SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 23, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Saxe, Feinman, Gische, JJ.

2201 Jonathan M. Henry, Index 158530/14
Plaintiff-Appellant,

-against-

Bank of America, et al.,
Defendants-Respondents.

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Henry & Regan-Henry, White Plains (John V. Henry of counsel), for appellant.

Goodwin Procter LLP, New York (Lindsay E. Hoyle of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about May 8, 2015, which, to the extent appealed from, granted defendants' motion to dismiss as time-barred the causes of action for statutory fraud, common-law fraud, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and unconscionability, unanimously affirmed, without costs.

Plaintiff was enrolled in defendants' Credit Protection Plan (CPP) on March 8, 2001 and their Privacy Assist Service (PAS)

program in March 2007.[1] He was billed for the services in his monthly account statements. On March 6, 2009, when plaintiff advised defendants of his dire financial situation and unemployment since on or about November 17, 2007, defendants enrolled plaintiff in a less expensive CPP program that provided lesser benefits.

Plaintiff closed his credit card account on June 14, 2010. CPP and PAS fees plus interest and penalties were included in plaintiff's account balance which reached $29,246.06 as of approximately February 7, 2011. On May 31, 2013, defendants issued a refund check to plaintiff for PAS fees improperly charged during the period of March 2007-November 2008, when no PAS services were actually provided.

On August 27, 2014, plaintiff, alleging that he was enrolled in the two optional credit card products without his consent, for which he received no benefit, commenced this action seeking, inter alia, compensatory and punitive damages. Plaintiff asserts that he became aware of defendant's scheme in or about

[1]CPP is a credit card debt cancellation product that can cancel a card holder's obligation to make minimum payments, and in the event of certain contingencies, such as death, disability or unemployment, some or all of his outstanding balance. PAS is purportedly a defense against invasion of privacy, identity fraud and identity theft.

November/December 2012 when he was advised of a California CPP class action, and on May 31, 2013 when he was informed by defendants that he had been charged PAS fees for which he received no services.[2]

Supreme Court granted defendants' motion to dismiss as time barred the first (Delaware Consumer Fraud Act), second (New York Consumer Fraud and General Business Law statutes), and seventh (breach of fiduciary duty) causes of actions, governed by a three-year statute of limitations, and the third (common law fraud), fifth (breach of covenant of good faith and fair dealing), and eighth (unconscionability) causes of action, governed by a six-year statute of limitations.[3] We now affirm.

The subject causes of action accrued either in March 2001, when defendants allegedly enrolled plaintiff without his consent in the CPP, or in March 2007, when they allegedly enrolled him without his consent in the PAS program, more than six years

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[2]The CPP class action was filed on December 13, 2011 in the United States District Court for the Northern District of California. On January 16, 2013, the Court approved a class action settlement. Plaintiff opted out. A PAS class action was commenced on February 2, 2011 and dismissed on October 9, 2012.

[3]The court declined to dismiss plaintiff's claims for unjust enrichment and money had and received with respect to amounts paid within the six years prior to filing suit.

before the commencement of this action in 2014 (*see State ex rel. Brady v Pettinaro Enters.*, 870 A2d 513, 526 [Del Ch 2005]; *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 [2001]).

Plaintiff's reliance on the continuing wrong doctrine to toll the limitations periods is misplaced. The continuous wrong doctrine is an exception to the general rule that the statute of limitations "'runs from the time of the breach though no damage occurs until later'" (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). The doctrine "is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" (*Selkirk v State*, 249 AD2d 818, 819 [3d Dept 1998]). Where applicable, the doctrine will save all claims for recovery of damages but only to the extent of wrongs committed within the applicable statute of limitations (*see Jensen v General Elec. Co.*, 82 NY2d 77, 83-85, 88 [1993]; *Sutton Inv. Corp. v City of Syracuse*, 48 AD3d 1141, 1143 [4th Dept 2008], *lv dismissed* 10 NY3d 858 [2008]).

The doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs"

(*Doukas v Ballard*, 39 Misc 3d 1227(A) [Sup Ct, New York County 2013]; *see also Roslyn Sav. Bank v National Westminster Bank USA*, 266 AD2d 272 [2d Dept 1999]). The doctrine is inapplicable where there is one tortious act complained of since the cause of action accrues in those cases at the time that the wrongful act first injured plaintiff and it does not change as a result of "'continuing consequential damages'" (*Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1032 [2013]; *see also Quintana v Wiener*, 717 F Supp 77, 80 [SD NY 1989]). In contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party (*see Bulova Watch Co. v Celotex Corp.*, 46 NY2d 606, 611 [1979]; *Meadowbrook Farms Homeowners Assn., Inc. v JZG Resources, Inc.*, 105 AD3d 820, 822 [2d Dept 2013], *lv dismissed* 21 NY3d 1024 [2013]; *King v 870 Riverside Dr. Hous. Dev. Fund Corp.*, 74 AD3d 494, 496 [1st Dept 2010]). Thus, where a plaintiff asserts a single breach — with damages increasing as the breach continued — the continuing wrong theory does not apply (*see Kahn v Kohlberg, Kravis, Roberts & Co.*, 970 F2d 1030, 1041 [2d Cir 1992], *cert denied* 506 US 986 [1992]).

Here, the alleged wrongs are the enrollment of plaintiff in the CPP and PAS programs in March 2001 and 2007, respectively,

and there was no breach of a recurring duty. The monthly billings demanding payment of CPP and PAS fees, both before and after plaintiff closed his account, represent the consequences of those wrongful acts in the form of continuing damages, not the wrongs themselves, and do not qualify for application of the continuous wrong doctrine.

Plaintiff's argument that he could not reasonably have discovered the alleged fraudulent conduct within the limitations period due to defendants "concealment" and ongoing "scheme," is not reconcilable with his admissions that he was billed for the charges monthly. There is no more information that plaintiff could have needed to determine if he had been involuntarily enrolled in the programs (*see Sanchez de Hernandez v Bank of Nova Scotia*, 76 AD3d 929 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

Plaintiff's argument that the CPP and PAS claims accrued on March 6, 2009, when defendants involuntarily enrolled him in a new CPP contract at different fees is without merit. While plaintiff characterizes it as enrollment in a new program, defendants merely switched him from a more expensive CPP program to a cheaper CPP program, which was a continuing effect of the initial involuntary enrollment on March 8, 2001.

We have considered plaintiff's remaining contentions, including that the federal class actions tolled the limitations periods (*see American Pipe & Constr. Co. v Utah* (414 US 538, 554 [1974]), and that dismissal of the complaint as time barred would be unconscionable and inequitable, and find them unavailing.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Acosta, J.P., Mazzarelli, Andrias, Feinman, Webber, JJ.

2650- Index 653439/12
2651 Jerome M. Eisenberg, Inc.,
Plaintiff-Appellant,

-against-

Maurice E. Hall, Jr., et al.,
Defendants-Respondents.

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Law Office of Frank Raimond, New York (Frank Raimond of counsel), for appellant.

Heng Wang & Associates, P.C., New York (Jacob Tebele of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about August 28, 2015, which denied plaintiff's motion for summary judgment on its cause of action for breach of contract, affirmed, without costs. Appeal from order, same court and Justice, entered on or about August 28, 2015, which granted defendants Maurice E. Hall, Jr. and Michael Hall Collections, Inc.'s motion for summary judgment to the extent of dismissing the fourth, fifth and sixth causes of action in the amended complaint, dismissed, without costs, as abandoned.

Jerome M. Eisenberg buys and sells antiquities. He is a principal of plaintiff Jerome M. Eisenberg, Inc. (Eisenberg, Inc.), and a Qualified Appraiser of the Appraisers Association of

America. He is a self-proclaimed expert in classical antiquities with a doctorate in Roman, Egyptian, and Near Eastern Art.

Defendants Maurice E. Hall, Jr. (Hall), Michael Hall Collections, Inc., and Michael Hall Fine Arts, Inc. are art dealers that mainly deal in sixteenth to nineteenth century European art. Hall was a principal and sole shareholder of both Hall entities. Hall asserts that his expertise is in Renaissance art and that he is merely an "amateur collector" of classical antiquities. Eisenberg also stated that he did not believe Hall to be an expert in classical antiquities.

This appeal deals with plaintiff securing from defendants a bust and a statue that they believed to be ancient but were later revealed to be modern forgeries.

In February 2009, Eisenberg visited Hall's townhouse, out of which Hall operated his business, and secured[1] a marble head or bust of Faustina II, purported to be ancient Roman[2], and a bronze warrior statue purported to be Etruscan or Roman era (the

[1]The parties dispute as to whether there was a consignment or sale, whether the sale was "as is," and whether the invoices accurately reflected the underlying agreements.

[2]Faustina II or Faustina the Younger was an Empress Consort of the Roman Empire from 7 March 161-175 CE. She was the daughter of Emperor Antoninus Pius and Faustina the Elder and became the wife of Emperor Marcus Aurelius. She died in 175 or 176 CE.

Etruscan Warrior).[3] Some months later plaintiff sold the Faustina Bust to the Mougins Museum of Classical Art in France. In or about September 2011, the Mougins Museum informed plaintiff that the Faustina Bust was a fake in that it was modern and not ancient. The museum sent plaintiff a report by Professor R.R.R. Smith of Oxford University and Susan Walker, a curator at the British Museum, who opined that the bust was likely modern.

In April 2011, plaintiff obtained from defendants the Etruscan Warrior and a bronze helmet. Plaintiff subsequently sent photographs of the statue to Dr. Michael Padgett at Princeton University, who opined that the piece had some stylistic inconsistencies. Plaintiff then submitted the statue to Oliver Bobin of the Centre d'Innovation et de Recherche pour l'Analyse et le Marquage for metallographic analysis. Bobin determined that the Etruscan Warrior was actually from the nineteenth or twentieth century and therefore was not ancient.

Plaintiff alleges that due to the "mutual mistake" of the

[3]The Etruscan civilization is the modern name given to a powerful, wealthy and refined civilization of ancient Italy, in existence from 768 BC to 264 BC. It refers to an area corresponding to what is now Tuscany, western Umbria and northern Lazio. It ultimately assimilated into the Roman Republic beginning in the late fourth century BC with the Roman-Etruscan Wars.

parties regarding whether the items were ancient, it is entitled to summary judgment.

We agree with the motion court's decision that plaintiff is not entitled to summary judgment on its breach of contract claim pursuant to the doctrine of mutual mistake (*see generally Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]). Although the record reflects that both plaintiff and defendants mistakenly assumed at the time of the transactions that the items at issue were ancient, issues of fact exist as to whether plaintiff bore the risk of that mistake due to its "[c]onscious ignorance" of the items' authenticity (*P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200, 201 [1st Dept 1996] [internal quotation marks omitted][alteration in original]; *Richard L. Feigen & Co. v Weil*, 1992 NY Misc LEXIS 711, *10-12 [Sup Ct, NY County 1992], *affd for reasons stated below* 191 AD2d 278 [1st Dept 1993], *lv denied* 82 NY2d 652 [1993]; *Backus v MacLaury*, 278 App Div 504, 507 [4th Dept 1951], *lv denied* 278 App Div 1043 [4th Dept 1951]; *ACA Galleries, Inc. v Kinney*, 552 Fed Appx 24, 25 [2d Cir 2014]; Restatement [Second] of Contracts § 154 and Comment *c*).

"Generally, a contract entered into under a mutual mistake of fact is voidable and subject to rescission" because it "does

not represent the 'meeting of the minds' of the parties" (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]). In order to justify rescission, "[t]he mutual mistake must exist at the time the contract is entered into and must be substantial" (*id.*).

The doctrine of mutual mistake "may not be invoked by a party to avoid the consequences of its own negligence" (*P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d at 201). Where a party "in the exercise of ordinary care, should have known or could easily have ascertained" the relevant fact (*id.* at 202) - here, whether the items were ancient - that party is deemed to have been "[c]onscious[ly] ignoran[t]" and barred from seeking rescission (*id.* at 201 [second and third alterations added]) or other damages. This is true "[e]ven where a party must go beyond its own efforts in order to ascertain relevant facts (such as obtaining experts' reports)" (*id.* at 202).

The conscious ignorance exception applies only where a party is aware that his knowledge is limited but decides to contract anyway "in the hope that the facts accord with his wishes," thus assuming "[t]he risk of the existence of the doubtful fact . . . as one of the elements of the bargain" (*Backus v MacLaury*, 278 App Div at 507 [internal quotation marks omitted]; *accord ACA*

Galleries, Inc. v Kinney, 552 Fed Appx at 25; *Feigen*, 1992 NY Misc LEXIS 711, *10-12; Restatement [Second] of Contracts § 154 and comment *c*).

We agree with the dissent that both plaintiff and defendants shared the mistaken belief that the Faustina Bust and the Etruscan Warrior were "ancient." Where we diverge is that we find that the record at this time does not support a finding that Eisenberg did not consciously ignore his uncertainty as to a crucial fact (*see Feigen*, 1992 NY Misc LEXIS 711, *12).

Questions exist as to whether Eisenberg genuinely believed the bust and statue to be ancient, or was aware that they might not be ancient but decided to assume this risk. Plaintiff presented evidence that Eisenberg is an expert on classical antiquities and a qualified appraiser who generally relies on his own expertise in evaluating works unless he is unsure of a piece's authenticity. He could thus have reasonably accepted that the items were ancient "based on [a] rational assessment of the source and style of work" (*Feigen*, 1992 NY Misc LEXIS 711, *15). Moreover, as to the Etruscan Warrior, Hall admittedly informed Eisenberg that he believed it to be from the private collection of renowned art collector J. Pierpont Morgan as signified by a painted red number. Eisenberg could have

rationally relied on Morgan's reputation in addition to his own observations (*id.*).

However, plaintiff also admits in its complaint that several other items purchased from defendants later turned out to be inauthentic. This suggests that plaintiff should have been on notice that the items might not be ancient - at least by the time of the later Etruscan Warrior purchase.

The circumstances surrounding the transactions, including the visits to Hall's townhouse and bedroom, with little or no discussion of the provenance of the pieces, as well as plaintiff's admission that several other items purchased from defendants turned out to be inauthentic, cast plaintiff's professed certainty as to the authenticity of the items into doubt and could support a finding that plaintiff was on notice that the items might not be ancient.

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

ANDRIAS, J. (dissenting)

It is undisputed that both plaintiff and defendants shared the mistaken belief that the sculptures at issue were "ancient," and that the purchase prices were based on that assumption. Nevertheless, the majority affirms the denial of plaintiff's motion for summary judgment on its cause of action for breach of contract on the ground that "issues of fact exist as to whether plaintiff bore the risk of that mistake due to its '[c]onscious ignorance' of the items' authenticity." Because I believe that the requisite "meeting of the minds" is absent (*see County of Orange v Grier*, 30 AD3d 556, 556-557 [1st Dept 2006]) and that there is no evidence that plaintiff consciously ignored its "uncertain[ty] as to a crucial fact" (*Richard L. Feigen & Co. v Weil*, 1992 NY Misc LEXIS 711, *12 [Sup Ct, NY County 1992, Moskowitz, J.], *affd* 191 AD2d 278 [1st Dept 1993], *lv denied* 82 NY2d 652 [1993]), I respectfully dissent.

Defendants, art dealers specializing in sixteenth to nineteenth century European art, sold a marble bust of Faustina II (the Faustina Bust), thought to be ancient Roman, and a bronze warrior statue (the Etruscan Warrior), thought to be ancient Etruscan or Roman, to plaintiff, a buyer and seller of antiquities. Plaintiff's principal, Jerome M. Eisenberg, and

defendant Maurice E. Hall, who negotiated the sales, both believed that the statues were authentic.[1] However, Eisenberg, a Qualified Appraiser of the Appraisers Association of America and a self-proclaimed expert in classical antiquities with a doctorate in Roman, Egyptian, and Near Eastern Art, relied on his

[1]The parties disagree as to the particulars of the sales. Eisenberg claims that Hall offered the Faustina Bust for sale and that he took it on consignment in February 2009. In December 2009, plaintiff sold the bust to the Mougins Museum of Classical Art in France and paid defendants $75,000. In or about September 2011, the Mougins Museum informed plaintiff that the bust was a fake and returned it. Hall claims that Eisenberg initiated the outright purchase of the bust and a second marble head after noticing them in his townhouse, where defendants conducted their business. While Hall made no representations with respect to the bust, defendants admit that the bust was "assumed by both [Eisenberg and Hall] to be Roman."

Eisenberg claims that in April 2011, Hall offered the Etruscan Warrior and a bronze helmet for sale, "presenting them as ancient objects." Eisenberg did not have much time to inspect them because Hall wanted immediate payment. On April 6, 2011, plaintiff purchased both items for $100,000. Handwritten notes on the invoice by plaintiff's office manager indicate $85,000 was apportioned to the Etruscan Warrior. Plaintiff later questioned the authenticity of the statue and, based on the opinions of two experts, concluded that it was not authentic. Hall claims that Eisenberg noticed the Etruscan Warrior and helmet in his townhouse and initiated the purchases. Hall made no representations as to the statue's authenticity, but told Eisenberg that he thought it was from the private collection of J. Pierpont Morgan, a renowned art collector, as signified by a painted red number. Hall believed the statue was Roman; Eisenberg insisted it was Etruscan. There was no discussion of the price breakdown and the notations on the invoice were not an accurate reflection of the agreement.

own expertise in purchasing the works, which were later revealed to be modern forgeries.

"Generally, a contract entered into under a mutual mistake of fact is voidable and subject to rescission" because it "does not represent the 'meeting of the minds' of the parties" (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]; *see also Sunlight Funding Corp. v Singer*, 146 AD2d 625, 626 [2d Dept 1989]). However, a party's "negligence, or '[c]onscious ignorance,' regarding the [alleged mistake] bars rescission" (*P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200, 201 [1st Dept 1996] [second alteration added]). Thus, under the conscious ignorance exception, mutual mistake does not apply where a party is aware that his knowledge is limited but decides to contract anyway, thereby assuming the risk of his mistake (*see ACA Galleries, Inc. v Kinney*, 928 F Supp 2d 699, 701-702 [SD NY 2013], *affd* 552 Fed Appx 24 [2d Cir 2014]). However, "if a party does not make a conscious decision to proceed in the face of insufficient information, the conscious ignorance exception to the mutual mistake doctrine does not apply" (*Feigen*, 1992 NY Misc LEXIS 711 at *11-12 [internal quotation marks omitted]).

The majority finds that "[t]he circumstances surrounding the transactions, including the visits to Hall's townhouse and

bedroom, with little or no discussion of the provenance of the pieces, as well as plaintiff's admission that several other items purchased from defendants turned out to be inauthentic, cast plaintiff's professed certainty as to the authenticity of the items into doubt and could support a finding that plaintiff was on notice that the items might not be ancient." I do not agree.

The record establishes that defendants presented the Faustina Bust and Etruscan Warrior to plaintiff as ancient items. As the majority concedes, Eisenberg could have reasonably accepted that the items were ancient based on his own expertise and a "rational assessment of the source and style of work" (*Feigen*, 1992 NY Misc LEXIS 711, *15). Moreover, as to the Etruscan Warrior, Hall admittedly informed Eisenberg that he believed it to be from the private collection of renowned art collector J. Pierpont Morgan. As the majority acknowledges, "Eisenberg could have rationally relied on Morgan's reputation in addition to his own observations." While Hall and Eisenberg disagreed whether that statue was Etruscan or Roman, the dispositive fact is that they both believed it to be ancient, and that there was a rational basis for that belief.

There is no evidence demonstrating that Eisenberg did not genuinely believe that the items were ancient or that he was

"uncertain as to a crucial fact" regarding their authenticity following his inspections (*Feigen*, 1992 NY Misc Lexis 711, *12). That plaintiff purchased several items in the past that were later determined to be fakes does not establish conscious disregard of any facts pointing to the inauthenticity of the sculptures at issue. Plaintiff's money was refunded in each of those cases and the particular circumstances of those transactions and the discovery of the fakes is unclear. Moreover, given that those transactions were rescinded and did not result in a financial loss, they should not form the basis of imposing a heightened duty of inquiry on plaintiff.

Whether Hall affirmatively offered the items for sale or made any affirmative representations is of no consequence. Plaintiff does not premise its breach of contract claim on the breach of a contractual warranty. Rather, the claim is based on the premise that there was no meeting of the minds because the parties were mutually mistaken about a material fact. The basis of the bargain and the statues' value lay in the items being ancient, which proved to be untrue.

Even if Eisenberg is the more credentialed expert in classical antiquities among the two, Hall is an established dealer in fine arts who sold those items. In any event, "there

is no authority for the proposition . . . that in a contract between an expert and non-expert, rescission based on mutual mistake is unavailable to the expert" (*Feigen*, 1992 Misc LEXIS 711, *13). In *Feigen*, the seller of a drawing that both parties assumed to be a Matisse, but which turned out to be a forgery, argued that the buyer, an art dealer, acted with conscious ignorance because it failed to authenticate the drawing before purchasing it (*id.* at *6). Justice Moskowitz, then sitting as a trial judge, held that the conscious ignorance exception to the mutual mistake doctrine did not apply because "both parties, far from assuming any risk, mistakenly assumed the facts underlying the transaction" (*id.* at *10). In so ruling, Justice Moskowitz rejected the defendant's argument that the plaintiff had a duty to authenticate the drawing because it had more expertise, stating that the plaintiff "was not asked to nor did it have any substantive or legal obligation to go beyond a 'cursory inquiry' as to its authenticity" (*id.* at *15). This Court affirmed for the reasons stated by Justice Moskowitz (191 AD2d 278 [1993]).

Following *Feigen*, in *Uptown Gallery, Inc. v Doniger* (1993 NY Misc LEXIS 661 [Sup Ct, NY County 1993]), the court rejected the defendant's conscious ignorance claim, stating that "[t]his is not a case where the parties were uncertain as to a crucial fact,

consciously ignored it and despite this uncertainty contracted. To the contrary, both parties entered into the contract based on the assumption that the painting being purchased was an authentic Bernard Buffet" (*id. at* *3-4). The court rejected the defendant's argument that it would be more reasonable under the circumstances to place the risk of loss on the buyer, stating "[t]here is no reason why defendant should be entitled to a windfall based on its sale of a painting which was not what either party believed it to be. The painting was clearly not worth the contract price and there is no basis for allowing defendant to receive much more for the painting than what it is worth" (*id.* at *4). This rationale is equally applicable to the facts in this case.

P.K. Dev. v Elvem Dev. Corp. (226 AD2d 200), cited by the majority, is inapposite. There, the defendant, a corporate seller of a residential cooperative unit, and the plaintiff, the buyer, both believed that the unit was occupied (*id.* at 201). When the seller discovered that the unit was unoccupied, which made it more valuable, it refused to close (*id.*). The buyer sued for specific performance and breach of contract and the trial court granted the seller summary judgment rescinding the contract based on mutual mistake (*id.*). This Court reversed and granted

the buyer summary judgment, holding that the seller's ignorance of the unit's vacancy resulted from its own negligence because it could have easily learned of the vacancy by exercising ordinary care as an owner of the unit (*id.* at 201-202). Here, defendant, not plaintiff, was the owner of the sculptures and it has not been shown that plaintiff, which relied on its principal's expertise and statements of Hall, could have easily ascertained that the sculptures were forgeries (*see Gitelson v Quinn*, 118 AD3d 403, 404 [1st Dept 2014] ["'Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible'"], quoting *Da Silva v Musso*, 53 NY2d 543, 551 [1981]).

