SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 3, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, DeGrasse, Richter, JJ.

12955 The People of the State of New York, Ind. 5801/11
Respondent,

-against-

Jamal Chamlee, also known as
Jamal Chanlee,
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 (Patricia Curran of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 8, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the second degree, criminal possession of a weapon in the second degree and criminally using drug paraphernalia, and sentencing him to an aggregate term of 12 years, unanimously reversed, on the law, and the indictment dismissed.

This Court previously held this appeal in abeyance pending a

suppression hearing (120 AD3d 417 [1st Dept 2013]). Supreme Court granted defendant's motion to suppress the contraband at issue, and the People do not seek to challenge that determination. Accordingly, we vacate the conviction and dismiss the indictment.

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

ENTERED: MARCH 3, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Manzanet-Daniels, Gische, Clark, JJ.

13595 The People of the State of New York Ind. 2721/09
Respondent,

-against-

Raphael Golb,
Defendant-Appellant.

_____

Ronald L. Kuby, New York, for appellant.

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

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Judgment of resentence, Supreme Court, New York County (Laura A. Ward, J.), rendered July 14, 2014, resentencing defendant to an aggregate term of two months, concurrent with three years' probation, unanimously affirmed.

Defendant argues on this appeal that his CPL 330.30 motion should have been granted, since he was tried under an unconstitutionally broad reading of statutes that were subsequently narrowed by the Court of Appeals (23 NY3d 455 [2014], cert denied _ US _, 83 USLW 3559 [2015]). Further, defendant claims that the trial court erred in finding his CPL 330.30 motion untimely.

We find that defendant's appeal from his judgment of resentence following remand from the Court of Appeals does not

bring up for review defendant's present challenges to his original conviction (*see e.g. People v Ramos*, 105 AD3d 684 [1st Dept 2013], *lv denied* 21 NY3d 1045 [2013]). Under CPL 450.30(3), an appeal "from a resentence following an order vacating the original sentence," is considered an "appeal from a sentence." An appeal from a sentence may be based only "upon the ground that such sentence either was (a) invalid as a matter of law, or (b) harsh or excessive" (CPL 450.30[1]). Thus, while defendant's direct appeal from his judgment of resentence is properly before this Court, it is improper to consider or review defendant's present challenges regarding his CPL 330.30 motion. Moreover, even if defendant's claims were reviewable on this appeal, his CPL 330.30 motion was properly denied as untimely since it was not made prior to the original sentence (*see* CPL 330.30; *People v Jenkins*, 78 AD3d 1212 [3d Dept 2010]).

Additionally, even upon considering the merits of defendant's argument that he was tried under an unconstitutionally broad reading of statutes that were subsequently narrowed, we find that this issue has already been addressed by the Court of Appeals (23 NY3d 455). Defendant raised this exact argument on his application to the Court of Appeals for reargument which was also denied (24 NY3d 932

[2014]). Thus, on this appeal, defendant is requesting relief already denied by the Court of Appeals.

Defendant argues that, in light of the analysis set forth in the opinion of the Court of Appeals, he should receive a new trial on the counts not dismissed by that Court, with different jury instructions reflecting such analysis. Nevertheless, this new argument should have been addressed to the Court of Appeals itself (*see People v Suarez*, 110 AD3d 420 [1st Dept 2013], *lv denied* 22 NY3d 1044 [2013]).

Finally, defendant asserts that his sentence of two months incarceration followed by three years of probation is unduly harsh. However, given defendant's convictions on the 19 misdemeanor counts of criminal impersonation and forgery, we do not find the sentence imposed at resentencing harsh or excessive.

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

ENTERED: MARCH 3, 2015

CLERK

Mazzarelli, J.P., Acosta, Richter, Clark, JJ.

12893 Eugene Stolowski, et al., Index 8850/05
Plaintiffs-Respondents,

-against-

234 East 178th Street LLC,
Defendant-Respondent,

The City of New York,
Defendant-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for Eugene Stolowski, Brigid Stolowski, Eileen Bellew, Jeffrey G. Cool, Sr., Jill Cool, Joseph G. DiBernardo and Brendan K. Cawley, respondents.

Meyer, Suozzi, English & Klein, P.C., Garden City (Andrew J. Turro of counsel), for Jeanette Meyran, respondent.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for 234 East 178th Street LLC, respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 27, 2013, which denied the motion of defendant City of New York (City) for summary judgment dismissing the complaint and all cross claims against it, unanimously modified, on the law, to dismiss that portion of the General Municipal Law § 205-a claims that are predicated on alleged violations of 29 CFR 1910.134(g)(4), the common-law negligence claims, any claim of

improper building inspection, any spousal derivative claims, and the cross claim seeking contribution, and otherwise affirmed, without costs.

The motion court properly declined to dismiss the portion of plaintiffs' General Municipal Law § 205-a claims predicated on an alleged violation of Labor Law § 27-a(3)(a)(1). The City unavailingly contends that Labor Law § 27-a(3)(a)(1) cannot provide a valid predicate for any General Municipal Law § 205-a claim. However, the statute, known as the Public Employee Safety and Health Act (PESHA), which imposes a general duty on an employer to provide employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees" (Labor Law § 27-a[3][a][1]), is sufficient since it is "'a well-developed body of law and regulation that imposes clear duties'" (*Gammons v City of New York*, __NY3d __, 2014 NY Slip Op 08869 [2014], quoting *Williams v City of New York*, 2 NY3d 352, 364 [2004]; *see also Fisher v City of New York*, 48 AD3d 303 [1st Dept 2008]).

Moreover, the City failed to "show that it did not negligently violate any relevant government provision or that, if it did, the violation did not directly or indirectly cause plaintiff's injuries" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 [2003]). There is evidence, including testimony and an investigative report, that the failure to issue personal ropes to the firefighters contributed to the injuries and deaths suffered when the firefighters jumped from windows using either no safety devices or a single rope that had been independently purchased by one of the firefighters. The City is also not entitled to dismissal of these claims pursuant to governmental function immunity, since the evidence concerning the removal of existing personal ropes in 2000, and the failure to provide new ropes in the period of more than four years from then until the fire giving rise to these claims, raises issues of fact concerning whether the absence of ropes "actually resulted from discretionary decision-making -- i.e., the exercise of reasoned judgment which could typically produce different acceptable results" (*Valdez v City of New York*, 18 NY3d 69, 79-80 [2011] [internal quotation marks omitted]).

Contrary to the City's argument, plaintiffs pleaded the alleged PESHA violations in their complaints. We do not consider

the City's argument that the investigative report is inadmissible, which was improperly raised for the first time in its reply brief.

However, the City established its entitlement to dismissal of that portion of the General Municipal Law § 205-a claims that is based on alleged violations of 29 CFR 1910.134(g)(4), by noting the apparent absence of any such violation, notwithstanding the conclusory assertions in the investigative report.

The common-law negligence claims, any claim alleging improper building inspection, the spousal derivative claims, and the cross claim seeking contribution are deemed abandoned.

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

ENTERED: MARCH 3, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13481- Index 101518/12
13481A John De Lande Long,
Plaintiff-Appellant,

-against-

Patrick G. O'Neill, et al.,
Defendants-Respondents.

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Citak & Citak, New York (Donald L. Citak of counsel), for appellant.

Levett Rockwood P.C., Westport, CT (Frank J. Silvestri, Jr. of the bar of the State of Connecticut, admitted pro hac vice, of counsel), for Patrick G. O'Neill, respondent.

Press Law Firm PLLC, New York (Matthew J. Press of counsel), for Fred Knoll, respondent.

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Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about January 9, 2013, which granted defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(1), unanimously affirmed, without costs.

Defendants Patrick O'Neill and Fred Knoll were the sole members of KOM Capital Management LLC (KOM). Around December 2005, defendants became directors of a Cayman Islands investment fund, CMIA China Fund II Ltd. (the Fund). Defendants were responsible for preparing the Fund's operating documents, including the provisions containing the circumstances for

discharging the manager that the Fund would appoint. At about the same time, the Fund appointed CMIA Capital Partners, PTE (CMIA Capital) as its investment manager and KOM as its investment subadvisor. As subadvisor, KOM was entitled to certain fees based on the Fund's profitability. Plaintiff is the principal of a financial planning firm; in exchange for procuring investors for the Fund, that firm was entitled to a portion of the performance fees that the Fund paid to KOM.

In July 2007, plaintiff became a director of the Fund, serving along with defendants and three other people. When the Fund's directors decided that circumstances warranted terminating CMIA Capital as the Fund's investment manager, they discovered that under the operating documents, they lacked direct express authority to do so, regardless of CMIA Capital's performance.

According to the parties, CMIA Capital breached its fiduciary duties, thereby depriving the Fund of somewhere between $50 million and $100 million. Thus, in May 2009, the Fund commenced an action in Singapore to remove CMIA Capital for its alleged misconduct. CMIA Capital asserted counterclaims in the Singapore action and also commenced a derivative action in New York, alleging that the Fund's directors had breached their fiduciary duties and committed corporate waste by commencing the

Singapore action. On November 22, 2010, Supreme Court (Shirley Werner Kornreich, J.) granted the directors' motion to dismiss the derivative action for lack of standing.

Plaintiff alleges that in recognition of his efforts in connection with the lawsuit against CMIA Capital, defendants entered into an oral agreement to ensure that "plaintiff would be fairly compensated" for his efforts; the parties allegedly reaffirmed this oral agreement at various times during the lawsuits. Plaintiff also alleges that at some later date, the parties modified their agreement to provide that plaintiff would receive one-third of the performance fee that KOM received.

In June 2011, the parties reached an agreement to settle all their disputes. Accordingly, plaintiff, defendants, KOM, and CMIA Capital entered into a settlement agreement, along with certain nonparties to this appeal. The recitals in the settlement agreement stated that disputes had arisen among the parties "relating to the management of the Fund and its investments" and that the settlement agreement was to resolve the disputes, including all claims brought in the lawsuits.

In addition to discontinuing the lawsuits, terminating CMIA Capital, and requiring certain payments among the parties, the settlement agreement provided for the liquidation of the Fund and

the distribution of its assets. The parties agreed that upon the Fund's liquidation, KOM was to receive a $1,155,903.21 performance fee. Ultimately, a company wholly owned by defendant O'Neill received this fee; that company apparently transferred defendant Knoll's share to a company under Knoll's control.

The settlement agreement contained a release, which provided that the agreement was made in "full and final settlement of *all matters arising out of or in connection with* the facts, matters, claims, actions and allegations" made in the lawsuits. Further, the release provided that each party released "each other Party" from:

> "*all and/or any* actions, claims, rights, demands, suits, charges, complaints, obligations, damages, costs (including attorney's fees and costs actually incurred), expenses, liabilities, losses, debts, set-offs, promises, contracts, agreements and controversies of any nature whatsoever . . . *whether known or not now known* . . . *arising from or resulting from or in connection with* any act or omission, event, transaction, occurrence, agreement, contract or relationship *concerning* [the Fund], its investments, business or affairs (*including without limitation* the matters alleged in the [lawsuits]" (emphases added).

Plaintiff then commenced this action, asserting that he had played a significant role in resolution of the suit against CMIA Capital, and thus was entitled, under his oral agreement with O'Neill and Knoll, to $385,301 – one-third of the $1,155,903 settlement fee that CMIA had paid to KOM. In the complaint,

plaintiff interposed causes of action for breach of contract, fraudulent inducement, unjust enrichment, and promissory estoppel.

Defendants moved separately to dismiss the complaint, contending, among other things, that the release barred plaintiff's claim for payment. In opposition, plaintiff asserted that because the settlement agreement was between two groups (the Fund, its directors, and KOM on one side, and CMIA Capital and its principal on the other), the settlement agreement did not contemplate releasing claims between parties on the same side, such as between him and defendants. Plaintiff further asserted that the release could not bar his claim because that claim had not yet ripened at the time of the settlement, and releases could only bar claims that were asserted or that could have been asserted at the time of the release.

The IAS court granted both defendants' motions to dismiss under CPLR 3211(a)(1). In so doing, the court observed that the meaning and coverage of a release "necessarily depends, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given (*Cahill v Regan*, 5 NY2d 292 [1959])," and held that the release barred plaintiff's claim. The court found that, although the

recital in the settlement agreement stated that it was executed between two opposing sides, it defined "party" to include plaintiff and defendants; thus, the release made clear that it was meant to apply to more than the settlement of the lawsuits involving CMIA Capital. According to the court, the settlement agreement's inclusion of extensive lists of the entities who the release covered, as well as the broad sweeping language of the release, indicated that the parties "intended to leave no loose ends" regarding the Fund's affairs. Moreover, the court stated, the settlement agreement included detailed instructions for liquidation of the Fund and the disposition of its assets; therefore, had the parties intended to compensate plaintiff for his efforts in negotiating the liquidation, they should have so stated.

We now affirm. Plaintiff fairly and knowingly signed the release, and its terms now bind him. Indeed, plaintiff himself states that he played a significant role in helping all the parties come to terms to resolve disputes and enter into the settlement agreement; he cannot now be heard to say that he did not intend to release what the contract language says he is releasing.

Despite plaintiff's contention otherwise, there is no ambiguity as to the release's intended scope. The language in the release contains several phrases indicating its exceptional breadth – for example, the language stated that the agreement was made in full settlement "of all matters arising out of or in connection with the facts, matters, claims, actions and allegations" made in the lawsuits. This language is not "reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *see also Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 402 [1st Dept 2010]). This conclusion holds particularly true given that the settlement agreement provided for liquidation of the Fund and winding up of its business, and thus, the end of the business relationships regarding the Fund. Accordingly, the language of the release makes clear that when the Fund ended as an entity, so did any of the claims or rights relating to it.

