SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 1, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Richter, Gische, Gesmer, JJ.

3807 The People of the State of New York, Respondent, Ind. 359/08

-against-

Allen Bell,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered July 2, 2013, as amended July 19, 2013, convicting defendant, after a jury trial, of attempted murder in the second degree, and sentencing him to a term of 25 years, unanimously reversed, on the law, and the matter remitted for a new trial.

Defendant Allen Bell was convicted of the attempted second-degree murder of Kevin Russo. Russo was shot once in the head, but survived his injuries with physical and psychological limitations. A disputed issue at trial was the extent he may have also suffered cognitive impairments, affecting the credibility of his testimony. Bell appeals from his conviction on the basis that the jury's verdict was against the weight of the evidence, and alternatively, that it was reversible error for the court to have admitted certain hearsay records in evidence without a proper foundation or limiting instruction. While we find that the verdict was not against the weight of the evidence, we reverse the conviction and remit for a new trial based upon the improper admission of hearsay evidence.

At about midnight on October 25, 2007, police responded to a "shots fired" 911 call and discovered two bodies at the top floor of a five story walk-up building on the Grand Concourse in the Bronx. The two-bedroom apartment (Newton's apartment) was a "stash" house where drugs where stored and sold. One body was that of Daniel Newton, also known as "Danny," "D" or "B-Block," who was a large scale drug dealer. The other body was of Lumildy Rosado, Newton's girlfriend, known as "Mindy." Each victim sustained a single, close range gunshot to the head and each died immediately. A third victim, Russo, was also shot once in the forehead, but he survived. Russo remains paralyzed on one side and, at the time of trial, resided in a nursing home.

Bell, who is also known as "Butter," and his codefendant Raheim Bruno, were charged with murder in the first degree, two counts of murder in the second degree, attempted murder in the second degree, two counts of manslaughter in the first degree, assault in the first degree, and criminal possession of a weapon in the second degree, in connection with Newton and Rosado's murders. They were also charged with the attempted second-degree murder of Russo. Bell and Bruno were jointly tried. Each defendant was acquitted of the murder charges regarding Newton and Rosado, but convicted of Russo's attempted murder. In November 2016, this Court reversed Bruno's conviction and dismissed the indictment against him on the basis that there was insufficient evidence adduced at trial that he shared Bell's intent to cause Russo's death (*People v Bruno*, 144 AD3d 413 [1st Dept 2016], *lv denied* 28 NY3d 1182 [2017]).

The evidence at trial was as follows:

The police arrived at the apartment, finding two guns, approximately a kilogram of cocaine, marijuana, ecstasy pills, and approximately $5,000 in cash. Newton's body, found in the living room located in the rear right side of the apartment, had a single bullet hole in the back of his head. The furniture was overturned. Rosado's nude body was found in Newton's bedroom, to the left and rear of the apartment. The door to Russo's bedroom, located near the front entrance of the apartment, to the right of its interior hallway, had been kicked down or knocked off its hinges. The door was smeared with blood.

Officers were also dispatched to a nearby subway station at 171st Street and the Grand Concourse. Witnesses described seeing two men, one of them approximately six feet tall and light skinned black, possibly Hispanic. The officers also found an iced tea bottle in a nearby trash can and a white plastic bottle cap nearby. The bottle cap appeared to have blood on it. Both items were swabbed later and tested for DNA.

A police team investigated the apartment, tested for latent prints and swabbed various items believed to have human blood on them. They also searched for weapons and ballistics. Altogether, 13 pieces of ballistics evidence were recovered, including: a discharged shell casing in the bedroom where the Rosado's body was found, a live cartridge in Russo's bedroom, another live cartridge in the apartment's interior hallway, and a third live cartridge in the living room, along with a discharged shell near Newton's body. Also recovered were two deformed bullets, two shell casings and a broken pistol handle, whose magazine contained three uncharged cartridges. The broken handle, from a 9 millimeter gun, was found near where Russo was shot. Another gun was found in a drawer in Newton's bedroom.

Two neighbors testified at trial. One witness, D.L., was 12 years old when the shooting occurred in 2007. D.L. lived next door to Newton and knew the victims well. D.L. testified that around midnight of October 25th, she was awakened by yelling, screaming and "tussling" next door. She heard someone calling for "Danny" and testified it sounded like someone was trying to break into Newton's apartment. While placing a call to her mother, D.L. heard a gunshot, a short pause and then another gunshot. D.L. testified she then heard a voice, which she recognized as Russo's, urgently saying "Yo D, Yo D, get up," a third gunshot and the sound of people running down the hallway stairs. She then heard someone repeatedly saying, "[C]ome on, come on . . . get the gun." D.L. also testified she heard someone say, "Gutta, get the gun." [1] According to D.L., Russo's urgent calling out to Newton came from somewhere near the front entrance to the apartment, where Russo's bedroom would have been. When police arrived and knocked on her door, D.L. did not answer, but remained silently inside. D.L.'s mother never took her to

[1] "Gutta" was possibly a reference to "Butter," Bell's nickname.

speak to the police and it was not until several years later, after running into Newton's sister in court, that D.L. came forward. T.J., who lived on the fourth floor, in the apartment below Newton's, also testified at trial. T.J. was familiar and friendly with the occupants of Newton's apartment. She testified that around midnight on October 25th, she heard loud noises, "tussling," and then a gunshot from the apartment above. She heard Russo screaming, "D, D," a second shot, then Russo screaming for somebody to call the police. T.J. called 911. She then heard a female screaming for help, more shots, more tussling and dogs barking, at which time T.J. placed a second 911 call. From the door's peephole, she had a direct view of the stairs leading down from the fifth floor. T.J. saw two men, one a light-skinned black or Hispanic male, running down the stairs holding something in his hand, resembling a stick or a two-by-four piece of wood. T.J. also got a glimpse of a second person, running down from the fourth floor towards the floor below. She identified the second person as a black male. At trial, T.J. identified Bell as the light-skinned man she saw facing her as he ran down the stairs from the fifth floor. T.J. also testified that she overheard the second man who was in front say to the man behind him, "Yo Butters, did you get that?" or "Son, did you get that?" On cross-examination, however, T.J. admitted that she was not sure about what was said "five years ago" and she might have first heard the nick name (Butter) from others who were talking about the shooting. T.J. did not provide a usable description of the light-skinned male when she was interviewed by the police in October 2007. The first time T.J. provided a description of Bell was in January 2013 when the police showed her a photo array containing Bell's photo.

Lead detective Hennessey testified that his initial attempts to speak to Russo at the hospital after the shooting were unsuccessful, because Russo was unresponsive. By November 13th Russo was able to communicate by gestures, but still could not speak. Hennessey already had a tip, from an informant, that there was talk in the neighborhood that Bell and Bruno were involved in the shooting. Consequently on November 14th, Hennessey brought two photo arrays with him to the hospital. One array contained Bell's photo; the other contained Bruno's photo. Through a series of gestures, Russo was able to identify both Bell and Bruno in the photos and further convey that neither of them had a gun at the time of the shootings.

On November 16th, Hennessey located Bruno, who was brought to the precinct for questioning. During an "interview" that lasted 17 hours, Bruno provided a written and videotaped statement. Bruno's written and recorded statements were introduced in evidence. Insofar as relevant to this appeal, the statements contained the following facts:

Bruno denied that he or Bell had anything to do with the actual shooting, although they were present when it occurred. He explained that they fled the apartment immediately after it was over. Bruno stated that he and Bell were sent to Newton's apartment by "Sookie" to buy drugs from Newton. Sookie gave defendant $460 for the purchase and $20 for Bruno's own use. Newton, Bell, Bruno and Sookie all knew each other before the shootings from the Fulton Houses in Manhattan and their involvement in the drug "business."

Before heading from Manhattan to Newton's apartment, Bruno and Bell bought some marijuana and got high. Newton, who was expecting them, let Bruno and Bell into the apartment. Bruno gave Newton the money and Newton went into the living room to get the drugs. Bruno stated that when he walked in, he noticed a man, who appeared to be in his 30s, wearing either braids or a do-rag, something hanging down each side of his head, maybe curls, sitting in one of the chairs in the living room. Bruno stated that, while he was playing with the dogs in the apartment, he saw the seated man suddenly get up, holding a black "cop gun" in his hand. The man wordlessly walked up to Newton, pointed it at his head and fired once. Bruno saw Newton spin and fall. Russo, hearing the gunshot, ran out of his bedroom, but when he saw the man had a gun, he turned around as if to either run towards the front door or back into his bedroom, but the man shot Russo in the face and he landed in the interior hallway of the apartment.

Bruno, who was high, panicked and started yelling for Butter; together they ran into Russo's bedroom and closed the door. Bruno then heard the shooter heard towards Newton's bedroom and start shouting "get the work, get the work," which he took to mean "get the drugs." Bruno heard a female voice answer "I don't know where nothing is at. I'm on your side," and then another gunshot. Bruno did not hear anything else from the female or ever see her before or after that.

The shooter then came to Russo's bedroom where Bruno and Bell were trying to hide. The shooter aimed his gun directly at Bell who "folded" himself over trying to protect himself. The gun jammed; it neither clicked nor fired. The shooter then started to rummage through their front pockets. Although he took Bruno's wallet and ID, he did not take the $15 that remained from the money Sookie had gave him or Bell's wallet. Bruno stated that the shooter then "breezed out the crib."

After the shooter left, Bruno and Bell fled the apartment. As they left, Bruno slipped on blood and almost tripped over Russo's body because there was "mad blood" everywhere. Bruno stated he got blood on his hand, leg and pants and Bell also had blood on his hand. The two of them went to a nearby subway station and headed back to Sookie's apartment to deliver the drugs. Bruno had stashed the package inside the front of his boxers, near his groin. While on the subway platform, Bruno and Bell tried to clean the blood off themselves by using the liquid from a bottle of "soda" they picked up off the ground and Bell's sweater. Bell saw he also had blood on his sneakers. Bruno stated he never called 911 because he did not know what to do and "didn't want to deal with cops."

