SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 1, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Andrias, Saxe, Gische, JJ.

13848 The People of the State of New York, Respondent, Ind. 3671/09

-against-

William Lane, also known as Gary Rice, Defendant-Appellant.

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

William Lane, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Doris M. Gonzalez, J.), rendered December 6, 2010, convicting defendant, after a jury trial, of assault in the first degree and conspiracy in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously reversed, on the law, and the matter remanded for a new trial.

During the course of this trial, the jury sent seven notes to the court; it is the trial court's handling of two of these notes (the third and fifth note), which concern us on this

appeal. The third note, sent by the jury on October 21, 2010 at 4:30 p.m., consisted of three parts. It was sent the same day the jury was charged and began deliberation. In the note, among other things, the jury asked whether it could start "fresh" the next day because they had "a lot of information" to consider. They also asked for extensive read backs (two days' worth) of certain testimony. The court did not read the third note in its entirety into the record then, or at any time thereafter. The record is also devoid of any mention that the note was handed over to the attorneys to read. Instead, the court called the jury back into the courtroom and paraphrased only some aspects of it, omitting other requests of a substantive nature. The next day, October 22, at 1:20 p.m., the jury sent the fifth note stating that it was "deadlocked," indicating some dissension and asking "What should we do? How should we proceed?" Unlike the third note, this one was read into the record verbatim, but the court did not ask the attorneys for any input as to how it should respond. No objections were made.

By only paraphrasing some of the content of the third note, and failing to read the precise content of the that note into the record verbatim at any time, the court violated the procedures

set forth in *People v O'Rama* (78 NY2d 270, 277-278 [1991]), more recently reiterated in *People v Nealon* (__ NY3d __ , 2015 NY Slip Op 07781 [2015]), and previously in *People v Silva* (24 NY3d 294, 299 [2014] *rearg denied* 24 NY3d 1216 [2015]; *see also People v Mendez*, __ NY3d __, 2015 NY Slip Op 07786). A court does not satisfy its responsibility to provide counsel with meaningful notice of a jury's substantive inquiry by summarizing the substance of the jurors' note (*Nealon*, __ NY3d at __, 2015 NY Slip Op 07781 **3 citing *O'Rama*, 78 NY2d at 275, 278-279). The third note, which was a substantive jury inquiry, should not have been paraphrased, but read in its entirety so that counsel had meaningful notice of its contents and, therefore, an opportunity to formulate a proposed response. Although counsel did not object to how the court handled the third note, the court's failure to read this substantive note into the record verbatim, is a "mode of proceedings error," and given this departure, counsel was not required to object to it in order to preserve any claim of error for appellate review (*Nealon*, ___ NY3d at __, 2015 NY Slip Opn 07781 **3-4). In responding to the fifth note, which was read into the record verbatim, the court did not elicit any recommendations or input from counsel in how to respond. Since reversal is required on the basis of the court's departure in handling the third note alone (*id.* at **4 citing *People v*

Walston, 23 NY3d 986, 990 [2014]; *People v Tabb*, 13 NY3d 852, 853 [2009]; *People v Kisoon*, 8 NY3d 129, 135 [2007]), we do not reach the issue of whether the court's departure in handling the fifth note is also a basis for reversal.

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

ENTERED: DECEMBER 1, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, JJ.

14330 The People of the State of New York, Respondent, Ind. 1/11 4635/10

-against-

Alberto Ramirez, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered November 16, 2012, convicting defendant, after a jury trial, of robbery in the first degree, criminal possession of stolen property in the fifth degree and petit larceny, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, unanimously affirmed.

The trial court's handling of the note sent out by the jury during deliberations did not constitute a mode of proceedings error (*see People v Nealon*, __ NY3d __, 2015 NY Slip Op 07781 [2015]; *People v O'Rama*, 78 NY2d 270, 277 [1991]). The note contained two questions and two requests for exhibits. While the court initially read only the first substantive question into the record in the presence of counsel before the jury was brought into the courtroom, once the jury was brought in, the court read

the remainder of the note aloud, essentially[1] verbatim, stopping at the end of each of the four parts to provide its response. Although the court did not inform counsel in advance about the entirety of the note or give the parties any opportunity for input into the court's proposed responses, by reading the full contents of the note in the presence of the parties and the jury, the court satisfied its core responsibility (*id.*).

To the extent the failure to follow the full procedure set forth in *People v O'Rama* (78 NY2d at 277-278) nevertheless constituted error, such error requires preservation for appellate review (*see People v Williams*, 21 NY3d 932, 934-935 [2013]). The claim here is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that defendant was not prejudiced by the lack of full compliance with the *O'Rama* procedures.

The verdict was based on legally sufficient evidence and was

[1] The court's omission of the name of the witness in its reading of the request for "copy of ATT bill for Abraham (witness)" is immaterial, since the only possible response was to provide the bill, which the court did. There could have been no confusion, nor any objection or suggestion relating to the court's response.

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

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

ENTERED: DECEMBER 1, 2015

CLERK

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

16176 The People of the State of New York, Respondent, Ind. 5971/09

-against-

Edward Demirdjian, Defendant-Appellant.

_____

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

Edward Demirdjian, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered April 23, 2013, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

Defendant's challenges to the prosecutor's summation are entirely unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The remarks at issue were generally based on reasonable inferences drawn from the evidence, constituting fair responses to defense counsel's summation arguments, and there was

nothing so egregious as to warrant a new trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

We have considered and rejected defendant's ineffective assistance of counsel arguments, including those raised in his pro se brief (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16242- Ind. 2295/10
16242A The People of the State of New York, 1986/10
Respondent,

-against-

Fabian Faulknor,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Judith Lieb, J.), rendered June 25, 2013, convicting defendant, upon his pleas of guilty, of murder in the second degree and assault in the second degree and sentencing him to an aggregate term of 22 years to life, unanimously affirmed.

Defendant's unpreserved challenges to the validity of his plea do not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline to review them in the interest of justice. As an alternative holding, we find that the plea was knowing, intelligent and voluntary. The record fails to support defendant's assertion that the sentencing court's remarks

violated the plea agreement (*see e.g. People v Jeffrey*, 254 AD2d 230 [1st Dept 1998], *lv denied* 92 NY2d 1033 [1998]). Unlike the situation in *People v Mox* (20 NY3d 936 [2012]), there was nothing in the actual plea allocution that triggered a duty to inquire into an potential insanity defense, and the fact that there had been proceedings under CPL article 730, which had established defendant's competency, did not trigger such a duty of inquiry.

