SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 20, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7624 Unicorn Construction Enterprises, Inc., Index 162714/15
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

____

Goetz Fitzpatrick LLP, New York (Donald J. Carbone of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for respondent.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered June 13, 2017, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to deny the dismissal of the complaint with regards to the West 148th Street Pedestrian Bridge and the Inwood Hill Park Pedestrian Bridge, and otherwise affirmed, without costs.

Plaintiff Unicorn Construction Company contracted with defendant City of New York in 2007 to rehabilitate 12 City bridges. The complaint contains causes of action for breach of

contract and quantum meruit.

As an initial matter, the court properly considered documentary evidence submitted by the City on its motion to dismiss pursuant to CPLR 3211(a)(7), including the municipal contract, certificates of substantial completion, and extension requests, and correctly concluded that plaintiff has no cause of action (*see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014]).

Plaintiff argues that the City never issued a substantial completion certificate for all the work under the contract, and thus the time limitations on plaintiff's claims were never triggered. Plaintiff cites to the contract's definition of "Work" at Article 2.1.33, contending that it encompasses all work required to complete the project, and thus, the City was obligated to issue a certificate of substantial completion only after all 12 bridges were substantially completed. Since the City failed to do so, plaintiff posits, the time requirements for filing a claim were never triggered.

The City admits that it did not issue a certificate of substantial completion once all the 12 bridges were completed. It argues that under the contract it was not required to issue a certificate of completion for all 12 bridges. It notes that

plaintiff's actions and communications, including its requests for payment, comported with the City's method of considering the progress of each bridge individually and issuing certificates as the work on each bridge was substantially completed.

By a time extension request dated July 22, 2014, plaintiff acknowledged that the work on 10 bridges was complete and an extension was needed on two pedestrian bridges, West 148th Street Pedestrian Bridge and Inwood Hill Park Pedestrian Bridge. Pursuant to Article 13.8.2(c) of the contract, to request such an extension, plaintiff was required to make a "statement that the Contractor waives all claims except for those delineated in the application, and the particulars of any claims which the Contractor does not agree to waive." Plaintiff complied with this provision and stated that "we agree to and hereby waive and release any and all claims . . . except the items of claim which we hereby reserve . . . [and] reserve[] the right to file a claim for all incomplete bridges including but not limited to price escalation and extended overhead." Accordingly, as to the 10 completed bridges, plaintiff expressly waived all its claims in the July 22, 2014 time extension request.

However, with respect to the claims as to the two aforementioned pedestrian bridges, we find that looking solely to

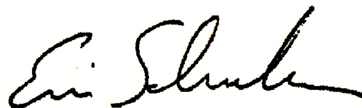
the plain language used by the parties within the four corners of the contract, there is an ambiguity in the interpretation of the contract that cannot be resolved on a CPLR 3211 motion to dismiss (*see Telerep, LLC v U.S. Intl. Media LLC*, 74 AD3d 401, 402 [1st Dept 2010]).

On August 20, 2014, the City issued certificates of substantial completion for the two pedestrian bridges. There remains an issue of fact as to whether Article 2.1.33 and Article 44 require the City to submit a certificate of substantial completion after "the Work" had been performed on all 12 bridges or whether the parties' course of conduct demonstrated that there would be separate certificates of substantial completion issued for each bridge (*see Citibank, N.A. v 666 Fifth Ave. Ltd. Partnership*, 2 AD3d 331, 332 [1st Dept 2003]).

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

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Acosta, P.J., Renwick, Mazzarelli, Gesmer, Singh, JJ.

7762-
7763 In re Michael B.,
Petitioner-Appellant,

-against-

Latasha T.-M.,
Respondent-Respondent.

____

Carol L. Kahn, New York, for appellant.

Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child.

____

Appeal from order, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about August 4, 2017, which, after a hearing, inter alia, awarded primary physical custody of the subject child to respondent mother, unanimously dismissed, without costs, as abandoned. Order, same court and Judge, entered on or about December 13, 2017, which, to the extent appealed from as limited by the briefs, denied the father's petition for modification of custody, unanimously reversed, on the law, without costs, and the petition granted to the extent of remanding the matter for a full hearing on the issue of whether it is in the child's best interests to relocate with his mother

to Florida on a permanent basis. The schedule for the father's phone/email/electronic contact with the child and for his summer visitation set forth in the August 4, 2017 order shall remain in effect pending further order of the Family Court.

The appeal from the August 4, 2017 custody order is dismissed as abandoned, as petitioner father currently raises no challenge to that determination (*see e.g. Ifill-Colon v 153 E. 149th Realty* Corp., 160 AD3d 583, 584 [1st Dept 2018]; *Dias v Stahl*, 256 AD2d 235, 237 [1st Dept 1998]).

On or about September 13, 2017, the father filed a petition for writ of habeas corpus and a petition alleging that the mother had violated the August 4, 2017 custody order in that he had not seen or heard from the child or the mother in two weeks. The Family Court issued a writ of habeas corpus dated September 13, 2017 directing the mother to produce the child in court on September 19, 2017. It appears that this never occurred.

On December 13, 2017, Family Court held a brief hearing at which the father testified in person and the mother testified by telephone from Florida. No other witnesses were called, and no documentary evidence was introduced. The mother alleged that she had gone to Florida on September 4, 2017 to visit her mother, learned two days later that she had been evicted from her Bronx

apartment while she was in Florida, and claimed that her physician had advised her not to travel because she was in the final month of a high-risk pregnancy. The mother testified that she did not intend to return to New York.

Family Court properly found that the mother violated the August 4, 2017 order by intentionally relocating to Florida without the father's consent or permission of the court, and that this impaired the father's visitation rights. The court did not abuse its discretion in remedying this impairment by ordering that the father have visitation on particular dates during the child's upcoming winter and spring school breaks, and by directing the mother to pay for the child's travel expenses (*see Matter of Yeager v Yeager*, 110 AD3d 1207 [3d Dept 2013]). Accordingly, we decline to disturb Family Court's determination of the father's violation petition.

Family Court correctly determined that the mother's testimony about her unilateral relocation constituted a change in circumstances, triggering an inquiry into whether the child remaining in the mother's custody in Florida is in the child's best interests (*see Matter of Bennett v Abbey*, 141 AD3d 882, 885 [3d Dept 2016]). However, the court abused its discretion in making a final determination on that issue without a full hearing

at which the parties and the child’s attorney had an opportunity to present relevant evidence. The question of a child’s relocation out of state necessarily requires “due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child (*Tropea v Tropea*, 87 NY2d 727, 739 [1996]). [C]ustody and visitation decisions should be made with a view toward minimizing the parents' discomfort and maximizing the child's prospects of a stable, comfortable and happy life” (*id.* at 742). Relevant factors include the parties’ good faith in requesting or opposing the move, the child's attachments to each parent, the quality of the life-style that the child would have if the proposed move were permitted or denied, the effect that the move may have on any extended family relationships, and whether a visitation plan can be achieved that permits the noncustodial parent to maintain a meaningful parent-child relationship (*id.*). In this case, since the father had raised concerns in his petition about the child’s education, the parties should have had the opportunity to present evidence about this, in addition to other relevant factors.

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

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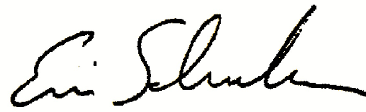
ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kapnick, Webber, JJ.

