diaz,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered June 6, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him to four years' probation, unanimously reversed, on the law, defendant's motion to suppress granted, and the indictment dismissed.

As the People concede, defendant is entitled to suppression because the hearing evidence did not establish a sufficient basis

for a search of a closed container incident to defendant's arrest, under the principles set forth in *People v Jimenez* (22 NY2d 717 [2014], which was decided after defendant's conviction.

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5139 26th LS Series Ltd., Index 651566/12
Plaintiff-Appellant,

-against-

Audrie Brooks, et al.,
Defendants,

Gary C. Sickler, et al.,
Defendants-Respondents.

- - - - -

[And Third Party and Other Actions]

_____

J. Michael Gottesman, Kew Gardens, for appellant.

Thompson Hine LLP, New York (Maranda E. Fritz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 11, 2015, which denied plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

The order appealed from is an appealable paper (CPLR 5512[a]). The transcript of the January 26, 2015 oral argument on the cross motion was not so-ordered; however, the ruling on the cross motion was stated orally during those proceedings, and memorialized separately in the written order entered February 11, 2015 (*see Matter of Juan Alejandro R.*, 221 AD2d 183 [1st Dept 1995]; *cf. Smith v United Church of Christ*, 95 AD3d 581 [1st Dept 2012], *lv denied in part, dismissed in part* 19

NY3d 940 [2012]).

Plaintiff alleges it is successor in interest to promissory notes and associated credit agreements defendants issued in favor of HM Ruby, which obligations were secured by two life insurance policies. It alleges Ruby sold these instruments and underlying collateral to Teleios, which in turn sold them to plaintiff. Defendants contend, among other things, that because plaintiff cannot adequately show the instruments were transferred by Ruby to Teleios, plaintiff cannot establish that the notes, payable to Ruby, are enforceable by plaintiff against defendants.

On appeal, plaintiff asserts that its possession of the original promissory notes and related loan documents vests it with standing as a matter of law and, regardless of any issues concerning the chain of title, entitles it to summary judgment against defendants to enforce the notes.

Plaintiff's failure to raise this legal issue on the original cross motion does not bar this Court's review. Plaintiff emphasized its possession of the original instruments in support of its position below, and alleges no new facts to support this argument now. Under the circumstances, raising the issue for the first time on appeal does not prejudice defendants since it is apparent on the face of the record (*see Chateau D'If*

Corp. v City of New York, 219 AD2d 205 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

Upon consideration of the issue, we find Supreme Court properly denied plaintiff's cross motion. The notes at issue were expressly payable to Ruby, and the record includes no proof that they were endorsed in blank, or to Teleios, or plaintiff. To the extent plaintiff is in possession of the original notes and related documents, it is a nonholder in possession (NY UCC 1-201[21][A]), and, to enforce the notes against defendants, must account for its possession of them by proving the transactions through which it acquired them (*see* NY UCC 3-201, Comment 8). Plaintiff asserts on appeal that the notes were endorsed to it after submission of the cross motion, but this cannot be confirmed on the record before us; moreover, plaintiff does not show how such belated endorsement suffices for present purposes (*see Deutsche Bank Natl. Trust Co v Haller*, 100 AD3d 680 [2d Dept 2012]).

As a nonholder, it does not matter that plaintiff is in possession of the instruments now, if it cannot show Teleios acquired them from Ruby before selling them to plaintiff (*see In re DeConne*, 2015 WL 5460100, *3, 2015 US Dist LEXIS 126024, *6-8 [SD NY, Sept. 1, 2015, No. 15-CV-175 (VB)]). The court properly

recognized that plaintiff had not made this showing as a matter of law, given material issues of fact as to whether or when the Ruby/Teleios transaction closed, what if any consideration may have been paid for the notes, and why new notes, payable to Teleios, were apparently not issued (*see* CPLR 3212[b]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cadlerock Joint Venture II, L.P. v Baddoo*, 38 Misc 3d 133[A] [App Term 1st Dept 2013]).

As these material factual issues concerning plaintiff's chain of title to the instruments preclude summary enforcement of the instruments in plaintiff's favor, they also necessarily preclude plaintiff's summary enforcement of its alleged security interest in the life insurance policies securing those instruments.

