SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 14, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4227N Emigrant Bank, as successor-by-merger with Emigrant Savings Bank - Manhattan, Plaintiff-Respondent, Index 850136/14

-against-

Luigi Rosabianca, et al., Defendants,

Carmelo Rosabianca, et al., Defendants-Appellants.

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Petroff Amshen LLP, Brooklyn (James Tierney of counsel), for appellants.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered June 17, 2016, which denied the motion of defendants Carmelo and Vivian Rosabianca (the Rosabiancas), inter alia, to file a late answer pursuant to CPLR 3012(d), affirmed, without costs.

Notwithstanding the Rosabiancas' sympathetic position, we conclude that the denial of their motion for relief under CPLR 3012(d) was warranted for the reasons that follow.

I. *Factual and Procedural Background*

Since 1974, the Rosabiancas have owned and lived at the residential property located at 2342 Benson Avenue in Brooklyn. Allegedly without their knowledge, in 2008, the Rosabiancas' son, defendant Luigi Rosabianca (Luigi),[1] used their home as collateral for a $1.76 million mortgage loan he obtained from Emigrant Mortgage Company (EMC) on a condominium unit located at 55 Wall Street in Manhattan. EMC subsequently assigned the collateral mortgage and related note to Emigrant Savings Bank - Manhattan (ESBM), which was later merged into plaintiff, Emigrant Bank.

On April 30, 2008, shortly before Luigi's purchase of the condominium, the Rosabiancas each granted Luigi a durable general statutory short form power of attorney, appointing Luigi to act as their attorney-in-fact for all matters listed on the instruments, including "real estate transactions" and "banking transactions" with respect to their Brooklyn home. The Rosabiancas' signatures on both powers of attorney were duly acknowledged by a licensed notary public. Both powers of

[1] Luigi was suspended from the practice of law on March 12, 2015. He was indicted for stealing $4.4 million from clients and pleaded guilty to multiple counts of grand larceny, and was sentenced to 4 to 12 years' imprisonment subsequent to the events here at issue. He has since been disbarred.

attorney have a handwritten notation at the bottom stating, "2342 Benson Ave., Brooklyn[,] NY Block 6874[,] Lot 50."

At the May 14, 2008 closing on the condominium unit, Luigi acted as borrower, attorney-in-fact for the Rosabiancas, title closer, and title agent for Fidelity Title Insurance Company. Also at the closing that day, Luigi executed both the collateral mortgage and an adjustable rate note referring to a "Mortgage/Lien in the amount of $1,760,000" to be placed on two properties, setting forth the addresses of the Manhattan condominium unit and the Rosabiancas' Brooklyn home. Luigi signed the collateral mortgage on the Rosabiancas' behalf as their attorney-in-fact. Luigi also provided an affidavit of effectiveness, sworn and subscribed before a licensed notary public[2] with respect to each of the powers of attorney, in which he swore that each power of attorney was a "valid and subsisting

[2] Although both affidavits state that Luigi swore and subscribed them before notary public David Ross Koshers on the "14th day of May, 2007[,]" the collateral mortgage, which was signed by Luigi as attorney-in-fact for both of the Rosabiancas, reflects that "[o]n the 14th day of May 2008" before the same notary public, Luigi "acknowledged . . . that . . . he . . . executed the same in his . . . capacity . . . and that by his . . . [signatures] on the instrument, the [individuals] or the person upon behalf of which the [individuals] acted, executed the instrument." The 2007 date on the affidavits of effectiveness was evidently a typographical error, which, under the circumstances, was cured by the recitation of the correct date on the collateral mortgage.

[p]ower which has not been revoked" and that he had "full and unqualified authority to execute all documents." Luigi alleges that, subsequent to the closing, he was unable to locate the original powers of attorney and collateral mortgage, and for that reason never recorded them.

Luigi allegedly made the collateral mortgage loan payments for more than three years until defaulting on the loan by failing to make the mortgage payment due August 1, 2011. One week later, on August 8, 2011, he obtained a $500,000 loan from a Panamanian lender, Little Bay Investment Corp. (Little Bay), which was secured by a mortgage on the Wall Street condominium. On September 1, 2011, that mortgage was recorded in the Office of the New York City Register.

On April 18, 2012, the Rosabiancas were each served a copy of a summons and complaint in an action brought by ESBM for an order directing the Office of the New York City Register, Kings County, to accept for recording copies of the powers of attorney signed by the Rosabiancas and the collateral mortgage, because the original documents were lost (*Emigrant Savings Bank - Manhattan v Rosabianca*, Sup Ct, Kings County 2012, Index No. 6591/12) (the Kings County action). The first page of the complaint refers to the "Collateral Mortgage in the original principal sum of $1,760,000.00 dated May 14, 2008," and states

that the powers of attorney were "given by Defendants Carmelo Rosabianca and Vivian Rosabianca to Luigi Rosabianca to act as their Attorney in Fact *with respect to the granting of a collateral mortgage in favor of* [*EMC*] *on the premises known as 2342 Benson Avenue, Brooklyn, New York 11214*" (emphasis added).

On September 7, 2012, after the Rosabiancas failed to appear in the Kings County action, ESBM moved for a default judgment directing that the copies of the powers of attorney and collateral mortgage be recorded and to quiet title in its favor. On November 19, 2012, Supreme Court, Kings County, granted the motion and issued an order of default. On January 29, 2013, the Rosabiancas were each served with a notice of entry of the order of default.

On June 21, 2013, Supreme Court, Kings County, entered a judgment directing that the copies of the powers of attorney and collateral mortgage be recorded in the Office of the City Register, Kings County. On August 13, 2013, a notice of entry of judgment was served on each of the Rosabiancas with a copy of the judgment attached. The judgment describes the "Collateral Mortgage" as a "mortgage in the original principal sum of $1,760,000.00 dated May 14, 2008," and as "given by Defendants Carmelo Rosabianca and Vivian Rosabianca to Luigi Rosabianca in favor of [EMC], on the Property." The address of the "Property"

appearing on the judgment is "2342 Benson Avenue, Brooklyn, New York 11214."

On September 6, 2013, the copies of the powers of attorney and collateral mortgage were recorded at the Office of the City Register, Kings County, by EMC.

On November 19, 2013, EMC served a 90-day notice of default on the Rosabiancas pursuant to RPAPL 1304. The notice of default stated that the Rosabiancas were 841 days in default on the collateral mortgage and were at risk of losing their home.

In February 2014, Little Bay assigned its mortgage on the Wall Street condominium to Secured Lending Corp.

On March 26, 2014, plaintiff filed a summons and complaint in the instant action to foreclose on both the Rosabiancas' home and Luigi's condominium unit, naming the Rosabiancas, Luigi and Secured Lending as defendants. The Rosabiancas were served with copies of the summons and complaint by delivery to a person of suitable age and discretion at their place of residence on April 11, 2014, followed by delivery of copies of the summons and complaint to the Rosabiancas at their home address via first class mail on April 17, 2014 (*see* CPLR 308[2]). The affidavits of service as to both of the Rosabiancas were e-filed in the Office of the New York County Clerk on April 28, 2014.

The Rosabiancas now allege that it was only upon their

receipt of the copies of the summons and complaint in this action that they became aware of the existence of the collateral mortgage. They also aver that, after they were served with the summons and complaint, Luigi assured them that he would "do everything in his power" to prevent foreclosure on their home.

On May 28, 2014, the Rosabiancas' time to answer the summons and complaint expired, without the Rosabiancas having appeared in the action.

On June 9, 2014, plaintiff served the Rosabiancas with notices of default pursuant to CPLR 3215(g)(3)(i) by first class mail.

On August 20, 2014, Luigi appeared at a mandatory foreclosure settlement conference, where he admitted the default and indicated that he intended to reinstate the loan from plaintiff and to settle with Secured Lending on its mortgage against the condominium unit, which, although obtained subsequently, had been recorded prior to the recording of plaintiff's mortgage. The settlement conference was adjourned to October 20, 2014, to afford Luigi time to prepare and submit a settlement proposal. However, Luigi failed to appear for the adjourned settlement conference. On December 12, 2014, plaintiff moved for a default judgment of foreclosure.

Subsequently, the Rosabiancas retained counsel. Rather than

opposing plaintiff's motion for a default judgment, however, they moved, on April 23, 2015, as relevant on appeal, for leave to file a late answer. On June 16, 2016, following oral argument, Supreme Court denied the motion.

On appeal, the Rosabiancas argue that Supreme Court should have granted their motion to file a late answer because Luigi used their home as collateral for the mortgage without their knowledge or consent. They also claim that their lack of awareness of the collateral mortgage and their reliance on their son to protect their home from foreclosure once they became aware of the mortgage constitute an excusable default and a meritorious defense. In addition, they argue that the powers of attorney used by Luigi to obtain the collateral mortgage on their home were deficient because their signatures were obtained on those documents without their knowledge of the documents' true nature and contents.

In response, plaintiff maintains that the Rosabiancas' default was not excusable because the Rosabiancas could have hired counsel other than Luigi when they first became aware of the collateral mortgage. Plaintiff further contends that the Rosabiancas have no meritorious defense because they each executed a valid power of attorney authorizing Luigi to act as their attorney-in-fact.

II. *Discussion*

Under CPLR 3012(d), a trial court has the discretionary power to extend the time to plead, or to compel acceptance of an untimely pleading "upon such terms as may be just," provided that there is a showing of a reasonable excuse for the delay. In reviewing a discretionary determination, the proper inquiry is whether the court providently exercised its discretion.

In *Artcorp Inc. v Citirich Realty Corp.* (140 AD3d 417 [1st Dept 2016]), we adopted the factors set forth in *Guzetti v City of New York* (32 AD3d 234, 238 (*id.*) [1st Dept 2006] [McGuire, J., concurring]) as those that "must . . . be considered and balanced" in determining whether a CPLR 3012(d) ruling constitutes an abuse of discretion. Those factors include the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense (32 AD3d at 238).

In this case, with respect to the first *Artcorp*/*Guzetti* factor, the length of the delay, the Rosabiancas were served with copies of the summons and complaint in this action showing that plaintiff sought foreclosure on both Luigi's Manhattan condominium unit and the Rosabiancas' Brooklyn home, in April 2014. The Rosabiancas made their motion on April 16, 2015.

Thus, the length of the delay in their response to the summons and complaint was approximately one year. This factor tends to support denial of their motion, especially when viewed in light of their prior notices of the mortgage at least by April 2012 and of the default by November 2013.

Regarding the second *Artcorp*/*Guzetti* factor, the excuse offered for the delay, the Rosabiancas aver that they reasonably relied on their son's representation that he would "do everything in his power" to prevent foreclosure on their home, which they understood to mean that he would appear in court on their behalf and defend them. Although the circumstances afford a sympathetic view of the Rosabiancas, the merit of their position is questionable, given that they can point to no action taken by Luigi on their behalf following service of the summons and complaint upon them. We treat this factor as neutral, tending neither to favor nor to disfavor denial of the Rosabiancas' motion.

With respect to the third *Artcorp*/*Guzetti* factor, the absence or presence of willfulness, the Rosabiancas maintain that they first learned that the collateral mortgage had been placed on their home in April 2014, when they were served with the summons and complaint in this action. As the record shows, however, the Rosabiancas were served with the complaint in the

Kings County action on April 18, 2012. That complaint showed that ESBM sought to record both powers of attorney signed by the Rosabiancas and contemporaneously record the original collateral mortgage on their Brooklyn home. By no later than August 13, 2013, when they were served with the notice of entry of the default judgment in the Kings County action, the Rosabiancas had been informed that the copies of the powers of attorney and the collateral mortgage on their home would be recorded. Thus, at the time that Carmelo Rosabianca stated, in his April 14, 2015 affidavit in support of the Rosabiancas' motion, that he had no knowledge that a mortgage had been placed on his home before the commencement of this action, the Rosabiancas were almost certainly knowing participants in the transaction, as they were aware of both the mortgage and its function of enabling Luigi to finance the purchase of the condominium unit using the equity in their home. This factor tends to support denial of the motion.

Concerning the fourth *Artcorp/Guzetti* factor, the possibility of prejudice to an adverse party, plaintiff's argument as to the prejudice it would suffer due to the delay in recouping its interest in the property is substantially neutralized by its delay in pursuing its legal remedies. This factor tends neither to favor nor to disfavor denial of the motion.

Regarding the fifth *Artcorp/Guzetti* factor, whether the Rosabiancas have a meritorious defense, Supreme Court was correct in observing that it is not a defense for the Rosabiancas to state that they were cheated by their son. Moreover, the powers of attorney signed by the Rosabiancas expressly granted Luigi full powers to act on their behalf with respect to real estate, banking and loan transactions relating to their home. In addition, EMC secured from Luigi affidavits of effectiveness attesting to the validity of the powers of attorney and that Luigi had "full and unqualified authority to execute all documents" on behalf of the Rosabiancas. The affidavits of effectiveness demonstrate that the powers of attorney granted Luigi not only apparent, but also express, authority to act on the Rosabiancas' behalf as their attorney-in-fact. Thus, there is no merit in the Rosabiancas' argument that the powers of attorney were fraudulently obtained.

Neither is it a defense in the foreclosure action that Luigi apparently committed fraud in carrying out his duties under the powers of attorney. "[A] principal may be held liable in tort for the misuse by its agent of his apparent authority to defraud a third party who reasonably relies on the appearance of authority, even if the agent commits the fraud solely for his personal benefit, and to the detriment of the principal" (*Parlato*

v Equitable Life Assur. Socy. of U.S., 299 AD2d 108, 113 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]). Because the record amply demonstrates the lack of any meritorious defense, this factor weighs strongly in favor of denial of the motion.

Of these five factors, three – - the lack of a potential meritorious defense, which is the most notable, the length of the delay, and the willfulness of the default -- weigh against granting the motion. The remaining factors, whether the delay was excusable and whether there was any possibility of prejudice to an adverse party, are arguably neutral. Therefore, considering and weighing the five *Artcorp/Guzzetti* factors, we conclude that Supreme Court properly denied the Rosabiancas' motion.

The dissent advances several arguments for its differing view, most of them not raised by the Rosabiancas and requiring rejection for that reason alone. Moreover, these arguments are contrary to the well-settled statutory scheme regarding short form powers of attorney and its underlying policy considerations.

First, the dissent's view is that the limiting language of the powers of attorney prohibited Luigi from exercising any of the broad general powers enumerated in those instruments except in relation to the refinancing of the Rosabiancas' residence. This argument was not advanced by the Rosabiancas before either

Supreme Court or this Court, and cannot serve as a basis for finding that the motion should have been granted.

Similarly never raised by the Rosabiancas is the dissent's argument that EMC was obligated to refuse Luigi's exercise of authority over his parents' home because of language in the powers of attorney purportedly limiting his authority solely to refinancing that property. Moreover, there is no support in law for the notion that, when presented with statutory short form powers of attorney in conjunction with mortgages, a third party, such as EMC here, is required to look beyond their facial validity and interpret their language to ensure that the named attorney-in-fact is not acting outside the scope of the authority granted. Rather, because the statutory short form powers of attorney used by Luigi had been recently executed and were in all respects facially valid at the time of the closing, EMC was entitled to rely on them (*Oliveto Holdings, Inc. v Rattenni*, 110 AD3d 969, 971 [2d Dept 2013]).

In fact, examination of the statutory scheme respecting powers of attorney makes clear that the dissent's position is contrary to the law. The statutory short form power of attorney was created by the Legislature in 1948 to assure that the grant of authority given by a principal to an agent would not be thwarted by a third party's unreasonable refusal to accept the

power of attorney (Rose Mary Bailly and Barbara S. Hancock, Practice Commentaries, McKinney's Cons Laws of NY, Book 23A, General Obligations Law § 5-1504 at 155). Until that time, refusal by financial institutions to accept general powers of attorney had been a common occurrence (*id.*). As a result, the Legislature enacted General Obligations Law § 5-1504, which bars lenders and others doing business in New York from refusing, without reasonable cause, to honor a statutory short form power of attorney that has been properly executed. A bank is entitled, under the statute, to accept and rely on a properly executed power of attorney in the absence of actual knowledge that the principal lacked capacity to subscribe it or was subject to fraud, duress or undue influence in executing it, unless the bank has actual notice that the instrument has been terminated or revoked (General Obligations Law § 5-1504; *see Oliveto Holdings*, 110 AD3d at 971).

The statutory short form powers of attorney granted to Luigi were properly executed, and there is no claim that EMC possessed actual knowledge of any of the specified grounds for their rescission. Moreover, as noted, at the closing, Luigi furnished affidavits of effectiveness attesting to his authority to act on behalf of his parents in the transaction. Indeed, the Rosabiancas have not challenged the overall validity of the

powers of attorney, nor have they questioned EMC's legal duty to honor them.

Thus, EMC reasonably relied on Luigi's actual authority to bind his parents to the collateral mortgage, as set forth in his contemporaneous sworn statements. The bank was statutorily bound to honor the documents presented to it, as it had no reasonable cause not to do so.

Next, the dissent argues that the Rosabiancas have a meritorious defense, i.e., that the complaint fails to state a cause of action. In the dissent's view, the collateral mortgage secures a nonexistent note, since no note was signed by either of the Rosabiancas as "borrower." Again, this argument was not advanced before either Supreme Court or this Court, and must be rejected for that reason alone. Furthermore, it is an argument that emphasizes form over substance. The collateral mortgage, signed by Luigi as attorney-in-fact for each of the Rosabiancas, was clearly intended to secure the Rosabiancas' home and to refer to the adjustable rate note signed by Luigi the same day. Moreover, both the note and the mortgage set forth the address of the Rosabiancas' home in Brooklyn and $1,760,000 as the amount of principal to be paid to the lender.

Relying upon *Ford v Unity Hosp.* (32 NY2d 464, 472-473 [1973]), the dissent further argues that because Luigi lacked any

express authority to enter into the loan transaction, but relied on apparent authority to justify his actions, EMC had a duty to determine the extent of his authority. Once again, this argument must be rejected because it was not raised before either Supreme Court or this Court. Furthermore, as indicated, Luigi's express authority to engage in the transaction was demonstrated at the closing. In any case, even were we to find that Luigi demonstrated only apparent authority to act for his parents, *Ford* is both inapposite and distinguishable. In *Ford*, the Court of Appeals found that the unauthorized act of a foreign agent for a Mexican insurance company in delivering into this State a cover letter for a policy of malpractice insurance, which was both beyond the scope and in direct contravention of its agency agreement, did not sufficiently comply with standards of due process to subject its principal to the jurisdiction of New York courts pursuant to section 59-a of the Insurance Law. It was conceded that the entity in question was unauthorized to deliver the letter regarding the issuance of the insurance policy, and, in fact, had been directed not to do so. The common-law rule there invoked, that "[o]ne who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority" (32 NY2d at 472), upon which the dissent relies, is not at issue here, where the applicable principles

regarding powers of attorney have been statutorily codified and supplant the general common-law doctrine.