1009 The People of the State of New York, Ind. 5490/01
Respondent,

-against-

Angelo Tejeda,
Defendant-Appellant.

____

Jorge Guttlein & Associates, New York (Juan-Carlos Guttlein of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Brenda G. Soloff, J. at plea and sentencing; Patricia M. Nuñez, J. at postconviction hearing), rendered July 13, 2004, convicting defendant of criminal sale of a controlled substance in the third degree and sentencing him to a term of 1¾ to 5¼ years, unanimously affirmed.

We previously held this appeal in abeyance (141 AD3d 444 [1st Dept 2016]) in order to afford defendant the opportunity to demonstrate a "reasonable probability" that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea (*see People v Peque*, 22 NY3d 168, 199, 200 [2013], *cert denied* 574 US __, 135 S Ct 90 [2014]). A hearing was held in October, 2017. Based upon the evidence

adduced at the hearing, we agree with the hearing court that defendant did not meet that burden.

We find no basis for disturbing the hearing court's credibility determinations. The court correctly weighed the relevant *Peque* factors and found defendant’s proof did not establish the requisite reasonable probability. Defendant’s evidence of strong family ties to the United States, and his own testimony that he was not advised by counsel or the court of the immigration consequences of his negotiated plea, were outweighed by the strength of the evidence against defendant in the underlying drug case, the potential for a life sentence, and the very favorable terms of the disposition (*see e.g. People v Manon*, 151 AD3d 626 [1st Dept 2017], *lv denied* 30 NY3d 981 [2017]).

We have considered defendant’s remaining arguments regarding the *Peque* hearing and find them unavailing.

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

ENTERED: NOVEMBER 20, 2018

DEPUTY CLERK

Friedman, J.P., Gische, Tom, Kern, Singh, JJ.

6697 Gwendolyn Snipes, Index 303681/10
Plaintiff-Appellant,

-against-

Kevin Schmidt, et al.,
Defendants-Respondents.

____

Silbowitz Garafola Silbowitz Schatz & Frederick, LLP, New York (Howard Schatz of counsel), for appellant.

Dwyer & Taglia, New York (Gary J. Dwyer of counsel), for Kevin Schmidt and Ramakrishna Transportation, Inc., respondents.

Caitlin Robin and Associates, PLLC, New York (Kevin Volkommer of counsel), for Regency Extended Care Center, Inc., respondent.

____

Appeal from order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about September 29, 2017, which granted defendants Kevin Schmidt and Ramakrishna Transportation, Inc.'s motion to dismiss the complaint on the ground of the unreasonable delay in substitution pursuant to CPLR 1021, unanimously dismissed, without prejudice, without costs, for lack of jurisdiction to entertain the appeal.

The plaintiff in this personal injury action died after discovery was complete, leaving no surviving relatives and a will naming four beneficiaries. Although a petition was filed in Surrogate's Court seeking the appointment of an executor and the

issuance of letters testamentary, four years later, no appointment had been made. Defendants moved by order to show cause, on notice to the four persons potentially interested in the estate, to dismiss the complaint on the ground of the delay in seeking substitution. None of the interested persons appeared, and the motion was granted.

Although the decedent's counsel appeared in opposition to the motion, his power to act on the decedent's behalf had terminated upon her death, and he did not state the basis of his or his law firm's authority to act in the matter (*see Silvagnoli v Consolidated Edison Empls. Mut. Aid Socy.*, 112 AD2d 819, 820 [1st Dept 1985]). Accordingly, counsel has no standing to appeal from the order that dismissed the complaint pursuant to CPLR 1021 (*see Thomas v Benedictine Hosp.*, 8 AD3d 781, 782 [3d Dept 2004]).

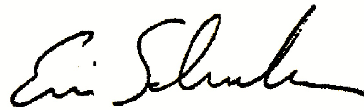
The dismissal of this appeal does not preclude a new motion at Supreme Court to substitute a representative for plaintiff upon Surrogate Court's appointment of a representative for the late plaintiff's estate (*see Silvagnoli*, 112 AD3d at 821). Such a representative would be permitted to move for vacatur of the dismissal, upon a showing of reasonable excuse for the delay,

merit and no undue prejudice to defendants (*see Thomas*, 8 AD3d at 782).

The Decision and Order of this Court entered herein on May 29, 2018 (161 AD3d 670 [1st Dept 2018]) is hereby recalled and vacated (see M-3196 & M-3559 decided simultaneously herewith).

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7376- Index 312320/14
7377- 100806/17
7377A &
M-4450 Jacqueline Shabot Svatovic,
Plaintiff-Respondent-Appellant,

-against-

Zarko Svatovic,
Defendant-Appellant-Respondent.
- - - - -
Zarko Svatovic,
Plaintiff-Appellant,

-against-

Jacqueline Shabot Svatovic,
Defendant-Respondent.

Zarko Svatovic, appellant-respondent/appellant pro se.

Thomas Torto, New York, for respondent-appellant/respondent.

Judgment of divorce, Supreme Court, New York County (Matthew F. Cooper, J.), entered March 22, 2017, which to the extent appealed from as limited by the briefs, after a hearing, determined pro se defendant husband's distributive share of the parties' former marital residence as $250,000, unanimously modified, on the law, to declare that enforcement of the parties' separation agreement is barred by the applicable statute of limitations and that all claims regarding the sale of the former

marital residence and payment of equitable distribution therefrom are dismissed as time barred, without costs. The matter is remanded to Supreme Court for an amended judgment of divorce in accordance herewith, which shall also provide for husband to pay wife restitution in the sum of $250,000, the payment she made to avoid sale of the former marital residence. Appeal from order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about September 28, 2017, which transferred the action to Matthew F. Cooper, J., unanimously dismissed, without costs. Order, same court (Matthew F. Cooper, J.), entered on or about October 5, 2017, which, to the extent appealed from, granted defendant wife's motion to dismiss the complaint pursuant to CPLR 3211(a)(5), and denied sanctions, unanimously affirmed, without costs.

Husband's appeal and wife's cross appeal pertain to the judgment of divorce in a matrimonial action that wife commenced in 2014. Husband separately appeals from Supreme Court's dismissal of a subsequent contract action he commenced in 2017, after the parties were divorced. Husband also appeals from an order by Justice Braun transferring the contract action to Justice Cooper.

Justice Braun's order transferring the contract action to

Justice Cooper is not appealable as of right because it was not rendered in connection with a motion made on notice to the parties (see CPLR 5701[a][2]). Since husband never sought leave to appeal, husband's appeal from that order is dismissed. Were we to reach the merits, we would find that the transfer was a provident exercise of discretion (*see Drasser v STP Assoc., LLC*, 90 AD3d 701 [2d Dept 2011]).

The most contentious issue framed by both of husband's appeals and wife's cross appeal concerns disposition of the former marital residence, a coop apartment in Manhattan that was purchased in 1981 for $135,000. At the time of trial, it was valued at approximately $2,000,000. Husband brought an order to show cause to compel the immediate sale of the apartment so he could collect a share of the proceeds pursuant to the parties' agreement. He claimed he was entitled to a share based upon the value of the apartment at the time of trial. Wife, however, opposed any sale of the apartment on the basis that enforcement was barred by the statute of limitations, or alternatively, that circumstances had changed in the time since the parties' agreement, rendering it unenforceable under the doctrines of laches and equitable estoppel. In her cross appeal, she seeks to recoup the payment she made to husband pursuant to the judgment

to avoid having to sell the apartment. Alternatively, she claims that Supreme Court correctly decided that husband's distributive share regarding the apartment should be no greater than what a sale would have yielded had the apartment been sold in 2003 when their youngest daughter became emancipated.