Regardless of whether defendant made a valid appeal waiver, we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16243 In re Tomas Carmona, Index 400082/14
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Lisa H. Blitman, New York, for petitioner.

David I. Farber, New York (Andrew M. Lupin of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority, dated September 23, 2013, which, after a hearing, approved the decision to deny petitioner's remaining family member grievance in connection with his deceased grandmother's apartment, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Michael D. Stallman, J.], entered June 30, 2014), dismissed, without costs.

Respondent's determination has a rational basis and is based upon substantial evidence that petitioner failed to obtain respondent's written consent to his occupancy of the apartment at issue (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]; *Matter of Lieder v New York City Hous. Auth.*, 129 AD3d 644, 645 [1st Dept 2015]).

We reject petitioner's claim that he was denied his right to counsel at the hearing. Respondent is not obligated to assign legal representation in its administrative hearings (*Matter of Folks v New York City Hous. Auth.*, 27 AD3d 270, 271 [1st Dept 2006], *lv denied* 7 NY3d 709 [2006]), and both respondent and the Hearing Officer advised petitioner of his right to retain counsel (*id.*). Further, the guardian ad litem (GAL) adequately represented petitioner's interests at the hearing, by calling witnesses, asking petitioner pertinent questions during his direct examination, and entering evidence into the record on behalf of petitioner (*cf. Matter of Russo v New York City Hous. Auth.*, 128 AD3d 570, 571 [1st Dept 2015] [GAL was not a suitable representative where, among other things, he did not appear to understand the issues framed by the Housing Authority]).

The Hearing Officer considered petitioner's evidence that he was an original family member of the apartment, and properly found it insufficient (*see Matter of Ruiz v New York City Hous. Auth.*, 81 AD3d 465, 466 [1st Dept 2011]). Petitioner's claim is contradicted by his deceased grandmother's 10 most recent affidavits of income, none of which list him as an occupant of her apartment (*see Matter of Dancil v New York City Hous. Auth.*, 123 AD3d 442, 442 [1st Dept 2014]). Further, the evidence does not support petitioner's claim that his grandmother's language

ability prevented her from properly completing her income affidavits (*see Matter of Echeverria v New York City Hous. Auth.*, 85 AD3d 580, 581 [1st Dept 2011]). His grandmother submitted her affidavits of income in English every year and, on the final affidavit of income she submitted before her death, she listed several individuals as occupants of her apartment, none of whom are petitioner.

Petitioner's alleged mitigating circumstances do not provide a basis for annulling respondent's determination, and petitioner may not invoke estoppel against respondent (*see Matter of Ortiz v Rhea*, 127 AD3d 665, 666 [1st Dept 2015]).

We have considered petitioner's remaining contentions, including that respondent's determination constitutes a shocking and disproportionate penalty and an abuse of discretion, and find them unavailing.

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16244 In re Georgette D. W.,
Petitioner-Respondent,

-against-

Gary N. R.,
Respondent-Appellant.

_____

Joel B. Mayer, New York, for appellant.

DiLorenzo & Rush, Bronx (Christopher M. DiLorenzo of counsel), for respondent.

_____

Order, Family Court, Bronx County (Peter Passidomo, J.), entered on or about July 25, 2014, which denied respondent's objections to an order, same court (Anne Marie Loughlin, Support Magistrate), entered on or about March 21, 2014, denying his motion to dismiss the petition for upward modification of his child support obligation, and directing a de novo hearing on the issue of child support, unanimously modified, on the law, to grant the objection to the extent of deleting the directive that a de novo hearing be held and the matter remanded for a modification hearing, and otherwise affirmed, without costs.

Respondent's objections to the March 21, 2014 order were untimely (Family Court Act § 439[e]), and we find that he failed to proffer a reasonable excuse for the delay. Nevertheless, we

exercise our discretion to entertain this appeal (*see* Family Court Act § 1112), since it concerns Family Court's subject matter jurisdiction.

The Support Magistrate stated that she was not "invalidating" the child support provision of the parties' stipulation, which was incorporated but not merged into the judgment of divorce. However, her sua sponte determination that the stipulation's noncompliance with the requirements of the Child Support Standards Act provided a basis for a de novo hearing on child support was tantamount to invalidating the stipulation, which is beyond the power of Family Court (*Matter of Savini v Burgaleta*, 34 AD3d 686 [2d Dept 2006]; *see* Family Court Act § 461).

Respondent's motion to dismiss the petition for failure to plead facts warranting modification of child support was correctly denied since the petition and supporting affidavit allege that respondent does not meet his support obligations, that the child's expenses have increased, and that there has been a significant increase in respondent's financial resources in the

eight years since the parties entered into the stipulation (*see e.g. Matter of Kent v Kent*, 29 AD3d 123, 132-133 [1st Dept 2006]; *Matter of Casolo v Casolo*, 50 AD3d 1196 [3d Dept 2008]; *Ward v Ward*, 79 AD2d 683 [2d Dept 1980], *lv denied* 52 NY2d 705 [1981]).

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16245 The People of the State of New York, Ind. 3771/12
Respondent,

-against-

Carlos Cruz,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered on or about February 27, 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: DECEMBER 1, 2015

CLERK

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

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16246 Chevelle Jenkins Bowles, as
Administratrix of the Estate of
Alease Jenkins, et al.,
Plaintiffs-Appellants,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Law Office of Amy Posner, New York (Marshall Posner of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered April 30, 2014, which granted defendant New York City Housing Authority's (NYCHA) CPLR 3212 motion for summary judgment dismissing of the complaint, and denied plaintiffs' cross motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

This action for wrongful death and conscious pain and suffering arises from a fire that occurred in an apartment occupied by plaintiff's decedent, Alease Jenkins, on August 7, 2011. NYCHA owned and maintained the decedent's apartment. Plaintiff Chevelle Jenkins Bowles is the decedent's daughter and the personal representative of her mother's estate.

NYCHA has demonstrated its prima facie entitlement to

summary judgment dismissal of the complaint and plaintiffs failed to show the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). It is undisputed that NYCHA installed a working smoke detector in the apartment when the decedent's tenancy commenced and that it was her responsibility to maintain and repair the device (Administrative Code of City of NY § 27-2045 [b]; *Rocco v Prism Mgt. Co.*, 10 AD3d 585, 586 [1st Dept 2004]). Even if this Court were to assume that maintenance worker Richard Rodriguez went to the apartment on May 16, 2011, in response to the decedent's and/or nonparty witness Eugene Wright's oral complaints that the smoke detector was not working, the record shows that maintenance worker William Gourdine inspected the device the next day (i.e., on May 17, 2011) and determined that Rodriguez's notation that it was missing or broken was unfounded.