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

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5140 The People of the State of New York, Ind. 629/13
Respondent,

-against-

Hector Lebron,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert E. Torres, J.), rendered December 16, 2015, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him, as a second violent felony offender, to a term of 18 years, unanimously affirmed.

Even if we assume that defense counsel's highly ambiguous remarks constituted adoption of defendant's pro se constitutional speedy trial motion (*see People v Rodriguez*, 95 NY2d 497, 501-03 [2000]), appellate review of this issue is foreclosed because defendant pleaded guilty while the motion remained undecided (*see e.g. People v Capellan*, 142 AD3d 923 [2016][1st Dept 2016], *lv denied* 28 NY3d 1123 [2016]). Defendant's arguments concerning whether he made a knowing and intentional waiver are misplaced,

because he forfeited review "by operation of law as soon as he pleaded guilty" (*People v Alexander*, 19 NY3d 203, 219 [2012]).

In any event, defendant's failure to provide this Court with transcripts of the relevant court appearances renders his constitutional speedy trial claim unreviewable for that reason as well (*see e.g. People v Thomas*, 128 AD3d 440 [1st Dept 2015], *lv denied* 25 NY3d 1208 [2015]). In particular, "these minutes are necessary because of their bearing on the critical issue of the reasons for the delay" (*id.* at 440). To the extent that the present record permits review, defendant has not established a violation of his constitutional right to a speedy trial (*see People v Taranovich*, 37 NY2d 442, 445 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5141 Edward L. Berman, et al., Index 652446/15
Plaintiffs-Appellants,

-against-

Holland & Knight, LLP,
Defendant-Respondent.

_____

John J.D. McFerrin-Clancy, New York, for appellants.

Orrick, Herrington & Sutcliffe LLP, New York (J. Peter Coll of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 17, 2016, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to deny the motion as to the first cause of action (actual fraud), and otherwise affirmed, without costs.

The court properly dismissed the second cause of action (constructive fraud) as time-barred. "[T]he two-year discovery provision [of CPLR 213(8)] . . . does not apply to constructive fraud" (*Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 168 [1st Dept 1995], *lv dismissed in part and denied in part* 86 NY2d 882 [1995]). The alleged fraud occurred, at the latest, on January 22, 2004, but plaintiffs did not sue until July 13, 2015.

The two-year discovery provision *does* apply to actual fraud

(first cause of action). "[T]he issue of when a plaintiff, acting with reasonable diligence, could have discovered an alleged fraud . . . involves a mixed question of law and fact, and, where it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might be reasonably inferred, the cause of action should not be disposed of summarily on statute of limitations grounds. Instead, the question is one for the trier-of-fact" (*Saphir Intl., S.A. v UBS PaineWebber Inc.*, 25 AD3d 315, 315-316 [1st Dept 2006] [internal quotation marks omitted]). One cannot say, as a matter of law, that the Internal Revenue Service's July 2007 deficiency notice, which mentioned only nonparty Derivium, placed plaintiffs on inquiry notice of defendant's alleged fraud (*see id.* at 316). Plaintiffs plausibly allege that, until defendant produced its file on January 8, 2015 in response to a motion to compel in Tax Court, they had no inkling of its purported fraud (*see CSAM Capital, Inc. v Lauder*, 67 AD3d 149, 157 [1st Dept 2009]). Unlike the subprime crisis in *Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.* (137 AD3d 685 [1st Dept 2016]) (cited by defendant), Derivium's fraud was not common knowledge.

It is true that plaintiffs sued Derivium's clearing broker-dealers in March 2010 (*see Berman v Morgan Keenan & Co.*, 2011 WL

1002683, 2011 US Dist LEXIS 27867 [SD NY, March 14, 2011, No. 10 Civ. 6866(PKC)], *affd* 455 Fed Appx 92 [2d Cir 2012]). However, plaintiffs would have had far more reason to suspect Derivium's brokers than their own attorneys. Plaintiffs were entitled to place "ultimate trust and confidence" in defendant, who represented them (*Johnson v Proskauer Rose LLP,* 129 AD3d 59, 72 [1st Dept 2015] [internal quotation marks omitted]).

Contrary to defendant's contention, the actual fraud claim is not a malpractice claim in disguise (*see id.* at 68-69).

