SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 28, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5270 The People of the State of New York, Respondent, Ind. 3189/08

-against-

Irving Ayala,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stoltz, J.), rendered October 7, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of one year, unanimously affirmed.

Defendant's claim that the court's discussion of his rights under *Boykin v Alabama* (395 US 238 [1969]) was deficient is unpreserved, and does not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 381-82 [2015]). We decline to review defendant's claim in the interest of justice.

As an alternative holding, we find that the record as a whole establishes the voluntariness of the plea. A court's omission of the word "jury" in discussing a defendant's right to a trial does not, by itself, vitiate the validity of a guilty plea (*see e.g. People v Mendez*, 148 AD3d 555 [1st Dept 2017], *lv denied* 29 NY3d 1083 [2017]).

In any event, dismissal of the indictment, which is the only remedy sought on appeal, would not be the proper corrective action in this case.

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5271 In re Christine Buffolino, Index 100587/16
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

_____

Christine Buffolino, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Shlomo Hagler, J.), entered April 6, 2017, denying the petition to annul respondent New York City Department of Education's (DOE) determination, which terminated petitioner's teaching position effective December 14, 2015, and dismissing this hybrid proceeding brought pursuant to CPLR article 78 and 42 USC § 1983, unanimously modified, on the law, to the extent of vacating the dismissal of the 42 USC § 1983 claim and converting the proceeding into a plenary action, and otherwise affirmed, without costs.

This action arises out of DOE's acceptance of a resignation letter, dated December 2, 2015, that petitioner is alleged to have submitted, resigning her position as a teacher, effective December 14, 2015. Petitioner denies having sent the letter to

the Superintendent of the school and on December 17 and 18, 2015, sought to withdraw and/or rescind the letter.

The article 78 petition was properly dismissed as premature, since it was brought prior to the conclusion of the grievance procedure set forth in the collective bargaining agreement entered into between petitioner's union and her employer (see *Matter of Gil v Department of Educ. of the City of N.Y.*, 146 AD3d 688 [1st Dept 2017]; *Matter of Sapadin v Board of Educ. of City of N.Y.*, 246 AD2d 359, 360 [1st Dept 1998]).

However, no extraordinary circumstances support the court's sua sponte dismissal of the entire proceeding (*see Grant v Rattoballi*, 57 AD3d 272, 273 [1st Dept 2008]; *Myung Chun v North Am. Mtge. Co.*, 285 AD2d 42, 46 [1st Dept 2001]). In the absence of a motion to dismiss the 42 USC § 1983 claim, conversion of this proceeding to a plenary action is warranted (*see* CPLR 103[c]; *Thornton v New York City Bd./Dept. of Educ.*, 125 AD3d 444, 445 [1st Dept 2015]).

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5272 In re Lorin F.,
Petitioner-Respondent,

-against-

Jason D.,
Respondent-Appellant.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Helene Bernstein, Brooklyn, for respondent.

_____

Order of protection, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about November 21, 2016, upon a fact-finding determination that respondent committed the family offense of harassment in the second degree, unanimously affirmed, without costs.

Respondent's contention that the record does not establish that the parties were involved in an "intimate relationship," as required for the underlying offense to be considered as a family offense (*see* Family Ct Act § 812[1][e]), is unpreserved for appellate review (*see e.g. Matter of Larry B.*, 39 AD3d 399 [1st Dept 2007]). In any event, both parties testified that they were in a relationship on and off for at least four years, leaving no doubt that their relationship was intimate (*see Matter of Sonia S. v Pedro Antonio S.*, 139 AD3d 546, 547 [1st Dept 2016]).

Although the Family Court did not specify which family

offense respondent committed, the parties addressed the offense of harassment in the second degree (Penal Law § 240.26[3]) in their summations, and respondent concedes that "it can be inferred" from the court's findings of fact, which refer to elements of that offense, that the court found he had committed that offense. In any event, reversal would not be required because "the record is sufficiently complete to allow this Court to make an independent factual review and to draw its own conclusions" (*Matter of Keith H. [Logann M.K.]*, 113 AD3d 555, 555 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]; *see Matter of Charlene R. v Malachi R.*, 151 AD3d 482 [1st Dept 2017]), and upon review of the evidence, and according great deference to the court's findings and credibility determinations (*see Matter of Sonia S. v Pedro Antonio S.*, 139 AD3d at 547), a preponderance of the evidence supports a determination that respondent committed the family offense of harassment in the second degree.

Contrary to respondent's argument, the petition gave

adequate notice of the incidents charged, and respondent's conduct was not an isolated incident, but a course of conduct over a period of time involving threats and demands for money, followed by postings of pictures on different sites.

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5273 In re Paul John Ferraro, Index 652793/15
Petitioner-Appellant,

-against-

Carmen Farina, et al.,
Respondents-Respondents.

_____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered July 29, 2016, dismissing the proceeding, and bringing up for review a decision and order, same court and Justice, entered April 22, 2016, which, to the extent appealed from as limited by the briefs, denied the petition brought pursuant to CPLR article 75, seeking to vacate the opinion and award of respondents, dated August 3, 2015, terminating petitioner's employment, unanimously affirmed, without costs.

Education Law § 3020-a(5) provides that upon judicial review an arbitration award shall be vacated only upon a finding of one or more of the grounds cited at CPLR 7511(b)(1) (misconduct in procuring an award; arbitrator bias; arbitrator exceeding its power; procedural defects). Where, as here, the parties have submitted to compulsory arbitration "judicial scrutiny is

stricter [than that for a determination made in a voluntary arbitration] and the determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78. The party challenging [the] determination has the burden of showing its invalidity" (*Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 418-419 [1st Dept 2013] [internal quotation marks and citations omitted]).

The court properly upheld the hearing officer's determination which was amply supported by the record. Petitioner admitted to specifications 5 through 8. With respect to other specifications upheld, the school administrators cited numerous examples of petitioner's pedagogical deficiencies which were noted in many formal and informal observations, and the extensive unsuccessful efforts to assist him to improve. Petitioner's assessment of the quality of his lessons was insufficient to overcome this testimony and the documentation of his deficiencies (*see Matter of Benjamin v New York City Bd./Dept. of Educ.*, 105 AD3d 677, 678 [1st Dept 2013]).

The standard for reviewing a penalty imposed after a hearing pursuant to Education Law § 3020-a is whether the punishment of dismissal was so disproportionate to the offenses as to be shocking to the court's sense of fairness (*see Matter of Asch* at

421). Termination of petitioner's employment does not shock the conscience in that the attempts to improve his performance, which extended over a two to three year period, were largely unsuccessful. Moreover, his testimony demonstrated that he did not believe that his pedagogical technique was deficient (*see Matter of Ajeleye v New York City Dept. of Educ.*, 112 AD3d 425, 425-426 [1st Dept 2013]).

The record does not include evidence that respondents discriminated against petitioner or retaliated against him when he complained, and he admitted that his requests for accommodations were largely granted.

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5274 Joseph Bux, Index 301476/13
Plaintiff-Appellant,

-against-

MD Selim Pervez, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about April 21, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to demonstrate that he suffered a serious injury to his cervical spine, lumbar spine or right shoulder within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion with respect to plaintiff's claims that he suffered a serious injury to his right shoulder, and otherwise affirmed, without costs.

Plaintiff alleges that he sustained permanent consequential and significant limitations in his cervical spine, lumbar spine and right shoulder as a result of the subject motor vehicle accident. Defendants made a prima facie showing that plaintiff's

conditions were not causally related to the accident by submitting the affirmed report of a radiologist, who opined that the MRI films of the cervical spine, lumbar spine and right shoulder all revealed degenerative conditions that preexisted the accident (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). They also submitted the affirmed report of an orthopedist who found normal range of motion in the shoulder.

In opposition, plaintiff submitted his own medical records, which included an X-ray report of his spine showing extensive degeneration, but failed to submit any medical report explaining those findings. Thus, he failed to raise an issue of fact causally relating his claimed spinal injuries to the accident (*see Rivera*, 123 AD3d at 509-510; *Alvarez*, 120 AD3d at 1044).

However, with respect to his right shoulder, plaintiff raised an issue of fact through the affirmed report of his orthopedic surgeon, who examined him within months after the accident and four years later. That doctor found limitations in range of motion at both examinations, and opined that the tears in plaintiff's right shoulder were caused by the accident, based on his examinations of plaintiff, his review of the MRI film and report, and the fact that plaintiff was asymptomatic before the

accident (*see Ahmed v Cannon*, 129 AD3d 645, 647 [1st Dept 2015]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]).

Under the circumstances, plaintiff's cessation of physical therapy treatment is not dispositive. He provided other evidence concerning the causation and seriousness of his shoulder injury (*see generally Pommells v Perez*, 4 NY3d 566, 577 [2005]), and was not required to provide any particular proof of his inability to pay for costs associated with treatment (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906 [2013]).

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5275 The People of the State of New York, Respondent, Ind. 1173/16

-against-

John Clemente, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered January 10, 2017, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of one year, unanimously affirmed.

Following our in camera review of unredacted search warrant documents, we find that there was probable cause for the issuance of the warrant. A reliable confidential informant personally made two controlled buys, and this information was verified by

the police who supervised the buys (*see e.g. People v Jaen*, 140 AD3d 594 [1st Dept 2016], *lv denied* 28 NY3d 931 [2016]). The informant's account of the buys was detailed, and the information was not stale.

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5276 In re Kyle Jiggetts, Index 101206/15
Petitioner-Appellant,

-against-

New York City Human Resources Administration, et al.,
Respondents-Respondents.

_____

Kyle Jiggetts, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered November 1, 2016, which denied and dismissed petitioner's CPLR article 78 petition to reverse an arbitration award, granted respondents' cross motion for sanctions, ordered petitioner to pay $10,000 in sanctions, and enjoined petitioner from commencing any further actions or proceedings arising out of his termination of employment from the New York City Department of Homeless Services (DHS) without prior leave of the Supreme Court, unanimously affirmed, without costs.

Petitioner is collaterally estopped from arguing that he has standing to raise any challenges to the arbitration award that concluded that, as a per diem employee, he was not entitled to challenge respondent New York City Human Resources Administration's termination of his employment in 1994 under the

disciplinary review procedures set forth in the applicable collective bargaining agreement (*see Jiggetts v New York City Human Resources*, Sup Ct, NY County, Oct. 20, 2011, Huff, J., Index No 400903/11; *Jiggetts v New York City Off. of Collective Bargaining, et al.*, Sup Ct, NY County, Dec. 30, 2014, Billings, J., Index No 400361/14; *see Chupka v Lorenz-Schneider Co.*, 12 NY2d 1, 6 [1962]; *see also Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481 [1979]; *BDO Seidman LLP v Strategic Resources Corp.*, 70 AD3d 556, 560 [1st Dept 2010]).

To the extent petitioner's remaining claims of discrimination and retaliation are not barred by res judicata principles based on prior federal and state court rulings rejecting his challenges to HRA's termination of his employment in 1994 (*Matter of Josey v Goord*, 9 NY3d 386, 389-390 (2007]; *Matter of Hunter*, 4 NY3d 260, 269 [2005]; *see Jiggets v New York City Human Resources Admin., et al.*, US Dist Ct, SD NY, 11 Civ 8749, Buchwald, J., 2012), they are barred by the applicable statutes of limitations, as the instant petition, filed in 2015, was commenced more than three years after petitioner was terminated in 1994 (*see Horan v New York Tel. Co.*, 309 AD2d 642, 642 [1st Dept 2003]), and well over four months after the

agency's determination (CPLR 217; *Faillace v Port Auth. of N.Y. & N.J.*, 130 AD2d 34, 43 [1st Dept 1987], *lv denied* 70 NY2d 613 [1987]; *Matter of Edmead v McGuire*, 67 NY2d 714, 716 [1986]).

As petitioner has continued to pursue lawsuits long after their lack of any legal basis was made apparent to him, the court providently exercised its discretion in imposing sanctions (22 NYCRR §§ 130-1.1, 130-1.1-a[b]). The court also providently exercised its discretion in enjoining petitioner from commencing any further suits without prior court approval given his history of frivolous litigation (*see Bikman v 595 Broadway Assoc.*, 88 AD3d 455 [1st Dept 2011], *lv denied* 21 NY3d 856 [2013]).

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5277 The People of the State of New York, Ind. 465/16
Respondent,

-against-

Michael Gaines,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk 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, Bronx County (Miriam R. Best, J.), rendered September 15, 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 28, 2017

CLERK

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

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5278-
5278A-
5278B In re Antonio James L., and Others,

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

Eric David L.,
Respondent-Appellant,

Emily L.,
Respondent-Appellant,

Edwin Gould Services for Children and
Families, et al.,
Petitioner-Respondent.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for Eric David L., appellant.

Neal D. Futerfas, White Plains, for Emily L., appellant.

John R. Eyerman, New York, for respondent.

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

_____

Orders of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about June 10, 2016, which, upon a finding of permanent neglect, terminated respondents' parental rights to the subject children and transferred the children's care and custody to petitioner agency and the Commissioner for the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs. Appeal from

order, same court and Judge, entered on or about May 18, 2016, which dismissed the aunt and uncle's custody petitions for the children, unanimously dismissed, without costs.