Once NYCHA met its initial burden, the burden shifted to plaintiffs to raise a triable issue of fact as to whether the smoke detector was not working after Gourdine's May 17, 2011 inspection of the device and that NYCHA had actual or constructive notice that it was not operable, which they failed

to do (*see Verizon N.Y., Inc. v Garvin*, 13 NY3d 851, 852 [2009]; *and see Vanderlinde v 600 W. 183rd St. Realty Corp.*, 101 AD3d 583, 583 [1st Dept 2012]).

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16247 Brett Zorse, Index 159181/13
Plaintiff-Respondent,

-against-

Eric Gitter, etc., et al.,
Defendants-Appellants.

_____

Marin Goodman, LLP, Harrison (Russell S. Jamison of counsel), for appellants.

Joshua E. Bardavid, New York, for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 25, 2014, which, to the extent appealed from, denied defendants' motion to dismiss the causes of action for unjust enrichment and fraudulent conveyance pursuant to Debtor and Creditor Law § 273, unanimously reversed, on the law, without costs and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff alleges that on November 14, 2007, he transferred $300,000 to the account of defendant Chickie the Cop Entertainment, Inc., to be used to produce a film called Seasons of Dust, and that the money was used, instead, for the personal benefit of the Gitter defendants, who were officers of Chickie. Defendants contend that plaintiff actually loaned the $300,000 to another entity, nonparty Markowitz Films, Inc. In support of

their motion to dismiss, defendants submitted a letter written by plaintiff to Markowitz in which he referred to a $300,000 loan he had made to Markowitz pursuant to terms clearly defined in a contract signed by both parties. Defendants also submitted documents evidencing a separate agreement, dated November 15, 2007, between Markowitz and Seasons of Dust, LLC (to be signed by Chickie as its managing member), in which Markowitz agreed to lend a total of $1 million, secured by promissory notes of $300,000 and $700,000, to finance the film. In opposition, plaintiff did not deny, or address, the existence of a signed loan agreement between himself and Markowitz or a separate loan agreement between Markowitz and Seasons of Dust, LLC. In reply, defendants submitted a copy of a complaint filed by plaintiff in New York Supreme Court against Markowitz, which annexed a fully executed copy of the loan agreement between plaintiff and Markowitz and the promissory note executed by Markowitz.

Under the circumstances, the loan agreement between plaintiff and Markowitz and the promissory note executed by Markowitz, although submitted by defendants in reply, may be considered on their motion. Plaintiff does not dispute that he entered into an agreement with Markowitz to loan him $300,000, and he does not object to this Court's considering the executed loan documents, which were annexed to his complaint against

Markowitz.

This documentary evidence conclusively establishes a defense to the causes of action for unjust enrichment and fraudulent conveyance pursuant to the Debtor and Creditor Law, since it demonstrates that the transaction underlying the unjust enrichment cause of action was covered by a written agreement (*see Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]) and that plaintiff is not a creditor of defendants (*see* Debtor and Creditor Law §§ 270; 273).

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

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16248 The People of the State of New York, Ind. 12/13
Respondent,

-against-

Isaias Alicea,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered July 12, 2013, as amended August 23, 2013, convicting defendant, after a jury trial, of offering a false instrument for filing in the first degree (10 counts) and official misconduct, and sentencing him to an aggregate term of six months, with five years' probation, unanimously affirmed.

The People improperly introduced, on their direct case, evidence that defendant, a police officer on trial for making a false drug sale arrest, had previously been disciplined for unlawfully entering and searching an apartment. While defendant's intent was at issue at trial, this dissimilar and unrelated prior act had little probative value on that issue, and any probative value was outweighed by its prejudicial effect. Nevertheless, any error in this regard was harmless in light of

the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230, 242 [1975]), which included a surveillance videotape.

Defendant's vague remarks at the charge conference, and his request that the court give the "standard" charge (which the court agreed to do), coupled with his failure to take any exception after the court charged the jury, failed to preserve his present challenge to the charge (*see People v Whalen*, 59 NY2d 273, 280 [1983]), and we decline to review it in the interest of justice. As an alternative holding, we find that the court's charge that use of an innocent intermediary to file false written instruments would not insulate defendant from liability under Penal Law § 175.35 conveyed the appropriate legal principles (*see People v Bel Air Equip. Corp.*, 39 NY2d 48, 55-56 [1976]), and that defendant was not prejudiced by the absence of the language about accessorial liability he suggests on appeal.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16249 Michael Lobel, Index 652984/11
Plaintiff-Appellant,

-against-

Uri Hakami, et al.,
Defendants-Respondents,

Nguyen Xuan Nguyen, et al.,
Defendants.

_____

The Law Offices of David Carlebach, New York (David Carlebach of counsel), for appellant.

Rosenberg Calica & Birney LLP, Garden City (Kenneth E. Aneser of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered December 9, 2013, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' (defendants) motion for summary judgment dismissing the breach of contract and breach of fiduciary duty causes of action, unanimously affirmed, with costs.

The motion court correctly granted defendants summary judgment dismissing plaintiff's breach of contract cause of action, as the evidence does not support plaintiff's claim of an oral partnership agreement between him and defendant Hakami (*see Moses v Savedoff*, 96 AD3d 466, 470 [1st Dept 2012]). In the absence of evidence showing a partnership relationship, the court

correctly granted defendants summary judgment dismissing plaintiff's breach of fiduciary duty claim (*see Langer v Dadabhoy*, 44 AD3d 425, 426 [1st Dept 2007], *lv denied* 10 NY3d 712 [2008]).

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

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16250-
16250A &
M-4190

Ind. 944/09

The People of the State of New York,
Respondent,

-against-

Keith Fagan,
Defendant-Respondent.

_____

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

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

_____

Judgment of resentence, Supreme Court, Bronx County (George R. Villegas, J.), rendered on or about May 21, 2014, resentencing defendant, as a second violent felony offender, to a term of 15 years, and order, same court and Justice, entered on or about February 13, 2015, which denied the People's CPL 440.40 motion to set aside the judgment of resentence, unanimously affirmed.