Nor does *ACA Galleries, Inc. v Kinney* (928 F Supp 2d 699) warrant a different result. There, the buyer, who had reservations, decided not to have the item inspected, despite the seller shipping it to him for that purpose (928 F. Supp 2d at 702). Here, there is no showing that plaintiff recognized the

need to have the sculptures authenticated by an outside expert but nevertheless chose not to do so.

Accordingly, I would grant plaintiff summary judgment rescinding the sales.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2738- Index 651733/13
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2744 Stanley Jonas, et al.,
Plaintiffs-Appellants,

-against-

National Life Insurance Company,
et al.,
Defendants-Respondents.

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The Law Offices of Neal Brickman, P.C., New York (Neal Brickman of counsel), for appellants.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for National Life Insurance Company, National Life Group and Equity Services, Inc., respondents.

Winget, Spadafora, Schwartzberg, LLP, New York (Matthew Tracy of counsel), for Ronald Housley and Integre, LLC, respondents.

Mound Cotton Wollan & Greengrass LLP, New York (Kate Elizabeth DiGeronimo of counsel), for Christian Buzzanca, respondent.

Nicholas Goodman & Associates, PLLC, New York (H. Nicholas Goodman of counsel), for Certain Underwriters at Lloyd's of London, Petersen International Underwriters, Thomas Petersen and Carney & Carney, Inc., respondents.

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Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 11, 2015, dismissing the action as against Certain Underwriters at Lloyds of London (Underwriters),

Petersen International Underwriters (PIU), Thomas Petersen (Mr. Petersen) (individually and d/b/a Petersen International Insurance Brokers), and Carney & Carney, Inc., d/b/a International Risk Management Group (IRMG), unanimously modified, on the law, to vacate the judgment as to Underwriters, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about April 27, 2015, which, to the extent appealed from and appealable, granted defendants Christian Buzzanca's, Ronald Housley's, Equity Services, Inc.'s (ESI), National Life Insurance Company's (NLIC), and Integre, LLC's motions to dismiss all claims as against them except the breach of fiduciary duty claim, unanimously modified, on the law, to grant said defendants' motions as to the breach of fiduciary duty claim, and otherwise affirmed, without costs, and the appeal therefrom, to the extent it granted Underwriters' motion to dismiss the complaint as against them, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeals from orders, same court and Justice, entered on or about December 3, 2015, which, upon reargument, granted Housley's, Integre's, Buzzanca's, NLIC's, and ESI's motions to dismiss the breach of fiduciary duty claim as against them, unanimously dismissed, without costs, as academic.

The court properly deemed plaintiffs' application for disability insurance to be documentary evidence (*see Hefter v Elderserve Health, Inc.*, 134 AD3d 673, 674-675 [2d Dept 2015]). However, since plaintiff Stanley Jonas disputed the genuineness of his signatures on the disability insurance offer, we will not treat the offer as documentary evidence (*see id.*).

In a footnote in their reply brief, plaintiffs contend that the application cannot be considered because it was not attached to the policy, contrary to Insurance Law § 3204. Assuming that this contention (mentioned in plaintiffs' opening brief only in a footnote in their Statement of Facts) can be considered, we reject it. Whether or not a disability insurance policy is a "policy of life, accident or health insurance, or contract of annuity" pursuant to § 3204(a)(1), is an issue we need not decide. It would only be relevant here if defendants were seeking to use a misstatement in the application to their advantage (*see Cutler v Hartford Life Ins. Co.*, 22 NY2d 245, 250-251 [1968]). However, defendants did not rely on the application to demonstrate that plaintiffs made a misrepresentation. To the contrary, they argued that the application was consistent with the insurance ultimately procured for plaintiffs.

The motion court correctly dismissed plaintiffs' claim that

Housley and Buzzanca (and therefore their employers, NLIC, Integre, and ESI) breached an implied contract by failing to procure the type of disability insurance plaintiffs requested. According to Jonas's affidavit, Housley and Buzzanca told him that the only place he could obtain disability coverage sufficient to cover his needs was through Underwriters and that he needed to enlist the assistance of an excess line broker. In other words, they told him that they were unable to obtain the requested coverage, thus satisfying their duty under *Murphy v Kuhn* (90 NY2d 266 [1997]) "to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so" (at 270). Indeed, the amended verified complaint alleges that, ultimately, Mr. Petersen served as Jonas's insurance broker.

The application submitted by plaintiffs to PIU, which Jonas does not deny signing, refutes plaintiffs' claim that the Petersen defendants failed to procure the type of disability insurance plaintiffs requested.

Plaintiffs contend that the court erred in dismissing so much of their contract claim as alleges that Underwriters and the Petersen defendants breached a contract (the disability policy) by failing to pay thereunder. As to the Petersen defendants, the

court did not err. The policy was issued by Underwriters, not the Petersen defendants, and, while the amended verified complaint alleges that PIU was Underwriters' agent, there is no allegation, let alone clear and explicit evidence, that the Petersen defendants intended to "substitute or superadd [their] liability for, or to, that of [Underwriters]" (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964] [internal quotation marks omitted]).

As to Underwriters, that part of the breach of contract claim should not have been dismissed. The motion court found that Jonas was not permanently totally disabled because he admitted that, after submitting his insurance claim, he applied for a position that would have paid him $300,000 a year. However, the fact that he applied for that position does not necessarily mean that he could perform the material and substantial duties (as those terms are defined in the policy) of the occupation described in his insurance application, namely, "Head of Broker Dealer/Introducing Broker." As in *Acquista v New York Life Ins. Co.* (285 AD2d 73 [1st Dept 2001]), issues of fact preclude dismissal of the contract claim as against Underwriters.

Plaintiffs failed to state a cause of action against Underwriters for anticipatory breach of contract, since the

policy at issue is not a policy for monthly benefits but a policy for a lump sum benefit of $5 million (*see Wurm v Commercial Ins. Co. of Newark, N.J.*, 308 AD2d 324, 327-328 [1st Dept 2003], *lv denied* 3 NY3d 602 [2004]).

The claim for fraud in the inducement, which alleges that defendants never intended that plaintiffs would recover under the policy and that defendants made representations to Jonas about the policy they were to procure for him, knowing they had no intent to procure any such policy for him, fails to state a cause of action (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *see also Lucker v Bayside Cemetery*, 114 AD3d 162, 175 [1st Dept 2013], *lv denied* 24 NY3d 901 [2014]).

The fraud claim fails to state a cause of action since, apart from impermissibly lumping together all defendants (*see* CPLR 3016[b]), it is supported only by the conclusory allegation that defendants engaged in a scheme to receive premium payments and give no benefit in return (*see New York Univ.*, 87 NY2d at 319). The allegation that defendants "had a pecuniary incentive to maximize premium income while minimizing benefits paid" is insufficient to plead scienter (*see e.g. CeltixConnect Equity Invs. LLC v Sea Fibre Network Ltd*, 52 Misc 3d 1210[A], 2016 NY Slip Op 51103[U], *8-9 and n 7 [Sup Ct, NY County 2016] [citing

cases]). In addition, the element of reasonable reliance is absent with respect to Housley and Buzzanca, whom Jonas's affidavit shows he did not rely on at what he called the "seminal meeting" that occurred on June 8, 2007: Jonas says he asked Housley and Buzzanca to confirm his coverage with Mr. Petersen, and that Mr. Petersen confirmed that plaintiffs were fully covered.

Plaintiffs did not allege exceptional circumstances supporting the imposition of a fiduciary duty on Housley, Buzzanca, and the Petersen defendants (*see Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 867 [1st Dept 2009]; *Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 645 [1st Dept 2007]). Since Housley and Buzzanca did not owe plaintiffs a fiduciary duty, neither did their employers (NLIC, ESI, and Integre).

The court correctly dismissed the claim for a declaratory judgment regarding the disability insurance policy issued by Underwriters since, with respect to defendants other than Underwriters, there is no justiciable controversy (*see Bolt Assoc. v Diamonds-in-the-Roth*, 119 AD2d 524 [1st Dept 1986]), and, as to Underwriters, plaintiffs have an adequate remedy under their contract claim (*see Watson v Sony Music Entertainment*, 282

AD2d 222 [1st Dept 2001]).

No cause of action for "illegal evasion of an insurance claim" exists (*see Acquista*, 285 AD2d at 78, 81-82).

Although, as narrowed in plaintiffs' reply brief, the claim under General Business Law § 349 is arguably consumer-oriented, it does not allege facts from which a deceptive act or practice by defendants could be inferred (*Goldblatt v MetLife, Inc.*, 306 AD2d 217 [1st Dept 2003]; *cf. Acquista*, 285 AD2d at 78 [factual allegations set forth insurer's pattern of avoiding the claim]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

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

2905- Ind. 3810/09
2906 The People of the State of New York,
Respondent,

-against-

Andy Mercado,
Defendant-Appellant.

_____

Speiser & Heinzmann, White Plains (Joseph C. Heinzmann, Jr. of counsel), for appellant.

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

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Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about April 17, 2015, which summarily denied defendant's CPL 440.10 motion to vacate the judgment of conviction, reversed, on the law, and the motion granted to the extent of remanding the matter for a hearing on defendant's claim of ineffective assistance of counsel and a decision de novo on the motion. Appeal from judgment, same court and Justice, rendered May 18, 2012, as amended May 29, 2012, convicting defendant, after a jury trial, of burglary in the second degree and two counts of robbery in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 13 years, held in abeyance pending the aforesaid hearing and

decision.

Prior to jury selection, the court began a *Sandoval* hearing. At the hearing, the People stated that defendant had been convicted of a number of prior crimes. The court asked the People to obtain further details about some of the convictions, and adjourned the hearing to the following week. At the resumed *Sandoval* hearing, the People provided additional information about defendant's criminal history. The court, however, again adjourned the hearing because a panel of prospective jurors was about to be brought into the courtroom. The court stated that it would resume the hearing at a later point, but never did. The court did not thereafter make a *Sandoval* ruling, and defendant did not testify at trial.

After sentencing, defendant moved, pursuant to CPL 440.10, to vacate the judgment of conviction based on ineffective assistance of counsel.[2] Defendant argued, among other things, that his trial counsel provided inadequate representation by failing to ask the court to resume the *Sandoval* hearing and render a *Sandoval* decision. In support of the motion, defendant

[2] Defendant also sought to vacate the judgment based on newly discovered evidence. On appeal, defendant does not challenge the motion court's denial of that aspect of the motion.

submitted an affidavit stating that he wanted to testify at trial, but did not have the opportunity to decide whether it was wise to do so because of trial counsel's failure to obtain a *Sandoval* ruling. Defendant further stated that when he told trial counsel that he wanted to testify, counsel threatened to "leave the case." Trial counsel also allegedly told defendant that he should not testify because "everything about [his] past would come up." Joseph C. Heinzmann, Jr., defendant's 440.10 counsel, submitted an affirmation stating that trial counsel rebuffed his attempts to obtain information about the case, and made clear that he would not "cooperate with [the 440.10] motion." Trial counsel did not submit an affirmation in support of defendant's motion.

In denying defendant's motion, the motion court in its written decision noted that at some unspecified time after the *Sandoval* hearing was postponed the second time, "[d]efense counsel . . . informed the court that the defendant was not going to testify, but in the event that changed, that the *Sandoval* hearing could be continued beforehand." The court concluded that, under the circumstances, trial counsel could not be deemed ineffective for agreeing to delay a ruling on the *Sandoval* motion. A Justice of this Court granted defendant leave to

appeal, and we now reverse.

Defendant's moving papers were sufficient to warrant a hearing on the motion. Factual issues exist as to whether defendant was deprived of effective assistance of counsel due to trial counsel's failure to ask the court to render a *Sandoval* ruling. Although the court's written decision indicates that trial counsel told the court that defendant would not be testifying, the record does not reflect that colloquy. The court's decision does not shed any light on whether trial counsel's representation was made in writing, by telephone or in person. More importantly, it is unknown whether defendant was present when trial counsel's statement was made, whether defendant had consented to counsel's making such a representation, or whether defendant had any knowledge of counsel's statement to the court. Notably, the People's response to the 440.10 motion is silent as to whether trial counsel made any such representation to the court.

It is well established that a defendant who is represented by counsel nevertheless retains authority over certain fundamental decisions regarding the case, including the decision whether to testify in his or her behalf (*see Rock v Arkansas*, 483 US 44, 53 n 10 [1987]; *People v Hogan*, 26 NY3d 779, 786 [2016]).

The decision to testify in one's behalf is personal and can be waived only by the defendant, not counsel alone (*see People v Robles*, 115 AD3d 30, 34 [3d Dept 2014], *lv denied* 22 NY3d 1202 [2014]). Defendant's affidavit submitted with the 440.10 motion made clear that he informed trial counsel that he wished to testify, depending on the outcome of the *Sandoval* hearing. In light of this affidavit, a hearing is required to more fully explore the circumstances surrounding trial counsel's alleged representation to the court that defendant would not be testifying, and whether defendant was aware of, and concurred with, that decision.

The hearing on remand should also address defendant's claim that trial counsel was ineffective for failing to retain and consult with an expert about the DNA evidence in the case, which was the critical evidence linking defendant to the crime. Defendant maintains that trial counsel's failure to consult a DNA expert limited his ability to effectively cross-examine the People's DNA expert (*see People v Oliveras*, 21 NY3d 339, 346 [2013] ["[e]ssential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, is the attorney's investigation of the law, the facts, and the issues that are relevant to the case"]).

In his affidavit, defendant stated that his family had given trial counsel $1,500 to hire a DNA expert to better understand the DNA evidence, but that counsel did not hire any such expert. Defendant's brother submitted an affidavit stating that he personally gave trial counsel the $1,500 for the expert. The affirmation of 440.10 counsel Heinzmann stated that trial counsel claimed to have consulted with "someone in Ohio" about the DNA evidence, but never provided that person's name. Heinzmann also stated that trial counsel's file contained nothing to suggest a review of the DNA evidence in the case. Further, the file had no names or contact information for any DNA consultant, and contained no telephone numbers correlating to Ohio area codes.

Defendant also submitted the affidavit of Eric J. Carita, a forensic DNA consultant, who reviewed the DNA evidence and the trial testimony, and opined that, had defendant hired a forensic DNA expert, trial counsel could have mounted a more effective defense. For example, Carita stated that the report and testimony of the People's DNA expert failed to provide a match rarity statistic for some of her DNA comparisons. Carita also stated that the People's expert erroneously testified that there were no alleles, on a certain item of evidence, that were foreign to either defendant or the victim. According to Carita, if trial

counsel had retained a DNA expert, he could have more effectively cross-examined the People's DNA expert on these matters. In light of the affidavits submitted on the 440.10 motion, factual issues exist as to whether trial counsel retained a DNA expert, and if not, whether there existed strategic or other reasons for how trial counsel approached the DNA evidence (*see People v Garcia*, 137 AD2d 402, 406 [1st Dept 1988] [remanding for 440.10 hearing where it was not clear from the record whether defense counsel's failure to raise an issue was due to ineffectiveness of counsel or trial strategy]).

The dissent argues that no hearing is necessary because "the alleged deficiencies in trial counsel's performance . . . could not have affected the result of the trial." That, however, is not the standard for reviewing claims of ineffective assistance of counsel under the State Constitution. New York "refuse[s] to apply the harmless error doctrine in cases involving substantiated claims of ineffective assistance" (*People v Benevento*, 91 NY2d 708, 714 [1998]). Although whether a defendant would have been acquitted but for counsel's errors is relevant, a state claim of ineffective assistance "is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*id.*). "Thus,

under our State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial" (*People v Caban*, 5 NY3d 143, 156 [2005]).

In focusing on the fundamental fairness of the process, the Court in *Benevento* emphasized that "our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence" (91 NY2d at 714, quoting *People v Donovan*, 13 NY2d 148, 154 [1963]). In order to properly assess whether defendant here was deprived of a fair trial, a hearing is necessary to further explore the purported errors committed by trial counsel. As noted, defendant makes a number of serious allegations, including that trial counsel threatened to "leave the case" if defendant were to testify, and told defendant that his entire criminal history would come up if he testified, even though no *Sandoval* ruling had been rendered. We also note that in his direct appeal, which we are holding in abeyance pending the hearing, defendant raises a number of other ineffectiveness claims based on alleged errors and omissions during the course of the trial. We believe the more prudent course of action here is to examine defendant's ineffectiveness claim in toto, upon a full record, after a hearing.

Contrary to the dissent's view, we are not ordering a hearing based on "an exceedingly generous reading" of defendant's affidavit. In fact, defendant explicitly stated he "told [trial] counsel that [he] wanted to testify" but "never had the opportunity to decide whether it would be a good idea . . . to testify based on how much of [his] criminal record the jury would hear because [he] never got a court decision on [his] motion." Defendant also stated that trial counsel "kept [him] off the witness stand by threatening to leave the case and using [his] record against [him], even though the court never made that ruling." These statements cannot be reconciled with the dissent's conclusion that "trial counsel prevailed upon [defendant] to drop the idea of taking the stand in his own defense." In urging that no hearing is necessary, the dissent gives short shrift to defendant's serious allegations against trial counsel.

As noted, the record here is unclear as to whether defendant himself made the decision not to testify in his own behalf, or whether counsel made that decision without defendant's input. The dissent recognizes that trial counsel was required to have consulted with defendant about whether defendant wished to exercise his right to testify. However, by concluding that no

hearing is required, the dissent effectively ignores the questions as to how and when the trial court was purportedly informed that defendant would not testify, whether defendant was aware of this communication, and whether defendant agreed with that decision. The dissent also mistakenly suggests that we are concluding that a defense lawyer who advises a defendant not to testify, despite defendant's wish to do so, is ineffective. We come to no such conclusion, but simply remand for an evidentiary hearing on the ineffectiveness claim.

The dissent faults defendant for not having asked trial counsel to request that the court render a *Sandoval* decision. It was not defendant's responsibility, however, to remind trial counsel to do his job. Requiring a criminal defendant to bring legal issues to counsel's attention would turn an ineffective assistance claim on its head. Contrary to the dissent's position, the fact that defendant had a criminal record has nothing to do with whether trial counsel was ineffective in not obtaining a *Sandoval* ruling. A defendant with a criminal past has no less of a right to the effective assistance of counsel than a first-time offender. Moreover, the very purpose of a *Sandoval* ruling is to ensure that a defendant who does have a criminal record knows what the consequences of his testifying

will be.

The dissent makes reference to whether the trial court committed error by failing to make a *Sandoval* determination and whether any such error would be harmless. Because we are holding defendant's direct appeal in abeyance, we do not address the merits of defendant's claims in this regard. We do believe, however, that the questions of whether the trial court erred in not ruling on defendant's *Sandoval* request, and whether trial counsel was ineffective by not asking the court to make a ruling, are intertwined and are best resolved together, after the hearing we are ordering.

All concur except Friedman, J.P. and Saxe, J. who dissent in a memorandum by Friedman, J.P. as follows:

FRIEDMAN, J.P. (dissenting)

At about 4:00 a.m. on April 2, 2009, three masked men assaulted a young man as he was returning to the first-floor apartment where he lived with his 72-year-old grandfather. The assailants forced the young man to let them into the apartment, where they handcuffed him and his grandfather with orange plastic zip ties. They forced the young man to open a safe, from which they took $1,600 in cash, a gold watch worth about $5,000, and a coin collection worth about $10,000. The men, whom the victims could not identify due to their masks, absconded with the valuables from the safe, among other items.

When the police arrived, they found on the living room table a number of sets of orange plastic zip ties, such as had been used as handcuffs on the victims. One of these zip ties (subsequently identified as trial exhibits 3A-3B) had DNA material on it that was an exact match of defendant's DNA, the profile of which was in the law enforcement database as a result of his earlier offenses. Defendant was arrested and, after a jury trial at which he was represented by retained counsel, was convicted of burglary in the second degree and two counts of robbery in the second degree.

On this consolidated appeal by defendant from the judgment

of conviction and from the denial of his postjudgment motion (brought by appellate counsel) to set aside the conviction pursuant to CPL 440.10, the majority remands this matter for a hearing on whether defendant received effective assistance of counsel at his trial. In my view, there is no need for such a hearing. Even if all factual issues concerning the representation are resolved in defendant's favor, the alleged deficiencies in trial counsel's performance — counsel's failure to obtain a ruling on his *Sandoval* application (the hearing on which was suspended and then never completed) and counsel's failure to address the DNA evidence from the zip tie identified as trial exhibits 4A-4B (which neither positively matched nor excluded him) — could not have affected the result of the trial, beyond a reasonable doubt (*see People v Crimmins*, 36 NY2d 230, 237 [1975] [stating the standard for finding constitutional error harmless]). This is because the DNA evidence from exhibits 3A-3B, which, as previously noted, matched defendant's DNA profile exactly — a match that defendant has never questioned, either at trial, upon his CPL 440.10 motion, or upon this appeal — provided overwhelming proof of his guilt. Specifically, defendant does not dispute that, as the People's forensic expert testified at trial, DNA that was unquestionably his was found on the zip tie

received into evidence as exhibits 3A-3B. To be clear, the People's expert testified, and defendant does not question, that the DNA on exhibits 3A-3B matched defendant's DNA to a degree of certainty *greater than one in one trillion* — as the expert put it, she "would expect to see this [DNA] profile again if we had 153 planet Earths, each populated with 6.5 billion people." In view of this overwhelming evidence, in this particular case, I cannot conclude that counsel's alleged errors would have deprived defendant of meaningful representation.

Defendant suggests no innocent explanation for the undisputed presence of his DNA on exhibits 3A-3B that he could have offered the jury had he exercised his right to testify at trial. Indeed, when he was questioned by the police about this crime after the DNA match was made, defendant claimed that he had never owned or touched orange zip ties and that he had never visited the apartment where the crime was committed. While defendant asserts in support of his CPL 440.10 motion that "[he] could have explained that statement to the jury and proved to them that [his] statement was not a lie and was not an attempt on [his] part to mislead the police," he does not disclose what this explanation would have been. More fundamentally, defendant offers no theory of how his DNA could have ended up on orange zip

ties found at the crime scene other than through his participation in the crime. Accordingly, even if defendant had decided to testify in his own defense, and even if his counsel had done more to attack the expert's testimony concerning the less conclusive DNA evidence obtained from exhibits 4A-4B, "there is no reasonable possibility" (*Crimmins*, 36 NY2d at 237) that the trial would have resulted in a verdict more favorable to defendant, and any error by the trial court or by defendant's trial counsel was therefore "harmless beyond a reasonable doubt" (*id.*).

The majority does not dispute that, as just noted, even a judicial error of constitutional dimension at a criminal trial does not warrant setting aside a conviction in a case where the evidence against the defendant was so overwhelming that there is no reasonable possibility that a more favorable verdict would have resulted in the absence of the error. Nor does the majority seriously take issue with my view that, under this standard, any error by the trial court in failing to render a *Sandoval* ruling was harmless beyond a reasonable doubt, given the undisputed less than one in one trillion chance that the DNA material on exhibits 3A-3B was left by someone other than defendant, and given further defendant's complete failure to suggest a plausible innocent

explanation of that evidence that he might have given the jury had he chosen to testify at trial. Instead, the majority focuses on the alleged deficiencies of the performance of defendant's retained trial counsel, noting that the Court of Appeals has stated that it has "refused to apply the harmless error doctrine in cases involving substantiated claims of ineffective assistance" (*People v Benevento*, 91 NY2d 708, 714 [1998]).