The record shows by clear and convincing evidence that the agency made diligent efforts to strengthen the parental relationship between respondent father and the children by scheduling visitation, and referring him for mental health services, a parenting skills class, random drug screenings and sex offender treatment (*see* Social Services Law § 384-b[7][f]; *Matter of Elijah Jose S. [Jose Angel S.]*, 79 AD3d 533, 533-534 [1st Dept 2010], *lv denied* 16 NY3d 708 [2011]). The father's claim that it was inappropriate to require him to receive sex offender treatment because no finding of sexual abuse was entered against him is unavailing. The Family Court entered such a finding in a fact-finding order entered on or about February 13, 2013 (almost two years before the permanent neglect petition was filed), after it determined that a child he was legally responsible for saw child pornography on his computer and that he had participated in chat rooms where child pornography was discussed.

The record also shows by clear and convincing evidence that the agency exercised diligent efforts to strengthen the parental relationship between respondent mother and the children by, among

other things, scheduling visitation, referring her for mental health treatment and random drug testing, and urging her to enter and complete her services (*see Matter of Jordane John C.*, 14 AD3d 407, 407-408 [1st Dept 2005]).

In addition, the record demonstrates by clear and convincing evidence that the parents permanently neglected the children, despite regularly visiting them, by failing to comply with the agency's referrals for services, complete necessary programs, attend mental health therapy regularly, and gain insight into the reasons for the children's placement into foster care (*Matter of Tiara J. [Anthony Lamont A.]*, 118 AD3d 545, 546 [1st Dept 2014]; *see* Social Services Law § 384-b[7][a]). The record also shows that the mother refused to separate from the father even though she was made aware that not doing so would impede the return of the children to her care (118 AD3d at 546).

The determination that it was in the children's best interest to terminate the parents' parental rights and free them for adoption is supported by a preponderance of the evidence (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Neither parent demonstrated that they were close to completing their service plan or had a realistic plan to provide the children with an adequate and stable home (*see Matter of Malachi P. [Georgette P.]*, 142 AD3d 883, 884 [1st Dept 2016]). Furthermore, the record

shows that the children were placed in the foster mother's care when they were very young (*see Matter of Fernando Alexander B. [Simone Anita W.]*, 85 AD3d 658, 659 [1st Dept 2011]).

The aunt and uncle's appeal from the order dismissing the custody petitions is dismissed. Their proof of service states that only the Administration for Children's Services was served with their notice of appeal and appellants' brief even though they were required to also serve those papers upon the parents, the agency and the attorney for the children (*see* Family Ct Act § 1115; CPLR 2103[e]; 5515[1]).

Nevertheless, since the custody order is incorporated into the order of disposition, and since the parents argue, in the alternative, that the children should have been placed with the aunt and uncle, we will consider the order.

Family Court properly determined that dismissal of the custody petitions is in the children's best interests (*see Matter of Azmara N.G. v Jesse Stephanie S.*, 93 AD3d 404 [1st Dept 2012], *lv denied* 19 NY3d 803 [2012]). The children found stability and

a loving home with the foster mother, where they have lived for almost five years. Further, the record shows that the aunt and uncle had not received foster parent training, and did not believe that the father had committed sexual abuse.

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5279-
5280 &
M-6119 Index 602374/09

Street Snacks, LLC,
Plaintiff-Respondent,

-against-

Bridge Associates of Soho, Inc., et al.,
Defendants-Appellants,

York Resources, LLC, et al.,
Defendants.

_____

Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for appellants.

Larocca Hornik Rosen Greenberg & Blaha, LLP, New York (Amy D. Carlin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered March 15, 2016, which denied defendants Bridge Associates of Soho, Inc. and Adam D. Luckner's motion pursuant to CPLR 3215(c) to dismiss the complaint as against them as abandoned, unanimously affirmed, with costs. Order, same court and Justice, entered August 2, 2016, insofar as it denied defendants' motion to renew and to dismiss the complaint pursuant to CPLR 3211(a), unanimously affirmed, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

Plaintiff commenced this action in August 2009 to foreclose a mortgage on certain properties securing a loan to defendant

Bridge Associates of Soho, Inc., the fee owner of one of the properties. The mortgage and note were guaranteed by defendants Midway Holdings Corp. and Adam Luckner, the president of Bridge and Midway. Over the next six years, the parties engaged in a complex course of negotiations, during which time plaintiff, by its counsel, granted defendants, by an individual who spoke for them, many extensions of time to answer the complaint.

Defendants argue that because the individual who was in contact with plaintiff's counsel was not a lawyer, he did not have the legal capacity to bind them to the extensions of time, that therefore the extensions are nullities, and that plaintiff's failure to seek entry of a default judgment for six years constitutes an abandonment of the complaint pursuant to CPLR 3215(c).

As the motion court observed, defendants' citing of the rule that a corporation may be represented in a legal action only by an attorney is an improper attempt to use the rule as a sword, rather than the shield it was meant to be (*see Jimenez v Brenillee Corp.*, 48 AD3d 351 [1st Dept 2008]). "[T]he rule is not intended to penalize an adverse party for the corporation's improper appearance, but is rather to ensure that the corporation has a licensed representative who is answerable to the court and other parties for his or her own conduct in the matter" (*id.* at

352 [internal citation and quotation marks omitted]). Defendants do not deny that plaintiff granted the extensions of time, which were requested on their behalf by an individual who had apparent authority to act on their behalf and who is identified in the record as a vice president of Bridge, to allow them to negotiate a disposition of the property more favorable than foreclosure.

In any event, the record of the aforementioned negotiations demonstrates that plaintiff did not abandon this action, and thus shows sufficient cause why the complaint should not be dismissed (CPLR 3215[c]; *see Ocuto Blacktop & Paving Co. v Trataros Constr.*, 277 AD2d 919, 920 [4th Dept 2000]; *Micheli v E.J. Builders*, 268 AD2d 777, 779-780 [3d Dept 2000]; *First Nationwide Bank v Pretel*, 240 AD2d 629 [2d Dept 1997]).

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

No appeal lies from an order denying reargument (*Mill Fin., LLC v Gillett*, 149 AD3d 643, 645 [1st Dept 2017]).

M-6119 - *Snacks, LLC, v Bridge Associates of Soho, Inc.*

Motion to adjourn appeal for oral argument denied.

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5281 In re Sherman J.,
Petitioner-Appellant,

-against-

Betty J.,
Respondent-Respondent.

Larry S. Bachner, New York, for appellant.

Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about May 1, 2017, which authorized petitioner to access his former residence on a specified date and time in order to retrieve personal belongings, unanimously affirmed, without costs.

Application by petitioner's assigned counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed the record and agree with assigned counsel that there

are no nonfrivolous issues which could be raised on this appeal. In fact, the Family Court's order provided petitioner with the exact relief that he was seeking.

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5282 U.S. Bank National Association, etc.,
Plaintiff-Respondent,

-against-

Lennon A. Thomas,
Defendant-Appellant,

JP Morgan Chase Bank, NA, etc., et al.,
Defendants.

Index 381770/09

_____

Lennon A. Thomas, appellant pro se.

Shapiro, DiCaro & Barak, LLC, Rochester (Austin T. Shufelt of counsel), for respondent.

_____

Appeal from unsigned and unentered judgment, Supreme Court, Bronx County (John A. Barone, J.), deemed appeal from order, same court and Justice, entered March 17, 2014, which granted plaintiff's motion for a final judgment of foreclosure and sale, and denied defendant-appellant's motion to dismiss this action on the basis that plaintiff lacks standing, and, so considered, said order unanimously affirmed, without costs.

Because defendant failed to timely raise defenses based on service of process and standing in an answer or pre-answer motion to dismiss, those defenses are waived (CPLR 3211[e]; *International Bus. Machs. Corp. v Murphy & O'Connell*, 172 AD2d 157, 158 [1st Dept 1991], *appeal dismissed* 78 NY2d 908

[1991][service of process]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 280-281 [1st Dept 2006], *appeal dismissed 8* NY3d 837 [2007][standing]).

In any event, the affidavit of service of the summons and complaint on defendant constitutes prima facie evidence of proper service, which defendant failed to rebut with anything more than conclusory denials of receipt (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]).

Plaintiff has demonstrated that it has standing by providing the affidavit of Marc Hinkle, a vice president of the mortgage loan servicer, affirming that plaintiff was the owner and holder of the note and mortgage at the commencement of this action (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]).

Defendant's failure to move to vacate the default judgment against him also precludes his success on this appeal. Any such motion would be time-barred (CPLR 5015[a][1]), and defendant has not attempted to show that he has a justifiable excuse for his default and a meritorious defense to this foreclosure action (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]).

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 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5283 Lewis Gross MD, Index 153081/16
Plaintiff-Respondent,

-against-

Ismael Leyva Architect, P.C.,
Defendant-Appellant,

ABN Realty LLC, et al.,
Defendants.

_____

Gallo Vitucci Klar LLP, New York (Mary L. Maloney of counsel), for appellant.

Weg & Myers, P.C., New York (Joshua L. Mallin of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 9, 2017, which denied as premature the motion of defendant Ismael Leyva Architect, P.C. (ILA) to dismiss the complaint as against it, unanimously affirmed, without costs.

ILA has not established entitlement to dismissal of the negligence claim as against it. The amended agreement indicating that it agreed to perform "Construction Observation (Quality Control) other than those included in Architect's [Construction Administration] responsibilities during site visits," raises questions as to whether ILA was responsible for inspecting the excavation and underpinning and, if so, whether it properly performed such work (*see e.g. 27 Jefferson Ave., Inc. v Emergi*,

18 Misc 3d 336, 340-341 [Sup Ct, Kings County 2007]). Thus, the motion court properly denied the motion "with leave to bring it again after depositions." Notably, the cases upon which ILA relies were decided at the summary judgment stage, after the completion of discovery (*see e.g. 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014]; *492 Kings Realty, LLC v 506 Kings, LLC*, 105 AD3d 991 [2d Dept 2013]).

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5284 In re Nicholas Amatulli, Petitioner, Index 100055/16

-against-

William J. Bratton, etc., et al., Respondents.

Tanner & Ortega, LLP, New York (Hugo Ortega of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Aaron Bloom of counsel), for respondents.

Determination of respondents, dated September 18, 2015, which, after a hearing, found petitioner guilty of accessing, downloading, and possessing child pornography, and terminated his employment as a police officer, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, Supreme Court, New York County [Barbara Jaffee, J.], entered June 2, 2016), dismissed, without costs.

The determination that petitioner was guilty of downloading and possessing child pornography is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. Of Human Rights*, 45 NY2d 176, 180 [1978]). As for the downloading specification, respondents showed that 148 child pornography files were shared and downloaded to petitioner's IP address

between January 26, 2013 and March 31, 2013. The dates on which these files were detected corresponded to dates on which petitioner had taken leave or a day off from work. As for the possession of child pornography specification, respondents established that the WD external hard drive found in petitioner's basement contained at least five nondeleted, graphic, child pornography videos in a "hidden" folder. Petitioner's behavior during the execution of the search warrant, during which he was found locked in the basement where he was allegedly filing comic books, and told officers there was no tower computer in the basement, even though one was later found there, provided circumstantial evidence of his guilt as to both charges (*see Matter of S & R Lake Lounge v New York State Liq. Auth.*, 87 NY2d 206, 209 [1995]). The Hearing Officer was entitled to take petitioner's demeanor during his testimony into account when assessing his credibility (*see e.g. Matter of Edwards v Safir*, 282 AD2d 287 [1st Dept 2001]).

Despite petitioner's tenure with the police department since 1999, the absence of any formal disciplinary record, and the fact

that he had been awarded several medals, his termination for downloading and possessing child pornography does not shock our sense of fairness (*see e.g. Matter of Taylor v New York State Div. of State Police*, 28 AD3d 978 [3d Dept 2006]).

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5285 The People of the State of New York, Ind. 1209/15
Respondent,

-against-

Jahquar Christian,
Defendant-Appellant.

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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 (Charles Solomon, J.), rendered November 10, 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 28, 2017

CLERK

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

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5286 In re Javaughn V.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency.

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Larry S. Bachner, Jamaica, for appellant.

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

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about October 14, 2016, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the second degree, criminal possession of a weapon in the fourth degree and obstruction of governmental administration in the second degree, and imposed a nonsecure placement with the Administration for Children's Services for a period of 6 to 18 months, unanimously affirmed, without costs.

Appellant's legal insufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we conclude that the court's finding was based on legally sufficient evidence. We also conclude that it

was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. Evidence credited by the court established all the elements of the offenses charged.

Appellant's argument for a dismissal in the interest of justice is without merit.

The disposition was a provident exercise of discretion that constituted the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), in light of appellant's history of escalating delinquency and failure to benefit from opportunities for rehabilitation.