Russo, who is the sole surviving victim of the shootings, also testified at trial. After the shootings, Russo was taken to the hospital, undergoing life saving medical treatment, including being placed into a coma. He underwent surgery to remove parts of his skull, ease the pressure of his swelling brain and address some oozing brain matter. Russo's medical records reflect he underwent a partial frontal lobectomy. Russo's medical records, consisting of thousands of pages, were admitted into evidence, without objection. Only the People called a medical expert at trial.

On February 20, 2013, Russo took the witness stand at trial for the first time. He testified that on October 25, 2007, he came home from work, showered and went into his room, leaving the door open. Newton was in the living room watching TV and Rosado was in Newton's bedroom. Later that evening, Russo heard a knock at the front door and someone was let in. He could not see who came in or how many people there were, but could overhear Newton arguing with one other male, shouting, "[F]__ you, I ain't giving you shit" and "Get the f__ out of here." Russo then heard a gunshot from the apartment's interior hallway and Rosado screaming, "Please don't, please don't." Russo then heard a second gunshot, after which Russo did not hear Newton or Rosado anymore. Wrapped in a sheet, Russo left his bedroom and saw Newton laying on the floor unresponsive. When the prosecutor asked, "[W]hat happens next?," Russo testified that "[i]t went black, I must have collapsed . . . [f]rom my injury." Upon being asked questions about how he came to be shot, Russo responded that he "came to assist Danny and I ran into one of the perpetrators, started physically fighting with him . . . ."

Russo described this as "an actual fistfight that I was desperate to win." When asked, "[W]ho shot you in the head?" Russo responded, "I cannot remember. After going blank, blacked out, I don't remember much. The next thing I remember after that was being in the hospital." When asked whether anyone else was present in the apartment other than Newton, Rosado, himself, and the person with the gun, Russo responded, "The dogs, that's it." The court followed up by asking, "So no one else was present?" and Russo responded, "No one else that I can remember." The court adjourned testimony for the day, dismissed the jury and held a conference with the attorneys.

At the conference, the prosecution made an application to introduce Russo's grand jury testimony into evidence as a past recollection recorded. Russo's grand jury testimony had been videotaped in December 2007, while he was still in the hospital. The court directed that a hearing be held the next day, outside the presence of the jury, to ascertain whether a foundation existed to admit the grand jury testimony. In December 2007, before the grand jury, Russo had testified that Diaz, a friend, was in the apartment at the time of the shooting. Russo stated that Diaz came to the apartment with Bell and Bruno. Russo and Diaz were engaged in a fight when Diaz pulled a gun and shot him.

During the evidentiary hearing on February 21st, Russo was asked, this time outside of the jury's presence, whether he remembered who had shot him and whether he had told the truth before the grand jury. Russo testified that "yesterday" he had not remembered who shot him, and had watched the videotape, but "still don't remember." He testified Diaz was a "close friend" and that he had told the grand jury that Diaz was in the apartment when he was shot. When asked whether he presently remembered whether Diaz had been in the apartment that night, Russo answered, "No . . . I believe he was not in the apartment that night" and that he had "no idea" why he had said that, but that he had not lied and had made "a mistake." Russo also stated that he had truthfully testified that Bell had been the one who shot him and he remembered "Mr. Bruno and Mr. Bell" also being in the apartment that night. Russo denied that seeing the videotaped testimony had reminded him of what had happened, and stated that it was "the photo of my friend [Newton] on the ground [that] brung back that whole day like it was[,] just like it just happened." He denied anyone had coached him. At the conclusion of the hearing, defense counsel withdrew her application to admit the grand jury testimony in evidence.

After the jury was brought back into the courtroom, Russo resumed his direct examination. He testified that it was Bell whom he fought with that night and that it was Bell who had shot him in the forehead. Russo reiterated that it was seeing the photo of Newton, his dead friend, that "brung me back to that date" and no one had shown him any other photos since court had recessed the day before. Bell's attorney, thereafter, notified the court that if Russo denied making the statement about Diaz being present in the apartment on October 25th, he intended to impeach Russo with his grand jury testimony. Russo was unable to identify Bell in court and gave inaccurate testimony about Bell's age, stating that Bell was 16 years old at trial, which would mean that he was only 10 or 11 years old at the time of the shooting.

On cross-examination by Bell's attorney, Russo was asked about his grand jury testimony and why he had testified Diaz was present in the apartment, if he was not. He answered that he knew "back then he wasn't there," and attributed his statement to the "condition I was in at that time." When pressed about whether he had "imagined that . . . Diaz was there," Russo answered, "I'm not going to say imagined. I wouldn't know why I said his name" and acknowledged that maybe he was "confused about other things in this case." He denied having had a fistfight with Diaz because “he wasn’t there.” Although Russo admitted that during his grand jury testimony the prosecutor had asked why he had said Diaz was present in the apartment the night of the shooting, Russo denied he had altered his testimony because of what she asked him, and stated, “I don’t remember ever saying I was hitting Jose [Diaz].” After Bell’s attorney read some of Russo’s grand jury testimony into the record, Russo stated, “I remember the questions, but those answers make no sense to me.” On redirect he was asked, “How did Jose Diaz come out of your mouth with respect to this?,” Russo answered that he had “no clue,” but denied that his “memory var[ied] from day to day,” or that he had “ever been confused about who shot [him] in the forehead.”

While cross-examining Detective Hennessey, Bell’s attorney asked Hennessey “whether or not Jose Diaz may have been in the apartment on the night of the shooting . . . .” Hennessey replied that Diaz had been at work, in Florida, on October 25th. Hennessy’s testimony was based on his investigation, during which he located Diaz in Florida and had, thereafter, been provided with time sheets on corporate letterhead, purporting to show that Diaz was working in Florida at the time of the shootings. The prosecutor sought to offer the time sheets into evidence. Bell’s attorney initially had no objection but after hearing Bruno's attorney object, qualified his response by adding that he did not object "[o]nce the proper foundation has been laid," stating that he had been "thinking it is a business record; therefore I'm thinking business record exception . . . ," but before he could complete his statement, Bruno's attorney interrupted, stating, "It's hearsay, Judge."

Bell's attorney stated that it was his position that Diaz was in the apartment when the shooting took place, to which the court responded that "obviously [Diaz's] alibi cannot be proven by the records which are in the possession of the Detective . . . ." At that point, Bruno's attorney objected that the records could only be introduced "through the proper sponsoring witness" such as a "custodian of records from th[e] company," because the records were not reliable or self-authenticating. After argument, the court ruled that although Bell had the right to inquire about whether a third party committed the crime he was charged with, Hennessey's testimony in response to such inquiry was hearsay and that by eliciting such hearsay from Hennessey, defense counsel had "opened the door" and thereby, "waived [any] evidentiary objection" to the admission of the time sheets. Although the court gave a limiting instruction it was not as broad as requested by Bell’s attorney.

The People also introduced the results of forensic DNA analysis of the several swabs and samples that were recovered from the apartment and subway station during the investigation, including blood from the interior hallway near Russo’s bedroom, the broken pistol handle, the bottle and bottle cap found in the subway station and the gun found in the drawer in Newton’s bedroom. The results of such testing had been compared to Newton’s, Rosado’s, Bell’s and Bruno’s DNA samples, but no blood sample was ever obtained from Russo. Through such DNA testing, three distinct male profiles were developed, designated as Male Donor A, Male Donor B, and Male Donor C. Bruno’s DNA did not match any of the profiles that were developed, and he was excluded as a contributor to any of the samples that were analyzed. Bell was determined to be Male Donor B and determined to be the source of the blood sample on the bottle cap. Bell was also found to be a likely contributor to the mixture on the bottle itself. Male Donor A’s DNA was on the swab taken from the interior hallway of the apartment and a major contributor to the DNA mixture found on the broken pistol handle found near Russo.[2]

[2]On appeal the People concede that Male Donor A is “likely” Russo.

A ballistics expert testified that the two deformed, discharged bullets were fired from one gun, and the two spent shell casings also came from one gun, but the expert could not confirm that all four ballistic items came from the same gun. Accordingly, the expert concluded that "a minimum of one, maximum of two" firearms were the source for the two shell casings and two deformed bullets.

The People also called Dr. Ronald St. Louis, who was qualified as an expert in internal medicine. Dr. St. Louis had been Russo's primary physician for two years preceding trial. He testified that Russo is paralyzed on one side and also unable to open his right eyelid. Russo suffers from depression and has anger management issues. Notwithstanding medical records to the contrary, Dr. St. Louis, however, denied that any part of Russo's brain was removed, admitting only that part of his skull was removed immediately after the shooting. Dr. St. Louis acknowledged on cross-examination that the type of injury Russo has can affect someone's memory, but testified that Russo is "very aware," and his mental condition has not deteriorated. When asked about a medical record made in January 2011, indicating that Russo sustained long-term memory loss and has difficulty making decisions, Dr. St. Louis claimed he did not know Russo when the record was made and it did not describe his current status. The document is part of the care plan for Russo at the Beth Abraham Health Services facility where Russo lived and Dr. St. Louis worked.

Bell requests that this Court reverse on a weight of the evidence review. This is a two step process that begins with an analysis of whether an acquittal would not have been unreasonable (*People v Romero*, 7 NY3d 633, 636 [2006]). If so, the court then "must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*People v Danielson*, 9 NY3d 342, 348 [2007]). In this regard, the court is essentially seated as the thirteenth juror, deciding which facts were proven at trial (*id.* at 348). The fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor is afforded great deference (*People v Kancharla*, 23 NY3d 294, 303 [2014], citing *People v Bleakley*, 69 NY2d 490, 495 [1987]). If the jury's verdict was not against the weight of the evidence, it will not be disturbed, but if it failed to give the evidence the weight it should be accorded, then the verdict may be set aside as being against the weight of the evidence (*Danielson* at 348-349).