Moreover, even accepting as true (as we must on a motion to dismiss) plaintiff's argument that he believed his claims did not exist when he executed the settlement agreement, this argument would not change the outcome, as the release disposed of even unripe and contingent claims. According to the language of the agreement, the release broadly barred "all and/or any" claims

"arising from" or "resulting from" or "in connection with" "any act [etc.] concerning [the Fund]." This Court has actually construed similar broad language to bar fraud claims relating to the subject matter where the signatories to the agreement did not specifically refer to, or even know about, those fraud claims before executing their release (*see Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 76 AD3d 310, 318-319 [1st Dept 2010], *affd* 17 NY3d 269, 276 [2011]). Similarly, courts have given effect to releases even when the releasors are subjectively unaware of the precise claims they are releasing (*see Mergler v Crystal Props. Assoc.*, 179 AD2d 177, 180 [1st Dept 1992]).

Plaintiff is no more persuasive with his argument that the settlement agreement did not contemplate releasing claims between parties on the same side, such as between him and defendants. The settlement agreement established defined terms for each group of adverse parties – for example, the Fund, KOM, defendants, plaintiff, and one nonparty to this appeal are defined collectively as the "CCF2 parties" while yet another group of signatories to the settlement agreement is referred to collectively as the "CMIA Parties." Nonetheless, the language in the release simply states that "each Party . . . irrevocably and

fully releases and forever discharges each other Party." Had the parties wanted to release only specific individuals or entities, the agreement provided the language by which the parties could have done so. Thus, the release here at issue makes clear that each individual party released each other individual party regardless of the position in which those parties stood at the time they signed the release.

In light of our holding, we need not reach plaintiff's remaining arguments.

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14365 The People of the State of New York, Ind. 4422/11
Respondent,

-against-

David Simons,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Leila N. Tabbaa of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered August 17, 2012, convicting defendant, after a jury trial, of robbery in the first degree, burglary in the first degree, criminal possession of a weapon in the third degree, assault in the second degree and three counts of grand larceny in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 40 years to life, unanimously modified, on the law, to reduce the sentence on the weapon conviction to 3½ to 7 years, and the sentences on each grand larceny conviction to 2 to 4 years, and substitute second felony offender adjudications as to those convictions in place of persistent violent felony offender adjudications, and, as a matter of discretion in the interest of justice, to run all

sentences concurrently, resulting in an aggregate term of 20 years to life, and otherwise affirmed.

We reject defendant's argument that the verdicts convicting him of robbery in the first degree, burglary in the first degree, assault in the second degree and criminal possession of a weapon in the third degree were against the weight of the evidence with respect to the dangerous instrument element required for each of those charges (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The victim testified that defendant used a pen knife to cut him on his ears, neck, and body, that defendant then jabbed him with scissors, stabbed him with a syringe, and repeatedly threatened to kill him if he did not cooperate during the incident. This evidence established the element of use or threatened use of a dangerous instrument element required for each charge (*see People v Davila*, 37 AD3d 305 [1st Dept 2007], *lv denied* 9 NY3d 842 [2007]), as that element is defined in Penal Law § 10.00(13). There is no basis for disturbing the jury's credibility determinations. Moreover, the victim's testimony was largely corroborated by photographs and medical evidence regarding his injuries.

Furthermore, the court properly declined to submit lesser included offenses not requiring the dangerous instrument element.

There was no reasonable view of the evidence, viewed most favorably to defendant, that he committed the corresponding greater offenses without wielding at least one object that qualified as a dangerous instrument under the statutory definition and the facts presented (*see People v James*, 11 NY3d 886, 888 [2008]).

As the People concede, defendant was improperly sentenced as a persistent violent felony offender on his convictions of criminal possession of a weapon in the third degree and grand larceny in the fourth degree, since these crimes are not violent felony offenses. Accordingly, the sentences on those convictions are reduced as indicated. We also find the aggregate sentence to be excessive to the extent indicated.

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14366 In re Robert Carniol, Index 114029/11
Petitioner-Appellant,

-against-

The New York City Taxi and Limousine Commission, et al.,
Respondents-Respondents.

_____

Law Office of Daniel L. Ackman, New York (Daniel L. Ackman of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondents.

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Judgment, Supreme Court, New York County (Kathryn E. Freed, J.), entered October 3, 2013, denying petitioner's motion, granting respondents' cross motion to deny petitioner's amended petition for, among other things, the restoration of his taxi driver's license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court correctly concluded that petitioner failed to exhaust his administrative remedies, because he failed to appeal respondent Chairperson's final decision to revoke petitioner's license (*see* 35 RCNY former 68-18[a], now 68-11[a]). Contrary to petitioner's argument, the court correctly found that the revocation of petitioner's license was a "[d]iscretionary

[r]evocation," which may be appealed to the full Commission (*id.*), and not a mandatory revocation. As the court found, when read as a whole, 35 RCNY former 2-87(a)(1) (now 35 RCNY 54-02[e]), which prescribes the penalties for engaging in overcharging in violation of 35 RCNY former 2-34 (now 54-17[a]), indicates that the Commission "shall revoke" a driver's license when there have been three findings by respondent New York City Taxi and Limousine Commission (TLC) that the driver violated the overcharging rule (*id.*), not merely when there have been three incidents of overcharging by the driver. Accordingly, although petitioner was found to have overcharged passengers on numerous occasions, that adjudication was his first offense and did not automatically mandate revocation. Appeal to the full Commission was available and petitioner failed to pursue it.

Even if petitioner had exhausted his administrative remedies, he would not prevail. We reject petitioner's contention that the data from a global-positioning-system (GPS) device installed by TLC as part of its Taxi Technology System was obtained in violation of the New York State Constitution and the United States Constitution. Even if the installation of the device constituted a "search" within the meaning of both

Constitutions (*see United States v Jones*, 565 US __, 132 S Ct 945 [2012]; *People v Weaver*, 12 NY3d 433 [2009]), the search was reasonable under the special needs exception to the warrant requirement (*see Skinner v Railway Labor Executives' Assn.*, 489 US 602 [1989]).

Petitioner was not entitled to a *Frye* hearing (*see Frye v United States*, 293 F 1013 [DC Cir 1923]) with regard to the GPS evidence, because that evidence did not concern a novel scientific theory, technique, or procedure (*see Nonnon v City of New York*, 32 AD3d 91, 102-103 [1st Dept 2006], *affd* 9 NY3d 825 [2007]; *see also People v Littlejohn*, 112 AD3d 67, 73 [2d Dept 2013], *lv denied* 22 NY3d 1140 [2014]).

The evidence that petitioner, on numerous occasions, charged passengers a rate that was double the legal rate, provided substantial evidence of his specific intent to overcharge the

passengers (*see generally 300 Gramatan Ave. Assoc. v State Div.of Human Rights*, 45 NY2d 176, 179-182 [1978]).

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

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14368-
14368A The People of the State of New York
Respondent,

-against-

Rayson Perez,
Defendant-Appellant.

Ind. 2129/10
897/11

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

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

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered January 24, 2013, convicting defendant, after a jury trial, of gang assault in the first degree and assault in the first degree, and sentencing him to an aggregate term of seven years, and judgment, same court, Justice and date, as amended September 4, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third and fourth degrees, and sentencing him to a concurrent aggregate term of two years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find

that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the jury's determination that a group of men, including defendant, attacked the victim with a common purpose and with a shared intent to cause serious physical injury, and that they caused serious physical injury. At the time of trial, more than 2 years after the incident, the victim's health was still impaired by injuries caused by the assault.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14369 In re Jackie B.,

A Child Under Eighteen
Years of Age, etc.,

Pamela G.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

_____

Law Offices of Susan Barrie, New York (Susan Barrie of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

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

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about March 6, 2014, which denied respondent mother's application pursuant to Family Court Act § 1028, challenging the remand of the subject child, unanimously affirmed, without costs.

Actual injury is not a condition of a finding of imminent risk (*see Matter of Eric C.*, 220 AD2d 282, 283 [1st Dept 1995]), and proof of the neglect or abuse of one child is admissible evidence on the issue of the abuse or neglect of another child

(*see Kimberly H.*, 242 AD2d 35, 38 [1st Dept 1998]).

The court properly found that the child was at risk of imminent harm based on the caseworker's testimony that the mother locked the child's older sister out of the home on cold and snowy days, with only a light jacket, that she withheld food as a form of punishment, and based a prior neglect finding against the mother on the same conduct directed at the child's older brother. Additionally, the caseworker noted that the mother refused to consent to mental health and occupational therapy to improve the child's functioning and behavior, without explanation, despite the efforts of numerous school personnel. Although the mother denied these claims, deference is properly accorded to the court's credibility determination (*see Matter of R/B Children*, 256 AD2d 96 [1st Dept 1998]).

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14370 The People of the State of New York, Ind. 2744/12
Respondent,

-against-

Alberta Bagu,
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 (Anthony Ferrara, J. at plea; Abraham L. Clott, J. at sentencing), rendered on or about October 17, 2012, unanimously affirmed.

Application by appellant'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 appellant'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: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14371- Index 651092/12
14372-
14373-
14374-
14375-
14376-
14377-
14378-
14379-
14380 The Apparel Corporation (Far East),
Plaintiff-Respondent,

-against-

Sheermax LLC, et al.,
Defendants-Appellants.

_____

Richard J. Migliaccio, New York (Joel Scott Ray of counsel), for appellants.

Law Office of Steven R. Sutton, New York (Steven R. Sutton of counsel), for respondent.

_____

Order and judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered August 21, 2013, awarding plaintiff the principal sum of $211,466.16, plus interest, costs and disbursements against the entity defendants, unanimously affirmed, with costs. Appeals from the unfiled order and judgment, same court and Justice, dated June 13, 2013, and the order and judgment, same court and Justice, entered August 13, 2013, unanimously dismissed, without costs, as superseded by the

appeal from the August 21, 2013 order and judgment. Appeals from the order, same court and Justice, entered December 10, 2012, which denied defendants' motion to dismiss and granted plaintiff's cross motion for partial summary judgment on its first, second, third and ninth causes of action against the entity defendants, and the order, same court and Justice, entered August 7, 2013, which denied the entity defendants' motion for renewal, unanimously dismissed, without costs, as subsumed in the appeal from the August 21, 2013 order and judgment. Additional judgment, same court and Justice, entered December 2, 2013, awarding plaintiff judgment against the individual defendants on the foregoing causes of action and an additional principal sum of $23,820 against all defendants, unanimously affirmed, without costs. Appeal from the order, same court and Justice, entered November 22, 2013, which denied the individual defendants' motion for summary judgment dismissing the complaint as against them, and, upon a search of the record, granted plaintiff summary judgment against them and on a portion of the fourth, fifth and sixth causes of action, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid additional judgment. Supplemental judgment, same court and Justice, entered on or about March 14, 2014, awarding plaintiff $74,288 in attorneys'

fees against all defendants, unanimously affirmed. Appeal from the order, same court and Justice, entered May 13, 2014, which granted plaintiff's motion for attorneys' fees pursuant to Debtor and Creditor Law § 276-a, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid supplemental judgment.

Defendants were correctly held liable for their failure to pay plaintiff's invoices, based on their acknowledgment of the debt, which contained nothing inconsistent with their intention to pay (*see Mosab Constr. Corp. v Prospect Park Yeshiva, Inc.*, __AD3d__, 2015 NY Slip Op 00505 [2d Dept 2015]). Liability was correctly imposed on the individual defendants, who operated through an entity with an unregistered assumed name (*see McDonald v McBain*, 99 AD3d 436, 437 [1st Dept 2012], *lv denied* 21 NY3d 854 [2013]). The motion court correctly rejected defendants' unsupported claim of an accommodation between the parties and an industry custom at variance with the rule of Uniform Commercial Code § 2-606(1) requiring a buyer's timely rejection of goods, which were both irrelevant in light of the acknowledgment of the debt. Similarly, renewal was properly denied because defendants' evidence, even if newly discovered, would not have altered the outcome. There is sufficient evidence of fraudulent intent to

establish the fraudulent conveyance cause of action (*see Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). The amount of the attorneys' fee award appropriately encompasses services rendered with respect to causes of action inextricably intertwined with the fraudulent conveyance cause of action (*see Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177, 179 [1st Dept 2004]).

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

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14381 In re Scott Vincent, etc., Index 100604/13
Petitioner,

-against-

Raymond W. Kelly, etc., et al.,
Respondents.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Larry A. Sonnenshein of counsel), for respondents.

_____

Determination of respondent Police Commissioner, dated February 8, 2013, which, insofar as challenged, approved the Hearing Officer's findings that petitioner had engaged in misconduct, and imposed a penalty of forfeiture of 30 vacation days, a 30-day suspension, without pay, and a one-year dismissal probation period, 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 [Carol E. Huff, J.], entered November 14, 2013), dismissed, without costs.

Substantial evidence supports the findings that petitioner had refused to cooperate with a Port Authority Police Department (PAPD) investigation, and that he gave vague and nonresponsive

answers at a subsequent interview by respondent New York City Police Department (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-182 [1978]). There is no evidence that respondents sought to obtain a statement from petitioner through the PAPD; accordingly, petitioner's argument regarding that statement is unavailing.

The imposed penalty does not shock our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]).

We have considered petitioner's other arguments and find them unavailing.

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14382 Richard Kenny, et al., Index 100791/12
Plaintiffs-Respondents,

-against-

Daniel Glaser, et al.,
Defendants-Appellants.

_____

Wade Clark Mulcahy, New York (Brian Gibbons of counsel), for appellants.

Harris J. Zakarin, P.C., Melville (Harris J. Zakarin of counsel), for respondents.