The complaint adequately alleges scienter (*see Houbigant, Inc. v Deloitte & Touche,* 303 AD2d 92, 98 [1st Dept 2003]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5142 In re Jose C., et al.,
Petitioners-Appellants,

-against-

Johnny C. (Deceased Father),
Respondent,

Beatriz A. H.,
Respondent-Respondent.

_____

Anne Reiniger, New York, for appellants.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for respondent.

Andrew J. Baer, New York, attorney for the child.

_____

Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about November 21, 2016, which, to the extent appealed from as limited by the briefs, dismissed petitioner grandparents' petition for custody of the subject child, unanimously affirmed, without costs.

Family Court properly dismissed summarily the paternal grandparents' petition for custody of the subject child, since the petition contained only conclusory statements that failed to allege extraordinary circumstances warranting a hearing (*see Matter of Maddox v Maddox*, 141 AD3d 529 [2d Dept 2016], *lv denied* 28 NY3d 905 [2016]). There was no basis for the child to be

placed in the custody of the grandparents without a showing of extraordinary circumstances, where the child was in the custody of an otherwise fit parent (*see id.*).

Although the grandparents asserted that they cared for the child for seven years after his birth, there was no proof of a prolonged separation between the mother and child or intent by the mother to relinquish her parental duties and care of the child to the grandparents (*compare Matter of Suarez v Williams*, 26 NY3d 440 [2015] [grandparents may demonstrate standing where the child has lived with the grandparents for a prolonged period of time]). Nor was there an allegation that rose to the level of surrender, abandonment, unfitness, or persistent neglect sufficient to warrant a hearing (*see id.* at 446; *see also Matter of Bennett v Jeffreys*, 40 NY2d 543 [1976]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5143 The People of the State of New York, Ind. 3575/13
Respondent,

-against-

Natoine Marshall,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Abraham L. Clott, J.), rendered September 16, 2015, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the first-degree robbery conviction to 16 years with 5 years' postrelease supervision, and otherwise affirmed.

After defendant elicited a portion of a statement made by the victim to a detective after the robbery, the court providently exercised its discretion in permitting the People to elicit additional portions of the statement that "did no more than to explain, clarify and fully elicit a [statement] only

partially examined by the defense" (*People v Ochoa*, 14 NY3d 180, 186 [2010]). Defendant's selective use of certain portions of the victim's statement tended to suggest that the victim had given the detective an account of the robbery that was very different from the victim's trial testimony, and the court properly allowed the People to correct that false impression.

The court also properly exercised its discretion in admitting recorded telephone calls, made by defendant while incarcerated, whose overall subject matter was defendant's efforts to induce others to engage in witness tampering. This evidence tended to demonstrate defendant's consciousness of guilt (*see e.g. People v Squire*, 115 AD3d 454, 455-456 [1st Dept 2014], *lv denied* 23 NY3d 1043 [2014]). Defendant's principal argument is that portions of these calls were not probative of his consciousness of guilt and were prejudicial. However, we find that the portions at issue had a sufficient connection to the pattern of witness tampering, provided relevant background and context, and were not unduly prejudicial.

In any event, we find that any error regarding the victim's statement to the police, or defendant's phone calls, was harmless

in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We find the sentence excessive to the extent indicated.

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5144 Archstone Development LLC, Index 654491/16
Plaintiff-Appellant,

-against-

Renval Construction LLC, et al.,
Defendants-Respondents.

_____

Novack Burnbaum Crystal LLP, New York (Howard C. Crystal of counsel), for appellant.

Kushnick Pallaci PLLC, Bohemia (Adam S. Cohen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 10, 2017, which granted defendants' CPLR 3211 motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court correctly dismissed the causes of action for fraudulent inducement as duplicative of the breach of contract claim (*see generally Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). Plaintiff's allegation that defendants misrepresented their intent to use a deposit to engage subcontractors amounts to allegations of an insincere promise of future performance under the contract, which is insufficient to plead fraud (*see Cronos Group Ltd. v XComIP, LLC*, — AD3d —, 2017 NY Slip Op 06515 [1st Dept 2017]; *Castellotti v Free*, 138 AD3d

198, 211 [1st Dept 2016]). The claim based on allegations of post-contract misrepresentations is similarly duplicative of the breach of contract claim (*Clark-Fitzpatrick*, 70 NY2d at 389).