Even though an acquittal would not have been unreasonable, based on the weight of the credible evidence, the jury was justified in finding Bell guilty beyond a reasonable doubt (*id.*). Bell's weight of the evidence argument primarily focuses on Russo's seemingly confused and irreconcilable testimony at trial about the events surrounding the shooting, first testifying that he could not remember what happened that night, yet testifying the next day he remembered the evening in detail, including that it was Bell who shot him. Notwithstanding that testimony, Russo also acknowledged that he may have been "confused" about things that happened during the shooting. Bell seeks to buttress his argument about Russo's unreliability as a witness by drawing upon statements, reports and other information contained in the thousands of pages of medical records in evidence. Bell contends the records document not only Russo's injuries, but support his claim that when Russo underwent a partial frontal lobectomy, part of Russo's damaged brain was removed, affecting his memory. Bell argues that the jury's ability to properly weigh the reliability of Russo's account of the shooting was undermined by Dr. St. Louis's testimony, incorrectly stating that Russo's brain remains intact and that he suffers from no memory loss. Bell seeks to highlight Russo's unreliability by pointing to his other inconsistent testimony, for instance, Russo's insistence at trial he was only 32 years old, though informed he was older; Russo's failure to make an in-court identification of Bell the first day he took the stand, although Bell was in court and they have known each other for several years; Russo's statement that Bell was, at the time of trial, about 16 years old, meaning Bell would have been only 10 or 11 years old when the shooting took place in 2007, and Russo's testimony about the layout of Newton's apartment and that there were three, not two bedrooms. Finally, Bell points out that none of the DNA testing identified his blood as having been recovered from the apartment, that the live cartridges recovered in the apartment, particularly near Russo's bedroom, where Bruno claimed he and Bell attempted to hide, is evidence that they would also have been victims, but for the pistol jamming when the shooter came into the bedroom.

It is possible for the prosecution to prove its case even if the complaining witness cannot remember details of the crime because of impaired memory (*People v Vargas*, 176 AD2d 450 [1st Dept 1991], *lv denied* 79 NY3d 865 [1992] [the defendant was convicted of attempted murder of complaining witness who suffered from amnesia as a result of being shot in the head by the defendant]). Russo was not the only witness to testify about the events of October 25, 2007, and there was also DNA evidence;

collectively, this evidence was weighed by the jury. A rational jury could have concluded that Bell's guilt was established beyond a reasonable doubt. Bell's codefendant, Bruno, not only placed Bell at the scene of the crime, Bell was present throughout the entire incident. Bell was identified by T.J., the neighbor, as the man she saw fleeing from the 5th floor, and Bruno was overheard by neighbors telling Bell or "Butter" to "get the gun." Bell was injured and bleeding that evening. Blood was recovered on the plastic bottle cap found on the subway platform, and DNA testing confirmed that the blood matched the sample Bell provided. The DNA match supports a rational view of the evidence that Bell was injured when he engaged in a fistfight with Russo — the same fistfight Russo testified at trial that he "was desperate to win," a loud struggle that was overhead by both neighbors who testified.

In conducting a weight of the evidence review, the jury's determination is afforded great deference because the jury had the "opportunity to view the witnesses, hear the testimony and observe demeanor" (*Romero*, 7 NY3d at 643-644 [internal quotation marks omitted]). Furthermore, any inconsistencies or deficiencies in Russo's testimony only implicate issues of credibility. The jury credited Russo's identification of Bell as the shooter and there was other evidence of his guilt. Likewise, it was the jury's province to either accept or reject, in whole or part, Dr. St. Louis's evidence about Russo's cognitive capacity and ability to recall events. Although an acquittal would not have been unreasonable in this case, the evidence is of such weight and credibility warranting a conclusion that the jury was justified in finding defendant guilty of attempted murder in the second degree beyond a reasonable doubt (*id.* at 643).

Notwithstanding that the verdict survives a weight of the evidence analysis, we find that the court committed reversible error in admitting Diaz's time sheets into evidence. The business records of Diaz's employer were admitted without a proper foundation, and the court failed to clearly instruct the jury that the time sheets could not be considered for the truth of their content. The jury was not told that the time sheets could not be relied upon to conclude that Diaz was not in the apartment at the time of the shootings. The business records exception to the hearsay rule is codified in CPLR 4518(a), and it also applies in criminal cases (CPL 60.10) (*People v Cratsley*, 86 NY2d 81, 89 [1995]). For a business record to be admissible, it must be made in the regular course of business, it must be the regular course of business to make the record, and "the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made" (*Cratsley*, 86 NY2d at 89). Business records are customarily offered through a foundation witness, such as the custodian of the records or an employee who is familiar with the record-keeping procedures of the record maker (*People v Kennedy*, 68 NY2d 569, 578 [1986]).

We reject the People's argument that the evidentiary issue is unpreserved. Bell's attorney, individually, and in tandem with Bruno's attorney, timely objected to the introduction of the time sheets. Although Bell's attorney's objection may have been awkwardly stated, the nature of his objection on Bell's behalf is unmistakable: Bell's attorney made it clear that he had no objection to the time sheets coming into evidence, provided that the prosecution was able to lay a proper foundation for their introduction as a business record. Contrary to the court's ruling, Bell's attorney's cross-examination of Hennessy about his investigation into Diaz's whereabouts on October 25th did not open the door to the introduction of the time sheets.

The People argue that the time sheets were admitted not for the truth of their content, but only to rebut defense counsel's extensive challenges to the adequacy of the police investigation, and that the court's limiting instruction was adequate. The limiting instruction that the court gave was imprecise and confusing. The court only instructed the jury that the time sheets were "being received in evidence as documents which [Detective Hennessey] says reflect what efforts he did and what information he received on a very particular subject matter . . . ." The court did not clearly instruct the jurors that they were not to consider the time sheets in determining whether Diaz was in the apartment at the time of the shootings. This error was not harmless. There was a substantial disputed issue about whether Diaz was the additional person in the apartment, whom Bruno identified as the shooter. This conclusion was also supported by Russo's grand jury testimony, even though Russo later repudiated it. The time sheets established an alibi for Diaz, that he was in Florida on October 25, 2007. Bell's defense was that he did not shoot Russo, and someone else in the apartment did the shooting. Allowing the time sheets into evidence was not harmless error because there was "a significant probability . . . that the jury would have acquitted the defendant had it not been for the error" (*People v Crimmins*, 36

NY2d 230, 242 [1975]). Consistent herewith, we therefore vacate the conviction and remit for a new trial.

Since we vacate the conviction, we do not reach Bell’s other arguments, including his alternative request for relief.

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

ENTERED: AUGUST 1, 2017

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CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Andrias, Webber, JJ.

3833 The People of the State of New York, Ind. 4399/10
Respondent,

-against-

Rayheame Hill,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Dechert LLP, New York (Amanda Tuminelli of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered March 13, 2014, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 10 years, affirmed.

According to the investigating detective at a suppression hearing, the complainant reported that, while he was in an elevator, he was robbed by a man brandishing a revolver. The complainant described his assailant as a black man in his twenties, just over six feet tall and wearing a mask. The robber forced the complainant to hand over two rings, a necklace, his driver’s license, and $60 in cash. After he handed over the property, the complainant heard a gunshot in the elevator fired in a downward direction. The robber told the complainant to face the wall, and then fled. Officers responding to the scene found no evidence that a bullet had been fired. This led the detective to believe that the assailant had possibly shot himself in the foot.

Later that day, the detective heard over his police radio that a man complaining of a bullet wound to his leg had arrived at a local hospital. The detective went to the hospital with the complainant and found defendant, the person the radio transmission had been referring to, in the emergency room. Defendant told the detective that he was shot while walking in the street. Without first obtaining defendant’s permission, the detective took possession of two paper bags located under defendant’s hospital bed, and opened them. The bags contained defendant’s clothing. While the clothes were being removed, a ring fell out of the pocket in a pair of pants. The complainant identified the ring as one of the pieces of jewelry that had been taken from him during the robbery. The detective also removed a driver’s license from the same pocket; it too was the complainant’s.

The detective then interviewed defendant’s girlfriend, who told him that she had gone with defendant to the hospital in a car. Defendant's girlfriend gave the detective the keys to the car, which he later discovered belonged to defendant's aunt. After leaving the hospital, the detective secured the vehicle at the precinct, where it was inventoried.

The detective proceeded to defendant's residence, a basement apartment. He arrived at around 1:30 a.m. with three other officers. The officers wore suits and ties and displayed their badges; though they were armed, no guns were drawn. Two sets of locked gates separated the apartment from street level. The detective banged on the gates until he was allowed inside. At the apartment, the police were met by defendant's uncle, who let the police inside. The uncle told the police that he, his wife, and their children lived in the apartment, and that defendant also stayed with them. He told the police that defendant had been at the apartment earlier that evening suffering from a bullet wound.

The detective asked the uncle for consent to search the apartment, which the uncle gave by signing a consent form that had been read to him and which gave the police permission to search "[t]he premises, [and] access . . . the apartment and accessible areas." The police recovered a Taser and a BB gun from a pile of defendant's clothes in defendant's living space, which was in the living room. After those items were recovered, in the area between the second locked gate leading to the apartment and the apartment itself, the police recovered a revolver from inside an unsecured pipe. While in the apartment, the detective also received written consent from defendant's aunt to search the vehicle in which defendant had arrived with his girlfriend at the hospital. Thereafter, back at the precinct, the detective searched the vehicle. Inside its center console, he recovered another ring that the complainant identified as belonging to him.

Defendant's uncle also testified at the suppression hearing. Although his testimony was consistent with the detective's in broad terms, he stated that he consented to the police entering the apartment only after they forced their way in, and did not know what he was signing when he signed the consent form, but just wanted to get the police out of the apartment as quickly as possible because he was afraid. Further, he stated that the police had already begun to search inside the apartment at the time he signed the consent. The uncle also testified that he never consented to the police search of the area where the revolver was recovered.