The majority correctly states that defendant, to prevail on his ineffective assistance claim, must demonstrate that counsel failed to provide him with meaningful representation (*see e.g. People v Caban*, 5 NY3d 143, 152 [2005]), which does not necessarily require a showing of what the likelihood of a more favorable verdict would have been had the representation been more effective. This, however, does not mean that the strength of the People's case is completely irrelevant to an ineffective assistance claim, as the Court of Appeals observed in the very decisions cited by the majority (*see id.* at 155-156 ["we continue to regard a defendant's showing of prejudice as a significant but not indispensable element in assessing meaningful representation"] [internal quotation marks omitted]; *Benevento*, 91 NY2d at 714 ["whether defendant would have been acquitted of the charges but for counsel's errors is relevant, but not

dispositive under the State constitutional guarantee of effective assistance of counsel"]).

What emerges from the Court of Appeals' rejection of the more outcome-oriented federal standard for claims of ineffective assistance (*see Strickland v Washington*, 466 US 668 [1984]) and its simultaneous acknowledgment that prejudice remains "significant" to such claims under New York law (*Caban*, 5 NY3d at 155 [internal quotation marks omitted]) is that the nature of the People's case against a defendant must be taken into account in determining whether defense counsel's representation was, in fact, meaningful under the state standard. Here, even assuming that defendant did not acquiesce in his trial counsel's apparent decision to drop the *Sandoval* application, it is plain that counsel's decision to take this course — given that defendant even now does not suggest what testimony he could have given that would have actually assisted his defense — did not render counsel's representation less than meaningful.[1] For the majority to hold otherwise is tantamount to stating that a criminal defense lawyer renders ineffective assistance by advising a defendant, contrary to that defendant's inclination, not to

[1]Needless to say, if defendant was not going to testify, there was no need for a *Sandoval* ruling.

exercise the right to testify. This is not the law (*see People v Carpenter*, 52 AD3d 729, 729 [2d Dept 2008] [defendant received effective assistance of counsel where, "after a colloquy among defense counsel, the court, and the defendant, the defendant voluntarily chose to follow the advice of his attorney and not testify"], *lv denied* 11 NY3d 830 [2008]).

It is of course true that counsel properly should have sought defendant's agreement not to exercise his right to take the stand (and, as more fully discussed below, I believe that defendant has essentially admitted having given such agreement). But, even if defense counsel acted unilaterally in this regard, given the overwhelming likelihood that defendant would only have damaged his own defense by testifying, I do not believe that such conduct by counsel (assuming it occurred) would have deprived defendant of meaningful representation or a fair trial. To reach this conclusion is not to "ignore[]" defendant's right to decide whether he will testify (however imprudent his exercise of that right might have been), but simply to acknowledge that, viewing the case as a whole, any error by trial counsel in this regard (and I do not believe that defendant alleges one) did not render counsel's representation — in which he was naturally focused on

getting the best verdict possible — meaningless.[2] As to the alleged deficiencies in trial counsel's approach to the inconclusive DNA evidence on exhibits 4A-4B, the People never contended that this material definitively implicated defendant, as the People's forensic expert confirmed under cross-examination, and I do not believe that counsel's approach, while perhaps not beyond criticism in all respects, rendered his representation as a whole less than meaningful.

I further note that the majority grants defendant a hearing on his CPL 440.10 claim based on an exceedingly generous reading of his postjudgment affidavit. In this regard, the majority states that defendant's affidavit "made clear that he informed trial counsel that he wished to testify, depending on the outcome

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[2]I see no reason for the majority's concern with when and how defense counsel informed the trial court that defendant would not testify. Presumably, the majority does not mean to question the trial court's uncontradicted statement on the record that defense counsel indicated to him during trial that defendant would not testify. Even if I agreed with the majority that a hearing is needed to determine whether defendant agreed to take his attorney's advice not to testify, the manner in which counsel conveyed to the court the decision not to have defendant take the stand — whether in writing, in person, by telephone, or simply by resting his case without requesting a *Sandoval* ruling — is legally irrelevant. Any error by the court in failing to render a *Sandoval* ruling is unpreserved and, for the reasons already discussed, was harmless beyond a reasonable doubt. The only conceivable basis on which to grant defendant relief with respect to the *Sandoval* issue is his ineffective assistance claim.

of the *Sandoval* hearing." Defendant said no such thing. In fact, the clear import of his affidavit is that trial counsel prevailed upon him to drop the idea of taking the stand in his own defense — which, as previously noted, would not constitute ineffective assistance of counsel (*see People v Carpenter*, 52 AD3d at 729).[3] While defendant alleges that his attorney said that he would "leave the case" if defendant insisted on testifying, I am not aware of any authority holding that a lawyer acts improperly by advising the client that the lawyer will seek leave to withdraw if the client insists upon pursuing a course

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[3]In pertinent part, defendant's affidavit states:

> "10. More importantly, counsel failed to obtain a Sandoval ruling, or even make an argument, to limit the prosecutor's cross-examination if I testified. This was critically important because when I told counsel that I wanted to testify, he told me two things: First, he said he would leave the case if I testified, but second, he said that I couldn't testify because the prosecutor would bring up my criminal record in front of the jury.
>
> "11. I know that there was a Sandoval application made and that the court started that hearing, but my lawyer never argued that motion and no Sandoval ruling was ever made. I never had the opportunity to decide whether it would be a good idea for me to testify based on how much of my criminal record the jury would hear because I never got a court decision on my motion. Instead, what my lawyer did was tell me that everything would come up and therefore, I shouldn't testify."

that the lawyer believes to be self-defeating, illegal or unethical. As to defendant's claim that his counsel told him that "everything about [his] past would come up" if he testified, it is plain that defendant's record of at least four prior felony convictions (more fully described below) would have been used against him to some extent had he taken the stand, however the court might have limited the underlying facts that could be placed before the jury. It is astonishing that the majority suggests that counsel's representation might have been rendered less than meaningful by his giving defendant such commonsense advice. Further, nowhere does defendant's affidavit state that he asked his attorney, at any point during trial, to request that the court complete the *Sandoval* hearing and render a ruling. Indeed, defendant does not even claim to have asked his attorney about the status of the *Sandoval* application when defense counsel, after the resting of the People's case and an off-the-record colloquy, told the court that there would be no defense case.[4]

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[4]Contrary to the majority's implication, in pointing to defendants' failure to allege that he pressed trial counsel to obtain a *Sandoval* ruling, I am not taking the position that it was "defendant's responsibility . . . to remind trial counsel to do his job." I merely point out that, based on defendant's own vague allegations in support of the CPL 440.10 motion, it is much

To the extent the majority might be concerned that defendant failed to ask his attorney about the status of the *Sandoval* application due to confusion or anxiety, it should be borne in mind that defendant apparently was well acquainted with the criminal justice system by the time this case went to trial. The record of the *Sandoval* hearing reflects that defendant's prior criminal record included no less than four prior felony convictions from three different states. These were: (1) a 2008 New York conviction for criminal possession of marijuana in the second degree; (2) a 2007 New Jersey conviction for money laundering; (3) a 2002 Virginia conviction for cocaine possession; and (4) a 2001 Virginia conviction for two counts of possession of cocaine with intent to distribute. In addition, defendant had a New York youthful offender adjudication for burglary. Moreover, defendant absconded for more than a year after pleading guilty to the marijuana charge and was not

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more likely than not that he actually acceded during trial to his attorney's advice not to testify. Further, while I of course agree with the majority that it is not "defendant's responsibility . . . to remind trial counsel to do his job," it seems to me that it was defendant's obligation on his postjudgment motion to tell the court what transpired between trial counsel and himself with respect to the *Sandoval* application, and what they said to each other concerning whether he would exercise his right to testify, if he wished to have his conviction vacated on this ground.

sentenced thereon until he was arrested for the burglary and robbery charges that are the subject of the instant appeal.

In sum, the majority orders a hearing on the chance that somehow, or in some way, defendant's retained trial counsel interfered with defendant's right to testify at trial, and to ascertain whether the attorney should have done more to address the People's evidence based on exhibits 4A-4B. The majority thus ignores the utter harmlessness of any deficiencies of counsel's performance in these matters, given the unchallenged exact scientific match between defendant's DNA and the DNA on the zip tie identified as exhibits 3A-3B. To reiterate, quite apart from the damaging statement to the police that defendant asserts he would have somehow explained away had he testified, defendant does not begin to offer even a theory of how his DNA came to be found on a zip tie found at the crime scene other than through his participation in this brutal crime. Further, defendant does not even allege facts that, if true, would establish that his trial counsel interfered with his right to testify; defendant essentially admits that, however reluctantly, he ultimately accepted trial counsel's advice not to exercise his right to take the stand, thereby rendering it unnecessary to complete the *Sandoval* hearing. Accordingly, I respectfully dissent from the

majority's remand of the matter for a hearing on the CPL 440.10 motion. On this record, we should affirm the denial of the CPL 440.10 motion and proceed to consider defendant's direct appeal from the judgment of conviction.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2945 Ning-Yen Yao, Index 311337/07
Plaintiff-Appellant,

-against-

Karen Kao-Yao,
Defendant-Respondent,

Chemtob Moss & Forman, LLP,
Intervenor-Appellant.

_____

Blank Rome LLP, New York (Caroline Krauss-Browne and Heidi A. Tallentire of counsel), for Ning-Yen Yao, appellant.

Chemtob Moss & Forman, LLP, New York (Nancy Chemtob of counsel), for Chemtob Moss & Forman, LLP, appellant.

Julie Hyman, P.C., Bronx (Julie Hyman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura E. Drager, J.), entered March 10, 2015, to the extent appealed from as limited by the briefs, awarding defendant equitable distribution of 10% of plaintiff's enhanced earning capacity, maintenance of $5,000 per month, retroactive to June 1, 2009 and for one year following entry of the judgment of divorce, and counsel fees of $200,000, unanimously modified, on the law and the facts, and the matter remanded to Supreme Court for entry of an amended judgment that conforms with the court's decision dated October 15, 2013 and is in accordance herewith, and otherwise affirmed, with

costs.

Although plaintiff appeals from several aspects of Supreme Court's judgment of divorce, the single most divisive issue between the parties is the court's decision to distribute an equitable share of plaintiff's enhanced earning capacity, due to his attainment of a medical license during the marriage.[1] Plaintiff contends there was a failure of proof because defendant's expert was unreliable, and even if reliable, plaintiff's enhanced earnings are solely due to his own efforts without any contribution whatsoever, whether economic or noneconomic, by defendant. We conclude that Supreme Court correctly relied upon defendant's expert in determining the value of plaintiff's enhanced earnings. We conclude further that the Supreme Court did not abuse its discretion in awarding defendant 10% of this marital asset for her noneconomic contributions (*Holterman v Holterman*, 3 NY3d 1, 8 [2004]; *see O'Brien v O'Brien*, 66 NY2d 576 [1985]).

The parties were married on May 27, 2000. They have two children, born in August 2002 and November 2004. This divorce

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[1] This case was commenced before the law changed, eliminating the valuation of enhanced earning capacity as an asset of the marriage. The new law only affects cases commenced on or after January 25, 2016.

action was commenced on October 11, 2007. By the time the parties met in December 1998, plaintiff had completed medical school and was in the middle of a one year internship at a local hospital in New York. He had already completed one year of his residency at a hospital in Boston. Plaintiff completed two out of three parts of the United States Medical Licensing exam during medical school, and passed the third part in February 2001, nine months after the parties married. Although plaintiff enrolled in an unaccredited fellowship program after graduation, he did not complete the program. In July 2003 he accepted employment with Lenox Hill Anesthesiology PLLC (LHA). Plaintiff has yet to pass the oral component of his medical boards for anaesthesiology, although he has taken the exam twice. LHA was aware of this fact when they offered him partnership track employment. Plaintiff remains employed by LHA and although his employment agreement expired in 2007, he works under an "evergreen" renewal of the agreement, meaning he is working under the same terms and conditions.

Defendant took some college courses before marriage, but did not complete her bachelor's degree (in East Asian Studies) until May 2007. She has sporadically worked at various office jobs that pay $15 or less an hour. She also works as a Mandarin

language tutor and for which she is paid $30 per hour. Throughout the marriage, however, defendant did not work outside the home. The parties maintained a fairly frugal lifestyle and vacations consisted mostly of visiting family. Frequently, defendant took the children on extended visits to China and on at least one occasion spent the summer there. Plaintiff did not always accompany the family on these visits.

Issues of equitable distribution, maintenance, and counsel fees were referred to a Special Referee to hear and report. This appeal involves the court's decision and order dated October 15, 2013, confirming in part and partly modifying and rejecting the Referee's recommendations in her January 22, 2013 report.

Witnesses at trial included the parties, their parents, James Richter, M.D., LHA's manager, and David Gresen, CPA/ABV, who was qualified as an expert in forensic accounting. Gresen was called as defendant's expert witness to value that part of plaintiff's enhanced earning capacity attained during the parties' marriage. Plaintiff did not call any expert on this valuation issue.

In preparing his report, Gresen relied on various documents, including plaintiff's W-2 forms, information about plaintiff's license to practice medicine, and his employment agreement with

LHA dated July 14, 2003. Much of this information is not in dispute. Plaintiff obtained his New York State medical license on May 5, 2003 and he had income of $122,516 in 2003; $258,210 in 2004; $454,492 in 2005; $715,313 in 2006; and in 2007 his income was $837,253. Plaintiff was on a partnership track at LHA and was compensated the first year at an amount equal to 50% of what a representative full member of that partnership would receive; the second year, his compensation was 70%; the third year at 90%; and the fourth year and final year of the contract, which was 2007, also his earning year as of the date of trial, he received compensation equal to 100% of what a representative partner of LHA was paid. In valuing plaintiff's enhanced earnings, Gresen stated in his report and testified at trial, that he was not provided with information regarding how plaintiff is paid or a breakdown between his basic compensation and any bonuses. Gresen could only state that plaintiff's compensation was determined by the accumulation of "points."

Gresen used a methodology commonly employed in determining the value of a medical license earned during a marriage (*Grunfeld v Grunfeld*, 94 NY2d 696, 702 [2000]). He first determined that plaintiff would have earned $173,000 per annum as a typical family practitioner, without the enhancement (baseline earnings).

He then determined what plaintiff's earnings were with the license (topline earnings). Although Gresen proposed two different possibilities for topline earnings, the court accepted the lower value of $733,000, based upon a three-year weighted average of plaintiff's earnings from 2005 to 2007. Gresen deducted baseline earnings from topline earnings, detailed how tax impacted the amount, and made other adjustments, including a calculation of earnings over a work life expectancy, which was then reduced to reflect present value. He also applied a coverture fraction to reflect the fact that the enhancement was attained partly during the marriage and partly before. Based upon his mathematical calculations, Gresen valued plaintiff's enhanced earning capacity as $3,740,000.

At trial, plaintiff challenged some of Gresen's assumptions and Gresen made some further adjustments to his calculations. He reduced the coverture fraction from 75% to 69%, to account for the incomplete fellowship and a seven month leave of absence that plaintiff took from his residency (July 2000 – February 2001) when he decided to explore a nonmedical career path. Gresen acknowledged that he had not known about the leave of absence, or realized plaintiff had not completed his fellowship. These adjustments resulted in a lower valuation of $3,440,000, which

was ultimately accepted by the court.

At trial, plaintiff's employer, Dr. Richter, was called to testify about plaintiff's work habits and compensation. Apparently a primary purpose of Dr. Richter's testimony was to establish that Gresen's topline earnings calculation was incorrect. Dr. Richter testified that LHA doctors are compensated according to a formula using "units" and "compensation points," rather than straight hours worked, resulting in unpopular shifts, such as holidays, nights and weekends being worth more, and earning higher compensation, than more conventional days and hours. Dr. Richter also testified that he could not continue to employ plaintiff if he does not become board certified, and that plaintiff is the only doctor on staff at LHA who is not board certified. Dr. Richter testified, however, that he has afforded plaintiff flexibility, because plaintiff is a valuable asset to the group. Plaintiff remains employed with LHA on the same employment terms and conditions, notwithstanding that his employment contract expired in 2007. Since 2007, which was his highest grossing year, plaintiff has earned less, but also worked fewer units. In 2008 he earned $554,848.85, in 2009 he earned $565,259, and in 2010 he earned $611,829.11.

The Referee found Gresen's valuation flawed, and recommended that his report, testimony and valuation be rejected in its entirety, resulting in no award of enhanced earnings to defendant (*Halaby v Halaby*, 289 AD2d 657, 660 [3d Dept 2001]). Alternatively, the Referee recommended that if the valuation of plaintiff's enhanced earnings was accepted by the court, then defendant's award should be no more than 10% of the enhanced earning capacity, because her contribution to this attainment was "de minimis." The Referee also recommended that plaintiff pay defendant taxable maintenance of $10,000 per month for four years after entry of the divorce judgment.

Supreme Court rejected the Referee's recommendation that Gresen's valuation was unreliable. The court determined that the methodology he used was "appropriate" and that adjustments made at trial accounted for any mistaken assumptions in his original calculations. After assessing defendant's contributions, the court awarded her a modest 10% of plaintiff's enhanced earnings. The court then rejected the Referee's recommendation on maintenance, finding that because defendant would be receiving equitable distribution, a lesser amount of maintenance for a shorter duration was appropriate. She was awarded permanent maintenance of $5,000 per month for a period of one year.

The party seeking distribution of an award based on the other party's enhanced earning capacity must establish its value through expert testimony (*Ruo Mei Cai v Lau*, 133 AD3d 541, 542 [1st Dept 2015], *appeal dismissed* 26 NY3d 1119 [2016], *lv denied* 27 NY3d 905 [2016]; *see generally Kurtz v Kurtz*, 1 AD3d 214, 215 [1st Dept 2003]). Defendant's expert used a methodology that is commonly used when calculating the value of enhanced earning capacity (*Grunfeld v Grunfeld,* 94 NY2d at 702*; O'Brien v O'Brien*, 66 NY2d at 582). Plaintiff's disagreement with certain assumptions made by the expert was not a basis to simply disregard the expert's opinion and treat it as a complete nullity. Some of plaintiff's criticisms resulted in adjustments in value at trial. Thus, for example, the coverture fraction ultimately accepted by the court was adjusted downward in plaintiff's favor. Other challenges are simply without basis in the record. For example, plaintiff's challenge to Gresen's use of age 67 as plaintiff's projected retirement is unwarranted. Gresen explained that age 67 is the age when plaintiff will become eligible for full social security benefits (https://www.ssa.gov/planners/retire/1960.html, accessed Jan. 24, 2017). Plaintiff has not provided any data or expert opinion that anesthesiologists, as an entire profession, retire any

sooner than the general population. Nor is the retirement age chosen by Gresen so out of bounds with our common experience on retirement that the court should have rejected the entire valuation out of hand.

Plaintiff's greatest challenge to Gresen's valuation is that the topline earnings, although based on his actual earnings, were too high to reflect what he could actually earn in the future. Plaintiff claims that he worked many hours in order to achieve those high earnings, and that he cannot continue to work at that pace throughout his career. Actual earnings, projected over time are, however, a recognized proxy for value of a person's future earning capacity (*McSparron v McSparron*, 87 NY2d 275, 286 [1995] ["The value of a newly earned license may be measured by simply comparing the average lifetime income of a college graduate and the average lifetime earnings of a person holding such a licensee . . . . In contrast, where the licensee has already embarked on his or her career and has acquired a history of actual earnings, the foregoing theoretical valuation method must be discarded in favor of a more pragmatic and individualized analysis . . . ."]). The court credited plaintiff's arguments to the extent that it decided to use Gresen's lower calculation of topline earnings in determining value. The expert's opinion was not and did not have

to be completely disregarded because it was based upon plaintiff's actual earnings information (*McSparron*, 87 NY2d at 286). Although Dr. Richter's testimony may have highlighted some of the limitations in using past earnings as a predictor of future earnings, plaintiff offered no alterative expert evidence or calculations to demonstrate how such limitations would have, as a function of actual dollars, have changed topline projected earnings. Valuation of a professional license is largely dependent upon expert testimony and plaintiff made no effort to establish a different value by retaining his own expert for the court to consider (*see Heydt-Benjamin v Heydt-Benjamin*, 127 AD3d 814, 815 [2d Dept 2015]). The court was justified in relying on the only expert opinion it had, and making corresponding adjustments that took into account some of plaintiff's challenges.

The court also properly exercised its discretion in making a distributive award equal to 10% of plaintiff's enhanced earnings (*see Farrell v Cleary-Farrell*, 306 AD2d 597, 599-600 [3d Dept 2003]; *see Vora v Vora*, 268 AD2d 470, 471 [2d Dept 2000]). It is well-established law that both parties in a matrimonial action are entitled to "fundamental fairness in the allocation of marital assets, and that the economic and noneconomic

contributions of each spouse are to be taken into account" (*Holterman*, 3 NY3d at 8). In reaching its decision the court below considered the statutory factors listed in Domestic Relations Law § 236, as well as the nontitled defendant spouse's direct and/or indirect contributions to the marriage (*Holterman*, at 3; see *Del Villar v Del Villar*, 73 AD3d 651 [1st Dept 2010]). It is apparent from Dr. Richter's testimony that plaintiff was earning almost twice as much as other LHA doctors because he worked extraordinarily long hours, accepted unpopular shifts, like holidays, weekends and evenings, and was better compensated precisely because plaintiff kept this "totally unbalanced life." By not adhering to a more balanced work schedule, plaintiff necessarily shifted primary responsibility for his home life to defendant. Although he may have borne equal, if not primary, responsibility for the children when he was home, this was often a physical impossibility, given his demanding work schedule. Defendant not only made it possible for plaintiff to work the grueling schedule that he kept, she also made sure plaintiff was able to study without interruption for the boards on two separate occasions. She did this by taking the children away to visit relatives and doing other things to keep them out of his way.

Plaintiff's own testimony revealed that the parties lived a

fairly frugal existence, although he was a high wage earner. Despite such income, plaintiff testified that the parties used a baby sitter, but never employed a full time nanny, and "never spent over $3,000 a month for any kind of childcare."[2] Given plaintiff's extended absences from the home while he worked double shifts and given the relatively young ages of the parties' children (six and eight) at the time of trial, the responsibility for their care necessarily fell to defendant. The fact that she may have been assisted by other family members or even, at times, a paid babysitter does not change this fact. In light of these contributions and others, the modest 10% awarded to defendant was equitable. This modest distribution took into consideration the court's determination that defendant's other contributions to plaintiff's enhanced earnings were not significant.

The maintenance award was also proper. The equitable distribution awarded is a very modest percentage of plaintiff's enhanced earnings and the maintenance awarded is not only for a very limited duration after the entry of judgment, but it is also a relatively small amount. Under these circumstances, there is

[2]This argument was raised in response to defendant's budget request of $3,000 a month in her statement of net worth. Plaintiff's did not testify how much the babysitter was paid.

no risk of double dipping using the same stream of income to pay both awards (*see Grunfeld v Grunfeld*, 94 NY2d at 705). Turning to the award of counsel fees, such an award lies within the discretion of the court (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]). In exercising this discretionary power, the Supreme Court was fully aware of the parties' financial circumstances and all other circumstances of the case, including the relative merit of the parties' positions (*id.*). The trial court providently exercised its discretion in awarding defendant $200,000 in counsel fees, an amount that only represents a portion of the counsel fees she actually sought. In making this award, the court considered the issues involved and the protracted nature of this litigation (*see Ansour v Ansour*, 61 AD3d 536, 537 [1st Dept 2009]).