The motion court correctly dismissed the breach of contract claim on the ground that plaintiff failed to satisfy a condition precedent required for bringing suit. Although plaintiff timely filed a notice of claim with the initial decision maker under § 15.1.2 of the AIA A201-2007 form agreement (construction agreement), it did not pursue mediation as required by § 15.3.1 (*see MCC Dev. Corp. v Perla*, 81 AD3d 474, 475 [1st Dept 2011], *lv denied* 17 NY3d 715 [2011]). Plaintiff's contention that it was not required to comply with the condition precedent because the agreement giving rise to the deposit was separate and distinct from the construction agreement is unavailing. As the construction agreement governs costs and payment for work performed, which included the 10% deposit, the negotiations and agreement giving rise to the deposit have been superseded by the construction agreement pursuant to the latter agreement's merger clause (*see Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 599-600 [1997]; *Garthon Bus. Inc. v Kirill Ace Stein*, 138 AD3d 587, 591-592 [1st Dept 2016], *appeal dismissed* 27 NY3d 1182 [2016]).

The motion court correctly rejected plaintiff's claim of a mutual termination, in light of emails clearly showing a unilateral termination.

Although the motion court erroneously relied on an inapplicable contract provision in dismissing the breach of fiduciary duty claim, the claim should still be dismissed as duplicative of the breach of contract claim (*Clark-Fitzpatrick*, 70 NY2d at 389; *Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600 [1st Dept 2014]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5146 The People of the State of New York, Ind. 4030/14
Respondent,

-against-

Gregory Sanford,
Defendant-Appellant.

_____

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

Gregory Sanford, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered November 2, 2015, convicting defendant, upon his plea of guilty, of attempted assault in the second degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The record demonstrates that defendant's guilty plea was knowing, intelligent, and voluntary (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]), and that the court providently exercised its discretion in denying defendant's plea withdrawal motion. At the plea colloquy, the court gave defendant all the information he needed to "knowingly, voluntarily and intelligently choose among alternative courses of action" (*People v Catu*, 4 NY3d 242,

245 [2005]; *see also Hill v Lockhart*, 474 US 52, 56 [1985]). In particular, the court explained that the promised sentence of 1½ to 3 years would run consecutively to any undischarged term of imprisonment, referring specifically to defendant's prior unrelated sentence of 16 years to life, upon which he had been released on parole. Defendant expressly acknowledged that he understood.

At sentencing, defendant appeared to express confusion over whether his aggregate sentence would be limited to the instant sentence, or whether it would also include whatever portion of the preexisting life sentence that the parole authorities might choose to add. This was not a basis for withdrawal of the plea, given the court's clear statements to defendant at the plea colloquy. The knowing and intelligent nature of the plea is further supported by defendant's considerable familiarity with

the criminal justice system, which includes numerous prior convictions resulting from guilty pleas.

We have considered and rejected defendant's pro se claims.

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5147 The People of the State of New York, Ind. 1140/16
Respondent,

-against-

Antonio Jones,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Casey Boome of counsel), for respondent.

_____

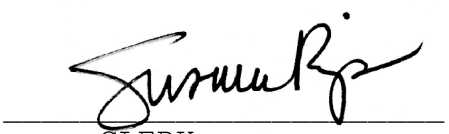
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (George Villegas, J.), rendered June 16, 2016,

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

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

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

ENTERED: DECEMBER 5, 2017



CLERK

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

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5148 Yves Filius, Index 22203/14E
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

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

Daniella Levi & Associates, P.C., Fresh Meadows (Steven L. Sonkin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered on or about November 15, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established its entitlement to judgment as a matter of law by submitting evidence showing that plaintiff fell during a storm in progress. The certified meteorological records and plaintiff's testimony demonstrate that it was snowing at the time of the accident (*see Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendant's snow removal efforts created or

exacerbated a hazardous condition (*see Gleeson v New York City Tr. Auth.*, 74 AD3d 616, 617 [1st Dept 2010]). Plaintiff's testimony that he fell on "dirty snow," which could have fallen in the time between defendant's snow removal and the accident, and his conclusory claim that defendant's shoveling was inadequate, do not raise triable issues of fact (*compare Baumann v Dawn Liqs., Inc.*, 148 AD3d 535, 537 [1st Dept 2017]).

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

ENTERED: DECEMBER 5, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kern, Singh, JJ.