Under the principles applicable in this case, as set forth in General Obligations Law §§ 5-1502A and 1504 and in currently prevailing case law, lenders without actual knowledge to the contrary are required to rely on facially valid and, at the time of closing, unrevoked, statutory short form powers of attorney where "the circumstances surrounding [their] presentation would not . . . put a reasonable person on notice that something was amiss" (*see Oliveto Holdings,* 110 AD3d at 971 [internal quotation marks omitted]). These principles govern the duties of lenders in real estate mortgage loan transactions involving statutory short form powers of attorney, such as EMC in this case. Thus, the general common-law principles set forth in *Ford v Unity Hosp.*, which govern the duties of third parties to investigate the extent of the authority of agents in circumstances other than real estate transactions involving statutory short form powers of attorney, are inapplicable in this case.

Finally, the dissent contends that although powers of attorney bar attorneys-in-fact from making gifts, including to themselves, exceeding $10,000, Luigi essentially made a gift to himself of all of the equity in his parents' home, violating his statutory duty to act in the best interests of his principals

(*see* General Obligations Law § 5-1514 [former General Obligations Law § 5-1502]). Again, this argument was not advanced before either Supreme Court or this Court and, accordingly, we reject it.

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

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

GESMER, J. (dissenting)

The record before us supports a finding that defendants Carmelo and Vivian Rosabianca should have been granted permission to interpose a late answer, upon consideration of every applicable factor. Most notably, the motion court failed to consider "the strong public policy in favor of resolving cases on the merits," which we have held normally weighs in favor of granting such motions (*Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417, 418 [1st Dept 2016]). That is particularly appropriate here, where the movants demonstrated, although "not essential" on this pre-judgment request to file a late answer, that they have at least two meritorious defenses to this foreclosure proceeding (*id.* at 418 [quoting *Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008]; *see also* CPLR 3012[d]; *Hirsch v New York City Dept. of Educ.*, 105 AD3d 522 [1st Dept 2013]). First, in accepting the mortgage executed by Luigi Rosabianca on his parents' home, plaintiff's predecessor improperly relied on powers of attorney that did not give Luigi Rosabianca actual authority, or necessarily apparent authority, to mortgage his parents' home. In addition, plaintiff fails to state a cause of action to foreclose the mortgage signed in the names of Carmelo and Vivian Rosabianca, because the mortgage states that it secures a note signed by them, but plaintiff bases its

foreclosure action only on a note signed by their son, and no note signed by the senior Rosabiancas has been produced.

Since, as the majority concedes, there would be no prejudice to plaintiff due to delay in permitting Mr. and Mrs. Rosabianca to file a late answer, the factors of delay and prejudice weigh in favor of granting the motion. Their reasonable excuse, and evidence of the lack of willfulness in their delay, as discussed more fully below, arise from their reasonable reliance on the representation by their lawyer son, defendant Luigi Rosabianca, that he would appear on their behalf in this action. Because, in my view, all of the applicable factors favor granting leave to file a late answer, I respectfully dissent.

Facts

Carmelo and Vivian Rosabianca are elderly Italian immigrants. Mr. Rosabianca worked for 40 years as a mechanic.

Luigi Rosabianca is the senior Rosabiancas' son. He was admitted to the practice of law in 2000, and developed a highly visible law firm specializing in real estate. In March 2015, he was suspended from the practice of law for mishandling and misappropriating IOLA funds (*Matter of Rosabianca*, 127 AD3d 142 [1st Dept 2015]). He was disbarred in July 2015 for continuing to practice law during his suspension (*Matter of Rosabianca*, 131 AD3d 215 [1st Dept 2015]). He was indicted in October 2015 on

charges that he stole $4.5 million from clients.

In 1974, the senior Rosabiancas purchased a home at 2342 Benson Avenue in Brooklyn (the Brooklyn residence) along with another married couple, the Modicas. The senior Rosabiancas have lived in the Brooklyn residence ever since. By bargain and sale deed executed on April 15, 2008, and recorded on May 21, 2008, the Modicas conveyed their interest in the Brooklyn residence to the senior Rosabiancas. Before the events at issue here occurred, the senior Rosabiancas paid off their mortgage in full.

On or about April 30, 2008, the senior Rosabiancas executed powers of attorney that contain the following limiting language in bold type, above the parties' signatures: "This power of attorney is created for the express, limited purpose of authorizing and empowering the agent to do any and all acts connected with the refinance of the residential property known as 2342 Benson Avenue."

Two weeks later, on May 14, 2008, Luigi Rosabianca purchased condominium unit 540 at 55 Wall Street in Manhattan. In order to do so, he borrowed $1,760,000 from Emigrant Mortgage Company, Inc. (EMC) and signed a note dated May 14, 2008 (the Note). The Note was secured by a mortgage executed by Luigi Rosabianca and dated May 14, 2008 (the Mortgage), which purports to encumber

both the Condominium and the Brooklyn residence.[1] Luigi did not sign the Mortgage as attorney-in-fact for his parents, but only in his own capacity as the sole "Borrower" identified in the Mortgage. The Mortgage also recites that "[the Borrower] lawfully own[s]" the property encumbered by the Mortgage, although there is no evidence that Luigi ever owned the Brooklyn residence.

On the same date, Luigi, purporting to act as attorney-in-fact for his parents under the powers of attorney, executed a "Collateral Mortgage" on his parents' residence (the Collateral Mortgage). The Collateral Mortgage defines the "Borrower" as Carmelo and Vivian Rosabianca, and recites that the senior Rosabiancas signed a note on May 14, 2008 that shows that they owe $1,760,000 to EMC and that the Collateral Mortgage secures that note. The record does not contain a note executed by Carmelo and Vivian Rosabianca, either directly or by power of

[1]The Mortgage states that the Borrower gives the Lender "rights in the Property . . . which is located at 55 WALL STREET APT 540 New York, New York 10005-2823. This property is in KINGS County. It has the following legal description: See Schedule 'A' attached hereto and made a part hereof. These premises are improved by a 1-4 family dwelling only. Further collateralized by: 2342 Benson Avenue, Brooklyn, NY 11214" (bracketed material omitted). "Schedule A" contains property descriptions for both the Condominium and the Brooklyn residence. The attached Adjustable Rate Rider, 1-4 Family Rider and Interest Only Payment Rider refer only to the Condominium.

attorney, and no one has claimed that such a note exists.

At the closing, Luigi acted as borrower, attorney-in-fact for his parents, title closer, and title agent for Fidelity Title Insurance Company. It is undisputed that the senior Rosabiancas' home was not encumbered by a mortgage at the time of the closing, and there is no claim that the Collateral Mortgage constituted a refinance of that property. Neither Carmelo Rosabianca nor Vivian Rosabianca authorized Luigi to use their home as collateral for the purchase of the Condominium or to represent that they had borrowed $1,760,000 from EMC, and they did not know at that time that he had done so, or that he had represented himself to be their attorney-in-fact at the closing. Luigi never recorded the mortgages or powers of attorney.[2]

On or about October 30, 2009, EMC assigned the Note and the Mortgage to Emigrant Savings Bank-Manhattan (ESBM).[3] On December

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[2]In 2012, plaintiff brought an action in Kings County in which it sought to record copies of the powers of attorney and the Collateral Mortgage. The senior Rosabiancas did not appear. The majority suggests that their failure to appear in that action shows that their delay in filing an answer in this case was willful. However, their default in the Kings County action seems to me entirely consistent with their affidavits submitted in this action stating that they relied upon their son in all respects with regard to the events underlying this action, and were unaware of his fraudulent acts committed against his clients.

[3]The complaint alleges that the Collateral Mortgage was assigned to plaintiff on October 30, 2009, as well. However, the exhibit attached to the complaint in support of this claim is the

31, 2012, ESBM merged with and into plaintiff Emigrant.

Luigi Rosabianca made mortgage payments until in or about August 2011. On or about March 17, 2014, Emigrant commenced this foreclosure action against Luigi and the senior Rosabiancas, claiming that Luigi was in default on the Note he had signed. In the first cause of action, Emigrant seeks to foreclose only on the Condominium on the basis of the Mortgage. In the third cause of action, Emigrant seeks to rely on the Collateral Mortgage to foreclose on the Brooklyn residence. The complaint contains no allegations that the senior Rosabiancas signed any note.

When the senior Rosabiancas learned of this action, Luigi assured them that "he would do everything in his power to prevent [their] home from being foreclosed upon." Notwithstanding that, he failed to file an answer on their behalf, or on his own. He appeared at the mandatory settlement conference on August 20, 2014, where, according to plaintiff's counsel, he admitted that he and his parents had defaulted, and indicated that he intended to reach a settlement with Emigrant. However, Luigi failed to appear on the adjourned conference date or any subsequent court date.

On or about December 29, 2014, plaintiff filed a motion

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assignment of the Mortgage, not the Collateral Mortgage.

seeking entry of a default judgment and appointment of a referee. Neither Luigi nor anyone else acting on the senior Rosabiancas' behalf submitted opposition. However, plaintiff's motion for a default judgment was not decided at that time (and indeed, not until April 11, 2016), because the judge presiding over this matter was transferred to the Kings County Supreme Court, and the matter had to be assigned to a new judge.[4]

When the senior Rosabiancas learned that their son had failed to do anything to prevent their home from being foreclosed upon, they retained counsel. On April 27, 2015, their attorney filed an order to show cause seeking to vacate their default in appearing, to permit them to file a late answer, to dismiss so much of the complaint as seeks to foreclose on their home, and to award them counsel fees pursuant to Real Property Law § 282. In their affidavits in support of the motion, the senior Rosabiancas pointed out that they never entered into an agreement with Emigrant Bank, and that, consistent with the limiting language in the powers of attorney, they "never authorized Luigi Rosabianca to enter into an agreement which placed a mortgage on [their] primary residence. . . . [and they] never authorized Luigi Rosabianca to use [their] home as collateral in the purchase of

[4] Neither this motion nor the 2016 judgment is in the record on appeal.

the 55 Wall Street Property." They also explained that, "[a]fter [they] learned about this action, Luigi reassured [us] that he would do everything in his power to prevent our home from being foreclosed upon," and that they "did not know of Luigi's ... legal troubles which he had caused for himself by stealing money from his clients." They further stated that, "[u]pon learning that [Luigi] did not do anything on our behalf," they retained counsel. When the senior Rosabiancas filed their motion for leave to file a late answer, plaintiff's motion for a default judgment was still pending, due to the change in the assigned justice.

On April 11, 2016, counsel appeared for oral argument. After hearing oral argument, the motion court denied the senior Rosabiancas' motion. A written order denying the motion was entered on April 16, 2016, and the senior Rosabiancas now appeal.[5]

Analysis

I agree with the majority that the motion by the senior

[5]On April 11, 2016, the motion court directed the parties to settle an order granting plaintiff's motion for a default judgment. The Unified Court System website indicates that the settled order was signed on July 22, 2016. If this Court had decided in the senior Rosabiancas' favor on this appeal, that could have provided them a basis to seek renewal of plaintiff's motion for a default judgment.

Rosabiancas for leave to file a late answer is governed by CPLR 3012(d), which provides that, upon application, "the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." The determination of a CPLR 3012(d) motion lies within the sound discretion of the court (*see Myers v City of New York*, 110 AD3d 652 [1st Dept 2013]. Here, the motion court abused its discretion by failing to treat the motion as a motion to permit the filing of a late answer under CPLR 3012(d), and instead analyzing it as a motion "to vacate the default" under CPLR 5015.

The majority implicitly acknowledges that the motion court failed to consider the factors relevant to a motion to permit the filing of a late answer under CPLR 3012(d) discussed in *Artcorp Inc. v Citirich Realty Corp.* (140 AD3d 417 [1st Dept 2016], *supra*), and *Guzetti v City of New York* (32 AD3d 234, 238 [1st Dept 2006] [McGuire, J., concurring]). In my view, consideration of these factors weighs in favor of granting the senior Rosabiancas' motion, particularly in view of our State's "strong public policy in favor of resolving cases on the merits," recognized by this Court in *Artcorp* (140 AD3d at 418). As Justice McGuire noted, quoting the sponsor's memorandum for the Senate bill that became CPLR 3012(d), "[C]ourts must have broad

discretion to regulate litigation in the interests of justice, while preserving adherence to reasonable requirements of diligence as essential to the administration of justice" (*Guzetti*, 32 AD3d at 239n). Considering the absence of any prejudicial effect on either plaintiff or the court system in this case, and the potential for injustice in not extending the senior Rosabiancas' time to file an answer, I would find that the denial of their motion was an abuse of discretion. I address each factor below.

Delay

The factor of delay favors granting the motion here, since, as the majority concedes, there would be no prejudice to plaintiff in permitting the senior Rosabiancas to file a late answer. Moreover, the delay in this matter up to the time when this motion was decided was not attributable to either party, but to the court's need to assign a new judge, which did not occur for over a year.

Excuse for Delay

I strongly disagree with my colleagues that the excuse offered by the senior Rosabiancas is "questionable" and that this factor is "arguably neutral" in this case. Even a "less than compelling" excuse for delay may suffice on a CPLR 3012(d) motion, since "there is a strong preference in our law that

matters be decided on their merits in the absence of demonstrable prejudice" (*Elemery Corp. v 773 Assoc.*, 168 AD2d 246, 247 [1st Dept 1990]; *see also HSBC Bank USA v Lugo*, 127 AD3d 502, 503 [1st Dept 2015]). Here, it was entirely reasonable of the senior Rosabiancas to rely on the representation of an experienced real estate attorney, who is also their son, that he would take whatever steps were necessary on their behalf (*see D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 90 AD3d 403, 406 [1st Dept 2011] [defendant who failed to answer complaint or appear for 26 months in good faith reliance on incorrect advice of counsel demonstrated reasonable excuse]).

No one disputes that Luigi Rosabianca assured his parents that he would prevent the foreclosure of their property and that he then failed to file an answer or to make any appearances in this action except at the initial settlement conference. Where conduct such as this is the result of law office failure, a court may exercise its discretion to excuse the party's delay, because CPLR 2005 provides that "the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure." This case provides an even stronger argument for the exercise of the court's discretion, because the senior Rosabiancas' delay in answering the complaint was not the result

of their attorney's law office failure but rather the consequence of another instance of their son's now well documented history of defrauding clients, who, in this case, were his parents.

Willfulness

The majority would find that the delay by the senior Rosabiancas showed willfulness. In *Artcorp*, we declined to find willfulness where a party did not demonstrate an "inten[t] to abandon the case" (*Artcorp*, 140 AD3d at 418). The senior Rosabiancas' reasonable reliance on their son, who turned out to have stolen millions of dollars from his clients, and their prompt retaining of counsel when they realized he had done nothing to protect them, indicates that their delay in filing an answer showed no intent to abandon their defenses, and was therefore not willful.

I would find that the motion court's failure to consider the reasonableness of the senior Rosabiancas' excuse, and the lack of willfulness on their part, was an abuse of discretion, since this is clearly a situation where the court had ample evidence that innocent and trusting parents had been swindled by their dishonest son. At the time of oral argument before the court on April 11, 2016, Luigi Rosabianca had been suspended from the practice of law (in March 2015) for failure to cooperate with the Disciplinary Committee's investigation and for mishandling and

misappropriating IOLA funds; he had been disbarred in July 2015 for continuing to practice law during his suspension; he had been indicted in October 2015 on charges that he stole $4.5 million from clients; and he was incarcerated.

Prejudice

I agree with my colleagues that consideration of any prejudice to plaintiff in permitting the senior Rosabiancas to file a late answer does not weigh against granting their motion. However, I disagree to the extent that the majority finds that consideration of this factor is somehow "neutral." Although the majority implies that plaintiff has argued that it would suffer prejudice due to "delay in recouping its interest in the property," plaintiff does not make this argument; it cites only to cases based on CPLR 5015, which does not require a showing of prejudice. Plaintiff also did not argue before the motion court that it would suffer any prejudice if the court permitted the senior Rosabiancas to file a late answer. Prejudice is the loss of "some special right . . ., some change of position, or some significant trouble or expense that could have been avoided" (*Barbour v Hospital for Special Surgery*, 169 AD2d 385, 386 [1st Dept 1991] [internal quotation marks omitted]). The filing of the senior Rosabiancas' motion caused no prejudice to plaintiff by delay, since, at the time, the motion court was holding

plaintiff's summary judgment motion in abeyance due to the transfer of the matter to a different justice.

Meritorious Defense

Where a motion for leave to file a late answer is made prior to entry of a default judgment, no showing of meritorious defense is required (*Hirsch*, 105 AD3d at 522). Indeed, in *Artcorp*, cited by the majority, we noted that demonstration of a meritorious defense is "not 'essential'" on such a motion (*Artcorp*, 140 AD3d at 418). This is consistent with Justice McGuire's concurrence in *Guzetti*, in which he quoted from the sponsor's memorandum: "'while the merits of the applicant's case may sometimes be an appropriate factor for consideration, routine insistence on a showing of merits in cases of short delay would be an unwarranted burden'" (32 AD3d at 239n). Yet the majority finds that this is the "most notable" factor in affirming the motion court's denial of the senior Rosabiancas' motion.

In any event, the senior Rosabiancas have demonstrated at least one meritorious defense. The senior Rosabiancas' primary argument is that the Collateral Mortgage was ineffective to give plaintiff a security interest in their home because Luigi did not have authority to execute the Collateral Mortgage. Specifically, each power of attorney provides on its face that it is "created for the express, *limited* purpose of authorizing and empowering

the agent to do any and all acts connected with the *refinance* of the residential property known as 2342 Benson Avenue" (emphasis added). This limiting language explicitly prohibited Luigi from exercising any of the initialed powers except in relation to a "refinance" of the senior Rosabiancas' residence, and thus vitiated the broad general language of the powers of attorney. According to Black's Law Dictionary (10th ed 2014, refinancing), a refinance is "[a]n exchange of an old debt for a new debt." Since it is undisputed that there was no mortgage on the senior Rosabiancas' home either at the time they executed the powers of attorney or when their son closed on the Collateral Mortgage approximately two weeks later, there was no debt to refinance, and there is no claim that there was any. The limiting language on the face of the powers of attorney should have put plaintiff's predecessor in interest on notice that Luigi Rosabianca did not have actual authority, and may not have had apparent authority, to execute the Collateral Mortgage.[6]

The majority states that the senior Rosabiancas "have not challenged the overall validity of the powers of attorney, nor

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[6]The majority's statement that the bank was not "required to look beyond the[] facial validity" of the powers of attorney fails to recognize that the limiting language appears on the face of each power of attorney. Accordingly, there was no need to look beyond the face of each document to determine that it limited Luigi's power to act.

have they questioned EMC's legal duty to honor them." This is inaccurate. In their affidavits, the senior Rosabiancas explicitly state that they "never authorized Luigi Rosabianca to use [our] home as collateral in the purchase of the 55 Wall Street Property." That statement is entirely consistent with the limiting language in the powers of attorney, as discussed above. The senior Rosabiancas' attorney argued in his affirmation in support of the motion, and in his brief to this Court, that Luigi "had no actual authority to use his parents' house as security to purchase his Manhattan condominium." Accordingly, the senior Rosabiancas very explicitly dispute that the powers of attorney gave Luigi authority to execute a mortgage on their home in order to secure a loan to enable him to purchase the Condominium.[7]

The majority states that there was nothing about the powers of attorney that would have put the bank on notice that "something was amiss" (*Oliveto Holdings, Inc. v Rattenni* (110 AD3d 969, 971 [2d Dept 2013] [internal quotation marks omitted]). However, I find that the limiting language appearing on the face of each power of attorney should have put the bank on notice.