Defendant previously appealed from the underlying judgment of the same court and Justice, rendered July 6, 2010, convicting him, upon his plea of guilty, of attempted robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 18 years to life, and an order of the same court and Justice, entered July 3, 2013, which denied his CPL 440.20 motion to set aside his sentence. This Court unanimously

modified the judgment to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed the judgment, reversed the order, and granted defendant's motion (*see* 116 AD3d 451 [1st Dept 2014]). This Court agreed with defendant's argument that his counsel rendered ineffective assistance by failing to challenge the constitutionality of his 2000 New York County conviction, which was used as a predicate felony in adjudicating defendant a persistent violent felony offender, since "[i]t is undisputed that at his 2000 plea proceeding, defendant was not advised that his sentence would include postrelease supervision" (*id.* at 451, citing *People v Catu*, 4 NY3d 242 [2005]).

At a resentencing proceeding on remand from this Court's prior order, the court rejected the People's argument that defendant should remain a persistent violent felony offender in light of the 2000 conviction. Instead, the court adjudicated defendant a second violent felony offender based solely on a 1980 conviction. The People subsequently moved pursuant to CPL 440.40 to set aside the judgment of resentence. The court denied the motion, and the People appeal from that order and the judgment of resentence.

CPL 400.15(7)(b) provides: "A previous conviction . . . which was obtained in violation of the rights of the defendant

under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate violent felony conviction." The People's argument that a *Catu* error does not violate the United States Constitution is improperly raised for the first time in their reply brief, and is without merit in any event.

"[A] conviction obtained in violation of *Catu* implicates rights under the federal Constitution as well as the state constitution" (*People v Smith*, __ AD3d __, 2015 NY Slip Op 07565 [1st Dept 2015]). Furthermore, although the *Catu* error in this case occurred in 2000, prior to the 2005 *Catu* decision, *Catu* applies retroactively (*id.*).

Defendant's 2000 conviction was unconstitutionally obtained for purposes of its use as a predicate felony. Although the 2000 sentencing court also failed to include PRS in its oral pronouncement of sentence (*see People v Sparber*, 10 NY3d 457 [2008]), there was nevertheless a *Catu* error, because PRS was added administratively (albeit also illegally), and defendant served more than four years of PRS, as well as being jailed for a violation thereof. The *Catu* error was not cured by subsequent events (*see Fagan*, 116 AD3d at 451), in which a PRS term was imposed judicially in 2009, and then removed in 2010 pursuant to

People v Williams (14 NY3d 198, 219-220 [2010], *cert denied* 562 US 947 [2010]).

The motion court improperly invoked CPL 440.40(2) in finding that this Court's prior order constituted a binding determination that defendant's 2000 conviction was obtained in violation of *Catu* and thus could not be used to enhance defendant's sentence. This Court's prior order did not decide that issue on the merits (*see People v Lara*, 130 AD3d 463, 465 [1st Dept 2015]). However, this error regarding CPL 440.40(2) is academic in light of the foregoing discussion.

M-4190 - *People v Fagan*

Motion to strike the People's reply brief granted to the extent of striking the argument raised for the first time therein, as indicated, and otherwise denied.

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

ENTERED: DECEMBER 1, 2015

CLERK

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

16251 Kennedy Associates, Index 650019/12
Plaintiff-Respondent,

-against-

JPMorgan Chase Bank N.A.,
Defendant-Appellant.

_____

Small & Calvo, New York (Eugene L. Small of counsel), for appellant.

Cane & Associates LLP, New York (Peter S. Cane of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered June 19, 2014, which denied defendant's motion for summary judgment dismissing the breach of contract cause of action (the only remaining cause of action in the complaint), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The contract between the parties clearly required a written assignment document containing certain information provided by defendant, in order for plaintiff to be paid for its recruiting services. The contract also noted that defendant reserved the right to hire candidates based on unsolicited résumés without paying plaintiff a fee. Where, as here, the parties set down their agreement in a clear, complete document, their writing

should be enforced according to its terms (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Plaintiff failed to present evidence of a written document from defendant authorizing it to seek candidates for a position in defendant's Hong Kong office. We reject plaintiff's contention that defendant waived the writing requirement because, on other occasions, it had paid plaintiff placement fees despite the lack of a formal, written assignment document. The contract contained a provision repudiating unwritten waivers of its requirements. In addition, where, as here, a contract is clear on its face, there is no need to resort to the parties' course of conduct in order to determine their intent (*see Ninth St. Assoc. v 20 E. Ninth Corp.*, 114 AD3d 518, 519 [1st Dept 2014]). Moreover, plaintiff failed to present sufficient evidence showing that, after the effective date of the contract, defendant paid plaintiff for placements that occurred without a written

assignment document.

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

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16252 ACS Systems Associates, Inc., Index 150625/11
Plaintiff-Respondent,

-against-

Safeco Insurance Company of America,
Defendant-Appellant.

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Jaspan Schlesinger LLP, Garden City (Ryan E. Cronin and Charles W. Segal of counsel), for appellant.

Cohen Seglias Pallas Greenhill & Furman PC, New York (Shawn R. Farrell of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about July 10, 2014, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its payment bond claim, awarding it damages in the amount of $1,502,964, plus interest in the amount of $362.30 per day until entry of judgment and thereafter at the statutory rate, unanimously modified, on the facts, to delete the amount of damages awarded and substitute $1,501,310.77 therefor, and to delete the amount of interest per day until entry of judgment and substitute $362.26 therefor and otherwise affirmed, without costs.

The general contractor hired by the School Construction Authority (SCA) for a school renovation project obtained a payment bond from defendant to guarantee payment to its

subcontractors and material suppliers. It is undisputed that SCA paid the general contractor in full for the work performed by plaintiff subcontractor on the project and that the general contractor failed to remit payment to plaintiff (*see* General Municipal Law § 106-b[2]). General Municipal Law § 106-b(2) requires a contractor who receives any payment from a public owner to make prompt payment to its subcontractors for their work "less an amount necessary to satisfy any claims, liens or judgments against the subcontractor . . . which have not been suitably discharged." Contrary to defendant's contention, an unrealized, admittedly "potential" claim for liquidated damages that the SCA may or may not assert against the general contractor does not constitute a claim for liquidated damages against plaintiff by which defendant or the general contractor may offset its payment to plaintiff (*see NRS Constr. Corp. v City of New York*, 134 AD2d 219 [1st Dept 1987]).