Appellant's claim that the Family Court failed to conduct a proper dispositional hearing is also unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5287 In re Alexander H.,

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

Brenda P.-H.,
Respondent-Appellant,

Sheltering Arms Children and Family Services,
Petitioner-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Marion C. Perry, Bronx, for respondent.

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

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Notice of appeal from order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about November 22, 2016, which granted petitioner agency's motion for summary judgment on the issue of severe abuse as to the subject child, deemed a motion for leave to appeal, the motion granted, and the order unanimously affirmed, without costs.

The agency established prima facie that the child was "severely abused" by respondent mother (Social Services Law § 384-b[8][iii][C], [iv]) by submitting respondent's criminal conviction of second-degree assault with respect to another of her children and a prior order of the court granting the agency's

motion to excuse it from making efforts to reunify respondent with the child, from which respondent did not appeal. In opposition, respondent failed to raise a triable issue of fact (*see Matter of Vivienne Bobbi-Hadiya S. [Makena Asanta Malika McK.]*, 126 AD3d 545 [1st Dept 2015], *lv denied* 25 NY3d 909 [2015]).

There is no appeal as of right from a nondispositional order in a permanent neglect proceeding (Family Court Act § 1112[a]; *Matter of Tasha E.*, 161 AD2d 226, 227 [1st Dept 1990]; *see also Matter of Alyssa L. [Deborah K.]*, 93 AD3d 1083, 1085-1086 [3d Dept 2012]). Nevertheless, we find there is no merit to the claim.

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5288 Hugo I. Palma, Index 22754/13E
Plaintiff-Appellant,

-against-

Anthony A. Douglas, et al.,
Defendants-Respondents.

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Law Offices of William Pager, Brooklyn (William Pager of counsel), for appellant.

Law Offices of John Trop, Yonkers (David Holmes of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered June 9, 2016, which, in this action for personal injuries sustained in a motor vehicle accident, denied plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

The court properly denied plaintiff's motion as the evidence, including the parties' conflicting accounts as to how

the accident occurred and the police accident report, presents triable issues of fact as to who was at fault for the accident (*see e.g. Geralds v Damiano*, 128 AD3d 550 [1st Dept 2015]).

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5289-
5290N Louis M. Atlas,
Plaintiff-Respondent,

-against-

Francis Smily,
Defendant-Appellant.

Index 301091/06

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Louis M. Atlas P.C., New York (Louis M. Atlas of counsel), for respondent.

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Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered May 4, 2016, which denied defendant wife's motion for leave to renew her motion to vacate the parties' June 2015 stipulation; and order, same court and Justice, entered April 27, 2017, which granted plaintiff husband's motion to enforce the stipulation by appointing a receiver to sell the former marital residence, directing the husband to be reimbursed $17,555.25 from the net proceeds of the sale, and ordering the wife to timely pay the mortgage and maintenance on the property until a final sale of the property is effectuated, unanimously affirmed, without costs.

The motion court properly denied the wife's motion to renew since it was not based on new facts that would change the prior

determination (CPLR 2221[e]; *Bank of N.Y. Mellon v Izmirligil*, 88 AD3d 930 [2d Dept 2011]). The "new facts" presented by the wife, concerning the husband's failure to timely file a satisfaction of judgment pursuant to the 2015 stipulation, were wholly unrelated to the court's prior determination that the stipulation was not the product of duress (*see Kaya v B&G Holding Co., LLC*, 101 AD3d 685, 687 [2d Dept 2012]). The wife, under the guise of renewal, actually advances a new legal theory (breach of the stipulation) rather than grounds for renewal of her original motion (invalidity of the stipulation on grounds of duress), and the court properly recognized her efforts to do so were not within the scope of CPLR 2221 (*see Nassau County v Metropolitan Transp. Auth.*, 99 AD3d 617, 619 [1st Dept 2012], *lv dismissed in part and denied in part* 21 NY3d 921 [2013]).

The motion court also properly granted the husband's motion to enforce the stipulation. Although the satisfaction of judgment was not timely filed by the husband, by interim orders of this Court, the wife obtained an additional 6½ months to fulfill her obligations under the stipulation and avoid the sale of the property. The wife's efforts to do so, however, were belated, and minimal. She showed no efforts to try to refinance before March 2016, when she learned the satisfaction of judgment had not been filed, and offered no persuasive explanation as to

why she did not try to seek refinancing for the first ten months after the stipulation was entered into. The record contains one apparently unsuccessful effort by her to assume the mortgage, yet the documents concerning that effort do not support her efforts to blame the husband. Nor does she submit any proof in support of her most recent alleged efforts to secure refinancing jointly with her daughter. The wife's conclusory and vague references to these refinancing efforts do not justify further postponements of her deadline.

The wife, moreover, offers no persuasive justification for her failure to keep current on the mortgage, as was her obligation under the stipulation's clear terms. Nor does she provide adequate proof to rebut the husband's clear showing that he paid the monthly obligations on which she defaulted.

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5291N Helga Arminak, et al., Index 651781/16
Plaintiffs-Appellants,

-against-

Trimas Corp., et al.,
Defendants,

Rieke-Arminak Corp., et al.,
Defendants-Respondents.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shirley W. Kornreich, J.), entered on Aril 6, 2017,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated November 21, 2017,

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

ENTERED: DECEMBER 28, 2017

CLERK

Acosta, P.J., Richter, Mazzarelli, Andrias, Gesmer, JJ.

5292N In re State Farm Fire & Casualty Company,
Petitioner-Respondent,

-against-

James W. Clark, et al.,
Respondents,

21st Century Assurance Company,
Respondent-Appellant.

Index 260125/14

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Burrati Rothenberg & Burns, Melville (Mitchell E. Pak of counsel), for appellant.

Martin, Fallon & Mullè, Huntington (Richard C. Mullé of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about August 3, 2016, which granted the CPLR article 75 petition and permanently stayed the subject uninsured motorist arbitration, unanimously affirmed, without costs.

The hearing court properly found that additional respondents Olga Leon-Lobello and Santo Lobello were insured by additional respondent 21st Century Assurance Company on the date of the subject accident. 21st Century did not show that it timely mailed the requisite renewal documents to the Lobellos (*see Weathers v Hartford Ins. Group*, 77 NJ 228, 234-235 [1978]; *Lopez*

v N.J. Auto. Full Ins. Underwriting Assn., 239 NJ Super 13, 24 [NJ App Div 1990], *cert denied* 122 NJ 131 [1990]; NJAC 11:3-8.3[b]).

Even assuming that 21st Century had demonstrated that it mailed the requisite documents, it is undisputed that the Lobellos paid the premium within the policy coverage period, and six days prior to the accident. It is also undisputed that the Lobello's promptly notified 21st Century of the accident, and that 21st Century did not disclaim coverage until a day later. Moreover, 21st Century did not refund the premium payment until nearly two weeks after the accident. Under these circumstances, 21st Century's acceptance of the Lobello's premium estops them from denying coverage (*see Cervone v N.J. Auto. Full Ins. Underwriting Assn.*, 239 NJ Super 25, 29 [NJ App Div 1990]).

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

ENTERED: DECEMBER 28, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3357 Dennis T. Palmeri, Jr., Index 650501/13
Plaintiff-Appellant,

-against-

Willkie Farr & Gallagher LLP,
Defendant-Respondent.

_____

Ansell Grimm & Aaron, P.C., New York (Joshua S. Bauchner of counsel), for appellant.

Lupkin & Associates PLLC, New York (Jonathan D. Lupkin of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 5, 2015, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny in part defendant's motion for summary judgment, and reinstate the first cause of action for breach of fiduciary duty, and otherwise affirmed, without costs.

In January 2001, nonparty Ramius Securities LLC hired plaintiff Dennis T. Palmeri, Jr. to serve as manager of its stock lending securities department. At some point in 2007, the Financial Industry Regulatory Authority (FINRA)[1] began a

[1] The investigation began under the auspices of the National Association of Securities Dealers, the predecessor to FINRA.

regulatory investigation seeking information on the use of so called finders in Ramius's stock lending business. In December 2007, after having received information from Ramius in response to its initial requests, FINRA served both Ramius and plaintiff with letter requests for additional information regarding transactions that had included a finder's fee.

In preparing his responses to the FINRA request, plaintiff conferred with Ramius's General Counsel and its Chief Operating Officer, both of whom were attorneys. Plaintiff alleged that the GC and the COO informed him they were "there as his counsel," allegedly leading plaintiff to believe that an attorney-client relationship was formed.

Plaintiff left Ramius's employ in 2008. In early 2009, plaintiff retained defendant Willkie Farr & Gallagher LLP to represent him in connection with the FINRA investigation. Before undertaking any representation of plaintiff, defendant informed plaintiff that Ramius, which was then a client of defendant, would not accept any situation in which defendant was adverse to Ramius. At the same time, defendant noted that it did not foresee any set of circumstances in which plaintiff would be adverse to Ramius. Defendant sent plaintiff an engagement letter dated January 14, 2009; the letter made no mention of any conflict of interest arising from defendant's representation of

both plaintiff and Ramius, nor did it enumerate the rights plaintiff would have if he and Ramius were to become adverse. Approximately one month afterward, in connection with the same FINRA investigation, Ramius also retained defendant to represent it and certain of its current or former employees.

On or about January 27, 2009, defendant represented plaintiff during his investigative examination before FINRA. In June 2009, however, defendant informed plaintiff that defendant could no longer represent him because of a conflict of interest concerning defendant's concurrent representation of Ramius and its current and former employees, and unilaterally terminated its representation of him on June 25, 2009. By letter dated September 23, 2009 from defendant to FINRA, defendant appeared to shift to plaintiff all or most of the responsibility for any alleged violations of FINRA's rules.

In January 2010, Ramius entered into a letter of acceptance, waiver, and consent (AWC) with FINRA; defendant negotiated the letter on Ramius's behalf. The AWC absolved Ramius and its employees of further liability.

On or about December 1, 2010, FINRA commenced a disciplinary proceeding against plaintiff, alleging that he had made false and misleading statements to Ramius's chief compliance officer during the FINRA investigation, thus causing Ramius to give inaccurate

responses to FINRA.

The hearing on the disciplinary proceeding was held on June 28 and 29, 2011. In the months leading up to the hearing, defendant communicated with FINRA about matters related to the hearing, such as testimony to be given by Ramius employees. Moreover, at the hearing, defendant was present on behalf of Ramius and Ramius employees who testified.

By decision dated on or about November 18, 2011, the hearing panel dismissed the complaint, finding that FINRA had failed to prove by a preponderance of the evidence that plaintiff had violated FINRA rules. The panel also determined that certain of the Ramius employees who testified were not credible. On February 15, 2013, upon FINRA's appeal, the National Adjudicatory Council for FINRA upheld the hearing panel's dismissal of the FINRA complaint against plaintiff.

In the complaint in this action, dated February 15, 2013, plaintiff asserted causes of action against defendant for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, gross negligence, professional negligence, breach of contract, and breach of the implied covenant of good faith and fair dealing. Plaintiff alleged that defendant, during its representation of Ramius in the FINRA investigation, shifted all responsibility for any alleged violations of FINRA's rules to

him, suggesting that plaintiff undertook certain wrongful actions without Ramius's knowledge. Plaintiff further asserted that defendant disclosed to FINRA his internal, privileged communications with Ramius's counsel, thus causing FINRA to assert charges against Palmieri. Moreover, plaintiff alleged that defendant disclosed information that it had learned during the time it represented him. Plaintiff also alleged that the FINRA complaint was primarily based on privileged statements he had made to counsel at Ramius, and that these statements were also disclosed during the course of Willkie's representation of Ramius after it ceased representing him.

Defendant moved under CPLR 3212 to dismiss the complaint as time-barred and for failure to state a claim. Plaintiff cross-moved for summary judgment in his favor. In its decision, which it read into the record, the IAS court found that all six of plaintiff's claims were premised on the same operative facts and sought identical monetary damages. Accordingly, the IAS court "merged" plaintiff's claims for gross negligence, breach of contract and breach of the implied covenant of good faith and fair dealing into his legal malpractice claim, leaving for consideration only that claim and claims based on breach of fiduciary duty.

The IAS court then dismissed both claims as untimely.

Because plaintiff sought purely monetary damages, the court applied the three-year statute of limitations to the breach of fiduciary duty claim, rather than the six-year period. The court held that the claim was time-barred, since plaintiff filed it in February 2013, more than three years after defendant represented him from January through June 2009.

To begin, the motion court properly dismissed plaintiff's claims for gross negligence, breach of contract, and breach of the implied covenant of good faith and fair dealing as duplicative of his legal malpractice claim, given that they are all based on the same facts and seek the same relief (*Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669 [1st Dept 2012]).

Plaintiff's claim for legal malpractice, in turn, is untimely. Claims for legal malpractice are subject to a three-year statute of limitations and accrue when the malpractice is committed, not when the client learns of it (*Lincoln Place, LLC v RVP Consulting, Inc.*, 70 AD3d 594 [1st Dept 2010], *lv denied* 15 NY3d 710 [2010]; CPLR 214[6]). Plaintiff's legal malpractice claim first accrued on or about June 25, 2009, when defendant terminated its legal representation of him, but continued to represent Ramius in the ongoing FINRA investigation. He did not, however, file his claim until February 15, 2013, more than three

years later.