5149N Vincent D. Fernandez, Index 24883/14E
Plaintiff-Respondent,

-against-

Toyota Lease Trust, et al.,
Defendants.
- - - - -
The Hartford, Workers' Compensation Carrier,
Nonparty Appellant.

_____

Smith, Sovik, Kendrick & Sugnet, P.C., Syracuse (Debra C. Salvi of counsel), for appellant.

Greenstein & Milbauer, LLP, New York (Bart Andrew Pittari of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered February 8, 2017, which, purportedly, granted plaintiff's motion to equitably distribute the proceeds of a settlement between plaintiff and defendants by awarding plaintiff, his counsel and nonparty the Hartford $12,500 each, and amended order, same court and Justice, entered March 8, 2017, which addressed the Hartford's cross motion, made before the prior order, by which the Hartford sought to enforce its lien in the amount of $22,408.27, as a Workers' Compensation insurance carrier, and granted the cross motion only to the extent of recognizing the lien amount of $12,500, unanimously reversed, on

the law, without costs, the order and amended order vacated, and the matter remanded for an equitable apportionment between plaintiff and the Hartford of the actual litigation costs, including attorney's fees, in the underlying action.

The court was without authority to arbitrarily divide the proposed settlement amount equally between plaintiff, plaintiff's counsel and the Hartford, or to strike, waive or reduce any portion of the Hartford's lien, beyond its share of the litigation expenses, including attorney's fees, so that plaintiff could recover more. The court was authorized only to equitably divide the actual and demonstrable litigation costs and fees between plaintiff and the Hartford, reflecting the carrier's total benefit (*see Matter of Kelly v State Ins. Fund*, 60 NY2d 131, 138 [1983]; *Burns v Varriale*, 9 NY3d 207, 213-214 [2007]; *Hammer v Turner Constr. Corp.*, 39 AD3d 705 [2d Dept 2007]; Workers' Compensation Law § 29).

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

ENTERED: DECEMBER 5, 2017

CLERK

Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4800 The People of the State of New York, Ind. 3189/12
Respondent,

-against-

Dominique Peters,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Kate Mollison of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered November 7, 2014, reversed, on the law, the matter remanded for a new trial, and the People precluded from using the testimony of Edward Jones at any retrial.

Opinion by Gesmer, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Barbara R. Kapnick
Ellen Gesmer
Cynthia S. Kern, JJ.

4800
Ind. 3189/12

_____x

The People of the State of New York,
Respondent,

-against-

Dominique Peters,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered November 7, 2014, convicting him, after a nonjury trial, of criminal sale of a controlled substance in the third degree, and imposing sentence.

Christina Swarns, Office of the Appellate Defender, New York (Kate Mollison of counsel), for appellant.

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

GESMER, J.

In this observation drug sale case, defendant, an alleged seller, was appointed the same attorney at his Criminal Court arraignment as Edward Jones, one of the alleged buyers. During the course of counsel's simultaneous representation of defendant and Jones, Jones accepted a plea that required him to allocute to a description of one of the drug sellers. Jones allocuted to a description fitting defendant, and testified consistently with the allocution as a prosecution witness at trial. Since we find that counsel's simultaneous representation of defendant at the time of Jones's plea constituted an actual conflict, we reverse and remand for a new trial. In addition, because Jones's testimony is interwoven with a violation of defendant's New York State and Federal right to the effective assistance of counsel, we preclude the People from using Jones's testimony at any retrial.

Defendant was arraigned in Criminal Court on July 8, 2012. The felony complaint alleged that, along with a codefendant, defendant had been observed speaking with Edward Jones and another man in the vicinity of 333 Sixth Avenue. The complaint identified Jones by name, described him as a "separately charged

defendant," and listed his arrest number.[1] According to the complaint, Jones allegedly handed money to defendant, who walked over to a magazine stand. Jones then walked to the magazine stand, picked up an object, and placed it in his pocket. When Jones was arrested, he possessed crack cocaine.

During defendant's arraignment, he was appointed the same counsel as Jones. Defendant and Jones's simultaneous representation continued for the next six months.

Counsel represented defendant during his arraignment in Supreme Court on August 1, 2012. He filed an omnibus motion on defendant's behalf on August 20, 2012. In his supporting affirmation, counsel stated, "It is alleged the defendant . . . did sell a bag of cocaine to Edward Jones . . . in the vicinity of 333 [Sixth Avenue] . . . ."