The parties, now in their 70's, were married in 1974 and have two children. The apartment was purchased with wife's savings and gifts from her family. In 1994, husband moved out of the apartment and the parties entered into a separation agreement, formalizing their decision to live apart. The separation agreement, dated September 12, 1995, resolved the issues related to custody, support and equitable distribution. The apartment was their only marital asset.

It was agreed that wife could continue to reside in the apartment with the children until they attained 22 years of age, and then the apartment would be sold as "quickly" as possible. Upon sale, wife would be entitled to a separate property credit of $135,000 and a $100,000 property distribution from the net proceeds. Net proceeds in excess of $235,000 would be used to pay the children's college education expenses, and the remaining balance would then be divided equally between the parties as payment of their distributive shares.

The separation agreement required that wife make a $47,000 up front payment to husband as a condition for his agreement to sign over the shares of stock and proprietary lease to her. She made the necessary payment and obtained those documents. The parties also agreed that capital gains tax resulting from the future sale of the apartment would be paid solely by wife and deducted from her share of the net sale proceeds. Although husband agreed he would provide health insurance for the family, he was largely unemployed throughout the 20 years of their separation and he never met this obligation. It was wife who provided the family, including husband, with health insurance. He received this benefit throughout their separation, and the parties apparently never filed for divorce so husband could retain such insurance. Husband made representations to wife that she could continue to live in the apartment indefinitely and that it did not have to be sold because they would eventually bequeath it to their children. Almost immediately after their separation, husband married his girlfriend (BB) in Croatia. Once wife commenced this divorce action, husband rectified his illegal, simultaneous marriage to two different women by divorcing BB in Croatia.

At trial, husband sought to compel the immediate sale of the

apartment and distribution of the sale proceeds, not only in accordance with the terms of the separation agreement, but also at its current value of approximately $2,000,000. Wife, however, was opposed to selling the apartment on the basis that since the parties' separation she alone had borne all the expenses attendant to maintaining the apartment, including assessments and any improvements and repairs that were needed. Although husband had made child support payments, they did not cover all of the child-related expenses, and his child support obligation had ended in May 2003 upon emancipation. Alternatively, wife sought to have husband's distributive share of the net proceeds from the sale of the apartment capped at what it would have been had the sale taken place in May 2003, when the condition for selling the apartment was met.

The trial court credited wife's testimony regarding husband's representations to her that he did not want a divorce and that she could continue to live in the apartment indefinitely because it was beneficial for him to have health insurance and they would bequeath the apartment to their children (*see Melcher v Greenberg Traurig, LLP*, 102 AD3d 497, 501 [1st Dept 2013], *revd on other grounds* 23 NY3d 10 [2014]). The court also credited wife's testimony that she had maintained the expenses for the

apartment without any help from husband and paid most of their children's expenditures, also without contribution from him.

Finding that husband's delay in enforcing the separation agreement had prejudiced wife, the court decided that husband was barred under the doctrines of equitable estoppel and laches from compelling a sale of the apartment. The court also determined that husband was only entitled to a distributive share of the appraised value of the apartment as of May 2003. After applying certain credits due to wife, the court ordered that husband was entitled to a $250,000 payment from wife, which she paid. The trial court did not address wife's statute of limitations argument. In her cross appeal, wife seeks recoupment of that payment.

Notwithstanding that the parties' rights under their separation agreement had been adjudicated in the matrimonial action, in 2017, following entry of the judgment of divorce, husband commenced a separate contract action against wife, alleging breach of the separation agreement. He again sought the immediate sale of the apartment, despite the judgment of divorce specifying otherwise. After the case was transferred to Justice Cooper, wife moved to dismiss the action on the basis of res judicata and the statute of limitations; she also moved for

sanctions. The court granted her motion to dismiss, observing that the issues raised in the contract action were identical to those fully litigated in the matrimonial action and that husband's claims were time barred by both the statute of limitations and res judicata. Wife's motion for sanctions was, however, denied.

Husband's claims in the divorce action are barred by the applicable statute of limitations. A separation agreement is a separate, enforceable contract, like any other, and it is subject to the six-year statute of limitations set forth in CPLR 213(2) (*Tauber v* Lebow, 65 NY2d 596, 598 [1985] [superceded by statute with respect to support payment arrears]; *Allard v Allard*, 145 AD3d 1254, 1256 [3d Dept 2016]; *Matter of Scola*, 118 AD3d 895, 896 [2d Dept 2014], *citing Fade v Pugliani/Fade*, 8 AD3d 612 [2d Dept 2004]; *Chayes v Chayes*, 28 AD3d 355, 356-357 [1st Dept 2006]). The parties' separation agreement required that the apartment be put up for sale and sold as quickly as possible once the children were emancipated. That condition was met in May 2003, and that is when husband's cause of action accrued, triggering the applicable six-year statute of limitations that applies to contract claims (*see Scola* at 896). The obligation to sell the apartment and distribute the proceeds was a fixed

obligation at an ascertainable point in time (*Makarchuk v Makarchuk*, 59 AD3d 1094, 1095 [4th Dept 2009]). Rather than bringing legal action at that time, husband did not act. He failed to act and waited to pursue that claim until after the applicable six-year limitations period had expired. Since husband's claims are completely barred, he cannot compel a sale of the apartment, nor is he entitled to any distributive share of any interest he believes he has in the apartment.

Were we to reach wife's claim under the doctrines of equitable estoppel and laches, we would find that the same result concerning the sale obtains (*see e.g. Jean v Joseph*, 117 AD3d 989, 990 [2d Dept 2014]).

The subsequent breach of contract action was correctly dismissed by the motion court on the ground of res judicata and the statute of limitations. A valid final judgment bars future actions between the same parties on the same cause of action. The contract action involves the same parties and identical claims to those that were already decided in the divorce (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). All other claims arising from the separation agreement, including those related to wife's pension, are likewise barred by res judicata because husband failed to raise them in the matrimonial action (*see*

Boronow v Boronow, 71 NY2d 284, 289 [1988]). The six-year statute of limitations also bars this action.

As the wife did not cross-appeal from the denial of her motion for sanctions against husband, we cannot award this relief (*see Seldon v Spinnell*, 95 AD3d 779 [1st Dept 2012], *lv denied* 20 NY3d 857 [2013]).

Wife is entitled to restitution of the $250,000 payment that she made to husband as a condition for the judgment of divorce entered March 22, 2017, allowing her the option of buying out husband's interest. We remand this matter to the trial court for an amended judgment in accordance herewith; such amended judgment shall provide for a money judgment in wife's favor in the amount of $250,000.

We have considered other arguments raised by husband in each of his appeals and find them unavailing.

M - 4450 - *Svatovic v Svatovic*

Motion to strike reply brief
and allow submission of reply denied.