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Order, Supreme Court, New York County (Louis B. York, J.), entered November 29, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff Richard Kenny allegedly slipped and fell on ice on a public sidewalk abutting defendants' property. Defendants made a prima facie showing that they are exempt from liability for any failure to remove snow and ice from the sidewalk (*see* Administrative Code § 7-210[b]) and that their voluntary snow removal efforts did not create or exacerbate the alleged

hazardous condition on the sidewalk (*see Titova v D'Nodal*, 117 AD3d 431 [1st Dept 2014]). Defendant Emily Glaser testified that two independent contractors cleared the sidewalk of snow and ice and put down salt and/or sand on the morning of the accident, and that the last contractor finished working not more than an hour before plaintiff's fall (*see Ortiz v Citibank*, 62 AD3d 613 [1st Dept 2009]). Ms. Glaser also testified that there was no snow or ice on the walkway shortly after plaintiff's fall. Although Ms. Glaser testified that the sidewalk "glistened" and was "wet" after the accident, this is not evidence that defendants' snow removal caused ice.

In opposition, plaintiffs failed to raise material questions of fact. Plaintiffs' claim that defendants' snow removal efforts created an icy condition is unsupported by any evidence (*see Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 464 [1st Dept 2007]). Although plaintiff testified that he slipped on ice, he was unable to give any details about the ice or the condition of the sidewalk. Plaintiff's affidavit attesting that he did not observe any salt or sand on the sidewalk fails to create a

factual issue, as it contradicts his deposition testimony (*see* *Titova*, 117 AD3d at 431).

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

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14383 The People of the State of New York, Ind. 973/12
Respondent,

-against-

Useth Harley,
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 (Ryan Gee 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 (Juan Merchan, J.), rendered on or about August 6, 2012,

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: MARCH 3, 2015

CLERK

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

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14384-
14385-
14385A Index 400734/12

Henrik F. Schulbach, now known
as Henrick Barkley De Pearson, etc.,
Plaintiff-Appellant,

-against-

Morris & McVeigh, LLP, et al.,
Defendants-Respondents.

_____

Michaels & Smolak, P.C., Auburn (Lee S. Michaels of counsel), for appellant.

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

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Marian C. Rice of counsel), for Judith Dillon Segreti, respondent.

Kelley Drye & Warren LLP, New York (Steven P. Caley of counsel), for Kelley Drye & Warren LLP, Peter Wolfram, Michael S. Insel, Christina M. Mason, Lili Kishinevksy and Brenda Chizinski, respondents.

_____

Judgment, Supreme Court, New York County (Louis B. York, J.), entered May 16, 2013, dismissing the complaint, and bringing up for review orders, same court and Justice, entered April 9, 2013, which granted defendants' motions to dismiss the complaint and denied plaintiff's cross motion for leave to file a third amended complaint, unanimously affirmed, without costs. Appeals from the foregoing orders, unanimously dismissed, without costs,

as subsumed in the appeal from the judgment.

The court properly dismissed the claims against the Kelley Drye defendants based on plaintiff's execution of a general release that clearly and unambiguously waived all claims against those defendants (*see Mergler v Crystal Props. Assoc.*, 179 AD2d 177 [1st Dept 1992]). Plaintiff's contention that this release was premised on mutual mistake is untenable. All of the facts giving rise to the instant malpractice claims were in existence at the time of the release and plaintiff does not assert that the *Kelley Drye* defendants in any way attempted to conceal them (id. at 182). The claims against the remaining defendants were also properly dismissed, since plaintiff executed a separate release that discharged the claims that were the predicate for those claims. The court properly exercised its discretion in denying plaintiff's motion for leave to file a third amended complaint asserting claims that would be barred by the release.

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14386 Marie Carole Seide, et al., Index 350464/10
Plaintiffs-Appellants,

-against-

Alberto Calderon, et al.,
Defendants-Respondents.

_____

Law Offices of Laurence Jeffrey Weingard, New York (Mitchell F. Senft of counsel), for appellants.

Law Office of John Trop, Yonkers (David Holmes of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 3, 2013, which denied plaintiffs' motion for a default judgment against defendants, and granted defendants' cross motion to dismiss the complaint as abandoned pursuant to CPLR 3215(c), deemed appeal from judgment, same court and Justice, entered February 7, 2014, and, so considered, the judgment unanimously affirmed, without costs.

We exercise our discretion under CPLR 5520(c) to deem the appeal from the order as taken from the subsequent judgment, because the relief granted by the judgment is identical to that granted in the order (*see Gutman v Savas*, 17 AD3d 278, 278-279 [1st Dept 2005]).

The motion court providently exercised its discretion in dismissing the complaint as abandoned, because plaintiffs failed to demonstrate a reasonable excuse for waiting over a year after the expiration of the one-year limitation period before moving for a default judgment (*see* CPLR 3215[c]; *Diaz v Perez*, 113 AD3d 421, 422 [1st Dept 2014]). Plaintiffs' unsubstantiated excuses are insufficient (*see Butindaro v Grinberg*, 57 AD3d 932, 933 [2d Dept 2008]; *Brodmerkel v James McCullagh Co., Inc.*, 46 AD3d 853, 853 [2d Dept 2007], *lv dismissed* 10 NY3d 821 [2008]).

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14387- Index 650962/12E
14388- 650964/12E
14389- 650965/12E
14390-
14391-
14392 Baxter Street Condominium, etc.,
Plaintiff-Respondent,

-against-

LPS Baxter Holding Co., LLC,
Defendant-Appellant.

_____

Dollinger, Gonski & Grossman, Carle Place (Matthew Dollinger of counsel), for appellant.

Wolf Haldenstein Adler Freeman & Herz, LLP, New York (Maria I. Beltrani of counsel), for respondent.

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Judgments, Supreme Court, New York County, (Anil C. Singh, J.), entered October 22, 2013 and October 17, 2013, awarding plaintiff $46,882.52, $42,053.75, and $46,349.99, unanimously affirmed, with costs. Appeals from the underlying orders, same court and Justice, entered June 20, 2013, which granted plaintiff's consolidated motions for summary judgment in three actions, severed the claims for legal fees, and referred them to a referee to hear and report, unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

Plaintiff condominium established its entitlement to recover unpaid common charges and late fees from defendant, a designee of the sponsor and an owner of three commercial condominium units, representing defendant's proportionate share of a $700,000 assessment issued against all unit owners. The condominium board's determination that the assessment was necessary for "repair" work, which, pursuant to the by-laws, does not require the sponsor's consent or the unit owners' approval, is protected by the business judgment rule (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]; *Pomerance v McGrath*, __ AD3d __, 2015 NY Slip Op 00466 [1st Dept 2015]). The board's determinations are supported by evidence of water leaks that have been recurring since the building's construction, an engineer's report identifying various defects as the cause of the water infiltration, including the use of vulnerable material during construction of the balconies, and recommending remedial measures, as well as the engineer's estimated budget for the work to be performed (*see Helmer v Comito*, 61 AD3d 635, 636-637 [2d Dept 2009]; *Gennis v Pomona Park Bd. of Mgrs.*, 36 AD3d 661, 663 [2d Dept 2007]). In opposition, defendant failed to making a showing of bad faith, fraud, self-dealing or unconscionability

(*see Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 989 [1st Dept 2009]; *Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33, 36 [1st Dept 1999]).

The pendency of a separate action by the condominium against the sponsor and others, alleging different causes of action arising from the design and construction of the building, does not require plaintiff to await the resolution of that action before making an assessment for what it deems to be necessary repairs. Contrary to defendant's contention, the by-laws provide that, to the extent the board is responsible for maintenance and repair of the limited common elements, which include the balconies, the same "shall be charged to *all* Unit Owners as a Common Expense" (Art. V., Section 10[B] [emphasis added]).

Defendant cannot avoid summary judgment by speculating that discovery will provide the necessary evidence (*see Silverstein v Westminster House Owners, Inc.*, 50 AD3d 257258 [1st Dept 2008]).

The mere fact that depositions have not been held is an insufficient ground to excuse the deficiencies in defendant's proof (*see Perez v Brux Cab Corp.*, 251 AD2d 157, 160 [1st Dept 1998]).

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14393 In re Steve Loren, etc., Index 401945/12
Petitioner-Appellant,

-against-

The New York City Department
of Education, et al.,
Respondents-Respondents.

_____

Steve Loren, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondents.

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered January 24, 2013, granting respondents' cross motion to deny the petition to annul respondents' determination, dated July 31, 2012, which terminated petitioner from the New York City Teaching Fellows training program, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner had only recently been accepted into the training program and was in the midst of a seven-week pre-service training period. Thus, he had no more rights than those of probationary employees, who "may be discharged for any or no reason at all in the absence of a showing that [their] dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of

law" (*Matter of Brown v City of New York*, 280 AD2d 368, 370 [1st Dept 2001]).

Here, the record demonstrates that petitioner did not have a cause of action as the evidence submitted with the petition and cross motion established that during the pre-service training period, several complaints had been made about petitioner's performance, resulting in the issuance of a performance concern letter. The complaints indicated that petitioner had been admonished multiple times for using his cellphone in the classroom and improperly leaving the classroom when students were present. He was also directed by a supervisor to refrain from contacting another teacher who had expressed concerns about how he had previously spoken to her. Under these circumstances, where there is evidence of multiple instances of unsatisfactory performance during a short seven-week period, the discharge was

made in good faith (*see Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]).

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14394-
14395 &
M-558

Ind. 1453/11
3242/09

The People of the State of New York,
Respondent,

-against-

Greg Poirier,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered August 6, 2012, convicting defendant, after a jury trial, of burglary in the first degree as a sexually motivated felony and sexual abuse in the first degree, and sentencing him to an aggregate term of 25 years to be served consecutively to the sentence on defendant's April 21, 2010 conviction, and judgment, same court (Maxwell Wiley, J.), rendered April 21, 2010, convicting defendant, upon his plea of guilty, of burglary in the second degree as a sexually motivated felony, and sentencing him to a term of 5 years, unanimously affirmed.

Defendant's legal sufficiency claim as to the element of physical injury is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The victim's testimony that she found it "really painful" to eat or chew for "a couple of weeks" after her jaw was hurt in the incident, and that she used over-the-counter pain medication and vicodin, provided ample evidence that she suffered "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]. Physical injury was further established by testimony that the victim had bruises on her back, shoulder, and knee as a result of the incident (*see e.g. People v Harvey*, 309 AD2d 713 [1st Dept 2003], *lv denied* 1 NY3d 573 [2003]). Moreover, the victim testified that she was injured when defendant pinned her to the floor of her apartment, pressed his hand against her mouth as she was lying on the floor, and subjected her to sexual touching, prompting her to scream and injure her jaw in the process. To establish physical injury, there is no requirement that a victim seek medical treatment or miss work (*see People v Guidice*, 83 NY2d 630, 636 [1994]; *People v Jackson*, 296 AD2d 313 [1st Dept 2002], *lv denied* 98 NY2d 768

[2002]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Trial counsel's failure to raise the sufficiency argument defendant raises on appeal was not ineffective since, as discussed above, that claim lacks merit. Any error in counsel's failure to request an adverse inference charge regarding missing photographs was not so egregious or prejudicial as to warrant a finding of ineffective assistance (*see People v Blake*, 24 NY3d 78, 81-84 [2014]).

We perceive no basis for reducing the sentence.

M-558 - *People v Poirier*

Motion to file a supplemental brief denied.

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14396- Index 654353/12
14396A Joseph Rubens,
Plaintiff-Appellant,

-against-

UBS AG,
Defendant-Respondent.

_____

Law Office of Ethan A. Brecher, LLC, New York (Ethan A. Brecher of counsel), for appellant.

Gibson, Dunn & Crutcher LLP, New York (Gabriel Herrmann of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered February 14, 2014, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered November 14, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

We reject plaintiff's contention that the forum selection clauses contained in an account opening document and a power of attorney he signed are merely permissive. Both documents use clear, unconditional language to designate Zurich, Switzerland, as the parties' forum of choice (*cf. Columbia Cas. Co. v Bristol-Myers Squibb Co.*, 215 AD2d 91, 96 [1st Dept 1995] [provision

containing no mandatory language binding parties to particular forum was "clearly permissive"]). Moreover, plaintiff does not dispute that the forum selection clauses in the parties' three subsequent agreements are mandatory; he contends only that he lacked the power to enter into those agreements. However, as established by the defendant's expert affidavit, the agreements are valid and enforceable against plaintiff under Swiss law.

Plaintiff failed to show that the parties' agreements containing the forum selection clauses are "permeated with fraud" since he does not allege a material misrepresentation by defendant (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011]). Plaintiff's argument that defendant fraudulently showed him only the signature pages of the agreements is unavailing since he "is presumed to know the contents of the instrument [he] signed and to have assented to such terms" (*British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234, 234 [1st Dept 1991]). The remainder of plaintiff's fraud allegations are conclusory (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

We reject plaintiff's argument that he will be denied his day in court if the mandatory forum selection clauses, to which

he assented, are enforced. Plaintiff provides no legal basis for his contention that his age would make litigation in Switzerland impracticable and inconvenient or that he has an unmitigated right to litigate his claims in New York under a contingency fee arrangement. Nor can plaintiff avoid enforcement of the mandatory forum selection clauses under these circumstances on the ground that Switzerland does not follow the "American rule" with respect to attorneys' fees.

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14397 In re Fort Independence Park Neighborhood Association, etc., et al., Petitioners-Appellants,

-against-

Meenakshi Srinivasan, etc., et al., Respondents-Respondents.

- - - - -

Community Board No. 8, Bronx County, Amicus Curiae.

Index 260729/11

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Padernacht Law, P.C., Bronx (Daniel Padernacht of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for municipal respondents.

Sheldon Lobel, P.C., New York (Jordan Most of counsel), for GRA V, LLC, respondent.

