SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 17, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15781 Barbara Stimmel, et al.,
Plaintiffs,

Index 103019/09
59048/11

-against-

Julianne Osherow, etc.,
Defendant-Appellant,

Jeff Kamin,
Defendant.

- - - - -

Julianne Osherow as Administratrix
of the Estate of Ina K. Berkowitz,
Third-Party Plaintiff-Appellant,

-against-

Gumley Haft Kleier Inc., et al.,
Third-Party Defendants,

Prudential Douglas Elliman Real Estate, et al.,
Third-Party Defendants-Respondents.

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Law Office of James J. Toomey, New York (Louis C. Annunziata of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered March 6, 2014, which granted third-party defendants

Prudential Douglas Elliman Real Estate and Nora Leonhardt's motion for summary judgment dismissing the third-party complaint and all cross claims against them, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff Barbara Stimmel tripped and fell while viewing a condominium unit owned by defendant Jeff Kamin and occupied by Ina K. Berkowitz, defendant Julianne Osherow's decedent. Plaintiff was considering renting the unit, which was being shown by third-party defendant Nora Leonhardt. Leonhardt was a real estate broker with third-party defendant Prudential Douglas Elliman Real Estate, which had contracted with Kamin to act as exclusive rental agent. The accident occurred as plaintiff was reentering the apartment after having viewed the terrace, which was accessible from the living room. The entrance to the terrace was adorned with floor-to-ceiling drapes, which were drawn open at the time of the accident. Plaintiff testified at her deposition that she did not see the cord used to open and close the drapes before the accident, and that her foot caught it as she stepped back into the apartment, causing her to fall forward into the apartment. Leonhardt testified that it was her custom when showing the apartment (she had shown it approximately 20 times) to open the drapes, if they were not open already when she

arrived, and to attach the cord to a hook next to the short staircase leading to the terrace. However, she stated that, while the drapes were open at the time of the accident, she had no specific recollection whether she was the person who opened them.

Plaintiff commenced this action against Kamin and Berkowitz's estate. The estate commenced a third-party action against Leonhardt and Prudential.[1] Prudential and Leonhardt moved for summary judgment dismissing the third-party complaint, arguing that they owed plaintiff no duty to keep the apartment in a reasonably safe condition. They asserted that a real estate agent, who has no prior knowledge of a dangerous condition and only shows a premises to potential buyers and/or tenants, cannot be held liable for an alleged defective condition on the premises. They also contended that there was no evidence that Leonhardt had created the condition or launched the instrument of harm. In support of their motion, they submitted an affidavit by Leonhardt in which she reiterated that, although she did not

[1] The estate also impleaded plaintiff's agent, who was present in the apartment when the accident occurred, and the brokerage firm that employed him. However, the estate ultimately discontinued those third-party claims.

recall raising the shades that adorned the glass doors leading to the terrace before the accident, it was her practice to "ma[k]e sure to place the cord in the six-inch space between the steps and the wall towards the right of the steps so that the cord would not obstruct the steps." She also averred that she had never observed the cord obstructing the steps "prior to or on the date of the accident," and "did not coil, drape, hang or otherwise place the cord on the steps leading to the terrace at any time on the date of the accident."

Plaintiff moved to amend the complaint to assert a negligence claim directly against Prudential and Leonhardt. She also opposed Prudential and Leonhardt's motion for summary judgment, arguing that they had failed to meet their initial burden of establishing that they did not control the apartment when the accident happened, because Leonhardt had voluntarily assumed a duty to make sure the accident location was safe. Plaintiff also argued that Leonhardt had failed to use reasonable care to prevent the launching of an instrument of harm because she knew that a tripping hazard would result if the cord were not properly secured by the hook next to the door. Plaintiff claimed that a broker has a duty to make a reasonable inspection and to warn prospective buyers who tour a property of defects that are

reasonably discoverable, and that Leonhardt breached this duty by failing to inspect the premises before showing the apartment to her. Plaintiff further contended that, even if Prudential and Leonhardt had made a prima facie showing that they did not exercise sufficient control over the apartment to create liability, they had raised a triable question of fact as to the issue by demonstrating that Leonhardt had visited the apartment on many occasions before the accident and had advised Berkowitz on the condition in which the apartment should be presented to prospective renters. Kamin submitted an affidavit in support of plaintiff's position, averring that there was an issue of fact as to whether Leonhardt was negligent in failing to secure the cord. The court granted Prudential and Leonhardt's motion. The court determined that the third-party complaint should be dismissed on the basis that a "real estate broker is generally not responsible for a personal injury that occurs in the premises which the broker is showing," unless the injured party shows that the broker controlled the property, which the court concluded the record did not reflect. The court also determined that the motion to amend the complaint should be denied, because the proposed amended complaint had no merit, given Prudential and Leonhardt's showing that they did not have control over the

premises and owed no duty of care to plaintiff.

The estate seeks contribution on the theory that Leonhardt and Prudential owed a duty to plaintiff arising out of the contract between Prudential and Kamin. Such a duty can arise under three distinct circumstances. Those are where "the contracting party 'launche[s] a force or instrument of harm,' where the plaintiff suffers injury as a result of reasonable reliance on the defendant's continued performance of [the] contractual obligation, [and] 'where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (*Megaro v Pfizer, Inc.*, 116 AD3d 427 [1st Dept 2014], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). The estate's arguments on appeal implicate only the first and third predicates for liability. They mention the second circumstance, but state that it was Berkowitz, not plaintiff, who relied on the contract between Kamin and Prudential. Again, it is the injured person whose reliance is necessary (*id.*). Accordingly, Berkowitz's reliance cannot form the basis for third-party liability.

As for the third possible basis for third-party liability, we note that there is no evidence that Prudential and Leonhardt assumed liability by displacing Kamin's duty to maintain a safe

premises. Such an obligation was not set forth in the written contract between the parties. Further, neither Kamin nor Leonhardt testified that Leonhardt or Prudential took such control of the premises as to imply a duty to keep the apartment free of dangerous conditions. To the contrary, Leonhardt testified that Berkowitz was living in the apartment at the time of the accident, and would leave the apartment when Leonhardt came to show it to a prospective renter. This suggests that Leonhardt and Prudential did not intend to ensure their clients' safety, since the presence of Berkowitz in the apartment until just before Leonhardt showed it would have made it impractical to remove any potential hazards. Leonhardt stated that she gave Berkowitz instructions regarding how to keep the apartment presentable on days when it was being shown. However, these instructions did not cover safety issues.

We thus turn to the first potential predicate for finding third-party tort liability, which rests on whether Prudential or Leonhardt launched an instrument of harm. Since they were the movants for summary judgment, Prudential and Leonhardt had the prima facie burden of demonstrating that there were no triable issues of fact and that they were entitled to judgment as a matter of law on the issue (*see Zuckerman v City of New York*, 49

NY2d 557, 562 [1980]). Leonhardt's deposition testimony, and her affidavit in support of the motion, established that it was possible that she opened the drapes before the accident occurred, although she was not able to state with a reasonable degree of certainty that she did. If indeed she had opened the drapes, Leonhardt surmised, she would have wrapped the cord around the hook, because that is what she always did. However, evidence of a particular custom is insufficient to shift the burden in a premises liability case, because the defendant is required to proffer "specific evidence as to [her] activities on the day of the accident" (*Jackson v Manhattan Mall Eat LLC*, 111 AD3d 519, 520 [1st Dept 2013]). Here, since Leonhardt had no specific recollection concerning the opening of the drapes on the day of the accident, she and Prudential were unable to eliminate the

possibility that they were responsible for the hazardous placement of the cord on the floor. Accordingly, they failed to meet their prima facie burden, and the court should have denied their motion for summary judgment.