The court granted defendant’s motion to suppress only to the extent of suppressing the evidence found in the clothing bags seized at the hospital. This was on the basis that the police did not have probable cause at that time to arrest defendant, who had a privacy interest in the bags. The court denied, however, suppression of the ring recovered from the vehicle, finding that defendant did not have standing to challenge the search, because he did not own, drive or borrow the vehicle, and because possession of the keys, alone, did not establish standing. In any event, the court observed, the aunt consented to the search. The court denied suppression of the gun found in the alleyway because defendant did not have standing to challenge the search of the apartment. It found that the only area of the apartment where he had an expectation of privacy was the living room where he slept, which excluded the area where the gun was found. In any event, the search was legal because the uncle consented to it.

At trial, the court submitted four counts to the jury, two each of first-degree robbery and second-degree criminal possession of a weapon. The jury returned a verdict convicting defendant only of second-degree criminal possession of a weapon.

Preliminarily, we find that the People did not waive their argument that defendant lacked standing to challenge the searches. “[T]he People must timely object to a defendant’s failure to prove standing in order to preserve that issue for appellate review” (*People v Hunter*, 17 NY3d 725, 726 [2011]; *see People v Stith*, 69 NY2d 313, 320 [1987]). Here, the People specifically argued at the suppression hearing that defendant did not establish standing to challenge the searches of the vehicle or apartment, and the court itself raised the issue of standing during counsel’s argument and based its ruling on that doctrine. We reject defendant’s argument that the People were required to raise the issue of standing before the close of evidence.

To have standing to challenge a search, a defendant must have a legitimate expectation of privacy in the area where the evidence was seized (*see People v Ramirez-Portoreal*, 88 NY2d 99, 109 [1996]). Defendant has the burden of establishing standing, and is entitled to rely on evidence elicited during the People’s direct case (*see People v Burton*, 6 NY3d 584, 587-588 [2006]; *People v Gonzalez*, 68 NY2d 950, 951 [1986]). “The number of times a person stays in a particular place, the length and nature of the stay, and indicia of connectedness and privacy, like change of clothes or sharing expenses or household burdens, are all factors . . . [to] support a reasonable expectation of privacy" (*People v Rodriguez*, 69 NY2d 159, 163 [1987]). Here, defendant's uncle told the police that defendant had stayed with his family "on and off" since he was five years old. He testified that, although defendant did not have his own room in the apartment and slept on the couch, he stored all of his clothes in the living room, and received mail at the apartment. This evidence suggests that defendant had a legitimate privacy interest in the apartment and surrounding curtilage, and we find that the court erred in finding that defendant lacked standing to challenge the propriety of the search of the apartment.

On the other hand, there is no dispute that defendant did not own the vehicle, and no evidence at the hearing showed that he or his girlfriend drove the vehicle to the hospital with the aunt's permission. That the keys to the vehicle were in defendant's girlfriend's possession is insufficient to confer standing on defendant (*see People v Jose*, 252 AD2d 401, 403 [1st Dept 1998] *lv denied* 94 NY2d 844 [1999]). Defendant's aunt did not testify, so we do not know whether she gave her nephew permission; further, although defendant's uncle testified that he told defendant to go to the hospital to have his leg treated, he did not state that he told him to borrow the car to get there. Under the circumstances, it cannot be said that defendant had a reasonable expectation of privacy in the car, and, accordingly, the court was correct in denying defendant's challenge to its search.

Although we find that defendant had standing to challenge the apartment search, we reject that challenge on the merits. The People bear the "heavy burden of proving the voluntariness" of a consent to search (*People v Gonzalez*, 39 NY2d 122, 128 [1976]), since such consent "must be a free and unconstrained choice[, and o]fficial coercion, even if deviously subtle, nullifies apparent consent" (*id.* at 124). Whether a defendant's consent to search was voluntary is determined based on the totality of the circumstances — with no one factor being determinative (*id.* at 128). Factors for the court to consider include (1) whether consent was given while the individual was in police custody, how many officers were present on the scene, and whether the individual was handcuffed; (2) the personal background of the individual, including his or her age and prior experience with the law; (3) whether the individual offered resistance or was cooperative; and (4) whether the police advised the individual of his or her right to refuse consent (*id.* at 128-130; *Matter of Daijah D.*, 86 AD3d 521, 521-522 [1st Dept 2011]). The suppression court's credibility determinations are entitled to great deference on the question of voluntariness, unless they were manifestly erroneous or plainly unjustified by the evidence (*People v Vasquez*, 166 AD2d 194, 195 [1st Dept 1990], *lv denied* 77 NY2d 845 [1991]; *see generally People v Prochilo*, 41 NY2d 759, 761-762 [1977]).

The People met their burden of showing that the uncle's consent was voluntary. First, at no time was he ever placed in police custody or restrained in any way. The detective testified that none of the police officers had their weapons drawn when they approached the apartment. The uncle immediately agreed to let the police into the apartment. Most importantly, it is uncontested that he signed a written form permitting the search. Defendant can point to no evidence that the uncle hesitated or initially refused to sign the consent form, and the detective denied threatening or coercing the uncle into signing. We reject defendant's argument that the consent was obtained retroactively, since the detective testified otherwise and we perceive no reason to question the court's decision to credit that testimony over the uncle's.

Finally, defendant contends that the illegality of the police's search of the clothing bags at the hospital impermissibly tainted the subsequent searches of the vehicle and apartment. He argues that the police would not have been able to search the vehicle or apartment absent the illegal search of the clothing bags, which confirmed defendant's involvement in the robbery. We reject this argument under the independent source rule.

"[W]here the evidence sought to be suppressed is the product of an independent source entirely free and distinct from proscribed police activity, it should be admissible and not subject to a per se rule of exclusion based solely on the unlawful conduct" (*People v Arnau*, 58 NY2d 27, 35 [1982], *cert denied* 468 US 1217 [1984]). "[T]he independent source rule is applicable . . . [where] there is no causal connection, direct or indirect, proximate or attenuated, between the illegality and the subsequent seizure. In cases where this causal nexus is lacking, the exclusionary rule simply does not apply" (*id.* at 34). A key consideration in determining whether this rule applies is whether "the prosecution has somehow exploited or benefitted from its illegal conduct, [whether] there is a connection between the violation of a constitutional right and the derivative evidence" (*People v Burr*, 70 NY2d 354, 362 [1987], *cert denied* 485 US 989 [1988]).

Here, the challenged searches were attenuated from the illegal search of defendant's clothing bags. When the detective entered the hospital room, his theory of the crime was that it had been committed by a black male who had a gunshot wound to the leg. Defendant fit that description. Thus, we disagree with the dissent's statement that, even if the search of the clothing bags turned up no evidence, the police "would have had little cause to pursue the investigation, let alone . . . search defendant's vehicle and home." To the contrary, regardless of what the detective were to find in defendant's possession, he was likely to continue investigating defendant as a possible suspect. Such investigation would have included the routine and natural investigatory step of interviewing defendant and his girlfriend, which is what led him to learn about the car and the apartment. Further, none of the items recovered during the illegal search was used to procure defendant's uncle's consent to search the apartment, so the police did not engage in "exploitation of [the] illegality" as charged by the defense.

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

The primary illegality of the police conduct in searching defendant’s belongings while he was hospitalized at Jacobi Hospital is undisputed. The physical evidence subsequently discovered by the police — a ring in defendant’s vehicle and a gun in the curtilage of his home — was obtained as the result of the earlier, impermissible search of defendant’s belongings. I would accordingly grant the motion to suppress the physical evidence subsequently recovered as the fruit of the poisonous tree.[1]

As an initial matter, defendant’s argument was preserved. Defense counsel argued that because the seizure of defendant’s belongings was illegal, the property of the complaining witness subsequently recovered was the product of not only the illegal arrest but of the illegal seizure.

The complainant testified that he was riding in the elevator when a masked man, described as a male black in his twenties, confronted him and took his money and jewelry. The victim heard a gunshot, but was not injured during the encounter.

[1]Because I would suppress the challenged evidence on this ground, I do not address the alternate arguments raised by defendant and addressed by the majority.

After speaking with the complainant, the investigating detective heard a radio report of a man at Jacobi Hospital with a bullet wound to the leg. No description of the man was given over the radio. After interviewing defendant, the detective searched the bags under his bed, without obtaining permission to do so. The complainant identified the ID and the ring recovered from the bags as his property. It was only after showing the illegally-seized evidence to the complainant that the detective questioned defendant's girlfriend and obtained the keys to defendant's home and vehicle. This evidence, seized moments after the unlawful search and without any attenuating events, was the direct result of and not sufficiently attenuated from the illegality itself (*see People v McCree*, 113 AD3d 557, 558 [1st Dept 2014]).

There was no exigency. Defendant was confined to a hospital bed and unable to leave let alone access the areas the police searched. If the police intended to continue their investigation regardless of what was found among his personal belongings at the hospital, they could have applied for a warrant to search his vehicle and his home.

This is not a case where the exclusionary rule has no application because the connection between the illegal conduct of the police and the discovery of the challenged evidence has “become so attenuated as to dissipate the taint” or the People learned of the evidence from an independent source (*Wong Sun v United States*, 371 US 471, 487 [1963] [internal quotation marks omitted]). I disagree with the majority that regardless of what the police found in defendant’s possession, they were likely to pursue defendant as a possible suspect. If the police discovered nothing in the illegal search of defendant’s belongings, they would have had little cause to pursue the investigation, let alone to question defendant’s girlfriend, from whom they obtained the keys to defendant’s vehicle, and to thereafter search defendant’s vehicle and home. The necessary links between defendant and the robbery were the illegally seized identification and ring, the second ring found in the vehicle, and the gun found in the curtilage of defendant’s home. The police were led to the challenged evidence by “exploitation of that illegality” (*Wong Sun*, 371 US at 488). The physical evidence recovered should have been suppressed as the fruit of the illegal search.