There are, however, many inconsistencies between the judgment of divorce the court signed and the relevant court decision. "[W]hen there is an inconsistency between a judgment and the decision upon which it is based, the decision controls . . . [and] [s]uch an inconsistency may be corrected on [] appeal" (*Pauk v Pauk*, 232 AD2d 386, 390-391 [2d Dept 1996], *lv dismissed* 89 NY2d 982 [1997] [internal quotation marks omitted]; *see Herpe v Herpe*, 225 NY 323, 327 [1919]). The judgment should

have only reflected the matters decided in the court's October 15, 2013 decision, the Referee's January 22, 2013 decision to the extent that it was confirmed and the parties' final parenting agreement. The pervasive inconsistencies cannot stand. We remind the parties that the court's decision is a snapshot in time and that after-occurring disputes, which were never adjudicated by the court, have no place in the judgment. The matter is, therefore, remanded to the Supreme Court for an amended judgment to be settled and entered correcting the following items:

The judgment incorrectly provides a direction that the award of counsel fees is be deposited into the "current attorney's escrow account." The current attorney is not the attorney who represented defendant at trial. The decision, ordered payment "directly to the Wife's attorneys." Nancy Chemtob, Esq. of Chemtob Moss & Forman (CM&F), who represented defendant during the divorce action and at trial, is entitled to the fees. There is no provision that the fees be put in escrow. Since the court ordered plaintiff to pay $200,000 in legal fees "directly to the Wife's attorneys," the order in the judgment directing payment of counsel fees to "[d]efendant's current attorney's escrow account" is hereby stricken and the judgment shall instead require that

payment counsel fees shall be "directly to Wife's attorneys, Chemtob Moss & Forman LLP." The timing and schedule of this payment (i.e., two equal payments, the first within 30 days of the entry of judgment, the second within four months from entry of judgment), remains unaffected by this order.

The judgment is also incorrect on the issue of custody. Custody was settled by the parties in a parenting agreement. The judgment contains language characterizing the rights of the parties in a manner different from the parenting agreement. Accordingly, the first two full paragraphs on page 3 of the judgment pertaining to custody are hereby vacated and an amended judgment shall be entered explicitly reflecting the rights and obligations contained in the parenting agreement.

The judgment contains a table listing various assets, identifying who the title owner of the asset was prior to trial, the value of the asset, the title holder after trial, the page in the decision or Referee's report where the asset is addressed for equitable distribution purposes, and whether plaintiff or defendant must make a payment to the other party. Some values and distributions are different from what was actually ordered. The table in the judgment is, therefore, stricken and an amended judgment should be entered precisely reflecting the values and

distributions ordered by the court. While some of the inconsistencies cannot be reconciled on appeal because accounts listed in the judgment are not identifiable as the accounts referenced by the court, other discrepancies are apparent on their face.

On page 3, the first account listed, which is the Fidelity account ending in 8931, bears the value of $547,559. It states the asset is in defendant's name, and orders that defendant must pay plaintiff "$166,050." The amount of $166,050 is incorrect. The same table, continuing on page 5 of the judgment, states that "Defendant's transfers to her sole Fidelity account" (no identifying account number provided), is valued at $94,000, defendant is the sole title holder, but that defendant pays to plaintiff "$0" referring to page 15 of the court's decision and page 50 of the Referee's report. The Referee recommended and the court confirmed, however, that plaintiff is entitled to a $47,000 credit. The award of "$0" has no basis in the record and it is stricken. On page 6 of the judgment, the HSBC account ending in 6975 states that the value of that account is $100,099 and that "defendant pays to plaintiff $50,049." This is an incorrect distribution. The court confirmed that plaintiff is entitled to an off the top credit of $40,000 (Referee's report page 50 and

decision page 16), and that the balance of $60,099 be divided equally between the parties, requiring that plaintiff pay the amount of $70,049.50, reflecting the credit and division of this asset. There are inconsistencies regarding an account solely identified as "[d]efendant's transfer to sole Fidelity Acct" and "[d]efendant's transfer to sole HSBC Acct." In briefing this appeal, each side has presented redlined judgments with widely different figures, credits and explanations for why the judgment is incorrect and plaintiff claims he is due an additional $87,000 payment. These discrepancies must be settled in the amended judgment.

The judgment also incorrectly includes child support arrears. Section D appearing on pages 9 and 10 of the judgment indicates there are $75,641.24 in purported child support arrears owed by plaintiff, but there is no finding of arrears either in the court's decision or the Referee's report. Section D of the judgment appearing on pages 9 and 10 is stricken in its entirety. The only child support arrears awarded was $1,700 for a Chinese language program. The amended judgment should reflect this decision.

The court, in its decision, made the retroactive maintenance award "taxable" to defendant, but the judgment (page 10, first

full paragraph, third sentence) contains decretal language that classifies the award as "nontaxable." The language pertaining to maintenance on page 10, first full paragraph of the judgment, third sentence is therefore stricken and the amended judgment should provide that the retroactive payment of maintenance is taxable.

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

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Kahn, JJ.

3028 The People of the State of New York, Ind. 1450/15
Respondent,

-against-

Robert DePalo, et al.,
Defendants-Appellants,

Pangaea Trading Partners, LLC,
Defendant.

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Peter R. Ginsberg Law, LLC, New York (Peter R. Ginsberg of counsel) and Moskowitz & Book, LLP, New York (Avraham C. Moskowitz of counsel), for appellants.

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

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Appeal from order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about August 16, 2016, which denied defendants' motion for issuance of letters rogatory seeking the assistance of judicial authorities in the United Kingdom in the conduct of discovery there, unanimously dismissed, as taken from a nonappealable order.

In this matter where an indictment has been filed, a criminal trial is pending, and defendants seek information via letters rogatory for use at their criminal trial, the denial of the application for such letters is part of the criminal proceeding, notwithstanding that the application was brought

under CPLR 3108 (*see People v Santos*, 64 NY2d 702, 704 [1984]; *People v Christopher B.*, 102 AD3d 115, 117-120 [1st Dept 2012], *lv denied* 20 NY3d 860 [2013]; *People v Johnson*, 103 AD2d 754, 755 [2d Dept 1984]; *compare Matter of Abrams [John Anonymous]*, 62 NY2d 183, 192 [1984] [denial of motion to quash preindictment subpoena "issued pursuant to a criminal investigation, is civil by nature and not subject to the rule restricting direct appellate review of orders in criminal proceedings"]).

"It is well established that no appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute" (*People v Pagan*, 19 NY3d 368, 370 [2012] [internal quotation marks omitted]). The order appealed from is not a disposition listed in CPL 450.10 or 450.15, and is therefore not an appealable paper (*see People v Hurley*, 47 AD3d 488 [1st Dept 2008]). A "defendant may only appeal after

conviction" (*People v Coppa*, 45 NY2d 244, 249 [1978]), and may not obtain an interlocutory appeal by claiming to invoke the court's civil jurisdiction.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Acosta, Mazzarelli, Manzanet-Daniels, Webber, JJ.

3054-
3055 Index 304460/08

Herminio Pizarro, et al.,
Plaintiffs-Respondents,

-against-

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

P.O. Jose M. Reyna, et al.,
Defendants.

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

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

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Judgment, Supreme Court, Bronx County (Alexander Hunter, J.), entered April 7, 2015, to the extent appealed from as limited by the briefs, upon a jury verdict in favor of plaintiffs, awarding, as against defendant Police Officer Morales, punitive damages to plaintiff Pizarro in the amount of $1,000,000 and to plaintiff Garcia in the amount of $250,000, unanimously modified, on the law and the facts, to vacate in toto the punitive damage awards, and otherwise affirmed, without costs. Order, same court and Justice, entered October 8, 2015, which granted plaintiffs' motion for legal fees, unanimously reversed, on the law, without costs, and the motion denied.

While plaintiffs' counsel made remarks in his closing statement that were improper, obliquely referencing a high-profile death in an altercation with police and implying that his past position as an assistant district attorney gave him personal knowledge as to why the People ultimately requested the dismissal of charges against plaintiff Pizarro, the remarks cannot be said to have contaminated the proceedings to the extent of depriving defendant Morales of a fair trial (*see e.g. Genza v Richardson*, 95 AD3d 704, 705 [1st Dept 2012]; *Chappotin v City of New York*, 90 AD3d 425 [1st Dept 2011], *lv denied* 19 NY3d 808 [2012]).

Under the facts of this case, the award of punitive damages was inappropriate (*Rand & Paseka Mfg. Co. v Holmes Protection, Inc.*, 130 AD2d 429, 431 [1st Dept 1987], *lv denied* 70 NY2d 615 [1988]). The award of punitive damages to plaintiff Garcia must be vacated, because there is no evidence that Morales was involved in the assault on her.

Pizarro testified that Morales pushed him up against a wall and then down to the ground. However, the evidence that Morales did not accompany Pizarro to the station in the patrol car was uncontroverted. Thus, Morales was not involved in the assaults that Pizarro testified occurred in the car and later in the precinct's bathroom. Thus, the award of punitive damages to

Pizarro should also be vacated (*see* CPLR 5501[c]; *Cardoza v City of New York*, 139 AD3d 151, 166-167 [1st Dept 2016]).

The motion for attorneys' fees must be denied. An award of attorneys' fees is inappropriate in the absence of a valid claim for punitive damages (*Royal Globe Ins. Co. v Chock Full O'Nuts Corp.*, 86 AD2d 315, 321 [1st Dept 1982], *lv dismissed*, 58 NY2d 800 [1983]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3174 The People of the State of New York, Dkt. 95297/09
Respondent,

-against-

Kenneth Carter,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered December 13, 2011, convicting defendant, after a nonjury trial, of unlawful possession of marijuana, and sentencing him to a fine of $25, unanimously affirmed.

The court properly denied defendant's suppression motion. Officers patrolling a New York City Housing Authority building observed that defendant unsuccessfully tried to enter the building, then waited until someone entered with a key and followed him inside. Even if this means of entry may have had innocent explanations, it provided an objective credible reason for the officers' level one inquiry as to whether defendant lived in the building (*see People v Verges*, 120 AD3d 1028 [1st Dept 2014], *lv denied* 24 NY3d 1047 [2014]). Defendant answered the

officers' questions to the extent of admitting that he was not a resident of the building and maintaining that he was visiting someone. However, he refused to provide this person's name or apartment number, claiming that this might get his friend in unspecified "trouble." Under these circumstances, "the totality of the information before the officer supported a reasonable inference, for probable cause purposes, that defendant was not 'licensed or privileged' (Penal Law § 140.00[5]) to be in a building in which he admittedly did not reside" (*People v Barksdale*, 110 AD3d 498, 499 [1st Dept 2013], *affd* 26 NY3d 139 [2015]), providing the officers with probable cause to arrest him and conduct a lawful search incident to arrest.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3175 Erick Idona, Index 307669/10
Plaintiff-Appellant,

-against-

Manhattan Plaza, Inc.,
Defendant-Respondent,

Hobo Construction Company,
Defendant.

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Alexander J. Wulwick, New York, for appellant.

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered June 28, 2016, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff's testimony that he fell from scaffolding materials stacked atop the surface of a flatbed truck, about 10 feet above the ground, and that he was not provided with a safety device that would have prevented his fall, was sufficient to establish his entitlement to partial summary judgment on his

Labor Law § 240(1) claim (*see e.g. Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578 [1st Dept 2012]). Although plaintiff was wearing a safety harness at the time of the accident, there was no place on the truck where the harness could be secured.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3176 In re Jadalynn N.,
Appellant,

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

Louis N.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

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Larry S. Bachner, Jamaica, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondent.

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Appeal from order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about October 23, 2015, which found that respondent father neglected the subject child, and directed that the child be released to nonrespondent mother, with nine months of supervision by a child protective agency, unanimously dismissed, without costs, as moot.

Application by the child-appellant's attorney to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no nonfrivolous issues which could be raised on this appeal from

the dispositional order, as it has been rendered moot by the expiration of the terms of that order (*Matter of Geovany S. [Martin R.]*, 143 AD3d 578 [1st Dept 2016]; *Matter of Carl J. [Carl J., Sr.]*, 94 AD3d 473 [1st Dept 2012]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3177 Linda Verderese, Index 303851/13
Plaintiff-Appellant,

-against-

3225 Realty Corp.,
Defendant-Respondent.

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Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Mark R. Bernstein of counsel), for appellant.

Kerley, Walsh, Matera & Cinquemani, P.C., Seaford (Lauren B. Bristol of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 4, 2016, dismissing the complaint, and bringing up for review an order, same court and Justice, entered December 17, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she fell on an interior stair located in a lobby of a residential building owned and maintained by defendant. Plaintiff claims that the stairway lacked handrails as required by the applicable 1916 Building Code and that defendant's negligence in maintaining the area departed from good and accepted engineering practice.

Pursuant to section 153(6) of the 1916 Building Code,

handrails are required only for "[i]nterior stairs" (*see Maksuti v Best Italian Pizza*, 27 AD3d 300, 301 [1st Dept 2006], *lv denied* 7 NY3d 715 [2006]). Given the lack of a definition of "interior stairs" in the 1916 Code, it is appropriate to consider the definition in subsequent Codes (*id.*). The 1968 Building Code, which defendant relies upon, defines an "interior stair" as "[a] stair within a building, that serves as a required exit" (Administrative Code § 27-232). An "exit" is defined as "[a] means of egress from the interior of a building to an open exterior space[,]" but does not include "access stairs" (*id.*). An "access stair" is defined as "[a] stair between two floors, which does not serve as a required exit" (*id.*).

Defendant made a prima facie showing that the stair upon which plaintiff fell was an "access stair," and not an "interior stair," within the meaning of the 1968 Building Code, and that handrails were therefore not required under the 1916 Code (*see Pwangsunthie v Marco Realty Assoc., L.P.*, 136 AD3d 502, 502 [1st Dept 2016], *lv denied* 27 NY3d 906 [2016]). The color photographs defendant submitted show two stairs that do not serve as a means of egress from the interior of the building to an open exterior space (*see* Administrative Code § 27-232). In opposition, plaintiff failed to raise a triable issue of fact.

Defendant also made a prima facie showing that the stairs did not constitute a dangerous condition or hidden trap (*see Pwangsunthie*, 136 AD3d at 502-503; *see also Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009]). Plaintiff testified that she had successfully traversed the steps without incident for approximately 40 years, knew that the stairs were not equipped with a handrail, and tripped after she failed to raise her foot all the way to the top part of the first step, causing her to make a misstep (*see Barakos v Old Heidelberg Corp.*, 145 AD3d 562 [1st Dept 2016]).

Plaintiff's expert's averment that the absence of handrails violated good and accepted safe engineering practices failed to raise a triable issue of fact (*see Jones v City of New York*, 32 AD3d 706, 707 [1st Dept 2006]). The expert's opinion was conclusory and without probative force; the only standards the expert relied upon were the 1916 Building Code, which was not violated, and the 2008 Building Code, which is inapplicable.

Plaintiff has abandoned her claim regarding the alleged lack of nonslip treads on the stairs (*see Batas v Prudential Ins. Co. of Am.*, 37 AD3d 320, 321 n 1 [1st Dept 2007]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3178 Renee Lindsay-Thompson, et al., Index 300113/10
Plaintiffs-Appellants,

-against-

Montefiore Medical Center, et al.,
Defendants-Respondents.

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Alegria & Barovick LLP, White Plains (Andrew J. Barovick of counsel), for appellants.

KL Rotondo & Associates, Rye (Kathi Libby Rotondo of counsel), for respondents.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about August 25, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Although defendants failed to establish that there was no departure from good and accepted medical practice in their administration of Phenergan, an anti-nausea medication, to plaintiff Renee Lindsay-Thompson (plaintiff), they established prima facie that any departure was not a proximate cause of plaintiff's alleged injuries (*see Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]). Their expert opined that plaintiff's symptoms were inconsistent with extravasation (leakage) of Phenergan, and that, in any event, there was no

causal relationship between extravasation and the alleged injuries, reflex sympathetic dystrophy (RSD) and fibromyalgia.

Because defendants failed to establish the absence of a departure from the standard of care, plaintiffs were not required to raise a triable issue of fact as to whether there was a departure (*see Stukas v Streiter*, 83 AD3d 18, 29-30 [2d Dept 2011]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Kimberlee M. v Jaffe*, 139 AD3d 508, 509 [1st Dept 2016]). However, they failed to raise an issue of fact with respect to proximate cause.

Although there is just enough evidence to raise an issue of fact whether extravasation occurred, plaintiffs failed to establish any causal connection between extravasation and RSD or fibromyalgia. Their medical expert did not assert that there was any connection to fibromyalgia, opining instead that fibromyalgia was caused by "chronic pain and depression." To the extent plaintiffs claim that this "chronic pain and depression" was caused by defendants' malpractice, the claim is impermissibly speculative - especially in light of plaintiff's many preexisting conditions. Although plaintiffs' medical expert conclusorily asserted that extravasation was capable of causing RSD, she failed to address or even acknowledge that a pain specialist whom

plaintiff consulted had conclusively ruled RSD out.

To the extent plaintiffs raise arguments on appeal as to their informed consent and negligent hiring claims, we find that those claims were correctly dismissed. Plaintiffs' experts failed to respond to defendants' expert's assertion that "it is not the standard of care to give informed consent to administer a small dose of Phenergen [sic]," which is FDA-approved and administered routinely. With respect to negligent hiring, plaintiffs do not even allege any acts outside the scope of the individual defendants' employment (*see Boyd v City of New York*, 143 AD3d 609, 610 [1st Dept 2016]).

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: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3179 S&P Global Inc. formerly known as McGraw Hill Financial, Inc., etc.,
Petitioner,

-against-

New York City Tax Appeals Tribunal, et al.,
Respondents.

Index 53/16

_____

McDermott Will & Emery LLP, New York (Peter L. Faber of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Andrew G. Lipkin of counsel), for respondents.

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Decision of respondent New York City Tax Appeals Tribunal, dated October 28, 2015, which, inter alia, reinstated Notices of Disallowance for petitioner's New York City General Corporation Tax (GCT) returns for the calendar years 2003 through 2007 and a Notice of Determination, dated August 17, 2011, to the extent applicable to the 2008 tax year, unanimously confirmed, the petition denied and the proceeding, commenced in this Court pursuant to CPLR 506(b)(4) and article 78, dismissed, without costs.

The Tribunal's decision that income earned from petitioner's

credit rating business was derived from "services" (*see* Administrative Code of City of NY § 11-604.3[a][2]) and thus, properly sourced on a place-of-performance or origin basis, was rationally based and is entitled to deference (*see Matter of De Mayo v Rensselaer Polytech Inst.*, 74 NY2d 459, 462 [1989]; *Matter of Hilton Hotels Corp. v Commissioner of Fin. of City of N.Y.*, 219 AD2d 470, 476 [1st Dept 1995]).

The terms of petitioner's agreements with its clients make it clear that petitioner is being paid for a service, namely, "analytic review and issuance of a rating," which fee is not contingent on public dissemination. Petitioner is also paid an annual surveillance fee for continued maintenance of the rating. Even where a rating is not issued, "the issuer/obligor agrees to compensate [petitioner] based on the time, effort, and charges incurred." Indeed, for years, petitioner treated its credit ratings income as a service, informing the New York City Department of Finance that the same consists of "the review and analysis of debt instruments or other securities" and that, "[s]ince this is an individualized service, all revenue . . . has been reported . . . on an origin basis."

At the hearing, petitioner failed to meet its burden (Administrative Code § 11-680.5) of establishing that the subject

income was derived from "all other business receipts" (Administrative Code § 11-604.3[a][2][D]). Unlike the New York State Department of Taxation and Finance's opinions relied upon by petitioner, New York Tax Guidance No. NYT-G-07(1)C (Jan. 17, 2007) and TSB-A-(15)C (Sept. 6, 2000), where subscription fees, advertising revenue, licensing, and access fees were found to constitute "other business receipts," the income here is earned for petitioner's work in providing an analysis and the resulting credit ratings are available to the public for free.

As the income is not earned from sales of subscriptions, advertising, or broadcasting, it does not fall within the media exception to the generally applicable income derivation rule (Administrative Code §§ 11-604.3[a][2][B][iv] and 11-604.3[a][9]).

The credit ratings at issue are a form of speech protected by the First Amendment (*see Lowe v S.E.C.*, 472 US 181, 203-204 [1985]*; Matter of Scott Paper Co. Secs. Litig.*, 145 FRD 366, 370 [ED Pa 1992]). However, applying the rule set forth in *Leathers v Medlock* (499 US 439, 447 [1991]), the allocation here is not suspect. The allocation of income under the GCT applies to the type of revenue at issue, regardless of the idea or content of the published material (Administrative Code §§ 11-

604.3[a][2][B][iv];74 11-604.3[a][9]). The allocation does not single out or target credit rating agencies, a small group of providers of financial information, it applies to any First Amendment speaker who derives income from sources other than advertising and subscription sales (*see Leathers* at 447; *see also Stahlbrodt v Commissioner of Taxation & Fin. of State of N.Y.*, 92 NY2d 646, 650 [1998]).

Unlike in *Matter of McGraw-Hill, Inc. v State Tax Commn.* (146 AD2d 371, 375 [3d Dept 1989], *affd* 75 NY2d 852 [1990]), respondents do not seek to impose a different sourcing method for the same type of revenue, namely, advertising, against different members of the press engaged in a substantially similar business.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3180 Mohamed Fall, Index 308749/12
Plaintiff-Respondent,

-against-

Binta Diallo,
Defendant-Appellant.

_____

Binta Diallo, appellant pro se.

Stanley M. Nagler, P.C., New York (Stanley M. Nagler of counsel), for respondent.

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Judgment of divorce, Supreme Court, New York County (Lancelot B. Hewitt, Special Referee), entered April 1, 2015, and bringing up for review prior orders, same court and Referee, both entered June 8, 2015, which, respectively, determined that defendant wife's amended answer had not been timely or properly served, and denied the wife's motion to vacate her default at a hearing, unanimously affirmed, without costs.

The wife failed to seek leave of court before filing her amended answer, and she was outside the time limit for making an amendment without leave (*see* CPLR 3025[a], [b]). Accordingly, the motion court properly determined that the wife's amended answer was improper and untimely.

The motion court also properly denied the wife's motion to

vacate her default, since she failed to establish the presence of a meritorious defense (*Goncalves v Stuyvesant Dev. Assoc.*, 232 AD2d 275, 276 [1st Dept 1996]). Given the lack of a valid amended answer alleging annulment, the annulment defense that the wife currently relies upon was not properly before the court.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3181-
3182 The People of the State of New York,
Respondent,

-against-

Lesley Martinez,
Defendant-Appellant.

- - - - -

The People of the State Of New York,
Respondent,

-against-

Jason Rivera,
Defendant-Appellant.

Ind. 3887/13

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Linklaters LLP, New York (John W. Eichlin of counsel), for Lesley Martinez, appellant.

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

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

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Judgments, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered October 3, 2014, convicting defendants of grand larceny in the third degree and possession of burglar's tools, and sentencing both defendants, as second felony offenders, to aggregate terms of 3½ to 7 years, unanimously

affirmed.

The court properly denied defendants' suppression motion. Under the fellow officer rule (*see People v Ketcham*, 93 NY2d 416, 419 [1999]; *see also Matter of Malik L.*, 58 AD3d 520, 520-521 [1st Dept 2009]), the police had reasonable suspicion to stop defendants in their minivan based on two radio transmissions sent by an officer who had been assigned to monitor a pattern of alleged motorcycle thefts in the area, possibly involving a white van. The reporting officer stated that he had heard a loud metallic noise coming from a direction in which he then saw two men standing next to a motorcycle in a deserted area in the middle of the night, that he then saw a white van driving nearby a few minutes later, and that he later noticed that the two men and the motorcycle were missing but a broken chain was lying on the ground where the motorcycle had been. These observations gave rise to a reasonable inference that the two men had stolen the motorcycle and used the van to transport it, and, given the closeness of the temporal and spatial factors, justified the police in stopping the white minivan they found stopped at a red light in a location consistent with the officer's transmission (*compare People v Tindal*, 231 AD2d 404, 405 [1st Dept 1996], *lv denied* 89 NYD2d 930 [1996] [observation of make and color of

vehicle did not provide reasonable suspicion "24 hours after receipt of . . . general, limited information provided by the complainant"]).