The parties dispute the number of days for which interest was awarded. We find that interest on amounts due to plaintiff on requisition 18 began to accrue on May 10, 2011, and accrued for 1148 days, until the date of the order appealed from, for a total of $287,348.49, and that interest on amounts due to plaintiff on requisition 19 began to accrue on October 4, 2011, and accrued for 1001 days, until the date of the order, for a

total of $112,073.28. Accordingly, we modify the damages award as indicated.

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

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16253 The People of the State of New York, Ind. 175/10
Respondent,

-against-

Antwan Hope,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Cassandra Mullen, J.), entered on or about July 16, 2014, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not

adequately taken into account by the guidelines, and the record does not establish any basis for a downward departure, particularly in light of the seriousness of the underlying crime and defendant's criminal history.

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16254-
16255 In re Essence S. and Another,

Children Under the Age of Eighteen Years, etc.,

Stephanie G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Douglas H. Reiniger, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

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

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Orders of fact-finding, Family Court, New York County (Rhoda J. Cohen, J.; Stewart H. Weinstein, J.), entered on or about May 11, 2012 and February 13, 2014, which, inter alia, determined that respondent mother neglected the subject child Essence S., and derivatively neglected the subject child Eternity S., unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that the mother neglected Essence S. (*see* Family Ct Act § 1012[f]; § 1046[b][i]). The record shows that the mother suffers from mental illness diagnosed as Bipolar Disorder NOS, Post-Traumatic Stress Disorder and Borderline Personality Disorder. As a result

of the mother's untreated mental illness and marijuana use, three of her other children, two of whom have been adopted and one who resides in the permanent custody of his father, are no longer in her care. At the time of Essence's birth, as a result of the mother's longstanding, uncontrolled mental illness, as manifested by her bizarre behavior in the hospital after giving birth to Essence, as well as the need for continued mental health services to manage her symptoms, Essence was in danger of neglect (*see Matter of Star Marie S. [Sonia S.]*, 129 AD3d 499 [1st Dept 2015]; *Matter of Eugene G.*, 76 AD2d 781 [1st Dept 1980], *appeal dismissed* 51 NY2d 878 [1980])

Furthermore, following a mental health evaluation conducted in October 2012, while the dispositional hearing was pending for Essence and during the time that the mother was pregnant with Eternity S., the mother was diagnosed with the above-referenced mental disorders, with a recommendation that it would be unsafe to discharge Essence to the mother's care. The record also shows that the mother had cared for Essence without supervision, on a regular basis, in violation of the court's order to the contrary.

The finding of derivative neglect as to Eternity was also proper because the child was born so close in time to the period in which conditions underlying the mother's longstanding history of neglect existed that Eternity would have been a neglected

child if placed in the mother's care (*see Matter of Nhyashanti A. [Evelyn B.]*, 102 AD3d 470 [1st Dept 2013]; *Matter of Cruz*, 121 AD2d 901 [1st Dept 1986]).

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

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16256 Ralph G. Ullum, et al., Index 159629/13
Plaintiffs-Appellants,

-against-

The American Kennel Club,
etc., et al.,
Defendants-Respondents.

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Raneri, Light, Sarro & O'Dell, PLLC, White Plains (Kevin D. O'Dell of counsel), for appellants.

Seward & Kissel LLP, New York (Dale C. Christensen, Jr. of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 3, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiffs' causes of action for defamation, breach of contract, and tortious interference with business relations, unanimously affirmed, without costs.

Plaintiffs Ullum and French are owners of plaintiff Topaz Siberians Kennel, which breeds and exhibits purebred Siberian Huskies. On December 17, 2010, while attending a show-dog competition sanctioned by defendant the American Kennel Club (AKC), Ullum was accused of poisoning another competitor's dog. A local Event Committee held a hearing, at which Ullum chose not to testify because criminal charges were pending against him.

The Committee found Ullum guilty of attempting to poison the dog and recommended that he be suspended. AKC denied Ullum's appeal of the suspension and reported the suspension on its website in March 2011. It also reported in its June 2011 newsletter that Ullum "was charged with feeding a dog medication that a veterinarian identified as having the potential to adversely affect the dog's performance and health." After Ullum was acquitted of the criminal charges arising from the incident, he asked AKC to reinstate him, but his request was denied in October 2012. A year later, plaintiffs commenced this action against AKC and its president, defendant Dennis Sprung.

Plaintiffs' cause of action for defamation is time-barred, since it was brought more than one year after the publication of the alleged defamatory statements. Plaintiffs' republication claim is insufficient, because their affidavits failed to specify to whom the alleged defamatory republication was made (*see Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]), and their argument on appeal that AKC republished the statement on its website in December 2012 is insufficient to show that the statement reached "a new audience" (*Firth v State of New York*, 98 NY2d 365, 371 [2002]). In any event, the alleged defamatory words are not actionable, because they were a "basically accurate account" of Ullum's suspension and the charges against him

(*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 383 [1977], *cert denied* 434 US 969 [1977]). Moreover, plaintiffs alleged no defamatory words published by defendant Sprung (*see Asensio v KPMG, LLP*, 293 AD2d 426 [1st Dept 2002]).

The motion court correctly dismissed plaintiffs' cause of action for tortious interference with prospective business relations, since they failed to plead that defendants' alleged interference was "accomplished by wrongful means" or that defendants "acted for the sole purpose of harming . . . plaintiff[s]" (*Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 [1st Dept 1999] [internal quotation marks omitted]).

Plaintiffs also failed to state a viable cause of action for breach of contract. Plaintiffs' claim is based on defendants' alleged violation of AKC rules and guidelines incorporated in an entry form plaintiffs signed when they entered the show-dog competition. Even if AKC was bound by the terms of the entry form, plaintiffs failed to plead that the form prohibited AKC from upholding the local Event Committee's recommendation to suspend Ullum, or that it was obligated to stay Ullum's suspension or grant his request for reinstatement. Moreover, courts are reluctant to interfere with the internal disciplinary

affairs of a private voluntary association such as AKC (*see Thornton v American Kennel Club*, 182 AD2d 358, 358 [1st Dept 1992]), and a breach of contract cause of action is not the proper vehicle for a claim that such an association has failed to fulfill obligations imposed by its internal rules (*see Matter of Caso v New York State Pub. High School Athletic Assn.*, 78 AD2d 41, 45 [4th Dept 1980]; *see also James v National Arts Club*, 99 AD3d 523, 525 [1st Dept 2012], *lv dismissed* 21 NY3d 886 [2013]). In addition, there is no allegation that Sprung is a signatory on the entry form in his individual capacity or that he otherwise entered into an agreement with plaintiffs (*see Tutora v Siegel*, 40 AD3d 227, 228 [1st Dept 2007], *lv denied* 9 NY3d 808 [2007]).