Admitting the ring and gun into evidence cannot be said to be harmless error under the circumstances (*see People v Crimmins*, 36 NY2d 230, 237 [1975]). The People’s case depended on circumstantial evidence that the illegally-obtained ring found in the vehicle had been taken from the victim during the alleged robbery and served as the only identification of defendant during the trial.

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

ENTERED: AUGUST 1, 2017

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Sweeny, J.P., Richter, Andrias, Kahn, JJ.

3960- 3960A- 3960B	The People of the State of New York, Respondent,	Ind. 2058/10 5512C/12 50051C/10 20977C/10

-against-

Daniel Renvill,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Beth Kublin of counsel), for respondent.

Judgments, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered May 10, 2013, convicting defendant, upon his pleas of guilty, of reckless endangerment in the first degree, assault in the third degree, resisting arrest and bail jumping in the third degree, and sentencing him to an aggregate term of two to six years, unanimously reversed, on the law, the pleas vacated, and the matter remanded for further proceedings.

The court improperly denied defendant’s motion to withdraw his guilty pleas. The record, viewed as a whole, demonstrates that defendant lacked sufficient information about the potential scope of sentencing in the event he violated the plea agreement (*see People v McAlpin*, 17 NY3d 936, 938 [2011]). Although the court clearly told defendant that he was pleading guilty to a class D felony, reckless endangerment in the first degree, its repeated statements, over the course of multiple court appearances, that defendant's sentence would involve "jail" time, and its failure to clearly apprise defendant that he could receive a state prison sentence, and the potential maximum term thereof, if he violated the plea agreement, taken together, rendered his pleas unknowing and involuntary (*see People v Ziegler*, 149 AD3d 634 [1st Dept 2017]; *People v Shanks*, 115 AD3d 538 [1st Dept 2014]).

In light of the foregoing, we do not reach defendant's alternative arguments.

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

ENTERED: AUGUST 1, 2017

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Friedman, J.P., Manzanet-Daniels, Moskowitz, Kapnick, Webber, JJ.

3987-3988 Ind. 1815/12

The People of the State of New York
Respondent,

-against-

Domingo Ricart,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at speedy trial motion; Ruth Pickholz, J. at jury trial and sentencing), rendered October 7, 2014, convicting defendant of attempted murder in the second degree and assault in the first degree, and sentencing him to an aggregate term of 15 years, reversed, on the law, defendant's CPL 30.30 motion granted, and the indictment dismissed.

The People were required to be ready for trial within 183 days after the commencement of the action. The motion court denied defendant's 30.30 motion, finding that the People were chargeable with 181 days. On appeal, the People concede that they should have been charged with 12 additional days that, if added to the total charged by the court, would require dismissal. The People argue that the judgment should nevertheless be affirmed because the court overcharged them by including periods that should have been excluded.

The motion court properly determined that the 17 disputed days between August 5, 2013 to September 17, 2013 were chargeable to the People. The motion court also properly determined that 13 days between July 23 and August 5, 2013 were chargeable to the People, as conceded by the People below. When these days are added to those the People concede on appeal, the total exceeds the People's speedy trial time, regardless of the other disputed periods.

Pursuant to CPL 30.30(4)(g), periods of delay caused by "exceptional circumstances" are excludable from the time charged to the People; the People have the burden of proving the existence of an exceptional circumstance (*see People v Zirpola*, 57 NY2d 706 [1982]). CPL 30.30(4)(g)(i) specifically makes excludable a continuance "granted because of the unavailability of evidence material to the [P]eople's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period." While the unavailability of a witness may be an exceptional circumstance within the contemplation of the statute, the People are required to demonstrate that they “attempted with due diligence to make the witness available” (*Zirpola*, 57 NY2d at 708). Due diligence requires that the People “undertake ‘credible, vigorous activity’ to make the witness available” (*People v Figaro*, 245 AD2d 300, 300 [2d Dept 1997], quoting *People v Washington*, 43 NY2d 772, 774 [1977]).

As the People concede, the mere fact that a necessary witness plans to go on a vacation does not relieve them of their speedy trial obligation (*see People v Boyd*, 189 AD2d 433, 437 [1st Dept 1993], *lv denied* 82 NY2d 714 [1993] [“the absence from the country of a witness . . . during this popular vacation month [of June] can hardly be recognized as exceptional”]; *People v Thomas*, 210 AD2d 736, 737-738 [3d Dept 1994] [“that the case was adjourned to accommodate the witness’s vacation schedule . . . does not constitute an ‘exceptional circumstance’”]; *see also People v Allard*, 128 AD3d 1081, 1082 [2d Dept 2015], *affd* 28 NY3d 41 [2016]). “[I]t is the responsibility of the People to be cognizant of the progress of a particular case” (*People v Gonzalez*, 136 AD3d 581, 583 [1st Dept 2016] [internal quotation marks omitted]).

The court properly determined that the People failed to exercise the necessary due diligence. The People knew that their cooperative witness was planning a vacation to the Dominican Republic, yet they failed to call him or to otherwise secure his presence before he left the country. The prosecutor admitted that although learning of the witness's proposed vacation plans on July 25, 2013, and being specifically asked by the witness to contact him the next day to discuss the trial schedule and his proposed vacation, no one from the District Attorney's office tried to contact the witness until July 30, 2013, at which time they learned he had already left on vacation. Although the witness indicated a willingness to work with the prosecutor on scheduling his vacation and had not yet bought his ticket to the Dominican Republic, the prosecutor never subpoenaed the witness, sought a material witness order, or even communicated with him prior to his departure.

The People do not seriously dispute the proposition that their witness's vacation plans do not relieve them of their speedy trial obligations. Instead, they argue that because the prosecutor learned "sometime" before the July 30, 2013 trial date that the defense was going to request an adjournment, the July 30, 2013 date was not firm and the People therefore were not required to exercise due diligence to secure the witness's presence. Accepting the People's reasoning, the dissent excludes the entirety of the period from July 30, 2013 through August 22, 2013.

We reject the People's argument. The People do not dispute that they were aware of the witness's vacation before the adjourn date and that they did nothing to prevent it or to work with the witness to schedule the vacation as he suggested. Under the People's interpretation, they should be permitted to turn a blind eye to a witness's proposed vacation, and then, once the witness has left the country, assert that the time was excludable as an "exceptional circumstance." This is gamesmanship we surely ought not to endorse.

The People's contention that the defense requested a one-week adjournment on July 30, 2013 due to the unavailability of defense witness is not borne out by the record. The record shows that on that date the prosecutor suggested that the case be adjourned for a week in order to accommodate a defense witness. The defense clarified, however, that it "[did not] have a witness," and that it "was actually the prosecution's witness who was not available until the next week." Under these circumstances, the seven days from July 30, 2013 through August

5, 2013 were properly chargeable to the People.[1]

We accordingly find that the prosecutor failed to exercise the requisite due diligence, and that the period between July 23 and August 22, 2013 (i.e., the witness's vacation) was not excludable as an exceptional circumstance.

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

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[1]The dissent's calculation of 177 days under this scenario does not take into account the six additional days from July 30, 2013 through August 5, 2013.

WEBBER, J. (dissenting)

I respectfully dissent. In my opinion, the motion court properly denied defendant's speedy trial motion.

In this case, the People were required to be ready for trial within 183 days after the commencement of the action. The motion court denied defendant's 30.30 motion, finding that the People were chargeable with 181 days. On appeal, the People concede that they should have been charged with additional days that, if added to the total charged by the court, would require dismissal. The People argue, and I agree, that the judgment should nevertheless be affirmed because the court overcharged them by including periods that should have been excluded.

This Court has the authority to review the calculations presented to the motion court and to decide whether the court's calculations and determinations were correct (*see People v Mena*, 29 AD3d 349 [1st Dept 2006], *lv denied* 7 NY3d 792 [2006]; *see also People v Salgado*, 27 AD3d 71 [1st Dept 2006], *lv denied* 6 NY3d 838 [2006]). In doing so, I find that while there were errors in calculation, defendant's motion pursuant to CPL 30.30 was properly denied.

On October 11, 2012, the People stated that they were not ready to proceed because the arresting officer was unavailable.

They requested the case be adjourned to October 16, 2012. Defense counsel indicated that October 16, 2012 was inconvenient and requested that the case be adjourned to November 1, 2012.

Hurricane Sandy struck the New York Metropolitan area on or about October 29, 2012. As a result, all courts were closed from October 29, 2012 through November 5, 2012. All cases appearing on the calendar during this period were adjourned. The instant case was administratively adjourned to November 20, 2012. While the motion court correctly excluded the period after October 29, 2012, as a delay due to an exceptional circumstance, it charged the People from October 11, 2012 to October 29, 2012, a total of 18 days. Clearly, the People should only have been charged from October 11, 2012 to October 16, 2012. Thus, 13 days should have been excluded.

In computing the time within which the People must be ready for trial, the court must exclude "the period of delay resulting from a continuance granted by the court at the request of, or with the consent, of the defendant or his counsel" (CPL 30.30[4][b]). On October 11, 2012, the People specifically requested October 16, 2012. It was defendant's request that the case be adjourned to November 1, 2012. Thus defense counsel's consent was "clearly expressed" (*People v Smith*, 82 NY2d 676, 678

[1993]; CPL 30.30[4][b]; *see People v Barden*, 27 NY3d 550, 554-556 [2016]). Defense counsel actively participated in setting the adjourn date, sought a date longer than the date requested for his convenience, and actually requested the selected date (*see e.g. People v Davis*, 80 AD3d 494, 495 [1st Dept 2011]; *People v Matthews*, 227 AD2d 313 [1st Dept 1996], *lv denied* 88 NY2d 989 [1996]).