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

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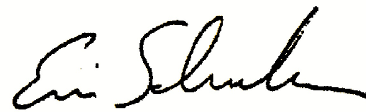

DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7643-
7643A The People of the State of New York, Ind. 169/15
Respondent,

-against-

Howard Stokes,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered May 12, 2016, convicting defendant, upon his plea of guilty, of burglary in the second degree and robbery in the third degree, and sentencing him to an aggregate term of five years, and order (same court and Justice), entered on or about October 19, 2017, which denied defendant's CPL 440.20 motion to set aside his sentence, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. The court's oral colloquy with defendant concerning the waiver avoided conflating the right to appeal with the rights normally forfeited upon a guilty plea, and an isolated remark by the court, when viewed in context, had no such effect. The oral

colloquy met or exceeded the minimum standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]), and it was supplemented by a written waiver that defendant signed after consulting with counsel. Defendant's valid waiver of the right to appeal forecloses his claims that the court misunderstood the lawful scope of sentencing and that the sentence was excessive (*see People v Brito*, 159 AD3d 410 [1st Dept 2018], *lv denied* 31 NY3d 1011 [2018]).

Defendant's CPL 440.20 motion was properly denied, because the sentence imposed was not unlawful.

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

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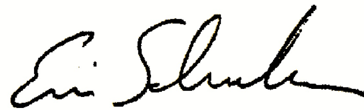

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DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7644 In re Raheem D.,

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

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Dawne A. Mitchell, The Legal Aid Society, New York (Diane Pazar of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah E. Wassel of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about June 15, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual abuse in the first and third degrees (two counts each) and endangering the welfare of a child, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court’s finding was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Issues of credibility, including the weight given to minor inconsistencies, were properly considered by the court, and there is no basis for disturbing its determinations.

The court providently exercised its discretion in adjudicating appellant a juvenile delinquent and placing him on probation, because this was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), in light of the serious sex offense committed against a much younger child. An adjournment in contemplation of dismissal would not have ensured that, after its term expired, appellant would remain in and satisfactorily complete an appropriate sex offender treatment program.

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

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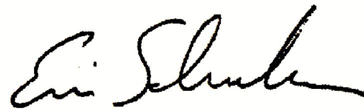

DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7645 Alan S. Ripka, Index 157823/14
Plaintiff-Appellant,

-against-

Seth Rotter,
Defendant-Respondent.

____

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

Frederick J. Martorell, P.C., Brooklyn (Frederick J. Martorell of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 16, 2015, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the complaint, and denied plaintiff's cross motion for leave to amend the complaint, unanimously affirmed, without costs.

Plaintiff alleges that defendant is required to reimburse him for 50% of the judgment entered against him personally in a prior action (*Lifeline Funding, LLC v Ripka*, 114 AD3d 507 [1st Dept 2014] [the *Lifeline* action), pursuant to a Stipulation of Settlement entered into between the parties concerning their obligations for debts of their former law firm. The motion court correctly determined that the breach of contract and negligence claims are barred by the applicable statutes of limitations (CPLR

213; 214), because this action was commenced more than six years after the underlying law firm debt became due and more than three years after defendant's alleged negligence occurred in failing to satisfy the debt. The indemnification claim was correctly dismissed because there is no indemnity provision in the Stipulation of Settlement (*see Ruiz-Hernandez v TPE NWI Gen.*, 106 AD3d 627 [1st Dept 2013]). Moreover, defendant cannot be required to indemnify plaintiff for the judgment entered against him in the *Lifeline* action, because the judgment was based on plaintiff's own wrongful conduct (*see Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]).

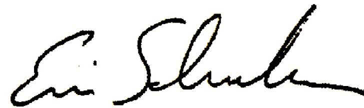
The motion court properly denied plaintiff's cross motion for leave to amend his complaint to assert a contribution claim, because contribution is not available "between two parties whose potential liability to a third party is for economic loss

resulting only from a breach of contract” (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 23 [1987]; *see Bloostein v Morrison Cohen LLP*, 157 AD3d 432 [1st Dept 2018]).

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

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

ENTERED: NOVEMBER 20, 2018



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DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7646 Maryellis Bunn, Index 158770/13E
Plaintiff-Appellant-Respondent,

-against-

The City of New York,
Defendant-Respondent,

Port Motors Lincoln-Mercury, Inc.,
et al.,
Defendants-Respondents-Appellants.

____

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

Hoffman, Roth & Matlin, LLP, New York (Joshua Hoffman of counsel), for Port Motors Lincoln-Mercury, Inc., respondent-appellant.

Collins, Fitzpatrick & Schoene, LLP, White Plains, (Wilton R. Fernandez of counsel), for Aldair Lemos and Lucemi Love, respondents-appellants.

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

____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered November 15, 2016, which denied plaintiff's motion to declare defendant Port Motors Lincoln-Mercury, Inc. (Port Motors) the owner of the subject motor vehicle, and for summary judgment against Port Motors and defendant Aldair Lemos on the issue of liability, denied Lemos and defendant Lucemi Love's cross motion for summary judgment dismissing the complaint and all cross

claims against Love and for summary judgment on their cross claim against Port Motors declaring it the owner of the subject motor vehicle, and denied Port Motors's separate motion for summary judgment dismissing the complaint and all cross claims against it, unanimously modified, on the law, to vacate so much of the order as denied plaintiff's motion, and Lemos and Love's cross motion, to grant the branch of plaintiff's motion and of the cross motion for a declaration that Port Motors was the owner of the subject motor vehicle, and it is so declared, to grant that branch of plaintiff's motion for summary judgment against Port Motors and Lemos on the issue of liability, and to grant that branch of Lemos and Love's cross motion for summary judgment dismissing the complaint and all cross claims against Love, and otherwise affirmed, without costs.

Because Port Motors "fail[ed] to comply with the statutory requirements regarding vehicle registration procedures . . . [it] is estopped from denying ownership of the vehicle and is fully liable to the plaintiff as if it were the 'owner' of the vehicle" (*Brown v* Harper, 231 AD2d 483, 484 [2d Dept 1996]; *see Switzer v Aldrich*, 307 NY 56, 59-60 [1954]; *Getz v Searles*, 265 AD2d 839, 840 [4th Dept 1999]). Although this Court has held that "title to a motor vehicle is transferred when the parties intend such

transfer to occur" (*Godfrey v G.E. Capital Auto Lease, Inc.*, 89 AD3d 471, 477 [1st Dept 2011]), here, there is no evidence that the parties intended to transfer title to the vehicle from Port Motors to Love prior to the accident. Unlike in *Godfrey*, here, none of the paperwork to begin transferring formal ownership of the vehicle to Love had been executed at the time the accident occurred. Moreover, the purchase order signed by Love contained language allowing Love to cancel the order and be refunded her down payment if she did not agree to the credit terms once they were presented to her. It is undisputed that Love was never presented with any credit terms prior to the accident and that she still had the right to cancel the transaction.

We reject the argument that the Port Motors employee who allowed Lemos and Love to leave the dealership with the subject vehicle without complying with those registration procedures was acting outside the scope of his employment (*see Geotel, Inc. v Wallace*, 162 AD2d 166, 168 [1st Dept 1990], *lv denied*, *dismissed* 76 NY2d 917 [1990]). Accordingly, Port Motors, being estopped from denying ownership of the vehicle, is responsible for Lemos's negligence, to whom express or implied permission to operate the vehicle was given (*see* Vehicle and Traffic Law § 388[1]).

Because Port Motors is the de facto owner of the subject

vehicle, the action should be dismissed against Love, as should any and all cross claims against her.