We have considered plaintiffs' remaining contentions, including that they are entitled to discovery on their causes of action, and find them unavailing.

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16258 The People of the State of New York, Respondent, Ind. 4119/12

-against-

Edward Green, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered June 14, 2013, convicting defendant, after a jury trial, of two counts of robbery in the second degree, and sentencing him, as a second felony offender, to concurrent terms of seven years, unanimously affirmed.

The court properly declined to charge petit larceny as a lesser included offense, since there was no reasonable view of the evidence, viewed most favorably to defendant, that he stole property without using force. Defendant either participated in a robbery or committed no crime; there was no evidence to support a theory that he somehow "opportunistically" took the victim's property without being part of the robbery (*see e.g. People v Flores*, 28 AD3d 380 [1st Dept 2006], *lv denied* 7 NY3d 755 [2006]).

Defendant's challenges to the prosecutor's summation are entirely unpreserved, notwithstanding his postsummations mistrial motion (*see People v Romero*, 7 NY3d 911, 912 [2006]; *People v LaValle*, 3 NY3d 88, 116 [2004]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The remarks at issue generally constituted permissible responses to defense counsel's summation arguments, and they did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16259 The People of the State of New York, Respondent, Ind. 1726/13

-against-

Ray P. Macaulay, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about October 24, 2013, unanimously affirmed.

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

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

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

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16260- Ind. 3109/12
16260A The People of the State of New York, 3247/12
Respondent,

-against-

Carlos Narvaez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Kiran Rosenkilde of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (John Moore, J.), rendered July 16, 2014, convicting defendant, upon his plea of guilty, of attempted robbery, (Penal Law § 110/160.10[1] under indictment 3247/2012 and attempted robbery in the second degree (Penal Law § 110 /160.10[1] under indictment 3109/2012 and sentencing him to an aggregate term of five and one-half years incarceration, to be followed by five years of post release supervision, unanimously affirmed.

Although we do not find that defendant made a valid waiver

of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16262N American Stevedoring, Inc., Index 651472/12
Plaintiff-Respondent,

-against-

Red Hook Container Terminal, LLC,
et al.,
Defendants,

The Alex N. Sill Company,
Nominal Defendant.
- - - - -
Hiller, PC,
Nonparty Appellant.

[And a Third-Party Action]

_____

Hiller, PC, New York (Michael S. Hiller of counsel), for appellant.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 29, 2015, which, inter alia, directed nonparty Hiller, PC (HPC), plaintiff's former counsel, to turn over its litigation file within 10 days of the date of the order, unanimously reversed, on the law, without costs, and that part of the order vacated.

The court erred in requiring HPC to turn over its litigation file, on which HPC had a retaining lien, without first ensuring that payment for HPC's legal services was made or secured, and in

the absence of any waiver or exigent circumstances (*see Wankel v Spodek*, 1 AD3d 260 [1st Dept 2003]; *Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 186-187 [1st Dept 2002]; *Corby v Citibank*, 143 AD2d 587, 588 [1st Dept 1988]). The court also erred in not directing plaintiff, as the former client, to bear the costs of reproduction and delivery of the file (*see Matter of Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30, 38 [1997]).

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

ENTERED: DECEMBER 1, 2015

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Manzanet-Daniels, JJ.

16263 In re Dr. Richard Sunday Ifill, Ind. 143/14
[M-4543] Petitioner,

-against-

Hon. Richard D. Carruthers,
etc., et al.,
Respondents.

_____

Dr. Richard Sunday Ifill, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Richard D. Carruthers, respondent.

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

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: DECEMBER 1, 2015

CLERK

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

16291 The People of the State of New York, Respondent, Ind. 1498/11

-against-

Michael Kenny, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 28, 2013, convicting defendant, after a jury trial, of murder in the second degree and aggravated criminal contempt, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The verdict convicting defendant of second-degree murder, and rejecting the affirmative defense of extreme emotional disturbance, was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence failed to support either the subjective or objective elements of this defense (*see People v Moye*, 66 NY2d 887, 890 [1985]). The jury could have reasonably found that defendant's actions in connection with the killing of his wife were generally deliberate

and purposeful, and that his wife's alleged admission of infidelity was not the kind of reasonable excuse or explanation contemplated under the defense (*see People v McKenzie*, 19 NY3d 463, 468 [2012]).

The court properly exercised its discretion in precluding admission of the defense expert's chart listing 13 factors he deemed relevant to the defense of extreme emotional disturbance (*see generally People v Aska*, 91 NY2d 979, 981 [1988]). The chart was potentially misleading to the jury (*see People v Workman*, 308 NY 668, 670 [1954]), the 13 factors had not been subjected to peer review, and the doctor was not aware of any psychiatrist who had ever relied on these factors. Nevertheless, the expert was permitted to testify as to these factors, and thus defendant could not have been prejudiced by the exclusion of the chart.

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

ENTERED: DECEMBER 1, 2015

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15092 The Bank of New York Mellon, solely as Securities Administrator for J.P. Morgan Mortgage Acquisition Trust 2006-WMC4, Plaintiff-Respondent, Index 654464/12

-against-

WMC Mortgage, LLC, Defendant,

J.P. Morgan Mortgage Acquisition Corporation, et al., Defendants-Appellants.

_____

Sullivan & Cromwell LLP, New York (Darrell S. Cafasso of counsel), for appellants.

Boies, Schiller & Flexner LLP, Armonk (Motty Shulman of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 22, 2013, affirmed, with costs.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Richard T. Andrias
Karla Moskowitz
Judith J. Gische, JJ.

15092
Index 654464/12

_____x

The Bank of New York Mellon,
solely as Securities Administrator
for J.P. Morgan Mortgage Acquisition
Trust 2006-WMC4,
Plaintiff-Respondent,

-against-

WMC Mortgage, LLC,
Defendant,

J.P. Morgan Mortgage Acquisition
Corporation, et al.,
Defendants-Appellants.

_____x

Defendants J.P. Morgan Mortgage Acquisition Corporation (JPMMAC) and JPMorgan Chase Bank, N.A. appeal from the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 22, 2013, which, to the extent appealed from as limited by the briefs, denied their motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the third and fourth causes of action and so much of the seventh cause of action as is based on breach of JPMMAC's warranties.