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

ENTERED: NOVEMBER 17, 2015

CLERK

Corrected Order - November 17, 2015

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16153 The People of the State of New York, Ind. 4170/09
Respondent,

-against-

Larry White,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered September 20, 2010, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 7 years, unanimously affirmed.

Since, as the court concluded, there was no reasonable view of the evidence to support a justification charge, and since there was no reasonable possibility of an acquittal on that ground, defendant could not have been prejudiced by anything in the court's **in artful** responses to notes in which the deliberating jury inquired about justification despite the absence of such an instruction from the court's main charge.

Defendant's claim that his counsel rendered ineffective assistance by failing to pursue an additional theory of justification is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). 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])

We perceive no basis for reducing the sentence or for remanding for resentencing.

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16155 In re Davion H.,

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

Linda R.,
Respondent-Appellant,

Martin H.,
Respondent-Appellant,

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

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for Linda R., appellant.

Larry S. Bachner, Jamaica, for Martin H., appellant.

John R. Eyerman, New York, respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 28, 2014, which, upon a fact-finding determination that respondent mother had permanently neglected the subject child and that respondent father's consent to adoption is not required, terminated respondent mother's parental rights to the child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services

for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7]; *Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). The evidence shows that the agency exercised diligent efforts to encourage and strengthen the parental relationship by, among other things, referring the mother for mental health services, and by scheduling and facilitating the mother's visitation with the child (*see Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512, 512 [1st Dept 2015]). Despite these efforts, however, the evidence shows that the mother failed to plan for the child's future, as she failed to continue with mental health counseling, obtain suitable housing, improve the quality of visits, and understand the child's special needs (*see Matter of Alliyah C. [Colleen C.]*, 113 AD3d 562, 563 [1st Dept 2014], *lv denied* 23 NY3d 901 [2014]; *see also Matter of Tashameeka Valerie P. [Priscilla P.]*, 102 AD3d 614, 615 [1st Dept 2013], *lv denied* 21 NY3d 852 [2013]).

A preponderance of the evidence supports the determination that the child's best interests would be served by terminating the mother's parental rights and freeing the child for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child has remained continuously in foster care since he was two

days old, and he has lived for more than three years with the foster mother, who wants to adopt him and with whom he has a loving relationship (*Matter of Amilya Jayla S. [Princess Debbie A.]*, 83 AD3d 582, 583 [1st Dept 2011]). A suspended judgment is unwarranted as the mother has failed to, among other things, demonstrate a realistic and feasible plan to provide an adequate and stable home for the child (*see Matter of Charles Jahmel M. [Charles E.M.]*, 124 AD3d 496, 497 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]).

Clear and convincing evidence supports the finding that the father's consent to adoption is not required, as he failed to communicate with the child or agency on at least a monthly basis, and he admittedly failed to provide financial support for the child, beyond a one-time payment of $200, despite the means to do so (Domestic Relations Law § 111(1)(d); *Matter of Lynik Jomae E. [Lynik Jomae E.]*, 112 AD3d 513, 514 [1st Dept 2013], *lv dismissed* 23 NY3d 1007 [2014]; *see also Matter of Lambrid Shepherd C. [Jeffrey S.]*, 73 AD3d 496, 496 [1st Dept 2010]).

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

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16156 The People of the State of New York, Ind. 3222/11
Respondent,

-against-

Jeffrey Richards,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William Mogulescu, J.), rendered on or about April 22, 2014,

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

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

ENTERED: NOVEMBER 17, 2015

CLERK

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

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16157 Rachel Tantaro, Index 157893/12
Plaintiff-Appellant,

-against-

All My Children, Inc.,
doing business as Fifth Avenue Beauty,
et al.,
Defendants-Respondents.

_____

Peter H. Paretsky, New York, for appellant.

Gannon, Rosenfarb & Drossman, New York (Sophia Candela of counsel), respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered January 6, 2014, which granted plaintiff's motion to strike defendants' answer for failing to comply with discovery to the extent of marking the parties' deposition dates as final, unanimously affirmed, without costs.

Plaintiff failed to establish that defendants' alleged failure to comply with disclosure obligations was willful, contumacious or in bad faith (*see Perez v New York City Tr. Auth.*, 73 AD3d 529 [2010]). Given the fact that the record demonstrates that the delays in discovery were caused by both parties, it cannot be said that Supreme Court abused its discretion in determining that striking defendants' answer was

inappropriate and instead granting plaintiff's motion to strike to the extent of imposing the lesser sanction of marking the deposition dates as final (*see DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581 [1st Dept 2011]; *Islar v New York City Bd. of Educ.*,64 AD3d 405 [1st Dept 2009]).

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16158 Leola M. Atkins, etc., Index 22193/06
Plaintiff-Appellant,

-against-

Beth Abraham Health Services,
Defendant-Respondent.

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

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Elizabeth J. Sandonato of counsel), for respondent.

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Appeal from order, Supreme Court, Bronx County (Stanley Green, J.), entered December 30, 2013, which granted defendant's motion for summary judgment dismissing the complaint, deemed appeal from judgment (CPLR 5520[c]), same court and Justice, entered January 28, 2014, dismissing the complaint, unanimously affirmed, without costs.

In her complaint and bill of particulars, plaintiff, administrator of her husband's estate, alleged that her husband, who suffered from diabetes mellitus and was an inpatient at defendant nursing home, died because its employees negligently failed to feed him during a 12-hour period, causing him to become hypoglycemic, which resulted in his death.

Defendant established its prima facie entitlement to

judgment on all causes of action through the records of treatment provided to plaintiff's decedent and the affirmation of its expert, who opined that no public health laws were violated by defendant, that feeds were appropriately administered at all times, and that decedent's blood sugar levels were consistently monitored and addressed. Noting that no autopsy had been performed and that the death certificate lists cardiac arrest as the cause of death, the expert further opined that decedent's death was not caused by and could not be attributed to any care and treatment provided or not provided by defendant.

In opposition, plaintiff submitted an affirmation of an osteopath, who did not profess that he possessed knowledge necessary to render an opinion on the issues presented involving the treatment of a geriatric patient with diabetes and other conditions (*see Limmer v Rosenfeld*, 92 AD3d 609 [1st Dept 2012]). Even assuming the expert were qualified, he failed to address the theories of liability raised in the complaint and bill of particulars or to rebut defendant's showing. Instead, plaintiff's expert posited a new theory - that defendant had failed to perform sufficiently frequent tests of decedent's blood sugar levels. A plaintiff cannot defeat a summary judgment motion by asserting a new theory of liability for the first time

in opposition papers (*see Keilany B. v City of New York*, 122 AD3d 424, 425 [1st Dept 2014]; *Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]; *Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]). If considered, the new theory is speculative as to how any such failure proximately caused decedent's death and is not grounded in the record (*see Foster-Sturrup v Long*, 95 AD3d 726, 727-728 [1st Dept 2012]; *Roques v Noble*, 73 AD3d 204, 207 [1st Dept 2010]). Thus, the negligence and wrongful death claims were properly dismissed.

Plaintiff also failed to raise a triable issue of fact with respect to the claims alleging Public Health Law violations, gross negligence and loss of companionship, and those claims were also properly dismissed.