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[7]For the same reason, my colleagues' statement that the Rosabiancas never raised the argument that Luigi lacked authority to act is not correct. The defense is present in each of the senior Rosabiancas' affidavits and in their attorney's affirmation.

Oliveto is not comparable to the case at bar, since there is no indication that the power of attorney at issue in that case contained either additional limiting language or a limitation on gifts to the agent. Here, the mortgage transaction violated the express terms of the powers of attorney both because it was not a refinance of debt secured by the senior Rosabiancas' home and because it is undisputed that Luigi's use of the powers of attorney benefitted only himself.

Furthermore, *Oliveto* was decided after trial. As discussed further below, the Court of Appeals has held that where, as here, a bank invokes the doctrine of apparent authority to justify its actions, it has a duty to determine the extent of the agent's authority, and whether or not the bank did so is a question of fact. Thus, when faced with such a situation, the Court of Appeals reversed the Second Department and held that "it was error for the Appellate Division to hold, as a matter of law, that the bank was under no duty to investigate the circumstances surrounding the mortgage . . . [since that] issue, involving inferences to be drawn from evidentiary proof," should not be determined on a motion to dismiss (*Collision Plan Unlimited v Bankers Trust Co.*, 63 NY2d 827, 830 [1984]). Similarly, this case is not in an appropriate procedural position to make a finding as a matter of law on the issue of whether or not Luigi

had apparent authority to act.

Even if the Collateral Mortgage taken on their unencumbered home to finance their son's purchase of a condominium for himself could be seen as a "refinance," the majority fails to address the fact that each power of attorney restricts gifts made by the agent, including to himself, to no more than $10,000 per year. By imposing a mortgage on his parents' home as collateral for a $1.76 million dollar loan in order to purchase a condominium for himself, Luigi essentially made a gift to himself of all of the equity in his parents' home, which plaintiff claims had a value of $918,500 as of February 23, 2015. The General Obligations Law (GOL) "unambiguously imposes a duty on the attorney-in-fact to exercise gift-giving authority in the best interest of the principal . . . [and] the purpose of the gift-giving authority is to allow an attorney-in-fact to carry out the principal's intentions to use gifts as part of a financial or estate plan" (*Matter of Ferrara*, 7 NY3d 244, 252-253 [2006]).[8] The

[8]As discussed further below, the GOL was amended in 2008, effective September 1, 2009. In *Ferrara*, the Court of Appeals addressed section 5-1502M(1) of the GOL, which, at the time, provided that gifts were to be made by an attorney-in-fact "in the best interest of the principal" (*Ferrara*, 7 NY3d at 251). That section was repealed by the 2008 amendment and replaced with a new section 5-1514, effective in 2009, which also provides that the gift-giving power must be exercised by the attorney-in-fact "in the best interest of the principal" (Subd [5]).

Rosabiancas' son acted beyond his limited powers under the powers of attorney by giving himself a gift in excess of $10,000 in the form of a collateral mortgage on his parents' home to secure a debt of $1.76 million, and by doing so in a manner that was clearly not in their best interests as part of a financial or estate plan.

The majority concludes, without any analysis of the language of the powers of attorney, that Luigi Rosabianca had "not only apparent, but express authority," upon which plaintiff "reasonably relied." This conclusion is not consistent with Court of Appeals cases, all the more relevant here because the powers of attorney at issue were executed and used at the closing before the effective date of the 2008 amendments to the GOL. Those cases show that a party who deals with an agent has a duty to determine the extent of the agent's authority (*Ford v Unity Hosp.*, 32 NY2d 464, 472–473 [1973]) and that, where an agent has neither actual nor apparent authority, the principal is not liable to third parties (*Standard Funding Corp. v Lewitt*, 89 NY2d 546 [1997] [insurance company not bound by premium financing agreements entered into by one of its agents where the agency's contract only authorized the agent to issue policies and collect premiums]). The Court of Appeals has explained that:

"The mere creation of an agency for some

> purpose does not automatically invest the agent with 'apparent authority' to bind the principal without limitation. An agent's power to bind his principal is coextensive with the principal's grant of authority. One who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority. Upon failure to properly determine the scope of authority, and in the face of damages resulting from an agent's misrepresentations, 'apparent authority' is not automatically available to the injured third party to bind the principal. Rather, the existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentations of the agent because of some misleading conduct on the part of the principal—not the agent. As one treatise on New York law states: 'The very basis of the doctrine of apparent authority indicates that the principal can be held liable under the doctrine only where he was responsible for the appearance of authority in the agent to conduct the transaction in question. The apparent authority for which the principal may be held liable must be traceable to him; it cannot be established by the unauthorized acts, representations or conduct of the agent'" (*Ford*, 32 NY2d at 472-473).[9]

Here, plaintiff claims it is protected by the doctrine of apparent authority. However, it had a duty of reasonable inquiry into the scope of Luigi Rosabianca's authority (*id.*; *see also Collision Plan Unlimited*, 63 NY2d at 830; *1230 Park Assoc., LLC v*

[9]The majority attempts to distinguish *Ford* by pointing out that, in that case, it was undisputed that the agent was not authorized to act. However, that does not alter the legal principle articulated by the Court, which is applicable in this case.

Northern Source, LLC, 48 AD3d 355, 356 [1st Dept 2008]). There is no claim that plaintiff or its predecessor undertook any inquiry, even to the extent of reading the powers of attorney with care, before the Mortgage closing.

The majority concludes that these common-law rules about agency do not apply to powers of attorney because the "applicable principles. . . have been statutorily codified." I disagree for two reasons. First, the powers of attorney at issue here were executed and used at the closing in April and May 2008, respectively. The amendments to the General Obligation Law, including those sections relied upon by the majority, were not effective until September 2009, and the amendment provides that it "shall apply to all powers of attorney executed *on or after the effective date of this act* and ... shall not affect the validity of any power of attorney or the conveyance of authority to an attorney-in-fact or agent contained in a power of attorney executed prior to the effective date of this act if such power of attorney was valid at the time of its execution" (L 2008, ch 644 [emphasis added]). Second, in *Ferrara*, the Court of Appeals observed that, even after the legislature amended the GOL power of attorney provisions in 1996 so that the agent's duty to act in the principal's "best interest" appeared in some provisions but not others, reading the best interest requirement into a

provision that did not contain those words "is consistent with the [common-law] fiduciary duties that courts have historically imposed on attorneys-in-fact" (7 NY2d at 254). Indeed, section 5-1504 of the GOL, as amended in 2008, prohibiting third parties from refusing to accept validly executed powers of attorney "without reasonable cause" merely incorporates the previously existing common-law principle that "a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable" (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]).

Furthermore, given the express limitation on the face of the powers of attorney here, I disagree with the majority's statement that plaintiff "reasonably" relied on them. I also disagree that *Parlato v Equitable Life Assur. Socy. of U.S.* (299 AD2d 108, 113 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]) imposes liability on the senior Rosabiancas. Despite having taken the position that "applicable principles regarding powers of attorney have been statutorily codified and supplant the general common-law doctrine," the majority cites *Parlato* for the proposition that a principal may be held liable in tort where its agent misuses its apparent authority to commit fraud to the detriment of the principal. There, the defendant, Equitable Life, had fired the plaintiff's insurance agent, but failed to notify his clients of

the firing. For approximately four years following the firing, the ex-agent continued to hold himself out to the plaintiff as her Equitable Life agent, and ultimately stole her money. The Court of Appeals held that the plaintiff's claim against Equitable Life for the ex-agent's acts after his termination should not have been dismissed, because a third party is entitled to assume that the agent's authority continues until the third party receives notice that the principal has revoked the agent's authority.

In contrast, here, the powers of attorney did not give the agent, Luigi Rosabianca, actual authority to use the Rosabiancas' home as collateral for his purchase of a condominium for himself, and there is at least a question of fact as to whether they gave him apparent authority to do so. Moreover, here, the principals were not a large financial service company, but the elderly immigrant parents of the agent, to whom the agent had a fiduciary duty (*Ferrara*, 7 NY3d 244, 255 ["'A power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal"]).[10]

Nor is it clear as a matter of law that plaintiff's conduct is justified by GOL § 5-1504. The current version of the

[10]This principle was codified at GOL § 5-1501(2)(a), as a result of the 2008 amendment (L 2008, ch 644. § 2).

statute, in pertinent part, bars a third person from "refus[ing], without reasonable cause, to honor a statutory short form power of attorney." In May 2008, however, section 5-1504 provided only that "[n]o financial institution located in this state shall refuse to honor a statutory short form power of attorney" (L 1996, ch 499, §5). In my view, neither version of the statute permits a person to honor a power of attorney for any purpose other than that explicitly stated. Certainly, the bank would have violated the statute if it had refused to permit Luigi to execute documents "connected with the refinance of the [Brooklyn residence]." Plaintiff's claim that it can rely on the powers of attorney for any other purpose raises at the very least a question of fact, which cannot be resolved in the procedural posture of this case.

In addition, as the senior Rosabiancas' attorney argued before the motion court, "There may also be further defenses that come up once discovery is complete." One potential defense is the facial inadequacy of the foreclosure claim against the Brooklyn residence, based on the documents attached to the senior Rosabiancas' motion papers. The third cause of action in the complaint seeks foreclosure on the Brooklyn residence. The claim, which is based solely on the Collateral Mortgage, asserts that the plaintiff is entitled to foreclose the Collateral

Mortgage because Luigi defaulted under the Note. However, the Collateral Mortgage does not secure the Note executed by Luigi. Rather, the Collateral Mortgage, on its face, provides security only for a note executed by the senior Rosabiancas. However, no one has produced such a note. The senior Rosabiancas explicitly deny signing any agreement with plaintiff. Moreover, the record does not contain any note executed by the senior Rosabiancas, either in their own capacity or by power of attorney, and no one claims that such a note exists.

The majority seeks to excuse this obvious gap by stating that the Collateral Mortgage "was clearly intended to secure the Rosabiancas' home and to refer to the adjustable rate note signed by Luigi." However, we do not have authority to rewrite the Collateral Mortgage. If plaintiff believes the Collateral Mortgage contains an error, its remedy is to seek reformation of the Collateral Mortgage. Were plaintiff to do so, it would be required "to proffer evidence, which, in no uncertain terms, evinces fraud or mistake and the intended agreement between the parties" (*US Bank N.A. v Lieberman*, 98 AD3d 422, 424 [1st Dept 2012]). The senior Rosabiancas dispute that they authorized Luigi to encumber their home, and certainly dispute that they are parties to that transaction. Accordingly, the identity of the intended borrower or borrowers under the Collateral Mortgage, as

well as the parties' intent, are issues of fact that are not clarified by the record on this appeal. Therefore, the senior Rosabiancas' defense that the complaint fails to state any claim against them or their home may be meritorious.

Accordingly, I would find that the motion court abused its discretion by failing to consider the appropriate factors in determining the senior Rosabiancas' CPLR 3012(d) motion for permission to file a late answer. I would further find that consideration of all five of the factors discussed in the concurrence in *Guzetti*, as well as our "strong public policy in favor of resolving cases on the merits" (*Artcorp*, 140 AD3d at 418), support granting the motion. Therefore, I would find that they should be permitted to interpose an answer.

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

ENTERED: DECEMBER 14, 2017

CLERK

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

4403 William Fabian Hoyos, Index 109409/09
Plaintiff-Respondent, 590865/10

-against-

NY-1095 Avenue of the Americas, LLC,
Defendant-Appellant,

Structure Tone, Inc.,
Defendant.
- - - - -
[And a Third Party Action]

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

The perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered March 24, 2016, which, to the extent appealed from as limited by the briefs, denied the motion of defendant NY-1095 Avenue of the Americas, LLC (NY-1095) for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1), 200 and common-law negligence, and granted plaintiff's cross motion for summary judgment as to liability on the Labor Law § 240(1) claim, affirmed, without costs.

Plaintiff, a painter employed by a subcontractor hired by defendant Structure Tone in connection with a renovation project, was injured when he slipped or fell off an elevated loading dock.

The accident occurred as plaintiff stood in line with other construction workers, waiting to sign a security log and obtain a pass that would allow him to enter into the building where he was working. The loading dock, which was approximately four feet off the ground, had no guardrails, chain, rope, or other indication where its platform ended and the ledge began. When the accident occurred, at approximately 6:30 a.m., the dock was overcrowded with workers reporting for work. The dock, located in a service entrance, was the sole designated means for all construction workers to gain access into the 42 story commercial office building owned by NY-1095 and managed by nonparty Equity Office. Access to the loading dock itself was through a sliding garage door that remained locked until it was opened by building security in the morning.

At the time of the accident, plaintiff had been working on the construction project for approximately one month. His particular assignment was to paint several of the floors that had been renovated by Metropolitan Life Insurance Company (MetLife), one of the building's tenants. The morning of the accident, plaintiff was reporting for work and following the building's usual sign in procedure, which required that he and any other construction workers entering the building use the service entrance. None of the contractors were allowed to use the lobby

to gain access into the building. The loading dock led to a ramp at the top of which was a guard who sat at a small security desk

Since construction workers were not allowed to enter through the main entrance the same way tenants do, when the accident occurred, the loading dock was crowded with "quite a few" workers on line waiting to sign in. Only after signing in with the security guard and obtaining a pass would plaintiff (or any of the other construction workers) be allowed to gain access to the interior of the building.

NY-1095's office lease agreement with MetLife, dated December 19, 2006 (lease), has several exhibits, schedules and attachments that are incorporated into and made a part of the lease. Particularly germane to the issues raised in this appeal is Exhibit E-2 to the lease, "Alteration Rules and Regulations," which includes "Contractor Rules and Regulations for Construction Projects." These rules and regulations set forth standards and procedures that had to be followed so as to insure that other tenants of the building were not inconvenienced by the construction. Among the owner's requirements were that all workers of the various contractors had to use the loading dock and freight elevator at all times; a prohibition against any contractor setting up "shop" outside a particular tenant's area, unless the owner approved of an alternate "shop" area; and a

requirement that contractors' regular, weekly job meetings be scheduled so that members of the owner's management team could attend.

Supreme Court did not err in finding that plaintiff was covered under Labor Law § 240(1) and granting plaintiff's motion for summary judgment. Labor Law § 240(1) requires that site owners, contractors and their agents provide safety devices and that they be "constructed, placedseeks to remove plaintiff from the protections of Labor Law § 240 (1), on the basis that plaintiff was not "working" at the time of the accident and he was in street clothes, those facts do not dictate whether an injury is within or without the protections of the Scaffold Law. This is not a situation where the plaintiff was injured after he had already completed an enumerated activity (*Beehner v Eckerd Corp.*, 3 NY3d 751 [2004] [job completed, worker merely retrieving serial and model numbers from unit]), nor is it a situation where the task was not an enumerated activity, or even if it was, that it had not yet commenced (*Simon v Granite Bldg. 2, LLC*, 114 AD3d 749 [2d Dept 2014] [the plaintiff, hired to hang wall paper, was injured when the vehicle, in which he was riding, skidded on ice in garage]).

Here, plaintiff, who had been working on this construction project for a month, was following the rules and regulations of

the owner and building protocol that he wait outside a closed, gated service entrance until it was opened by the building's security staff. Once the gate was opened, and after proceeding through the gate, he could not travel directly upstairs to whichever floor he was assigned to paint. He was required to line up with other construction personnel and use the crowded, elevated loading dock to gain access into the building at the start of each workday and throughout the day whenever he needed to retrieve supplies. Plaintiff had no choice but to adhere to the owner's work site policy, and he was not provided with a safer or different means of gaining access to any other part of the building, including the area that MetLife was renovating in accordance to the terms of its lease with the owner. Since plaintiff's painting assignment related to a construction/renovation project within the building plaintiff was unquestionably engaged in an enumerated activity within the meaning of Labor Law § 240(1).

Defendant contends, and the dissent agrees, that plaintiff was not engaged in an activity enumerated by the statute because he was not physically on the "construction site," meaning any of the floors upstairs that he had to paint and, therefore, had not yet begun to work. The dissent nonetheless acknowledges that accidents occurring "on the job site" come within the protections

of Labor Law § 240(1), even if they occur at a time when the plaintiff is not, or no longer, directly involved in the enumerated work (*Reinhart v Long Is. Light Co*, 91 AD2d 571, [1st Dept 1982] *appeal dismissed* 58 NY2d 1113 [1983]). This distinction, based upon rigid definitions of what it means to be "on the job" or "on a job site" ignores the reality of what construction workers employed on projects in high rise buildings face where, as here, a renovation project within a building (i.e. a vertical "job site"), may very well extend over several, possibly noncontiguous floors.

Labor Law § 240(1) should be "construed with a commonsense approach to the realities of the workplace at issue" (*Salazar v Novalex Contracting Corp.*, 18 NY3d 134, 140 [2011]). The loading dock and service entrance is within the multi-storied high rise building owned by NY-1095, in which the MetLife project took place in accordance with the lease, subject to the owner's rules and regulations. The building as a whole, and in particular those parts, which must be accessed by a worker to do his or her job, cannot be discounted as a job site simply because it is multi-storied and the dock is not in the immediate vicinity of the floor(s) above that plaintiff was assigned to paint.

The fact that plaintiff was in the process of entering the building, but had not yet physically begun painting is not a

basis to deny summary judgment. We have held, for instance, that a worker who is injured on a staircase that did not have any guardrails is entitled to the protections of the scaffold law, although his injury occurred while leaving the building and the alleged condition was not directly related to his assignment (see *Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 432 [1st Dept 2012]). We have also held that a worker injured when he fell into a excavated hole at a work site is entitled to the protections of Labor Law § 240(1) although the worker had arrived early for work that day and was not yet performing his tasks (*Amante v Pavarini McGovern, Inc.*, 127 AD3d 516 [1st Dept 2015]).