Sullivan & Cromwell LLP, New York (Darrell S. Cafasso and Robert A. Sacks of counsel), for appellants.

Boies, Schiller & Flexner LLP, Armonk (Motty Shulman, Richard E. Weill, Ian M. Dumain and Marc Ayala of counsel), for respondent.

MOSKOWITZ, J.

This breach of warranty action arises from a residential mortgage backed securitization called the J.P. Morgan Mortgage Acquisition Trust 2006-WMC4 (the Trust). The Trust was arranged and sponsored by defendant J.P. Morgan Mortgage Acquisition Corporation (JPMMAC), which made certain representations and warranties as to the quality of the mortgage loans in the Trust. We find that plaintiff's interpretation of the language of the representations and warranty at issue is the only reasonable interpretation, and therefore affirm the motion court's denial of JPMMAC's motion to dismiss the causes of action based on its alleged breach of that representation and warranty.

Securitization is a financing tool used to pool and convert assets such as residential mortgages into financial instruments that can be sold in the capital markets. Mortgages on residential real estate are commonly securitized because the borrower has an obligation to make regular payments, which offer investors a consistent and predictable cash flow. By buying residential mortgage backed securities, investors acquire the right to receive money from the cash flows of the underlying mortgage loans or from their proceeds, such as loan principal and interest. Accordingly, investors are necessarily concerned with, among other things, the credit quality of the underlying mortgage

loans, as it directly affects the cash flow from the loans.[1]

A series of interlocking agreements controlled the securitization process. The first was a Mortgage Loan Sale and Interim Servicing Agreement (MLSA) dated as of July 1, 2005. Under the MLSA, defendant WMC Mortgage, LLC sold to JPMMAC all of its rights in certain mortgage loans that WMC owned or originated.[2] The sale of the loans was to close on October 30, 2006 (the Whole Loan Sale Date). The second relevant document was an Assignment and Assumption Agreement dated as of December 20, 2006, under which JPMMAC sold a substantial portion of the mortgage loans to a special purpose entity, J.P. Morgan Acceptance Corporation I (the depositor). Finally, under the Pooling and Servicing Agreement, dated as of December 1, 2006, the depositor transferred the loans into the Trust; defendant JPMorgan Chase Bank, N.A. (together with JPMMAC, JPMorgan) serviced the loans. The closing date for the transaction was December 20, 2006 (the closing date).

The MLSA contained numerous representations and warranties

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[1] The facts are taken from the complaint and accepted as true for the purposes of the CPLR 3211 motion.

[2] Defendant WMC Mortgage, LLC is sued here as the successor in interest to WMC Mortgage Corporation; the latter entity actually entered into the MLSA. For ease of reference, the company will be referred to throughout this decision by its current name.

that WMC, as originator, made to JPMMAC concerning the nature and quality of the mortgage loans and the mortgage loan files eventually deposited into the Trust. As relevant here, in the MLSA, WMC represented and warranted to JPMMAC "as of the related Closing Date" – that is, October 30, 2006 – that "[t]he information set forth in the Mortgage Loan Schedule and the tape delivered by [WMC] to [JPMMAC] is true, correct and complete in all material respects."[3] The Mortgage Loan Schedule, as defined in the MLSA, described each mortgage loan and, for each one, set forth extensive information concerning the likelihood of repayment – for example, the loan-to-value (LTV) ratio at origination, the appraised value of the mortgaged property, the occupancy status of the mortgaged property at the time of origination, and the borrower's credit score.

The representation and warranty at issue on this appeal appears in section 2.06(a)(iii) of the Pooling and Servicing Agreement. In that section, JPMMAC represented and warranted to plaintiff:

> "With respect to the period from [the] Whole Loan Sale Date to and including the Closing Date, [JPMMAC] hereby makes the representations and warranties contained in

[3] "The tape" refers to the loan tape, which contains "key statistics about each underlying loan in the pool" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 292 [1st Dept 2011]).

> paragraph (a) . . . of Schedule 4 attached hereto . . . . [that] [t]he information set forth in the Mortgage Loan Schedule and the tape delivered by [WMC] to [JPMMAC] is true, correct and complete in all material respects."

The Pooling and Servicing Agreement also provided that, if JPMMAC breached a representation or warranty it made in section 2.06, it was to cure the breach within 90 days after notification; if it failed to do so, it was to repurchase the defective mortgage loan or substitute a qualifying loan for the defective one.

In September and November 2012, certain certificate holders notified WMC, JPMorgan, and plaintiff, the securities administrator for the Trust, that many of the mortgage loans were plagued by high rates of delinquency and default and that more than 40% of the remaining collateral was delinquent. According to the certificate holders, these deviations constituted material breaches of the MLSA and Pooling and Servicing Agreement, both of which represented that the mortgage loans conformed to their description in the Mortgage Loan Schedule and the loan tape, and therefore misled investors about the quality and content of the mortgage loans in which they were investing. Accordingly, the certificate holders demanded that WMC and JPMMAC repurchase the breaching mortgage loans. JPMMAC refused the demand, and this suit ensued.

On February 24, 2013, plaintiff commenced this action,

alleging, among other things, breach of representations and warranties (the third cause of action) and breach of contract for failure to repurchase the purportedly defective mortgage loans (the fourth cause of action). JPMMAC moved to dismiss the complaint under CPLR 3211(a)(1) and (7); in an order entered November 22, 2013, the motion court denied the motion with respect to all causes of action except one not at issue on this appeal.

JPMorgan now appeals from so much of the order as denied the motion to dismiss the third and fourth causes of action and the seventh cause of action to the extent it is based on breach of JPMMAC's warranties.

JPMorgan argues that section 2.06(a)(iii) was a "gap" or "bring-down" warranty, meant to ensure that there was complete warranty coverage up until the closing date, and thus, that the section covered only instances where defects in the mortgage loans arose during the warranty period – that is, the period from the whole loan sale date to the closing date. Therefore, JPMorgan argues, it can be held liable only to the extent that the Mortgage Loan Schedule and the loan tape *became* inaccurate during that period. In the alternative, JPMorgan argues that section 2.06(a)(iii) is ambiguous and that the matter should be remitted for the admission of extrinsic evidence to show the

parties' intent. We reject both arguments.