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16159 The People of the State of New York, Ind. 2792/10
Respondent,

-against-

Randell Timmons,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered on or about August 9, 2011, unanimously affirmed.

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

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

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

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16160-
16161 Barbara Stewart,
Plaintiff-Appellant,

-against-

William Stewart,
Defendant-Respondent.

Index 350054/07

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McLaughlin & Stern, LLP, New York (Peter C. Alkalay and Carly A. Krasner of counsel), for appellant.

Pryor Cashman LLP, New York (Donald Lockhart Schuck of counsel), for respondent.

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Judgment of divorce, Supreme Court, New York County (Ellen Gesmer, J.), entered April 30, 2014, among other things, equitably distributing the marital estate, denying plaintiff wife's request for maintenance, and denying plaintiff's request for an additional award of counsel fees, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 14, 2014, which confirmed a special referee's report in part and rejected it in part, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court's unequal distribution of the marital property in favor of defendant husband was amply supported by the record and was a provident exercise of the court's discretion (Domestic

Relations Law § 236[B][5][d]; *see Holterman v Holterman*, 3 NY3d 1, 8 [2004]). The court issued a careful, comprehensive decision addressing all relevant factors, including plaintiff's egregious economic fault in claiming to have given away jewelry and property worth over $10 million, failing to disclose her offshore and foreign accounts, and secreting millions more in assets (*see id.; see also Maharam v Maharam*, 245 AD2d 94, 94-95 [1st Dept 1997]). The award to plaintiff is not "cashless"; rather, it includes many valuable assets that will be sold (including luxury vehicles, a Swiss chalet and its contents, and a Bermuda estate and its contents), with the net proceeds equally divided by the parties.

Further, the court awarded plaintiff $4,207,775 in Agravina stock, which can be sold to third parties so long as they are first offered to other shareholders. We find no merit to plaintiff's current claim that the court erred in distributing the Agravina shares because the shares' value was not established at trial. The evidence shows that the parties agreed to adopt their son-in-law's valuation of the shares.

The court also awarded plaintiff jewelry valued at $8,520,000. The evidence does not support plaintiff's claim that she transferred the jewelry to an entity named Topaze or to her

daughter-in-law. The evidence shows that plaintiff had assembled a jewelry collection worth over $18 million, which she kept in Switzerland and New York. While she testified that she gave her jewelry to Topaze or her daughter-in-law, she presented no documents showing a transfer. Further, as the Referee noted, if she did transfer the jewelry, it constitutes an improper dissipation of a marital asset.

The court properly accepted the jewelry appraisal based on a "hypothetical fair market valuation." Plaintiff cannot complain about this valuation method, since she secreted the very jewelry she now complains is missing from the valuation.

The court awarded plaintiff two Swiss chalets worth a total of nearly $4 million. The Referee's credibility findings, including his determination that plaintiff was not credible regarding her purported transfer of one of the chalets, was properly accepted by the court (*see Gass v Gass*, 42 AD3d 393, 393-394 [1st Dept 2007]). In any event, the documentary evidence does not support her claim, and if the claimed transfer took place, it was an improper dissipation of a marital asset.

The court properly distributed all personalty that was found to be marital property. The remaining personalty — including personalty located in Manhattan apartments, a Maine estate, and

on the parties' yacht — was the property of the parties' trusts, which plaintiff admitted and which the evidence demonstrates to be the case.

The court's denial of a maintenance award to plaintiff was supported by the record and was a provident exercise of its discretion (*Naimollah v De Ugarte*, 18 AD3d 268, 271 [1st Dept 2005]). The court considered the relevant factors (*see* Domestic Relations Law § 236[B][6][a]), including the marital standard of living, the length of the marriage and age of the parties, that plaintiff would continue to receive substantial income from her ownership interest in Agravina and from the parties' Income Trust, that she was to receive millions of dollars of assets in equitable distribution, and that she had secreted millions more in marital assets (*see Bayer v Bayer*, 80 AD3d 492, 492-493 [1st Dept 2011]; *Hartog v Hartog*, 85 NY2d 36, 51-52 [1995]).

After considering the financial positions of the parties and the circumstances of the case, the court providently exercised its discretion in denying plaintiff's request for an additional award of counsel fees beyond the $410,000 defendant has already paid (*see* Domestic Relations Law § 237; *Johnson v Chapin*, 12 NY3d

461, 467 [2009]).

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

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16163 The People of the State of New York, Ind. 961/13
Respondent,

-against-

Rolando Cabrera,
Defendant-Appellant.

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Law Office of Daniel Berke, LLC, New York (Robert M. Berke of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered September 3, 2014, convicting defendant, after a jury trial, of course of sexual conduct against a child in the second degree and three counts of public lewdness, and sentencing him to an aggregate term of four years, unanimously affirmed.

The court properly exercised its discretion in declining to permit defendant to call a retired detective as an expert on police procedures, and this ruling did not violate defendant's constitutional right to present a defense *(see Crane v Kentucky*, 476 US 683 [1986]). Under the circumstances of the case, the proposed testimony consisted of matters that were speculative, that were within the knowledge of the typical juror, or that were, or could have been, explored through fact witnesses (*see*

generally People v Cronin, 60 NY2d 430 [1983]; *see also People v Inoa*, 25 NY3d 466 [2015]). Contrary to defendant's assertion, the People introduced only factual testimony, rather than any expert opinions, on this subject.

By contrast, the testimony of the People's expert on child sexual abuse was entirely proper. Her testimony was beyond the knowledge of the average juror, and it did not opine on the victim's credibility or the particular factual allegations in the case (*see People v Spicola*, 16 NY2d 441, 465-466 [2011], *cert denied* 565 US __, 132 S Ct 400 [2011]; *People v Carroll*, 95 NY2d 375, 387 [2000]).

Defendant was not prejudiced when a former prosecutor, who gave relevant testimony as a fact witness, briefly mentioned that he had become a judge, since the prosecution did not exploit the witness's status to suggest to the jury that he had enhanced credibility (*see People v Castillo,* 94 AD3d 678 [1st Dept 2012], *lv denied* 19 NY3d 971 [2012]). We have considered and rejected defendant's remaining arguments concerning this witness's testimony.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for

reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The remarks in question constituted permissible comment on the evidence and the reasonable inferences to be drawn therefrom, and they did not deprive defendant of a fair trial. We have considered and rejected defendant's related claim of ineffective assistance of counsel.

Defendant's legal sufficiency claim regarding the public lewdness convictions is unpreserved and we decline to review it in the interest of justice. His argument that two of the public lewdness counts were duplicitous is without merit.

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16164-
16165 In re Edubilio Andre R.,
16165A and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Andre R.,
Respondent-Appellant,

Cardinal McCloskey Community Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall Carmel of counsel), for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

Daniel R. Katz, New York, attorney for the children.

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Orders of fact-finding and disposition, Family Court, Bronx County (Carol Sherman, J.), entered on or about March 24, 2014 and on or about May 16, 2014, insofar as they determined that respondent father had permanently neglected the subject children, unanimously affirmed, and the appeals therefrom otherwise dismissed, without costs. Appeal from order, same court and Judge, entered on or about February 5, 2014, which granted petitioner agency's motion to be excused from its duty to exercise diligent efforts to reunite respondent father with the subject children, unanimously dismissed, without costs, as

subsumed in the appeals from the aforementioned orders.