Charles G. Moerdler, New York, for amicus curiae.

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Order and judgment (one paper), Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 31, 2013, which denied the petition to annul the determination of respondent Board of Standards and Appeals (BSA) dated August 16, 2011, adopting a resolution finding that respondent GRA V, LLC had established a common law vested right to continue work pursuant to a permit, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

BSA's determination that developer GRA V's permit was valid was not arbitrary and capricious (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). After an earlier remand from the Court of Appeals (*see Matter of GRA V, LLC v Srinivasan*, 12 NY3d 863 [2009]), GRA V LLC was given the opportunity to establish its entitlement to a minor retroactive amendment to its plans to reflect the required additional minimum setback from the street line. Such minor amendments to plans are permitted to cure errors and administrative irregularities, and to validate a permit retroactively (*see Matter of Menachem Realty Inc. v Srinivasan*, 60 AD3d 854, 856 [2nd Dept 2009]). Here, after GRA V amended its plans, the Department of Buildings determined that all outstanding zoning issues related to the plans had been resolved and that the foundation permit was valid, and the BSA agreed.

The BSA also rationally concluded that GRA V established that its financial expenditures, including irrevocable commitments, and the amount of work completed, were substantial, and also that it would suffer serious loss absent common law vested rights (*see Matter of Ellington Constr. Corp. v Zoning Bd. of Appeals of Inc. Vil. of New Hempstead*, 77 NY2d 114 [1990];

Matter of Putnam Armonk v Town of Southeast, 52 AD2d 10 [2nd Dept 1976]).

There is no merit to the claim made by amicus curiae, Community Board 8, that the BSA ignored the public health, safety and welfare in making its determination. The BSA specifically considered and rejected the claim that the project will have an adverse impact on the public health, safety and welfare. In addition, the BSA correctly noted that the question of public safety, health and welfare arises where, unlike here, the specific issue of divestment of the common law vested right to build has been raised (*see Putnam Armonk*, 52 AD2d at 15). In any event, there was no record evidence to support the claim that this project poses a public safety or health risk.

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

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14398N Auto One Insurance Company, Index 161419/13
Petitioner-Appellant,

-against-

Hillside Chiropractic, P.C.,
Respondent-Respondent.

_____

The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

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Order, Supreme Court, New York County (Peter H. Moulton, J.), entered July 2, 2014, which denied the petition seeking to vacate the determination of the Master Arbitrator, dated November 6, 2013, affirming the award of the lower arbitrator in this no-fault arbitration, unanimously reversed, on the law, without costs, the petition granted, the arbitration award vacated, and the matter remanded for a new arbitration hearing before a different arbitrator.

The no-fault arbitrator gave no weight to an independent medical examination (IME) report, prepared by a chiropractor and submitted by petitioner, because it was not notarized pursuant to CPLR 2106. The Master Arbitrator, in reviewing the award, deferred to the no-fault arbitrator's determination of the weight to be given to the evidence, as did the IAS court.

We find that the no-fault arbitrator's decision to adhere, with strict conformity, to the evidentiary rule set forth in CPLR 2106, although such conformity is not required (*see* 11 NYCRR § 65-4.5[o] [1] ["The arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary."], was arbitrary. Accordingly, the award must be vacated (*see In re Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 211 [1981]). We note that since no substantive determination regarding the weight of the IME report was ever made, the Master Arbitrator and the IAS court erred in deferring to the no-fault arbitrator's determination.

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

ENTERED: MARCH 3, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Feinman, JJ.

14399N Li Xian, et al., Index 304347/09
Plaintiffs-Appellants,

-against-

Tat Lee Supplies Co., Inc.,
Defendant-Respondent,

Lorimer Development, LLC, et al.,
Defendants.

_____

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

Spizz Cohen & Serchuk, P.C., New York (Joseph P. Cervini, Jr. of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered September 16, 2013, which, to the extent appealed from as limited by the briefs, granted defendant Tat Lee Supplies Co., Inc.'s motion to renew and, upon renewal, granted its motion to vacate the default judgment entered against it, unanimously affirmed, without costs.

The motion court properly granted defendant's motion to vacate the default judgment upon renewal. Although defendant's failure to maintain a current address with the Secretary of State is not a reasonable excuse for default warranting relief under CPLR 5015(a)(1), defendant demonstrated grounds for relief

pursuant to CPLR 317, since it was not personally served, did not receive actual notice in time to defend, and has a meritorious defense (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141-142 [1986]; *Olivaria v Lin & Son Realty, Corp.*, 84 AD3d 423, 424-425 [1st Dept 2011]).

Vacatur was also warranted pursuant to CPLR 5015(a)(3), since the default judgment was obtained through misrepresentation or misconduct. Defendant demonstrated that plaintiffs' motion for a default judgment was granted, in part, based on plaintiffs' counsel's incorrect representation that defendant's old address was the "only known" address for service of the additional summons required by CPLR 3215(g)(4), when, in fact, plaintiffs' sublease provided another address for service of legal notices on defendant.

The grant of renewal and vacatur of the default judgment is consistent with the strong public policy favoring disposition of

cases on their merits (*see Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633 [1st Dept 2009]).

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

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14401 The People of the State of New York, Dkt. 41513C/11
Respondent,

-against-

Esmilta Fernandez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Paul B. Hershan of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered May 24, 2012, convicting defendant, after a nonjury trial, of attempted petit larceny and attempted criminal possession of stolen property in the fifth degree, and sentencing her to a conditional discharge, unanimously affirmed.

The verdict 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. The evidence, viewed as a whole, supports an inference that, after finding the victim's wallet, defendant removed money from the wallet before returning it to the victim.

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14402 In re Norma Romero-Mitchell, Index 112854/11
Petitioner-Respondent,

-against-

New York City Department of Housing
Preservation and Development,
Respondent-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for appellant.

Vernon & Ginsburg, LLP, New York (Darryl M. Vernon of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered April 8, 2013, granting the petition, brought pursuant to CPLR article 78, seeking to annul the determination of respondent, New York City Department of Housing Preservation and Development (HPD), dated August 22, 2011, to evict petitioner from an apartment in a Mitchell-Lama building, unanimously affirmed, without costs.

In or about 1970, petitioner, then a minor, moved into the subject cooperative apartment with her mother. Years later, in 1975, shortly before her 18th birthday, petitioner was issued shares in the housing corporation, as a joint owner with right of survivorship. Under these circumstances, the court properly

found that petitioner should not have been required to establish entitlement to occupancy pursuant to HPD's succession rules (*see* 28 RCNY 3-02[p]). Rather, the court properly determined that petitioner is entitled to remain in occupancy until the housing corporation establishes at a hearing before HPD that a ground exists to terminate her occupancy and evict her pursuant to 28 RCNY 3-18. The housing corporation's and HPD's treatment of petitioner as an applicant for succession rights does not define her status (*see e.g. Matter of Fruchter v New York City Dept. of Hous. Preserv. & Dev.*, 36 AD3d 500 [1st Dept 2007]).

The housing corporation's bylaws and Mitchell-Lama's regulatory scheme clearly indicate that ownership of cooperative shares is tied to the occupancy agreement (*see* 28 RCNY 3-06[c]). Moreover, the succession guidelines provided to petitioner by the housing corporation state that "Stock Certificates and Occupancy Agreements are treated as one; therefore all changes are always done simultaneously." Under these circumstances, in the absence of any explanation for the change in ownership and lack of a corresponding change in the occupancy agreement, the absence of an occupancy agreement between petitioner and the housing corporation is not dispositive.

The court properly considered petitioner's argument that HPD's succession rules are inapplicable, since HPD reached and determined the issue (*compare Matter of Klapak v Blum*, 65 NY2d 670, 672 [1985] [Court of Appeals would not review issue argued on appeal, as it was not considered by the administrative agency]). The court also properly refused to consider the occupancy agreement for the apartment, as the agreement was not submitted to HPD at the administrative hearing (*see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]).

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

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14403 In re Domenico Mancini, Index 100328/13
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

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

David Farber, New York City Housing Authority, New York (Jeffrey Niederhoffer of counsel), for respondent.

_____

Determination of respondent, dated October 25, 2012, which, after a hearing, found petitioner guilty of disciplinary charges, and suspended his employment for 31 work days, 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 [Doris Ling-Cohan, J.], entered November 29, 2013), dismissed, without costs.

The determination that petitioner engaged in an incident of workplace violence is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Petitioner's supervisor testified that petitioner threatened him as petitioner stood near him, holding wood or another object in his hand, and raised the wood

while getting angrier in his statements to the supervisor. There exists no basis to disturb the credibility determinations of the Trial Officer (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Based on respondent's strong concern with promoting a nonviolent workplace, the suspension imposed does not shock our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32 [2001]; *see also Matter of Dockery v New York City Hous. Auth.*, 51 AD3d 575 [1st Dept 2008], *lv denied* 11 NY3d 704 [2008]; *Matter of Sindoni v County of Tioga*, 67 AD3d 1183, 1184-1185 [3d Dept 2009]).

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14406 Kristina M. Armstrong, Index 651881/13
Plaintiff-Respondent,

-against-

Blank Rome LLP, et al.,
Defendants-Appellants.

_____

Hinshaw & Culbertson LLP, New York (Philip Touitou of counsel), for appellants.

Sack & Sack, LLP, New York (Eric R. Stern of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 10, 2014, which, to the extent appealed from, denied defendants' motion to dismiss the Judiciary Law § 487 claim and to strike certain allegations in the complaint, unanimously affirmed, with costs.

The complaint states a claim for violation of Judiciary Law § 487 with sufficient particularity (see *Flycell, Inc. v Schlossberg LLC*, __ F Supp 2d __, 2011 WL 5130159, *5, 2011 US Dist LEXIS 126024 [SDNY 2011]; *Greene v Greene*, 47 NY2d 447, 451 [1979]). Specifically, the complaint alleges that defendants concealed a conflict of interest that stemmed from defendant law firm's attorney-client relationship with Morgan Stanley while simultaneously representing plaintiff in divorce proceedings

against her ex-husband, a senior Morgan Stanley executive, who participated in Morgan Stanley's decisions to hire outside counsel (*see* New York Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7[a]). Contrary to defendants' argument, applying a liberal construction to the allegations in the complaint (*see e.g. Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), plaintiff identifies the nature of the conflict as stemming from defendants' interest in maintaining and encouraging its lucrative relationship with Morgan Stanley and the impact of that interest on defendants' judgement in its representation of plaintiff in the divorce proceedings (*see* New York Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7[a]).

Further, the complaint alleges numerous acts of deceit by defendants, committed in the course of their representation of plaintiff in her matrimonial action. Additionally, the complaint sufficiently alleges that the individual defendants knew of but did not disclose defendant law firm's representation of Morgan Stanley to plaintiff, and it details the calculations of her damages.

The court did not improvidently deny defendants' motion to strike allegations in the complaint regarding the conflict of interest, and it correctly found that the allegations complained

of are relevant to the legal malpractice claim (*see Kaufman & Kaufman v Hoff*, 213 AD2d 197, 199 [1st Dept 1995]). Although an order denying a motion to strike scandalous or prejudicial matter from a pleading is not appealable as of right (*see* CPLR 5701[b][3]), we nevertheless reach this issue since plaintiff did not raise the issue of appealability (*see Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600 [1st Dept 2014]).

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14407 The People of the State of New York, Ind. 4903/12
Respondent,

-against-

Terrell Dews,
Defendant-Appellant.

_____

John R. Lewis, Sleepy Hollow, for appellant.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about April 16, 2013, unanimously affirmed.

Application by appellant'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 appellant'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: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, Richter, JJ.

14408 Chris Bevilacqua, Index 155615/12
Plaintiff-Appellant,

-against-

CRP/Extell Parcel I, L.P.,
et al.,
Defendants-Respondents.

_____

Held & Hines, LLP, New York (James K. Hargrove of counsel), for appellant.

Boies, Schiller & Flexner LLP, Armonk (Jason C. Cyrulnik of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered July 11, 2013, which granted defendants' motion to dismiss the complaint on the grounds of res judicata, collateral estoppel, and failure to state a cause of action, unanimously affirmed, without costs.

Plaintiff's claims for return of his down payment and rescission of his condominium unit purchase agreement were precluded by the Attorney General's prior determination against him and the article 78 proceeding dismissing his challenge to it, which barred the claims that he brought and those that he could have brought (*see Sweeny v New York City Dept. of Health & Mental Hygiene*, 91 AD3d 420, 421 [1st Dept 2012], *lv denied* 19 NY3d 802

[2012]). Contrary to plaintiff's claimed understanding, neither the administrative determination nor the judgment dismissing his petition contained language authorizing the instant action. We reject plaintiff's contention that the administrative proceeding was not sufficiently judicial to warrant according it preclusive effect; as in related cases involving purchasers seeking rescission and return of their down payments for units in the same condominium, there were no issues that would have been illuminated by an evidentiary hearing or cross examination (*see Coffey v CRP/Extell Parcel I, L.P.*, 117 AD3d 585 [1st Dept 2014], *lv dismissed* 24 NY3d 934 [2014]; *Matter of CRP/Extell Parcel I, L.P. v Cuomo*, 101 AD3d 473 [1st Dept 2012]). Upon our review of the complaint, we agree with the motion court that the fraud claims are preempted by the Martin Act and the regulations promulgated thereunder (*see Assured Guar. [UK] Ltd. v J.P. Morgan*

Inv. Mgt. Inc., 18 NY3d 341, 353 [2011]; *Berenger v 261 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012]).

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

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14410 In re Uni-Rty Corporation, et al., Index 157621/12
Petitioners-Appellants,

-against-

New York Guangdong Finance, Inc., et al.,
Respondents.