In distinguishing these cases the dissent seeks to do so on their facts, pointing out that the accidents occurred on the job or construction site. Labor Law § 240(1), however, protects workers engaged in enumerated work activities. The statute does not use or define the term "construction site" or otherwise expressly limit its protections in that way. The salutary purpose of Labor Law § 240(1) is to protect workers from elevated risks which may manifest in many forms, and as succinctly stated by the Court of Appeals:

> "Our jurisprudence defining the category of injuries that warrant the special protection of Labor Law § 240(1) has evolved over the

> last two decades, centering around a core premise: that a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal citations omitted]).

Rather than isolating the moment of a plaintiff's injury, the general context of the work is what should be taken into account (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). Clearly, at the time of the accident, plaintiff was entering the building and reporting to the construction site through the only means of access the owner made available to him and all other construction workers. Arguments that plaintiff's injury did not occur at a "construction site," under the circumstance of this case, places an unintended limitation on Labor Law § 240(1).

While at the precise moment of plaintiff's injury he was awaiting clearance to enter the building and he slipped or fell off a permanent structure, there is no merit to NY-1095's further contention that plaintiff was not actually engaged in work involving a gravity-related risk (*see O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60, 61 [1st Dept 1999]). We have held that injuries sustained while a worker was on site, although entering or exiting the site, or on a break, come within the protections of Labor Law § 240(1) (*Amante*, at 516; *Morales v*

Spring Scaffolding, Inc., 24 AD3d 42, 44 [1st Dept 2005]; *Campisi v Epos Contr. Corp.*, 299 Ad2d 4 [1st Dept 2002]). It is, therefore, of no moment the elevated loading dock is a permanent fixture that existed before the project began, not an open excavation pit as in *Amante*.

Although the loading dock was several feet off the floor, it had no railing, chain, demarcation or other protective safety device to prevent someone on the crowded platform from falling off its edge and the only argument summoned by NY-1095 is that it had no obligation under OSHA regulations to provide any kind of perimeter protection. Whether the dock was elevated three or four feet off the ground, plaintiff's fall therefrom cannot be described as a fall from a de minimis height. Furthermore, owner's asserted compliance with OSHA requirements applicable to loading docks does not defeat plaintiff's prima facie showing that he was injured when he fell from an elevated dock used by him to gain access to the work site and floors above (*see e.g. Dalaba v City of Schenectady*, 61 AD3d 1151, 1152 [3d Dept 2009]; *Cruz v Cablevision Sys. Corp.*, 120 AD3d 744, 746 [3d Dept 2014]). This was plaintiff's sole means of accessing his assigned floor once he entered the work site (*see Oprea v New York City Hous. Auth.*, 226 AD2d 310, 311 [1st Dept 1996]), and he could not perform his work as a painter until he complied with these

mandatory requirements (*see e.g. Amante* at 516; *Campisi* at 6-7). Not only was plaintiff required to enter via the loading dock each day and throughout the day, he did not countermand any order or building policy that he to use some other means by which to enter the building (*see Amante* at 516). Moreover, any argument that plaintiff himself was to blame for his fall because he should have been more careful, or was rushing, touches on the issue of comparative negligence, which is not a defense to a Labor Law § 240(1) claims (*Somereve v Constr. Corp.*, 136 AD3d 537, 539 [1st Dept 2016]). Here, under the lease, NY-1095 had the right and ability to provide safer access to the construction workers using the loading dock. Plaintiff's fall was a direct consequence of the owner's failure to provide adequate protection against the risk of such fall.

Summary judgment dismissing the Labor Law § 200 and common-law negligence claims was also properly denied. NY-1095 did not meet its burden of showing that the loading dock complied with

all applicable codes, and was not inherently dangerous, because the affidavit of its architect was unsigned and unsworn.

All concur except Tom, J.P. who dissents in part in a memorandum and Richter, J. who dissents in part in a memorandum as follows:

TOM, J.P. (dissenting in part)

While I agree with the majority that Supreme Court correctly denied that branch of defendant NY-1095 Avenue of the Americas, LLC's (NY-1095) motion for summary judgment seeking dismissal of the Labor Law § 200 and common-law negligence claims, I would find that the court erred in denying dismissal of the Labor Law § 240(1) claim. Accordingly, I respectfully dissent.

In October 2008, plaintiff, who was employed as a painter by nonparty Cosmopolitan Decorating Co., Inc. (Cosmopolitan), was assigned to do painting work on certain floors at a building located at 1095 Avenue of Americas, a 42-story commercial office building with many different tenants, owned by defendant NY-1095. NY-1095 leased floors 13-20 and 40-41 to nonparty Metropolitan Life Insurance Company (MetLife), which was doing renovation work on the leased floors. MetLife hired defendant Structure Tone as general contractor to perform renovations, which in turn hired Cosmopolitan to perform painting in MetLife's leased space.

In order to access the construction project on floors 13-20 and 40-41, plaintiff first had to enter the building through a loading dock entrance. Paul Gordon, then general manager of the building, testified that, in October 2008, workers used the building's service entrance through a loading dock located on 41st Street, signed in with security before gaining access to the

building, and would then take the freight elevator to the floors where the renovation work was being performed. Gordon stated that a concrete ramp to the right of the loading dock led to the landing of the loading dock. The ramp had railings, but the loading dock did not because "[i]t would stop a truck from being able to make a delivery on that dock."

Plaintiff testified that, each morning at approximately 6:30 a.m., he and other contractors reported to the loading dock of the building, to wait for the door to open so they could sign in at a security desk. After signing in, he would take a freight elevator to the floor where he was painting, and change into his work clothes. Plaintiff testified that he worked at the site for more than a month before his accident. He always signed in at the loading dock once a day, sometimes more often if "we had to go down to receive a delivery for paint."

According to Gary Trobe, who measured the loading dock on behalf of NY-1095, the dock was just under four feet high. Plaintiff claimed the loading dock was five feet high.

Plaintiff testified that on the day of the accident he was standing on the loading dock, looking at a door, waiting for his turn to sign in. One person was ahead of him, and more than 10 were behind him in line. James Joyce, of Structure Tone, also stated that there was a large group of people waiting to sign in.

According to plaintiff, as he was about to sign in, someone with identification behind him said: "[E]xcuse me. I need to go through." Plaintiff, who did not recall how close he was to the edge of the dock, took "a half step" back and fell off the loading dock. He stated that he did not trip on anything, and the accident did not involve any debris or slipping.

Labor Law § 240(1) protects workers engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*see Martinez v City of New York*, 93 NY2d 322, 326 [1999]; *see also Soto v J. Crew Inc.*, 21 NY3d 562, 566 [2013]). In addition, to recover, the plaintiff must have suffered an injury as "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

The majority, in invoking Labor Law § 240(1) in this case, has expanded its application to include an injured worker who was not at the work site and not engaged in any enumerated activity under the statute at the time of his injuries, and a fall from a height which the Court of Appeals has deemed not to constitute a significant elevation differential to warrant application of section 240(1). This is a substantial departure from the legislature's clear intent in promulgating section 240(1) and the

case precedents concerning the statute issued by the Court of Appeals.

While section 240 is to be construed liberally to accomplish its purpose (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]), "the statutory language must not be strained in order to encompass what the Legislature did not intend to include" (*Martinez v City of New York*, 252 AD2d 545, 546 [2d Dept 1998], *affd* 93 NY2d 322 [1999], quoting *Karaktin v Gordon Hillside Corp.*, 143 AD2d 637, 638 [2d Dept 1988]). Further, "there is a bright line separating . . . enumerated and nonenumerated work" (*Beehner v Eckerd Corp.*, 3 NY3d 751, 752 [2004] [holding that injuries occurring before or after an enumerated activity are not within the purview of section 240(1)]; *see also Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 753 [2d Dept 2014][holding section 240 inapplicable because "the accident occurred before the plaintiff and his decedent had begun any work that conceivably could have been covered under these sections of the Labor Law"]).

In this case, since plaintiff was not engaged in an activity enumerated by the statute, had not yet begun his work and was not physically on the construction site, and did not face a significant elevation differential, his cause of action based on Labor Law § 240 should be dismissed.

To reiterate, in order to determine whether plaintiff should be afforded the protections of Labor Law § 240(1), we look at 1) whether he was engaged in an enumerated activity, 2) whether he was on the construction site, and 3) whether he faced a significant gravity related risk. Here, none of these factors are present.

Initially, the majority's statement that because "plaintiff's painting assignment related to a construction/renovation project within the building plaintiff was unquestionably engaged in an enumerated activity" is unsupported by the facts of this case, and contrary to case precedent. In an effort to support its ultimate conclusion, the majority erroneously reasons that because plaintiff was required to use the loading dock entrance in order to enter the building and eventually reach the floor on which he was working, he was somehow engaged in an enumerated activity. However, in no reading of the section could a worker merely waiting to sign into a building be found to be engaged in an enumerated activity. Indeed, waiting in line to sign in and enter a building cannot possibly qualify as engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Simply, plaintiff was not even working at the time of his fall and thus cannot possibly invoke the application

of § 240(1).

It should be noted that not all of the building was not under renovation. It was only the floors leased by MetLife which were being renovated. The other floors in this 42-story office building were occupied by other tenants who were operating their respective businesses. It is quite a stretch for the majority to conclude that the building was a work site. In fact, the work site was only on floors 13-20 and 40-41 where construction work was being performed in the building. Stated differently, the construction site is the location where the work enumerated in section 240(1) is taking place. Therefore, because no work of any kind related to the construction work on the upper floors was taking place at the loading dock, the loading dock entrance cannot be considered a part of the construction site.

The majority argues that finding the loading dock not to be part of the construction site "ignores the reality of what construction workers employed on projects in high rise buildings face." In this regard, the majority stresses repeatedly that plaintiff was required to use the loading dock entrance to reach the floor he would be painting. However, in order to extend the protections of the Labor Law to the loading dock, we must consider the context of the work and the accident. Here, the loading dock was not where the renovation of MetLife's space was

taking place, and plaintiff was not carrying out a task that was connected to any enumerated activity.

The majority also posits that because section 240(1) does not define "construction site" we can extend the work site in this case to the entrance of a building where renovation work was being performed on certain floors contained therein. However, limiting the section's coverage to the actual location where the enumerated activities are taking place is a commonsense, reasonable interpretation of the statute employed by the courts in these cases.

Nor was plaintiff facing a risk arising from a physically significant elevation differential. Critically, plaintiff was injured before he began any covered activity as he stood on a large and stable four-foot high loading dock waiting to sign in and enter the building. While the majority deems the height of the dock not to be de minimis, they fail to address or even acknowledge the Court of Appeals' position on this issue (*see Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005]).

The majority ignores the most fundamental principle applicable to these cases which is "the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240(1)" (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017], citing *Berg v Albany Ladder Co., Inc.*, 10

NY3d 902, 904 [2008]; *Toefer* at 407; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Indeed, while plaintiff may have valid Labor Law § 200 and common-law negligence claims, the fact that he fell does not equate to a sustainable § 240 claim. Once again, the loading dock here was not a part of the construction site.

Further, as the Court of Appeals explained in *Rocovich* (78 NY2d at 513), a violation of the statute cannot "establish liability if the statute is intended to protect against a particular hazard, and a hazard of a different kind is the occasion of the injury [internal quotation marks omitted])."

The "special hazards" referred to in *Rocovich*, do not "encompass *any and all* perils that may be connected in some tangential way with the effects of gravity" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Rather, they are:

> "limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured . . . In other words, Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*id.*).

Here, as the majority notes, the section "protects workers engaged in enumerated work activities" and since plaintiff was not so engaged at the time of the accident and was not subjected to a significant gravity-related risk, there is no basis to extend the protections of the statute in this case. Further, what type of protective device prescribed under section 240(1) can be provided to a worker who was injured while waiting on a loading dock to sign in before entering a building where he would then take a freight elevator to the floor where he was assigned to do painting work? Plaintiff testified that neither a safety belt nor harness would have prevented the accident. Clearly, this is not the type of accident section 240(1) was intended to prevent.

The cases upon which the majority and plaintiff rely are inapposite. Indeed, the circumstances of those cases allowed for a reasonable extension and liberal construction of section 240 to accomplish its purpose. Specifically, those cases, unlike this one, involved workers exposed to special hazards related to work site elevation differentials, such as collapsing scaffolds or other failed safety devices, or unmarked pits or gaps on the work site. Here, however, extending section 240 to protect plaintiff requires a strained interpretation of the statutory language far beyond what the legislature intended, and in conflict with

controlling Court of Appeals precedent.

The first category of these cases involve accidents where the plaintiffs were not engaged in an enumerated activity at the moment when the accident occurred, but took place at the work site. In *Morales v Spring Scaffolding, Inc.* (24 AD3d 42 [1st Dept 2005]), the plaintiff was situated on a sidewalk bridge used as a staging area and as an entryway onto the scaffolding. The accident occurred when, during his lunch break, the plaintiff fell from the bridge as it collapsed. In *Reinhart v Long Is. Light. Co.* (91 AD2d 571 [1st Dept 1982], *appeal dismissed* 58 NY2d 1113 [1983]), the scaffold collapsed not when the plaintiffs were engaged in plumbing, but when they were discussing payroll and timesheet problems. However, a critical distinction is that those accidents occurred on the job site and took place on scaffolds or bridges, devices constructed to give workers proper protection, but which were defective.

Here, the loading dock was not where the renovation of MetLife's space was taking place, and plaintiff was not carrying out a task that was connected to any enumerated activity (*cf. Rivera v Squibb Corp.*, 184 AD2d 239, 240 [1st Dept 1992] [the plaintiff injured on a loading dock area while engaged in removing construction debris, in connection with demolition work performed on the 25th through 27th floors]).

Further, unlike the scaffold or bridge in the foregoing cases, the loading dock here was a permanent structure and appurtenance of the building, and was not temporarily constructed to give plaintiff proper protection during his work. Nor was it being used as a safety device to gain access to an elevated work site. *Ryan v Morse Diesel* (98 AD2d 615 [1st Dept 1983]) is instructive. In *Ryan*, the plaintiff was injured when, "carrying a bucket of bolts, he stubbed his toe and fell while walking down a permanently installed but unfinished interior stairway of the hotel under construction" (*id.* at 615). We found Labor Law § 240(1) inapplicable, stating:

> "under no construction [of the statute] can this permanently installed stairway, used by the plaintiff as a place of passage, be deemed to be a scaffold, hoist, stay, ladder, sling, hanger, block, pulley, brace, iron or rope. The stairway was not a tool used in the performance of the plaintiff's work (*id.* at 616)."

In *Brennan v RCP Assoc.* (257 AD2d 389, 391 [1st Dept 1999], *lv dismissed* 93 NY2d 889 [1999]) we further explained that "the determinative criterion in *Ryan* is not the permanence of the structure but its character as a normal appurtenance of the building rather than a device designed to protect the worker from elevation-related hazards." Thus, in *Brennan*, we found section 240 applicable to a platform "installed precisely to afford access to the building's cooling towers so as to permit normal

maintenance and repairs to be carried out" (*id.* at 391; *see also Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510 [1st Dept 2011] [finding section 240 applicable to defective temporary loading dock installed to protect workers]). By contrast, the loading dock in this case was a normal appurtenance of the building and not a device designed to protect plaintiff from elevation-related hazards. Yet, the majority would avoid this key distinction between permanent fixtures and devices designed to protect workers. In so doing, the majority misplaces reliance on cases, discussed below, where upon entering the site the worker is subjected to a significant gravity related hazard (*see e.g. Amante v Pavarini McGovern, Inc.*, 127 AD3d 516 [1st Dept 2015]).

The second category of cases involve plaintiffs injured while entering and exiting the construction site. In *Alarcon v UCAN White Plains Hous. Dev. Fund Corp.* (100 AD3d 431 [1st Dept 2012]), the plaintiff, while in the process of exiting the site, fell 3½ stories from a scaffold and connected makeshift staircase which lacked guardrails. In *Amante* (127 AD3d at 516), the plaintiff fell into a 12 to 15 foot deep excavation pit after entering through an open gate - the only entrance provided - and crossing onto the job site. In *Campisi v Epos Contr. Corp.* (299 AD2d 4 [1st Dept 2002]), the plaintiff entered the threshold of

the building entrance, fell through a gap between two flooring joists, and ended up dangling between the first floor and the basement. Notably, all of these accidents occurred on the job site and involved either a device constructed to provide protection which was defective or an unmarked pit/gap which created an exposure to an elevation-related risk. Such circumstances do not exist here. In relying on these cases, the majority appears to ignore the significant facts of those cases that the accident occurred at the work site and especially the significant gravity-related risks to the workers. Instead, they focus only on the fact that the workers were not performing their tasks at the time of the accident.

Controlling precedent from the Court of Appeals dictates that when a worker is on a "large and stable surface only four feet from the ground. [t]hat is not a situation that calls for the use of a device like those listed in section 240(1) to prevent a worker from falling" (*Toefer v Long Is. R.R.*, 4 NY3d at 408). As set forth in *Toefer*:

> "A four-to-five-foot descent from a flatbed trailer *or similar surface* does not present the sort of elevation-related risk that triggers Labor Law § 240(1)'s coverage. Safety devices of the kind listed in the statute are normally associated with more dangerous activity . . . Obviously, the distance between the work platform and the ground is relevant; no one would expect a worker to come down without a ladder or other safety device from a work platform that was 10 feet

> high. But the lesser distance Marvin had to travel, considering the nature of the platform he was departing from, was not enough to make Labor Law § 240(1) applicable" (*id.* at 408-409 [emphasis added]).

Therefore, since the loading dock from which plaintiff fell was a stable surface no more than four feet high, and there are no other circumstances in this case which created a significant gravity related risk, Labor Law § 240(1) is inapplicable. The majority's statement that plaintiff's fall from a loading dock three or four feet off the ground "cannot be described as a fall from a de minimus height" is in direct conflict with the Court of Appeals in *Toefer*, which this Court is bound to follow. As a matter of law, plaintiff's fall from the four foot high permanent loading dock under similar circumstances as in *Toefer* was not "enough to make Labor Law § 240(1) applicable" (4 NY3d at 409). The majority also relies on inapposite cases involving falls of 30 and 40 feet (*see Cruz v Cablevision Sys. Corp.*, 120 AD3d 744 [2d Dept 2014]); *Dalaba v City of Schenectady*, 61 AD3d 1151 [3d Dept 2009]), which are clearly distinguishable from the facts of this case which involves a four foot drop.