Diligent efforts to encourage and strengthen the parental relationship are only required "when such efforts will not be detrimental to the best interests of the child" (Social Services Law § 384-b[7][a]). Here, the court properly determined, after a hearing, that the circumstances warranted excusing diligent efforts. Such circumstances included the father's conviction of a felony involving the sexual abuse of a girl, and Family Court's issuance of orders of protection after finding that the father had sexually abused his then eight-year-old daughter and medically neglected his son who has severe special needs. The court also considered the expert testimony of social workers who testified that reunification would be traumatic to each of the children who continued to suffer from the abuse and neglect, and the evidence that the father had not participated in any services or sexual offender program while incarcerated. Under these egregious circumstances, efforts to reunite would be futile and contrary to the children's best interests (*see Matter of Marino S.*, 100 NY2d 361 [2003], *cert denied* 540 US 1059 [2003]; *Matter of Milan N.*, 45 AD3d 358 [1st Dept 2007], *lv denied* 10 NY3d 703 [2008]). As the record was undisputed that the father failed to maintain contact with the children or plan for their future, the

finding of permanent neglect was supported by clear and convincing evidence (Social Services Law § 384-b[7][a]).

No appeal lies from the dispositional portions of the orders, since the father defaulted at the dispositional hearings(*see Matter of Jaquan Tieran B. [Latoya B.]*, 105 AD3d 498, 499 [1st Dept 2013]).

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16166 Kirsis Corporan, as Administratrix of the Estate of Ronnie Garcia, deceased, Plaintiff-Respondent-Appellant, Index 300799/11

-against-

Barrier Free Living Inc., et al., Defendants-Appellants-Respondents.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Meredith Drucker Nolen of counsel), for appellants-respondents.

Sivin & Miller, LLP, New York (Edward Sivin of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered January 13, 2015, which denied plaintiff's motion for summary judgment on the issue of liability and denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Triable issues of fact exist as to whether defendants, the owner and operator of a transitional facility for disabled homeless people, breached their common-law duty to provide reasonable security measures to protect plaintiff's decedent from foreseeable harm (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]). The fatal attack on decedent by a fellow resident was immediately preceded by two prior physical attacks, by the

same resident, and police officers responding to the earlier attacks had told defendants' staff members to keep the two residents apart.

In light of the conflicting testimony as to the perpetrator's demeanor prior to the final attack and whether defendants were on notice of his alleged threat to continue the attack on decedent, it is for a jury to determine whether a further attack was foreseeable. The fact that defendants may not have been able to "anticipate the precise manner of the [attack] or the exact extent of injuries. . .does not preclude liability as a matter of law where the general risk and character of injuries are foreseeable" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316-317 [1980]). Furthermore, while unforeseeable and intentional criminal acts by third parties are supervening acts which sever the causal connection with any alleged negligence (*see Ullrich v Bronx House Community Ctr.*, 99 AD3d 472 [1st Dept 2012]), here, "the alleged intervening criminal act is itself the

foreseeable harm that shapes the duty [of care sought to be] imposed" (*Browne v International Bhd. of Teamsters Union 851*, 187 AD2d 296 [1st Dept 1992] [internal quotation marks omitted]).

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16167 Impala Partners, et al., Index 104091/11
Plaintiffs-Respondents,

-against-

Michael P. Borom,
Defendant-Appellant.

_____

Blank Rome LLP, New York (Leslie D. Corwin of counsel), for appellant.

Herrick , Feinstein LLP, New York (David Feuerstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 7, 2015, which, inter alia, granted plaintiffs' motion for partial summary judgment dismissing defendant's first counterclaim, unanimously reversed, on the law, without costs, and the motion denied.

Defendant, a former founding partner of plaintiffs, left the company in 2009 for another firm. To facilitate his departure, plaintiffs and defendant negotiated a Reorganization Agreement, pursuant to which defendant was to receive a 23% payout of the "Net Proceeds" of what was referred to as "that certain transaction with Enron ('*Rawhide*')." Prior to his departure, defendant had been involved with the Enron transactions, which involved the untangling of certain Argentinian assets from the

bankruptcy estate of Enron and their liquidation. While the parties both contend that the contract is unambiguous, they nonetheless dispute the meaning of the phrase "that certain transaction with Enron ('*Rawhide*')," including the definition of "Rawhide" itself and the payment to which defendant would be entitled.

It is well settled that the question of whether a writing is ambiguous is a question of law that is to be resolved by the court (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). "[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face" (*id.* at 163). Only where a contract term is ambiguous may parol evidence be considered to clarify the disputed portions of the parties' agreement (*Blue Jeans U.S.A. v Basciano*, 286 AD2d 274, 276 [1st Dept 2001]. Given the extent of the dispute over the meaning of the term "that certain transaction with Enron ('*Rawhide*')," and the fact that resolving it necessarily involves credibility determinations of the parties' testimony and the assessment of parol evidence, we find

that the term is ambiguous and issues of fact exist that preclude the grant of summary judgment (*see e.g. IBM Credit Fin. Corp. v Mazda Motor Mfg. [USA] Corp.*, 152 AD2d 451, 452 [1st Dept 1989]).

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16168 The People of the State of New York, Ind. 2297/11
Respondent,

-against-

Jose Tayo,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered August 14, 2013, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion, made when, midway through their case, the People introduced a previously undisclosed confession that defendant made to a health care worker at a hospital where he was being treated for a suicide attempt. This statement tended to corroborate a similar confession that defendant made to a detective shortly thereafter. It is undisputed that the People had no statutory duty to disclose this statement, because it was not made to anyone connected with law enforcement (*see* CPL

240.20[1][a]), and because no *Rosario* material was involved. Defendant nevertheless complains that his due process right to a fair trial was violated by the timing of the disclosure, because he would have formulated a different defense had he known the People intended to introduce a confession to a civilian witness. However, we find no evidence of deceit or trickery on the part of the People, and defendant's claim of prejudice is unpersuasive. Unlike the situation in *People v Kelley* (19 NY3d 887, 889 [2012]), there was no misrepresentation that the undisclosed evidence did not exist, and the trial had not progressed to the point where defendant could not have adjusted his defense, or requested less drastic relief than a mistrial.

Defense counsel did not object to the health care worker's testimony on the ground of physician-patient privilege, and we decline to review this unpreserved claim in the interest of justice. Defendant's claim that his counsel rendered ineffective assistance by failing to raise this issue is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the

alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that failure to raise the privilege issue fell below an objective standard of reasonableness, or that it deprived defendant of a fair trial or affected the outcome of the case. Counsel could, among other things, have reasonably concluded that the privilege was waived or inapplicable under the facts presented. Likewise, defendant had not shown that an objection based on the privilege would have succeeded (*see e.g. People v Figueroa*, 173 AD2d 156, 159 [1st Dept 1991], *lv denied* 78 NY2d 1075 [1991]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16169 The People of the State of New York, Ind. 2520/08
Respondent,

-against-

William Davila,
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 (Hope Korenstein of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered on or about January 9, 2014,

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

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

ENTERED: NOVEMBER 17, 2015

CLERK

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

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16170 Alan Metz, Index 651993/13
Plaintiff-Appellant,

-against-

Davis Polk & Wardwell,
Defendant-Respondent.

_____

Alan Metz, appellant pro se.

Epstein Becker & Green, New York (Peter L. Altieri of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 7, 2014, which granted defendant's motion to dismiss on forum non conveniens grounds, unanimously affirmed, without costs.