In addition, the motion court correctly dismissed the claim for aiding and abetting a breach of fiduciary duty, as plaintiff is collaterally estopped from relitigating the question of whether an attorney-client relationship existed between him and his employer's in-house counsel. The identical issue was decided in the FINRA proceeding and plaintiff had a full and fair opportunity to litigate it before FINRA (*see Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]; *Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 [2013]).

However, the IAS court should have permitted the breach of fiduciary duty claim to proceed. The IAS court correctly noted that the claim was subject to a three-year statute of limitations. The court was mistaken, however, in finding that the allegedly wrongful conduct ended on June 25, 2009, when defendant unilaterally terminated its representation of plaintiff. On the contrary, defendant's conduct extended through at least June 29, 2011, during which time it represented Ramius and its employees in their participation at plaintiff's FINRA disciplinary hearing.

Here, plaintiff alleges not only that defendant breached its fiduciary duty when it terminated its professional relationship with him, but also when, until at least June 2011, it acted in a

manner directly adverse to his interests. Where there is a series of continuing wrongs, the continuing wrong doctrine tolls the limitation period until the date of the commission of the last wrongful act (*Harvey v Metropolitan Life Ins. Co.*, 34 AD3d 364 [1st Dept 2006]; *see also Ring v AXA Fin., Inc.*, 2008 NY Slip Op 30637[U] [Sup Ct, NY County 2008] [applying continuing violations doctrine to General Business Law § 349 claim where initial payments occurred outside statute of limitations but "the insurer [] continued to bill, and ... [plaintiff] ... continued to pay" within three years of filing suit]).

Here, plaintiff has presented evidence of a "continuing wrong," which is "deemed to have accrued on the date of the last wrongful act" (*Leonhard v United States*, 633 F2d 599, 613 [2d Cir. 1980], *cert denied* 451 US 908 [1981]; *Harvey*, 34 AD3d at 364). Indeed, the record contains evidence sufficient to create an issue of fact as to whether defendant breached its fiduciary obligations to plaintiff after June 2009 and well into June 2011 during its ongoing representation of the Ramius parties.

For example, as noted, the record contains evidence that in the early portion of 2011, defendant helped Ramius identify witnesses who would testify against plaintiff at his FINRA disciplinary hearing. Similarly, defendant was present on behalf of Ramius and Ramius employees who testified at plaintiff's FINRA

hearing on June 28 through 29, 2011 – a hearing at which the employees gave testimony that was generally adverse to plaintiff's interests. This evidence is sufficient for a fact-finder to determine that defendant breached its duty of loyalty to plaintiff, a former client (*see Cooke v Laidlaw, Adams & Peck*, 126 AD2d 453, 456 [1st Dept 1987] [ethical standards applying to the practice of law impose a continuing obligation upon lawyers to refuse employment in matters adversely affecting a client's interests, even if the client is a former client]).

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

> The Decision and Order of this Court entered herein on July 25, 2017 is hereby recalled and vacated (*see* M-6062 decided simultaneously herewith).

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

ENTERED: DECEMBER 28, 2017

CLERK

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

4692 37 East 50th Street Corporation, Index 653067/13
Plaintiff-Respondent-Appellant,

-against-

Restaurant Group Management Services, L.L.C.,
Defendant-Appellant-Respondent.

_____

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for appellant-respondent.

Camarinos Law Group, LLC, New York (John M. Mavroudis of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 19, 2015, which, to the extent appealed and cross-appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the fifth and sixth causes of action, and denied the motion as to the second through fourth causes of action and for judgment on its second counterclaim, unanimously affirmed, without costs.

The court properly denied so much of the motion as sought dismissal of the second cause of action. First, like the IAS court, we reject defendant's argument that the sentences in the parties' 2011 agreement referring to a lease with both parties as tenants are inoperative. These sentences are not in recital or "whereas" clauses. Furthermore, "[i]n construing a contract, one

of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless" (*Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]). "[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a realization of their reasonable expectations" (*Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 555 [1982] [brackets and internal quotation marks omitted]). The drafts of the 2011 letter agreement show that plaintiff specifically negotiated to have itself named as a tenant. Second, there is a disputed issue of fact as to whether the parties are the sole members of the tenant. Third, we agree with the motion court that the issue of whether plaintiff waived its right to sue defendant presents a question of fact (*see e.g. Fundamental Portfolio Advisors, Inc. v Toqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]).

The second cause of action is also based on defendant's alleged failure to manage the restaurant on a "meaningful profitable basis." Like the motion court, we decline to find that phrase too indefinite to be enforceable as a matter of law. "Striking down a contract as indefinite and in essence meaningless is . . . a last resort" (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991] [internal quotation marks omitted]). The 2011 letter agreement does not contain a merger/integration clause; hence, parol

evidence is admissible to explain what "meaningful profitable basis" means. Depositions had not yet been held when defendant moved for summary judgment. If extrinsic evidence is required to glean the intent of the parties to a contract, summary judgment is inappropriate (*see e.g. Bank of N.Y. Mellon Trust Co., N.A. v Merrill Lynch Capital Servs. Inc.*, 99 AD3d 626, 628 [1st Dept 2012]; *Musman v Modern Deb*, 56 AD2d 752, 753 [1st Dept 1977]).

To the extent the second cause of action and second counterclaim are based on plaintiff's termination notice, defendant is not entitled to summary judgment. If one views the record in the light most favorable to plaintiff, as one must on defendant's motion (*see e.g. Fundamental Portfolio Advisors*, 7 NY3d at 105), the July 19, 2013 notice says, "we will take control . . . on August 26, 2013," i.e., more than 30 days after the notice. Although plaintiff did not give defendant an opportunity to cure its defaults, plaintiff alleges that some of the defaults (such as defendant's failure to operate the restaurant on a meaningful profitable basis in 2012 and 2013) can never be cured. We do not find the phrase "upon thirty . . . days notice to [defendant] of default, which default remains uncured, and which [defendant] does not commence diligent effort to cure" to be a condition precedent (*see MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009] ["the use of terms such

as 'if,' 'unless' and 'until' constitutes unmistakable language of condition"] [some internal quotation marks omitted]). Even if it were a condition precedent, there are issues of fact as to whether plaintiff properly terminated defendant for cause, as opposed to for default.

The court properly denied so much of the motion as sought dismissal of the fourth cause of action (breach of fiduciary duty). A "contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract" (*North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 179 [1968]) and "[i]t is well settled that the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself" (*Mandelblatt v Devon Stores*, 132 AD2d 162, 167-168 [1st Dept 1987]). The parties had a long-term fiduciary relationship that preceded the 2011 agreement by 15 years. Pursuant to this relationship of higher trust, plaintiff relied on defendant to ably manage its business and to exercise business judgment in good faith and without personal bias or conflict of interest. Plaintiff alleges that defendant created a company without plaintiff's consent and then intentionally entered into a lease in contravention of the

parties' 2011 agreement. In other words, it is alleged that defendant "intentionally improperly performed their contract . . . and did so, in connection with their other acts . . . to [its] own substantial benefit" (*Albemarle Theatre v Bayberry Realty Corp.*, 27 AD2d 172, 177 [1st Dept 1967]). While these claims concern some of the same underlying conduct as the breach of contract claim, the allegations concern a breach of a duty that is independent of the contract, and therefore not subject to dismissal as duplicative (*see Phipps Houses Servs., Inc. v New York Presbyt. Hosp.*, 139 AD3d 480, 481 [1st Dept 2016]; *Minnelli v Soumayah*, 41 AD3d 388, 389 [1st Dept 2007], *lv dismissed* 9 NY3d 1028 [2008]; *Sally Lou Fashions Corp. v Camhe-Marcille*, 300 AD2d 224, 225 [1st Dept 2002]).

We have considered defendant's arguments regarding the third cause of action and plaintiff's arguments on its cross appeal and find them unavailing.

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

ENTERED: DECEMBER 28, 2017

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kern, Oing, JJ.

4968 Jesse Strauss, Index 159627/15
Plaintiff-Appellant,

-against-

EAN Holdings, LLC, et al.,
Defendants-Appellants,

City of New York,
Defendant-Respondent.

_____

Jonathan Silver, Kew Gardens, for Jesse Strauss, appellant.

Carman, Callahan & Ingham, LLP, Farmingdale (Peter F. Breheny of counsel), for Ean Holdings, LLC, appellant.

Jaffe & Asher LLP, New York (Marshall T. Potashner of counsel), for Liberty Mutual Fire Insurance Company, appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

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Order, Supreme Court, New York County (James E. D'Auguste, J.), entered April 22, 2016, which granted defendant City of New York's motion to dismiss the complaint as against it, unanimously affirmed, without costs.

Plaintiff's claims for a defense and indemnity from the City were correctly dismissed as time-barred, since plaintiff failed to file the complaint within four months after he became aware of the City's determination to deny representation in the underlying action (*see* CPLR 217[1]). Contrary to plaintiff's contentions, his demand for a defense and indemnity are subject to General

Municipal Law § 50-k, which provides for the City's defense and indemnity of City employees with respect to any alleged act or omission of the employee while acting within the scope of his or her public employment and in the discharge of his or her duties.

Plaintiff's reliance on General Municipal Law § 50-k(7), which provides that "[t]he provisions of this section shall not be construed to impair, alter, limit or modify the rights and obligations of any insurer under any policy of insurance," is misplaced. "[S]elf-insurance is not insurance but an assurance – an assurance that judgments will be paid" (*Guercio v Hertz Corp.*, 40 NY2d 680, 684 [1976]). While *Matter of Country-Wide Ins. Co. (Manning)* (96 AD2d 471, 472 [1st Dept 1983], *affd* 62 NY2d 748 [1984]) recognized, "as a matter of public policy," that the City is required to provide uninsured motor vehicle coverage, it does not hold that the City is an insurer that provides policies of insurance. Moreover, in contrast to *Country-Wide*, the risk that an injured party will not be able to collect from the City based on its status as an unregulated self-insurer is not present in this case (*see* Vehicle and Traffic Law § 388[1]), and to the extent that a City employee seeks a defense and indemnification for his or her own liability, that claim is covered by General Municipal Law § 50-k.

To the extent plaintiff is still pursuing a claim against

Liberty Mutual, and to the extent Liberty's cross claim against the City was dismissed, there is no basis to reinstate the cross claim, given that the City does not have any statutory obligation to defend or indemnify plaintiff.

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

ENTERED: DECEMBER 28, 2017

CLERK

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

5225-
5226 The People of the State of New York,
Respondent,

-against-

Ramusa Alejandro,
Defendant-Appellant.

Ind. 504/15

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Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and White & Case LLP, New York (Jackson Herndon of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 19, 2016, as amended July 18, 2016, convicting defendant, after a jury trial, of assault in the second degree and petit larceny, and sentencing him to an aggregate term of five years, unanimously affirmed.

The evidence was legally sufficient to prove that the complainant, Rosalino Luna (Luna), suffered "physical injury," as is required to establish guilt of assault in the second degree under Penal Law § 120.05(12). "Physical injury" is "impairment of physical condition or substantial pain" (Penal Law § 10.00[9]). Luna described the pain he suffered as varying from a lot of pain to a great deal of pain. His son, Martin Luna, testified that after being struck by defendant, Luna's face "blew

up" and became discolored. P.O. Ezequiel Burgos testified as to his observations of a contusion on Luna's face. Finally, the hospital records indicated bruising and swelling to Luna's face. The evidence established that Luna sustained injuries that caused pain that was "more than slight or trivial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see e.g. People v Samba*, 97 AD3d 411, 413 [1st Dept 2012], *lv denied* 20 NY3d 1065 [2013] [pain need not be "excruciating or incapacitating"]; *People v Hodge*, 83 AD3d 594, 595 [1st Dept 2011], *lv denied* 17 NY3d 859 [2011] ["(m)inor injuries causing moderate pain," as well as injuries not requiring medical treatment, may suffice]). Further, there was legally sufficient evidence that Luna experienced these injuries and the resultant pain as a result of defendant's conduct and independent from that of codefendant Vincent Lopez.[2]

The trial court did not err in denying defendant's request for a charge on justification. A defendant is entitled to a charge on justification when the charge is "supported by a reasonable view of the evidence" (*People v Johnson*, 75 AD3d 426 [1st Dept 2010]; *see also People v Watts*, 57 NY2d 299, 301

[2] Lopez was charged in a separate count with assault in the second degree, pleaded guilty, and was sentenced to two years incarceration.

[1982]).

Here, the evidence did not support a reasonable belief on defendant's part that the use of physical force against him was imminent. Despite defendant's assertions, there was nothing in the record to suggest that he was surrounded and/or that Luna brandished a knife. The only testimony regarding distance came from Martin Luna, who testified that he was about three meters from Luna and defendant when the punch was thrown by defendant. Even viewing the evidence in the light most favorable to defendant, this testimony did not support the contention that defendant was "surrounded." Further, nothing in the record indicated that Martin Luna was about to use physical force against defendant.