On January 17, 2013, counsel appeared with Jones in Criminal Court and informed the sitting judge that "[t]here is an offer of a violation, 15 days. My client will allocute as to the seller. That's what they want him to do, they want him to describe the seller that he bought from. . . ." The People confirmed that they were offering a disorderly conduct violation that required a

[1] Jones was separately charged with the misdemeanor offense of criminal possession of a controlled substance in the seventh degree based on his possession of crack cocaine allegedly purchased from defendant.

"particular allocution" from Jones. "After a conversation with Mr. Jones," counsel informed the court that he was authorized to enter Jones's plea.

Jones was sworn in and the People allocuted him as follows:

> "[The People]: [I]s it true that you . bought crack cocaine from two men . . . ?
>
> "[Jones]: Yes.
>
> "[The People]: One of those men was an African American who was about 24 years old?
>
> "[Jones]: Yes.
>
> "[The People]: Six feet tall?
>
> "[Jones]: Yes.
>
> "[The People]: Weighed about 180 pounds?
>
> "[Jones]: Yes."[2]

Counsel continued to represent defendant after Jones's plea. In June 2013, counsel asked to be relieved because defendant had filed a disciplinary complaint against him. Defendant was appointed a new attorney. That attorney was also relieved, and in October 2014, defendant proceeded to hearings and a nonjury trial under the representation of his third attorney (trial counsel).

The People subpoenaed Jones to testify at defendant's trial.

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[2] At the time of his arraignment, defendant was 20 years old, six feet, three inches tall, and weighed 200 pounds.

Before Jones was called as a witness, the Assistant District Attorney informed the trial court that, "[o]n the advice of some of my supervisors, I obtained an order . . . for counsel to be assigned, based on the fact that Mr. Jones said that if he were to testify, he would testify inconsistently with his sworn plea minutes, sworn plea allocution." Counsel was thus appointed to "explain . . . the dangers of giving testimony that could lead to perjury charges."

Trial counsel notified the trial court that, from his review of Jones's plea minutes, it appeared that, at the time of the plea, Jones and defendant had been represented by the same counsel. The trial court asked the Assistant District Attorney how this could have happened, and he replied that he did not know.

When Jones was called as a witness, he identified defendant in the courtroom and testified that he knew defendant from seeing him in the area of Sixth Avenue and West Fourth Street. Jones further testified that he saw defendant on Sixth Avenue on July 8, 2012 and that he indicated to defendant that he wanted to buy crack cocaine. Jones testified that he placed 10 dollars on a magazine stand for defendant and defendant placed a glassine of crack cocaine on the magazine stand that Jones took.

After the completion of Jones's direct examination, the

trial court recessed for trial counsel to prepare his cross-examination. When the proceedings resumed, trial counsel informed the trial court that he had confirmed with the People that prior counsel had simultaneously represented Jones and defendant. Trial counsel moved to strike Jones's testimony on the basis that defendant's right to the effective assistance of counsel had been violated by a "clear conflict." The People argued that, while it was "pretty clear that there was an issue with a conflict of interest between [prior counsel] representing both Mr. Jones and [] defendant," the appropriate remedy was not to exclude Jones's testimony. The People contended that nothing showed that the conflict had affected Jones's plea and allocution, or defendant's ability to be effectively represented. The trial court reserved decision.

During cross-examination, Jones admitted that he did tell the Assistant District Attorney, in his office, that defendant did not sell him crack cocaine. During redirect, Jones explained that he believed he did not have to tell the prosecutor the truth in his office, but that, now that he was under oath, he was "not going to perjure [him]self. . . ."

Prior to resting, trial counsel asked for a ruling on his application to strike Jones's testimony. The trial court denied the application. Trial counsel renewed his motion for a trial

order of dismissal on these grounds, which was also denied. The trial court found defendant guilty of criminal sale of a controlled substance in the third degree and imposed a sentence of time served.