The motion court providently exercised its discretion and properly balanced the factors set forth in *Islamic Republic of Iran v Pahlavi* (62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]; *Matter of Alla v American Univ. of Antigua, Coll. Of Medicine*, 106 AD3d 570, 571 [1st Dept 2013]). As the motion court observed in evaluating the situs of the events at issue, plaintiff "reached across the Pacific" to recruit the partner he claims to have introduced to the defendant law firm, and all discussions occurred with that partner located in Hong Kong.

Plaintiff claims that Hong Kong is not an adequate forum on the basis that he would be unable to retain counsel on a contingency fee. Here, however, where the negotiations at issue were directed to Hong Kong, and key witnesses were located there, the motion to dismiss was properly granted (*see Emslie v Recreative Indus., Inc.*, 105 AD3d 1335, 1336-1337 [4th Dept 2013]; *cf. Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327-328 [1st Dept 1991]).

Plaintiff further ignores the hardship to defendants whose key witnesses are located in Hong Kong, the noted admissibility problems with respect to electronic discovery, and the likely application of the law of Hong Kong. Since this action is almost entirely concerned with events and law in Hong Kong, it cannot be said that the action has a "substantial nexus" with New York (*Tetra Fin. (HK) v Patry*, 115 AD2d 408, 410 [1st Dept 1985]).

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16171 The People of the State of New York, Ind. 3090/12
Respondent,

-against-

Nicholas Mina,
Defendant-Appellant.

_____

Solomon J. Schepps, Goldens Bridge, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Edward McLaughlin, J.), rendered on or about November 28, 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: NOVEMBER 17, 2015

CLERK

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

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16172-
16173 Peter Stern et al., Index. 653476/13
Plaintiffs-Respondents,

-against-

Oleg Ardachev et al.,
Defendants-Appellants.

_____

Law Office of Robert Bondar, Brooklyn (Robert Bondar of counsel), for appellants.

David Estrakh, New York, for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about July 21, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the first through third causes of action in plaintiffs' complaint based upon the documentary evidence, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about December 9, 2014, which denied defendants' motion to reargue their motion to dismiss, unanimously dismissed, without costs, as taken from a nonappealable paper.

The complaint, which states a cause of action for breach of contract (as defendants concede on appeal), alleges that on or about January 16, 2009, defendants agreed to purchase plaintiff Express Trade Capital, Inc.'s (ETC) 50% membership interest in

defendant Air Cargo Services L.L.C. (ACS) for $400,000, to be paid by July 2012.

The documentary evidence, specifically exhibit A annexed to the complaint, does not "utterly refute[] [all of] plaintiff's factual allegations" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). For example, it does not refute the fact of an agreement, since it states, "Agreed." Nor does it refute plaintiffs' allegation that the parties' contract involved the sale of ETC's membership interest in ACS.

Exhibit A contains no merger clause, and it is clearly not an integrated contract. Therefore, extrinsic evidence is "admissible to supply the terms that the parties intended to incorporate into their agreement" (*Saxon Capital Corp. v Wilvin Assoc.*, 195 AD2d 429, 430 [1st Dept 1993]). We perceive no inequity if plaintiffs are allowed to introduce extrinsic evidence, such as the parties' testimony. The agreement is

sufficiently definite to survive defendants' motion to dismiss (*see Matter of 166 Mamaroneck Ave.Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991]).

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16174 The People of the State of New York, Ind. 3044/11
Respondent,

-against-

Anibal Ortiz,
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 (Bonnie Wittner, J.), rendered on or about May 9, 2013, unanimously affirmed.

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

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

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

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

ENTERED: NOVEMBER 17, 2015

CLERK

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16175 In re American Transit Insurance Company, Petitioner-Appellant, Index 20939/14E

-against-

Margarita Rosario, Respondent-Respondent.

_____

Marjorie E. Bornes, Brooklyn, for appellant.

Linda T. Ziatz, P.C., Forest Hills (Linda T. Ziatz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered July 10, 2014, which denied petitioner insurance company's petition to permanently stay arbitration of respondent's claim for uninsured motorist benefits, unanimously reversed, on the law, without costs, and the petition granted. The Clerk is directed to enter judgment accordingly.

On May 6, 2004, respondent was involved in an automobile collision with nonparty Alex Carela in Bronx County. At the time of the accident, respondent was insured by petitioner, and Carela was insured by nonparty American Independent Insurance Company, a Pennsylvania corporation not subject to jurisdiction in New York (*see Matter of American Tr. Ins. Co. v Hoque*, 45 AD3d 329 [1st Dept 2007]). Respondent obtained a default judgment against

Carela in 2009, and in 2012 she brought an action against American Independent in Bronx County, seeking to collect on the judgment (*see* Insurance Law § 3420[a][2]). American Independent moved to dismiss the action based on a lack of personal jurisdiction, and, by order entered May 8, 2013, Supreme Court (Mark Friedlander, J.), granted the motion.

Respondent then filed a demand for arbitration against petitioner, her insurer, seeking to collect uninsured motorist (UIM) benefits, and claiming that the May 8, 2013 order finding a lack of personal jurisdiction over American Independent had rendered Carela's car "uninsured." Petitioner sought to permanently stay arbitration, arguing that the applicable six-year limitations period had expired. Supreme Court rejected this argument, and denied the petition.

Supreme Court erred in denying the petition, as respondent's claim was untimely. A claim for UIM benefits is governed by the six-year statute of limitations applicable to contract actions (*see Matter of De Luca [Motor Veh. Acc. Indem. Corp.]*, 17 NY2d 76, 79 [1966]). The claim accrues either when the accident occurs or when subsequent events render the offending vehicle uninsured (*Matter of Allstate Ins. Co. v Morrison*, 267 AD2d 381, 381 [2d Dept 1999]). Since there is more than a six-year lapse

between the accident and the demand for arbitration, respondent must show that a later accrual date than the accident date is applicable, and that due diligence was used to determine whether the offending vehicle was insured on the date of the accident (*id.* at 381-382). Respondent failed to make this showing.

Supreme Court's ruling that there was no personal jurisdiction over American Independent in New York was not an event that rendered the offending vehicle uninsured within the meaning of Insurance Law § 3420(f)(1) (*see American Tr. Ins. v Barger*, 13 Misc 3d 386, 389 [Sup Ct, NY County 2006]). Rather, it was simply a ruling that respondent could not pursue its action against American Independent in a New York court (*accord Matter of Government Empls. Ins. Co. v Basedow*, 28 AD3d 766 [2d Dept 2006]; *Matter of Eagle Ins. Co. v Gutierrez-Guzman*, 21 AD3d 489 [2d Dept 2005]).

Because no event rendered the offending vehicle uninsured, the statute of limitations for respondent's UIM claim began to run on the date of the accident, May 6, 2004, and expired six years later. Accordingly, respondent's demand for UIM

arbitration, filed on or about February 10, 2014, was untimely and the arbitration should be permanently stayed.

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

ENTERED: NOVEMBER 17, 2015

CLERK

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

14367 In re Nayana Vyas, Index 102253/12
Petitioner Appellant,

-against-

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

_____

Glass Krakower LLP, New York (Jordan Harlow of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Kathryn E. Freed, J.), entered June 25, 2013, insofar as appealed from as limited by the briefs, granting respondents' cross motion to dismiss, pursuant to CPLR 3211(a)(7), the petition seeking the annulment of respondents' denial of petitioner's appeals of her unsatisfactory ratings (U-ratings) for the 2009-2010 and 2010-2011 school years, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner, who was formerly employed by respondent New York City Department of Education (DOE) as a probationary teacher, brought this proceeding under CPLR article 78 to annul her U-ratings for the 2009-2010 and 2010-2011 school years. In lieu of answering the petition, respondents made a cross motion, pursuant

to CPLR 3211(a)(7), to dismiss the petition for failure to state a cause of action. Because petitioner has not pleaded any specific facts giving rise to a fair inference that the U-ratings were arbitrary, capricious, made in bad faith, or issued in violation of lawful procedure, Supreme Court properly granted the cross motion and dismissed the petition.