Russ & Russ, P.C.,
Nonparty Respondent.

_____

Stuart D. Root, Livingston Manor, for appellants.

Russ & Russ, P.C., Massapequa (Jay Edmond Russ of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered October 28, 2013, which, insofar as appealed from, granted nonparty Russ & Russ P.C. (petitioners' former counsel) a charging lien pursuant to Judiciary Law § 475, and referred determination of the amount of the lien to a Special Referee, unanimously modified, on the law and the facts, to refer the matter to a Special Referee to determine whether Russ & Russ was entitled to enforce its charging lien, and, if the Referee determines that Russ & Russ was so entitled, to determine the amount of the lien, and otherwise affirmed, without costs.

Petitioners contend that a motion for a charging lien is subject to the same standards as a motion for summary judgment.

This argument is based on the fact that the last sentence of Judiciary Law § 475 says, "The court upon the *petition* of the client or attorney may determine and enforce the lien" (emphasis added). Petitioners note that a petition is a pleading in a special proceeding (*see* CPLR 402) and that "a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment" (*Karr v Black,* 55 AD3d 82, 86 [1st Dept 2008], *lv denied* 11 NY3d 712 [2008]). However, "Judiciary Law § 475 . . . permits enforcement of the lien either by way of motion in the main action or by plenary action" (*Miller v Kassatly,* 216 AD2d 260, 261 [1st Dept 1995]). Since Russ & Russ was not required to bring a special proceeding, its motion for a charging lien was not subject to the same standards as a motion for summary judgment.

"[W]here an attorney's representation terminates and there has been . . . no unjustified abandonment by the attorney, the attorney's right to enforce the statutory charging lien is preserved" (*Klein v Eubank,* 87 NY2d 459, 464 [1996]). In the instant proceeding, as in *Klein,* there is a dispute about whether the attorney abandoned his client. Therefore, "a hearing should be held on the question of [the former attorney's] entitlement to enforcement of his statutory charging lien" (*id.*).

"[D]etermination and enforcement of a charging lien" is "an equitable claim triable by the court" (*Grutman Katz Greene & Humphrey v Goldman*, 251 AD2d 7, 7 [1st Dept 1998]; *see also Matter of King*, 168 NY 53, 58-59 [1901]). Hence, the IAS court had the power to appoint a referee (*see King*, 168 NY at 58). *Matter of Jacob D. Fuchsberg Law Firm v Danzig* (248 AD2d 178 [1st Dept 1998]) is not to the contrary, as that case involved a "dispute between attorneys over the sharing of contingency fees" (*id.* at 179) and had been converted into a plenary action for breach of contract (*id.* at 178-179).

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14411 The People of the State of New York, Ind. 1383/12
Respondent,

-against-

Alfonso Harris,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Heidi Bota 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 (Renee A. White, J.), rendered October 2, 2012, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of seven years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

As the People concede, defendant is entitled to resentencing pursuant to *People v Rudolph* (21 NY3d 497 [2013]) for a youthful

offender determination. Since we are ordering a new sentencing proceeding, we find it unnecessary to address defendant's other arguments.

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14413 Amanda Lerner, Index 159038/12
Plaintiff-Respondent,

-against-

Friends of Mayanot Institute, Inc., et al.,
Defendants-Appellants,

Tannenbaum Chabad House,
Defendant.

_____

Wade Clark Mulcahy, New York (Alison Weintraub of counsel), for appellants.

Condon & Associates, PLLC, Nanuet (Laura M. Catina of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 21, 2014, which denied defendants-appellants' motion to dismiss this action on the ground of forum non conveniens, unanimously affirmed, without costs.

The motion court properly analyzed the relevant factors and properly found that this action, alleging, among other things, breach of contract and negligent supervision of the then-teenage plaintiff who was allegedly assaulted while she was on a tour in Israel, has a substantial nexus with New York (*see* CPLR 327[a]; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). Defendants failed to meet their

heavy burden to show that the relevant factors militate against the litigation being heard in New York (*see ACE Fire Underwriters Ins. Co. v ITT Indus., Inc.*, 44 AD3d 404, 406 [1st Dept 2007]). Plaintiff, as well as both of her parents and at least four medical providers who treated her after the alleged assault, all of whom are expected to testify at trial, are New York residents; defendant Friends of Mayanot Institute, Inc. is incorporated in New York; defendant Mayanot Institute of Jewish Studies, which was the designated operator of the tour, marketed itself as being at least partially based in New York, as its website provided a New York telephone number and physical address; and the tour was scheduled to begin and end in New York. Under these circumstances, notwithstanding that the alleged assault occurred in Israel, this case has a substantial nexus with New York (*see Neville v Anglo Am. Mgt. Corp.*, 191 AD2d 240 [1st Dept 1993]).

The motion court properly found that defendants failed to establish that they will face substantial hardships if required to litigate in New York (191 AD2d at 242). Defendants did not identify any foreign witness, nor did they specify the nature or materiality of the testimony of any foreign witness (*id.*). They have offered only "sheer speculation . . . that any such testimony will be unobtainable in New York" (*Anagnostou v Stifel*,

204 AD2d 61, 62 [1st Dept 1994]). They also failed to show that New York courts will be unable to apply Israeli law, should the necessity arise (*id.*).

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

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14414 The People of the State of New York, Ind. 6209/10
Respondent,

-against-

Trevell Coleman,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jody Ratner 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 (Michael J. Obus, J.), rendered May 8, 2012, as amended May 10, 2012, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 15 years to life, unanimously modified, on the law, to the extent of reducing the amounts of the mandatory surcharge and crime victim assistance fee from $300 and $25 to $150 and $5, respectively, and otherwise affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence

warrants the conclusion that the crime to which defendant confessed was the same crime with which he was charged. Defendant entered a police station and volunteered that he had shot a stranger, many years before, during a robbery attempt. The police matched the details that defendant provided with the facts of an unsolved 1993 homicide. The facts set forth in defendant's confession and the known facts of the crime, as established at trial, matched in many significant respects, and the strong similarity established defendant's identity as the perpetrator of this particular crime. The discrepancies between the two sets of facts were relatively minor and did not cast doubt on this conclusion.

Defendant did not preserve his claim that the court failed to give an adequate jury instruction on the subject of identity, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The court's charge clearly conveyed the People's burden of proving, beyond a reasonable doubt, that it was defendant who committed the acts at issue. Since there were no identifying eyewitnesses, there was no need for an expanded identification charge.

Since defendant committed the crime before the effective date of legislation increasing the mandatory surcharge and crime victim assistance fees, his sentence is unlawful to the extent indicated.

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14415-
14416 In re Jayden C., also known as Baby Boy C.,

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

Luisanny A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

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

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

_____

Order, Family Court, Bronx County (Joan L. Piccarillo, J.), entered on or about February 28, 2014, which granted the motion for summary judgment of petitioner Administration for Children's Services, finding that respondent mother derivatively abused the subject child, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about January 22, 2014, which denied respondent's application pursuant to Family Court Act § 1028 for return of the subject child, unanimously dismissed, as moot, without costs.

Petitioner agency made a prima facie showing of derivative abuse as to the subject child based on the prior findings of abuse against respondent with respect to her older children, including a finding that she abused her then one-year-old daughter who suffered severe head trauma consistent with a violent shaking. These prior findings, entered less than two years prior to the filing of the instant petition which was bought five days after the subject child's birth, were sufficiently close in time to support the conclusion that respondent's parental judgment remained impaired (*see Matter of Nhyashanti A. [Evelyn B.]*, 102 AD3d 470 [1st Dept 2013]; *Matter of Brianna R. [Marisol G.]*, 78 AD3d 437, 437-438 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]). Accordingly, the derivative finding of neglect was supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]).

Contrary to respondent's argument, the entry of the abuse finding, which was entered on consent, constitutes proof that her older child was abused, and was admissible on the issue of derivative abuse (*see Matter of William N. [Kimberly H.]*, 118 AD3d 703, 705 [2d Dept 2014]).

Respondent failed to raise "a triable issue of fact concerning an amelioration of the conditions that led to the

original finding" (*Matter of Takia B.*, 73 AD3d 575, 576 [1st Dept 2010]). Notably, the two older children had not yet been returned to respondent based on findings that their continued placement was required in furtherance of their best interests and safety needs. Further, respondent's testimony demonstrated that she continued to lack parental judgment and that she had not fully complied with service referrals.

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14418-
14419 Index 451042/12

Metropolitan Suburban Bus Authority,
Plaintiff-Appellant,

-against-

County of Nassau,
Defendant-Respondent.

_____

Jerome F. Page, Metropolitan Transportation Authority, New York (Helene Fromm of counsel), for appellant.

Carnell T. Foskey, County Attorney of Nassau County, Mineola (Robert F. Van der Waag of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered October 16, 2013, dismissing the complaint and awarding costs to defendant, unanimously affirmed, without costs. Appeal from underlying order, same court and Justice, entered September 3, 2013, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7), unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

When read in the context of the entire agreement, the plain, unambiguous meaning of the disputed language in section 13(ii) of the parties' lease and operating agreement conclusively refutes, as a matter of law, plaintiff's contract claim that defendant was

obligated to pay the post-contract termination labor costs due to plaintiff's former employees (*see Richard Feiner and Company Inc. v Paramount Pictures Corporation*, 95 AD3d 232, 237-238 [1st Dept 2012], *lv denied* 19 NY3d 814 [2012]). Section 13(ii) provides that upon a party's election to terminate the agreement (as occurred here), defendant would become accountable for plaintiff's post-termination wind-down labor costs associated with its employees continued furnishment of bus services for defendant only until such time as plaintiff's workforce was disbanded, or there was a transfer of such workforce to defendant's payroll, or to the payroll of defendant's designated replacement operator. Defendant designated a new, privatized bus operator to take over plaintiff's bus services the day after the agreement was terminated. Thus, it never actively took over the bus operation, or utilized any of plaintiff's former workforce in the provision of bus services after the termination date. Accordingly, defendant is not liable for the wind-down labor costs of plaintiff's former employees, and the complaint was properly dismissed (*see 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5-6 [1st Dept 2004]).

Plaintiff's proffered interpretation would render meaningless the language that conditions defendant's obligation to pay post-termination labor costs on defendant's subsequent operation of the bus system using plaintiff's former employees (*see generally Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]; *150 Broadway N.Y. Assoc., L.P.*, 14 AD3d at 6). A court may not, under the guise of construction, add or excise terms, or distort the meaning of terms used to make a new contract (*see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012]), as plaintiff's interpretation would require.

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14420 The People of the State of New York, Ind. 1016/12
Respondent,

-against-

Phillip Ward,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Avi Springer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole 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 (Laura Ward, J.), rendered on or about April 5, 2013,

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: MARCH 3, 2015

CLERK

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

Andrias, J.P., Saxe, DeGrasse, Richter, JJ.

14421 Thomas H. Christophel, etc., Index 154413/13
Plaintiff-Respondent,

-against-

New York-Presbyterian Hospital/Weill Medical College of Cornell University Anesthesiology Residency Training Program, et el.,
Defendants,

Medical Society of The State of New York Committee For Physician Health,
Defendant-Appellant.

_____

Kern, Augustine, Conroy & Schoppmann, P.C., Westbury (Donald Moy of counsel), for appellant.

Leland T. Williams, Rochester, for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered December 9, 2014, which, to the extent appealed from as limited by the briefs, denied defendant Medical Society of The State of New York Committee For Physician Health's (CPH) motion to dismiss the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as against CPH. The Clerk is directed to enter judgment accordingly.

In this action alleging negligence, medical malpractice and wrongful death against CPH, a physician's advocacy group from

which plaintiff's decedent sought help in February 2011, for a drug addiction, the complaint alleges that CPH's failure to turn over a medical report from a psychiatrist who performed an independent medical examination that would have alerted the other defendants to decedent's risk for relapse into substance abuse was a proximate cause of her death, a suicide from a drug overdose in May 2011. The complaint should have been dismissed as against CPH. CPH owed no duty to turn over the report since the medical records were confidential (*see Matter of Commissioner of Social Servs. of City of N.Y. [Guiliana S.] v David R.S.*, 55 NY2d 588, 592-593 [1982]; *Cartier v Long Is. Coll. Hosp.*, 111 AD2d 894, 895 [2nd Dept 1985]). Moreover, there is no evidence indicating that decedent was suicidal or that CPH should somehow have anticipated that she was (*see Cygan v City of New York*, 165 AD2d 58, 68 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]; *McGuire v Triborough Bridge and Tunnel Auth.*, 305 AD2d 322, 323 [1st Dept 2003], *lv denied* 1 NY3d 510 [2014]; cf. *Huntley v State*, 62 NY2d 134 [1984][psychiatric hospital liable where patient communicated specific suicide plan to hospital staff member who failed to transmit information to staff psychiatrist]). In any event, even assuming the existence of such a duty, upon receipt of the report, CPH alerted the other

defendants as to the potential for relapse and requested that they serve as decedent's monitor and therapist.

Additionally, we note that CPH does not practice medicine. It is a committee of the Medical Society of the State of New York, a membership society that offers a program to assist physicians who suffer from drug or alcohol abuse and that provides assistance, in the form of referrals and recommendations for treatment, but it does not provide any medical treatment.

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14422N LMF-RS Contracting, Inc., Index 652976/12
Plaintiff-Appellant,

-against-

Nevzet Kaljic, et al.,
Defendants-Respondents.

_____

Andrew B. Schultz, Great Neck, for appellant.

Wenig Saltiel LLP, Brooklyn (Richard A. Rosenzweig of counsel), for Nevzet and Christina Kaljic, respondents.