A defendant's right to the effective assistance of counsel includes the right to be represented by an attorney who has no conflicts and is "single mindedly devoted to the client's best interests" (*People v Berroa*, 99 NY2d 134, 139 [2002] [internal quotation marks ommitted]; US Const, 6th Amend; NY Const, art I, § 6). The Court of Appeals has distinguished between two types of conflicts of interest: actual conflicts and potential conflicts (*People v Sanchez*, 21 NY3d 216, 223 [2013]; *People v Solomon*, 20 NY3d 91, 95 [2012]). An actual conflict exists when "an attorney simultaneously represents clients whose interests are opposed" (*Sanchez*, 21 NY3d at 223). In the case of an actual conflict, "reversal is required if the defendant does not waive the actual conflict" (*id.* at 223; *see also Solomon*, 20 NY3d at 97). Where an attorney's representation merely creates the potential for conflict, reversal is required only if the potential conflict "operates on or affects the defense" and is not waived (*Sanchez*, 21 NY3d at 223 [internal quotation marks omitted]).

Here, defendant's right to the effective assistance of

counsel was infringed by an actual conflict. At the time of their simultaneous representation and Jones's plea, the interests of defendant and Jones were clearly opposed. Jones had an interest in avoiding a criminal conviction by allocuting to identify defendant as one of the people who had sold him drugs. Defendant had an interest in not being so identified. Counsel was thus placed in the "very awkward position of a lawyer subject to conflicting demands" (*Solomon*, 20 NY3d 91, 97 [2012] [internal quotation marks omitted]), and could not provide his "undivided loyalty" (*People v Prescott*, 21 NY3d 925, 927 [2013] [internal quotation marks omitted). Indeed, despite defendant's right to representation by an attorney single-mindedly devoted to his best interests, counsel pursued a strategy in Jones's case directly at odds with defending defendant from the drug sale charges that he faced (*see Prescott*, 21 NY3d at 927-928; *People v Lynch*, 104 AD3d 1062, 1063-1064 [3d Dept 2013]). After swearing to a description of one of the sellers that fit defendant, Jones became unavailable to defendant as a trial witness and his strength as a prosecution witness was enhanced.[3] Counsel's actions with

[3] If Jones deviated from his sworn allocution, the People would have been within their rights to impeach Jones with his plea minutes (*see* CPL 60.35[1]; *People v Liggan*, 62 AD3d 523, 524 [1st Dept 2009], *lv denied* 13 NY3d 908 [2009]), and he would have faced perjury charges.

respect to Jones were inconsistent with representing defendant in the best way possible, so defendant was denied the "right to receive advice and assistance from an attorney whose paramount responsibility is to that defendant alone" (*Solomon*, 20 NY3d at 97 [internal quotation marks omitted]).

In finding an actual conflict, we reject the People's argument that counsel's simultaneous representation of defendant and Jones gave rise only to a potential conflict. The People's reliance on *People v Harris* (99 NY2d 202 [2002]) is misplaced. In that case, counsel was unaware that he had represented both the defendant and a confidential informant who had testified against the defendant in the grand jury (*Harris*, 99 NY2d at 210). Here, Jones's connection to defendant was not hidden from counsel; the felony complaint alleged that Jones had purchased drugs from defendant, and counsel demonstrated he was aware of that allegation. Moreover, while the Court of Appeals acknowledged in *Harris* that, had the defendant and the informant been represented by separate counsel, defendant would not have received more vigorous representation, this case presents an actual conflict where reversal is required regardless of whether the conflict operated on the defense (*id.* at 211). Indeed, the issue here is not that a different attorney might have similarly advised Jones, but that counsel acted against defendant's

interests by advising Jones as he did.

We have also considered and rejected the People's argument that the record on appeal is insufficient to decide the conflict of interest issue (*cf. People v Mora*, 290 AD2d 373 [1st Dept 2002], *lv denied* 98 NY2d 639 [2002]; *People v Frias*, 250 AD2d 495, 496 [1st Dept 1998], *lv denied* 92 NY2d 982 [1998]).

We turn now to the issue of the appropriate remedy. While the presence of an actual conflict mandates reversal, defendant has argued that we should also either dismiss the indictment or remand for a new trial at which Jones's testimony is excluded. We reject defendant's request for dismissal, but we agree that the People should be precluded from using Jones's testimony.

Defendant's request for dismissal is unavailing for two reasons. First, the record before us establishes that, even without Jones's testimony, the People possess other evidence with which to establish a prima facie case against defendant should they retry him (*compare People v Rossi*, 80 NY2d 952, 954 [1992], *with People v Perkins*, 189 AD2d 830, 833 [2d Dept 1993]).