With regard to the U-rating for the 2009-2010 school year, petitioner's primary complaint is that she was evaluated based on assignments to teach science classes, which were outside her area of certification (mathematics). However, DOE was entitled to assign petitioner (who holds a medical degree) to teach science classes, notwithstanding that her certification is in mathematics. The provision of the Rules of the Board of Regents that prohibits assigning a teacher "to devote a substantial portion of [her] time in a tenure area other than that in which [she] has acquired tenure or is in probationary status, without [her] prior written consent" (8 NYCRR § 30-1.9[c]) is "not . . . applicable to city school districts located within cities having a population in excess of 400,000 inhabitants" (8 NYCRR § 30-1.2[e]), such as DOE (*see Steele v Board of Educ. of City of N.Y.*, 40 NY2d 456, 463 n 2 [1976]). Since DOE was entitled to make the teaching assignments in question, its evaluation of

petitioner based on those assignments does not give rise to an inference that the resulting U-ratings were arbitrary, capricious, or made in bad faith, nor were the U-ratings issued in violation of lawful procedure. Further, given that petitioner was a probationary teacher who could have been discharged at any time, for any lawful reason or no reason at all under Education Law § 2573(1)(a) (*see Matter of Venes v Community School Bd. of Dist. 26*, 43 NY2d 520, 525 [1978]), bad faith cannot be inferred from the fact that the U-rating was issued after the school principal insisted that petitioner sign an agreement consenting to an additional year of probation to avoid being discharged. The petition's remaining allegations concerning the 2009-2010 school year also fail to raise an inference that her U-rating for that year was issued in bad faith or was otherwise improper.

The only basis alleged in support of petitioner's challenge to her U-rating for the 2010-2011 school year is the contention that it was issued in retaliation for her having filed a complaint with the State Department of Education against the principal who issued her U-rating for the previous year, when she was teaching at a different school. This fails to state a cause of action for annulment of the rating because petitioner's imputation of a retaliatory motive for the U-rating is entirely

speculative; the specific facts alleged do not give rise to a fair inference that the U-rating was improperly motivated (*see Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]). Notably, petitioner admits that she was assigned to teach within her area of certification during the 2010-2011 school year, and she alleges no procedural irregularities that might have undermined the integrity or fairness of the rating process for that year (*cf. Matter of Kolmel v City of New York*, 88 AD3d 527, 529 [1st Dept 2011]).

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

ENTERED: NOVEMBER 17, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15812 In re 2589 Westside Market, LLC, Index 101531/13
Petitioner,

-against-

New York City Department of
Environmental Protection,
Respondent.

_____

Law Offices of Mitchell & Incantalupo, Forest Hills (Thomas V. Incantalupo of counsel), for petitioner.

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

_____

Determination of Environmental Control Board of the City of New York (ECB), dated August 29, 2013, which reversed the decision of an Administrative Law Judge (ALJ) dismissing a notice of violation (NOV) issued by respondent New York City Department of Environmental Protection (DEP) against petitioner for violation of Administrative Code of City of NY § 24-227(b), unanimously annulled, without costs, and the petition brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Cynthia S. Kern, J.], entered April 25, 2014), granted.

DEP's inspector testified that he went to the complainant's twelfth-floor apartment to take sound readings of the circulation

devices at petitioner's ground floor supermarket. He used a DEP issued meter, which he calibrated both before and after he took the readings three feet from an open window in the complainant's apartment. The inspector's measurements indicated that the total sound reading (with petitioner's equipment on) was 56 dB(A), that the ambient sound reading (with petitioner's equipment off) was 50 dB(A), and that the "calculated" sound level from petitioner's equipment was 55 dB(A), which exceeded the maximum decibel level of 45 db(A) allowed under section 227(b) of the Noise Control Code (Administrative Code of City of NY § 24-201 *et seq.*). On cross-examination, the inspector acknowledged that there was no Lmax setting on his meter, that he did not record the sound levels with decimal points because the analog meter did not give decimal point readings, that he was not sure whether the air conditioning units in other apartments in the building were on or off, that he did not notice any construction noise, and that he did not account for wind.

Petitioner's acoustic consultant testified as to alleged inadequacies in the inspector's tests, including that Lmax "has to be measured with a meter that has the Lmax function." The consultant was present when the inspector performed his tests, but was not allowed into the complainant's apartment. Instead,

he took his own readings on a 14th floor roof and from an open stairwell window on the twelfth floor, which showed sound levels with considerable variations, including an ambient sound level of 54 dB(A).

After the hearing, the ALJ granted petitioner's motion to dismiss the NOV, finding that DEP "failed to prove by a clear preponderance of the credible evidence[] that [petitioner] was in violation as charged." The ALJ found petitioner's evidence credible and that DEP did not counter it or offer any additional credible proof in support of the charge.

ECB reversed and imposed a penalty of $560. ECB found that DEP established by a preponderance of the credible evidence that the inspector's measurements accurately reflected that petitioner's circulation equipment produced "cumulative noise in excess of 45dB(A)," which shifted the burden of proof to petitioner, whose evidence did not refute the accuracy of the inspector's sound level measurements. In this regard, ECB found that the meter did not have to be equipped with Lmax and that petitioner's consultant's readings did not suffice to negate the inspector's readings because they were taken at a different location and time.

We now hold that ECB's determination is not supported by

substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]).

DEP bore the burden of establishing that the alleged noise constituted a violation. Administrative Code § 24-217.1 requires that sound level measurements "be taken in Lmax with the sound level meter set to slow response," which establishes Lmax as the standard and uniform metric of sound level in determining noise violations.

The inspector's testimony did not establish compliance with the requirements of § 24-217.1. When asked if he took his measurements in "LMAX slow or did you not utilize LMAX?," the inspector responded: "I did all slow response." When asked, "[B]ut did you use LMAX?," the inspector replied: "There was no LMAX [on that meter]." While Lmax is defined in § 24-203(37) as "the maximum measured sound level at any instant in time," the inspector's testimony did not establish that his readings measured or that his results reflected the maximum measured sound level at the time they were taken.

Accordingly, on the record before us, the "quality and quantity" of the evidence is insufficient to warrant a finding that ECB's determination is supported by substantial evidence

(*see Matter of 25-24 Café Concerto Ltd. v New York State Liq. Auth.*, 65 AD3d 260, 265 [1st Dept 2009]).

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

ENTERED: NOVEMBER 17, 2015

CLERK

Tom, J.P., Andrias, Moskowitz, Kapnick, JJ.

15938 The People of the State of New York, SCI 3738/13
Respondent,

-against-

William Acosta,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered July 10, 2014, convicting defendant, upon his plea of guilty, of aggravated family offense and assault in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years and time served, respectively, unanimously modified, on the law, to the extent of remanding for resentencing, and further modified, as a matter of discretion in the interest of justice, to the extent of remanding for a new determination of the duration of the orders of protection, and otherwise affirmed.