Moreover, the majority's discussion of the lack of railings, chains, demarcations or other protective devices on the loading dock and the fact that plaintiff did not countermand any orders when he entered via the loading dock is inconsequential given the

foregoing binding precedent. These points may be relevant to plaintiff's Labor Law § 200 and common-law negligence claims.

Accordingly, I would modify the order on appeal to the extent of granting that branch of NY-1095's motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim.

RICHTER, J. (dissenting in part)

I agree with the majority with respect to the Labor Law § 200 and common-law negligence claims. I agree with the dissent that the Labor Law § 240(1) claim should be dismissed. I join the dissent's analysis to the extent it concludes that, in this particular case, the area where the accident occurred was not part of the work site.

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

ENTERED: DECEMBER 14, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5153 Ruby Flanders, Index 301886/13
Plaintiff-Appellant,

-against-

Sedgwick Avenue Associates, LLC,
et al.,
Defendants-Respondents.

_____

Mallilo & Grossman, Flushing (John S. Manessis of counsel), for appellant.

Law Office of Beth S. Gereg, Smithtown (Beth S. Gereg of counsel), for respondents.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered December 1, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Owner defendants failed to make a prima facie showing that they lacked actual or constructive notice of the defect in the sidewalk that allegedly caused plaintiff to trip and fall (*see Uncyk v Cedarhurst Prop. Mgt., LLC*, 137 AD3d 610, 610 [1st Dept 2016]). A jury could infer from plaintiff's photograph of the defective condition that the condition existed for a sufficient length of time for owner defendants to have discovered it and had time to repair it (*see Taylor v New York City Tr. Auth.*, 48 NY2d 903, 904 [1979]).

In opposition, plaintiff raised an issue of fact as to whether the defect was actionable and not trivial. A photograph of the sidewalk at the time of plaintiff's accident showed the condition of the sidewalk to be well-worn, with cracks between the slabs, and the defect shown in close-up appeared to be capable of causing plaintiff to trip and fall (*see Dominguez v OCG, IV, LLC*, 82 AD3d 434 [1st Dept 2011]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5197- Ind.6584/06
5197A The People of the State of New York, 990/09
Respondent,

-against-

Derrick Richardson,
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 (Oliver McDonald of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Brenda Soloff at plea; Michael R. Sonberg, J. at sentencing), rendered June 30, 2015,

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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: DECEMBER 14, 2017

CLERK

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

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5198 In re Lloyd N. Gibbs, Index 250807/16
Petitioner,

-against-

New York State Department
of Motor Vehicles, et al.,
Respondents.

_____

Lloyd N. Gibbs, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondents.

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Determination of respondents, dated June 13, 2016, affirming a decision of an Administrative Law Judge (ALJ), which, after a hearing, found that petitioner violated Vehicle and Traffic Law (VTL) § 509(1) and § 1211(a) and imposed an aggregate fine of $266, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, Supreme Court, Bronx County [Julia Rodriguez, J.], entered August 2, 2016), dismissed, without costs.

The finding that petitioner backed up in a manner that was unsafe or interfered with traffic, in violation of VTL 1211(a), is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). A police officer testified at the hearing that he

observed petitioner back up in a manner that caused other cars to swerve to another lane to avoid an accident. Petitioner's contention that the ALJ should have credited his testimony that he backed up safely is unavailing (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The ALJ properly denied petitioner's request to dismiss the charge of unlicensed driving (VTL 509[1]) on the ground that the officer lacked probable cause to stop petitioner's car, since the officer's observation of petitioner backing up unsafely provided such probable cause.

Petitioner fails to demonstrate that the ALJ's findings resulted from bias (*see Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 197 [1981], *cert denied* 454 US 1125 [1981]; *see also Matter of Stone v City of New York*, 240 AD2d 216 [1st Dept 1997]).

Petitioner's evidentiary challenges to the hearing are unpreserved (*see Matter of Palleschi v Cassano*, 102 AD3d 603, 604 [1st Dept 2013]), and this Court has "no discretionary authority" to "reach[] an unpreserved issue in the interest of justice" in

an article 78 proceeding challenging an administrative determination (*Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001] [internal quotation marks omitted]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5199 In re Angelos F.,

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

Leonidas F.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

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

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about May 13, 2016, which, after a hearing, found that respondent father had neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the Family Court's finding of neglect (*see* Family Ct Act § 1012[f]). The testimony presented at the fact-finding hearing established that the father's focus on his unfounded belief that he was being surveilled as part of a conspiracy against him affected his ability to exercise a minimum degree of care and caused the child to become impaired and threatened to further impair the child's

physical, mental and emotional condition (*see Matter of Caress S.*, 250 AD2d 490 [1st Dept 1998]). As a result of the father's irrational belief, he socially isolated the child by keeping him confined to an unsanitary room in a shelter most of the time. The child was found unkempt and without the resources to bathe between January 23, 2015 and February 25, 2015. The father's actions resulted in the child becoming extremely distraught, anxious and angry to the point of attempting to cause injury to himself (*see Matter of Corine G. [William G.]*, 135 AD3d 443, 443 [1st Dept 2016]; *Matter of Skye C. [Monica S.]*, 127 AD3d 603, 603-604 [1st Dept 2015]).

In addition, a preponderance of the evidence establishes that the father educationally neglected the child by failing to promptly enroll him in school, provide him with the required instruction elsewhere, and provide a reasonable justification for the child's absences (*see Matter of Kaila A. [Reginald A.-Lovely A.]*, 95 AD3d 421, 421 [1st Dept 2012]; *Matter of Jessica J.*, 57 AD3d 271, 271-272 [1st Dept 2008]).

The father was not denied effective assistance of counsel. Given the evidence that the child was found unkempt for almost

one month and missed several weeks of school, the father could not have been prejudiced by any failing on the part of his counsel (*see Matter of Tyshawn Jaraind C.*, 33 AD3d 488 [1st Dept 2006]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5202 The People of the State of New York, Respondent, Ind. 4711/12

-against-

Jose Perez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Jill Konviser, J. at hearing; Arlene D. Goldberg, J. at jury trial and sentencing), rendered October 10, 2013, convicting defendant of auto stripping in the second degree (two counts), criminal possession of stolen property in the fifth degree (two counts) and possession of burglar's tools, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The hearing court properly determined that the police had probable cause for defendant's arrest. In the early morning hours, the police received a radioed description of a man breaking into a car. This description was sufficiently specific, in context, because the close spatial and temporal proximity between the crime and the police encounter with defendant made it "highly unlikely that the suspect had departed and that . . . an

innocent person of identical appearance coincidentally arrived on the scene" (*People v Johnson*, 63 AD3d 518, 518 [2009], *lv denied* 13 NY3d 797 [2009]). In addition to meeting the description, defendant was on a bridge that was frequently used as an escape route by persons who committed crimes in that deserted area, he appeared to be "very nervous" and he was clutching a bag to his chest that had wires suspiciously protruding from it.

Defendant did not preserve his claim that the search of his bag was not justified by exigent circumstances, and the hearing court did not expressly decide, in response to protest, the particular issue now raised on appeal. The issue at the suppression hearing was whether the officers had probable cause to arrest defendant, notwithstanding the hearing court's reference to a search incident to a lawful arrest (*see People v Miranda*, 27 NY3d 931, 932-933 [2016]; *see People v Turriago*, 90 NY2d 77, 83 [1997]). We decline to review this claim in the interest of justice.

The hearing court also properly denied defendant's motion to suppress the ensuing showup identification. The circumstances of the showup, when viewed in totality, were not unduly suggestive (*see generally People v Duuvon*, 77 NY2d 541, 545 [1991]; *see also People v Brisco*, 99 NY2d 596, 597 [2003] [showup reasonable under the circumstances and not unduly suggestive where it "took place

at the scene of the crime, within an hour of the commission of the crime, and in the context of a continuous, ongoing investigation"]; *People v Brujan*, 104 AD3d 481, 482 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013] [showup not unduly suggestive because "the overall effect of the allegedly suggestive circumstances was not significantly greater than what is inherent in any showup"]). The additional lighting on the scene was required to aid the witness in viewing the suspect because the ambient lighting on the bridge was poor, and also to assure the officers' safety, due to traffic on the bridge.

To the extent that the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not established that counsel's decision to rest on the record at the suppression hearing was unreasonable, or

resulted in any prejudice (*see People v Almodovar*, 142 AD3d 916 [1st Dept 2016], *lv denied* 28 NY3d 1070 [2016]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5204 The People of the State of New York, Respondent, Ind. 4290/14

-against-

Latee Brockington, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered April 20, 2015, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

Summary denial of defendant's suppression motion was proper. The People provided defendant with detailed information about the predicate for his arrest, including his presence in the driver's seat of a car that had been reported stolen, as well as his other illegal behavior. In response, defendant failed to raise any factual dispute requiring a hearing (*see People v Mendoza*, 82 NY2d 415 [1993]).

On appeal, defendant asserts that the People failed to specify that, before making the arrest, the police knew that the

car was stolen. This claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find no basis for ordering a hearing. Defendant effectively conceded that the police arrested him on the basis of a stolen car report. In any event, the People specified that defendant's arrest was also based on traffic and marijuana offenses.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5205-
5206 Index 154493/14

Hanna Jakubowski, et al.,
Plaintiffs-Appellants,

-against-

Axton Owner LLC, et al.,
Defendants-Respondents,

Vanguard Construction & Development, Inc.,
Defendant.

_____

Ginsberg & Wolf, P.C., New York (Robert M. Ginsberg of counsel), for appellants.

Brody & Branch, LLP, New York (Tanya M. Branch of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered September 15, 2016, dismissing the complaint as against defendants Axton Owner LLC and Starrett Corporation (collectively Starrett defendants), unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about June 30, 2016, which, inter alia, granted the motion of the Starrett defendants for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The Starrett defendants made a prima facie showing of entitlement to summary judgment based upon the "storm in progress" defense via the climatological data relied upon by

their expert meteorologist (*see* CPLR 4528*; Perez v Canale*, 50 AD3d 437 [1st Dept 2008]). In opposition, plaintiffs failed to raise a triable issue as to whether it had stopped snowing long enough for the Starrett defendants' duty to clear the snow to have arisen. Even fully crediting plaintiff Henrik Jakubowski's affidavit, it does not shed light on the snowfall during the relevant period, as Administrative Code of City of NY § 16-123(a) gives landowners a four-hour grace period to clear snow and ice, not including the period between 9:00 p.m. and 7:00 a.m. Furthermore, the nonparty witness's observation that it was not snowing at 5:00 p.m. is indicative of a temporary lull in the storm and insufficient to raise a triable issue of fact as to the existence of a duty to clear snow and ice (*see e.g. Guntur v Jetblue Airways Corp.*, 103 AD3d 485, 486 [1st Dept 2013]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Gesmer, Kern, Moulton, JJ.

5207-
5208 &
M-5694 Koster, Brady & Nagler, LLP, et al.,
Plaintiffs-Respondents,

-against-

Paul F. Callan, et al.,
Defendants-Appellants.

Index 654117/15

Robert & Robert, PLLC, Uniondale (Clifford S. Robert of counsel), for appellants.

Davidoff Hutcher & Citron LLP, New York (Larry Hutcher of counsel), for respondents.

Orders, Supreme Court, New York County (Ellen M. Coin, J.), entered April 20, 2017, which denied defendants Martin W. Edelman and Edelman & Edelman, P.C. (the Edelman defendants) and defendant-counterclaim plaintiff's Paul F. Callan's motion for summary judgment dismissing the complaint and on Callan's counterclaims and granted plaintiffs' motion for leave to amend the complaint, unanimously modified, on the law, to grant Callan and the Edelman defendants' motion for summary judgment to the extent of dismissing the accounting cause of action as against the Edelman defendants, and otherwise affirmed, without costs.

There is evidence in the record that Callan, while still a partner at plaintiff law firm, worked with defendants to woo a prospective client, concealing from his partners the true nature

and extent of his involvement in the matter as he prepared to leave the firm, after which departure he entered into a contingency fee agreement on the matter.

Accordingly, Callan and the Edelman defendants' motion for summary judgment dismissing the complaint was correctly denied, except for the accounting claim as against the Edelman defendants. Since these defendants have no fiduciary duty to plaintiffs, plaintiffs have no right to an accounting from them, even predicated on their alleged aiding and abetting of Callan's breach of fiduciary duty to plaintiffs (*see Front, Inc. v Khalil*, 103 AD3d 481, 483 [1st Dept 2013], *affd on other grounds* 24 NY3d 713 [2015]; *Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1st Dept 1997]).

No prejudice or surprise results from plaintiffs' amendment of the complaint, and the proposed amended complaint is not palpably improper or insufficient as a matter of law (*see McGhee v Odell*, 96 AD3d 449 [1st Dept 2012]).

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

M-5694 - *Koster, Brady & Nagler, LLP, et al. v Paul F. Callan*

Motion to strike portions of reply brief and to adjourn appeal granted to the extent of striking portions of reply brief, and otherwise denied as academic.

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Gesmer, Kern, Moulton, JJ.

5209 The People of the State of New York, Respondent,

-against-

Alfredo Gonzalez, Defendant-Appellant.

Ind. 5856/13

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

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

Judgment, Supreme Court, New York County (Marcy L. Kahn, J. at suppression hearing; Ruth Pickholz, J. at jury trial and sentencing), rendered November 6, 2014, convicting defendant of criminal sale 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 6 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]), and we reject defendant's argument that the unexpanded record is sufficient to review these claims. Trial counsel presented a multifaceted defense, and, unlike such cases as *People v Logan* (263 AD2d 397 [1st Dept

1999]), the unexpanded record is insufficient to establish that counsel based her defense on a misunderstanding of the Penal Law definition of a "sale" of drugs. Likewise, the present record fails to establish the absence of legitimate strategic reasons for not seeking to reopen a suppression hearing (*see People v Gray*, 27 NY3d 78 [2016]).

Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5212 The People of the State of New York, Respondent,

-against-

Guillermo Rodriguez, Defendant-Appellant.

Ind. 1536/04

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

Order, Supreme Court, Bronx County (Steven L. Barrett, J.), entered on or about February 19, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]) in following the Board of Examiners of Sex Offenders' recommendation for an upward departure. The risk assessment instrument did not adequately account for the fact that six months after committing the underlying rape, defendant committed a sex crime against a child (for which he was also adjudicated a level three offender). This evinces defendant's serious threat to public safety, which outweighs the mitigating factors he cites. We reject defendant's

attempt to minimize the second crime on the ground that he committed it before being arrested for the first crime (*see People v Gauthier*, 100 AD3d 1223, 1225-1226 [3d Dept 2012]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5213 Larell Fowler, et al., Index 300368/14
Plaintiffs-Appellants,

-against-

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

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 27, 2016, which, inter alia, granted defendants' motion for summary judgment dismissing plaintiffs' claims for false arrest, false imprisonment and malicious prosecution, and under 42 USC § 1983, and part of plaintiffs' excessive force and assault and battery claims, unanimously affirmed, without costs.

There is no dispute that the vehicle being operated by plaintiff Fowler had illegal tint to its windows, making the initial stop legal (*see People v Robinson*, 103 AD3d 421 [1st Dept 2013], *lv denied* 20 NY3d 1103 [2013]). The odor of marijuana emanating from the vehicle, in and of itself, provided probable cause to arrest plaintiffs and search the vehicle (*id.*). Moreover, the officers' observations of a marijuana cigarette in plain view provided independent probable cause to search the

vehicle (*see People v Cruz*, 7 AD3d 335 [1st Dept 2004], *lv denied* 3 NY3d 671 [2004]). Plaintiffs' denials are unsupported by the record, which contains the voucher paperwork for the marijuana cigarette located in the vehicle, as well as substantial amounts of other contraband located in false bottom soda cans (*see Shields v City of New York*, 141 AD3d 421, 422 [1st Dept 2016]; *Cheeks v City of New York*, 123 AD3d 532, 546 [1st Dept 2014]). Defendants' showing of probable cause defeats plaintiffs' claims of false arrest, false imprisonment, and malicious prosecution (*see Martinez v City of Schenectady*, 97 NY2d 78 [2001]; *Singer v Fulton County Sheriff*, 63 F3d 110, 118 [2d Cir 1995], *cert denied* 517 US 1189 [1996]), as well as the claims alleging assault and battery relating to the handcuffing of plaintiffs (*see Ostrander v State of New York*, 289 AD2d 463 [2d Dept 2001]).

The motion court also properly dismissed plaintiffs' claims pursuant to 42 USC § 1983. Plaintiffs' allegations of individual participation in every action attributed to the group do not "allege particular facts indicating that each of the individual defendants [were] personally involved in the deprivation of. . . plaintiffs' constitutional rights" (*Shelton v New York State Liquor Auth.*, 61 AD3d 1145, 1148 [3d Dept 2009] [internal quotation marks and brackets omitted]). In particular, plaintiffs' allegations of joint and several liability are

legally insufficient, as there is no vicarious liability between individual police officers in a section 1983 claim (*see Smith v Michigan*, 256 F Supp 2d 704, 712 [ED Mich 2003]; *see also Higgins v City of New York*, 144 AD3d 511, 515 [1st Dept 2016]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5214 The People of the State of New York, Respondent, Ind. 4299/11

-against-

Allen Proctor, Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered April 27, 2012, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him, as a second felony offender, to a term of five years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to withdraw his plea. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]). Defendant received a full opportunity to present his challenges to the plea.

The plea record shows that defendant knowingly,

intelligently, and voluntarily pleaded guilty in exchange for a favorable sentence (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). The sentencing court had sufficient information to determine that defendant's claims of innocence and ineffective assistance were meritless and warranted neither a hearing nor the assignment of new counsel (*see e.g. People v Mangum*, 12 AD3d 207 [2004], *lv denied* 4 NY3d 765 [2005]). In particular, defendant's central claim that he had a viable justification defense was undermined by his admission in his plea allocution that he committed an assault in the course of committing a felony.

We have considered and rejected defendant's remaining claims.

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5215 WL Ross & Co. LLC, et al., Index 650107/16
Plaintiffs-Respondents,

-against-

David H. Storper,
Defendant-Appellant.

_____

Koral Law Firm PLLC, New York (Jason M. Koral of counsel), for appellant.

Weil, Gotshal & Manges LLP, New York (Gregory Silbert of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 7, 2016, which, to the extent appealed from as limited by the briefs, denied so much of defendant's motion to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7), as sought dismissal of plaintiffs' first and second causes of action, unanimously affirmed, without costs.