Although the officers who stopped defendants did not specifically testify that they heard the second transmission, which reported that the motorcycle was missing from its original spot, this was a reasonable inference from the reporting officer's testimony about sending the two transmissions, the evidence that all of the officers were actively working together on this matter, and the reporting officer's testimony that he saw an unmarked police vehicle quickly driving in the direction in which the white van had been driving shortly after the second report was transmitted (*see People v Ramirez-Portoreal*, 88 NY2d 99, 113-114 [1996]).

Under the circumstances, the officers' conduct of ordering defendants out of the van at gunpoint and placing them in handcuffs was justified as a safety measure during the temporary detention while the officers waited for the reporting officer to arrive to make an identification, and did not constitute an arrest requiring probable cause (*see People v Allen*, 73 NY2d 378, 380 [1989]; *see also People v Foster*, 85 NY2d 1012, 1014 [1995]).

The search of the vehicle was justified by the automobile

and plain view exceptions to the warrant requirement (*see People v Blasich*, 73 NY2d 673 [1989]; *see also People v Brown*, 96 NY2d 80, 88-89 [2001]). Even if the police testimony was unclear about when exactly the search occurred, the People met their burden of coming forward, and defendants, who conducted no cross-examination at the suppression hearing, failed to meet their "ultimate burden of proving that the evidence should not be used against" them (*People v Berrios*, 28 NY2d 361, 367 [1971]).

The verdict against defendant Martinez was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. The circumstantial evidence overwhelmingly supported the conclusion that defendants stole a motorcycle and abandoned it. Defendant Rivera's weight of the evidence argument is similarly meritless, in addition to being improperly raised for the first time in a reply brief.

We find nothing prejudicial about the portion of the court's charge in which it introduced the concept of circumstantial evidence by referring to the necessity of resort to such evidence in some cases. Rivera's other challenges to the circumstantial evidence charge, his challenge to the court's reasonable doubt charge, and both defendants' claims regarding the prosecutor's

summation are unpreserved, and we reject defendants' arguments on preservation-related issues. We decline to review any of defendants' unpreserved claims in the interest of justice. As an alternative holding, we find that the jury instructions at issue, each viewed as a whole, conveyed the proper standards while containing no constitutionally defective language, and that the prosecutor's references to defendants' Bronx residences neither appealed to bias nor shifted the burden of proof.

We perceive no basis for reducing the sentences.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Mazzarelli, Kahn, JJ.

3183 Wimbledon Financing Master Fund, Ltd.,
Petitioner-Respondent,

-against-

David Bergstein, et al.,
Respondent-Appellants,

Weston Capital Asset Management LLC, et al.,
Respondents.

Index 150584/16

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Sills Cummis & Gross P.C., New York (Mark S. Olinsky of counsel), for David Bergstein, Graybox, LLC, Iskra Enterprises, LLC, and Henry N. Jannol, appellants.

Winget, Spadafora & Schwartzberg, LLP, New York (Michael Schwartzberg of counsel), for K Jam Media, Inc., appellant.

Kaplan Rice LLP, New York (Joseph A. Matteo of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about August 19, 2016, which, to the extent appealed from, granted petitioner's motion for a prejudgment attachment, and denied respondents David Bergstein, Graybox LLC, Iskra Enterprises, LLC, K Jam Media, Inc. and Henry Jannol's motion pursuant to CPLR 3211(a)(4) and (8) to dismiss the proceeding as against them, unanimously affirmed, with costs.

Contrary to respondents' contention, Supreme Court was entitled to consider the affirmation of counsel, which, although not made on personal knowledge, attached numerous documentary exhibits that strongly support petitioner's allegations (*see Swiss Bank Corp. v Mehdi Eatessami*, 26 AD2d 287, 290–291 [1st Dept 1966]). The court also properly considered the plea allocution of respondents' co-conspirator. Respondents' reliance on *People v Hardy* (4 NY3d 192, 197 [2005]) is misplaced, since that case applies to criminal defendants only, not civil litigants.

The detailed allegations in these materials amply support the court's finding that petitioner has a likelihood of success on the merits.

The same facts establish that respondents are subject to personal jurisdiction as part of a conspiracy that involved the commission of tortious acts in New York (*see Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427 [1st Dept 2013]).

Supreme Court providently exercised its "broad discretion" under CPLR 3211(a)(4) (*Anonymous v Anonymous*, 136 AD3d 506, 507 [1st Dept 2016]) to deny appellants' motion to dismiss this turnover proceeding under CPLR article 52 based on the pendency of a prior plenary action. While there is some overlap between

the parties and claims in this proceeding and the earlier-filed plenary action, the nature of the relief sought is not "substantially the same" (*Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975]), and the respondents named herein are not identical to the defendants sued in the plenary action. Morever, given that both this proceeding and the plenary action are pending before the same Justice, appellants will not be prejudiced by the simultaneous pendency of the two related matters.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3184 In re Shajada B., and Others,

Children Under Eighteen Years of Age, etc.,

Samantha N. (Anonymous),
Respondent-Appellant,

-against-

Administration for Children's Services,
Petitioner-Respondent.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Jamie D. Brooks of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Megan E.K. Montcalm of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (Alma M. Gomez, J.), entered on or about May 14, 2015, to the extent it brings up for review an order of fact-finding, same court (Erik S. Pitchal, J.), entered on or about February 20, 2015, which found that respondent mother neglected the subject children, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding of neglect (*see* Family Ct Act § 1046[b][i]). The court properly found that the subject children's physical, mental or emotional

condition was in imminent danger of becoming impaired, since the mother had left a daughter to supervise her younger siblings, who were nine, seven and six, respectively, for extended periods of time, without a working telephone, adequate food, or instruction as to how to care for the younger children (*see* Family Ct Act § 1012[f][i][A]; *Matter of Lah De W. [Takisha W.*], 78 AD3d 523 [1st Dept 2010]).

The court also properly found neglect based on the mother's regular misuse of marijuana in the home while the children were present (*see* Family Ct Act § 1012[f][i][B]; *Matter of Keoni Daquan A. [Brandon W.—April A.]*, 91 AD3d 414, 415 [1st Dept 2012]). Under the circumstances, petitioner agency was not required to prove actual or imminent impairment to the children (*id.* at 415). There is no basis to disturb the court's

credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3185 The People of the State of New York, Ind. 5038/13
Respondent,

-against-

Marvin Rosario,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber 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 (Gregory Carro, J.), rendered May 20, 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.

ENTERED: FEBRUARY 23, 2017

CLERK

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

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3187-
3188 Index 304009/09

Frank Sokolovic, as Administrator
of the Estate of Marianne Sokolovic, etc.,
Plaintiff-Appellant,

-against-

Throgs Neck Operating Company, Inc.,
Defendant,

Vision Healthcare Services doing
business as Vision Healthcare Staffing,
etc.,
Defendant-Respondent.

- - - - -

Frank Sokolovic, as Administrator of
the Estate of Marianne Sokolovic, etc.,
Plaintiff,

-against-

Throgs Neck Operating Company, Inc.,
Defendant-Respondent

Vision Healthcare Services doing business
as Vision Healthcare Staffing doing business
as A+ Staffing,
Defendant-Appellant.

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Eaton & Torrenzano, LLP, Brooklyn (Jay Torrenzano of counsel), for appellant/respondent.

Kerley, Walsh, Matera & Cinquemani, P.C., Seaford (Lauren B. Bristol of counsel), for respondent/appellant.

Caitlin Robin & Associates, PLLC, New York (Caitlin Robin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about December 18, 2015, which granted defendant Vision Healthcare Services' d/b/a Vision Healthcare Staffing d/b/a A+ Staffing (Vision) motion to enforce the hold harmless in a lien agreement between it and plaintiff, and order, same court and Justice, entered on or about April 7, 2015, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Throgs Neck Operating Company, Inc. (Throgs Neck) seeking summary judgment on its claim for contractual indemnity against Vision, unanimously affirmed, without costs.

The hold harmless agreement executed in connection with Vision settling plaintiff's claim against it provides that plaintiff is to hold Vision harmless from any "claim or action for contribution, indemnification or subrogation arising out of any act or omission of [Vision]." Thus, plaintiff is obligated to hold Vision harmless from the indemnification claim of Throgs Neck. That Vision's employee, a nurse provided to Throgs Neck under a staffing agreement between those two entities, was found to be a special employee of Throgs Neck for the purposes of Throgs Neck's liability to plaintiff did not affect the contract between Vision and Throgs Neck or the nurse's status as a general employee of Vision. And since the act of Vision providing the

nurse to Throgs Neck, and the acts and omissions of the nurse in her care of plaintiff's decedent, led to the imposition of indemnity against Vision, the hold harmless agreement is operable.

While plaintiff argues that he added language to a similar provision in the settlement agreement that would exempt him from indemnifying Vision, said language does not affect the provisions of the hold harmless agreement. At best it creates an ambiguity to be resolved against plaintiff as the drafter of that change (*see Macquarie Holdings [USA] Inc. v Song*, 82 AD3d 566 [1st Dept 2011]).

The staffing agreement between Vision and Throgs Neck provides that Vision "employs health care personnel and is willing to provide such personnel" to Throgs Neck. Vision, however, remains responsible for "maintain[ing] direct responsibility as employer," paying wages, determining withholding, and obtaining worker's compensation and unemployment insurance. Thus, the nurse provided by Vision to Throgs Neck was an employee of Vision so as to trigger the agreement's indemnity provision in favor of Throgs Neck. Vision's contractual obligation, as employer, to indemnify Throgs Neck was not altered or qualified in any way by the court's finding that the nurse was

a special employee of Throgs Neck for the purposes of Throgs Neck's liability to plaintiff (*see State of New York v Breeyear*, 55 AD3d 1033, 1035 [3d Dept 2008]). Vision's argument that Throgs Neck did not show itself free from negligence is unpreserved and, in any event, unpersuasive since the services agreement at issue is not governed by General Obligations Law § 5-321 (*see e.g. Karp v Federated Dept. Stores*, 301 AD2d 574, 575 [2d Dept 2003]).

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

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3189 Edgar Velecela, Index 21738/12
Plaintiff-Respondent,

-against-

Perimeter Bridge & Scaffolding Co.,
Defendant-Appellant,

Shifra Construction Corp., et al.,
Defendants.

_____

Milber Makris Plousadis & Seiden, LLP, White Plains (Gregory Saracino of counsel), for appellant.

Law Offices of Jesse Barab, New York (Hannah Whiteker of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered on or about April 8, 2016, which denied the motion of defendant Perimeter Bridge & Scaffolding Co. (Perimeter) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Perimeter established its entitlement to judgment as a matter of law in this action where plaintiff was injured when he fell from a scaffold erected by Perimeter. Perimeter submitted evidence showing that it did not owe a duty to plaintiff, who was

a third party to its contractual relationship with the property owner of the premises where construction work was being performed (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). In opposition, plaintiff failed to raise a triable issue of fact by failing to demonstrate that Perimeter launched a force or instrument of harm, that plaintiff detrimentally relied on Perimeter's continued performance of its contractual duties, or that Perimeter entirely displaced the property owner's duty to safely maintain the premises (*Espinal* at 140).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3190 The People of the State of New York, Ind. 4214/14
Respondent,

-against-

Frank Marra,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered June 24, 2015, unanimously affirmed.

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

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

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

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3192 The People of the State of New York, Ind. 5310/12
Respondent,

-against-

Gerard Rodriguez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered June 11, 2013, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of five years, with five years' postrelease supervision, unanimously modified, on the law, to the extent of vacating the period of postrelease supervision and remanding the matter for further proceedings in accordance with this decision, and otherwise affirmed.

Defendant is entitled to a remand for the sole purpose of reconsideration of the length of the term of postrelease supervision (*see People v Reynolds*, 57 AD3d 336 [1st Dept 2008], *lv denied* 12 NY3d 787 [2009]). It appears that the court did not realize that it had the discretion to impose a term of postrelease supervision of as little as 2½ years.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3193 Medine Bajrami, Index 21530/14E
Plaintiff-Respondent,

-against-

Twinkle Cab Corp., et al.,
Defendants,

Ortal Taxi Corp., et al.,
Defendants-Appellants.

_____

Marjorie E. Bornes, Brooklyn, for appellants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered February 24, 2016, which denied the motion of defendants Ortal Taxi Corp. and Isaiah Ocansey for summary judgment dismissing the complaint and all cross claims as against them, and granted plaintiff's cross motion for partial summary judgment as to liability as against defendants Twinkle Cab Corp. and Saleh Ahmed, unanimously modified, on the law, to grant Ortal Taxi Corp. and Ocansey's motion for summary judgment, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff was a passenger in a taxi driven by defendant Ahmed, when it struck the rear of a second vehicle owned by

Ortal Taxi Corp. and driven by Ocansey, which had stopped in traffic. A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of that driver to "come forward with an adequate nonnegligent explanation for the accident" (*Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]; *see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]). A claim by the rear driver that "the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence" (*Cabrera* at 553). Thus, whether or not Ocansey stopped suddenly, as Ahmed claimed, Ahmed failed to proffer a nonnegligent explanation for the rear-end collision, or to raise a triable issue of fact as to Ocansey's comparative negligence (*see e.g. Santos v Booth*, 126 AD3d 506 [1st Dept 2015]; *Chowdhury v Matos*, 118 AD3d 488 [1st Dept 2014]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3194 Josephine Caputo, et al., Index 450677/14
Plaintiffs-Appellants,

-against-

Michael R. Koenig,
Defendant-Respondent.

_____

Bronx Legal Services, Bronx (Anne Nacinovich of counsel), for appellants.

Robert Dashow, New Rochelle, for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 19, 2015, which, insofar as appealed from as limited by the briefs, dismissed plaintiffs' claim based on the Fair Debt Collection Practices Act (FDCPA) (15 USC § 1692, *et seq.*), without prejudice, on the ground that the court lacked subject matter jurisdiction over the federal claims, and dismissed all claims by plaintiff Charlene Owens, on the ground of res judicata, unanimously reversed, on the law, without costs, and the FDCPA claim and the claims by plaintiff Owens reinstated.

Given the presumption of concurrent state court jurisdiction over federal claims (*Simpson Elec. Corp. v Leucadia, Inc.*, 72 NY2d 450, 455 [1988]), the FDCPA's expansive expression of jurisdiction to include not only the Federal District courts, but

"any other court of competent jurisdiction" (15 USC § 1692k[d]), and the lack of any explicit statutory directive to the contrary, an unmistakable implication from legislative history, or clear incompatibility between State court jurisdiction and Federal interests (*see Simpson Elec. Corp.*, 72 NY2d at 455), the court improperly dismissed plaintiffs' FDCPA claim.

The court also improperly dismissed all of the claims by Charlene Owens on the ground of res judicata, due to a settlement in a prior case. Owens could not have raised the FDCPA as a counterclaim in the prior case because the plaintiff in that case was the creditor seeking to collect the rent due it, to which the FDCPA is not applicable (*see Monogram Credit Card Bank of Ga. v Mata*, 195 Misc 2d 96, 97 [Civ Ct, New York County 2002]). Nor is there an identity of parties from the prior case, as the creditor in that case is not a party to this case, and defendant in this case was not a party in that case (*see In re Hunter*, 4 NY3d 260, 269 [2005]; *All Terrain Props., Inc. v Hoy*, 265 AD2d 87, 92 [1st Dept 2000]).

Defendant's request for summary judgment is not properly before us, as he did not appeal from the order (*see Hecht v New York*, 60 NY2d 57, 61, 63 [1983]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3195N Benjamin Spivak, etc., Index 653712/15
Plaintiff-Respondent,

-against-

Eric Bertrand, et al.,
Defendants-Appellants,

Modus Operandi, LLC,
Defendant,

Eyeball Digital, Inc., et al.,
Nominal Defendants.

_____

Greenberg Freeman LLP, New York (Michael A. Freeman of counsel), for appellants.

Aguilar Bentley LLC, New York (Ryan Weiner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about February 8, 2016, which granted plaintiff's motion for a preliminary injunction, set an undertaking of $30,000, and enjoined defendants-appellants from cancelling plaintiff's shares in Eyeball on the Floor, Inc. and/or Eyeball Digital, Inc., or forcing him to involuntarily transfer such shares, unanimously modified, on the law, to remand for the fixing of an appropriate undertaking in accordance herewith, and otherwise affirmed, without costs.

Plaintiff established his probable success on the merits (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.* 4 NY3d 839 [2005]) by showing that he was wrongfully terminated from his officer position at Eyeball on the Floor, Inc., without cause, effective December 31, 2015. The parties agree that plaintiff's employment agreement, as written, provided that plaintiff could not be terminated without cause at the end of the initial term (December 31, 2015). "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012] [internal quotation marks omitted]).

Defendants-appellants contend that plaintiff's employment agreement contains a scrivener's error and that the parties intended to allow for termination without cause at the end of the initial term. However, their evidence fails to show "'exactly what was really agreed upon between the parties'" (*Resort Sports Network Inc. v PH Ventures III, LLC*, 67 AD3d 132, 135-36 [1st Dept 2009]; *see also George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]).

Without the preliminary injunction, plaintiff will be irreparably harmed, since his shares in Eyeball on the Floor,

Inc. and Eyeball Digital, Inc. will be automatically transferred to the individual defendants, and he will be stripped of his voting power and decision-making rights, including his right to vote on the potential merger with defendant Modus Operandi, LLC (*see Casita, LP v MapleWood Equity Partners [Offshore] Ltd.*, 60 AD3d 488 [1st Dept 2009]; *Yemini v Goldberg*, 60 AD3d 935, 937 [2d Dept 2009]).

The balance of the equities lies with plaintiff, since, without an injunction, he will lose all his shareholder rights in the companies. In contrast, defendants contend that plaintiff will vote against the merger and the companies will be forced to close, but they presented no evidence that either company is in financial distress.

We find that the amount of the undertaking fixed by the motion court is not rationally related to the damages that defendants-appellants may sustain by reason of an injunction finally determined to have been unwarranted (CPLR 6312[b]; *1414 Holdings, LLC v BMS-PSO, LLC*, 116 AD3d 641, 643-644 [1st Dept 2014]; *London Paint & Wallpaper Co., Inc. v Kesselman*, 138 AD3d

632, 633 [1st Dept 2016]). Accordingly, we remand the matter to Supreme Court to set the amount of the undertaking upon the receipt of competent evidence of the potential losses by the company and the value of the company's hard assets.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Friedman, J.P., Richter, Kapnick, Kahn, JJ.

3196N Country-Wide Insurance Company, Index 652013/15
Petitioner-Appellant,

-against-

Radiology of Westchester, P.C.,
as assignee of Elizabeth Colon,
Respondent-Respondent.

_____

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

Frank S. Patruno Law Offices P.C., Montgomery (Frank S. Patruno of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J), entered August 11, 2015, denying the unopposed petition to vacate a master arbitration award, dated March 17, 2015, which affirmed an arbitrator's award that had granted respondent no-fault insurance benefits, unanimously reversed, on the law, without costs, the petition granted, and the award vacated. The Clerk is directed to enter judgment accordingly.

The master arbitrator's award was arbitrary because it irrationally ignored petitioner's uncontroverted evidence establishing that the assignor failed to appear at the three

scheduled examinations under oath (*cf. Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015]; *Easy Care Acupuncture P.C. v Praetorian Ins. Co.*, 49 Misc 3d 137[A], 2015 NY Slip Op 51524[U] [App Term, 1st Dept 2015]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3197 The People of the State of New York, Respondent, Ind. 5022/10

-against-

Godfrey Molemohi, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered November 13, 2012, convicting defendant, after a jury trial, of assault in the first degree (two counts), assault in the third degree and attempted assault in the third degree, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

Defendant received effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. Initially, we note that defendant

raised some of his ineffective assistance claims in an unsuccessful CPL 440.10 motion, and his motion for leave to appeal to this Court was denied. Accordingly, while all of defendant's claims are still cognizable on direct appeal, our review is limited to the trial record (*see People v Evans*, 16 NY3d 571, 575 [2011]), which does not support a finding of ineffective assistance.

Defense counsel was confronted with the difficult task of raising a doubt on the issue of identity despite overwhelming evidence. At trial, all four eyewitnesses described defendant as wearing a distinctive hat, and three of the eyewitnesses identified him in court. Defendant was wearing the distinctive hat when he was arrested, which corroborated the witness's descriptions, and there was little counsel could do to challenge this fact, through expert testimony on cross-racial identifications or otherwise, as defendant argues he should have done. Their testimony was further corroborated by the facts that an MTA worker regularly saw defendant wearing the hat several times a week in the subway station where the crime occurred, and that he was wearing it two weeks prior to the instant incident when he was arrested for a separate offense inside the same

station. Workers at that station saw defendant so often that they even had a nickname for him based on the distinctive hat.

Similarly, the decision to have defendant testify, notwithstanding the possibility that he could be impeached with his prior inconsistent alibi, was an objectively reasonable strategy, as the People's case would have otherwise gone unrefuted. The record does not conclusively show that defense counsel misapprehended the law regarding impeachment of defendant's testimony with the prior inconsistent notice of alibi, and the court in any case ruled that he could be so impeached before defendant took the stand. Thus, defense counsel was able to meaningfully advise defendant on the potential adverse consequences of taking the stand.

We have considered and rejected defendant's remaining ineffective assistance claims to the extent the trial record permits review of those claims.

Defendant's arrests for fare beating in the same subway station 13 and 15 years before the charged crimes should have been excluded because their potential for prejudice exceeded their probative value on the issue of identity (*see generally People v Ely*, 68 NY2d 520, 530 [1986]). However, any error was harmless, because evidence of defendant's guilt was overwhelming,

and there was no significant probability that these arrests for minor nonviolent offenses affected the outcome of the trial.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3198 Joshua N. Diaz, et al., Index 113516/10
Plaintiffs-Appellants,

-against-

Samuel Almodovar,
Defendant-Respondent,

Manuel J. Zelada,
Defendant.

_____

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

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

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about April 2, 2015, which granted defendants' motion and cross motion for summary judgment dismissing the complaint based on plaintiffs' inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously modified, on the law, to the extent of reinstating plaintiff Lettsome's claims of permanent consequential and significant limitations of use injuries to his lumbar spine, and otherwise affirmed, without costs.

Defendants made a prima facie showing that plaintiff Diaz

suffered no serious injuries to his spine by submitting the affirmed reports of a radiologist who opined that the MRI films of Diaz's cervical and lumbar spine were unremarkable and revealed no evidence of acute trauma (*see Barry v Arias*, 94 AD3d 499 [1st Dept 2012]). Defendants also submitted the affirmed reports of an orthopedist and a neurologist, who found normal range of motion in Diaz's cervical spine and in his lumbar spine when he cooperated (*see Mulligan v City of New York*, 120 AD3d 1155, 1156 [1st Dept 2014]). In opposition, Diaz failed to raise a triable issue of fact since he submitted only the unsigned report of his physician, which was inadmissible (*see Lazu v Harlem Group, Inc.*, 89 AD3d 435 [1st Dept 2011]). Even if the electronic signature sufficed, Diaz's physician failed to examine his cervical spine and plaintiffs submitted no evidence to rebut the findings of defendants' radiologist that Diaz had no spinal injuries.