Second, while defendant has completed his sentence, he was convicted of a class B felony, a serious offense for which a "penological purpose []" would be served by remanding the matter for further proceedings (*People v Allen*, 39 NY2d 916, 918 [1976]; *People v Conceicao*, 26 NY3d 375, 385 n 1 [2015]).

However, we agree that it is necessary and appropriate to preclude the People from using Jones's testimony should they retry defendant. In other cases, courts have granted remedies uniquely tailored to dissipating the taint of counsel's ineffective assistance. Thus, in cases where a defendant received ineffective assistance because of counsel's failure to seek suppression, the matter was remitted for a suppression hearing (*People v Bilal*, 27 NY3d 961, 962 [2016]; *People v Zeh*, 144 AD3d 1395, 1398-1399 [3d Dept 2016], *lv denied* 29 NY3d 954 [2017]). Where appellate counsel failed to argue that trial counsel was ineffective for failing to object to the submission of a time-barred charge of manslaughter in the first degree and the jury acquitted the defendant of murder and convicted on the time-barred manslaughter count, the indictment was dismissed upon the granting of the defendant's coram nobis application (*see People v Turner*, 10 AD3d 458, 460 [2d Dept 2004], *affd* 5 NY3d 476 [2005]). Where defense counsel was ineffective for failing to make a CPL 30.30 motion, the matter was remitted for the appointment of new counsel and a hearing on the defendant's speedy trial claim (*see People v St. Louis*, 41 AD3d 897, 898-899 [3d Dept 2007]).

Under the unique circumstances of this case, the exclusion of Jones's testimony at any future trial is necessary to

dissipate the taint of counsel's conflicted and ineffective representation. Counsel acted against defendant's interests when he advised Jones to accept a plea requiring an allocution adverse to defendant. The allocution eliminated any possibility that Jones could have provided exculpatory testimony as a defense witness, and ensured instead that Jones's testimony would be inculpatory when he was called as a witness by the People. Accordingly, Jones's testimony was, and continues to be, interwoven with a violation of defendant's State and Federal right to the effective assistance of counsel.

We have considered and rejected defendant's arguments concerning suppression rulings. Since we are ordering a new trial, we find it unnecessary to reach any other issues.

Accordingly, the judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered November 7, 2014, convicting defendant, after a nonjury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to

time served, should be reversed, on the law, the matter remanded for a new trial, and the People precluded from using the testimony of Edward Jones at any retrial.

All concur.

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

ENTERED: DECEMBER 5, 2017

CLERK

CORRECTED ORDER - DECEMBER 5, 2017

Richter, J.P., Manzanet-Daniels, Andrias, **Kern**, Singh, JJ.

5135-
5136 Index 161419/14

Navigators Insurance Company, etc., et al.,
Plaintiffs-Respondents,

-against-

Ironshore Indemnity, Inc., et al.,
Defendants-Appellants.

_____

Vogrin & Frimet, LLP, New York (George J. Vogrin of counsel), for Ironshore Indemnity, Inc., appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for Transel Elevator & Electric, Inc., sued herein as Transel Elevator, Inc., appellants.

Kelly & Curtis, PLLC, New York (Mark S. Moroknek of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered October 26, 2015, which denied defendants' motions to dismiss the complaint as against them, and granted plaintiff's cross motion for summary judgment declaring that defendants must reimburse it for indemnity and defense costs it incurred in the underlying personal injury action, unanimously reversed, on the law, with costs, the motions granted, and the cross motion denied. Appeal from order, same court and Justice, entered April 25, 2017, upon reargument and renewal of the foregoing motions, unanimously dismissed, without costs, as academic. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff seeks reimbursement of defense and settlement payments it made on behalf of its insureds in the underlying action. As subrogee of its insureds, plaintiff has only the rights that its insureds have (*Daimler Chrysler Ins. Co. v New York Cent. Mut. Fire Ins. Co.*, 125 AD3d 518 [1st Dept 2015]). The insureds stipulated to the discontinuance with prejudice of their defense and indemnification claims in the underlying action. Thus, plaintiff's subrogation claim is barred by the doctrine of res judicata (*Schwartzreich v E.P.C. Carting Co.*, 246 AD2d 439 [1st Dept 1998]).

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

ENTERED: DECEMBER 5, 2017

CLERK