Defendant's argument that he was denied his right to be present at a material stage of trial when, in his absence, the court was informed of new facts regarding his prior conviction of attempted robbery, and effectively modified its ruling, is without merit.

At the *Sandoval* hearing, at which defendant was present, the court inquired of the People what prior convictions they wished to question defendant should he testify. The People, while requesting that they be allowed to question defendant regarding a prior conviction for attempted robbery, including the

underlying facts, had few facts concerning the conviction and were unable to respond to the court's questions regarding the conviction. The court chided the People for not providing more detailed information regarding the conviction. It then ruled that defendant could be questioned as to whether "he had a robbery conviction involving more than two people in the forcible theft of property from an individual." It prohibited the People from asking if defendant or an accomplice possessed a weapon during the commission of the crime. Later, during a midtrial discussion, when defendant was not present, the People informed the court and counsel that they had learned that both defendant and his accomplice had used knives during the robbery.

A *Sandoval* hearing is a material stage of the trial at which a defendant has a right to be present (*see People v Dokes*, 79 NY2d 656 [1992]). However, the right to be present is not violated by defendant's absence from any and all discussions that relate to *Sandoval*. Defendant's absence from the midtrial discussion of the facts underlying his prior conviction did not deprive him of the "opportunity for meaningful input" (*People v Liggins*, 19 AD3d 324, 325 [1st Dept 2005], *lv denied* 5 NY3d 853 [2005]) as there was no modification of the court's *Sandoval* ruling based on the newly disclosed facts. The information imparted to the court and counsel, in defendant's absence, was

information specifically ruled on by the court in defendant's presence. The court's *Sandoval* ruling was that the People were precluded from questioning defendant about his use or his accomplice's use of a knife. The court never altered this ruling.

Following the People's representations as to the prior robbery, the court acknowledged that defendant had not been in the courtroom. The court, which expressed its understanding that defendant did not intend to testify, stated that there was "always a chance the [new] information" would change defendant's position about testifying, and that the new information would be repeated in defendant's presence "so that he is in a position to make his final choice." Defendant was brought back to the courtroom and was informed of the information in an off-the-record conversation with his attorney. After being informed of the same, defendant did not testify.[3] Defendant's argument that the only reason for the court to give him a chance to change his position about testifying was that the newly disclosed facts had altered the court's *Sandoval* ruling is belied by the record. There was no statement by the court to counsel or to the People

[3]Defendant does not assert that counsel did not fully apprise of him of the People's representations regarding the robbery conviction.

that it was altering its prior ruling based upon the new information imparted by the People. Nor was there any inquiry by counsel, prior to speaking to his client, as to whether the court was altering or changing its ruling. Rather, as stated by the court, the information had to be communicated to defendant so that he had all the information necessary to make a final decision.

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5293-
5294 The People of the State of New York,
Respondent,

-against-

Mario Armond,
Defendant-Appellant.

Ind. 3776/14

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Center for Appellate Litigation, New York (Robert S. Dean 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 (Robert M. Stolz, J.), rendered March 4, 2015, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years; and order, same court and Justice, entered on or about December 21, 2016, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The verdict was supported by legally sufficient evidence, and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of inconsistencies in testimony. The jury could have readily rejected, as implausible, the defense theory that the

incident was a larceny and not a robbery. We have considered and rejected defendant's remaining arguments relating to the sufficiency and weight of the evidence.

The court providently exercised its discretion in denying defendant's CPL 440.10 motion without holding a hearing (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]). Based on the submissions on the motion, as well as the trial record, we conclude 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 cites counsel's failure to conduct an investigation of the victim (a taxi driver), which would have revealed a case before the Taxi and Limousine Commission imposing sanctions on the victim in connection with a car accident. However, defendant has not shown that this deficiency rose to the level of depriving defendant of a fair trial or affecting the outcome of the case. This lone incident, resulting only in civil sanctions, was unlikely to have had a significant impact in impeaching the victim's general credibility.

The court also properly rejected the branch of the CPL 440.10 motion claiming that the People violated their obligations under *Brady v Maryland* (373 US 83 [1963]) by failing to disclose the above-discussed potential impeachment material. There was no

showing that this information was in the People's "custody, possession or control" (*People v Garrett*, 23 NY3d 878, 886 [2014]), or that such knowledge should be imputed to them. The submissions on the motion satisfactorily refute defendant's claim that a remark by the prosecutor during jury selection demonstrated her knowledge of this information.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5297 In re Natalia R.,

A Child under Twenty-one Years of Age, etc.,

Derek R.,
Respondent-Appellant,

The Children's Aid Society,
Petitioners-Respondents.

_____

Carol L. Kahn, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Sara H. Reisberg of counsel), attorney for the child.

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Appeal from order, Family Court, New York County (Jane Pearl, J.), entered on or about August 23, 2016, which approved petitioner agency's permanency goal of adoption, unanimously dismissed, without costs.

Respondent father, whose consent was not required for the child's adoption pursuant to Domestic Relations Law § 111, and who indisputably received the required notice and opportunity to be heard regarding the child's best interests, was not aggrieved by the order of disposition (*see* Domestic Relations Law § 111-a; Social Services Law § 384-c; *Matter of Alyssa M.*, 55 AD3d 505, 506 [1st Dept 2008]). Accordingly, his appeal is dismissed (*see*

CPLR 5511; *Matter of Tanay R.S. [Tanya M.]*, 147 AD3d 858, 860 [2d Dept 2017]*)*.

Even if consideration of this appeal were proper, we would find that the agency met its burden of proving by a preponderance of the evidence that adoption was in the child's best interest (*see Matter of Skyla Lanie B. [Jonathan Miranda B.]*, 116 AD3d 589, 590 [1st Dept 2014]). The child was thriving in her foster home, where she had been living with her half-sister for two years, had bonded with her pre-adoptive foster parents, and was receiving treatment for her special needs (*see id.* at 590; *Matter of Jayden C. [Michelle R.]*, 82 AD3d 674, 675 [1st Dept 2011]; *see also* Social Services Law § 383[3]). By contrast, the father had virtually no relationship with the child, limited financial resources, and an untreated mental illness, and a transfer of custody to him would have resulted in separation of the child from her half-sister.

The father's argument that the agency thwarted him from

developing a relationship with the child is not supported by the record. At any rate, the agency was not required to make "diligent efforts" to encourage the development of such a relationship (Domestic Relations Law § 111[1][d]).

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5298 In re COB 3420 Broadway, LLC, Index 101835/15
Petitioner-Appellant,

-against-

Darryl C. Towns, etc., et al.,
Respondents-Respondents,

Sixto Merino
Respondent.

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Cullen & Associates, P.C., New York (Kevin D. Cullen of counsel), for appellant.

New York State Division of Housing Community Renewal, New York (Melina M. Stratos of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered May 20, 2016, denying the petition to annul the determination of respondent New York State Homes and Community Renewal (DHCR), dated August 13, 2015, that a rent overcharge occurred, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition granted, and the determination annulled.

DHCR's finding of a rent overcharge was based on its incorrect determination that respondent Merino's apartment was rent stabilized. Upon vacancy of the apartment by the previous rent controlled tenant, the rent reached the $2,000 deregulation

threshold due to a combination of vacancy and individual apartment improvement increases that were not challenged (*see Matter of 18 St. Marks Place Trident LLC v State of New York Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 149 AD3d 574 [1st Dept 2017]; *but see Altman v 285 W. Fourth, LLC*, 127 AD3d 654 [1st Dept 2015]). Thus, the apartment qualified for exemption from rent stabilization, regardless of whether Merino was actually charged and paid a monthly rent that was less than the deregulation threshold (Rent Stabilization Code [9 NYCRR] former § 2520.11[r][8][i], now § 2529.11[r][10][i]).

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5299 Russell J. Lester, Index 152112/12
Plaintiff-Appellant,

-against-

JD Carlisle Development
Corp., MD. et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]
- - - - -
Facade Technology, LLC,
Fourth-Party Plaintiff,

-against-

Exterior Erecting Services, Inc.,
Fourth-Party Defendant-Respondent.
- - - - -
[And a Fifth-Party Action]

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

Litchfield Cavo LLP, New York (David Lafarga of counsel), for JD Carlisle Development Corp., MD, Carlisle Development Corp. and 835 6th Ave. Master LP, respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for Exterior Erecting Services, Inc., respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered September 12, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' and fourth-party defendant's motions for summary judgment dismissing the Labor Law § 241(6) cause of action insofar as it based on Industrial Code

(12 NYCRR) §§ 23-1.7(e) and 23-1.24, unanimously modified, on the law, to deny the motion as to the cause of action insofar as it is based on § 23-1.7(e)(2), and, upon a search of the record, to grant plaintiff partial summary judgment on that cause of action, and otherwise affirmed, without costs.

Plaintiff was injured when he slipped to his knees on the sloped roof of a parking garage where he was installing panels for a video screen and his arm came into contact with the sharp edge of exposed flashing that had been installed as part of the video screen. The temporary roof surface was a membrane covered in small granules variously described as a fine-grit stone similar to sand, cinder materials, or ball bearings.

Industrial Code § 23-1.7(e)(1), which applies to "passageways," is not applicable to the roof, an open area, upon which plaintiff was working. However, § 23-1.7(e)(2) applies to "areas where persons work or pass." The record demonstrates that the loose granules on the roof surface that caused plaintiff to slip were not integral to the structure or the work (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]), but were an accumulation of debris from which § 23-1.7(e)(2) requires work areas to be kept free [*Serrano v Con Ed 146 AD3d 405* (1st Dept 2017)]. Thus, plaintiff is entitled to summary judgment as to liability on the

Labor Law § 241(6) cause of action insofar as it is predicated upon § 23-1.7(e)(2).

Industrial Code § 23-1.24(a)(1) requires that roofing brackets be used when work is performed on any roof with a slope steeper than one in four inches "unless crawling boards or approved safety belts are used." We note that plaintiff was wearing a harness and was tied off to a static line. In any event, this section is inapplicable to this case, because plaintiff did not fall from the roof (*see Bennion v Goodyear Tire & Rubber Co.*, 229 AD2d 1003 [4th Dept 1996], *appeal withdrawn* 91 NY2d 1004 [1998]; *see also Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 978 [2003]).

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5300 The People of the State of New York, Respondent, Dkt. 51271/12 93556/12

-against-

Courtney Cherry, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Erika M. Edwards, J. at first consolidation motion; Ann E. Scherzer, J. at second consolidation motion; Larry R.C. Stephen, J. at nonjury trial and sentencing), rendered April 9, 2014, convicting defendant of two counts of attempted forcible touching and two counts of sexual abuse in the third degree, and sentencing him to an aggregate term of 60 days, unanimously affirmed.

The second motion court providently exercised its discretion in granting the People's motion for consolidation. Given the issue of intent, proof relating to each incident was admissible with regard to the other (*see* CPL 200.20[2][b]).

Defendant's principal argument on appeal is that the order granting consolidation after another court of coordinate jurisdiction had denied the motion constituted a violation of the

law of the case doctrine. However, defendant did not preserve this issue (*see People v Johnson*, 301 AD2d 462 [1st Dept 2003], *lv denied* 99 NY2d 655 [2003]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

Regardless of whether the court had been aware of the earlier determination, it was not bound by it. Here, the discretionary determination as to whether to consolidate the cases involved the determination of an evidentiary issue that would not be binding on a subsequent justice in the same case (*see People v Evans*, 94 NY2d 499 [2000]; *People v McLeod*, 279 AD2d 372 [1st Dept 2001], 96 NY2d 921 [2001]).

In any event, defendant was not prejudiced by the consolidation. The trial court, sitting as trier of fact, made it clear that it was keeping the cases separate and avoiding any inference of criminal propensity.

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5301 In re the People of the State of New York ex rel. Alana Roth on Behalf of Miles Payton, Petitioner-Appellant, Index 452444/16

-against-

Joseph Ponte, etc., Respondent-Respondent.

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

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

Appeal from judgment (denominated an order), Supreme Court, New York County (Larry R.C. Stephen, J.), entered on or about December 19, 2016, denying the petition for a writ of habeas corpus and dismissing the proceeding brought pursuant to CPLR article 70, unanimously dismissed, without costs, as moot.

This habeas petition challenging the bail court's refusal to approve a bail bond, on the ground of insufficient collateral, is concededly moot in light of petitioner's subsequent guilty plea in the underlying case (*see e.g. People ex rel. Mason v Warden*, 138 AD3d 501 [1st Dept 2016]). We decline to apply an exception

to the mootness doctrine (*see Matter of Hearst Corp. v Clyne* (50 NY2d 707, 714-715 [1980]; *see also People ex rel. Fox v Ponte*, 151 AD3d 502 [1st Dept 2017], *lv denied* __ NY3d __, 2017 NY Slip Op 89291 [2017]).

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5302 Victoria Ortegas, Index 23111/15E
Plaintiff-Appellant,

-against-

G4S Secure Solutions (USA) Inc.,
et al.,
Defendants-Respondents.