At sentencing, defense counsel represented to the court that he had just been retained and received his client's file the day before. As a result, he asked for an adjournment of

approximately 19 days, which would be after defendant's court date in a related misdemeanor case and would also allow him to prepare a sentencing memorandum for the court. Without commenting on defense counsel's request, the court proceeded with sentencing forthwith, which involved an enhanced sentence for violating a plea agreement. Under these circumstances, the court abused its discretion and implicated defendant's right to effective assistance of counsel by denying defense counsel's request for an adjournment of sentencing (*see People v Foy*, 32 NY2d 473, 477 [1973]; *People v Jones*, 15 AD3d 208, 209 [1st Dept 2005]).

The record fails to reflect that defendant's waiver of his right to appeal was knowing, intelligent, and voluntary. Notwithstanding the exemplary written form clarifying that this waiver was distinct from other waivers and does not automatically result from a guilty plea, the court's colloquy with defendant, who merely confirmed his understanding that the waiver of the right to appeal was "separate" from his other waivers, failed to establish that defendant had actually signed the written form and was aware of its contents (*see People v Elmer*, 19 NY3d 501, 510 [2012]; *People v Oquendo*, 105 AD3d 447, 448 [1st Dept 2013], *lv denied* 21 NY3d 1007 [2013]). Nevertheless, in light of the fact

that we are remanding for resentencing, we take no position as to whether the sentence was excessive.

As the People concede, the court failed to pronounce the sentence imposed on the assault conviction, as required by CPL 380.20, and failed to take jail time credit into account in calculating the expiration date of the orders of protection, which were based on the maximum expiration date of the sentence imposed on the aggravated family offense conviction (*see* CPL 530.12[5][A][ii]).

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

ENTERED: NOVEMBER 17, 2015

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

15787 Peckar & Abramson, P.C., Index 100005/09
Plaintiff-Appellant,

-against-

Lyford Holdings, Ltd., et al.,
Defendants,

Mitchell Stern,
Defendant-Respondent.

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Strassberg & Strassberg, P.C., New York (Todd Strassberg of counsel), for appellant.

Wachtel Missry LLP, New York (Stella Lee of counsel), for respondent.

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Order Supreme Court, New York County (Joan A. Madden, J.), entered February 26, 2014, affirmed, without costs.

Opinion by Acosta, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando Acosta, J.P.
Dianne Renwick
Richard Andrias
Karla Moskowitz, JJ.

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Peckar & Abramson, P.C.,
Plaintiff-Appellant,

-against-

Lyford Holdings, Ltd., et al.,
Defendants,

Mitchell Stern,
Defendant-Respondent.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Joan A. Madden, J.), entered February 26, 2014, which, to the extent appealed from, granted defendant Mitchell Stern's motion for summary judgment dismissing the third cause of action as against him.

Strassberg & Strassberg, P.C., New York (Todd Strassberg of counsel), for appellant.

Wachtel Missry LLP, New York (Stella Lee and Evan S. Weintraub of counsel), for respondent.

ACOSTA, J.

At issue in this appeal is a claim under the Debtor and Creditor Law by plaintiff, a judgment creditor with an unpaid judgment against defendant Savoy Little Neck Associates, LP (Savoy), and against defendant Mitchell Stern, a former limited partner of Savoy. Stern received $425,000 for his sale and assignment of his interest in Savoy to defendant Savoy Senior Housing Corp. (SSHC). The source of that payment to Stern was a $722,365.43 property tax refund Savoy received in September 2004, which funds Savoy had turned over to defendant Savoy Management Corporation (SMC), which in turn, paid Stern. We find that since the transfer of Savoy's tax refund to SMC was upheld after trial as nonfraudulent, that determination bars plaintiff's claim against Stern even if it was a partnership distribution.

In an action commenced in April 2004, plaintiff law firm, Peckar & Abramson, P.C., obtained a default judgment against Savoy for $237,731.75 for outstanding legal fees (*Peckar & Abramson, P.C. v Savoy Little Neck Assoc., L.P.*, Sup Ct, NY County, index No. 105261/04).

Defendant Savoy was a limited partnership whose business consisted of acquiring and developing a property in Little Neck, New York. Stern became a limited partner of Savoy in March 1999, when he made a capital contribution for which he was assigned a

19.8% interest. At the same time, a number of Stern's friends and family members (with Stern, the Stern Group) also made capital contributions and became limited partners of Savoy. Together the Stern Group invested over $1 million in Savoy, representing a total preferred limited partnership interest of 37.62%.

On August 1, 2004, Stern, on the Stern Group's behalf, entered into an assignment with SSHC, assigning the Stern Group's interest in Savoy to SSHC, in consideration for $425,000. In October 2004, Stern was paid $425,000 by check drawn on an account held by SMC.

Approximately two months earlier, in June 2004, Savoy sold its major asset, the property, to an unrelated entity, CRP Little Neck, LP. Pursuant to Savoy's Operating Agreement, the sale was a "Liquidating Event." Plaintiff maintains that, as of the date of the sale, Savoy was insolvent and its only remaining major asset was a claim for a property tax refund.

By check dated September 24, 2004, the Department of Finance of the City of New York issued Savoy a real property tax refund in the amount of $722,365.43, which was deposited into an account held by SMC at North Fork Bank.

In January 2009 plaintiff commenced this action under the Debtor and Creditor Law and the Revised Limited Partnership Act

(RLPA), seeking to set aside a series of payments and/or distributions made by Savoy to defendants.

The court dismissed the original complaint as barred by RLPA (Partnership Law) § 121-607(c)'s three-year statute of limitations. The amended complaint alleges only violations of the Debtor and Creditor Law (DCL) and seeks to void the various checks and transfers pursuant to Debtor and Creditor Law article 10. The cause of action at issue for purposes of this discussion are: the second cause of action as against the Savoy defendants, challenging the transfer of the tax refund to SMC as being without consideration; and the third cause of action as against Stern, challenging SMC's transfer of the Tax Refund proceeds to Stern as being without consideration.

Stern and the Savoy defendants' subsequently moved for summary judgment. Stern sought dismissal of the third cause of action arguing that, although structured as an assignment, the $425,000 transaction was actually a return on his capital contribution and subject to RLPA's three-year statute of limitations.

The court agreed with Stern and dismissed the third cause of action, finding the payment to Stern to be a return on his capital contribution, and that the claim to set aside that payment is subject to RLPA's three-year statute of limitations,

and thus time-barred (Partnership Law § 121-607[c]).

The court, however, denied the Savoy defendants' motion for summary judgment, holding that because defendant SMC, White Acre Equities, LLC, Tuscanny Builders, LLC and Tivoli Partners LLC were not limited partners of Savoy, the transfers were subject to DCL's six-year statute of limitations. Plaintiff appealed from the dismissal of the complaint against Stern.

Meanwhile, on or about March 3, 2015, plaintiff proceeded to a bench trial against the Savoy defendants, including on the second cause of action. At the conclusion of the trial, the court issued a defense verdict finding that there were no fraudulent conveyances. Plaintiff did not appeal, and the time to do so has expired.

The verdict in the Savoy defendants' favor forecloses any claims by plaintiff against Stern as a limited partner, and plaintiff's failure to establish that the transfer of the tax refund was fraudulent and devoid of fair consideration forecloses any claim against Stern. The third cause of action, against Stern, relies upon the premise asserted in the second cause of action, that the transfer of the tax refund to SMC was void. While Stern was not a party to the trial, his potential culpability is dependent upon, and derivative of, a finding that the transfer of the tax refund from Savoy to SMC was void. As

Savoy and SMC have been exonerated from liability with regard to the transfer of the tax refund to SMC, the defense verdict as to this claim bars plaintiff from following the funds to its next stop, Stern.