A contractual provision that is clear on its face "must be enforced according to the plain meaning of its terms" (*Banco Espirito Santo, S.A. v Concessionaria Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012]; *see D.B. Zwirn Special Opportunities Fund, L.P. v SCC Acquisitions, Inc.*, 74 AD3d 530, 532 [1st Dept 2010]). This rule applies "with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople" (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012]. In addition, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss v Financial Performance Corp.*, 97 NY2d 195 [2001] [internal quotation marks omitted]).

Plaintiff's claim against JPMorgan accords with Section 2.06(a)(iii) of the Pooling and Servicing Agreement. Section 2.06(a)(iii) states that "[w]ith respect to the period from [the] Whole Loan Sale Date to and including the Closing Date," JPMMAC warrants that the representations in the Mortgage Loan Schedule and loan tape are correct. There is simply no language in this warranty addressing when the defects in the loans must arise for JPMMAC to be held liable for a misrepresentation on the Mortgage

Loan Schedule or loan tape. Rather, the language of Section 2.06(a)(iii) is straightforward: if false information – for example, information about a borrower's income or the loan-to-value ratio of a mortgage – was on the Mortgage Loan Schedule and loan tape before October 30, 2006, it constitutes a breach of JPMMAC's warranties as long as it remained on the Mortgage Loan Schedule or loan tape during the warranty period (that is, October 30, 2006 to December 20, 2006). Stated another way, JPMMAC warranted against the existence of any material misstatement during the warranty period, no matter when the misstatements first appeared on the Mortgage Loan Schedule or loan tape.

Indeed, bring-down representations are a common enough feature in financial contracts such as the one presented here; if JPMMAC, a commercially sophisticated entity, had intended that its representation would be operative only if the Mortgage Loan Statement became untrue between October 30, 2006 and December 20, 2006, it could well have expressed this intent in the representation by clearly so stating. For example, section 2.06(a)(iii) could have been written in such a way as to make JPMMAC liable only if the representation was rendered untrue by events occurring between October 30 and December 20. However, as section 2.06(a)(iii) is written, JPMMAC warrants the truth of the

information in the Mortgage Loan Schedule between the two dates without regard to when the defects in the loans arose (*see e.g. Matter of Goldstein v Plotnicki*, 301 AD2d 483 [1st Dept 2003]).

Despite JPMorgan's argument otherwise, this interpretation of section 2.06(a)(iii) does not render the phrase "[w]ith respect to the period from [the] Whole Loan Sale Date to and including the Closing Date" meaningless or superfluous. On the contrary, Section 2.06(a)(iii) as written means that JPMMAC will not be liable for loan misrepresentations in pre-warranty-period documents, but will be liable if any misrepresentations still exist on the Mortgage Loan Schedule or loan tape during the warranty period. This type of scenario is not hard to imagine – for instance, had JPMMAC, in the process of its due diligence, discovered defects in a certain loan before that loan was transferred to the depositor or the Trust, it could have removed the defective loan from the Mortgage Loan Schedule and substituted a nondefective one. Similarly, if the Mortgage Loan Schedule or the tape was incorrect on July 1, 2005 (the date of the MLSA) but WMC corrected the error before October 30, 2006, then JPMMAC would not be liable under section 2.06(a)(iii). This interpretation is a perfectly reasonable reading of the operative phrase in section 2.06(a)(iii), and does not leave it without meaning in the context of the Pooling and Servicing Agreement.

Nor does this interpretation of section 2.06(a)(iii) ignore the Trust's structure, as Section 2.06(a)(iii)'s warranty period narrows JPMMAC's obligations so that JPMMAC's liability for false statements on the Mortgage Loan Schedule or loan tape is limited to the warranty period only. WMC's warranties, on the other hand, give it broader liability, with representations beyond the ones that JPMMAC makes in section 2.06(a)(iii). For example, WMC warrants and represents in the MLSA that there are no pending environmental actions relating to the mortgaged properties and that the mortgaged properties are free from any toxic and hazardous substances. Likewise, WMC warrants in the MLSA that none of the mortgagors on any mortgage loan agreed to submit to arbitration related to the mortgage loan transactions. These representations and warranties are unrelated to the information on the Mortgage Loan Schedule – the only document to which JPMMAC's representations and warranties apply.

JPMorgan further contends that section 2.06(a)(iii) must be a gap warranty because some of the fields listed in the definition of "Mortgage Loan Schedule" represent data as of some point after the origination of the mortgage loans – for example, the 12-month history for each mortgage loan with number of days delinquent in the past 12 months, and the next due date of the mortgage loan. Thus, JPMorgan argues, it is logical and sensible

to interpret section 2.06(a)(iii) as a gap or bring-down warranty because some of the relevant information could have changed or only become known in the period between the whole loan sale date and the closing date.

We find this argument unpersuasive. It is true that some of the items on the Mortgage Loan Schedule and loan tape could change after origination. Nonetheless, there were many items that, by definition, could not change – for example, the Mortgage Loan Schedule lists "LTV at origination" and the "original principal amount of the [m]ortgage [l]oan." Nothing in the language of section 2.06(a)(iii) suggests that JPMMAC was making its representation as to the changeable items on the Mortgage Loan Schedule but not the unchangeable ones; it was making representations as to all the statements on the Mortgage Loan Schedule, which comprised both changeable and unchangeable information. Because JPMMAC was warranting the veracity of information that, by definition, could not change after the origination date, the warranty was not merely a bring-down or gap warranty.

For the reasons set forth above, we also reject JPMorgan's contention that section 2.06(a)(iii) is ambiguous. "'[A] contract is not rendered ambiguous just because one of the parties attaches a different, subjective meaning to one of its

terms'" (*Bajraktari Mgt. Corp. v. American Intl. Group, Inc.*, 81 AD3d 432, 432 [1st Dept 2011]). The unambiguous language in the Pooling and Servicing Agreement provides that JPMMAC will be deemed to have breached the agreement if the information in the Mortgage Loan Statement and loan tape is not correct at any point from October 30, 2006 to December 1, 2006.

We have considered JPMorgan's remaining contentions and find them without merit.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 22, 2013, which, to the extent appealed from as limited by the briefs, denied defendants J.P. Morgan Mortgage Acquisition Corporation and JPMorgan Chase Bank, N.A.'s motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the third and fourth causes of action and so much of the seventh cause of action as is based on breach of JPMMAC's warranties, should be affirmed, with costs.

All concur.

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

ENTERED: DECEMBER 1, 2015

CLERK