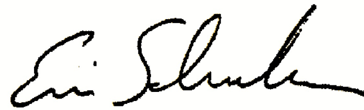
Finally, plaintiff should have been awarded summary judgment on the issue of liability against Lemos and, given our holding above, Port Motors. The metal barricade standing in the roadway was not "a sudden and unexpected circumstance which le[ft] little or no time for thought, deliberation or consideration, or cause[d] [Lemos] to be reasonably so disturbed that [he] [had to] make a speedy decision without weighing alternative courses of conduct . . . " (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]). Rather, by colliding with the barricade and propelling it onto the sidewalk, where it struck a pedestrian, Lemos failed to both operate his vehicle in a manner that was reasonable and prudent under the circumstances (*see e.g. DiCocco v Center for Dev. Disabilities*, 264 AD2d 803 [2d Dept 1999]) and to see what was there to be seen through the ordinary use of his

senses (*see e.g. Aponte v Vani*, 155 AD3d 929, 930 [2d Dept 2017]).

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

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7647 In re Asia Lynn S.,

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

Regina P.,
Respondent-Appellant,

Good Shepherd Services,
Petitioner-Respondent.

____

Andrew J. Baer, New York, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), attorney for the child.

____

Order, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about January 3, 2017, which, to the extent appealed from, revoked a May 19, 2014 order suspending judgment for 12 months, terminated respondent mother's parental rights to the subject child, and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purposes of adoption, unanimously affirmed, without costs.

The preponderance of the evidence in the latest proceedings, including testimony that the mother failed to visit the child, attend therapy, or complete a parenting skills program, all

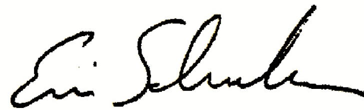
support the conclusion that the mother materially violated the terms of the suspended judgment (*Matter of Kendra C.R.*, 68 AD3d 467 [1st Dept 2009], *lv dismissed and denied* 14 NY3d 870 [2010]).

Further, the child has been in foster care since she was two months old, and has developed a positive relationship with her present foster mother, who provides for her special needs and wants to adopt her (*see Matter of Jada Serenity H.*, 60 AD3d 469, 470 [1st Dept 2009]).

We have considered and rejected the mother's remaining arguments.

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

ENTERED: NOVEMBER 20, 2018



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DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7648 La Nona Jean Salinas, Index 107662/10
Plaintiff-Appellant,

-against-

World Houseware Producing Co.,
Ltd., et al.,
Defendants-Respondents.

____

Bandas Law Firm, P.C., Corpus Christi, TX (Robert W. Clore, of the bar of the State of Texas, admitted pro hac vice, of counsel), for appellant.

Lynch Rowin, LLP, New York (Thomas P. Lynch of counsel), for World Houseware Producing Co., Ltd., respondent.

Russo & Toner, LLP, New York (Theresa Villani of counsel), for Josie Accessories, Inc., respondent.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Adam C. Calvert of counsel), for Dolgencorp of Texas, Inc., respondent.

____

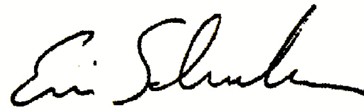
Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 30, 2017, which, in this action for burn injuries allegedly sustained when a potholder which plaintiff was using caught fire, granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Where the conclusion of an expert relies upon facts contrary to the plaintiff's testimony, the affirmation will fail to raise an issue of fact sufficient to defeat summary judgment (*see Feaster-Lewis v Rotenberg*, 93 AD3d 421, 422 [1st Dept 2012], *lv*

denied 19 NY3d 803 [2012]; *Wengenroth v Formula Equip. Leasing, Inc.*, 11 AD3d 677, 679 [2d Dept 2004]). Here, the validity of plaintiff's experts' opinions rely upon the assumption that the subject potholder caught fire after contacting the heating element of plaintiff's oven, a fact plaintiff specifically denied several times during her deposition. Plaintiff was not equivocal at her deposition, nor did she seek to correct her testimony at any time thereafter.

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7649 Harvardsky Prumyslovy Holding, A.S. - V Likvidaci,
Plaintiff-Respondent, Index 651826/12

-against-

Viktor Kozeny,
Defendant-Appellant,

Landlocked Shipping Co.,
Defendant.

____

Carey & Associates LLC, New York (Michael Q. Carey of counsel), for appellant.

Saito Sorenson LLP, New York (Sigurd A. Sorenson of counsel), for respondent.

____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about February 3, 2017, which denied the motion of defendant Viktor Kozeny to dismiss the amended complaint pursuant to CPLR 3211(a)(1), (7), and (8), unanimously affirmed, with costs.

Assuming, arguendo, that Kozeny has raised a nonfrivolous ground for denying recognition of the Czech judgment that plaintiff seeks to enforce, “there must be either an in personam or an in rem jurisdictional basis for maintaining the recognition and enforcement proceeding . . . in New York” (*AlbaniaBEG Ambient Sh.p.k. v Enel S.p.A.,* 160 AD3d 93, 94 [1st Dept 2018]).

However, Kozeny waived the defense of lack of personal jurisdiction because he is the alter ego of defendant Landlocked Shipping Co. (*see Harvardsky Prumyslovy Holding, AS. – V Likvidaci v Kozeny*, 117 AD3d 77, 83 [1st Dept 2014]), and Landlocked previously moved to dismiss pursuant to CPLR 3211(a)(1) and (7), not subdivision (8) (*see* CPLR 3211[e]; *see also New Media Holding Co. L.L.C. v Kagalovsky*, 118 AD3d 68, 77 [1st Dept 2014]).

Even if Kozeny did not waive the defense of lack of personal jurisdiction, New York has in rem jurisdiction. Plaintiff alleges that Landlocked has approximately $22 million at a bank in New York, and Kozeny did not submit documentary evidence utterly refuting this allegation. Furthermore, plaintiff seeks to enforce its Czech judgment against this $22 million (*see e.g. AlbaniaBEG*, 160 AD3d at 104 n 11 & 112; *see also Deutsche Bank, AG v Vik*, 142 AD3d 829, 829-830 [1st Dept 2016]).

The court properly denied the branch of Kozeny's motion that was based on CPLR 3211(a)(7). Kozeny contends that the Czech judgment "was rendered under a system which does not provide . . . procedures compatible with . . . due process" (CPLR 5304[a][1]) because the Czech court never had custody of him and he was tried in absentia. However, because the statute refers to

a system which does not provide procedures compatible with due process, "it cannot be relied upon to challenge the legal processes employed in a particular litigation on due process grounds" (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 89 [1st Dept 2002], *affd* 100 NY2d 215 [2003], *cert denied* 540 US 948 [2003]; *see also Downs v Yuen*, 298 AD2d 177, 178 [1st Dept 2002]). The Czech legal system provides procedures compatible with due process (*see Leser v Berridge*, 668 F3d 1202, 1208 n 2 [10th Cir 2011]).

Having had notice and an opportunity to be heard, Kozeny was "afforded due process, even if the [foreign] procedures were not as generous as those of New York" (*Standard Chartered Bank v Ahmad Hamad Al Gosaibi & Bros. Co.*, 110 AD3d 578, 578 [1st Dept 2013]). Plaintiff was not required to allege that the Czech court took Kozeny into its physical custody. It is sufficient if a plaintiff alleges that the foreign "judgment was 'conclusive'" (*id.* at 579), which plaintiff did.

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

ENTERED: NOVEMBER 20, 2018

DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7650-
7651-
7652 The People of the State of New York,
Respondent,

-against-

Antoine Gumbs,
Defendant-Appellant.