As to plaintiff Lettsome, defendants met their initial burden by submitting, inter alia, the affirmed reports of their neurologist and orthopedist who found normal range of motion in his cervical spine, and of a different radiologist, who opined that the MRI of Lettsome's lumbar spine revealed chronic

degenerative disc disease and a superimposed disc herniation that was likely degenerative in origin and no evidence of trauma (*see Pietropinto v Benjamin*, 104 AD3d 617 [1st Dept 2013]).

In opposition, Lettsome submitted no evidence to support his cervical spine claim, but raised a triable issue of fact as to his lumbar spine by submitting an affirmed report of his treating physician, who found range-of-motion deficits both months after the accident and recently (*see Shinn v Catanzaro*, 1 AD3d 195, 198 [1st Dept 2003]). The physician also opined that Lettsome's lumbar injuries were causally related to the subject accident. Given the absence of any evidence of degeneration or prior treatment in Lettsome's own medical records, and in light of his relatively young age, his physician's opinion sufficiently rejected the opinion of defendants' expert by attributing the injuries to a different, yet equally plausible, cause, namely, the accident (*see Grant v United Pavers Co., Inc.*, 91 AD3d 499 [1st Dept 2012]). If Lettsome establishes a serious injury at trial, he may recover for all injuries incurred as a result of the accident, even those that do not meet the serious injury threshold (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 550 [1st Dept 2010]).

Defendants demonstrated the absence of a 90/180-day injury by relying on plaintiffs' allegations and testimony that they were confined to bed and home for less than two weeks, and plaintiffs submitted no evidence to raise an issue of fact as to those claims (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3199 G.P. Exports, Index 157244/15
Plaintiff-Appellant,

-against-

Tribeca Design,
Defendant,

Tribeca Design Ltd., et al.,
Defendants-Respondents.

_____

Heitner & Breitstein, Brooklyn (Adam M. Brown of counsel), for appellant.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 28, 2016, which, insofar as appealed from as limited by the brief, denied, without prejudice, that portion of defendants Tribeca Design Ltd. and Tribeca Design Showroom LLC's motion seeking to dismiss the complaint pursuant to Business Corporation Law § 1312(a) and CPLR 3211(a)(3) based upon lack of capacity to maintain the action, and directed plaintiff to comply with Business Corporation Law § 1312(a), unanimously reversed, on the law, without costs, and defendants' motion denied in its entirety.

Defendants failed to meet their burden of demonstrating that plaintiff was a foreign corporation and that its "activities [were] so systematic and regular as to manifest continuity of

activity in New York" that it was required to comply with Business Corporation law § 1312(a) (*Nick v Greenfield*, 299 AD2d 172, 173 [1st Dept 2002]; *see Digital Ctr., S.L. v Apple Indus., Inc.*, 94 AD3d 571, 572 [1st Dept 2012]). Evidence of a single business transaction is insufficient to establish that a foreign corporation is doing business in the State within the meaning of the statute (*see Acno-Tec Ltd. v Wall St. Suites, L.L.C.*, 24 AD3d 392, 393 [1st Dept 2005]). In addition, plaintiff alleges in its complaint that it is an Indian partnership, not a corporation. Defendant failed to prove otherwise.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3200 Karlo Morato-Rodriguez, Index 303634/09
Plaintiff-Appellant,

-against-

Riva Construction Group, Inc.,
Defendant,

1412 Broadway, LLC, et al.,
Defendants-Respondents.

_____

Kagan & Gertel, Brooklyn (Irving Gertel of counsel), for appellant.

Law Office of James J. Toomey, New York (Michael J. Kozoriz of counsel), for Admit One, LLC, respondent.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for 1412 Broadway, LLC, respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered July 21, 2016, which, to the extent appealed from as limited by the briefs, granted defendant 1412 Broadway, LLC's (Broadway) motion to renew plaintiff's motion for partial summary judgment on the issue of Broadway's liability, and, upon renewal, denied plaintiff's motion, unanimously affirmed, without costs.

In a prior appeal brought by defendant Admit One, LLC from an order that, among other things, granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim as against Broadway and Admit One, this Court, among other things,

modified the order to deny plaintiff's motion (115 AD3d 401 [1st Dept 2014]). Broadway, which did not appeal from the motion court's original order, moved to renew plaintiff's motion as against it, arguing that plaintiff's motion should be denied as against it, based on this Court's prior order.

The motion court properly granted Broadway's motion to renew, since this Court's prior order "constituted a change in the law" (*David v Persaud*, 135 AD3d 530, 530 [1st Dept 2016]; *Spierer v Bloomingdale's*, 59 AD3d 267, 267 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009]; *see also* CPLR 2221[e][2]). Upon renewal, the motion court properly denied plaintiff's motion as to Broadway, based on the "law of the case" doctrine (*Persaud*, 135 AD3d at 530; *Spierer*, 59 AD3d at 267).

The rule of *Hecht v City of New York* (60 NY2d 57 [1983]) does not bar Broadway from seeking renewal (*see Koscinski v St. Joseph's Med. Ctr.*, 47 AD3d 685, 685-686 [2d Dept 2008]). Nor is the doctrine of res judicata applicable (*see generally Collins v Bertram Yacht Corp.*, 42 NY2d 1033, 1034 [1977]).

"[A] motion for leave to renew is not subject to any particular time constraints" (*Ramos v City of New York*, 61 AD3d 51, 54 [1st Dept 2009]), and plaintiff fails to show any prejudice resulting from Broadway's delay in making the motion.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3201 The People of the State of New York, Respondent,

Ind. 2244/14

-against-

Ricardo Roman,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 9, 2015, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The verdict convicting defendant of fourth-degree grand larceny but acquitting him of fourth-degree criminal possession of stolen property was not repugnant (*see generally People v Muhammad*, 17 NY3d 532, 539 [2011]), and the court properly denied defendant's application to resubmit the case to the jury. The two crimes have different sets of elements, and in its charge, the court gave each crime's set of elements its own distinct set of definitions. We conclude that given the elements of the two

crimes, as charged to the jury in this case, it is theoretically possible for a person to be guilty of the larceny charge while not guilty of the stolen property charge (*see People v Simmons*, 142 AD3d 884, 885 [1st Dept 2016]; *People v Buford*, 198 AD2d 55 [1st Dept 1993], *lv denied* 82 NY2d 892 [1993]). We do not find *People v Johnson* (70 NY2d 964 [1988], *affg* 133 AD2d 175 [2d Dept 1987]) to be controlling authority to the contrary, because its repugnancy analysis is based on, and limited to, the particular jury charge in that case.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3203 Boris Vishevnik, Index 309850/10
Plaintiff-Appellant,

-against-

Fade Bouna, et al.,
Defendants-Respondents.

_____

Frekhtman & Associates, Brooklyn (Eileen Kaplan of counsel), for appellant.

Thomas Torto, New York (Jeremy M. Weg of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 20, 2015, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish that he suffered a serious injury within the meaning of Insurance Law § 5102(d), and denied plaintiff's cross motion to amend his bill of particulars to add claims of serious injury to his cervical spine, lumbar spine and right shoulder, unanimously modified, on the law, to deny defendants' motion to the extent it sought dismissal of plaintiff's 90/180-day claim and proposed cervical and lumbar spine claims, and to grant plaintiff's cross motion to the extent of granting leave to amend the bill of particulars to add claims of serious injury to

his cervical and lumbar spine, and otherwise affirmed, without costs.

In support of their motion for summary judgment, defendants failed to submit evidence addressing plaintiff's claim that he suffered a nonpermanent serious injury preventing him from performing his customary daily activities for at least 90 of the 180 days following the accident. Since defendants did not meet their prima facie burden on the 90/180-day claim, the burden did not shift to plaintiff and it is unnecessary to consider the sufficiency of his evidence in opposition (*see Singer v Gae Limo Corp.*, 91 AD3d 526 [1st Dept 2012]). If the trier of fact finds that plaintiff sustained a serious injury, it may award damages to compensate him for all injuries proximately caused by the accident, whether or not they meet the serious injury threshold (*id.* at 527).

Defendants did make a prima facie showing that plaintiff did not sustain a serious injury to his right knee, as pleaded in his bill of particulars, or to his right shoulder, cervical spine or lumbar spine. Their expert examined plaintiff and found that he had full range of motion in each of those parts, and no permanent injuries as a result of the accident (*see Birch v 31 N. Blvd.*,

Inc., 139 AD3d 580 [1st Dept 2016]; *Perdomo v City of New York*, 129 AD3d 585 [1st Dept 2015]).

In opposition, plaintiff submitted no medical evidence to support his claims of injury to his right knee or shoulder, and those claims were thus properly dismissed (*see Walker v Whitney*, 132 AD3d 478 [1st Dept 2015]). However, plaintiff submitted the report of his treating physician and certified medical records, which were sufficient to raise issues of fact as to whether he sustained serious injuries to his cervical and lumbar spine as a result of the accident. At several examinations, his physician found objective evidence of cervical and lumbar disc injuries and significant limitations in range of motion. Further, he opined that the elderly plaintiff's injuries were causally related to the accident, notwithstanding a minimal finding of degeneration in his lumbar spine MRI, as he had no prior injuries to those parts (*see Perl v Meher*, 18 NY3d 208 [2011]).

Contrary to defendants' contentions, the physician's report was properly affirmed "under the penalties of perjury" (CPLR 2106; *cf. Offman v Singh*, 27 AD3d 284 [1st Dept 2006]), and the certified medical records may be considered for the purpose of demonstrating that plaintiff sought medical treatment for his claimed injuries contemporaneously with the accident and

continuing for a significant period of time thereafter (*Ortiz v Salahuddin*, 102 AD3d 617 [1st Dept 2013]).

Since plaintiff demonstrated that defendants would not be prejudiced or surprised by their proposed amendments to the bill of particulars, and demonstrated the potential merit of his claims of serious injury to his cervical spine and lumbar spine, his motion for leave to amend the bill of particulars should have been granted to that extent (*compare Henchy v VAS Express Corp.*, 115 AD3d 478, 479 [1st Dept 2014]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3204 The People of the State of New York, SCID 30080/13
Respondent,

-against-

Norman C. Martin,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (James M. Burke, J.), entered June 17, 2013, which adjudicated defendant a level three sexually violent predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant could not have been prejudiced by the court's denial of his request for an adjournment for the purpose of obtaining additional information about his health, because the court expressly stated that it accepted as true defense counsel's

description of defendant's medical condition and the content of the documentation counsel sought to provide, but that it did not consider defendant's medical condition a sufficient basis for a downward departure under all the circumstances. Accordingly, we find that a remand for a new proceeding is not warranted.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3205 Lampert Capital Markets, Inc. formerly known as ICM Capital Markets Ltd., etc., Plaintiff-Appellant, Index 152235/13

-against-

ICMC Holdings LLC, Defendant-Respondent.

- - - - -

ICMC Holdings LLC, Third-Party Plaintiff-Respondent,

-against-

ICM Capital Markets Ltd., et al., Third-Party Defendants.

_____

Herrick, Feinstein LLP, New York (Jonathan L. Adler counsel), for appellant.

Baker & Hostetler LLP, New York (Tatiana Markel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about January 13, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff and third-party defendants' motion for summary judgment on Lampert Advisors LLC's counterclaim for specific performance of a term sheet and dismissing defendant/third-party plaintiff's third counterclaim/third-party claim for unjust enrichment, unanimously affirmed, without costs.

The evidence does not establish as a matter of law that the parties intended the term sheet to be an enforceable agreement, rather than an agreement to agree (*see Offit v Herman*, 132 AD3d 409 [1st Dept 2015]).

In view of the foregoing, the unjust enrichment claim was correctly sustained.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3206 In re Jeffrey A.,

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

_____

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

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

_____

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about June 22, 2015, 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 sexual abuse in the first degree (two counts) and sexual abuse in the third degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's fact-finding determination was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. Despite minor inconsistencies in her account,

the victim gave a generally consistent description of the sexual abuse, providing details that an eight-year-old would be unlikely to be able to fabricate. The victim's recantation of her allegations, made to an another child, was satisfactorily explained and did not render her trial testimony incredible.

In the course of challenging the sufficiency and weight of the evidence, and arguing that the petition should be dismissed on that basis, appellant also challenges several evidentiary rulings made by the court. However, were we to find that any of these rulings constituted reversible error, the proper remedy would be a remand for further proceedings rather than a determination that the court's finding was based on legally insufficient evidence or was against the weight of the evidence (*see Matter of Clint B.*, 96 AD3d 534 [1st Dept 2012]). In any

event, we find that none of appellant's evidentiary claims warrant reversal.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3207 The People of the State of New York, Ind. 3757/15
Respondent,

-against-

David Garcia,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered October 29, 2015, unanimously affirmed.

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

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

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

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3208-
3209 The People of the State of New York, Respondent,

-against-

Androsfky Adames,
Defendant-Appellant.

Ind. 1023/04
1491N/04

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

Androsfky Adames, appellant pro se.

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

Appeal from judgments, Supreme Court, New York County (James A. Yates, J. at plea; Ronald A. Zweibel, J. at sentencing), rendered December 6, 2013, convicting defendant of criminal possession of a controlled substance in the first and second degrees, and sentencing him, as a second felony drug offender, to an aggregate term of 15 years to life, held in abeyance, and the matter remitted for further proceedings in accordance herewith.

It is undisputed that the court did not warn defendant during the plea proceeding that he could be deported as a result of his guilty plea (*see People v Peque*, 22 NY3d 168, 176 [2013]; *cert denied sub nom. Thomas v New York*, 574 US __, 135 S Ct 90

[2014]). However, the record on appeal is unclear as to whether defendant, who was born outside the United States, is a citizen, with the People contending that he is and defendant insisting that he is not, and with both sides citing inconclusive information. Accordingly, we remand so that the court can first resolve this factual question. If the court should determine that defendant is not a U.S. citizen, he must then be afforded the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had the court advised him of the possibility of deportation (*id.* at 198).

We have considered and rejected the People's remaining arguments for affirmance, as well as defendant's pro se argument for dismissal.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3210 In re Peter Ciollo, Index 100228/15
Petitioner,

-against-

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

_____

London & Worth, LLP, New York (Howard B. Sterinbach of counsel), for petitioner.

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

_____

Determination of respondents, dated November 26, 2014, terminating petitioner's position as a police officer with respondent New York City Police Department (NYPD), unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Margaret A. Chan, J.]), entered October 5, 2015), dismissed, without costs.

The Deputy Commissioner's findings of misconduct, sexual and otherwise, were supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). The Deputy Commissioner, while pointing out the victim's credibility issues, found that a preponderance of the credible evidence — namely, the forensic computer records, text

messages, controlled calls, and petitioner's own statements upon his arrest — supported the minor victim's version of the events. Further, the investigating officer's testimony and the Deputy Commissioner's finding that petitioner did not satisfy his duty to provide his commanding officer with his current address, are entitled to deference (*see Matter of Tommy & Tina, Inc. v Department of Consumer Affairs of City of N.Y.*, 95 AD2d 724, 724 [1st Dept 1983], *affd* 62 NY2d 671 [1984]).

Given the sensitive nature of the case and the victim's desire not to testify in front of her mother, the Deputy Commissioner providently exercised her discretion in closing the hearing to the public only during the victim's testimony (38 RCNY 15-04[g]; *see e.g. People v Vredenburg*, 200 AD2d 797, 798 [3d Dept 1994], *lv denied* 83 NY2d 859 [1994]).

The penalty of termination does not shock the judicial conscience, given the findings of petitioner's sexual misconduct with a minor (*see Matter of Tighe v Kelly*, 305 AD2d 274, 274 [1st Dept 2003], *lv denied* 100 NY2d 513 [2003]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3211 Tod A. Wender, Index 157024/12
Plaintiff-Appellant,

-against-

GA Global Markets, LLC,
Defendant-Respondent.

_____

Zabell & Associates, P.C., Bohemia (Saul D. Zabell of counsel), for appellant.

Sheppard, Mullin, Richter & Hampton, LLP, New York (Kevin J. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered August 25, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie its entitlement to summary judgment. Plaintiff's disparagement of defendant and disclosures of certain information to clients and competitors violated the parties' employment agreement and constituted cause for termination. In opposition, plaintiff failed to raise a triable issue of fact, even considering his affidavit. His speculative contention that his employment was terminated because of personal animosity is belied by the record.

The employment agreement provided that defendant would give plaintiff written notice of the cause for termination and an opportunity to cure a failure, "to the extent the failure is curable, as determined by [defendant] in is sole discretion." Because any written notice of cause as a condition precedent to termination would have been futile, defendant was relieved of that obligation (*see J. Petrocelli Constr., Inc. v Realm Elec. Contrs., Inc.*, 15 AD3d 444, 446 [2d Dept 2005]).

The reduction in plaintiff's salary was done in accordance with the terms of his employment contract, and therefore does not constitute a violation of Labor Law § 193 (*see Cuervo v Opera Solutions LLC*, 87 AD3d 426 [1st Dept 2011]). Nor does it constitute conversion or unjust enrichment. The unjust enrichment claim must be dismissed for the additional reason that there is no dispute as to the existence of a valid contract (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]; *Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]).

Defendant's counterclaims do not constitute a basis for plaintiff's claim of retaliation in violation of Labor Law § 215(1) (*see Arevalo v Burg*, 129 AD3d 417 [1st Dept 2015]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3212 Shanisha Wilson, Index 302005/12
Plaintiff-Appellant,

-against-

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

_____

Jeffrey W. Rizzo, Bronx, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered September 21, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the false arrest, false imprisonment, assault, and battery claims, and denied plaintiff's motion for partial summary judgment on the false arrest and false imprisonment claims, unanimously affirmed, without costs.

Defendants established prima facie that the arresting officer had probable cause to arrest plaintiff for criminal trespass in the third degree (Penal Law § 140.10[a]). The theater manager had reported to the police that plaintiff and others in her group were smoking marijuana and engaging in disruptive behavior, and had refused the manager's repeated

directives to leave the theater. Upon entering the theater, the officer detected the odor of marijuana. He watched the group refuse to leave when, at his behest, the manager asked again (*see People v Bigelow*, 66 NY2d 417 [1985]). Plaintiff failed to raise an issue of fact; indeed, her version of the events alone supports a finding of probable cause for her arrest for criminal trespass.

Plaintiff offered no competent proof to show that the officer's allegedly excessive force was unreasonable in the face of her active resistance to arrest (*see Koeiman v City of New York*, 36 AD3d 451 [1st Dept 2007], *lv denied* 8 NY3d 814 [2007]). Plaintiff also failed to show that she suffered compensable injury.

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: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3213 The People of the State of New York, Ind. 492/14
Respondent,

-against-

Frank Texidor,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Stephen J. Kress 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 (Gregory Carro, J.), rendered May 7, 2014,

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

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

ENTERED: FEBRUARY 23, 2017

CLERK

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

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3214 In re Christopher Woods, Index 100402/14
Petitioner-Appellant,

-against-

Kathryn Garcia, etc., et al.,
Respondents-Respondents.

_____

Law Office Robert N. Felix, New York (Robert N. Felix of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered October 13, 2015, inter alia, denying the petition to annul respondent Sanitation Department's determination, dated January 23, 2014, which terminated petitioner's employment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination terminating petitioner's employment was rational and not affected by an error of law (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

The record substantiates the special referee's findings that the field supervisor and garage supervisor on duty on the date of

the incident communicated to petitioner an order to submit to substance abuse testing and that petitioner disregarded that order (*see Andersen v Weinroth*, 48 AD3d 121, 133 [1st Dept 2007]; *Kardanis v Velis*, 90 AD2d 727 [1st Dept 1982]).

Petitioner's contention that the field supervisor violated departmental procedure governing paperwork is not supported by the record. In any event, such a violation would not affect the dispositive issue, which is whether respondent disregarded a substance use testing order (*see generally People v Middleton*, 36 AD3d 941 [2d Dept 2007], *lv denied* 8 NY3d 948 [2007]). That issue, as well as the credibility issue presented by the conflict between the garage supervisor's testimony that he told petitioner to go upstairs to be drug tested and his earlier handwritten, notarized statement that there was a "good chance" that petitioner did not hear the order in the noisy garage, was

resolved by the referee against petitioner on the basis of credibility determinations that are entitled to great weight (*see McFadden v Bruno*, 37 AD3d 177, 177 [1st Dept 2007]).

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3215 Amanda Espy, Index 301957/12
Plaintiff-Respondent,

-against-

Peter Espy,
Defendant-Appellant.

_____

Orenstein & Orenstein, LLC, New York (Keith S. Orenstein of counsel), for appellant.

Newman & Denney P.C., New York (Briana Denney of counsel), for respondent.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered June 22, 2016, which, in this postjudgment matrimonial proceeding, to the extent appealed from as limited by the briefs, granted plaintiff's motion for an order directing defendant to pay 80% of the private school expenses of the parties' child, unanimously affirmed, without costs.

Supreme Court properly determined that defendant was responsible for 80% of the private school educational expenses of the parties' child. "The terms of a separation agreement incorporated but not merged into a judgment of divorce operate as contractual obligations binding on the parties" (*Matter of Gravlin v Ruppert*, 98 NY2d 1, 5 [2002]). Contrary to defendant's contention, his refusal to give his explicit consent to the child

attending a certain private school did not absolve him of his contractual obligations. Pursuant to the parties' custody and settlement agreements, in the event of a dispute regarding a "major matter," including the child's education, the dispute resolution process included seeking judicial intervention. Here, under the circumstances presented, we agree with Supreme Court that defendant's actions, which included a failure to seek such judicial intervention, amounted to acquiescence to the child's enrollment in the private school (*see Matter of Parker v Parker*, 74 AD3d 1076 [2d Dept 2010]).

To the extent defendant claims he should be relieved of his contractual obligation to pay for the child's educational expenses because he cannot afford the private school, the argument is unavailing. The settlement agreement did not make consideration of financial factors a precondition to defendant's obligation to pay his share of the child's private school costs (*see Friedman v Friedman*, 143 AD3d 665, 668 [2d Dept 2016]). Furthermore, defendant failed to provide any evidence to

establish his claimed economic distress (*see Lennard v Lennard*, 97 AD2d 713 [1st Dept 1983]).

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: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3216 Norcast S.ar.l., et al., Index 651925/12
Plaintiffs-Appellants,

-against-

Castle Harlan, Inc.,
Defendant-Respondent.

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Sanford I. Weisburst of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Scott D. Musoff of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 28, 2016, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the fraud-based and unjust enrichment claims, unanimously affirmed, without costs.

This action arises from the sale of a business by plaintiffs to a special purpose vehicle part-owned by defendant. Plaintiffs claim that defendant fraudulently induced them to sell the business for the deflated purchase price of $190 million by concealing the true identity of the buyer, a competitor business.

Plaintiffs' fraud-based claims (including fraud, conspiracy to defraud, fraud in the inducement, negligent misrepresentation, and aiding and abetting fraud) were properly dismissed because

the damages sought were impermissibly speculative. Damages for fraud are calculated according to the "out-of-pocket" rule and must reflect "the actual pecuniary loss sustained as the direct result of the wrong" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Damages may only properly compensate plaintiffs for "what they lost because of the fraud, not . . . for what they might have gained," and "there can be no recovery of profits which would have been realized in the absence of fraud" (*id.*). Here, plaintiffs seek to recover the profits they might have gained had the true identity of the buyer been revealed. But there is no way of knowing what purchase price would have been agreed upon had the buyer's identity been known. Nor is there any suggestion that the agreed price was unfair, as it was voluntarily accepted by plaintiffs, who had their own financial advisors, as the result of a competitive bidding process and was $20 million higher than the next highest bid.