The motion court also improperly charged the People 13 days for the time period of July 23, 2013 to August 5, 2013. The record reflects that on July 23, 2013, the People stated that they were not ready to proceed to trial and requested a one week adjournment. The case was adjourned to July 30, 2013. On July 30, 2013, the People stated that they were ready to proceed to trial. It was noted by the parties that there was a witness[1] who would be potentially unavailable due to a scheduled vacation if the case were immediately sent out to trial. When asked by the court if the case should be adjourned to a date the following week to accommodate this potential witness, defense counsel acquiesced, stating, "[Y]es." The case was then adjourned to

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[1]The People stated that it was not their intent to call this individual as a prosecution witness. The defense stated that if the People did not call the individual as a witness they may "possibly" do so.

August 5, 2013.

While defendant argues that the defense neither consented to, nor requested the adjournment for purposes of accommodating a potential witness, they do not dispute that on July 30, 2013, the People stated that they were ready to proceed to trial. Given the statement of readiness by the People, they should not have been charged any time and this additional six day period should have been excluded.

Finally, I find that the motion court improperly included the period from August 5, 2013 to August 22, 2013, a total of 17 days. This period should have been excluded pursuant to CPL 30.30[4][g], due to the unavailability of a necessary witness. The People demonstrated that they exercised due diligence to make the witness available, in that they made credible and reasonable attempts to secure the witness's presence (*see People v Carpenito*, 199 AD2d 522 [2d Dept 1993]).

On July 25, 2013, in anticipation of the July 30, 2013 trial date, the witness was contacted. At that time he was told that although the case was set for July 30, 2013, it would probably not proceed on that date due to the unavailability of a potential defense witness. The witness indicated that he had tentative travel plans to visit family in the Dominican Republic. He did not state the exact dates of travel. As the People were unaware of the new trial date, he requested that he be contacted as to the new date. Following the July 30, 2013 trial date, it was learned that the witness had traveled to the Dominican Republic and would not be returning until August 22, 2013. The People learned this through conversations with the complaining witness and family members.

While certainly the witness should have been asked as to his travel schedule and his available dates, the failure to inquire does not mean that the People did not exercise due diligence. The People had been in contact with the witness days before. They were aware that the witness was still willing to testify at trial. They knew he was planning a vacation, but did not know his exact travel plans. This was not the situation where the People had lost contact with the witness or learned that the witness was no longer cooperating (*see People v Figaro*, 245 AD2d 300 [2d Dept 1997]; *cf*. *People v Khan*, 146 AD2d 806 [2d Dept 1989], *lv denied* 73 NY2d 1021 [1989]).

There is no legal support for the argument, as set forth by the majority, that the failure of the People to subpoena the witness, obtain a material witness order or apparently to direct his immediate return from the Dominican Republic constituted a failure on their part to exercise due diligence. Further, contrary to the majority's assertion, this finding of due diligence is not permitting the People to turn a blind eye to a witness's proposed vacation or condoning "gamesmanship."

However, even assuming the majority is correct and the People did not establish due diligence in securing the presence of the witness, the inclusion of this period is academic as the People would still be charged with less than the applicable 183 days.[2]

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

ENTERED: AUGUST 1, 2017

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[2]If the 17 day period from August 5, 2013 to August 22, 2013 were excluded, the People would be charged 160 days. If it were included, the People would be charged 177 days.

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

3202 NMC Residual Ownership L.L.C., et al., Plaintiffs-Appellants, Index 157183/15

-against-

U.S. Bank National Association, Defendant-Respondent.

Warner Partners, P.C., New York (Kenneth E. Warner of counsel), for appellants.

K&L Gates, LLP, Charlotte, NC (John H. Culver III of the bar of the State of Maryland and the State of North Carolina, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 1, 2016, modified, on the law, to deny the motion to dismiss the first cause of action for breach of contract, and otherwise affirmed, with costs against respondent.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Sallie Manzanet-Daniels
Richard T. Andrias
Judith J. Gische
Troy K. Webber, JJ.

3202
Index 157183/15

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NMC Residual Ownership L.L.C., et al.,
Plaintiffs-Appellants,

-against-

U.S. Bank National Association,
Defendant-Respondent.

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Plaintiffs appeal from the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 1, 2016, which granted defendant's CPLR 3211 motion to dismiss the complaint.

Warner Partners, P.C., New York (Kenneth E. Warner of counsel), for appellants.

K&L Gates, LLP, Charlotte, NC (John H. Culver III of the bar of the State of Maryland and the State of North Carolina, admitted pro hac vice, of counsel), and K&L Gates LLP, New York (Lani A. Adler of counsel), for respondent.

GISCHE, J.

This appeal concerns the rights and obligations of the parties with respect to the termination of certain REMIC (real estate mortgage investment conduit) trusts. The assets held by the trusts were mortgage loans. The trusts originally sold securities to outside investors, representing two classes of holders, i.e., regular security holders and residual security holders. Plaintiffs, NMC Residual Ownership L.L.C. and Caycorp Holdings, Ltd., are holders of the residual security interests in those trusts. While the holders of regular securities were entitled to receive regular payments on distribution dates, the residual security holders had no such right. Instead, they were entitled to receive the proceeds of the disposition of any asset remaining in the trust REMICs upon their termination, but only after each class of regular security holder had been paid. Plaintiffs' interest is referred to as the trust "equity." The residual holder interest was the riskiest tranche of ownership and any right to payment was subordinate to payment in full of amounts due to the regular interest holders.

Plaintiffs' original breach of contract cause of action alleges that in the process of terminating certain trusts, the defendant trustee sold the trust assets to a third party for a market price that reflected a positive equity value. Plaintiffs further allege that after the sales closed, the trustee improperly kept the equity for itself instead of distributing it to plaintiffs. The trustee, in bringing this motion to dismiss, claims that under the operative trust documents, it was permitted to (and actually did) purchase the trust assets in its own name at a set price, which was less than market value. The trustee argues that under the trust documents, it had the right to purchase trust assets at below market, even though it could resell them within days of acquiring them, allowing the trustee to realize millions of dollars in personal profit. The trustee is alleged to have kept for itself the profit it realized on the forward sale, which was in excess of $3,000,000.

Plaintiffs have stated a viable cause of action for breach of contract that should not have been dismissed. The documentary evidence does not conclusively establish that the trustee actually purchased the trust assets in its own name before reselling them. Even if the sale of assets to the trustee had been conclusively established by documentary evidence, there is still a valid claim that the trustee's actions create a conflict of interest prohibited under the operative trust agreements and in violation of the trustee's contractual obligations. The trust documents do not give the trustee the express right to purchase the trust assets for its own financial benefit at less than market value and to thereby diminish, let alone extinguish, plaintiffs' interest as residual security holders.

Under the trust documents, the trustee's duties are limited to those specifically set forth in the trust agreement. Included among them is the duty to hold all assets of the trust for the exclusive use and benefit of all security holders. In addition, except as otherwise expressly permitted in the trust agreement, the trustee could not in any capacity assert any claim or interest in trust assets.

The parties' disputes broadly involve the contractual rights of the parties in the context of the termination of a trust. Article VI, section 6.01, of the standard REMIC trust provisions (Standard Trust Provisions), which govern the parties' rights upon termination, provide in pertinent part:

> "On any Distribution Date on which the aggregate of the Class Principal Balances . . . is less than 1% of the aggregate of the Original Class Principal Balances, the Trustee may . . . effect a termination of the . . . Trust and retirement of the related Securities by purchasing (or causing the sale to one or more third parties of) all of the Trust Assets remaining in the Trust and depositing into the Book-Entry Depository Account the Termination Price therefor."

The "Termination Price" is defined as "[t]he Aggregate Remaining Balance as of the Termination Date, plus thirty days of accrued interest on the outstanding Trust Assets." In terms of how the liquidation process is to proceed, section 6.01 further instructs that

> "[t]he Trustee . . . shall mail notice of any termination to be caused by its purchase of the Trust's assets to Holders not earlier than the fifteenth day and not later than the twentieth day of the month preceding the month of final distribution . . . .
>
> "The following additional requirements shall be met in the event of any termination of the Trust pursuant to this Section. . . .
>
> "(b) upon making final payment of principal and interest . . . or depositing any unclaimed funds ... in the Termination Account . . . on the final Distribution Date, the Trustee shall distribute . . . to the Holders of the . . . Residual Securities, all cash on hand relating to the applicable Trust REMIC (other than cash retained to meet claims)."

The complaint alleges that the value of the trust principal had met the requirements permitting termination/liquidation of the trust under Article VI. A notice of termination dated November 12, 2015 was sent by the trustee to all trust holders. It stated that the trustee was electing to purchase the trust assets for the "[t]ermination [p]rice," terminate the trust and retire all of the holders' securities. The notice specified a final trust distribution date of December 16, 2015. Prior to November 16th, however, the trustee had solicited bids from the public to sell the very same assets, had made an agreement to sell the assets for a market price that exceeded the termination price, and set a settlement date for the sale of the assets to a third party on December 17, 2015, just one day after the projected trust termination date. The profit realized on the forward sale supports the plaintiffs' allegation that at the time of the termination, the value of trust assets exceeded the termination price.[1]

In support of its motion to dismiss, the trustee contends it elected to terminate the trusts, as it had the right to do, and provided plaintiffs with notice of its intention to purchase the trust assets in its own name at the termination price. The only documentary evidence that the trustee actually purchased the trust assets in its own name is its notice to plaintiffs dated November 12, 2015. While the notice expresses the trustee's intention to purchase certain trust assets in its own name, it does not actually prove that the trustee did so. There has been no discovery and the record is devoid of documentary evidence of payment by defendant to trusts for any of the assets it purportedly purchased.