____

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

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

____

Ind. 855/05

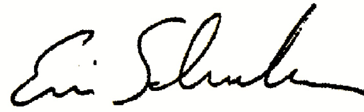
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered August 4, 2016,

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

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

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

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

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7653 In re Jaraira Del Carmen C.,
Petitioner-Appellant,

-against-

Junior M.,
Respondent-Respondent.

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

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

Karen P. Simmons, The Children's Law Center, Brooklyn (Rachel J. Stanton of counsel), attorney for the child.

Order, Family Court, Bronx County (Diane Kiesel, J.), entered on or about February 8, 2017, which denied petitioner mother's application to relocate with the parties' child to Waterbury, Connecticut, unanimously affirmed, without costs.

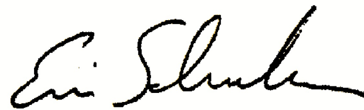
The parties consented to a custody order, which provides that the mother has legal and physical custody of their son in New York, and the father has visitation the first three weekends of the month and on alternate weeks during the summer. The father has been consistent in exercising his visitation rights.

Denial of the mother's motion to relocate, a motion concededly motivated by her desire to bring the parties' child to live with her present boyfriend and soon to be born child, has a

sound and substantial basis in the record (*see Matter of Tropea v Tropea*, 87 NY2d 727, 736 [1996]; *see Yamilly M.S. v Ricardo A.S.*, 137 AD3d 459 [1st Dept 2016]). The father testified that the move would disrupt both the amount and quality of his time with his son. The move would also put a strain on the child's relationship with his extended family, with whom he lives. In addition, both grandmothers provide significant childcare when the child's parents are unavailable.

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7654 The People of the State of New York, Respondent,

Ind. 680N/16
2106N/15

-against-

Rodolfo Abreu Cristomo,
Defendant-Appellant.

____

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

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

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 29, 2016,

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

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

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

ENTERED: NOVEMBER 20, 2018

____
DEPUTY CLERK

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

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7655-
7656 In re Wimbledon Financing Master Fund, Ltd., Petitioner-Respondent,

Index 150584/16

-against-

David Bergstein, et al.,
Respondents-Appellants,

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

Satterlee Stephens LLP, New York (Andrew L. Fish of counsel), for David Bergstein, Graybox, LLC and Iskra Enterprises LLC, appellants.

Winget, Spadafora & Schwartzberg, LLP, New York (Garry T. Stevens, Jr. of counsel), for K Jam Media, Inc., appellant.

The Law Offices of Nathaniel Z. Marmur, PLLC, New York (Nathaniel Z. Marmur of counsel), for Henry N. Jannol, appellant.

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

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 21, 2017, to the extent appealed from, awarding petitioner sums of money as against respondents David Bergstein, Graybox LLC, K. Jam Media, Inc. and Henry N. Jannol, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about July 18, 2017, which granted petitioner's motions for summary judgment on its turnover

petition and to dismiss respondents' cross petition for an accounting, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Petitioner, as assignee of a judgment entered in 2013 against nonparty Arius Libra, Inc., brought this proceeding pursuant to CPLR article 52 for a turnover order to recover assets that had been fraudulently conveyed away from Arius Libra (*see* Debtor and Creditor Law §§ 272, 273).

Because the conveyances at issue were made to third parties without benefit to petitioner's assignor, they were made without adequate consideration (*Geltzer v D'Antona [In re Cassandra Group]*, 312 BR 491, 497 [Bankr SD NY 2004]). Moreover, because the conveyances were made to insiders of the debtor, they were presumptively made in bad faith (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006]). Respondents failed to meet their burden of rebutting the presumption of the debtor's insolvency arising from the lack of adequate consideration (*see Battlefield Freedom Wash, LLC v Song Yan Zhuo*, 148 AD3d 969, 971 [2d Dept 2017]). The debtor's principal assets were concededly illiquid hedge fund interests, not "saleable" assets, i.e., assets for which there

was an actual market (*see McCarthy v Estate of McCarthy*, 145 F Supp 3d 278, 286 [SD NY 2015]; *Chase Natl. Bank v United States Trust Co.*, 236 App Div 500, 503 [1st Dept 1932], *affd* 262 NY 557 [1933]).

The motion court correctly determined that the conveyances were made with fraudulent intent (*see* Debtor and Creditor Law § 276). Two of the principal actors pleaded guilty to criminal fraud in connection with these transactions. The third was convicted after the judgment on appeal was entered. In any event, more than enough "badges of fraud" exist to support the court's determination (*see Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). These include "a close relationship between the parties to the alleged fraudulent transaction, a questionable transfer not in the usual course of business, inadequacy of the consideration, the transferor's knowledge of the creditor's claim and the inability to pay it, and retention of control of the property by the transferor after the conveyance" (*id.*).

Contrary to respondents' contention, the judgment creditor did not ratify the transactions. While its own investment advisors were part of the fraudulent scheme, the advisors disbursed funds through the creditor's own accounts, and the

creditor received no benefit (*see Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 131 [1990]). In any event, the malefactors could not ratify their own bad acts (*see Kelly v Handy & Harman*, 2010 WL 2305743, *13, 2010 US Dist LEXIS 61567, *34 [SD NY 2010], *affd* 406 Fed Appx 538 [2d Cir 2011]).

The motion court correctly found that, under Delaware law, Bergstein was the alter ego of the debtor (*see Crosse v BCBSD, Inc.*, 836 A2d 492, 497 [Del 2003]). Bergstein's sole argument is that the other members of the scheme controlled the debtor. However, he was the initiator of the scheme and the creator and chairman of the debtor. Moreover, while other conspirators had to approve the loan proceeds disbursements – more than 12 borrowing requests and 27 transfers initiated by Bergstein – the other participants did exactly as he directed.

We decline to remand for discovery as to any payments received by petitioner from the remaining assets of the debtor in its possession. Respondents can seek this information in the supplementary discovery process, when and if their assets are found.

Respondent Jannol's argument that the court does not have personal jurisdiction of him is barred by the doctrine of law of

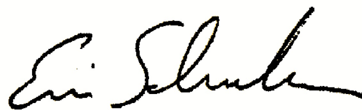
the case, this Court having rejected it on a prior appeal (*Matter of Brodsky v New York City Campaign Fin. Bd.*, 107 AD3d 544, 545-546 [1st Dept 2013]; *see Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 147 AD3d 644 [1st Dept 2017]).

The court correctly held Jannol personally liable although the funds were transferred into his client escrow account. Jannol completely controlled the funds that went in and out of the account, and thus is personally liable for his own tortious conduct, regardless of the fact that the account was in the name of his professional corporation (*see T&R Foods, Inc. v Rose*, 47 Cal App 4th Supp 1, 9 [Cal App 1996]).

Jannol fails to raise a factual issue as to his defense that he was merely a conduit of funds. Although no discovery occurred, the factual circumstances of his acceptance of the funds, which he fails to provide in his affidavit in opposition to the motion for summary judgment, are within his personal knowledge.

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7659 The People of the State of New York, Ind. 4733/13
Respondent,

-against-

Shondel Mason,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered August 9, 2016, convicting defendant, after a jury trial, of two counts of robbery in the first degree and two counts of criminal possession of a weapon in the fourth degree, and sentencing him, as a second violent felony offender, to an aggregate term of 18 years, unanimously affirmed.