Plaintiff argues that the propriety of SMC's transfer of $425,000 to Stern is subject to different proofs than the propriety of the other challenged transfers. However, that distinction is only relevant to the extent that plaintiff has a valid claim to the tax refund money deposited into SMC's account. Plaintiff has already litigated the propriety of the transfer of the tax refund to SMC and cannot relitigate this issue. In the absence of a finding that the tax refund transfer was improper, there can be no finding that any subsequent transfer by SMC violates the Debtor and Creditor Law. Thus, plaintiff's claim against Stern is precluded by the defense verdict rendered against the Savoy defendants.[1]

Plaintiff argues that the $425,000 payment to Stern is governed by the DCL's six-year statute of limitations, as it was made, pursuant to a contractual obligation, in October 2004,

[1] This conclusion is not based on principles of res judicata or collateral estoppel, as plaintiff suggests, inasmuch as the defense verdict was rendered in the present action and not a prior action (*Moezinia v Damaghi*, 152 AD2d 453, 457 [1st Dept 1989]).

after Stern had sold his partnership interest. Plaintiff further argues that the court erroneously made factual determinations as to the conflicting evidence concerning the payment and misinterpreted *Whitley v Klauber* (51 NY2d 555 [1980]). These positions, to the extent not mooted by the foregoing discussion, are unavailing.

RLPA (Partnership Law) § 121-607 prohibits limited partnerships from making distributions "to a partner to the extent that, at the time of the distribution, after giving effect to the distribution, all liabilities of the limited partnership. . . exceed the fair market value of the assets of the limited partnership" (Partnership Law § 121-607[a]).[2] A limited partner who knowingly receives a prohibited distribution is liable to the partnership in the amount of the distribution (§ 121-607[b]). However, "a limited partner who receives a wrongful distribution . . . shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution" (§ 121-607[c]). As noted by plaintiff, the Limited Liability Company Law (LLCL) contains a similar limitation on distributions

[2] RLPA (Partnership Law) §121-101(c) defines "Distribution" as "the transfer of property by a limited partnership to one or more of its partners in his capacity as a partner."

to members (LLCL §§ 102[i], 508[a]).

As an initial matter, the analysis of the statute of limitations and preclusion issues herein appear to be at odds with each other. This is so because the issues at trial, which did not include any limited partners of Savoy, were framed solely in the context of the DCL. However, Stern, a (former) limited partner who had different defenses available to the claim asserted against him, was not a party to the trial and thus, is not bound by the determinations therein. Thus, while a factual finding at trial, that the tax refund transfer to SMC was not a fraudulent conveyance, is binding on plaintiff, it is not binding as against Stern and does not preclude him from presenting proof to establish that the $425,000, despite being filtered through an account held by SMC, was really a partnership distribution.

As held by the Court of Appeals in *Whitley*, an analogous case, "primary in the determination whether a particular transaction constitutes a return of capital is not the limited partner's purpose or intent or how the transaction is structured but its effect upon partnership creditors" (*Whitley*, 51 NY2d at 563). In *Whitley*, the general and limited partners of the debtor partnership sold their interests to a third party (*id.* at 559). At issue was whether the sale constituted a "distribution" under Partnership Law §106(4) (*see id.*), which rendered limited

partners liable for a return of capital contribution, to the extent "necessary to discharge [the partnership's] liabilities to all creditors . . . whose claims arose before such return" (Partnership Law § 106[4]).

In determining that the consideration paid to the partners for the sale of their interests was actually a capital contribution, even though the consideration came from a third party, the *Whitley* Court considered the "end result . . . that the general and limited partners . . . , none of whom retained any connection with the [debtor partnership], have received the entire fair market value of the partnership assets, to the exclusion of its creditor" (51 NY2d at 568). The Court "look[ed] to the effect of the transactions rather than to the form, [to] conclude that they resulted in a return to defendants of their capital" (*id.*).

Thus, contrary to plaintiff's contention, *Whitley* is directly on point. Plaintiff's conclusory claim that the opinion "could not have endured the enactment of RLPA (Partnership Law) § 121-607" is unpersuasive. While *Whitley* involved the application of the Uniform Limited Partnership Act of 1916 (codified at article 8 of the New York Partnership Law), the RLPA, which was enacted in 1976, did not repeal the old act, and the purpose of the provision at issue here, RLPA (Partnership Law) § 121-607, is

the same – namely, to protect creditors from the threat of dissolution of partnership assets. That plaintiff is not so protected is a result of its failure to seek relief within the statutory period.

Here, Savoy's sole post liquidation asset, the tax refund, was transferred to SMC'S account, which had a negative balance prior to the transfer. Within 15 days, SMC, and not SSHC, the assignee, used a large portion of that money to pay Stern his assignment fee. It is clear that the tax refund, the only money in SMC's account, was the source of Stern's payment and plaintiff does not argue otherwise. To the contrary, plaintiff's claimed entitlement to the $425,000 paid to Stern arises from the fact that the money is traceable to Savoy, via the tax refund.

Plaintiff's contention that Stern was no longer a partner at the time of the transfer, having assigned his partnership interest months earlier, is disingenuous. The transfer was merely a delayed payment of consideration due at the time of the assignment. Defendants' inconsistent statements about the nature and purpose of the $425,000 payment do not preclude summary judgment, as the nature, and not the structure, of the transaction is determinative (*Whitley*, 51 NY2d at 568).

Plaintiff's reliance on *Avalon LLC v Coronet Props. Co.* (306 AD2d 62 [1st Dept 2003], *lv denied* 100 NY2d 513 [2003]), for a

contrary conclusion, is misplaced. There, this Court found that a 1994 assignment of a right to future settlement proceeds, if any, was final upon execution, when it was perfected, and not two years later, when the proceeds were distributed upon settlement of the underlying litigation (*id.* at 62-63). In contrast, the assignment here was of a partnership interest made in exchange for consideration, payment of which was delayed.

Plaintiff's reliance on *Mann v Broadwall Mgmt. of Apthorp LLC* (2009 NY Slip Op 33270[u] [Sup Ct, NY County 2009]), is likewise misplaced. There, the court merely found that moneys paid to the plaintiff, as a result of his status as an investor and creditor of an LLC, pursuant to a contractual agreement, was unrelated to his role as a member and thus, was not a distribution (*id.*). Here, Stern had only a member role in Savoy, and the payment made relates to that role. *In re 37-02 Plaza LLC* (387 BR 413 [ED NY 2008]), relied upon by plaintiff, also involved payments made to a creditor. There, the Bankruptcy Court found that a debtor LLC's payments of interest on promissory notes, as a maker of such notes, to former members one year after the sale of their membership interests, were contractual obligations and not wrongful distributions (*id.* at 420-422).

Based upon the foregoing, were it not mooted by plaintiff's

inability to challenge the propriety of the transfer of the tax refund to SMC, the grant of summary judgment to Stern, on statute of limitations grounds, would be proper.

Accordingly, the order of the Supreme Court, New York County (Joan A. Madden, J.), entered February 26, 2014, which, to the extent appealed from, granted defendant Mitchell Stern's motion for summary judgment dismissing the third cause of action as against him, should be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 17, 2015

CLERK