Robert M. Olshever, P.C., New York (Robert M. Olshever of counsel), for 5 LLC, respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about October 3, 2013, which, insofar as appealed from as limited by the briefs, granted defendants Nevzet Kaljic and Christina Kaljic's motion for summary judgment vacating the mechanic's lien, and denied plaintiff's motion to amend the mechanic's lien, unanimously affirmed, with costs.

Summary disposition is warranted, because the evidence that the amount of the lien was wilfully exaggerated is conclusive (*Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392 [1st Dept 2006]). Plaintiff included in its lien amount items

that are not for labor or materials, as its own itemization makes plain, and plaintiff has failed to even attempt to explain the discrepancies.

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

ENTERED: MARCH 3, 2015

CLERK

Acosta, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

14423 In re Shelia Robinson, Ind. 68864/12
[M-446] Petitioner,

-against-

The People of the State of
New York, et al.,
Respondents.

_____

Shelia Robinson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Laurence Bushing, respondent.

_____

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.

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

ENTERED: MARCH 3, 2015

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13243 TIAA Global Investments, LLC, et al., Index 652907/12
Plaintiffs-Respondents,

-against-

One Astoria Square LLC, et al.,
Defendants-Appellants,

Nyron Hall Engineering Services, LLC, et al.,
Defendants.

_____

Smith Buss & Jacobs LLP, Yonkers (Jeffrey D. Buss of counsel), for appellants.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Robert Alan Banner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 26, 2013, modified, on the law, to dismiss plaintiff's first and seventh causes of action, and otherwise affirmed, with costs.

Opinion by Mazzarelli, J.P. All concur except DeGrasse, J. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
Leland G. DeGrasse
Sallie Manzanet-Daniels, JJ.

13243
Index 652907/12

_____x

TIAA Global Investments, LLC, et al.,
Plaintiffs-Respondents,

-against-

One Astoria Square LLC, et al.,
Defendants-Appellants,

Nyron Hall Engineering Services, LLC, et al.,
Defendants.

_____x

Defendants One Astoria Square LLC, Shibber Khan and the Criterion Group, LLC, appeal from an order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 26, 2013, which denied there motion to dismiss the complaint as against them.

Smith Buss & Jacobs LLP, Yonkers (Jeffrey D. Buss and Jennifer L. Stewart of counsel), for appellants.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Robert Alan Banner of counsel), for respondents.

MAZZARELLI, J.P.

On or about January 13, 2011 defendant One Astoria Square LLC (Seller) and plaintiff TIAA Global Investments, LLC[1] entered into a contract for plaintiff to purchase a 115-apartment residential building for $43,000,000. The agreement expressly provided in sections 1.2 and 1.3 that plaintiff was not relying on any representations made by Seller, other than those expressly made in Article XIII of the agreement. Furthermore, the agreement stated in section 1.5 that

> "[e]xcept as specifically set forth to the contrary in this agreement or in the closing documents, [plaintiff] agrees (a) to take the property 'as is, where is, with all faults' and (b) that no representations are made or responsibilities assumed by Seller as to the condition of the property, as to the terms of any leases or other documents or as to any income, expense, operation or any other matter or thing affecting or relating to the property, now or on the closing date. Subject to and without limiting [plaintiff]'s rights under Article IX, [plaintiff] agrees to accept the property in the condition existing on the closing date, subject to all faults of every kind and nature whatsoever whether latent or patent and whether now or hereafter existing"(emphasis omitted).

Article XIII of the agreement contained Seller's representations and warranties, on which, as noted, plaintiff was

[1]TIAA Global subsequently assigned its rights in the property to plaintiff TCAM Core Property Fund Operating, LP.

entitled to rely. Three of them are relevant here. The first, embodied in section 13.1(c) of the agreement, stated that "[t]here are no actions, suits or proceedings (including arbitration proceedings) pending or, to Seller's knowledge, threatened against Seller which could have a material adverse effect on any portion of the Property, Seller's interest therein, the Leases or prevent Seller's ability to perform its obligations hereunder." The second representation at issue, set forth in section 13.1(g), provided that "[Seller] has received no written notice of any claims, defenses or offsets by any tenant with respect to its Lease," and that Seller had not received any notice of "any fact or circumstances which . . . could constitute a default by Seller as landlord." The third was found in section 13.1(k), in which Seller represented that "[t]o Seller's knowledge, all of the Property Documents delivered or made available by Seller to [plaintiff] in connection with the Property are true and complete copies of such items in Seller's possession which are used by Seller in the operation of the Property."

The one caveat to the Article XIII representations was that, pursuant to section 13.2, plaintiff was not entitled to rely on any representation by Seller "to the extent, prior to or at Closing, [plaintiff] shall have or obtain current, actual,

conscious knowledge . . . of facts contradictory to such representation or warranty." In addition, section 13.2 gave plaintiff the exclusive remedy, upon learning of facts contradictory to any representation in Article XIII, of terminating the agreement upon notice to Seller and receiving back its down payment. If plaintiff elected not to terminate, it would "waive such breach and proceed to Closing with no adjustment in the Purchase Price and Seller shall have no further liability as to such matter thereafter." Section 13.6 provided that

> "[t]he express representations and warranties made in this Article by Purchaser or Seller will not merge into any instrument of conveyance delivered at the Closing; provided, however, that any action, suit or proceeding with respect to the truth, accuracy or completeness of any such representations and warranties . . . shall be commenced, if at all, on or before the date which is nine (9) months after the date of the Closing and, if not commenced on or before such date, thereafter will be void and of no force or effect."

Section 15.7 provided that if plaintiff did commence an action, its damages were limited to $750,000.

Plaintiff was entitled to perform due diligence before closing on the transaction. This was facilitated by the contract's requirement that Seller provide plaintiff with a wide variety of documents related to the building, including tenants' lease files, major mechanical records and construction plans and

specifications. Further, section 7.1 of the agreement provided, in pertinent part, that

> "[Plaintiff] and its authorized agents or representatives were and shall be entitled to enter upon the Property and the Improvements during normal business hours upon advance written notice to Seller to make such investigations, studies and tests including, without limitation, surveys, engineering studies and environmental investigations (including a Phase I environmental site assessment), as [plaintiff] deems necessary or advisable (all investigations of the Property or any materials regarding the ownership, management, use or operation of the Property are herein collectively called the 'Property Investigations'). All investigations made by [plaintiff] have been and will be at [plaintiff]'s sole cost and expense and have been and will be performed without causing any damages to the Property that is not promptly repaired and without undue interference with the normal business operations of the Premises, including, without limitation, the rights of tenants at the Property. [Plaintiff] shall restore the Property in a timely manner at Purchaser's sole cost to the condition that existed immediately prior to the Property Investigations."

Plaintiff retained defendant Levien-Rich Associates, Inc., an engineering firm, to conduct an investigation and to prepare a report regarding the condition of the property. The engineers advised that nearly $2 million of repairs would be necessary in the next 10 years, of which $620,700-worth was deemed of "immediate" necessity. The recommended "immediate" repairs

related to the parking deck, Americans with Disabilities Act (ADA) compliance, and the public corridors and stairs, which were cold and required heating units. However, the report specifically stated that the property was "structurally sound, and free of any conditions requiring continuing extraordinary maintenance."

To address the issues identified in the engineers' report, the parties entered into an amendment to the purchase and sale agreement pursuant to which Seller agreed to reduce the purchase price by $496,753. Seller further agreed to place an additional $219,800 of the purchase price in escrow, payable to plaintiff unless Seller performed such work necessary to remedy the issues within six months after the closing. The amendment also scheduled the closing for March 1, 2011. According to the complaint, on February 28, 2011, one of plaintiff's representatives was presented with a letter, signed by 35 tenants and dated January 26, 2011 (the Tenant Letter), which purportedly had been sent on that date to defendant The Criterion Group LLC (Criterion), Seller's property manager. The Tenant Letter complained of excessive heating bills, excessive air infiltration, and inadequate heating, as follows:

> "According to infrared thermometer readings, air entering through balcony doors and electrical sockets on upper floors was almost

> identical to outside air temperatures (subfreezing) despite heating units that were set to 65 degrees Fahrenheit. We believe this indicates a lack of appropriate insulation and sealing around windows and doors in the apartments. . . . In addition to cold wind blowing into the apartments, many of us have actually experienced small amounts of rain and snow entering the apartments through cracks around the balcony doors."

The next morning, prior to the closing that was scheduled for that day, plaintiff wrote to defendant Shibber Khan, Seller's principal, inquiring about the high heating bills, which the Tenant Letter had asserted were a result of issues with the heating units and the apartment door/window assemblies. In an email sent later that day, Khan responded by stating that, "[i]n terms of the windows and insulation, everything is as per code and there is no excessive air penetration from the exterior of the building." On that same day, Khan provided a letter that he had procured from Mechanical Services, Inc. (MSI), a mechanical contractor that had been retained by Criterion, stating that the problem plaintiff had inquired about related specifically to defective valves in PTAC mechanical units,[2] and that all necessary repairs had been made on February 16, 2011.

In light of the issues raised in the Tenant Letter, the parties executed an escrow agreement at closing, which provided

[2]Packaged terminal air conditioners.

that the escrow agent would retain $175,000 of the purchase price until Seller conducted tests measuring the infiltration of air into the building, and performed any remedial work determined to be necessary. Plaintiff retained the right to recover the escrow funds if the work were not performed. Indeed, all escrow funds were released to plaintiff in May or June 2012.

After plaintiff gained control over the building, it came to suspect that the issues identified in its engineers' report and in the Tenant Letter were far worse than it had believed. This suspicion was partially fed by increasing complaints it received from tenants, as well as statements from tenants that Seller had promised them rent abatements and the right to terminate leases without penalty as a result of the air infiltration. Plaintiff asserts that none of these complaints or promises was evident from the lease files Seller was required to provide plaintiff prior to closing. Plaintiff retained Bone/Levine, an architectural firm, to perform a complete inspection of the building and to recommend solutions. Bone/Levine's reports, one issued in December 2011, eight months after closing, and another in July 2012, revealed that the air infiltration was due to problems far more fundamental than faulty valves in air conditioning units. Rather, it reported, the building had been constructed in such a shoddy manner that, by plaintiff's

description, it resembled "Swiss cheese" and was "hollow," due to a complete lack of insulation, and improper connections of vertical interior walls, which were not built slab-to-slab but had gaps between the Sheetrock and slab. Bone/Levine further reported that the building's construction was in significant violation of the fire code, as well as the ADA and the Fair Housing Act (FHA). Plaintiff claims it has spent millions of dollars to rectify these construction defects.

Plaintiff commenced this action in or about August 2012. In its complaint, plaintiff asserted a cause of action against Seller for breach of contract, specifically, the representations contained in section 13.1(c) (no pending or threatened lawsuits); (g) (no written notices of claims or defenses by tenants relating to their leases); and (k) (all property documents delivered are true and complete). This claim was based on plaintiff's assertions that defendants failed to turn over correspondence with the tenants referring to the air infiltration issue. It alleged, upon information and belief, that the correspondence complained of conditions rendering the apartments uninhabitable, contained threats to sue over the matter, and reflected defendant's written assurances that it would grant rent abatements and other rent adjustments. Plaintiff also asserted causes of action for fraudulent concealment, fraudulent

misrepresentation, and simple fraud against Seller, Criterion, and Khan. These claims were primarily based on defendants' affirmatively stating, and encouraging MSI to state, that the air infiltration issue was due to a discrete issue that had been fixed before the closing. Although plaintiff alleged that Criterion and Khan directly participated in the fraud, it alternatively sought recovery against them on alter ego and successor-in-interest theories. It sought damages against all defendants in an amount of no less than $4,000,000.

Defendants Seller, Criterion and Khan (defendants) moved to dismiss pursuant to CPLR sections 3211(a)(1),(5) and (7). They argued that the complaint was barred by the doctrine of merger, which extinguishes any claims at the time of closing, and that any representations that the parties expressly stipulated to survive closing were unrelated to the causes of action. They further asserted that the action had been filed well past the nine-month statute of limitations provided for in the agreement. With respect to the fraudulent concealment, fraudulent misrepresentation and fraud causes of action, defendants contended that they were duplicative of the breach of contract claim, and that, in any event, plaintiff could not have reasonably relied on any of the alleged misrepresentations in light of the broad due diligence rights that were afforded to

plaintiff. Defendants further argued that the fifth amendment to the contract of sale, as well as the escrow agreement executed at closing regarding the air infiltration issue, constituted an accord and satisfaction. Finally, defendants asserted that plaintiff alleged insufficient facts to support an alter ego theory against Criterion and Khan.

In opposition, plaintiff argued that defendants' reliance on provisions in the contract which made the transfer "as is," and which afforded plaintiff pre-closing inspection rights, was misguided, since the complaint alleged that Seller's own intentionally misleading acts of concealment thwarted plaintiff's good faith efforts to ascertain the true condition of the property. It posited that the merger doctrine did not apply, since the defects at issue were latent and could not have been discovered despite its best efforts during the due diligence period. It further contended that the fraud-based claims stood apart from the breach of contract claim, because the fraudulent misrepresentations were made in statements ancillary to the contract, such as the email from Khan on the day of the closing, and that they were made to induce plaintiff to enter into the contract and close on it, and so were not strictly redundant of the claim that Seller breached the contract. Plaintiff also asserted that the contractual statute of limitations and

limitation of liability clause should be set aside, since to hold otherwise would be to reward defendants for their malfeasance. With respect to the accord and satisfaction argument, plaintiff argued that its decision to accept escrow arrangements with respect to the air infiltration issue should not be used against it, since it did so based on facts defendants fraudulently led it to believe. Finally, plaintiff asserted that Khan and Criterion should bear full liability, since they were directly involved in the communication of fraudulent misrepresentations to it, and since Criterion exercised complete control over Seller, and Khan in turn dominated Criterion.