In any event, even if the trustee could prove by irrefutable

[1]The mortgage pools were able to sell above par because the interest rates on the mortgage pools were 7.5% and 8% — far higher than current rates.

documentary evidence that it actually purchased the trusts' assets in its own name before reselling them for a considerable profit to a third party, plaintiffs still have a viable cause of action for breach of contract. The REMIC trusts at issue are indentures. They bestow legal title of securities on a single trustee, here defendant, who acts to protect the interests of individual investors, who may be numerous or unknown to one another (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 555 [2014]). Unlike ordinary trustees, the rights and duties of an indenture trustee are not defined by a fiduciary relationship. Instead, they are defined exclusively by the terms of the agreements by which the relationships were formed (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 156 [2008]). That does not mean, however, that an indenture trustee does not owe the security holders a duty of care. It is well recognized by the Court of Appeals that an indenture trustee owes the security holders a duty to perform its ministerial functions with due care (*AG Capital*, 11 NY3d at 157). Most importantly, the courts have recognized that even an indenture trustee has a fundamental duty to avoid conflicts of interest (*id.* at 156-157; *see Commerce Bank v Bank of N.Y. Mellon*, 141 AD3d 413, 416 [1st Dept 2016]; *see also Elliot Assoc. v J. Henry Schroder Bank & Trust Co.*, 838 F2d 66, 71 [2d Cir

1988]). In this regard, § 4.02(b) of the Standard Trust Provisions prohibits the trustee from asserting a claim against the trust assets in any capacity, except as otherwise permitted by the trust agreement, because those assets are held for the exclusive benefit of all the investors.

It is clear from the trust documents that the trustee had the right to purchase the trust assets in its own name in connection with the termination of the trust. The salient issue on this motion is whether the trust documents also give the trustee the right to purchase those assets at less than market value. In the absence of an express contractual right to do so, the trustee's actions would clearly constitute a prohibited conflict of interest because it financially benefitted at the expense of the residual security holders. In other words, the trustee completely defeated the equity value otherwise belonging to the residual security holders, by taking that value for itself.

There is nothing in the trust documents that permits the trustee to purchase the trust assets for less than what they are worth. The trustee argues that the trust documents expressly give it the right to purchase the trust assets for the termination price, which is defined in the trust documents as the value of the regular shareholders interest plus 30 days of interest. That "right," however, is not clearly delineated in the trust documents and the operative language contained in section 6.01 of the Standard Trust Provisions merely permits the trustee to terminate the trust by purchasing the assets. There is no express reference to a purchase price or some other equivalent language.

The sole reference in § 6.01 to the termination price is only that the trustee must deposit such amount in the "Book-Entry Depository Account."" Under the trust documents, only the regular holders have book-entry securities, the residual security holders have certificated securities (Standard Trust Provisions § 2.01). Thus, the termination price, and which reflects the regular shareholders financial interests, is the only amount that can be deposited into the book-entry depository account. The obligation to deposit a certain sum of money into a book-entry depository account does not equate to the trustee having a right to purchase the trust assets for that deposited sum. Any assets in excess of the termination price received by the trustee would qualify as cash on hand, which the trust instrument expressly provides should be distributed outright to the residual security holders (Standard Trust Provisions § 6.01[b]). It is unclear how, as a practical matter, there could ever be cash on hand if the trustee's interpretation of the trust instruments is correct, because the trustee could always keep that entire gain for itself. Such interpretation of the trust documents is untenable and inconsistent with the trustee's duties to the security holders.

Nor does § 6.02 of the Standard Trust Provisions clearly provide that the trust assets may be purchased by the trustee at the termination price. This provision concerns termination of the trust agreement, and provides, among other things, that the trustee's obligations "shall terminate upon (a) the payment of all principal and accrued interest on the Securities and all other amounts due and owing by the Trustee under such Trust Agreement. . . ." One of the conditions for termination of the trust is that the trust assets be purchased "at a price equal to the Termination Price . . . ." Such language, however, reflects a threshold amount that must be met before the trust can be terminated, not a cap on the amount that is required to be paid for the assets.

We also reject the trustee's argument that once it purchased the trust assets in its own name, whatever responsibilities it had to plaintiffs under the trust documents terminated. The trust documents provide that the obligations of the trustee continue at least through the termination date, here December 16, 2015, and in some instances beyond (Standard Trust Provisions §

6.02).

The motion court, however, correctly dismissed the remaining causes of action. The anticipatory breach claim fails because the complaint merely alleges that defendant had a unilateral obligation to pay money (*see Long Is. R.R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 466 [1977]; *Acacia Natl. Life Ins. Co. v Kay Jewelers*, 203 AD2d 40, 43 [1st Dept 1994]). The cause of action for breach of the implied covenant of good faith and fair dealing is barred by documentary evidence, namely, section 5.01(a) of the Standard Trust Provisions, which states, "[N]o implied covenants or obligations shall be read into the . . . Trust Agreement against the Trustee" (*see e.g., Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 100 [1st Dept 2012]). The declaratory judgment claim "is unnecessary and inappropriate" since plaintiffs have "an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]).

Accordingly, the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 1, 2016, which granted defendant's CPLR 3211 motion to dismiss the complaint, should be modified, on the law, to deny the motion as to the first cause of action for breach of contract, and otherwise affirmed, with costs against respondent.

All concur.

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

ENTERED: AUGUST 1, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Gische, Kahn, JJ.

3777 Cece & Co. Ltd., etc., et al., Index 652491/15
Plaintiffs-Appellants,

-against-

U.S. Bank National Association,
Defendant-Respondent.

Chaitman LLP, New York (Lance Gotthoffer of counsel), for appellants.

K&L Gates, LLP, Charlotte, NC (John H. Culver III of the bar of the State of North Carolina and the State of Maryland, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 3, 2016, modified, on the law, to reinstate the breach of contract claim, and otherwise affirmed, with costs against respondent.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Sallie Manzanet-Daniels
Angela M. Mazzarelli
Judith J. Gische
Marcy L. Kahn, JJ.

3777
Index 652491/15

____x

Cece & Co. Ltd., etc., et al.,
Plaintiffs-Appellants,

-against-

U.S. Bank National Association,
Defendant-Respondent.

____x

Plaintiffs appeal from the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 3, 2016, which granted defendant's motion to dismiss the complaint.

Chaitman LLP, New York (Lance Gotthoffer of counsel), for appellants.

K&L Gates, LLP, Charlotte, NC (John H. Culver III of the bar of the State of North Carolina and the State of Maryland, admitted pro hac vice, of counsel), and K&L Gates LLP, New York (Lani A. Adler of counsel), for respondent.

GISCHE, J.

Plaintiffs are the titled and beneficial holders of certain residual interests in real estate mortgage investment conduit (REMIC) trusts. This action, brought against defendant in its capacity as trustee, claims that when the trustee exercised its otherwise valid option to effectuate an early termination of certain trusts, it breached its contractual duties to plaintiffs by purchasing the remaining trust assets in its own name, at millions of dollars below market value. The trustee does not dispute that it purchased the trust assets for its own account at below market value. It claims that under the trust agreements it was expressly authorized to do. The motion court agreed with the trustee's interpretation of the operative documents and dismissed the complaint. We find, however, that the trustee did not have the right under the trust agreements to personally profit from the sale of the trust assets. Consequently, plaintiffs have stated a viable cause of action for breach of contract.

The REMIC trusts at issue were formed approximately 15 years ago, and consist of pooled securities backed by residential mortgages. They were intended to conform to and receive the federal tax benefits contemplated under Internal Revenue Code (IRC) § 860. The securities represent only two classes of ownership, regular security holders and residual security holders. The rights and obligations governing the parties are set forth in separate trust agreements with substantially identical provisions (Trust Agreements).[1] While the holders of the regular securities were entitled to receive regular payments on specified distribution dates, the residual security holders were not. Instead, they were only entitled to receive the proceeds of the dispositions of any assets remaining in the trusts after each of the regular security holders' interests had been fully paid. In addition, pursuant to the Trust Agreements and federal tax law (IRC § 860), the regular security holders' payments were guaranteed by the Government National Mortgage Association (Ginnie Mae), while the residual security holders, who are considered the "equity holders" had no such guarantee of payment. Thus, the residual securities were the riskiest tranche of ownership and any right to payment was subordinate to payment in full of amounts due to the regular security holders. The regular and residual trust interests are also differentiated by the fact that the regular security interests are evidenced by book entries, while the residual security interests are represented by physical certificates, with certain investor

[1]The Trust Agreements used were all either identical, or identical in form, to the Standard Ginnie Mae REMIC trust provisions.

rights in the Trust Agreements defined by this differentiation.

The trust documents limit the trustee’s duties to those specifically set forth in the Trust Agreements (Trust Agreements § 5.01). They expressly require that the trustee hold all trust assets for the exclusive use and benefit of all present and future holders and otherwise limit the trustee’s right to, in any capacity, assert any claim or interest in the trust assets (Trust Agreements § 4.02).

Although each trust has a specified term by which it terminates, the Trust Agreements also provide for circumstances permitting early termination. The parties’ disputes in this case arise out of the trustee’s election to exercise an early termination of certain trusts. Over time, as the underlying mortgages are repaid, the original class principal balances of the trust decline. The Trust Agreements expressly provide that when the original class principal balance of a trust declines to less than 1%, the trustee has the option to effect an early termination.[2] This is commonly called a “clean up call.” Article VI section 6.01 of the Trust Agreements provide in pertinent part:

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[2]The early termination provision is intended to permit the trustee to end a trust that is no longer profitable, e.g., when the cost of administering the trust exceeds the benefits of operation (26 CFR 1.860G-2[j]).

> "On any Distribution Date on which the aggregate of the Class Principal Balances of the Securities in a particular Series . . . is less that 1% of the aggregate of the Original Class Principal Balances, the Trustee may, but shall not be obligated to, effect a termination of the related Trust and retirement of the related Securities by purchasing (or causing the sale to one or more third parties of) all of the Trust Assets remaining in the Trust and depositing into the Book-Entry Depository Account the Termination Price therefor."