The testimony of an analyst from the Office of the Chief Medical Examiner linking defendant's DNA to a sample found on a firearm recovered from the crime scene did not violate defendant's right of confrontation. The analyst's testimony amply established that she used her own "independent analysis of the raw data" to make the comparison, and the analysis was not

merely "a conduit for the conclusions of others" (*People v John*, 27 NY3d 294, 315 [2016]; *People v Rodriguez*, 153 AD3d 235, 246-247 [1st Dept 2017], *affd on other grounds* 31 NY3d 1067 [2018]).

The testimony of the detective identifying defendant as one of the men depicted in surveillance videos and photographs provides no basis for reversal in light of the other evidence in this case (*see People v Boyd*, 151 AD3d 641, 641 [1st Dept 2017], *lv denied* 29 NY3d 1124 [2017]).

The court properly denied defendant's request to preclude several recorded phone calls he made from jail prior to trial. "Defendant impliedly consented to the recording of the call(s) based on his receipt of multiple forms of notice that his calls would be recorded, and he was not entitled to separate notice that the calls might be subpoenaed by prosecutors" (*People v Holmes*, 162 AD3d 585, 586 [1st Dept 2018]). Defendant abandoned his request for a voluntariness charge as to the phone calls (*see People v Graves*, 85 NY2d 1024, 1027 [1995]), and we decline to review it in the interest of justice.

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

ENTERED: NOVEMBER 20, 2018

DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7660 The People of the State of New York, Ind. 493/15
Respondent,

-against-

Love Graham,
Defendant-Appellant.

____

Justine M. Luongo, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 19, 2015, unanimously affirmed.

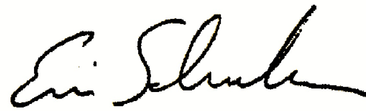
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7661 Rory Martin, et al., Index 158874/12
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

The Taub Law Firm, P.C., New York (Bruce E. Wingate of counsel), for appellants.

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

Order, Supreme Court, New York County (W. Franc Perry, J.), entered June 23, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff Rory Martin was injured when, while playing softball on defendant's field, he unsuccessfully attempted to jump over a hole that was in the field near home plate. Plaintiff testified at his 50-h hearing that a six-inch-deep hole, three-to-four feet long, and four-to-five feet wide, near the right hand batter's box, had been filled in with loose clay and appeared to be level when he stepped into the batter's box. After plaintiff safely reached first base and additional players used the batter's box, the hole became more exposed and surprised plaintiff as he ran home to try to score. When plaintiff saw the size of the hole and attempted to jump over it, his left foot

struck a clay-obscured edge of the hole, causing him to suffer a fractured ankle.

Under the circumstances presented, triable issues exist as to whether the City had notice of this particular defect, and, if so, whether the City negligently or improperly repaired the defect, whether the playing field was as safe as it appeared to be, whether plaintiff's injury arose as a consequence of a condition or practice common to the particular sport, and whether plaintiff assumed the risk of playing on the subject field (*see Zelkowitz v Country Group, Inc.*, 142 AD3d 424, 427-428 [1st Dept 2016]*; Henig v Hofstra Univ.*, 160 AD2d 761 [2d Dept 1990]).

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

ENTERED: NOVEMBER 20, 2018

DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7662 The People of the State of New York, Respondent, Ind. 5080/08

-against-

Melvin Peters, Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J. at hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered June 7, 2011, convicting defendant of murder in the second degree (two counts), kidnapping in the first degree, gang assault in the first degree and robbery in the first, second and third degrees, and sentencing him, as a second felony offender, to an aggregate term of 45 years to life, unanimously affirmed.

The court properly denied defendant’s motion to suppress his ultimate statement to a detective. After defendant refused to speak to two detectives or allow them to give *Miranda* warnings, these detectives engaged in the functional equivalent of interrogation by showing defendant a surveillance video, prompting a statement by defendant which, as the People concede, was properly suppressed. When a third detective, who was unaware of these events, entered the interview room, defendant

spontaneously announced that, although he refused to speak any further to the first two detectives, he insisted on speaking to the third. Shortly thereafter, outside the presence of the other two, the third detective administered *Miranda* warnings and took a statement. The record supports the court's finding that this statement was attenuated from the suppressed statement (*see People v White*, 10 NY3d 286, 288 [2008], *cert denied* 555 US 897 [2008]; *People v Paulman*, 5 NY3d 122, 130-131 [2005]). There was a pronounced break between the statements, the second statement was made to different interviewer, and "defendant had demonstrated an unqualified desire to speak to the [third] detective" (*People v Rodriguez*, 55 AD3d 351, 352 [1st Dept 2008], *lv denied* 12 NY3d 762 [2009]).

Defendant's arguments concerning the sufficiency and weight of the evidence supporting his convictions of kidnapping and of felony murder (based on robbery and kidnapping) are unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established each of the charges, and refuted the defense to felony murder set forth in Penal Law § 125.25(3). There is no basis for disturbing the jury's credibility determinations. Defendant's principal argument is that the incident took place in two phases, and that while he concededly took part in a robbery and gang assault in the first phase, he did not participate in the second phase where the victim was shot and killed. However,

the evidence, including several surveillance videotapes and proof of the time when the shooting occurred, supports the conclusion that defendant's intentional participation in the crime continued throughout, and that he was accessorially liable for the conduct of the other participants. We have considered and rejected defendant's remaining claims concerning the sufficiency and weight of the evidence.

The court providently exercised its discretion in permitting the People to introduce evidence on rebuttal that, while incarcerated pending trial, defendant assaulted a correction officer and made a threat that could be interpreted as an admission of his guilt of the instant murder. Even though the court had originally precluded the People from introducing this evidence on their direct case, after defendant testified it became clear that the probative value of this evidence exceeded any prejudicial effect (*see People v Massie*, 2 NY3d 179, 183-185 [2004]).

Defendant's absence from a portion of the discussion between the court and the attorneys of a jury note requesting certain legal instruction does not require reversal. The conference involved a purely legal matter about which defendant could not have provided meaningful input (*see People v Harris*, 76 NY2d 810 [1990]; *People v Salley*, 25 AD3d 473, 474-475 [1st Dept 2006], *lv denied* 6 NY3d 838 [2006]).

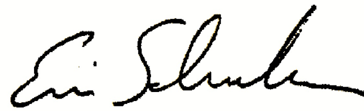
Defendant did not preserve any of his claims regarding incidents involving prospective and sworn jurors, his challenges to the prosecutor's summation, and his claim regarding sentencing procedure, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal or resentencing.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

The court lawfully imposed consecutive sentences for separate acts (*see* Penal Law § 70.25[2]), and we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7663 The People of the State of New York, Ind. 263N/15
Respondent,

-against-

Clarence Miller,
Defendant-Appellant.

____

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

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

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James M. Burke, J.), rendered October 14, 2015,

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

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

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

ENTERED: NOVEMBER 20, 2018

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DEPUTY CLERK

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

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7664 The People of the State of New York, Ind. 2078/14
Respondent,

-against-

William Grant,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Juan Merchan, J.), rendered March 30, 2015, unanimously affirmed.

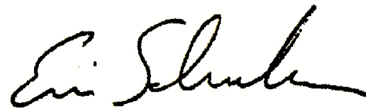
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7665 The People of the State of New York, Respondent, Ind. 1999/16

-against-

Jareyid Alobeyah, Defendant-Appellant.

Justine M. Luongo, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered July 27, 2016, unanimously affirmed.