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Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City (David R. Ehrlich of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Brian Pete of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered November 18, 2016, dismissing the complaint, and bringing up for review an order, same court and Justice, entered November 10, 2016, which granted defendants' motion to dismiss plaintiff's claims as time-barred, unanimously affirmed, without costs.

Plaintiff's employment application "utterly refutes" her discrimination claims and conclusively establishes defendants' defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; CPLR 3211[a][1]). The employment application unambiguously shortened the applicable statute of limitations to six months. Plaintiff does not contest that her complaint was untimely if this provision is enforceable, nor does

she specify evidence she might have obtained in discovery that would change this result.

Plaintiff's allegations that the employment application was unconscionable fail. Generally, a showing of unconscionability requires a showing that "the contract was both procedurally and substantively unconscionable when made – i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988] [internal quotation marks omitted]; *see Brower v Gateway 2000*, 246 AD2d 246, 253-254 [1st Dept 1998]). Here, plaintiff cannot establish substantive unconscionability, as New York courts have held that a six-month period to bring an employment claim is inherently reasonable (*see Hunt v Raymour & Flanigan*, 105 AD3d 1005, 1006 [2d Dept 2013]; *see also Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 [1st Dept 2014]). Nor do the allegations in plaintiff's affidavit establish that the employment application was procedurally unconscionable (*see Sablosky v Gordon Co.*, 73 NY2d 133, 139 [1989]).

We have considered plaintiff's remaining contentions, including that the motion court improperly converted the motion to dismiss to one for summary judgment without providing notice to the parties, and find them unavailing.

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5303 Arizona Premium Finance Company, Inc., Index 654130/13
Plaintiff-Respondent,

-against-

American Transit Insurance Co.,
Defendant-Appellant.

_____

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for appellant.

Gage Spencer & Fleming LLP, New York (William B. Fleming of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 2, 2017, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion for summary judgment on its claim for the return of unearned premiums on 14 of 46 cancelled insurance policies, unanimously affirmed, with costs.

Plaintiff provided premium financing for 46 insurance policies under which New York City livery car drivers were insured by defendant. After the insureds defaulted on their loan payments, plaintiff sought to cancel the policies, which it had authority to do, provided, inter alia, that it gave the insureds notice (with copies to defendant). The record demonstrates that defendant received the notices of cancellation with respect to 14

of the 46 policies and therefore that plaintiff is entitled to the return of the unearned premiums on those policies. With respect to the remaining 32 policies, issues of fact whether defendant received the notices preclude summary judgment in either side's favor (*see e.g. Crump v Unigard Ins. Co.*, 100 NY2d 12, 16-17 [2003]).

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 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5304 The People of the State of New York, Ind. 620/14
Respondent,

-against-

Clifford Cudjoe,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Robert C. Mciver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (James Hubert, J.), rendered February 26, 2015, unanimously affirmed.

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

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5305 Carol Faber, et al., Index 21754/13E
Plaintiffs-Respondents,

-against-

The Place Furniture, Inc. doing business as The Place Furniture Galleries, et al.,
Defendants-Appellants.

_____

Faust Goetz Schenker & Blee LLP, New York (Damian F. Fischer of counsel), for appellants.

Chiariello & Chiariello, Glen Cove (Gerald Chiariello II of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered November 7, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Defendants established prima facie entitlement to summary judgment based on evidence that the single 8" step onto the furniture display platform in defendants' showroom — on which plaintiff wife tripped — was an illuminated, open and obvious condition which was readily observable by reasonable use of one's senses (*Schwartz v Kings Third Ave. Pharmacy, Inc.* 116 AD3d 474 (1st Dept 2014); *Barakos v Old Heidlberg Corp.* 145 AD3d 562 (1st Dept 2016).; *Acosta v Gouverneur Ct. L.P.*, 133 AD3d 470 [1st Dept

2015]). Plaintiff wife, together with her family, had navigated the single step onto the furniture display platforms earlier that shopping day, and also during an uneventful visit to the same showroom just a few weeks prior to the date of her accident. There was no evidence to indicate that the single step, in its design, placement and maintenance, was inherently dangerous, and the defendants' use of warning signs to give notice of the step's presence did not, standing alone, render the steps unsafe.

Plaintiffs have not presented any proof that negligence on the part of defendants in the design, construction or maintenance of the subject step contributed to her fall, or that alleged showroom distractions support grounds to find liability on defendants' part under the circumstances presented (*see generally Franchini v American Legion Post*, 107 AD3d 432 [1st Dept 2013]).

The burden having shifted to plaintiffs on the motion, we find their evidence in opposition failed to raise a triable issue of fact.

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5307 The People of the State of New York, Ind. 4999/14
Respondent,

-against-

Everett Hardy,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered May 17, 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 28, 2017

CLERK

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

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5308-
5309 Index 652383/15

309 Fifth Owners LLC,
Plaintiff-Appellant,

-against-

MEPT 309 Fifth Avenue LLC,
Defendant-Respondent.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Leslie G. Fagen of counsel), for appellant.

Litchtenberg PLLC, New York (Barry E. Lichtenberg of counsel), for respondent.

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Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 23, 2016, dismissing the complaint, and bringing up for review an order, same court and Justice, entered August 2, 2016, which, inter alia, granted defendant's motion to dismiss the cause of action for breach of contract, unanimously reversed, on the law, with costs, the judgment vacated, and the motion to dismiss the breach of contract cause of action denied.

The parties' contract provides that a certain payment from defendant to plaintiff shall be computed based on "Appraised Value," which means "[t]he gross appraised value of the Property as determined by the most recent appraisal prepared on behalf of Purchaser [i.e., defendant] in the ordinary course of Purchaser's business and accepted by Purchaser as final for purposes of

Purchaser's portfolio valuation." The materials submitted by defendant did not "resolve[] all factual issues as a matter of law, and conclusively dispose[] of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA,* 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks omitted]; *see Goshen v Mutual Life Ins. Co. of N.Y.,* 98 NY2d 314, 326 [2002]). On the contrary, the documents submitted by defendant showed that the appraisals were *not* prepared on behalf of Purchaser; instead, they were prepared for nonparty NewTower Trust Company as Trustee of nonparty Multi-Employer Property Trust. Similarly, defendant's documents showed that the appraisals were not accepted by *it*; rather, they were accepted by NewTower on behalf of the Trust. The affidavit submitted by defendant, which does not constitute documentary evidence (*see e.g. Regini v Board of Mgrs. of Loft Space Condominium,* 107 AD3d 496 [1st Dept 2013]), but which can be used to help plaintiff (*see Rovello v Orofino Realty Co.,* 40 NY2d 633, 635-636 [1976]), shows that the Trust is not the same as defendant. It says defendant is a subsidiary of nonparty MEPT Edgemoor LP, which in turn is a subsidiary of the Trust.

Since plaintiff's breach of contract claim is being reinstated, we need not address its arguments about the implied covenant of good faith and fair dealing and leave to replead.

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5310 Douglas Elliman LLC, Index 650440/12
Plaintiff-Appellant,

-against-

Shoshana Tal also known as
Shoshana Mendelovici, et al.,
Defendants-Respondents.

_____

Cole Hansen Chester LLP, New York (Michael S. Cole of counsel), for appellant.

Law Offices of David Yerushalmi, P.C., Brooklyn (Annette G. Hasapidis of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered June 20, 2017, which, to the extent appealed from, granted so much of defendants' motion pursuant to CPLR 3126 as sought an adverse inference charge against plaintiff, for the purposes of summary judgment and trial, that defendant Tal notified plaintiff in 2008 of her employment with another real estate brokerage firm, Itzhaki Properties, and of her desire for dual licensure, to which plaintiff agreed, and to preclude plaintiff from presenting evidence to the contrary, unanimously affirmed, with costs.

The record demonstrates that plaintiff acted with gross negligence in destroying ESI not only after commencement of the action triggered a duty to preserve, but after defendant Tal's

deposition, in which she referenced an email exchange in which she allegedly advised plaintiff that she had started working at Itzhaki Properties, and requested dual licensure, which plaintiff approved (*see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). Accordingly, the court properly exercised its discretion in presuming the relevance of the email exchange and imposing spoliation sanctions (*id.*). Further, the court engaged in "an appropriate balancing under the circumstances" by ordering a tailored adverse inference charge limited to the alleged contents of the email exchange regarding defendant's Tal's work at Itzhaki Properties, and precluding plaintiff from presenting contrary evidence (*id.* at 47).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5311 Steven Benkovsky, Index 161243/13
Plaintiff-Appellant,

-against-

Gregg Lorenzo, etc., et al.,
Defendants-Respondents.

_____

Hantman & Associates, New York (Robert J. Hantman of counsel), for appellant.

Gusrae Kaplan & Nusbaum PLLC, New York (Ryan Whalen of counsel), for respondents.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered September 30, 2016, which denied plaintiff's motion for summary judgment and granted defendant Gregg Lorenzo's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court correctly dismissed the complaint, which alleged claims against Lorenzo only. On the breach of contract claim, Lorenzo established that he was not a party to the loan agreement and had not executed a written personal guarantee; plaintiff failed to raise issues of fact as to either issue. Claims of an oral guarantee of defendant GJL's obligations are barred by the statute of frauds (*see* General Obligations Law § 5-701[a][2]).

As for the unjust enrichment claim, Lorenzo established the

loan proceeds were used for their stated purpose and not to unjustly enrich him, and plaintiff failed to raise issues of fact as to this point (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Plaintiff's unsupported testimony that he believed defendants were alter egos of each other, fell short of creating a triable issue. Plaintiff's alleged belief was belied by his request that Lorenzo personally guarantee GJL's loan, which showed he understood the two defendants to be distinct from each other.

Defendant showed that the claims for misrepresentation and fraud were duplicative of the breach of contract claim, and plaintiff presented no grounds to show how the claims could be sustained independently (*see Demetre v HMS Holdings Corp.*, 127 AD3d 493, 494 [1st Dept 2015]). In addition, plaintiff failed to show a "special relationship" sufficient to sustain the negligent misrepresentation claim (*see Mandarin Trading Ltd. v Wildenstein*,

16 NY3d 173, 180 [2011]).

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

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5312-
5312A In re Jamil S., and Another,

Children Under Eighteen Years
of Age, etc.,

Shaaniel T.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Allison L. Mahoney of counsel), attorney for the children.

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Order of fact-finding, Family Court, New York County (Emily M. Olshansky, J.), entered on or about May 11, 2016, which, following a hearing, found the subject children to be neglected, unanimously affirmed, without costs; purported appeal by respondent mother from order, same court and Judge, entered on or about August 10, 2015, which denied respondent's request for a parole of the children pursuant to Family Court Act §§ 1027 and 1028, unanimously dismissed, without costs, as moot.

The agency established a prima facie case against the mother of derivative neglect as to the subject children, based on the mother's multiple prior findings over the course of approximately

ten years, including a finding of sexual abuse as to one of her children (*see Matter of Phoenix J. [Kodee J.]*, 129 AD3d 603 [1st Dept 2015]; *see also Matter of Essence S. [Stephanie G.]*, 134 AD3d 415, 416 [1st Dept 2015]; *Matter of Camarrie B. [Maria R.]*, 107 AD3d 409 [1st Dept 2013]). Moreover, the findings and orders which terminated the mother's rights as to another child based on permanent neglect were entered approximately five months prior to the birth of the subject children (*see Matter of Darren Desmond W. [Nirandah W.]*, 121 AD3d 573, 573-574 [1st Dept 2014]; *Matter of Jamarra S. [Jessica S.]*, 85 AD3d 803 [2d Dept 2011], newborn twins Jamil and Jamila (*see Matter of Kimberly H.*, 242 AD2d 35, 39 [1st Dept 1998]; *see also Matter of Noah Jeremiah J. [Kimberley J.]*, 81 AD3d 37, 44 [1st Dept 2010]; *Matter of Nhyashanti A. [Evelyn B.]*, 102 AD3d 470 [1st Dept 2013]).

Further, the mother had been asked to complete a number of service plans, which included domestic violence counseling, individual therapy and substance abuse treatment, as well as anger management based on domestic incident reports that were called in by her children. Notwithstanding, the mother stopped attending all of services when she became pregnant with the twins, claiming that she had been placed on "bed-rest" (*see Matter of Phoenix J.*, 129 AD3d 603). However, she failed to produce any documentation to support this claim, and the

caseworker testified that the documentation intended to support this claim indicated that the mother was not on "bed-rest," but only prohibited from lifting heavy objects. The evidence showed that the mother had been discharged from therapy for nonattendance, and repeatedly was advised that the academic counseling she received at school was an insufficient substitute given the school's assertion that it did not offer mental health services.

Further, the mother failed to comply with court orders which directed that the children Musa (a/k/a Milan) and Famod attend school on a daily basis and required appointments, including Milan's appointments related to his probation.

On this record, the mother failed to complete the services that were repeatedly ordered as a result of numerous child protective proceedings, including one involving sexual abuse, as well as a prior termination of parental rights proceeding, which concluded within five months prior to the filing of the underlying petition. Under the circumstances, the evidence establishes substantial risk to the newborn twins (*Matter of Vincent M.*, 193 AD2d 398, 404 [1st Dept 1993]).