In the Trust Agreements' glossary, the "Termination Price" is defined as "[t]he Aggregate Remaining Balance as of the Termination Date, plus thirty days of accrued interest on the outstanding Trust Assets." This amount is sufficient to satisfy any payments required to be made to the regular security holders.

The full mechanics of liquidation are set forth in Article VI of the Trust Agreements. It requires that the trustee decide whether it is going to purchase the remaining trust assets itself, or sell them to a third party. Notice must then be sent to the security holders specifying a final distribution date. The sale of assets and book entry deposit of funds sufficient to satisfy the regular shareholders' interest must be consummated before the specified distribution date. On the distribution date, the funds deposited into the book-entry deposit account are available to fully satisfy the remaining interests of the regular security holders. If there are any other available funds after the payment of expenses ("cash on hand"), the trustee is required to distribute such excess to the residual security holders, upon presentation and surrender of their certificates (Trust Agreements § 6.01). Any unclaimed funds must be deposited into a termination account and the Trust Agreements terminate only after all distributions are completed (Trust Agreements §§ 6.02, 6.03).

The complaint alleges that in 2015 the trustee exercised its option of early termination for seven trusts in which plaintiffs were the residual security holders. The trustee elected to purchase the remaining trust assets for itself at the termination price, fully aware that the market price greatly exceeded the termination price. The trustee is alleged to have then "flipped" these assets by selling them to a third party, realizing a personal profit believed to be in excess of $10 million. No part of the profit was remitted to the trusts or distributed to the residual security holders. Plaintiffs claim that the trustee's conduct was in violation of the Trust Agreements and derogation of the duties imposed upon commercial trustees by New York law.

Although the financial transaction underlying the dispute is complex, the parties' legal dispute is really quite simple. The parties do not dispute that the trustee had the right to effect an early termination of the trusts based upon the value of the original class principle balance. They do not dispute the termination procedure permitted the trustee the option of either purchasing the remaining trust assets in its own name or selling them to a third party. They do not dispute that if the trustee had elected to sell the remaining assets to a third party, the trustee would have been required to deposit the proceeds (net of the book-entry deposit and expenses) into the trust to be distributed to the residual security holders. The gravamen of the parties' dispute is whether under the terms of the Trust Agreements, when the trustee elects to purchase the remaining trust assets in its own name, it can do so at the "termination price," which in this case was substantially below the market value. If the trustee has that right, then at its sole option and for its sole financial benefit, it can completely defeat the interest of the residual security holders.

The REMIC trusts at issue are indentures. They bestow legal title of securities on a single trustee, here defendant, that acts to protect the interests of individual investors, who may otherwise be numerous or unknown to one another (*Quadrant Structured Prods. Co, Ltd. v Vertin*, 23 NY3d 549, 555 [2014]). Unlike an ordinary trustee, the rights, duties and obligations of an indenture trustee are not defined by a fiduciary relationship. Instead, they are defined exclusively by the terms of the agreements by which the relationships were formed (*AG Capital

Funding Partners, L.P. v State St. Bank & Trust Co., 11 NY3d 146, 156 [2008]).

That does not mean, however, that an indenture trustee does not owe security holders a duty of care. An indenture trustee clearly owes the security holders a duty to perform its ministerial functions with due care (*AG Capital,* 11 NY3d at 157). Most importantly, the courts have recognized that even an indenture trustee has a fundamental duty to avoid conflicts of interest (*id.* at 156-157; *see Commerce Bank v Bank of N.Y. Mellon*, 141 AD3d 413, 416 [1st Dept 2016]; *United States Trust Co. of N.Y. v First Natl. City Bank*, 57 AD2d 285, 296 [1st Dept 1977], *affd* 45 NY2d 869 [1978]; *see also Elliot Assoc. v J. Henry Schroder Bank & Trust Co.*, 838 F2d 66, 71 [2d Cir 1988]). Avoiding conflicts of interest encompasses a trustee's duty "not to profit at the possible expense of [the] beneficiary" (*Dabney v Chase Nat. Bank of City of N.Y.*, 196 F2d 668, 670 [2d Cir 1952]). Where the indenture itself gives the trustee rights that are seemingly in conflict with the beneficiary, there is no legal bar (*Elliot Assoc.*, 836 F2d at 71). The trustee's legal duty, as an indenture trustee, is reflected in Trust Agreements sections 4.02 (a) and (b), which acknowledge that the trustee holds the assets for the exclusive use and benefit of the security holders and prohibits the trustee from asserting a claim against the trust assets in any capacity, except as otherwise permitted by the Trust Agreements themselves.

At bar, while the trustee had an express right to purchase the remaining trust assets in its own name, there was no express contractual right to purchase the assets at less than market value. In the absence of an express contractual right to do so, the trustee's action clearly constitutes a prohibited conflict of interest, because it financially benefitted the trustee at the expense of the residual security holders. The trustee completely defeated the equity value of the trust assets that belonged to the residual security owners by usurping the profitable value of the assets for itself.

There is nothing in the Trust Agreements that expressly permits the trustee to purchase the trust assets for less than their fair market value. The trustee argues that the trust documents permit it to purchase the trust assets for the termination price, which is defined in the Trust Agreements as the value of the regular shareholders' interest, plus 30 days of interest. That "right," however, is not clearly delineated in the Trust Agreements. The language in section 6.01 of the Trust Agreements that the trustee relies on merely permits the trustee to terminate the trust by purchasing the assets. There is no express reference to a purchase price or some other equivalent language. The sole reference in section 6.01 to the termination price is only a requirement that the trustee must deposit such amount in the "Book-Entry Depository Account."[3] The obligation to deposit a sum certain into a book-entry depository account does not equate to the trustee having the right to purchase the trust assets for the sum that must be deposited. Nor does it set a ceiling price that the trustee can pay for the assets. Indeed, the Trust Agreements expressly require that any assets in excess of the termination price received by the trustee qualify as cash on hand, which must be distributed outright to the residual security holders (Trust Agreements § 6.01[b]). As a practical matter, there could never be any cash on hand, and this provision would be rendered entirely superfluous, if the trustee's interpretation of the Trust Agreements is accepted. Contrary to the trustee's argument, its actions to profit itself is not simply an inherent financial risk the residual security holders undertook when they decided to invest in the securities. The value of their investment, under such circumstances, would not be market driven, but dictated by whatever the trustee chooses to do

[3]Under the Trust Agreements only the regular holders have book entry securities, the residual security holders have certificated securities (Trust Agreements § 2.01). Thus, the termination price, which reflects the regular shareholders' financial interests, is the only amount that can be deposited into a book-entry depository account.

("Heads I win, Tails I win"). Such interpretation of the Trust Agreements is untenable and inconsistent with the trustee's general contractual duties to act on behalf of all security holders.

Nor does section 6.02 of the Trust Agreements clearly provide that the trustee may purchase the trust assets at the termination price. This provision concerns termination of the Trust Agreements and provides, among other things, that the trustee's obligations "shall terminate upon (a) the payment of all principal and accrued interest on the Securities . . . and all other amounts due and owing by the Trustee under such Trust Agreement. . . ." One of the conditions for termination of the trust is that the trust assets be purchased "at a price equal to the Termination Price . . . ." Such language reflects a threshold amount that must be met before the trust can be terminated, not a cap on the amount that is required to be paid for the assets.[4] [5]

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[4]The Trust Agreements were developed by Ginnie Mae. Ginnie Mae was the guarantor of the regular security holders' interest. It makes sense that Ginnie Mae would require that the early termination price cover, at a minimum, the financial interests that Ginnie Mae undertook the risk to pay.

[5]Plaintiffs also contend that the trustee's interpretation would jeopardize the favorable tax treatment otherwise afforded REMICs (IRC 860[f]). Defendants argue that clean up calls are exempted from prohibited transactions that would otherwise void

We recognize that under the Trust Agreements, the trustees' stated compensation for "all services" is a Trustee Fee calculated in accordance with the agreement (Trust Agreements § 5.05) There is no clear provision giving the trustee any right to additional fees and/or compensation by selling trust assets for its own account.

We also reject the trustee's argument that once it purchased the trust assets in its own name, whatever responsibilities it had to plaintiffs under the trust documents terminated. The Trust Agreements provide that the obligations of the trustee continue at least through the trust termination date, which is when the assets are actually distributed to the security holders. The termination date cannot occur until after any sale of the trust assets is consummated. We also find unpersuasive the trustee's argument that because it did not have to elect an early termination, but could have operated the trust until the assets had no value, it had no obligation upon early termination to

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the tax benefits. Because, however, we do not agree with defendant's interpretation of the trust agreements, we do not reach the issue of whether the federal tax benefits would be lost were we to decide otherwise. Certainly, making sure these contracts are consistent with their tax purpose is an important consideration and any interpretation that voids the tax benefit intended should be avoided (*see Shedlinsky v Budweiser Brewing Co.*, 163 NY 437, 439 [1900]; *Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 [1st Dept 1999]).

purchase or sell the trust assets at a price that would benefit the residual security holders. While the trustee had the right to either elect or not elect an early trust termination, having made such election, it was obligated to act in conformance with its contractual duties.

Notwithstanding our determination that plaintiffs have stated a claim for breach of contract, we find that their claims for conversion and anticipatory beach of contract were properly dismissed. The anticipatory breach claim fails because the complaint merely alleges that defendant had a unilateral obligation to pay money (*see Long Is. R.R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 466 [1977]; *Acacia Natl. Life Ins. Co. v Kay Jewelers*, 203 AD2d 40, 43 [1st Dept 1994]). The claim for conversion fails because it is duplicative of plaintiffs' breach of contract claims (*Sebastian Holdings, Inc. v. Deutsche Bank, A.G.*, 108 AD3d 433 [1st Dept 2012]).

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

Accordingly, the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 3, 2016, which granted defendant's motion to dismiss the complaint, should be modified, on the law, to the extent of reinstating the breach of contract claim, and otherwise affirmed, with costs against respondent.

All concur.

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

ENTERED: AUGUST 1, 2017

CLERK