Plaintiffs's fraud-based claims also fail because their reliance on the alleged misrepresentations was not reasonable. Plaintiffs did not press defendant for a contractual warranty regarding the purchaser's identity, or even for direct answers to their questions on this subject, despite their awareness of defendant's close relationship with their competitor and

suspicions regarding its involvement. "[W]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required" and "[i]t cannot reasonably rely on such representations without making additional inquiry to determine their accuracy" (*Global Mins. & Metals Corp. v Holme,* 35 AD3d 93, 100 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). Where, as here, "a party fails to make further inquiry or insert appropriate language in the agreement for its protection, it has willingly assumed the business risk that the facts may not be as represented" (*id.*).

Plaintiffs' unjust enrichment claim was also properly dismissed. To successfully plead unjust enrichment, "[a] plaintiff must allege 'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered'" (*Philips Intl. Invs., LLC v Pektor*, 117 AD3d 1, 7 [1st Dept 2014]). Here, the second element is not satisfied. Plaintiffs claim that defendant was unjustly enriched by a $25 million fee received from the competitor for its assistance in facilitating the purchase. Although there is no black-and-white rule that the payment complained of must have been made by the plaintiff itself (*see e.g. County of Nassau v*

Expedia, Inc., 120 AD3d 1178, 1179-1180 [2d Dept 2014]; *Harper-Lawrence, Inc. v Intershoe, Inc.*, 270 AD2d 8, 11-12 [1st Dept 2000]; Restatement 3d of Restitution & Unjust Enrichment, § 48), plaintiffs' claimed entitlement to the fee is too speculative to support their allegation that defendant was enriched "at [their] expense" (*Philips* at 7).

The unjust enrichment claim is also foreclosed by the existence of a valid and enforceable written contract governing the subject matter - i.e., the Share Purchase Agreement (*see Maor v Blu Sand Intl. Inc.*, 143 AD3d 579, 579 [1st Dept 2016]). This is true even though defendant is a third-party nonsignatory to the agreement (*see id.; Kordower-Zetlin v Home Depot U.S.A., Inc.*, 134 AD3d 556, 557-558 [1st Dept 2015]).

Because we dismiss this case, we need not reach the parties'

arguments regarding the appropriateness of plaintiffs' requests for punitive damages and attorneys' fees and whether Pala Investments Ltd. has standing.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3217 Calvin Black, Index 113716/11
Plaintiff-Respondent,

-against-

Wallace Church Associates, et al.,
Defendants-Appellants,

Mock Turtle Bay Properties, LLC,
Defendant.

_____

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for appellants.

Calvin Black, respondent pro se.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered January 29, 2016, which, insofar as appealed from, denied the cross motion of defendants Wallace Church Associates, Robert Wallace and Stanley Church (collectively defendants) for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the cross motion granted. The Clerk is directed to enter judgment dismissing the complaint in its entirety.

Dismissal of the complaint as against defendants is warranted in this action where plaintiff janitor alleges that he was injured when he slipped on pebbles on the bathroom floor of the building he was hired to clean. It is well established that

a maintenance or cleaning worker has no claim at law for injury suffered from a dangerous condition that he was hired to remedy *(see Jackson v Board of Educ. of City of N.Y.,* 30 AD3d 57, 63 [1st Dept 2006]; *see also Imtanios v Goldman Sachs,* 44 AD3d 383, 385 [1st Dept 2007], *lv dismissed* 9 NY3d 1028 [2008]), and here, plaintiff stated that as part of his job cleaning the bathroom, he frequently removed the pebbles from the floor.

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

ENTERED: FEBRUARY 23, 2017

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Gische, Webber, JJ.

3218N In re Pictet Funds (Europe) S.A., et al., Petitioners-Respondents, Index 650127/15

-against-

Emerging Managers Group, L.P., et al., Respondents-Appellants.

_____

Mandel Bhandari LLP, New York (Rishi Bhandari of counsel), for appellants.

Mayer Brown LLP, New York (Robert W. Hamburg of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Saliann Scarpulla, J.), entered October 29, 2015, which, in this proceeding brought pursuant to CPLR article 75, granted the petition to permanently stay the arbitration commenced by respondents against petitioners, unanimously affirmed, without costs.

Petitioner Pictet Funds (Europe) S.A. (Pictet) and the predecessor of respondent Emerging Managers Group, L.P. (EMG) entered into a relationship management agreement, which contained a governing law provision expressly stating that "all matters related to [the agreement's] validity, construction, performance and enforcement" shall be governed by Swiss law and determined

exclusively in Geneva, Switzerland. Nevertheless, the provision provided that, if there was a dispute "related solely to fees payable," then EMG's predecessor could initiate a FINRA-administered Dispute Resolution arbitration, in New York, NY. In 2014, a dispute arose as to whether EMG properly performed under the agreement, or whether Pictet breached the agreement, and EMG demanded arbitration of its breach of contract claim.

The motion court, relying on the reasoning of the Federal District Court (SDNY) in a prior action between these same parties, properly decided the issue of arbitrability, since the parties did not a make a "clear and unmistakable agreement" to arbitrate that gateway issue (*Matter of Monarch Consulting, Inc. v Nat'l Union Fire Ins. Co. of Pittsburgh PA*, 26 NY3d 659 [2016]; *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 45-46 [1997]). The motion court also properly determined that the parties did not agree to arbitrate the breach of contract claim, as the claim does not solely relate to fees payable (*see Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]).

Because there was no agreement to arbitrate EMG's claim, the CPLR 7503(c) deadline is not a bar to Pictet's petition for a stay (*see Matter of Matarasso [Continental Cas. Co.]*, 56 NY2d 264

[1982]; *Matter of Allstate Ins. Co. v LeGrand*, 91 AD3d 502, 502 [1st Dept 2012]; *see also LJL 33rd St. Assocs., LLC v Pitcairn Props. Inc.*, 725 F3d 184, 191-192 [2d Cir 2013], *cert denied* __ US __, 134 S Ct 2289 [2014]).

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

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

ENTERED: FEBRUARY 23, 2017

CLERK

Mazzarelli, J.P., Andrias, Saxe, Feinman, Gische, JJ.

2205 Norddeutsche Landesbank Girozentrale, et al., Plaintiffs-Respondents-Appellants, Index 651695/15

-against-

Lynn Tilton, et al., Defendants-Appellants-Respondents.

_____

Gibson, Dunn & Crutcher LLP, New York (Caitlin J. Halligan of counsel), for appellants-respondents.

Berg & Androphy, New York (Michael M. Fay of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 17, 2016, affirmed, with costs.

Opinion by Mazzarelli, J.P. All concur except Andrias and Saxe, JJ. who dissent in part in an Opinion by Andrias, J.

Order filed.

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2544 Karolina Hagman doing business as Karolina Hagman Interior Design, Plaintiff-Appellant, Index 154708/15

-against-

Kristen Swenson, et al., Defendants-Respondents.

_____

The Law Office of Greg Curry, P.C., Hauppauge (Greg Curry of counsel), for appellant.

Cohen & Gresser, LLP, New York (Nathaniel P.T. Read of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 25, 2016, modified, on the law, to reinstate plaintiff's breach of contract claim, and otherwise affirmed, without costs.

Opinion by Acosta, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
David B. Saxe
Paul G. Feinman
Judith J. Gische, JJ.

2205
Index 651695/15

_____x

Norddeutsche Landesbank Girozentrale, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Lynn Tilton, et al.,
Defendants-Appellants-Respondents.

_____x

Cross appeals from the order of the Supreme Court, New York County (Eileen Bransten, J.), entered March 17, 2016, which granted the part of defendants' motion seeking to dismiss the negligent misrepresentation claim, and denied the part of the motion seeking to dismiss the fraudulent misrepresentation claim.

Gibson, Dunn & Crutcher LLP, New York (Caitlin J. Halligan, Randy M. Mastro, Lawrence J. Zweifach and Mark A. Kirsch of counsel), for appellants-respondents.

Berg & Androphy, New York (Michael M. Fay, Jenny H. Kim and Chris L. Sprengle of counsel), for respondents-appellants.

MAZZARELLI, J.P.

In January 2005, plaintiffs purchased $75 million of notes issued by the collateralized debt obligation (CDO) fund Zohar II 2005-1, Limited (Zohar II). In April 2007, plaintiff purchased $60 million of notes issued by CDO fund Zohar III, Limited (Zohar III and, together with Zohar II, the Funds). Pursuant to collateral management agreements with the Funds, defendant Patriarch Partners, LLC (Patriarch LLC) was engaged to select and manage the collateral to be held by the Funds. Defendants Patriarch Partners XIV, LLC (Patriarch XIV) and Patriarch Partners XV, LLC (Patriarch XV) are controlled by Patriarch LLC and defendant Lynn Tilton, and are the respective collateral managers of Zohar II and Zohar III. Tilton is the principal and controlling member of the Patriarch entities. At least as far as the indentures governing the Funds represented them to be, the Funds were ordinary CDOs, that is, they were supposed to hold debt obligations. Further, the Funds were "blind," meaning that investors like plaintiffs did not know the identities of the companies to whom the loans that made up the Funds were made (the Portfolio Companies).

In March, 2015, the Securities and Exchange Commission commenced administrative and cease-and-desist proceedings against defendants (as well as against one other Zohar fund not involved

in this litigation), alleging that Tilton and the Patriarch entities defrauded the Funds and their investors "by providing false and misleading information, and engaging in a deceptive scheme, practice and course of business, relating to the values they reported for these funds' assets." The order commencing the proceeding directed that cease-and-desist proceedings be commenced to determine whether their allegations were true, and whether remedial action was appropriate in the public interest.

According to plaintiffs, the SEC proceeding alerted them to the need to perform their own investigation into their investment in the Funds. They claim that, upon the completion of that investigation, they concluded that the Funds were not CDOs at all. Rather, plaintiffs contend that, unbeknownst to them because of deliberate concealment by defendants, the Funds were de facto private equity funds. Plaintiffs claim to have discovered that defendants used the proceeds from Fund investors to obtain controlling positions in the Portfolio Companies, which turned out to be distressed and already at risk of failure. Further, they discovered that defendants purposely siphoned off the value in the Portfolio Companies to the point that they collapsed, including by taking excessive management fees for themselves, causing significant losses to plaintiffs and other investors. Less than two months after the SEC commenced its

proceeding, plaintiffs commenced this action. Their complaint asserts two causes of action, for fraudulent misrepresentation and for negligent misrepresentation.

Defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(7). They argued that the claims are barred under the applicable six-year statute of limitations for fraud, because plaintiffs filed their complaint 10 years after they made their investments. They further argued that plaintiffs could not avail themselves of the fraud discovery toll, contending that they were on notice of their claims as early as 2009, based on numerous disclosures made to them by defendants over a lengthy period of time that should have alerted plaintiffs that the Funds were not garden variety CDOs. These disclosures included the indentures governing the issuance of the Funds. Defendants pointed out that the Zohar II indenture detailed CDOs to be acquired by Zohar II from another fund, and that with respect to 23 out of the 27 borrowers listed therein, the other fund "owns equity interests in each such borrower, which equity interests. . . are also being transferred to [Zohar II]."

Defendants also directed the court to certain marketing materials released by them in February 2007 with respect to the Funds, known as the "Patriarch Presentation." The Patriarch Presentation disclosed that "[o]n January 13, 2005, Patriarch

closed a $1.1 billion CDO, Zohar II, Limited, in order to purchase companies and originate loan assets to companies undergoing pervasive change." The Patriarch Presentation further showed Zohar II's projected equity interest in various Portfolio Companies. Zohar's projected equity interest in several of the companies was shown as 100%, and its interest in various other companies was reflected as high as between 80% and about 96%. The Patriarch Presentation also disclosed Zohar III's projected equity interests in various entities of up to 40%. Defendants assert that, in total, the Patriarch Presentation disclosed that the Funds' combined equity interests exceeded 50% for 23 Portfolio Companies, and amounted to a 100% interest in seven Portfolio Companies.

The Patriarch Presentation further disclosed that the Funds' investment strategies included "[p]urchasing power to acquire companies by way of myriad sales processes including direct negotiations and acquisitions, Section 363 sales (in Bankruptcy) and Article 9 foreclosure sales (under the Uniform Commercial Code) with the subsequent re-levering of capital structures to meet such companies' and the Zohar funds' debt-financing requirements." In addition, it provided that "the Zohar asset yield is a product of a high yield current coupon combined with added loan accretion, preferred equity and common equity

interests ... the enhanced quality of the assets reduces the default probability of the portfolio and renders the added preferred loan and equity returns, in most cases, highly collectable."

Defendants also relied on the transcript of a December 12, 2011 Zohar III investor call, in which plaintiffs participated and in which they declined an opportunity to ask questions. The purpose of the call was for Tilton to discuss Zohar III's performance with investors and to allow investors to ask Tilton any questions. Tilton explained that

> "[the Funds] were raised to buy the loans and the equity of distressed companies. And when I say the equity, not buy the equity, but we agreed to contribute the equity of the companies that we purchased into these deals in whole or in part. And most of the time when the equity was purchased, it was purchased with my own money ... these funds are completely dependent upon the upside potential [i.e., growth] of these companies, which is one of the reasons that we agreed to do that, because we buy very distressed companies, either in Article 9 foreclosure sales or through bankruptcy 363 sale or through asset sales, and the theory is always taking that long journey of rebuilding companies and creating values. And so the feeling for us would be that if you were only putting the loans and not the upside in, that, in my view, it would be taking a lot of risk without sharing the reward. And so these deals were always set up such that we would go out and we would buy these companies, the loans would be made from these funds, sometimes also with asset-based loans

> above them or have been used to replace them, and then a percentage of the equity would be contributed into these funds."
>
> Tilton cautioned that
>
> "it's really important to understand that this is not like in any way typical CDOs, where you're owning pieces of publically traded loans where you can exit at a price. This is [illiquid][i.e., higher risk]. We need to actually create value in the companies and then we need to exit the value in the companies. That said, most CDOs also don't hold the equity value of the companies you don't see that anywhere."

In arguing that plaintiffs had sufficient information to at least begin an inquiry into the true nature of the CDOs well before the commencement of the SEC proceeding, defendants further relied on a publicly available SEC disclosure released by them in February 2012. That disclosure revealed that Patriarch Partners "primarily invests on behalf of its CDO Clients in undervalued, distressed companies or divisions and other assets thereof" and often "seeks to make opportunistic investments on behalf of its CDO Clients with the primary purpose of obtaining influence over or control of financially troubled companies, focusing on 'turning around' these Assets by restoring their value." The filing contained the following several disclosures about the Funds' equity positions in Portfolio Companies, and the risks inherent therein. For example, it stated that:

> "affiliates of the Investment Advisor often may take an equity position in these same companies. Despite being under no legal obligation to do so, these affiliates often transfer to CDO Clients the equity ownership of Assets in which the CDO Clients invest, thereby increasing the potential for returns on such Assets beyond the investments made by the CDO Clients. No credit is given to this equity ownership by the rating agencies and the value of this equity ownership is not used in fee calculations ... This equity ownership also provides an additional potential source of funds."

Finally, defendants cited publicly available court documents, from as early as November 2009 that alleged that the Funds acquired substantial equity stakes in the Portfolio Companies. Defendants also moved to dismiss the two causes of action for failure to state a claim.

The court granted defendants' motion, but only to the extent of dismissing the negligent misrepresentation claim for failure to state a cause of action. Addressing the statute of limitations argument, the court held that plaintiffs were not on notice of their claims until the SEC issued its order in March 2015, and that the Funds' underperformance and downgrades by Moody's, and the disclosures provided by defendants, raised no more than a mere suspicion of fraud, which the court stated is legally insufficient to put plaintiffs on notice. The court concluded that plaintiffs did not omit a possible inquiry or shut

their eyes to facts which called for investigation, noting that defendants had exclusive access to the information from which plaintiffs could have inferred a fraud. Thus, the court concluded that knowledge of the alleged fraud could not be imputed to plaintiffs, and the claims are not time-barred.

The court further found that the complaint sufficiently alleged misrepresentations in the offering documents and marketing materials provided by defendants upon which plaintiffs reasonably relied, that defendants acted deliberately and that plaintiffs suffered damages. The court, therefore, denied the motion to dismiss the fraudulent misrepresentation cause of action. However, the court dismissed the cause of action for negligent misrepresentation after finding that plaintiffs had alleged only an arm's length relationship and no special relationship of trust.

> "On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the Further, plaintiff's submissions in response to the motion must be given their most favorable intendment" (*Benn v Benn*, 82 AD3d 548, 548 [(1st Dept 2011)] [(internal quotation marks and citations omitted]).

Here, it is undisputed that, when plaintiffs commenced the action, six years had passed since plaintiffs made their investments in the Funds. The question, then, is whether plaintiffs discovered, or could with reasonable diligence have discovered, the fraud more than two years before commencement (CPLR 213[8]).

> "The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was possessed of knowledge of facts from which [the fraud] could be reasonably inferred. Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute. Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts" (*Sargiss v Magarelli*, 12 NY3d 527, 532 [2009] [internal quotation marks and citations omitted]).

At the same time, "[i]t is well settled that if a party omits an inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him" (*CSAM Capital, Inc. v Lauder*, 67 AD3d 149, 156 [1st Dept 2009] [internal quotation marks and emphasis omitted]). Loss alone, however, cannot give rise to such a duty to inquire (*id*. at 155).

Defendants maintain that plaintiffs should have inferred the

existence of the fraudulent scheme they allege as early as 2009, based on the various documents and events they present in support of their motion. Plaintiffs counter that the "clues" defendants contend they should have picked up were insufficient for them to establish the crux of their complaint, which is that the Funds were not CDOs, but rather a method by which defendants could use borrowed money to enrich themselves by plundering the Portfolio Companies. Giving to plaintiffs, as we must, the most favorable interpretation of defendants' evidence, we find that plaintiffs had insufficient facts before the SEC proceeding to plead their causes of action.

For example, the Zohar II indenture may have alerted plaintiffs to the fact that a fund that was an affiliate of defendants had transferred equity into the Zohar II fund. However, the existence of equity in the Funds was not something that should have surprised plaintiffs. In fact, the indenture provided that the Funds were permitted to hold equity "kickers" (equity offered by a borrowing company to entice it to lend in the first place), or equity given the lender in a workout of an under-performing loan. As for the Patriarch Presentation, there is nothing defendants can point to that would have alerted plaintiffs that, contrary to the purpose for which the Funds were marketed, defendants intended to immediately use their investment

as a vehicle to acquire companies wholesale for their own benefit. That the Patriarch Presentation included schedules depicting a potential scenario where the Funds had substantial equity in some of the Portfolio Companies does not change that analysis, especially where plaintiffs understood that the Funds could hold equity that was acquired incidentally. Simply put, the Patriarch Presentation does not offer any hint that, as plaintiffs allege, the raison d'ètre for the Funds was to acquire equity.

The investor call also fails as evidence that plaintiffs were aware of the fraud immediately after it occurred. There is no question that Tilton opined in the call that the CDOs at issue were not typical. However, this is far different than a statement consistent with plaintiffs' theory of the case, or even a hint that defendants had misrepresented the nature of the Funds before plaintiffs invested in them. Indeed, some of Tilton's statements in the call are completely at odds with the scheme that plaintiffs allege in their complaint. Again, plaintiffs allege that defendants used *the Funds* to purchase large equity stakes in the Portfolio Companies. Tilton asserted in the investor call that "these deals [i.e., the Funds] were raised to buy the loans and the equity of distressed companies. And when I say the equity, not buy the equity, but we agreed to contribute

the equity of the companies that we purchased into these deals in whole or in part." Plaintiffs maintain that, in referring to "we," Tilton was talking about Patriarch Partners, not the Funds. As noted above, in the present procedural posture, plaintiffs are entitled to the most advantageous reasonable interpretation of the evidence.

The SEC filings similarly offer no direct link to the fraud accusations ultimately leveled by plaintiffs. Those documents disclose that "affiliates" of Patriarch Partners may purchase equity positions in the Portfolio Companies. They do not state, as plaintiffs allege, that they would not be using their own money to do so, but rather would be using the Funds themselves to make those investments. Nor do they suggest that the equity stakes the Funds may obtain would be as a result of the alleged fraud, as opposed to the permitted acquisition of equity through kickers, workouts and other mechanisms anticipated in the indentures. Even if the court documents were sufficient to place plaintiffs on notice of the alleged fraud, we are aware of no authority placing the onus on an investor to monitor all court proceedings concerning its investments, especially where there is otherwise no "wealth of public information that should have put it on inquiry notice of the alleged fraud" (*Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d 685, 689 [1st Dept 2016]).

The cases on which the dissent relies do not compel a different result. For example, in *K-Bay Plaza, LLC v Kmart Corp.* (132 AD3d 584 [1st Dept 2015]), evidence that a commercial tenant had deliberately altered pages in the lease so as to reduce escalated rent payments was directly available to the landlord's accountant more than two years before the landlord commenced suit, in the form of a discrepancy the accountant discovered between what the landlord expected to be paid and what the tenant claimed was due under the altered lease. Similarly, in *Gutkin v Siegal* (85 AD3d 687 [1st Dept 2011]), the plaintiff claimed that the defendants had represented that oil and gas drilling partnerships he invested in would receive 60% of net drilling revenue, but within one year of his investment he began receiving quarterly drilling reports that showed the amount of revenues the partnerships were receiving was significantly less than 60%. In both cases, the plaintiffs received information that was completely at odds with what they claimed was their reasonable expectation, and triggered a duty to inquire. Here, in contrast, plaintiffs have adequately established that evidence offered by defendants in support of their motion is not necessarily inconsistent with plaintiffs' expectations that the Funds could acquire equity, and that in no unambiguous way did that evidence reveal that defendants were using the Funds for the unexpected

and deliberate purpose of acquiring controlling interests in companies in the style of a private equity fund.

Again, we make no conclusive finding that plaintiffs were blind to the scheme they accuse defendants of perpetrating. We merely determine, at this early stage of the litigation, that the evidence presented by defendants can be interpreted in a myriad of ways and does not facially clash with plaintiffs' position that, even having some knowledge that the Funds had an equity component to them, they could not have known before the SEC proceeding the extent to which defendants used plaintiffs' investment to acquire and control the Portfolio Companies, or otherwise had an obligation, based on that evidence, to further investigate. Thus, Supreme Court properly declined to dismiss the fraudulent misrepresentation complaint on statute of limitations grounds, and the viability of the defense must await a fully developed factual record, at which point it can be either decided as a matter of law on a motion for summary judgment, or at a trial.

Further, Supreme Court properly held that plaintiffs had sufficiently alleged the elements of a cause of action for fraudulent misrepresentation. Such a claim is stated when a plaintiff pleads a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance,

justifiable reliance by the plaintiff and damages flowing therefrom (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Further, it must be pleaded with particularity (*id.*; CPLR 3016[b]). Plaintiffs stated a claim for fraud based on specific allegations that defendants knowingly misrepresented the performance of the loans, and their intent to rebuild and sell the Portfolio Companies; that defendants intended to induce plaintiffs to invest, and maintain their investment, in the Funds; that plaintiffs justifiably relied on defendants' misrepresentations, of which they either had no notice or could not have discovered; and that they lost $45 million on their investment. Defendants' alleged present intention not to perform under the terms of the indentures at the time of plaintiffs' initial investment negates defendants' argument that the fraud claim is merely duplicative of one for breach of contract (*see Mañas v VMS Assoc., LLC*, 53 AD3d 451, 453-454 [1st Dept 2008]).