The court denied defendants' motion in its entirety. It found that the "merger clause" did not bar the breach of contract claim because the complaint alleged latent defects, and that equitable tolling applied to the contractual limitations period based on "numerous facts relating to defendants' concealment and deceit." With respect to the fraudulent concealment claim, the court found that plaintiffs' allegations that defendants actively concealed issues with the air filtration system supported the claim that any attempt to discover latent defects had been thwarted. As for the fraudulent misrepresentation and fraud claims, the court found that plaintiffs' allegations were sufficient to reflect knowledge of facts peculiarly in the

possession of defendants, and that issues of fact existed as to whether plaintiffs' due diligence efforts were sufficient and their reliance reasonable.

The court also found that plaintiffs' allegations that defendants made false extraneous representations designed to induce them to enter into the contract were not duplicative of their breach of contract claim, and that all of the indicia of a corporate veil piercing were sufficiently pleaded against Khan and Criterion.

We begin our discussion, as we often do in analyzing motions brought pursuant to CPLR 3211, by emphasizing that we must afford the pleading a liberal construction, accept the facts as alleged as true, and accord a plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

The merger doctrine in a real estate transaction provides that once the deed is delivered, its terms are all that survive and the purchaser is barred from prosecuting any claims arising out of the contract (*Ka Foon Lo v Curis*, 29 AD3d 525, 526 [2d Dept 2006]). The only exception to this rule is where the

parties clearly intended that the particular provision of the contract supporting the claim would survive the delivery of the deed (*id.*). Further, an "as is" clause in a contract to sell real property will ordinarily bar a claim for breach of contract (*see Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 581 [1st Dept 2010]). Plaintiff argues that the merger doctrine does not apply here because of the latent nature of the defects at issue. It further contends that its allegations of deceptive behavior on Seller's part to mask the true condition of the building render the "as is" clause inoperable.

Although plaintiff cites trial court opinions identifying a latency exception to the merger doctrine, the concept has not been adopted by any of the Appellate Divisions or by the Court of Appeals (*see Arnold v Wilkins*, 61 AD3d 1236, 1237 [3d Dept 2009]), and we are not adopting it here. Nevertheless, the merger doctrine is inapplicable in this case. Although the crux of the action is undoubtedly that plaintiff took title to a seriously defective building, the specific allegations in the complaint are that Seller breached the contract by failing to abide by those provisions designed to permit plaintiff to gain a true understanding of the condition of the property. As noted above, each of those representations was explicitly intended by

the parties not to merge into the deed.

Further, since the breach of contract cause of action is addressed to these representations, and not to the condition of the building itself, the presence of the "as is" clause is no bar to the claim. Additionally, while the "as is" clause states that Seller has made no representations as to "any other matter or thing affecting or relating to the property," it carries the caveat that this is "except as specifically set forth to the contrary in this agreement" (emphasis omitted). Thus, the three specific representations which plaintiff alleges were breached trump the "as is" clause. To the extent that plaintiff asserts fraud claims not directly related to the three surviving representations, the merger doctrine still does not apply (*West 90th Owners Corp. v Schlechter*, 137 AD2d 456, 459 [1st Dept 1988] ["fraud is a recognized exception to the merger doctrine").

Nevertheless, the breach of contract cause of action is time-barred. Initially, it is noted that the shortened limitations period provided in section 13.6 of the agreement only applies to Seller's breach of any of the representations and warranties contained in Article XIII of the agreement, except for several not at issue on appeal. Accordingly, this theory can only apply, if at all, to plaintiff's claim for breach of contract, not the entire action. Seller maintains that plaintiff

was required to commence litigation no later than December 1, 2012, nine months after closing. Plaintiff counters that, due to defendants' active concealment, it did not discover that Seller breached the three relevant representations until after the closing occurred, and that, under those circumstances, it is entitled to equitable tolling of the statute of limitations (*see Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]). However, any active concealment by defendants is only alleged to have thwarted plaintiff's ability to know that it had fraud-based claims based on the allegedly flawed construction of the building. This is irrelevant, because, as stated, defendants have no limitations defense on those claims. On the other hand, nowhere does plaintiff allege that defendants prevented it from becoming specifically aware, within the nine-month limitations period, of complaints from tenants about poor insulation in and around their apartments, or that documents memorializing those complaints existed. Since the breach of contract claim is based on those particular things, plaintiff has no excuse for not having timely interposed a breach of contract claim. As for the limitation of liability clause, we note that the complaint alleges sufficient allegations of fraudulent conduct on the part of Seller such that, if proven, that clause would be unenforceable (*see Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384-385

[1983]; *Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 244 [1st Dept 2007]).

Defendants argue that plaintiff's fraud-based claims should be dismissed because they arise out of the same facts supporting the breach of contract cause of action. It is true that, as held in the cases cited by defendants, one may not make as the basis for a fraud claim a representation in a contract that is later breached (*see Ka Foon Lo*, 29 AD3d at 526; *Crowley Mar. Assoc. v Nyconn Assoc.*, 292 AD2d 334, 334 [2d Dept 2002]). However, as plaintiff points out, it has alleged fraud arising not merely from contractual promises to perform at a later date, but rather actionable misrepresentations of "then-present facts," such as the status of the air infiltration issue as expressed in Khan's email and in the MSI letter, each of which is alleged to have fraudulently induced plaintiff, on the very day of closing, to proceed (*Success, LLC v Stonehenge Capital Co., LLC*, 81 AD3d 478, 479 [1st Dept 2011]). Where "allegations of intentional fraud, though parallel in many respects to the breach of contract claim, include claims of fraudulent misrepresentations made by defendants which induced them to enter into the contract and close on the property, they are not merely redundant of the breach of contract claim . . . [and a] fraud cause of action is sustainable" (*Gizzi v Hall*, 300 AD2d 879, 880 [3d Dept 2002]

[internal quotation marks and citation omitted]).

Defendants assert that, in any event, the fraud causes of action are unsustainable because the "as is" clause, coupled with the "no reliance" clause found in section 1.3, preclude plaintiff from claiming it was deceived by the Khan email, the letter from MSI, and other statements or omissions that defendants may have made to allegedly induce plaintiff to close. Indeed, a specific disclaimer of reliance on representations as to the condition of real property will ordinarily bar a fraud claim (*Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1959]). However, the *Danann* Court suggested that this is only the case where "the facts represented are not matters peculiarly within the [representing] party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation" (*id.* at 322 [internal quotation marks omitted]).

This "special facts doctrine" applies regardless of the level of sophistication of the parties (*see e.g. P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 [1st Dept 2003]). Further, it has been applied in circumstances remarkably similar to those here. In *Schooley v Mannion* (241 AD2d 677 [3d Dept 1997]), the plaintiff purchased a nine-unit apartment building with an "as is" clause. After closing, the

plaintiff became aware of tenant complaints regarding freezing pipes and high electric bills. Upon investigation, it discovered that the building was not insulated in accordance with the manner in which the seller had represented it was (241 AD2d at 677.) Although the plaintiff did not, as plaintiff did here, specifically disclaim reliance on representations by the seller, the Court held that this did not matter, and denied the seller's motion to dismiss the plaintiff's complaint for failure to state a cause of action, stating as follows:

> "[E]ven if the contract had contained specific disclaimers, the fact that the alleged defect regarding insulation was peculiarly within [the defendant]'s knowledge would be sufficient to salvage plaintiffs' cause of action. It is significant that [the defendant] is alleged to have recently gutted and renovated the entire property and that insulation is a nonvisible component, not easily verified without destructive testing" (*id.* at 678).

Defendants, as well as the dissent, argue that because of the broad due diligence rights that were afforded plaintiff in the agreement, knowledge of the defects was not "peculiarly within [their] knowledge." They emphasize section 7.1 of the agreement, which entitled plaintiff to undertake "such investigations, studies and tests including, without limitation, surveys, engineering studies and environmental investigations

(including a Phase I environmental site assessment), as [plaintiff] deems necessary or advisable." Defendants characterize this as a "virtually unlimited right," but it is impossible to determine at this stage of the proceedings whether it would truly have been *practical* for plaintiff, prior to taking possession of the building, to do the requisite testing, some of it possibly destructive, that would have been necessary to reveal the alleged defects. After all, section 7.1 of the agreement also stipulated that "[a]ll investigations made by [plaintiff] . . . have been and will be performed without causing any damages to the Property that is not promptly repaired and without undue interference with the normal business operations of the Premises, including, without limitation, the rights of tenants at the Property." Defendants argue that plaintiff's engineers could have used infrared testing and/or a borescope to view the inner construction of the building, but offer no support for that theory. Ultimately, the issue is one for a trier of fact, perhaps after the presentation of expert testimony.

The dissent argues that our conclusion is not supported by the record because it was not raised below. This position ignores the standard of review, however, which, as discussed above, is whether the complaint, which was obviously before the court, states a cause of action. Indeed, the complaint supports

plaintiff's position that it could not have reasonably detected the alleged defects, insofar as it claims that the defects at issue "were not capable of being observed by Purchaser during its site observations." Plaintiff was under no obligation to make an evidentiary showing in support of that allegation, as the dissent implies it was (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). That would only have been the case on a motion for summary judgment, or had the court converted this motion to one for summary judgment, which it did not (*id.*). Indeed, the relevant portion of *McPherson v Husbands* (54 AD3d 735 [2d Dept 2008]), cited by the dissent, was decided on summary judgment, and the court found in favor of the seller only after observing that "the [purchasers] failed to submit any evidence showing that [the seller] or his agents thwarted [their] efforts to fulfill [their] responsibilities fixed by the doctrine of caveat emptor" (54 AD3d at 736 [internal quotation marks omitted] [first and second alterations added]). Further, the right to inspect in that case was, as reflected in the quote excerpted by the dissent, "without restriction as to length or scope of inspection" (*id.*), unlike here, where any "destructive" testing could only be performed if it did not unduly interfere "with the normal business operations of the Premises, including, without limitation, the rights of tenants at the Property."

We reject defendants' position that the complaint should be dismissed because, by executing the escrow agreements, plaintiff either waived its claims or entered into an accord and satisfaction. There is no basis at this stage of the proceeding for us to conclude that, in entering into the fifth amendment to the agreement and the escrow agreement executed at closing, plaintiff demonstrated the requisite intent necessary to waive all known claims against defendants (*see Smith v Guardian Life Ins. Co. of Am.*, 116 AD3d 1031, 1032 [2nd Dept 2014], *lv denied* 24 NY3d 909 [2014]). To the contrary, those agreements were fashioned before plaintiff alleges it knew the full extent of the defects in the building's construction. Similarly, an accord and satisfaction will only be found where there is a "clear manifestation of intent by the parties that the payment was made, and accepted, in full satisfaction of the claim" (*Rosenthal v Quadriga Art, Inc.*, 105 AD3d 507, 508 [1st Dept 2013] [internal quotation marks omitted]). No such manifestation is evident from the complaint or anything else in the record before us.

Finally, defendants seek to dismiss the cause of action that is based on piercing the corporate veil. The corporate veil of a business entity may be pierced where a plaintiff sufficiently states "that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that

such domination was used to commit a fraud of wrong against the plaintiff which resulted in plaintiff's injury" (*Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005] [internal quotation marks omitted]). Here, the complaint alleged that Khan is the managing member of Seller and Criterion, that Criterion in turn was the "manager" of Seller, that the proceeds of the sale were transferred to Criterion or Khan, that Criterion abused the corporate form of Seller by failing to reserve funds for the purpose of Seller's contingent liability shortly after the closing and failing to follow any and all New York requisite corporate formalities in the governance and management of Seller. The complaint further alleges that Criterion entered into the contracts for the design and construction of the property, managed the property, and made the decision, as the alter ego of Seller, to conceal from plaintiff the tenant complaints and latent defects at issue in order to induce them to purchase the property. Plaintiff further alleged that Khan was integral to all of these events in his capacity as managing member of both Criterion and Seller. We find that these allegations were sufficiently pleaded and that the court properly sustained the corporate veil cause of action. However, because the breach of contract cause of action is time-barred, so too is plaintiff's claim against Criterion and Kahn based on successor liability

(the seventh cause of action), which is expressly based on section 15.16 of the agreement. That section binds successors-in-interest to the "covenants and conditions of this Agreement." However, it also states that those same covenants and conditions "inure to the benefit" of successors. Accordingly, Criterion and Kahn are also entitled to rely on the nine-month limitations period contained in section 13.6.

Finally, to the extent that we hold that Supreme Court properly denied defendants' motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7), we stress once again the procedural posture in which we have received this case. We have been presented only with allegations in a complaint, and some documentation which, at this stage, fails to negate any of those allegations. The allegations are to be construed liberally, assumed to be true, and plaintiff is to be afforded the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d at 87-88). Having applied that standard, we find that, with the exception of those that are time-barred, plaintiff has sufficiently stated each and every cause of action in the complaint.

Accordingly, the order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 26, 2013, which denied defendants One Astoria Square LLC, Shibber Khan and the Criterion Group, LLC's motion to dismiss the complaint as against them, should be modified, on the law, to dismiss plaintiff's first and seventh causes of action, and otherwise affirmed, with costs.

All concur except DeGrasse, J. who dissents in part in an Opinion:

DEGRASSE, J. (dissenting in part)

This appeal is from an order denying a motion to dismiss a fraudulent concealment cause of action, fraudulent misrepresentation cause of action, and a simple fraud cause of action asserted against defendants One Astoria Square LLC (One Astoria), the Criterion Group LLC and Shibber Khan (collectively, the sellers). The order entered below also denied the branches of the motion by which the moving defendants also sought a dismissal of a breach of contract cause of action against One Astoria as well as a claim by which plaintiffs seek to pierce One Astoria's corporate veil. I respectfully dissent because the fraud causes of action should have been dismissed for failure to state a cause of action and on the ground of defenses founded upon documentary evidence. I agree with the majority, however, that the contract cause of action and the successor liability cause of action are time-barred. Finally, there exists no ground for piercing One Astoria's corporate veil because the claims against that entity are not viable.