The mother's purported appeal from the denial of her request to return the twins pursuant to Family Court Act (FCA) § 1028 has been rendered moot by the determination of neglect (*see Matter of*

Jalicia G. [Jacqueline G.], 130 AD3d 402 [1st Dept 2015]); and is, for the reasons stated, in any event, unavailing (FCA § 1028[a][ii]).

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

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5313 The People of the State of New York, Ind. 4245/14
Respondent,

-against-

Jonathan Montero,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer 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 (Jill Konviser, J.), rendered January 19, 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 28, 2017

CLERK

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

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5314 Pauline Okpo, Index 162461/14
Plaintiff-Appellant,

-against-

City of New York,
Defendant,

District Council 37, et al.,
Defendants-Respondents.

_____

Law Office of Vincent I. Eke-Nweke, P.C., Brooklyn (Vincent I. Eke-Nweke of counsel), for appellant.

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about December 6, 2016, which denied plaintiff's motion for partial summary judgment on the issue of liability, and granted defendants-respondents' (the Union) cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

As a probationary employee, plaintiff's termination was not the basis for a "grievance" under the governing collective bargaining agreement (CBA). As such, the Union owed her no duty of fair representation (*see Portlette v Metropolitan Tr. Auth.*, 25 AD3d 389, 391 [1st Dept 2006]).

Even assuming that the Union owed her a duty here, it would

nonetheless have had no duty to initiate a CPLR article 78 proceeding on her behalf. The duty of fair representation is rooted in the bargaining agent's exclusive statutory authority to pursue grievances on behalf of covered employees under the CBA (*see Matter of Civil Serv. Bar Assn., Local 237, Intl. Bhd. of Teamsters v City of New York*, 64 NY2d 188, 196 [1984]; *Butler v McCarty*, 191 Misc 2d 318, 324 [Sup Ct Madison County 2002], *affd* 306 AD2d 607 [3d Dept 2003]). As a probationary employee, however, plaintiff could have challenged her termination herself in an article 78 proceeding (*see e.g. Matter of Castro v Schriro*, 140 AD3d 644, 644 [1st Dept 2016], *affd* 29NY3d 1005 [2017]). The nature and purpose of the duty of fair representation — representation in collective bargaining grievances — thus does not support expansion of the duty to cover article 78 proceedings.

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5315 The People of the State of New York, Respondent, Ind. 536/16

-against-

Shamel Brown, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Michael Sonberg, J.), rendered February 23, 2016, unanimously affirmed.

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

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

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

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

ENTERED: DECEMBER 28, 2017

CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5316N Brenton Adams, etc., Index 161589/15
Plaintiff-Appellant,

-against-

Kent Security of New York, Inc.,
Defendant-Respondent.

_____

Abdul Hassan Law Group, PLLC, Queens Village (Abdul K. Hassan of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Brian Pete of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered August 5, 2016, which granted defendant's motion to compel arbitration, unanimously reversed, on the law, without costs, and the matter remanded for further proceedings consistent herewith.

In connection with his employment by defendant, plaintiff executed an arbitration agreement in which he agreed to submit any claims arising out of his employment to binding arbitration before the American Arbitration Association (AAA) in Miami-Dade County, Florida. The arbitration agreement further provides that the prevailing party is entitled to recover costs, including reasonable attorneys' fees, and provides for application of the AAA's rules, including the rule concerning expenses which requires the parties to share all arbitration expenses other than

the expenses of their own witnesses.

In this putative class action law suit, plaintiff asserts a single claim for untimely payment of wages in violation of Labor Law § 191 and seeks to recover liquidated damages and attorney's fees under Labor Law § 198. Defendant moved to compel arbitration pursuant to the arbitration agreement (CPLR 7503), and plaintiff opposed, arguing that he had not agreed to arbitrate Labor Law claims, that any such agreement would be against public policy, and that, based on his limited financial means, as detailed in a supporting affidavit, the fee splitting and venue provisions of the agreement render arbitration financially prohibitive.

New York has a "long and strong public policy favoring arbitration," and "courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (*Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49-50 [1997] [internal quotation marks omitted]). As a general matter, therefore, a clear and unmistakable agreement to arbitrate statutory wage claims is not unenforceable as against public policy (*see Flynn v Labor Ready*, 6 AD3d 492 [2d Dept 2004]; *see generally Tamburino v Madison Square Garden, LP*, 115 AD3d 217, 222-223 [1st Dept 2014]; *Pierre v Mary Manning Walsh Nursing Home Co., Inc.*, 93 AD3d 541, 541-542 [1st Dept 2012]).

However, the court erred in failing to address plaintiff's contention that, because of his financial circumstances, requiring him to arbitrate, and to do so in Florida, would preclude him from pursuing his claims (*Matter of Brady v Williams Capital Group, L.P.*, 14 NY3d 459 [2010]). Acknowledging the "strong state policy favoring arbitration [] and the equally strong policy requiring the invalidation of such agreements when they contain terms that could preclude a litigant from vindicating his/her statutory rights in the arbitral forum" (*id.* at 467), the Court of Appeals in *Brady* held, as here relevant, that,

> "in this context, the issue of a litigant's financial ability [to arbitrate] is to be resolved on a case-by-case basis and that the inquiry should at minimum consider the following questions: (1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum. Although a full hearing is not required in all situations, there should be a written record of the findings pertaining to a litigant's financial ability" (*id.*).

Applying the foregoing standard, we hold that plaintiff has made a preliminary showing that the fee sharing and venue provisions in the arbitration agreement have the effect of precluding him from pursuing his statutory wage claim in arbitration. We remand for further proceedings, consistent with

Brady, which, at a minimum, would include proof of plaintiff's income and assets, as well as proof of the expected costs and fees to arbitrate this dispute in Florida. Because the parties' arbitration agreements contains a severability clause, in the event plaintiff prevails on his claim that the aforementioned fee sharing and venue provisions should be held unenforceable under *Brady*, the matter should proceed to arbitration in New York, with defendant to bear the costs of the arbitration.

In addition, plaintiff challenges that part of the arbitration agreement permitting defendant, if it prevails in arbitration, to recover attorneys' fees. He argues that he would be unable to afford such fees, and that their recovery is not authorized under Labor Law § 198(1), which only provides for costs and limited expenses to a prevailing plaintiff enforcing a wage claim. While *Brady* did not expressly address this issue, by extension of its logic, the risk of plaintiff having to pay

defendant's attorneys' fees, if it prevails, may be taken into account in considering whether the total costs associated with arbitration preclude plaintiff from pursuing his claim in the arbitral forum.

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

ENTERED: DECEMBER 28, 2017

CLERK

Tom, J.P., Richter, Kapnick, Kern, Moulton, JJ.

5351 Edward L. Shugrue III, et al., Index 650912/13
Plaintiffs-Appellants,

-against-

Lee Stahl, et al.,
Defendants-Respondents.

_____

Katsky Korins LLP, New York (Joel S. Weiss of counsel), for appellants.

Harry C. Demiris, Jr., P.C., Westbury (Harry C. Demiris, Jr. of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 2, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiffs' fraudulent inducement claim, and denied plaintiffs' motion for summary judgment dismissing defendants' breach of contract and anticipatory breach of contract counterclaims, unanimously modified, on the law, to deny defendants' motion, and otherwise affirmed, without costs.

The court erred in granting defendants summary judgment dismissing plaintiffs' fraudulent inducement claim on grounds of absence of justifiable reliance, as defendants did not raise the argument in their summary judgment motion (*Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73, 82 [1st Dept 2002]; *Sadkin v Raskin & Rappoport*, 271 AD2d 272, 273 [1st Dept 2000];

see Dunham v Hilco Constr. Co., 89 NY2d 425, 429-430 [1996]). Accordingly, we modify to reinstate the claim. Further, as limited by the parties' motion papers, we find issues of fact as to whether defendants made misrepresentations regarding the status of the approvals and permits required for the renovation work that allegedly induced plaintiffs to enter into the construction contract.

"Contract damages are ordinarily intended to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed" (*Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 373 [1992]). Plaintiffs claim that the schedule attached to the contract lists defendants' estimated profit upon completion. However, it is unclear from the schedule alone whether defendants would have realized actual profits in this fixed-price contract

that differ from the estimation listed. Because plaintiffs failed to meet their prima facie burden, plaintiffs' motion for summary judgment as to defendants' counterclaims was properly denied.

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

ENTERED: DECEMBER 28, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4557 The People of the State of New York, SCI 598/10
Respondent,

-against-

Reuel Mebuin,
Defendant-Appellant.

_____

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

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

_____

Appeal from order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about July 31, 2013, held in abeyance, and the matter remitted for a hearing on defendant's claim of ineffective assistance of counsel under *People v McDonald* (1 NY3d 109 [2003]) and a decision de novo on the motion.

Opinion by Gesmer, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Karla Moskowitz
Marcy L. Kahn
Ellen Gesmer, JJ.

4557
SCI 598/10

_____x

The People of the State of New York,
Respondent,

-against-

Reuel Mebuin,
Defendant-Appellant.
_____x

Defendant appeals from the order of the Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about July 31, 2013, which denied his CPL 440.10 motion to vacate a judgment of conviction rendered February 17, 2010.

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

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

GESMER, J.

Both the United States Supreme Court and the New York Court of Appeals have recognized that, for many noncitizens, deportation may be as dire a consequence of conviction as incarceration (*see e.g. Lee v United States*, - US -, 137 S Ct 1958, 1966, [2017]; *People v Peque*, 22 NY3d 168, 183 [2013], *cert denied sub nom Thomas v New York*, - US -, 135 S Ct 90 [2014]). In this appeal from the summary denial of his CPL 440.10(1)(h) motion, defendant contends that his counsel provided him ineffective assistance by misadvising him as to the deportation consequences of a misdemeanor guilty plea. Because defendant's allegations are sufficient to warrant a hearing, we hold that the motion court abused its discretion by summarily denying defendant's motion, and we remit the matter for further proceedings.

Background

Defendant, a citizen of the Republic of Cameroon, arrived in the United States in 1995 and was granted asylum in 1998, reflecting a finding that he had a well-founded fear of persecution if he returned to Cameroon. He became a lawful permanent resident in 2004.

In 2009, defendant was indicted on two counts of the class D felony of sexual abuse in the first degree for having allegedly

touched the private parts of his ex-girlfriend's two minor daughters.

On February 5, 2010, defendant appeared before the court with his counsel. The People offered a sentence of a conditional discharge if defendant pleaded guilty to the class A misdemeanor of endangering the welfare of a child. When the court asked defendant if he was going to agree to take the plea that day, they had the following exchange:

> DEFENDANT: "Your honor, I very much want to plead guilty, but I am so concerned with the-
>
> THE COURT: "You're what? . . . I am not your lawyer, you have a lawyer. I am just the judge. You tell me if you want the plea, and I will tell you what the consequences will be, but I can't help you with your immigration problems.
>
> . . .
>
> THE COURT: "[I]t's a very good offer, and if you get convicted of a felony you will still have the deportation issue."

Defendant accepted the People's offer. Accordingly, the court allocuted defendant to establish that he had acted in a manner injurious to the physical, mental, or moral welfare of his ex-girlfriend's two daughters, the elements of endangering the welfare of a child (Penal Law § 260.10[1]). The court then allocuted defendant as to whether he had touched the children inappropriately on their private parts, which established the elements of sexual abuse in the first degree (Penal Law §

130.65[3]), although it was not necessary to the plea agreement. Defendant's attorney did not object.

The court then stated: "Just one other thing I want to tell you that you're pleading in State court to a misdemeanor, however, this has nothing to do with your immigration status which is not decided by me. It will be decided in another venue do you understand that?"

Defendant answered, "I do."

Two weeks later, defendant appeared with counsel and pleaded guilty to one count of endangering the welfare of a child. The court again allocuted defendant as to whether he had acted in a manner injurious to one of his ex-girlfriend's daughters, and then incorporated, by reference, the full factual allocution that it had taken previously. During this appearance, the court stated: "This plea could affect your immigration status. I have no control over that. That's determined by the federal government. Do you understand that as well?" Defendant answered, "I do." The court accepted the plea and imposed the promised sentence. Defendant did not appeal.

Defendant applied for naturalization in September 2011. In March 2012, he was notified that the federal government sought to deport him, alleging that he had been convicted of an aggravated felony and a crime of child abuse (8 USC §§ 1227[a][2][A][iii],

[E][i]). He was immediately detained in immigration custody in New Jersey. Soon after, defendant's application to naturalize was denied for "poor moral character," based on the facts he allocuted to in the second part of his allocution.

In May 2012, the Newark Immigration Court granted the deportation petition based on defendant's conviction and his factual allocution on February 5, 2010. Defendant was ordered removed.[1]

While detained, defendant, pro se, submitted a motion to "revise and revoke" in March 2013, seeking to vacate his conviction on the grounds of ineffective representation under *People v McDonald* (1 NY3d 109 [2003]), because his counsel had misadvised him of the deportation consequences of his plea.[2] In support of the motion, defendant swore that counsel had told him that the plea would "have no [deportation] consequences at all" and that, if the plea did lead to deportation consequences, "[counsel] will get defendant out of any such consequences." Defendant also swore that he only became aware of the consequences of his guilty plea after he was placed into removal

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[1] Eventually, defendant was released on bond.