Plaintiffs' pleaded viable causes of action against defendant for breach of the non-compete provisions in the agreements (LLC agreements) at issue. The LLC agreements governed an employee's participation in general partnership investment entities (GP Entities) which were affiliated with defendant's former employer (plaintiff WL Ross & Co. LLC, hereinafter WL Ross) but were distinct from its operations and terms of employment. The challenged non-compete terms in the LLC

agreements precluded defendant from receiving carried interest from the GP Entities if he obtained subsequent employment with a business that competed with the business of the GP Entities and/or if he formed an entity that competed with the business of the GP Entities.

The complaint's allegations support the claims that defendant violated the non-compete provisions of the LLC agreements. The parties' Letter Agreement and Separation Agreement, executed near the time of defendant's departure from WL Ross, explicitly excepted the provisions of the LLC agreements from the release WL Ross granted defendant from his employment contract terms that precluded him from seeking employment with a competitor. The agreements at issue are unambiguous and should be enforced according to their terms (*see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]).

Defendant's argument, that WL Ross waived its rights to enforce the non-compete provisions in the LLC agreements on the basis of WL Ross emails that congratulated defendant for finding new employment with a competitor financial institution and for founding a competitive entity business, is unavailing. WL Ross alleges in its complaint that it believed defendant had become a retired member of the GP Entities and effectively abandoned his controlling member interest in said funds because the governing

terms of the GP Entities precluded participation if defendant gained employment with a business competitor, or formed an entity that competed with the GP Entities business. Moreover, defendant's conduct, in not asserting any rights or interest in the carried interest generated by the GP Entities for two years post-separation from WL Ross, tended to substantiate WL Ross' understanding that defendant was a retired member of the GP entities. As such, the emails that defendant relies upon as conclusively establishing that WL Ross, by its statements, had waived any rights to assert reliance upon the non-compete provisions in the LLC agreements, are unavailing. It cannot be said that, on this record, WL Ross intentionally relinquished its rights under the terms of the LLC agreements as a matter of law (*see generally Bantum v New Castle County Vo-Tech Educ. Assn.*, 21 A3d 44, 50 [Del 2011]).

Defendant argues that WL Ross should be equitably estopped from alleging in the complaint that he was a controlling member of the GP Entities (in order to enforce the non-compete provisions under the LLC agreements), since WL Ross asserted in an earlier Delaware proceeding that he was a retired member of the GP Entities and the instant complaint also describes defendant as a retired member of the GP Entities. This argument is unavailing. WL Ross can properly plead alternative arguments,

as well as take hypothetical or inconsistent positions in asserting its claims (*see* CPLR 3014; *Cohn v Lionel Corp.*, 21 NY2d 559, 563 [1968]).

The non-compete provisions of the LLC agreements that govern participation in the carried interest distribution from the GP Entities did not preclude defendant's further employment in other competing entities, and only dictated the terms by which participation in the GP Entities could continue. The challenged non-compete provisions therefore are not overbroad.

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

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5217 In re Dennis W. Quirk, etc., Index 100129/15
Petitioner-Appellant-Respondent,

-against-

Hon. Jonathan Lippman, etc.,
Respondent-Respondent-Appellant.

_____

Law Offices of David Schlachter, Uniondale (David Schlachter of counsel), for appellant-respondent.

John W. McConnell, New York (Pedro Morales of counsel), for respondent-appellant.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered July 21, 2016, denying the petition as time-barred to the extent it seeks retroactive salary adjustments and granting it to the extent it seeks "prospective relief," unanimously modified, on the law, to deny the petition as time-barred as to "prospective relief," and otherwise affirmed, and the proceeding is dismissed, without costs.

Petitioner, individually and as president of the New York State Court Officers Association (NYSCOA), seeks to compel respondent to pay NYSCOA members a salary adjustment retroactive to December 22, 2004, following *O'Neill v Pfau* (31 Misc 3d 184 [Sup Ct, Suffolk County 2011], *affd as modified* 101 AD3d 731 [2d Dept 2012], *affd* 23 NY3d 993 [2014]) (*O'Neill*). As this

proceeding was commenced nearly a decade after petitioner and the NYSCOA members were aggrieved by respondent's challenged administrative order, it is time-barred.

In *O'Neill*, a group of Suffolk County court officers challenged an administrative order issued by respondent in January 2004 that reclassified various court officers' employment titles, affecting their compensation, and an administrative order issued December 22, 2004, that made an upward salary adjustment to those titles, retroactive to January 2004. The petitioners argued that the effect of applying the December 2004 order retroactively would be to deprive them of a year of continuous service credit to which they otherwise would be entitled. On April 6, 2005, respondent issued pay checks reflecting the salary adjustments ordered in December 2004, without continuous service credit.

The Suffolk County petitioners commenced their proceeding on July 22, 2005. Ultimately it was determined, inter alia, that respondent had acted arbitrarily and without a rational basis in making the December 2004 order retroactive to January 2004. The Court of Appeals issued its decision in *O'Neill* in June 2014, and some three months later respondent made retroactive payments to the Suffolk County court officers in accordance with the decision.

Petitioner then requested that respondent recalculate the salaries of NYSCOA members in accordance with *O'Neill*. Respondent refused, and in January 2015 petitioner commenced this proceeding.

A cause of action challenging an administrative body's payment of salary or pay adjustments accrues when the petitioner receives a check or salary payment reflecting the relevant administrative order (*O'Neill*, 23 NY3d at 995). Like the Suffolk County court officers, petitioner and the NYSCOA members received their first paycheck reflecting the December 2004 order in April 2005. Thus, the four-month statute of limitations had run (CPLR 217[1]) long before they commenced this proceeding.

The time-barred claims may not be revived by recourse to equal protection principles (*see New York City Health and Hosp. Corp. v McBarnette*, 84 NY2d 194, 205-206 [1994]). There is no toll that exists "solely to enable aggrieved parties to sit on their existing rights pending the outcome of an early challenge brought by others" (*id.*).

Moreover, as petitioner brought this proceeding nearly 10 years after the four-month statute of limitations had begun to run, he had no more timely cause of action for "prospective" relief than he had for the retroactive pay adjustment he sought. Indeed, there is no legal basis for a distinction between

"prospective" and "retroactive" relief here. In failing to challenge the administrative order in a timely fashion, petitioner waived any right to the benefit of legal review of the December order, whatever its implications for the future.

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

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5218 The People of the State of New York, Dkt. 39971C/10
Respondent,

-against-

Jason Torres,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (William L. McGuire, J.), rendered March 8, 2012, convicting defendant, after a jury trial, of driving while intoxicated per se and driving while ability impaired, and sentencing him to a $500 fine and a conditional discharge, unanimously affirmed.

Defendant's Confrontation Clause claim is unavailing. A police officer, deemed an expert in breathalyzer tests, testified that he observed and recorded a breathalyzer test that was administered by a nontestifying officer. The testifying officer observed the other officer starting the machine, the machine self-calibrating, defendant blowing into the machine, and the machine printing out the results of the test. Because the officer testified based on his own observations and conclusions, and not as a surrogate for the officer who administered the test,

defendant's right of confrontation was not violated (*see People v Hao Lin*, 28 NY3d 701 [2017]).

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was ample evidence, including competent testimony as to the breathalyzer test results and the working condition of the machine, to satisfy all the elements of the charges. Defendant's acquittal of other types of intoxicated driving charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

The court providently exercised its discretion in denying defendant's request for a missing witness charge. The testimony of the officer who administered the breathalyzer test would have been cumulative, given that the videotape of the test was played for the jury, the officer who observed the test testified about his observations and the results, and another officer testified

that the machine was in proper working condition at the time of the test (*see generally People v Gonzalez*, 68 NY2d 424, 428 [1986]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5219N John Doe, Index 118182/09
Plaintiff-Appellant,

-against-

New York City Police Department, et al.,
Defendants-Respondents.

_____

Sekendiz Law Firm P.C., New York (Ismail S. Sekendiz of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 27, 2016, which, to the extent appealed from as limited by the briefs, partially denied plaintiff's motion to compel certain discovery, unanimously affirmed, without costs.

In this action, plaintiff, a former New York City Police Officer seeks to recover damages arising from alleged harassment on the job due to his sexual orientation. Plaintiff demanded a further deposition of one of his coworkers, a police officer, and disclosure of the disciplinary files of that officer and another employee of the police department.

Supreme Court providently exercised its discretion in denying plaintiff's requests for additional discovery (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d

223, 224 [1st Dept 2003]). During discovery, plaintiff's counsel battered the witness, a nonparty female officer, with questions that were so "grossly irrelevant" and "improper" that they were not required to be answered (*White v Martins*, 100 AD2d 805, 805 [1st Dept 1984]).

The police officer's disciplinary files are protected by Civil Rights Law § 50-a (*and see Espady v City of New York*, 40 AD3d 475, 476 [1st Dept 2007]), and plaintiff failed to provide a clear showing of facts sufficient to warrant even an in camera review of those records (*see id.; see also Flores v City of New York*, 207 AD2d 302, 303 [1st Dept 1994]; Civil Rights Law § 50-a[2]).

Discovery of the disciplinary file of the other police department employee was not warranted, as she was not similarly situated with plaintiff and thus is not comparable for the purpose of showing discrimination (*see Carryl v MacKay Shields*,

LLC, 93 AD3d 589, 590 [1st Dept 2012]; *Beckles v Kingsbrook Jewish Med. Ctr.*, 36 AD3d 733, 734 [2d Dept 2007])

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5220 Tribeca Lending Corporation, Index 105275/07
Plaintiff-Respondent,

-against-

Gregory M. Bartlett, etc.,
Defendant-Appellant,

NYS Department of Taxation,
et al.,
Defendants.

_____

Gregory M. Bartlett, appellant pro se.

Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City (Daniel J. Evers of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered November 1, 2016, which denied defendant Gregory Bartlett's motion to vacate a judgment of foreclosure and sale, unanimously affirmed, without costs.

Defendant may not relitigate issues resolved in prior appeals in this case (*see* 121 AD3d 613 [1st Dept 2014]; 103 AD3d 516 [1st Dept 2013]; 84 AD3d 496 [1st Dept 2011]). Nor may he raise new arguments in this appeal, because he had a full and fair opportunity to raise them in the prior appeals, and he has made no showing of subsequent evidence or a change of law (*see Delgado v City of New York*, 144 AD3d 46, 51 [1st Dept 2016]; *see also East N.Y. Sav. Bank v Sun Beam Enters.*, 248 AD2d 245, 246

[1st Dept 1998]).

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

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5221 The People of the State of New York, Respondent,

-against-

Howard Clarke, Defendant-Appellant.

Ind. 2681/09

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The Pascarella Law Firm, PLLC, Mineola (James A. Pascarella of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered December 2, 2010, as amended January 18, 2011, convicting defendant, after a jury trial, of attempted gang assault in the first degree, assault in the second degree, and robbery in the second degree (two counts), and sentencing him to concurrent terms of 6 years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

Defendant did not preserve his claim of improper judicial interference during the trial (*see People v Charleston*, 56 NY2d 886 [1982]), and we reject his argument that there was a mode of proceedings error exempt from preservation requirements. We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find no basis for

reversal. To the extent that any remarks by the court or other aspects of its conduct of the trial were inappropriate, we conclude that the court maintained sufficient neutrality to avoid undermining defendant's right to a fair trial (*see People v Arnold*, 98 NY2d 63, 67 [2002]; *People v Moulton*, 43 NY2d 944 [1978]). Although certain proceedings relating to a missing witness issue involving a female friend of defendant should have been conducted outside the jury's presence, the record does not demonstrate that defendant was prejudiced.

The only preserved aspect of defendant's claim of prosecutorial error is his argument that the People returned jewelry stolen from the victims without providing the notice required by CPL 450.10; however, the record supports the court's finding that any prejudice caused by the absence of the physical evidence was sufficiently minimized by photos of the jewelry introduced at trial. Defendant's remaining claims of prosecutorial error in questioning witnesses, summation, and other matters are unpreserved,, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v D'Alessandro*, 184 AD2d 114, 119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]; *People v Overlee*, 236 AD2d 133, 143 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]).

Furthermore, we find that any error related to the conduct

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

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they generally involve matters not reflected in, or fully explained by, the record, including counsel's trial preparation and strategic choices (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. In particular, defendant has not established that he was prejudiced by his trial attorney's failure to preserve certain issues that defendant raises on appeal.

Nothing in the record supports defendant's claim that he was harmed by any actions taken by the attorneys for the jointly tried codefendants.

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5222-
5223 In re Demetrius C., and Another,

Dependent Children under the Age
of Eighteen Years, etc.,

David C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Epifania C.,
Nonparty-Intervenor-Respondent.

- - - - -

In re Epifania C.,
Petitioner-Respondent,

-against-

David C.,
Respondent-Appellant.

_____

Anne Reiniger, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max O'McCann of counsel), for Administration for Children's Services, respondent.

Larry S. Bachner, New York, for Epifania C., respondent.

Tennille M. Tatum-Evans, New York, attorney for the child Demetrius C.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child Deborah C.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about May 19, 2015, which found that respondent father had abused his daughter and neglected his son,

unanimously modified, on the law and the facts, to vacate the finding of derivative neglect of the son, and otherwise affirmed, without costs. Order, same court and Judge, entered on or about February 17, 2016, which, to the extent appealed from as limited by the briefs, granted petitioner mother's petition seeking to modify a prior custody order, only to the extent of setting a visitation schedule for the father and otherwise marking the matter "settled," unanimously modified, on the law and the facts, to vacate the settled marking, remanded for a hearing on relocation, in accordance herewith, and otherwise affirmed as to the visitation schedule, without costs.

Family Court's determination that the father sexually abused his daughter is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). The child's in-court testimony regarding the sexual abuse inflicted upon her was sufficient to support the abuse finding (*Matter of Markeith G. [Deon W.]*, 152 AD3d 424, 424 [1st Dept 2017]). There is no basis for disturbing the court's credibility determinations, including its evaluation of the inconsistencies in the child's testimony, which were at any rate minor and peripheral (*id.*; *Matter of Fendi B. [Jason B.]*, 142 AD3d 878, 878 [1st Dept 2016]). Nor was the child's inability to recall certain details of the abuse, which occurred six years prior, sufficient to render the whole of her testimony

incredible (*see Matter of Lauryn H. [William A.]*, 73 AD3d 1175, 1176-1777 [2d Dept 2010]). Family Court properly drew a negative inference from the father's failure to testify at the fact-finding hearing, notwithstanding the ongoing criminal investigation (*see Markeith*, 152 AD3d at 424-425).

However, Family Court's determination that the father derivatively neglected his son was not supported by a preponderance of the evidence. The neglect finding was based entirely on the father's alleged sexual abuse of his daughter, which had occurred six years earlier. In addition, the children are differently situated such that the father's conduct toward his daughter is insufficient to demonstrate that the son is at risk of harm (*see Matter of Cadejah AA.*, 33 AD3d 1155, 1158 [3d Dept 2006]). There is no evidence that the father's sexual abuse of his daughter was ever directed at his son, or that the son, who was much younger than the daughter, was aware of the abuse (*Matter of Cindy JJ.*, 105 AD2d 189, 191 [3d Dept 1984]). Moreover, there was no evidence that the child was ever at risk of becoming impaired, although he had supervised and unsupervised visits with the father, during the six years following the abuse.

We find no error in the court modifying visitation to reflect the current situation, that the son is not presently in New York, but Family Court should not have deemed the mother's

relocation petition settled. The issue of whether the mother could relocate with the child was not settled, and therefore, a hearing was required (*Matter of Lela G v Shoshanah B.*, 151 AD3d 593, 594 [1st Dept 2017]). The mother, unilaterally moved with the children to Florida, before there was a hearing on the petition, and without judicial or the child's father's approval. The relocation petition was not settled, notwithstanding that the court properly modified the father's visitation with the son based on the parties' submissions and an in camera interview with the child. The mother's move to Florida, under the circumstances of this case, did not render a determination on whether such move was in the son's best interests academic (*see Matter of Angel D v Nieza S.*, 131 AD3d 874 [1st Dept 2015]).

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

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5224 Maria Blake, Index 300484/15
Plaintiff-Appellant,

-against-

Gregory Blake,
Defendant-Respondent.

_____

Felder, Felder and Nottes, PC, New York (Daniel H. Stock of counsel), for appellant.

Elliott Scheinberg, New City, for respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered April 20, 2017, which, in this divorce action, sua sponte dismissed the complaint, unanimously reversed, on the law and in the exercise of discretion, without costs, and the complaint reinstated.

A sua sponte order is not appealable as of right (*see* CPLR 5701[a][2]; *Sholes v Meagher*, 100 NY2d 333, 335 [2003]). However, given the extraordinary nature of the sua sponte relief, that is, dismissal of the complaint, the parties' competing claims, and the court's failure to identify a legal basis for dismissing the complaint other than that an action between the parties was pending in New Jersey seeking the same relief - a ground it had previously rejected in retaining jurisdiction over the financial issues ancillary to the divorce action - we deem

the notice of appeal from the order to be a motion for leave to appeal, and grant such leave (*see* CPLR 5701[c]; *see e.g. All Craft Fabricators, Inc. v ATC Assoc., Inc.*, 153 AD3d 1159 [1st Dept 2017]; *Seradilla v Lords Corp.*, 12 AD3d 279, 280 [1st Dept 2004]).

A court's power to dismiss a complaint, sua sponte, "should be used sparingly and only in extraordinary circumstances" (*Ray v Lee Chen*, 148 AD3d 568, 569 [1st Dept 2017] [internal quotation marks omitted]). Here, based on the record before us, no such circumstances exist to warrant dismissal. Further, in the absence of notice to plaintiff wife that the complaint would be dismissed, "the court was virtually without jurisdiction to grant the relief afforded" to defendant husband (*id.* [internal quotation marks omitted]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5230 The People of the State of New York, Ind. 5166N/14
Respondent,

-against-

Brian D.,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered April 20, 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 14, 2017

CLERK

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

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5231 In re Robert M. Levine, etc., Index 151958/14
Petitioner-Appellant-Respondent,

-against-

Seven Pines Associates Limited Partnership,
Respondent-Respondent-Appellant.

_____

Anthony Ostlund Baer & Louwagie P.A., Minneapolis (Brooke D. Anthony of the bar of the State of Illinois and State of Minnesota, admitted pro hac vice, of counsel), and Berland Nussbaum & Reitzas, LLP, New York (Peter W. Smith of counsel), for appellant-respondent.

Katten Muchin Rosenman LLP, New York (Jonathan J. Faust of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about February 14, 2017, which valued the Marion Levine Revocable Trust's interest in respondent at $325,000, denied petitioner interest, and denied both sides costs and expenses, unanimously modified, on the law, the facts and in the exercise of discretion, to increase the value of the Trust's interest to $343,247, to award petitioner the filing fees he paid to commence the instant special proceeding, and to award interest and remand for calculation thereof, and otherwise affirmed, without costs.