This action stems from the sale of a 14-story apartment building pursuant to a January 13, 2011 purchase agreement between One Astoria, as seller, and plaintiff TIAA Global Investments, LLC (TIAA), as purchaser. According to the complaint, Criterion was the manager of the property and Khan was

the managing member of One Astoria as well as Criterion. The closing took place on March 1, 2011. By plaintiffs' account, their causes of action are based on the alleged fraudulent concealment of "a massive problem with the air infiltration system resulting from major latent deficiencies at the property . . . ." Specifically, plaintiffs allege that "critical elements of the Property, such as insulation, fire walls and proper connection of vertical interior walls to slabs were virtually non-existent." Plaintiffs assert that these alleged defects were not discovered until after the closing. Controlling provisions of the purchase agreement are set forth as follows:

> "1.2 No Representations. Except for Seller's representations set forth in Article XIII[1]... Seller makes no express or implied representation or warranty with respect to the Property.
>
> "1.3 No Reliance. Purchaser agrees that . . . Purchaser *is not relying* on and has not relied on any statements, promises, information or representations made or furnished by Seller or by any real estate broker, agent or any other person representing or purporting to represent Seller but rather *is relying solely on its own expertise and on the expertise of its consultants and on the inspections and investigations Purchaser and its consultants has or will conduct*" (italics added).
>
> "1.5 'AS IS'. EXCEPT AS SPECIFICALLY SET FORTH TO THE CONTRARY IN THIS AGREEMENT OR IN THE CLOSING

[1]Article XIII contains the representations and warranties that are the subject of the time-barred breach of contract cause of action.

> DOCUMENTS, PURCHASER AGREES (A) TO TAKE THE PROPERTY 'AS IS, WHERE IS, WITH ALL FAULTS' AND (B) THAT NO REPRESENTATIONS ARE MADE OR RESPONSIBILITIES ASSUMED BY SELLER AS TO THE CONDITION OF THE PROPERTY . . . NOW OR ON THE CLOSING DATE. SUBJECT TO AND WITHOUT LIMITING PURCHASER'S RIGHTS UNDER ARTICLE IX,[2] PURCHASER AGREES TO ACCEPT THE PROPERTY IN THE CONDITION EXISTING ON THE CLOSING DATE, *SUBJECT TO ALL FAULTS OF EVERY KIND AND NATURE WHATSOEVER WHETHER LATENT OR PATENT* AND WHETHER NOW OR HEREAFTER EXISTING [italics added].

Immediately after Section 1.5, the purchase agreement provides:

> "Seller and Purchaser have agreed upon the Purchase Price relating to the Property and other provisions of this Agreement in contemplation and consideration of the Purchaser's agreeing to the provisions of Sections 1.2, 1.3 . . . and 1.5, which Sections shall survive the Closing and the delivery of the Deed and/or termination of this Agreement."

The fraud causes of action are based on the following events that occurred shortly before the March 1, 2011 closing. On the day before the closing, plaintiffs' property manager received a letter dated January 26, 2011 that was addressed to Criterion and signed by 35 tenants of the building. As quoted in the majority opinion, the letter sets forth the tenants' complaints of excessive heating bills plus apparently faulty insulation that caused the infiltration of cold air and, in some cases, rain and snow into the apartments. On the morning of the closing, Henry Dong, plaintiffs' assistant secretary, contacted and forwarded

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[2]Article IX, entitled "Risk of Loss," is not pertinent to this appeal.

the tenants' complaint letter to Khan.

The complaint alleges that Khan secured a letter dated March 1, 2011 from Mechanical Services, Inc. (MSI), a mechanical contractor. According to MSI's letter, the problem plaintiffs inquired about related to valves, and the necessary repairs were made on February 16, 2011. Khan forwarded MSI's letter to Dong and, in reply to the latter's email, also represented that "[i]n terms of the windows and insulation, everything is as per code and there is no excessive air penetration from the exterior of the building."

It is settled that justifiable reliance is an element of a cause of action based on fraudulent misrepresentation or fraudulent concealment (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). The complaint's core allegation supporting the fraudulent concealment and fraudulent misrepresentation claims is that

> "[p]urchaser relied upon the March 1, 2011 letter from Mechanical Services Inc. and the March 1, 2011 email from Khan and their representations that windows and insulation are per code, that there is no excessive air penetration and that all infiltration repairs were made on February 16, 2011 in deciding to go forward with the Closing later that day."

Plaintiffs' claim of justifiable reliance upon Khan's email and MSI's letter is precluded in every respect by section 1.3 of the purchase agreement, the "no reliance" clause.

This case is controlled by *Danann Realty Corp. v Harris* (5 NY2d 317 [1959]), which also involved a claim of fraud stemming from a real estate transaction. The issue identified by the Court in *Danann* was whether reliance upon alleged misrepresentations could possibly be established from the complaint read together with the underlying contract of sale (*id.* at 319). The contract in *Danann* contained an analogous recital that it was entered into with "*neither party relying upon any statement or representation*, not embodied in this contract, made by the other" (*id.* at 320). In finding that a fraud cause of action was not stated, the *Danann* Court held that "[s]uch a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon . . . contrary oral representations" (*id.* at 320-321). Accordingly, the "no reliance" clause precludes the fraud causes of action asserted against One Astoria, the contract vendor. Section 15.16 of the agreement provides that its covenants and conditions shall inure to the benefit of One Astoria's representatives. Therefore, the "no reliance" clause also requires dismissal of the fraud claims as asserted against Criterion, One Astoria's manager, and Khan, its managing member.

Although invoked by the majority, the "special facts" or "peculiar knowledge" doctrine has no application here. The standard that has been articulated by the Court of Appeals is as follows:

> "'[I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations'" (*Centro Empresarial Cempresa S.A. v Am Móvil, S.A.B. de C.V.*, 17 NY3d 269, 277-278 [2011], quoting *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]; *see also Danann*, 5 NY2d at 322).

Under the "special facts" doctrine, a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair (*Jana L. v W. 129th St. Realty Corp.*, 22 AD3d 274, 277 [1st Dept 2005][internal quotation marks omitted]). For the doctrine to apply, plaintiffs must satisfy a two-prong test (*Jana L.*, 22 AD3d at 278). Under the first prong, plaintiffs must demonstrate that the undisclosed material fact was information peculiarly within the sellers' knowledge (*id.*). The second prong requires a showing that the information could not have been discovered by plaintiffs through the exercise of ordinary intelligence (*id.*).

The cases cited below demonstrate that plaintiffs cannot meet either prong of the "special facts" test, because the broad

property investigations provision set forth under section 7.1 of the purchase agreement refutes any claim that information regarding the condition of the building was peculiarly within the sellers' knowledge. *McPherson v Husbands* (54 AD3d 735 [2d Dept 2008]) is on point. The fraud and contract claims in *McPherson* arose out of the plaintiffs' purchase of a house from the Husbands defendant (*id.* at 735). After closing, the plaintiffs discovered extensive termite damage and other defects throughout the house (*id.* at 736). In affirming an order granting the defendant's motion for summary judgment, the Second Department held that the defendant established his entitlement to judgment as a matter of law

> "by submitting an affidavit establishing that the premises were made fully available for inspection by the plaintiffs and their agents without restriction as to length or scope of inspection. *Under these circumstances, the facts represented were not matters peculiarly within the party's knowledge*, the plaintiffs had the means available to them of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, and it was their responsibility to make use of those means, they will be not be heard to complain that they were induced to enter into the transaction by misrepresentations" (*id.* [internal quotation marks omitted][emphasis added]; *accord 85-87 Pitt St., LLC v 85-87 Pitt St. Realty Corp.*, 83 AD3d 446 [1st Dept 2011][bug infestation held not to be peculiarly within a seller's knowledge where it could have been discovered with reasonable diligence and an inspection of the premises]; *Long v Fitzgerald*, 240 AD2d 971, 973 [3d Dept 1997][similar conclusion regarding damage

caused by pest infestation]).[3]

In this case, section 7.1 of the agreement provided for inspections, including engineering studies, at TIAA's expense and upon advance written notice without undue interference with the building's normal business operations and the rights of tenants. The agreement simply required TIAA's prompt repair of damage caused by such inspections. Accordingly, it is undisputed that TIAA could have but failed to conduct destructive inspections at a cost that would have been added to the $42.5 million purchase price.[4] Plaintiffs were undoubtedly aware of their right to conduct such testing. Notably, upon forwarding the tenants' complaint letter to Mr. Khan, Mr. Dong wrote: "We received this correspondence late yesterday and are evaluating the situation to determine if we need to postpone the closing and do further testing of the building." Plaintiffs nonetheless closed the deal

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[3]The principle articulated by the *McPherson* Court regarding the effect of a right to inspect is applicable notwithstanding the fact that *McPherson* involved an appeal from a motion granting summary judgment. In any event, *Pitt St.*, like this case, involved a CPLR 3211 motion.

[4]As stated in the complaint, TIAA, engaged defendant Levien-Rich Associates, Inc. (LRA), a construction consulting firm, to "review the construction plans for general compliance with applicable codes, suitability of materials specified and for adequacy of the capacity of building systems for the Property's use." LRA furnished TIAA with its report on or about January 31, 2011.

that same day. *Schooley v Mannion* (241 AD2d 677 [3d Dept 1997]), which the majority cites, is readily distinguishable because, as noted above, the purchase agreement before us provided for destructive testing. Nothing in *Schooley* suggests that the plaintiffs in that case had a similar contractual right.

The majority, however, concludes that it is impossible to determine at this stage whether it would have been practical for plaintiff to do the requisite and possibly destructive testing prior to taking possession of the building. Although the majority has reached this conclusion, plaintiffs took no such position in the court below. Plaintiffs' only assertion regarding destructive testing is set forth in the answering affidavit of their chief engineer, who merely begged the question by stating that the building's alleged deficiencies "could only be ascertained by destructive testing." For purposes of this discussion, the majority's reliance upon the complaint's assertion that the building's defects "were not capable of being observed by Purchaser during its site observations" is also unavailing. Similarly, plaintiffs made no assertion that the "normal business hours" and "rights of tenants" conditions contained in section 7.1 prevented them from exercising their right to conduct destructive testing. This too does not address the sellers' documentary evidence that plaintiffs had, but did

not avail themselves of, a contractual right to conduct destructive testing. In making this point, I do not seek to impose upon plaintiffs the burden of making an evidentiary showing. Mindful of the distinction between a CPLR 3211 motion and a motion for summary judgment, I confine my comments to the complaint's allegations and the documents proffered by the sellers (*see Rovello v Orfino Realty Co.*, 40 NY2d 633, 635 [1976]).

Under the breach of contract cause of action, plaintiffs allege that the sellers breached Article XIII of the purchase agreement, which contains the sellers' representations and warranties regarding: pending or threatened suits or claims (section 13.1[c]); written notices of actual or potential tenants' claims, defenses or offsets (section 13.1[g]); and the accuracy and completeness of "property documents" that were delivered or made available to plaintiffs (section 13.1[k]). Section 13.6 of the agreement provided that any action or proceeding with respect to the accuracy or completeness of the foregoing representations and warranties had to be commenced within nine months of the date of closing. As the closing took place on March 1, 2011, the sellers made a prima facie showing that the contractual statute of limitations expired on December 1, 2011, more than eight months before this action was commenced

(*see Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 405 [2d Dept 2007]). The burden then shifted to plaintiffs "to aver evidentiary facts establishing that [their] cause of action falls within an exception to the statute of limitations . . . ." (*id.*).

The particular exception relied upon by plaintiffs involves principles of equitable estoppel by which "a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]). As the *Simcuski* Court held, "due diligence on the part of the plaintiff in bringing his action is an essential element for the applicability of the doctrine of equitable estoppel, to be demonstrated by the plaintiff when he seeks the shelter of the doctrine" (*id.* at 450). Accordingly, "the burden is on the plaintiff to establish that the action was brought within a reasonable time after the facts giving rise to the estoppel have ceased to be operational" (*id.*). Plaintiffs in this case proffered no explanation as to how or even when they first learned of the sellers' alleged article XIII breaches (*see e.g. Commerce & Indus. Ins. Co. v Imrex Co.*, 270 AD2d 147 [1st Dept 2000]). Plaintiffs, who were in the best position to have this information, have failed to meet their burden under *Simcuski*.

Plaintiffs cite reports they received from Bone/Levine, an architectural firm, in December 2011 and July 2012. These reports do not bear upon plaintiffs' claim of equitable estoppel, because the statute of limitations applies only to the contract cause of action. The Bone/Levine reports relate solely to the fraud causes of action, because the reports were confined to the physical condition of the building. The reports do not address the specific representations and warranties that were contained in sections 13.1(c), (g) and (k) of the agreement. These representations and warranties form the sole basis of the contract cause of action.

As stated above, plaintiffs' causes of action against One Astoria should have been dismissed. Consequently, the claim by which plaintiffs seek to pierce its corporate veil should have likewise been dismissed. "[A]n attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). For the reasons stated by the majority, I agree that the escrow agreements executed at the closing did not constitute an accord and satisfaction. I would reverse the order

entered below and grant the sellers' motion to dismiss the fraud causes of action pursuant to CPLR 3211 (a)(1) and (7), the breach of contract and successor liability causes of action pursuant to CPLR 3211(a)(5), and the piercing the corporate veil claim pursuant to CPLR 3211(a)(7).

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

ENTERED: MARCH 3, 2015

CLERK