Finally, the negligent misrepresentation claim was correctly dismissed, since plaintiffs failed to allege a special relationship of trust or confidence between the parties to this arm's length transaction (*see Basis Pac-Rim Opportunity Fund [Master] v TCW Asset Mgt. Co.*, 124 AD3d 538 [1st Dept 2015]).

Accordingly, the order of the Supreme Court, New York County

(Eileen Bransten, J.), entered March 17, 2016, which granted the part of defendants' motion seeking to dismiss the negligent misrepresentation claim and denied the part of the motion seeking to dismiss the fraudulent misrepresentation claim, should be affirmed, with costs.

All concur except Andrias and Saxe, JJ. who dissent in part in an Opinion by Andrias, J.

ANDRIAS J. (dissenting in part)

In January and February 2005, plaintiffs, a commercial paper conduit and its administrator, purchased $75 million of notes issued by Zohar II 2005-1, Limited (Zohar II), a collateralized debt obligation (CDO) fund sponsored and managed by defendants. In April 2007, plaintiffs purchased $60 million of notes issued by defendants' Zohar III, Limited CDO fund (Zohar III, and, together with Zohar II, the Funds). The terms of the investments were outlined in deal documents, including indenture agreements.

In May 2015, plaintiffs filed this action against defendants asserting causes of action for fraudulent misrepresentation and concealment, and negligent misrepresentation. Plaintiffs allege that defendants fraudulently induced them to invest in the Funds by making numerous misrepresentations about their purpose, operation and management, and by concealing numerous risks, including their intent to use plaintiffs' investments to acquire substantial equity interests in the portfolio companies and to manage the Funds for their own benefit and profit.

We all agree that the negligent misrepresentation claim was correctly dismissed because plaintiffs failed to allege a special relationship of trust or confidence between the parties to this arm's length transaction. However, I disagree with the majority's conclusion that the motion to dismiss plaintiffs'

fraudulent misrepresentation claim as time-barred was correctly denied because the evidence presented by defendants does not disprove plaintiffs' claim that they could not have known the extent to which their investments were being used to purchase equity interests in the portfolio companies until the Securities & Exchange Commission commenced its proceeding against defendants in 2015. Rather, defendants conclusively established that, more-than two years before the commencement of the action, plaintiffs were provided with notice that the funds at issue were not typical CDOs and included the widespread acquisition of controlling equity interests in the portfolio companies, which gave plaintiffs an adequate basis, with due inquiry, to discover the alleged fraud (*see Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d 685 [1st Dept 2016]). Accordingly, I dissent in part and would dismiss plaintiffs' fraudulent misrepresentation claims.

The statute of limitations for fraudulent inducement is six years from the time of the fraud or within two years from the time the fraud was discovered or, with reasonable diligence, could have been discovered (CPLR 213[8]; *Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]). While plaintiffs commenced this action more than six years after the fraud claim accrued, i.e., when they purchased the notes (*Prichard v 164 Ludlow Corp.*, 49 AD3d

408 [1st Dept 2008]), they assert that the action is timely under the two-years-from-discovery rule because the monthly reports from defendants never revealed the Funds' equity positions and they were not put on notice of defendants' alleged fraud until on or about March 30, 2015, when the SEC issued an order commencing administrative cease-and-desist proceedings against defendants.[1]

"The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was possessed of knowledge of facts from which [the fraud] could be reasonably inferred" (*Sargiss*, 12 NY3d at 532 [internal quotation marks omitted]). "[K]nowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute"(*id.* [internal quotation marks omitted]). However,

> "where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him" *Gutkin v Siegal*, 85 AD3d 687, 688 [1st Dept 2011] [internal quotation marks omitted]).

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[1]In those proceedings, the SEC alleged that defendants had defrauded the Funds and the investors since 2003 by reporting misleading values for the assets held by the Funds and by failing to disclose a conflict of interest arising from the undisclosed approach to categorization of assets by defendant Lynn Tilton, the principal and controlling member of the Patriarch entities defendants.

See also CIFG Assur. N. Am., Inc. v Credit Suisse Sec. (USA) LLC, 128 AD3d 607, 608 [1st Dept 2015] ["Because plaintiff possessed information suggesting the probability that it had been defrauded, and failed to conduct an inquiry at that time, knowledge of the fraud is imputed"], *lv denied* 27 NY3d 906 [2016]).

On a motion to dismiss, "[d]efendants must make a prima facie showing that [the plaintiff] was on such inquiry notice of [their] fraud claims more than two years before the action was commenced. The burden then shifts to [the plaintiff] to establish that even if it had exercised reasonable diligence, it could not have discovered the basis for its fraud claims" (*Aozora Bank, Ltd. v Credit Suisse Group*, 144 AD3d 437, 438 [1st Dept 2016]).

The crux of plaintiffs' complaint is their allegation that defendants falsely represented that the Funds would be operated as typical CDOs, which acquire or originate portfolios of corporate debt, but instead operated them as incredibly risky private equity ventures, using Fund proceeds to finance leveraged buyouts (LBOs) of controlling stakes in distressed companies. Plaintiffs assert that defendants then made loans to the companies, which hampered their operations and ability to pay debts as they came due, and retained them in order to perpetuate

their role as collateral manager so that they could extract millions of dollars in excessive fees from the Funds.

The majority concludes that until the SEC proceeding was commenced in March 2015, plaintiffs had insufficient facts to plead these claims. At the heart of this finding is the majority's belief that plaintiffs' knowledge of the existence of some equity holdings in the Funds was not something that warranted further inquiry because the Funds were permitted to hold incidental equity interests, such as "equity kickers," and that the evidence presented by defendants, which can be interpreted in a myriad of ways, was not enough to alert plaintiffs to the true nature of the Funds.

However, the Zohar II Indenture disclosed in 2005 that Zohar II, at its inception, would purchase equity interests in 24 portfolio companies from another fund of the Patriarch defendants. A February 2007 Patriarch presentation, which plaintiffs received, stated that Zohar II was created "in order to purchase companies," that it focused on the "[a]cquisition of companies during periods of transition," and that the Zohar Funds provide "[p]urchasing power to acquire companies." The presentation also disclosed that the Funds had acquired or were going to acquire equity interests in 37 portfolio companies, including majority stakes in 23, and 100% stakes in seven.

Furthermore, in a December 12, 2011 Investor Call relating to Zohar III, in which plaintiffs participated, Tilton told plaintiffs that it was "really important to understand" that the Funds were "not like in any way typical CDOs", that the Funds "will be made and broken by the ultimate value of the companies, which truly includes all the equity value in these companies, and that you're never going to see until these companies are sold and the cash has come in," and that the monthly reports provided to investors did not include the equity interests held by the Funds. The transcript of the call also shows that plaintiffs were aware that Zohar III's equity holdings were not subject to the various quality tests mandated in the Fund documents and that investors were told that "[t]he only thing we can do is continue to manage these deals for cash, for the cash test, and to try to increase the value of the underlying companies, such that when we sell them, they'll be a huge benefit to the value of the equity which you don't see." While the call was for Zohar III, it also put plaintiffs on inquiry notice with respect to their investment in Zohar II, since much of Tilton's discussion was directed to the Funds generally and since the investment strategies for both Funds appear to be substantially similar.

Thereafter, in 2012, Patriarch publicly filed a Form ADV with the SEC which disclosed that "[o]ften, [Patriarch] seeks to

make opportunistic investments on behalf of its CDO clients with the primary purpose of obtaining influence over or control of financially-troubled companies, focusing on 'turning around' these Assets by restoring their value . . . ." Numerous filings in unrelated lawsuits, bought between 2009 and 2011, also referred to the Funds' direct acquisition of equity interests in portfolio companies. Moreover, plaintiffs knew that the Funds were underperforming when Moody's downgraded them twice before February 2011 and the S&P downgraded the CDOs in 2010.

This satisfied defendants' burden of establishing prima facie that plaintiffs were on inquiry notice of their fraud claims more than two years before the action was commenced in May 2015.

Noting that the investments were marketed as blind funds that did not identify the portfolio companies, plaintiffs argue that since defendants controlled all of the information that was produced in the monthly reports, no investors could have discovered the fraud until the SEC revealed the details of its investigation on March 30, 2015. In this regard, plaintiffs maintain that the disclosures defendants point to, at most, created a mere suspicion of fraud, which is insufficient to impute knowledge of the fraud (*see CSAM Capital, Inc. v Lauder*, 67 AD3d 149, 156 [1st Dept 2009]). Plaintiffs reason that while

investors were told that there could be "equity kickers," which plaintiffs describe as a "small piece of equity granted to a lender in order to improve the rate of return or otherwise incentivize the lender to take on the risk of lending," defendants did not disclose that their investments would be used to purchase controlling equity interests. Thus, plaintiffs posit that it was not until the SEC made public its investigation that they were prompted to conduct their own investigation in which they learned that defendants were operating a risky private equity venture that they were using to generate excessive management fees.

While the majority adopts these arguments, defendants' evidentiary submissions, viewed as a whole, are not consistent with plaintiffs' understanding that the Funds would only receive equity that was "acquired incidentally." Rather, they show that an integral purpose of the Funds was to acquire majority stakes in portfolio companies. While plaintiffs contend that only the possibility of equity kickers was disclosed, the evidentiary materials demonstrate that the Funds were "anything but typical [CDOs], for better or for worse" and had or would obtain majority or 100% stakes in many portfolio companies, putting plaintiffs on notice that the Funds were or would be operating far differently from what they purportedly believed, and that recovering on their

investment would depend, at least in part, on "the sale of [the Portfolio] Companies" (*see K-Bay Plaza, LLC v Kmart Corp.*, 132 AD3d 584, 590 [1st Dept 2015] [the plaintiff was on inquiry notice due to discrepancy between expected proceeds and proceeds actually received]; *see also Gutkin*, 85 AD3d at 688 [the plaintiff "had constructive knowledge of the alleged fraud" from quarterly reports that did not reflect the plaintiff's understanding of the terms of the agreement]). Moreover, none of the disclosures relied on by defendants, which show that the Funds were acquiring controlling interests in portfolio companies, was in defendants' unique possession and plaintiff has not shown how the existence of a blind trust prevented plaintiffs' from discovering the alleged fraud had they exercised due diligence.

Insofar as plaintiffs argue that the equity holdings were concealed because they were not disclosed in the monthly reports, they fail to consider Tilton's disclosure in the 2011 Investor call that the reports did not include the equity interests held by the Funds. This too should have prompted plaintiffs to ask questions, which they did not do despite Tilton's invitation to do so at the conclusion of the call. Nor do plaintiffs offer a viable explanation as to why the disclosures in the ADV filing and other court actions did not give them "notice of operative

facts that should have prompted further inquiry" (*see Rite Aid Corp. v Grass*, 48 AD3d 363, 364 [1st Dept 2008]). To the extent plaintiffs argue that knowledge should not be imputed because they did not have actual notice of the ADV filing or the unrelated court actions, inquiry notice is established where the relevant information was publicly available; there is no requirement of a showing that a plaintiff actually knew the information (*see Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d at 689 ["there was a wealth of public information that should have put [the plaintiff] on inquiry notice of the alleged fraud"]); *CIFG Assur. N. Am. Inc. v Credit Suisse Sec. (USA) LLC*, 128 AD3d at 608).

Plaintiffs' intimation that they were not on notice of defendants' alleged intent not to rebuild the distressed portfolio companies, but to operate them for the primary purpose of continuing to receive management fees or their alleged misleading of investors about the performance of loans so as to extract excessive management fees, does not provide a basis to sustain the fraud claim to that extent. Unlike *CSAM Capital, Inc. v Lauder*, this claim is "merely an additional aspect of a previously alleged fraud" and not "an entirely separate fraudulent act" (67 AD3d at 158). Plaintiffs do not dispute that defendants were entitled to collateral management fees from the

Funds or management fees for their role in managing the portfolio companies. The fraud alleged is that defendants misled plaintiffs to believe that the Funds were ordinary CDOs that would primarily hold debt, not equity, and the excessive fees flowed from the acquisition and management of the portfolio companies. Furthermore, unlike the plaintiffs in *CSAM*, plaintiffs' investigation was not impeded by "nonfraudulent explanations" (17 AD3d at 156).

In sum, viewing the wealth of information disclosed and available to plaintiffs, a person of ordinary intelligence would have been aware that the Funds were not being operated as typical CDOs and that they were acquiring substantial equity interests in the portfolio companies, not incidental interests in limited circumstances. As the wrongful acquisition of equity interests is the basis of plaintiffs' fraud claim, a duty of inquiry on this topic arose more than two years before the

commencement of this action, which plaintiffs did not satisfy. Thus, defendants' motion to dismiss the fraudulent misrepresentation claim should have been granted.

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

ENTERED: FEBRUARY 23, 2017

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
Richard T. Andrias
David B. Saxe
Judith J. Gische, JJ.

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_____x

Karolina Hagman doing business as
Karolina Hagman Interior Design,
Plaintiff-Appellant,

-against-

Kristen Swenson, et al.,
Defendants-Respondents.
_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered February 25, 2016, which granted defendants' motion to dismiss the complaint.

The Law Office of Greg Curry, P.C., Hauppauge (Greg Curry of counsel), for appellant.

Cohen & Gresser, LLP, New York (Nathaniel P.T. Read and Joanna K. Chan of counsel), for respondents.

ACOSTA, J.P.

Mixed transaction contracts, involving both goods and services, require a determination as to whether the transaction is predominantly one for goods or one for services, for statute of limitations purposes. In this case, the issue is raised in the context of a contract that provides for interior design services, including the procurement of furniture and other items required for achieving the desired design. Interestingly, notwithstanding that interior design services are apparently in much demand in New York, to our knowledge, there are no published opinions on this issue in this state. The action arises from an unpaid bill mostly for furniture and other items. The primary question on appeal is whether plaintiff's breach of contract claim is governed by the four-year statute of limitations set forth in UCC 2-725 for breach of a sale-of-goods contract or the six-year statute of limitations in CPLR 213 for breach of a services contract. We find that the transaction in this case is predominantly one for services (*Levin v Hoffman Fuel Co.*, 94 AD2d 640 [1st Dept 1983], *affd* 60 NY2d 665 [1983]), and the sale of goods is merely incidental to the services provided. Accordingly, plaintiff's breach of contract claim is timely.

Plaintiff, an expert in interior and exterior design, alleges that she and defendant Kristen Swenson entered into a

contract in June 2007 for interior design services. The contract provided that Ms. Swenson would be liable for payment of plaintiff's creative design services as well as the cost of furniture and other tangible items needed to achieve plaintiff's vision. Plaintiff alleged in the complaint that the predominant feature of the contract was her creative design services, with the furniture and other tangible items being incidental to such services.

Pursuant to the contract, from December 2007 through July 2010, plaintiff renovated and decorated numerous rooms in defendants' home in Tuxedo Park, New York. She also provided landscaping, exterior painting, and other exterior decorating services, which were billed separately. Plaintiff ultimately performed interior design services for three of defendants' houses. Defendants relied on plaintiff's creativity and vision as well as her choice, arrangement, and placement of each tangible item. Ms. Swenson allegedly accepted and approved plaintiff's designs and all furniture and items that plaintiff chose, placed, and arranged at the Tuxedo Park home.

Plaintiff delivered bills to defendants on a regular basis. The bills included "list prices" for the various items. The "list prices" consisted of the price of furniture and other items that plaintiff paid her suppliers, i.e., the "net price," and

plaintiff's fee for creative design services. Plaintiff alleges that this fee arrangement is standard in the interior design industry. She billed defendants in the same manner for her work at each of the three houses.

According to plaintiff, defendants paid the bills until June 2009. Thereafter, they made only partial payments, or no payments; their last payment was made on or about March 14, 2010. Plaintiff's final bill for services at the Tuxedo Park home was delivered to defendants in July 2010. As of July 2010, defendants had failed to pay $52,859.04 under the contract.

On or about May 11, 2015, plaintiff served a summons and complaint on defendants alleging breach of contract against Ms. Swenson, and unjust enrichment, quantum meruit, and account stated against both defendants.

Defendants moved to dismiss the complaint based upon documentary evidence, on statute of limitation grounds, and for failure to state a cause of action (CPLR 3211[a][1], [5], [7]). Of most relevance here, defendants argued that the contract was predominantly for the sale of goods and was therefore subject to the four-year statute of limitations provided in UCC 2-275. They argue that the undated contract between Ms. Swenson and plaintiff has a provision that states that a design fee of $1,200 will be charged at the start of the job, but that provision had been

crossed out. It also states that the products and materials were to be shown to Ms. Swenson, purchased by plaintiff, and "charged at List price," that "[a]ll advice and design suggestions such as construction, cabinetry, painting and using clients [sic] existing items will be charged at $200/hour," and that "[a]ll purchases including Tax and Delivery will be paid in full before delivery."

There is also a handwritten contract signed by plaintiff and Ms. Swenson, dated June 10, 2009, which states:

> "I Kristen Swenson will purchase all furniture and accessories shown in photos or in person by Karolina Hagman through Karolina Hagman and only from Karolina Hagman.
>
> "I will not purchase or get similar or actual furniture or accessories through someone else or from somewhere else as shown to me by Karolina Hagman.
>
> "I will allow Karolina Hagman and team to photograph and to publish or have published photos to her of my house and the inside of the rooms in Tuxedo Park, NY. [capitalization and spelling regularized]"

In opposition, plaintiff acknowledged that the parties agreed to cross out the $1,200 "design fee" and that Ms. Swenson would not need to pay this fee. Plaintiff states that when they signed the contract, she explained to Ms. Swenson that her creative services fee would be "built as mark-ups, into the cost of the goods/materials" charged to defendants. Defendants allegedly understood the fee structure.

Plaintiff asserted in her affidavit that in addition to her interior design fee, which was incorporated into the list prices, she billed defendants a $200/hour consulting fee. This fee was separate, and included specific items, such as construction, cabinetry, and painting. Of the $52,859.04 outstanding, plaintiff claims that only $4,000 (for 20 hours) is for consulting work in connection with the exterior of the home, kitchen layout, and bathroom layout.

From December 2007 to July 2010, plaintiff designed and decorated the Tuxedo Park home, including living rooms, hallways, dining rooms, sitting rooms, most of the five bedrooms, and three servants' rooms. She spent hundreds of hours designing and **furnishing the home.**

By order entered February 25, 2016, Supreme Court granted defendants' motion to dismiss the complaint. The court reasoned that because the contract discusses "products and materials," and the large majority of the outstanding bills involve goods, the services are "incidental" to the purchase of goods, and the four-year statute of limitations applies, barring the complaint. In addition, the court found that plaintiff failed to state a cause of action against Michael Swenson.

We conclude, to the contrary, that the breach of contract claim is governed by the six-year statute of limitations for

breach of services contracts and is thereby timely. Generally, breach of contract actions are governed by CPLR 213(2), which provides for a six-year statute of limitations. However, breaches of sale-of-goods contracts are governed by the four-year statute of limitations set forth in UCC 2-725. In the instant case there is a "mixed" transaction, involving both goods and services, which requires a determination whether the transaction is predominantly one for goods or predominantly one for services (*Levin v Hoffman Fuel Co.*, 94 AD2d 640 [1st Dept 1983], *affd* 60 NY2d 665 [1983], *supra; see also Wuhu Import & Export Corp. v Capstone Capital, LLC,* 39 AD3d 314, 315 [1st Dept 2007]). "If service predominates and the transfer of title to personal property is an incidental feature of the transaction, the contract does not fall within the ambit of the [UCC]" (*Schenectady Steel Co. v Bruno Trimpoli Gen. Const. Co.*, 43 AD2d 234, 237 [3d Dept 1974], *affd* 34 NY2d 939 [1974]).

While New York courts do not appear to have directly confronted whether an interior design contract is one for goods or services, they have addressed analogous situations. For example, in *Schenectady Steel Co.* (43 AD2d at 237), the Third Department held that a contract for the creation of a bridge, which included the furnishing of structural steel, was a contract for services. Similarly, in *Gibraltar Mgt. Co., Inc. v Grand*

Entrance Gates, Ltd. (46 AD3d 747, 748 [2d Dept 2007]), the Second Department held that a contract for construction of new entrances, which included, inter alia, the purchase of gates, was primarily one for services (*cf. Outdoor Scenes v Grace & Sons, Inc.*, 111 Misc 2d 36, 38 [Civ Ct, Queens County 1981] [concluding that a contract for the purchase and implantation of trees was a goods contract, based on the absence of an argument that the trees were "part of an integral scheme and design," which could allege a "service-oriented contract"]).

Moreover, other jurisdictions that have adopted the predominant purpose test have found interior design contracts to be contracts for services, not goods (*see Kirkpatrick v Introspect Healthcare Corp.*, 114 NM 706, 710-711, 845 P2d 800, 804-805 [1992]; *Connie Beale, Inc. v Plimpton*, 49 Conn. L. Rptr. 200 [Conn Superior Ct 2010]).

In this case, the contract was primarily for interior design services, and the provision of furniture and accessories was merely incidental. Thus, the six-year statute of limitations applies. This conclusion is supported by the fact that plaintiff is an expert in the field of interior design, and it is clear from the contract that Ms. Swenson hired her for that reason. The contract, which is on plaintiff's interior design company's letterhead, states that plaintiff will provide advice and design

suggestions regarding construction, cabinetry, painting, and using the clients' existing items. Plaintiff stated that she designed most of the rooms throughout defendants' Tuxedo Park house, and the contract provides that she will select products and materials, show them to Ms. Swenson, and then purchase them on her behalf. In addition, the contract provides that defendants will be charged "List price," which plaintiff states is understood in the industry to include both the cost of the materials as well as a percentage service fee. Moreover, the contract acknowledges that certain "custom work" will be done by "interior designers work people," and a number of the invoices referenced such "custom made" items. Finally, plaintiff and Ms. Swenson also agreed that plaintiff could use and publish photographs of the items to show off plaintiff's work, which demonstrates that plaintiff's value is attributed to the selection of the various items and putting them together for a particular scheme, not merely to her acting as a retailer.

The motion court improperly focused on the fact that most of the bills at issue listed goods purchased by plaintiff for Ms. Swenson. While the cost of materials greatly exceeds the cost of labor, this factor should not have been the sole consideration; the court should have looked to the nature of the transaction. Plaintiff selected the items purchased, and the contract was

primarily for the value that she added. The fact that title to the furniture and items would transfer to defendants is incidental to the purpose of the contract.

Since defendants do not dispute the existence of the interior design contract, or that the contract covers the issues at hand, the quantum meruit and unjust enrichment claims against ms. Swenson were correctly dismissed as duplicative of the breach of contract claim (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *Scarola Ellis LLP v Padeh*, 116 AD3d 609, 611 [1st Dept 2014]). They were also correctly dismissed as against nonsignatory Michael Swenson (*see Kordower-Zetlin v Home Depot U.S.A., Inc.*, 134 AD3d 556, 557-558 [1st Dept 2015]; *Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313 [1st Dept 1995]). Finally, the account stated claim was correctly dismissed as simply "another means to attempt to collect under a disputed contract" (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 485 [1st Dept 1991]).

Accordingly, the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered February 25, 2016, which granted

defendants' motion to dismiss the complaint, should be modified, on the law, to reinstate plaintiff's breach of contract claim, and otherwise affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 23, 2017

CLERK