[2] We liberally construe defendant's pro se motion papers (*see Haines v Kerner*, 404 US 519, 520-521 [1972 per curiam]) as a motion under CPL article 440, as did the motion court.

proceedings following his application to naturalize. Defendant explained that, had he known that the plea would result in deportation, he would not have pleaded guilty since he had been persecuted for his political views in his home country. Defendant noted that his child, a United States citizen, would be harmed by his deportation because he was a single parent. Defendant also supported his motion with letters of support from his son and from the staff and members of his church.

In opposition, the People argued, inter alia, that the court lacked jurisdiction to hear defendant's motion because he was in immigration custody in New Jersey, that defendant's allegations were conclusory and unsupported by an affidavit by his counsel, that defendant had failed to establish that, but for counsel's alleged ineffectiveness, he would have rejected the plea and gone to trial, that defendant was not prejudiced because he had obtained a nonincarceratory misdemeanor disposition, and that the court's statements to defendant had made the risk of deportation clear to him.

In reply, defendant submitted documentation of his status as an asylee and subsequent status as a lawful permanent resident. Defendant also explained the absence of an affidavit from his counsel by swearing that he had written to counsel but received no response. Defendant alleged that he had asked to take the

case to trial but counsel had discouraged him. Critically, defendant swore that he would have "insisted" on going to trial had counsel not misadvised him, because even "[l]ife in jail would have been . . . a better option than the death sentence [that] defendant [would] face[] upon his return to his native country if deported."

The motion court denied defendant's motion for the reasons stated in the People's affirmation in opposition.

A justice of this Court granted defendant leave to appeal (CPL 460.15), and we now reverse.

Analysis

A court may deny a motion under CPL article 440 without a hearing when, as the People argued here:

> "(a) The moving papers do not allege any ground constituting legal basis for the motion; or
>
> "(b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or
>
> . . .
>
> "(d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the

> other circumstances attending the case, there is no reasonable possibility that such allegation is true" (CPL 440.30[4]).

This Court may reverse the summary denial of a CPL article 440 motion when the motion court abuses, or improvidently exercises, its discretion (*see People v Samuels*, 143 AD3d 401, 402 [1st Dept 2016]).

We grant defendant's motion to the extent of ordering a hearing, because he sufficiently alleged both that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance (*McDonald*, 1 NY3d at 113-114, citing *Hill v Lockhart*, 474 US 52, 58-59 [1985]; *Strickland v Washington*, 466 US 668, 687-688 [1984]).[3]

Defendant showed that counsel "affirmative[ly] misrepresent[ed]" (*McDonald*, 1 NY3d at 115) the deportation consequences of the plea by alleging that counsel advised him that there would be no deportation consequences to the plea and

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[3] In *McDonald*, the Court of Appeals considered the defendant's claim of ineffective assistance of counsel based on immigration misadvice solely under the Federal Constitution (*McDonald*, 1 NY3d at 114; *see also People v Baret*, 23 NY3d 777, 785 [2014], *cert denied* - US -, 135 S Ct 961 [2015]). Since we conclude that defendant's allegations warrant a hearing under the federal standard, we do not review defendant's motion papers under New York State's broader "meaningful representation" standard (*see People v Henry*, 95 NY2d 563, 565 [2000] [internal quotation marks omitted]).

that, if there were, counsel would simply "get defendant out of" them (*People v Santos*, 145 AD3d 461 [1st Dept 2016]; *People v Rosario*, 132 AD3d 454 [1st Dept 2015]; *People v Roberts*, 143 AD3d 843, 845 [2d Dept 2016]).

The People challenge the sufficiency of defendant's allegations on the ground that defendant did not supply an affidavit by counsel (CPL 440.30[4][d]). We have not always required an attorney affidavit on a motion under CPL 440.10(1)(h) (*see People v Pedraza*, 56 AD3d 390 [1st Dept 2008], *lv denied* 12 NY3d 761 [2009]; *People v Gil*, 285 AD2d 7, 11-12 [1st Dept 2001]; *see also People v Radcliffe*, 298 AD2d 533, 534-535 [2d Dept 2002]; *accord People v Bennett*, 139 AD3d 1350, 1351-1352 [4th Dept 2016]). Here, the absence of an affidavit by defendant's counsel does not support the summary denial of defendant's motion for three reasons.

First, defendant's allegations are corroborated by other parts of the record (*cf. Rosario*, 132 AD3d at 454 [plea and sentencing minutes corroborated defendant's *McDonald* claim]). They are corroborated by defendant's application to naturalize, postplea, which exposed him to detection by Immigration and Customs Enforcement (ICE), since he certainly would not have made the application if he had known that he was in any danger of deportation. In addition, counsel's failure to object to the

court's unnecessary allocution on the elements of sexual abuse in the first degree (*see People v Clairborne*, 29 NY2d 950 [1972]) suggests that counsel may not have accurately understood the consequences of the plea.

Second, where, as here, defendant's application is adverse and hostile to his trial attorney, "[r]equir[ing] the defendant to secure an affidavit, or explain his failure to do so, is wasteful and unnecessary" (*Radcliffe*, 298 AD2d at 534; *People v Washington*, 128 AD3d 1397, 1399 [4th Dept 2015]).

Third, in any event, defendant explained the absence of an affidavit by his counsel (*see Pedraza*, 56 AD3d at 391; *Gil*, 285 AD2d at 11-12).

The People also challenge defendant's allegations of deficient performance on the ground that counsel's advice was not actually erroneous to the extent he told defendant that, if the plea did lead to deportation, counsel would "get defendant out of" that consequence (*see* CPL 440.30[4][a]; *People v Melo-Cordero*, 123 AD3d 595 [1st Dept 2014]). The People contend that this advice was accurate both because it conveyed to defendant that he could be deported as a consequence of the plea and because his conviction did not constitute an aggravated felony requiring mandatory deportation. The People argue that, since defendant was released on bond, the Immigration Court must have

now concluded that his conviction did not constitute an aggravated felony (8 USC § 1226[c][1][B]), and defendant is eligible for various forms of relief from removal. We reject the People's argument for two reasons.

First, to the extent the People's argument is based on their contention that defendant's conviction did not constitute an aggravated felony, the People are asking us to affirm the motion court on a ground that it did not reach. The court adopted the reasoning of the People's affirmation in opposition, and the People did not raise this issue before the court. Accordingly, our consideration of this argument is barred by *People v LaFontaine* (92 NY2d 470, 473-474 [1998]).

Second, regardless of whether defendant's conviction constitutes an aggravated felony, or instead a crime of child abuse, counsel's alleged advice was inaccurate. By allegedly stating that he could "get defendant out of" the plea's deportation consequences, counsel did not accurately convey the possibility of deportation to defendant. Rather, counsel's alleged advice made it seem as though obtaining relief from removal was guaranteed and that, as a result, defendant had no reason to fear being deported as a consequence of his plea. This was inaccurate. A noncitizen seeking relief from removal bears the burden of proving his or her entitlement to such relief (8

USC § 1229a[c][4][A]), and may not succeed.

Furthermore, defendant may lose his continued eligibility for asylum and related relief (8 USC § 1158[b][2][A][ii]; 8 USC § 1231[b][3][B][ii]; 8 CFR 1208.16[d][2]) based on a conviction for a "particularly serious crime," which is a broader category than an aggravated felony (*see Matter of M-H-*, 26 I&N Dec. 46, 50 [BIA 2012]). Here, the federal government may argue that defendant's factual allocution to sexual abuse in the first degree of young children should make defendant ineligible for continued asylum and thus subject to deportation (*see e.g. M-H-*, 26 I&N Dec. at 46-47). In addition, while defendant is eligible for cancellation of removal, that relief is discretionary, and the seriousness of defendant's offense, as allocuted, may be weighted against him (*see Matter of Sotelo-Sotelo*, 23 I&N Dec. 201, 203 [BIA 2001]).[4]

We turn now to the issue of defendant's proof of prejudice.

Defendant swore that he fears being deported to the Republic of Cameroon, where he believes that his life would be in danger, a belief that was credited when he was granted asylum. He alleged that he had been in this country more than 20 years, that he had become an important member of his church, and that he was

[4] Asylum is also a discretionary form of relief (*INS v Cardoza-Fonseca*, 480 US 421, 428 n 5 [1987]).

a single parent to his son, an American citizen. Defendant swore that he would have chosen trial over pleading guilty had he known that his plea would make him eligible to be deported. Thus, defendant's allegations sufficiently established that, but for counsel's misadvice, he would have rejected the plea and chosen to proceed to trial (*McDonald*, 1 NY3d at 114; *Santos*, 145 AD3d at 461; *Rosario*, 132 AD3d at 455).

The People argue that defendant failed to establish prejudice because the plea allowed him to avoid a felony conviction, which carried mandatory sex offender registration, a potential sentence of up to 14 years, and near-certain deportation, and instead to plead to a nonincarceratory, nonregistrable misdemeanor, which reduced the likelihood of his detection by ICE. The People further contend that their case was strong and that accepting the plea was the best way for defendant to avoid deportation. In addition, the People argue that, because the court mentioned deportation and immigration status during the plea proceedings, defendant could not have been prejudiced by accepting the plea. We reject these contentions.

Since deportation is a serious consequence, "the equivalent of banishment or exile" (*Delgadillo v Carmichael*, 332 US 388, 391 [1947]), we have recognized that a noncitizen defendant may be willing to forgo an otherwise "very beneficial deal" if it

carries the consequence of deportation (*see Samuels*, 143 AD3d at 403 [internal quotation marks omitted]). For defendant, the calculus of either pleading guilty or going to trial was not the same as it would have been for a citizen defendant, who would not have had to weigh the possibility of deportation. Even where the maximum penalty at trial is significantly greater than the penalty offered on the plea, a noncitizen defendant may be able to establish prejudice (*People v Picca*, 97 AD3d 170, 185 [2d Dept 2012]); *State v Sandoval*, 171 Wash 2d 163, 175-176, 249 P3d 1015, 1022 [2011]). That is even more the case for an asylee facing life-threatening consequences should he be deported to the Republic of Cameroon.

We do not find the unique plea calculus for defendant changed by the People's contention that their case was strong. At the outset, there is no record support for this contention beyond the indictment itself and the grand jury's finding of reasonable cause (CPL 190.65[1]). However, even if the People's case were particularly strong, we would still hold that defendant's allegations of prejudice were sufficient to warrant a hearing. In *Lee v United States* (- US -, -, 137 S Ct 1958, 1966 [2017], *supra*), the Supreme Court rejected the government's request that it "adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right

to trial." Rather, the Court concluded that, where deportation is the "determinative issue" in whether to plead guilty or proceed to trial, prejudice may still be established even when the likelihood of acquittal is remote (*id.*, 137 S Ct at 1968-1969). Here, defendant's allegations sufficiently established that deportation was indeed the determinative issue and that he was willing to take his chances at trial in order to avoid that consequence.

Our conclusion is also unchanged by the People's argument that the court's statements during defendant's plea proceedings alleviated the prejudice. While the court did mention deportation and immigration status, it did not affirmatively state that deportation was a possible consequence of defendant's plea (*cf. People v Peque*, 22 NY3d 168, 183 [2013], *cert denied sub nom Thomas v New York* - US -, 135 S Ct 90 [2014], *supra*).[5] In any event, we have recognized that an attorney's misadvice may undermine the court's statements about deportation consequences (*see People v Corporan*, 135 AD3d 485 [1st Dept 2016]).

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[5] Defendant also argues that his conviction should be reversed on *Peque* grounds. We reject that argument. We have previously held that a *Peque* claim is not cognizable on a CPL 440 motion and that *Peque* does not apply retroactively to a conviction that became final before it was decided (*People v Shabaan*, 138 AD3d 407 [1st Dept 2016], *lv denied* 27 NY3d 1155 [2016]).

For all these reasons, we find that the motion court abused its discretion by summarily denying defendant's motion, and we remit the matter for a hearing.[6]

Accordingly, the appeal from the order of the Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about July 31, 2013, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered February 17, 2010, should be held in abeyance, and the matter remitted for a hearing on defendant's

[6] Since we are remitting for a hearing on defendant's *McDonald* claim, we find it unnecessary to consider his claim of ineffectiveness based on counsel's alleged failure to investigate (*see People v Oliveras*, 21 NY3d 339, 346-347 [2013]). Defendant's allegation that counsel did not sufficiently investigate his trial defense in connection with advising him to plead guilty is relevant to the issue of counsel's alleged misadvice and defendant's desire to proceed to trial. Therefore, it is properly the subject of the hearing we now order.

claim of ineffective assistance of counsel under *People v McDonald* (1 NY3d 109 [2003]) and a decision de novo on the motion.

All concur.

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

ENTERED: DECEMBER 28, 2017

CLERK