In this special proceeding to determine the value of a dissenting limited partner's interest in a partnership whose sole

asset is a building, there is no basis to disturb the trial court's overall finding that respondent's experts were more convincing than petitioner's (*see Watts v State of New York,* 25 AD3d 324 [1st Dept 2006]; *Matter of Carolina Gardens v Menowitz,* 238 AD2d 189, 190 [1st Dept 1997]). The court's choice of respondent's real estate appraiser's value for the property owned by respondent can "be reached under a[] fair interpretation of the evidence" (*Seretis v Fashion Vault Corp.,* 110 AD3d 547, 548 [1st Dept 2013], *lv denied* 22 NY3d 861 [2014] [internal quotation marks omitted]; *see also Matter of Miller Bros. Indus. v Lazy Riv. Inv. Co.,* 272 AD2d 166, 167 [1st Dept 2000], *lv denied* 95 NY2d 761 [2000]). It makes sense that, when valuing a building, one would use its actual, historical expenses instead of market estimates, especially when respondent explained why the expenses for its building were higher than average. To be sure, the two sides' real estate appraisers disagreed as to whether an increase in insurance premiums after a fire was an owner-specific issue or whether the increase stayed with the property, but the trial court was "best able to measure the credibility of the witnesses" (*Matter of Jose L.I.,* 46 NY2d 1024, 1026 [1979]).

The court's choice of respondent's business valuation expert over petitioner's can also be supported by a fair interpretation of the evidence. Not surprisingly, petitioner's expert chose

petitioner's real estate appraiser's value for the building, while respondent's expert chose respondent's real estate appraiser's value. Second, when valuing the Trust's interest in respondent, petitioner's expert assumed that the Trust was entitled to its proportionate share of 95% of all of the cash that respondent had accumulated, whereas respondent's expert did not. Since the partnership agreement gives the general partner the power to deduct a reasonable reserve from Cash Flow (as defined in the agreement), and since there was testimony that respondent, in fact, had established a capital reserve fund, respondent's expert's approach is supported by the evidence. Third, petitioner's expert did not discount the value of the Trust's interest for lack of marketability, while respondent's expert did. In the past, we have applied discounts for lack of marketability (DLOM) to real estate holding companies (*Matter of Giaimo v Vitale,* 101 AD3d 523, 523-525 [1st Dept 2012], *lv denied* 21 NY3d 865 [2013]).

However, respondent's business valuation expert applied a minority discount, i.e., a discount for lack of control, as well as a DLOM. This is impermissible (*see Matter of Friedman v Beway Realty Corp.,* 87 NY2d 161, 167, 169 [1995]; *Carolina Gardens,* 238 AD2d at 189-190). Fortunately, "the record is sufficient for this Court to conduct an independent review of the evidence" on

this point (*Matter of Kimberly O. v Jahed M.*, 152 AD3d 441, 442 [1st Dept 2017], *lv denied* 30 NY3d 902 [2017]). Respondent's expert testified that the DLOM was 25% and that the value of the Trust's interest before applying any discounts and before adding return of capital was $375,996. If one applies a 25% DLOM and adds back the Trust's capital contribution of $61,250, one gets $343,247.

Business Corporation Law § 623(h)(6), which Partnership Law § 121-1105(b) incorporates by reference, states, "The final order shall include an allowance for interest" unless "the court finds that the refusal of any shareholder to accept the corporate offer of payment for his shares was arbitrary, vexatious or otherwise not in good faith." The trial court did not mention interest. We cannot deem this a sub silentio finding that petitioner's refusal to accept respondent's offer was arbitrary, vexatious, or in bad faith (*see Carolina Gardens*, 238 AD2d at 190). Having reviewed the evidence, we find that petitioner's refusal was not arbitrary, etc.; therefore, petitioner is entitled to at least some interest (*see Miller*, 272 AD2d at 168). However, he is not entitled to interest at 9%; the statute says, "interest at such rate as the court finds to be equitable" (Business Corporation Law § 623[h][6]). It also says, "In determining the rate of interest, the court *shall* consider all relevant factors,

including the rate of interest which the corporation would have had to pay to borrow money during the pendency of the proceeding" (*id.* [emphasis added]). Unfortunately, neither side submitted evidence of such rate. We therefore remand for the calculation of interest (*see Carolina Gardens,* 238 AD2d at 189).

Business Corporation Law § 623(h)(7) says, "the court may, in its discretion, apportion and assess all or any part of the costs, expenses and fees incurred by the corporation against any or all of the dissenting shareholders who are parties to the proceeding . . . if the court finds that their refusal to accept the corporate offer was arbitrary, vexatious or otherwise not in good faith." Since we have determined that petitioner's refusal to accept respondent's offer was not arbitrary, vexatious, or in bad faith, respondent is not entitled to costs and expenses. Petitioner's conduct during the instant proceeding (i.e., after his refusal) is irrelevant (*see Matter of Dimmock v Reichhold Chems.,* 41 NY2d 273, 276-277 [1977]; *Carolina Gardens,* 238 AD2d at 190).

Business Corporation Law § 623(h)(7) further provides, "The court may, in its discretion, apportion and assess all or any part of the costs, expenses and fees incurred by any or all of the dissenting shareholders who are parties to the proceeding against the corporation if the court finds any of the following:

(A) that the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay; (B) that no offer . . . was made by the corporation; (c) that the corporation failed to institute the special proceeding within the time specified therefor; or (D) that the action of the corporation in complying with its obligations as provided in this section was arbitrary, vexatious or otherwise not in good faith." We find subsections (A), (B), and (D) inapplicable. It is true that respondent failed to institute a special proceeding, forcing petitioner to institute it. Therefore, we award him the filing fees he had to pay to commence the instant proceeding. It is not appropriate to award him all of his attorneys' and experts' fees because he would have had to pay his lawyers and experts even if respondent had commenced the proceeding.

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5232 The People of the State of New York, Respondent,
Ind. 3049/03
255/04
217/04

-against-

Jose Alvarado,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 21, 2004, convicting defendant, after a jury trial, of course of sexual conduct against a child in the first and second degrees and two counts of endangering the welfare of a child, and sentencing him to an aggregate term of 20 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's recusal motion (*see People v Moreno*, 70 NY2d 403, 405 [1987]). In any event, regardless of whether it would have been the better practice for the court to have granted the motion, we find no basis for reversal. There is no indication that the court was actually biased against defense counsel as the result of a past incident, or that denial of the recusal motion deprived defendant of a fair trial.

The court also providently exercised its discretion in admitting evidence of defendant's uncharged sexual abuse of his sister, which employed a similar, distinctive modus operandi as his alleged sexual misconduct towards the victims, who were two of his daughters. The probative value of the evidence outweighed the danger of prejudice, which was minimized by the court's limiting instructions. Because of the distinctiveness of the modus operandi, the uncharged crimes were admissible on the contested issue of identity, notwithstanding that the defense claim was not mistaken identity, but of "intentionally false" identification (*People v Agina*, 18 NY3d 600, 603 [2012]). Furthermore, under the particular circumstances here, where the People also showed that defendant's conduct with his sister and daughters not only sought sexual gratification from the sexual abuse, but reflected a motive to sexually "initiate" his younger female relatives, this evidence was also admissible as evidence of motive.

The court also providently exercised its discretion in precluding defendant's girlfriend from testifying that one of the victims told her that she had witnessed another relative engage in sexual misconduct with the other victim. Regardless of whether the proffered testimony would have been admissible under the rules of evidence, its probative value was outweighed by the

risk of prejudice or jury confusion (*see People v Primo*, 96 NY2d 351, 355-357 [2001]). The proffered testimony did not support a defense of third-party culpability, because it did not link the other relative to any crimes with which defendant was charged, and it was too remote and speculative to have any exculpatory value (*see People v Gamble*, 18 NY3d 386, 398-399 [2012]). We also conclude that the court's ruling did not undermine its above-discussed ruling on uncharged crimes evidence. Finally, since defendant never asserted a constitutional right to introduce this evidence, his constitutional claim is unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

The challenged portions of the prosecutor's summation did not deprive defendant of a fair trial (*see People v Overlee*, 236

AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *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 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5233 In re Dock Properties, LLC, et al., Petitioners-Respondents,

Department of Housing Preservation and Development of the City of New York, et al., Respondents-Appellants.

Index 260736/15

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for appellants.

Order and judgment (one paper), Supreme Court, Bronx County (Howard H. Sherman, J.), entered May 6, 2016, which granted petitioners' motion to vacate and discharge respondents' recorded notice of lien seeking relocation and administrative costs, and denied respondents' cross motion to dismiss the proceeding, unanimously reversed, on the law, without costs, the motion denied, and the cross motion granted. The Clerk is directed to enter judgment denying the petition and dismissing the proceeding.

As conceded by petitioners, based on the Court of Appeals' recent holding in *Rivera v Department of Hous. Preserv. & Dev. of the City of N.Y.* (29 NY3d 45 [2017]), this dispute regarding the reasonableness of expenses claimed by respondents in an otherwise

facially valid notice of lien must be resolved through a foreclosure trial, rather than a summary discharge proceeding (*see id.* at 50).

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5235 The People of the State of New York, Respondent, Ind. 3183/11

-against-

Richard Rivera, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about January 6, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The Court properly assessed 20 points under the risk factor for the victim's helplessness because she was asleep at the time of defendant's initial assault began, and she woke up while defendant was on top of her (*see People v Acevedo*, 124 AD3d 500, 500 [1st Dept 2015]). We also find that there was no overassessment of points for this factor.

The court also correctly assessed 10 points for unsatisfactory conduct while confined, based on defendant's recent Tier III disciplinary infraction. The requirement of

clear and convincing evidence was satisfied by the undisputed existence of the infraction (*see* Correction Law § 168-n[3]; *People v Paredes*, 144 AD3d 609, 609 [1st Dept 2016]). Defendant's constitutional challenge to this assessment is unpreserved, and is unavailing in any event. We have considered and rejected defendant's remaining arguments regarding this assessment.

The court providently exercised its discretion when it declined to grant defendant's request for a downward departure to level two (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument, or that outweighed the seriousness of the underlying offense.

The court correctly designated defendant a sexually violent offender because he was convicted of an enumerated 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]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5236-
5237 WDF Inc.,
Plaintiff-Appellant,

-against-

The Trustees of Columbia University
in the City of New York, et al.,
Defendants-Respondents.

Index 651250/16

Pepper Hamilton LLP, New York (Frank T. Cara of counsel), for appellant.

Zetlin & De Chiara LLP, New York (James J. Terry of counsel), for The Trustees of Columbia University in the City of New York, respondent.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for Lend Lease (US) Construction LMB, Inc., respondent.

Orders, Supreme Court, New York County (Barry R. Ostrager, J.), entered November 15, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the second cause of action as to all claims for costs incurred due to delays caused by a stop work order and the third and fourth causes of action in their entirety, unanimously affirmed, with costs.

The subcontract entered into by plaintiff contained a no-damages-for-delay provision. Such a provision "is valid and enforceable and is not contrary to public policy" where, as here,

"the clause and the contract of which it is a part satisfy the requirements for the validity of contracts generally" (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]).

While the complaint here recites a list of purported causes for delays allegedly attributed to defendants, it sets forth no factual allegations in support of such claims. Similarly, it makes no factual allegations supporting the conclusory claim that such alleged delays fell within the exceptions to the no-damages-for-delay rule (*see Corinno*, 67 NY2d at 309). Moreover, in opposition to defendants' motions to dismiss pursuant to CPLR 3211(a)(1) and (7), plaintiff failed to submit any affidavits or other materials that remedied the defects in the complaint (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5238-
5239-
5240 In re Romeo J.,
A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Larry S. Bachner, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for presentment agency.

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Appeals from orders of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 19, 2017, which adjudicated appellant a juvenile delinquent upon his admissions that he committed acts that, if committed by an adult, would constitute the crimes of grand larceny in the fourth degree, aggravated harassment in the second degree and criminal mischief in the fourth degree, and placed him with the Administration for Children's Services' Close to Home program for a period of 12 months, unanimously dismissed as moot, without costs.

These appeals challenging dispositional orders, but not the underlying juvenile delinquency adjudications, are moot because appellant has also been placed with the Close to Home program under another dispositional order, from which he has not taken an

appeal. Therefore, the placement would remain the same regardless of the outcome of these appeals (*see People ex rel. Bourlaye T. v. Connolly*, 25 NY3d 1054 [2015]).

In any event, we find defendant's challenges to the dispositional orders unavailing.

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5242 BCG Partners, Inc., et al., Index 652669/12
Plaintiffs-Appellants-Respondents,

-against-

Avison Young (Canada) Inc., et al.,
Defendants-Respondents-Appellants.

_____

BGC Partners, Inc., New York (Emily Milligan of counsel), for appellants-respondents.

Kirkland & Ellis LLP, New York (Nathaniel J. Kritzer of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 18, 2016, which granted defendants' motion to dismiss the causes of action for tortious interference with contractual relations and prospective business relations, conspiracy, aiding and abetting breach of fiduciary duty, and unjust enrichment, and denied the motion to dismiss the causes of action for aiding and abetting breach of the duty of fidelity, theft of trade secrets, and injunctive relief, unanimously modified, on the law, to grant the motion as to the theft of trade secrets cause of action, and otherwise affirmed, without costs.

The cause of action for tortious interference with the Nevada and South Carolina agreements was correctly dismissed since plaintiffs' allegation of "but for" causation is conclusory

(*see Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]). In support of the cause of action for tortious interference with the broker agreements and the cause of action for tortious interference with prospective business relations, plaintiffs failed to allege interference by wrongful means (*see Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 193-194 [1980]). Plaintiffs' arguments addressed to the cause of action for aiding and abetting breach of fiduciary duty are unpreserved and in any event unavailing, since no fiduciary relationship arises from an employment relationship (*see Rather v CBS Corp.*, 68 AD3d 49, 55 [2009], *lv denied* 13 NY3d 715 [2010]). The relationship between the parties is too attenuated to support a claim for unjust enrichment (*see Sperry v Crompton Corp.*, 8 NY3d 204, 215-216 [2007]).

The cause of action for theft of trade secrets should be dismissed since in the circumstances the means by which defendants allegedly lured the brokers away from nonparty Grubb & Ellis, i.e., offering them competitive compensation, are not wrongful or improper (*cf. Schroeder v Pinterest Inc.*, 133 AD3d 12, 28 [1st Dept 2015] [company officer gave confidential and proprietary information to competitor]; *Guard-Life Corp.*, 50 NY2d at 191 [wrongful means include "fraud or misrepresentation, . . .

and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract"]).

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

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5245 Jennifer Liburd, Index 302534/15
Plaintiff-Appellant,

-against-

Joseph Lulgjuraj, et al.,
Defendants-Respondents.

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Scott L. Sherman & Associates, P.C., New York (Scott L. Sherman of counsel), for appellant.

Pillinger Miller Tarallo, LLP, Elmsford (Kimberly A. Sofia of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered on or about April 5, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Triable issues of fact exist as to the sequence of the collisions in this three-car accident. Although plaintiff testified that she, in the second vehicle, was struck from behind by defendant Lauren M. Lulgjuraj, causing her vehicle to strike the lead vehicle, the police accident report contains a statement attributed to plaintiff, in which she purportedly admitted that she had struck the lead vehicle prior to being hit by Lulgjuraj. "In a multi vehicle accident, where, as here, there is a question of fact as to the sequence of the collisions, it cannot be said as a matter of law there was only one proximate cause of

plaintiffs' injuries" (*Passos v MTA Bus Co.*, 129 AD3d 481, 482 [1st Dept 2015] [internal quotation marks omitted]). The court properly considered the police accident report, which contained statements attributable to plaintiff that would qualify as admissions (*see Matter of Rhodes [Motor Veh. Acc. Indem. Corp.-Biggs]*, 203 AD2d 46, 47 [1st Dept 1994]; *see also Newman v Vetrano*, 283 AD2d 264 [1st Dept 2001]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5246 The People of the State of New York, Ind. 4958/15
Respondent,

-against-

Thomas Rodriguez,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (o Herbert, (Samuel J. Mendez of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Larry Stephen, J. at plea; Laura Ward, J. at sentencing), rendered December 15, 2015,

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 14, 2017

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

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5247N Charles Britz, Index 22161/14E
Plaintiff-Respondent,

-against-

Grace Industries, LLC,
Defendant-Appellant,

The Haugland Group, LLC, et al.,
Defendants.

_____

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for appellant.

Gregory R. Saracino, Valhalla, for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 28, 2017, which granted plaintiff's motion to amend the complaint to add a demand for punitive damages against defendant Grace Industries, LLC (Grace), unanimously reversed, on the law, without costs, and the motion denied.

The proposed amended complaint alleges that Grace negligently failed to fill in a trench on the side of the road two days prior to the motor vehicle accident in which plaintiff was injured, that Grace parked construction vehicles by the roadway, and that its personnel joked around when they signed into a safety meeting. This conduct, if proven, is insufficient for the imposition of punitive damages, because it cannot be viewed as a conscious and deliberate disregard of the rights of

others (*see Marinaccio v Town of Clarence*, 20 NY3d 506, 511 [2013]). Accordingly, leave to amend is denied (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404 [1st Dept 2009], lv dismissed 12 NY3d 880 [2009]).

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

ENTERED: DECEMBER 14, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Moskowitz, Kapnick, Webber, JJ.

3983-
3984 Index 650150/15

Estate of Alexander Calderwood, etc.,
Plaintiff-Appellant,

-against-

ACE Group International LLC, et al.,
Defendants-Respondents.

_____

Ball Janik LLP, Portland, OR (James T. McDermott of the bar of the State of Oregon, State of Washington, State of Idaho and District of Columbia, admitted pro hac vice, of counsel), for appellant.

Squire Patton Boggs (US) LLP, New York (Richard L. Mattiaccio of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 1, 2016, modified, on the law, to declare upon the first cause of action that plaintiff is not a member of AGI with all the rights that the decedent held under AGI's LLC Agreement, to declare upon the second cause of action that defendants do not owe fiduciary duties to plaintiff, and otherwise affirmed, without costs.

Opinion by Kapnick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Sallie Manzanet-Daniels
Karla Moskowitz
Barbara R. Kapnick
Troy K. Webber, JJ.

3983-3984
Index 650150/15

_____x

Estate of Alexander Calderwood,
Plaintiff-Appellant,

-against-

ACE Group International LLC, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the orders of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 1, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the first (declaratory judgment/injunction that plaintiff is a Member of AGI), second (declaratory judgment that defendants owe fiduciary duties to plaintiff), fourth (access to AGI's books and records under Delaware law), fifth (accounting), and sixth (constructive trust) causes of action in the amended complaint (AC), and denied plaintiff's motion to include in the second amended complaint the causes of action in the AC that had been to declare upon the first cause of action that plaintiff is not a member of AGI with all the rights that the decedent held under AGI's LLC Agreement, to

declare upon the second cause of action that defendants do not owe fiduciary duties to plaintiff.

Ball Janik LLP, Portland, OR (James T. McDermott and Ciaran P.A. Connelly of the bar of the State of Oregon, State of Washington, State of Idaho and District of Columbia, admitted pro hac vice, of counsel), for appellant.

Squire Patton Boggs (US) LLP, New York (Richard L. Mattiaccio and Paul Myung Han Kim of counsel), for respondents.

KAPNICK, J.

In November 2013, nonparty Alexander Calderwood (Alex) died unexpectedly at age 47, intestate, and his father, Thomas B. Calderwood, was appointed the personal representative of Alex's Estate, the plaintiff in this action (the Estate). During his lifetime, Alex apparently enjoyed much success as an entrepreneur, including in the boutique hotel industry. He was the founder and creator of the Ace brand of boutique hotels, which had hotels located in New York, Seattle, Palm Springs and London. In 2011, Alex sought to buy out his then business partners, but needed capital to do so. Thus, in conjunction with defendant Ecoplace LLC (Ecoplace), a company controlled by defendant Stefanos Economou (Economou), he formed ACE Group International LLC (AGI), a Delaware limited liability company. AGI was formed as a management company with its primary assets being the management contracts it has with the various Ace hotel properties, as well as rights to the Ace brand and related intellectual property.

Pursuant to the AGI limited liability agreement (LLC Agreement), Ecoplace invested $10,000,000 into AGI, and in exchange, received a 33.33% interest in the company with a $10,000,000 preferred return and veto rights over certain "major decisions." Alex retained a 66.67% interest in AGI along with

control of AGI's day-to-day operations. Alex later transferred a portion of his interest to certain AGI executives, leaving him, at the time of his death, with a 51.74% majority stake in AGI.

Following Alex's death, the Estate sought to value the interests that Alex held in AGI in order to file an accurate accounting for estate tax purposes. Counsel for the Estate wrote to AGI, requesting access to its books and records for this purpose. Apparently, however, AGI did not provide the information that the Estate needed.

In April 2014, the Estate also was in conversation with counsel for Ecoplace regarding its offer to buy the Estate's entire ownership interest for $200,000. Counsel's letter stated that AGI "is likely to shortly require a substantial infusion of capital in order to (i) properly operate the Business and (ii) remedy certain disruptions to the Business resulting from Alex's unfortunate passing." The letter further explained that

> "[a]lthough the Estate is entitled to distributions from the Company in certain circumstances, given the current financial position of the Company and, more importantly, the fact that ECOPLACE is entitled to receive its initial investment amount of $10,000,000 (plus any additional capital contributions made pursuant to the above) before the Estate receives any such distributions, we do not believe that the Estate will realize any sort of financial benefit from its ownership interest in the foreseeable future (if ever)."

The Estate refused Ecoplace's offer and, in January 2015,

commenced this lawsuit. On March 6, 2015, the Estate filed an amended complaint (AC) asserting six causes of action, seeking (1) a declaration that the Estate is a member of AGI with all of Alex's rights; (2) a declaration that defendants owe the Estate fiduciary duties; (3) a declaration that the Estate may share AGI's financial and business information, for purposes of pursuing this litigation, with existing and prospective investors, lenders or other sources of capital;[1] (4) an order requiring defendants to provide the Estate with AGI's books and records; (5) an accounting of AGI; and (6) the imposition of a constructive trust on Ecoplace's membership interests in AGI and on AGI's assets, for the benefit of the Estate. Defendants answered, but then moved to dismiss, pursuant to CPLR 3211(a)(7), for failure to state a claim. Thereafter, the Estate moved for leave to file a supplemental amended complaint (SAC), in which some of the causes of action were the same or similar to those in the AC, while others were new causes of action, including claims for breach of contract.

The motion court dismissed the claims for a declaration that the Estate is a member of AGI with all of Alex's rights, a declaration that defendants owe the Estate fiduciary duties, an

[1] This cause of action is not at issue on this appeal.

accounting, and the imposition of a constructive trust, for failure to state a claim. The motion court also dismissed the claim for an order requiring defendants to provide the Estate with access to AGI's books and records as moot, because to the extent the Estate was entitled to financial information in order to value its assets in the probate action, it was being dealt with in discovery.[2]

Ultimately, the parties disagree on the Estate's rights and status under the LLC Agreement.[3] The Estate contends that it stepped into Alex's shoes upon his death, and that it possesses all of his rights and privileges as a Member under the LLC Agreement. Defendants, on the other hand, contend that under the terms of the LLC Agreement, the Estate is considered the successor in interest of a Withdrawing Member (Alex) with rights only to potential distributions, and no rights to control or

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[2] Discovery proceeded during motion practice and defendants produced, inter alia, a consolidated balance sheet, income statement, income and expense forecast, cash flow forecast and a projected fees cash flow for various periods covering 2014 and 2015, with the projections forecasted as far out as 2023. The motion court further ordered defendants to produce interim balance sheets, interim income statements and actual cash flows for 2013-2015, as well as the 2016 budget.

[3] Pursuant to the LLC Agreement, the rights of the Members "shall be governed by, and interpreted in accordance with, the Laws of the State of Delaware," and each Party "irrevocably submit[ed] to the exclusive jurisdiction of the New York State courts . . . ."

participate in the running of the company. In support of their argument, defendants point to section 9.7(b) of the LLC Agreement, which provides, in relevant part, that

> "[u]pon the death or disability of a Member . . . (the "Withdrawing Member"), the Withdrawing Member shall cease to be a Member of the Company and the other Members and the Board shall . . . have the right to treat such successor(s)-in-interest as assignee(s) of the Interest of the Withdrawing Member, with only such rights of an assignee of a limited liability company interest under the Act as are consistent with the other terms and provisions of this Agreement and with no other rights under this Agreement. Without limiting the generality of the foregoing, the successor(s)-in-interest of the Withdrawing Member shall only have the rights to Distributions provided in Sections 4 and 10.3, unless otherwise waived by the other Members in their sole discretion."

Thus, according to defendants, under the terms of the LLC Agreement, at the time of Alex's death he became a "Withdrawing Member" and "cease[d] to be a Member of the Company" and his successor in interest, the Estate, retained only the rights to distributions.

The Estate, however, argues that § 18-705 of the Delaware Limited Liability Company Act (LLC Act) is a mandatory provision pursuant to which the personal representative of a deceased member may exercise *all* of the member's rights, notwithstanding the limitations contained in the LLC Agreement. Section 18-705 provides that

> "[i]f a member who is an individual dies . . . the member's personal representative may exercise all of the member's

> rights for the purpose of settling the member's estate or administering the member's property, including any power under a limited liability company agreement of an assignee to become a member" (6 Del C § 18-705).

The Estate argues that because section 18-705 refers to "*all* of the member's rights" (emphasis added), the statute does not limit the rights of a personal representative to those rights given to a successor in interest under the LLC Agreement. We disagree. First, "under the Act, the parties to an LLC agreement have substantial authority to shape their own affairs and . . . in general, any conflict between the provisions of the Act and an LLC agreement will be resolved in favor of the LLC agreement" (*Achaian, Inc. v Leemon Family LLC*, 25 A3d 800, 802-803 [Del Ch 2011]). Second, the LLC Act's "primary function is to fill gaps, if any, in a limited liability company agreement" (*id.* at 802). This gap-filling provision is not required here because the LLC Agreement specifically addresses the exact situation in which the parties currently find themselves.

In an effort to further bolster its argument that section 18-705 controls here, the Estate relies on the lack of the phrase "unless otherwise provided in a limited liability company agreement" in section 18-705 as evidence of its mandatory status. However, and as noted by the motion court, this argument has already been considered and rejected by the Delaware courts (*see*

R&R Capital, LLC v Buck & Doe Run Valley Farms, LLC, 2008 WL 3846318, *5, 2008 Del Ch LEXIS 115, *20 [Del Ch, Aug. 19, 2008, C.A. No. 3803-CC] [finding that a provision of the LLC Act "*not* containing petitioners' magical phrase was nonetheless permissive and subject to modification"]; *see also Elf Atochem North America, Inc. v Jaffari*, 727 A2d 286, 291 [Del 1999] [expressly stating that the LLC Act "is replete with fundamental provisions made subject to modification in the Agreement (*e.g.* 'unless otherwise provided in a limited liability agreement . . . .')"]). Also notable, section 18-705 contains the phrase "*may* exercise" (emphasis added), which "connotes the voluntary, not mandatory or exclusive, set of options" (*R&R Capital*, 2008 WL 3846318, *5, 2008 Del Ch LEXIS 115, *20, quoting *Elf Atochem North America, Inc.*, 727 A2d at 296).

We also reject the Estate's argument that section 18-705 is "likely" to be mandatory under Delaware law because the purpose of section 18-705 is, in part, to protect third-party successors in interest. The Estate contends that section 18-705, in this case, "protects vulnerable heirs' interests by allowing them to exercise all of the deceased member's rights." However, and as the motion court correctly stated, "[t]o hold that § 18-705 alters a member's rights upon death in a manner contravening the LLC Agreement is inconsistent with the well settled law

articulated by the Delaware courts - that the substantive rights of LLC members are governed by contract." This interpretation is in line with Chancellor Chandler's statement in *R&R Capital, LLC*, that "[f]or Shakespeare, it may have been the play, but for a Delaware limited liability company, *the contract's the thing*. Ultimately, it is the contract that compels the Court's decision in this case because it is the contract that 'defines the scope, structure, and personality of limited liability companies'" (2008 WL 3846318, *1, 2008 Del Ch LEXIS 115, *1). Thus, whether section 18-705 is mandatory or permissive, we, nonetheless, find that in this case, it does not override section 9.7(b) of the LLC Agreement.

In further attempting to get around the provisions of section 9.7(b) of the LLC Agreement, the Estate argues that it is ambiguous and lacks sufficient clarity to allow the parties' intent to be resolved without the benefit of extrinsic evidence. Specifically, the Estate contends that section 9.7(b) does not limit Alex's rights, and ergo the Estate's rights as his assignee, but rather, only those of his "successor(s)-in-interest." In support of this argument, the Estate contends that because section 9.7(b) does not unambiguously abrogate section 18-705 of the LLC Act, it must mean that the "LLC Agreement recognizes that the Act conveys certain rights to assignees and

specifically allows the successor-in-interest to exercise all the rights of an assignee under the Act . . . .” First, and as already noted, “under the Act, the parties to an LLC agreement have substantial authority to shape their own affairs and . . . in general, any conflict between the provisions of the Act and an LLC agreement will be resolved in favor of the LLC agreement” (*Achaian, Inc.*, 25 A3d at 802-803). Second, “[a]n ambiguity exists when the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings” (*Nicholas v National Union Fire Ins. Co. of Pittsburgh, PA*, 83 A3d 731, 735 [Del 2013][internal quotation marks and alteration omitted]). The language at issue here, “[u]pon the death or disability of a Member . . . (the “Withdrawing Member”), the Withdrawing Member shall cease to be a Member of the Company,” is not susceptible to different interpretations, but rather states clearly the repercussions upon the death of a Member. Nothing in the text of section 9.7(b) suggests that a successor in interest is entitled to exercise all of the rights Alex once held.

The Estate next contends that a determination that the Estate is not a Member of AGI would lead to the absurd result of leaving the Estate, as the 51.74% majority owner of AGI, with no participation or control rights, while simultaneously leaving the

minority interest holder - Ecoplace - with full control of AGI. However, this result is not absurd as the Delaware courts have acknowledged that "it is far more tolerable to have to suffer a new passive co-investor one did not choose than to endure a new co-manager without consent" (*Milford Power Co., LLC v PDC Milford Power, LLC*, 866 A2d 738, 760 [Del Ch 2004]; *see also Achaian, Inc.*, 25 A3d at 804 n 14). Thus, we affirm the motion court's dismissal of the Estate's first cause of action and modify only to the extent of issuing a declaratory judgment that the Estate is not a member of AGI.

The Estate's second cause of action, seeking a declaration that defendants owe it fiduciary duties, was properly dismissed by the motion court, although we would affirm the dismissal on other grounds, and modify only to the extent of issuing a declaratory judgment that defendants do not owe fiduciary duties to the Estate. The motion court dismissed the second cause of action because it found that the parties were seeking an advisory opinion and that the Estate had not pleaded any facts to suggest that defendants had breached any fiduciary duty recognized under Delaware law. We do not agree that such a declaration would constitute an advisory opinion. "The fact that the court may be required to determine the rights of the parties upon the happening of a future event does not mean that the declaratory

judgment will be merely advisory" (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 530 [1977]). Indeed, "[i]n the typical case where the future event is an act contemplated by one of the parties, it is assumed that the parties will act in accordance with the law and thus the court's determination will have the immediate and practical effect of influencing their conduct" and, as such, a declaration does not constitute an advisory opinion (*id.* at 530-531).

The Estate's argument that it is owed fiduciary duties by defendants is based on a strained interpretation of the law. The Estate simply pronounces that it is bound by the LLC Agreement, and thus Ecoplace, as a managing member of AGI, and Economou, who controls Ecoplace, owe the Estate fiduciary duties.[4] In support of its position, the Estate relies on *Feeley v NHAOCG, LLC* (62 A3d 649, 661 [Del Ch 2012]) and sections 18-1101 and 18-1104 of the LLC Act for the proposition that "fiduciary duties are owed by managers of a limited liability company to others bound by the limited liability company's operating agreement unless those duties are expressly disclaimed." Because there is no

[4] On appeal, the Estate does not argue that AGI owes it fiduciary duties, nor could it make that argument, because if an LLC does not owe a fiduciary duty to a member (*see Furchtgott-Roth v Wilson*, 2010 WL 3466770, *5, 2010 US Dist LEXIS 92507, *14 [SD NY, Aug. 31, 2010, No. 09-Civ-9877(PKC)]), then a fortiori it does not owe a fiduciary duty to a nonmember.

disclaimer, the Estate contends that defendants owe it fiduciary duties. Moreover, according to the Estate, because section 18-1101 expressly references "another person that is a party to or is otherwise bound by a limited liability company agreement" (6 Del C § 18-1101[c]), and because section 18-1104 states that "the rules of law and equity relating to fiduciary duties . . . shall govern" (6 Del C § 18-1104), "default" fiduciary duties should be read into the LLC Agreement.

The Estate's pronouncement that it is a party bound by the LLC Agreement and its reliance on the imposition of "default" fiduciary duties are unfounded. Although the *Feeley* court referenced sections 18-1101 and 18-1104, the court did not define or explain what is meant by "otherwise bound by a limited liability company agreement" (6 Del C § 18-1101[c]). To the extent that courts have considered the term "otherwise bound," it has been in the context of creditors of the LLC, not successors in interest (*see In re BHS & B Holdings LLC*, 420 BR 112, 145 n 13 [Bankr SD NY 2009] [stating that "[e]ven creditors may be 'otherwise bound' by an LLC agreement that expressly waives fiduciary duties as between the LLC's members"]), *affd as mod* 807 F Supp 2d 199 [SD NY 2011]. Moreover, a case from the Supreme Court of Delaware expressly calls into question whether the LLC Act does or does not impose "default" fiduciary duties (*Gatz*

Properties, LLC v Auriga Capital Corp., 59 A3d 1206, 1219 [Del 2012] [finding that "the issue [of] whether the LLC statute does – or does not – impose default fiduciary duties is one about which reasonable minds could differ"]). Lastly, the *Feeley* court was tasked with determining a dispute between a managing-member and a nonmanaging-member of an LLC; it did not address whether fiduciary duties could or did indeed run from a member to a nonmember. Further, we note that the Estate has asserted in its SAC new causes of action for breach of contract based on the duty of good faith and fair dealing related to its rights to distributions as well as its alleged right to call Ecoplace's shares. Neither of these claims are impacted by our decision, and, indeed, are still viable claims based upon the motion court's decision granting the Estate's motion for leave to file the SAC.

We find that the Estate's claims for an accounting and constructive trust were properly dismissed, although we affirm the dismissal on different grounds. The Estate correctly contends that New York rather than Delaware law governs accounting and constructive trust claims. New York law, as the law of the forum, governs matters of procedure (*Martin v Dierck Equip. Co.*, 43 NY2d 583, 588 [1978]), and determines whether a matter is procedural or substantive, i.e., generally, whether it

pertains to the remedy or the right (*Tanges v Heidelberg N. Am.*, 93 NY2d 48, 54-55 [1999]). Under New York law, an accounting is an equitable remedy (*Barry v Clermont York Assoc. LLC*, 144 AD3d 607, 608 [1st Dept 2016]), "premised upon the existence of a fiduciary relationship" (*Castellotti v Free*, 138 AD3d 198, 210 [1st Dept 2016]). The accounting claim was, thus, correctly dismissed against defendants because, as previously determined, they do not owe the Estate any fiduciary duties (*see id.*).

The constructive trust claim is also an equitable remedy, the purpose of which is the "prevention of unjust enrichment" (*Simonds v Simonds*, 45 NY2d 233, 242 [1978]). Here, there is no reason to impose a constructive trust over Ecoplace's membership interest in AGI, which Ecoplace acquired legitimately in exchange for $10 million (*see Simonds*, 45 NY2d at 242). As for Economou, he does not own a membership interest in AGI on which to impose a constructive trust. Lastly, with respect to AGI, the Estate failed to show why, in equity and good conscience, AGI should not be allowed to retain its assets (*see id.*).

Finally, the Estate is not entitled to inspect AGI's books and records (fourth cause of action), because it is not a member of AGI (*see* section 6.1 of the LLC Agreement; *see also Prokupek v Consumer Capital Partners LLC*, 2014 WL 7452205, *3, 7, 2014 Del Ch LEXIS 271, *6, 18 [Del Ch, Dec. 30, 2014, C.A. No. 9918-VCN]).

Accordingly, the orders of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 1, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the first (declaratory judgment/injunction that plaintiff is a Member of AGI), second (declaratory judgment that defendants owe fiduciary duties to plaintiff), fourth (access to AGI's books and records under Delaware law), fifth (accounting), and sixth (constructive trust) causes of action in the amended complaint (AC), and denied plaintiff's motion to include in the second amended complaint the causes of action in the AC that had been dismissed, should be modified, on the law, to declare upon the first cause of action that plaintiff is not a member of AGI with all the rights that

the decedent held under AGI's LLC Agreement, to declare upon the second cause of action that defendants do not owe fiduciary duties to plaintiff, and otherwise affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 14, 2017

CLERK