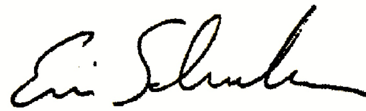
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7666N 106 Spring Street Owner LLC, Index 657050/17
Plaintiff-Appellant,

-against-

Workspace, Inc., et al.,
Defendants-Respondents.

____

Cole Schotz P.C., New York (Arianna Christopher Frankl of counsel), for appellant.

Braverman Greenspun P.C., New York (Scott S. Greenspun of counsel), for respondents.

____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 22, 2018, recalled and reissued by order entered January 26, 2018, which, to the extent appealed from as limited by the parties stipulation withdrawing the appeal from that part of the order denying plaintiff's motion for a preliminary injunction, denied plaintiff's motion for a *Yellowstone* injunction, unanimously reversed, on the law and the facts, without costs, and the motion granted.

Plaintiff met all four of the required elements for a *Yellowstone* injunction, whose purpose is to toll the cure period pending resolution of the dispute over whether a commercial tenant breached its lease (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]), and its motion for a *Yellowstone* injunction should have been granted.

The nature of the "standstill" ordered by the court in lieu

of a *Yellowstone* injunction may be, for all intents and purposes, equivalent to the requested relief, as defendants contend, but it is not clear, and plaintiff raises the reasonable concern that it omitted a key aspect of *Yellowstone* relief: tolling the time to cure (*see Korova Milk Bar of White Plains, Inc. v PRE Props., LLC*, 70 AD3d 646, 647 [2d Dept 2010]); we resolve any ambiguity here by granting the *Yellowstone* injunction.

The court lacked adequate basis to assume, as it did, that any failure on plaintiff's part to maintain the cooling tower meant it had "jeopardized public health and safety in a manner which is incurable." Defendants' October 2017 letter and December 2017 Notice of Default, demanding cure, belie the notion of incurability. The notices are, moreover, silent on the issue of public health and safety, as were defendants' affidavits opposing the motion. The issue, raised only in their memorandum of law was, in any case, unsubstantiated. The record before us contains no evidence to support the claim, or the court's conclusion that the violations at issue are incurable.

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

ENTERED: NOVEMBER 20, 2018

DEPUTY CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7667 In re Gilberto Diaz, Ind. 453/11
[M-3402] Petitioner, OP 154/18

-against-

Patricia J. Bailey, et al.,
Respondents.

Gilberto Diaz, petitioner pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Stephen J. Kress of counsel), for respondents.

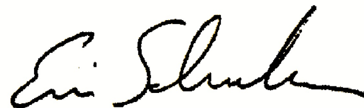
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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

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

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7668 The People of the State of New York, Ind. 2164/15
Respondent,

-against-

Isaac Dixon,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered June 15, 2017,

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

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

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

ENTERED: NOVEMBER 20, 2018

DEPUTY CLERK

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

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7669 4525 & 4555 Apartments Corp., Index 156473/14
Plaintiff-Appellant,

-against-

Dina Goldemberg, et al.,
Defendants-Respondents.

The Law Office of Steven G. Fauth, LLC, New York (Suzanne M. Saia of counsel), for appellant.

Nicolini, Paradise, Ferretti & Sabella, PLLC, Mineola (Jennifer Prusiecki of counsel), for respondents.

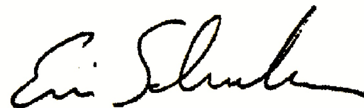
Order, Supreme Court, New York County (James E. d'Auguste, J.), entered on or about April 4, 2018, which, in this action for property damage, inter alia, denied plaintiff's cross motion for summary judgment to the extent of limiting its damages to those directly caused by the contractor hired by defendants Dina Goldemberg and Isaac Goldemberg, unanimously affirmed, with costs.

Defendants do not dispute that they are required to indemnify plaintiff for the damage their contractor directly caused by drilling into the building's gas line. However, plaintiff's claim that the need to bring the gas line into code compliance was caused by the accident and requires indemnification by defendants is unavailing. The proposal letter from the plumber plaintiff hired to have the building's gas service restored after the accident states that the gas line

would not pass the pressure test because most of the gas valves were original to the building that was constructed in 1953, and the risers needed to be equipped with lockable gas valves. The record shows that the problem with the gas line resulted from the age of the valves, which were plaintiff's responsibility to maintain and repair under the proprietary lease because they are part of the building's standard equipment. That defendants may have furnished the occasion for plaintiff to have to demonstrate that the building's gas distribution system was code compliant before service could be restored does not mean that defendants became responsible for the costs plaintiff incurred in achieving code compliance when such an obligation was not clearly implied under the proprietary lease (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]).

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7671 Dilsia Rodriguez, Index 160829/16
Plaintiff-Respondent,

-against-

Architron Environmental
Services, Inc.,
Defendant-Appellant

McGowan Builders, Inc.,
Defendant.

____

Edward B. Safran, New York, for appellant.

Law Office of Craig Rosuck, P.C., New York (Craig Rosuck of counsel), for respondent.

____

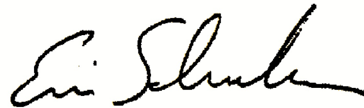
Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered February 8, 2018, which denied the motion by defendant Architron Environmental Services, Inc. for summary judgment dismissing the action as against it, unanimously affirmed, without costs.

The summary judgment motion was premature and the motion court properly denied it on that basis. No discovery had been conducted before Architron moved for summary judgment; thus, plaintiff was not given a chance to depose two parties — defendants in a related action that has now been consolidated with this one — who might have knowledge concerning the relevant issues in this action (*see Gonzalez v Vincent James Mgt. Co., Inc.*, 306 AD2d 226 [1st Dept 2003]; *La v New York Infirmary/Beekman Downtown Hosp.*, 214 AD2d 425 [1st Dept 1995]).

Moreover, even if the documents that Architron submitted on its motion had sufficed to make a prima facie showing that it had completed its work at the site before plaintiff's alleged accident, plaintiff nonetheless had an acceptable excuse for not offering any countervailing facts to oppose the motion — namely, the lack of any opportunity to conduct discovery (*see Gonzalez*, 306 AD2d at 226).

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7672- Ind. 999/12
7673 The People of the State of New York,
Appellant,

-against-

Sunil Brown,
Defendant-Respondent.
- - - - -
The People of the State of New York, Ind. 1531/12
Appellant,

-against-

Robert Salkey,
Defendant-Respondent.

Darcel D. Clark, District Attorney, Bronx (Robert McIver of counsel), for appellant.

Justine M. Luongo, The Legal Aid Society, New York (Jose David Rodriguez-Gonzalez of counsel), for Sunil Brown, respondent.

Kevin D. McLoone, Yonkers, for Robert Salkey, respondent.

Order, Supreme Court, Bronx County (John W. Carter, J.), entered January 23, 2017, which granted defendant Sunil Brown's motion to suppress physical evidence and defendant Robert Salkey's motion to suppress a lineup identification, unanimously affirmed.

The hearing court's decision rests primarily on its factual determinations, which are accorded great deference and are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The court appropriately considered the main police witness's very limited recollection of the events. The court

also determined that the timing of certain events was reliably established by the witness's testimony on cross-examination, rather than the version contained in his direct examination.

According to the court's findings of fact, at the time of the gunpoint seizure of the two defendants, the police had an anonymous tip that an undescribed suspect or suspects had burglarized an unspecified apartment on the sixth floor of a building, they spoke to building residents who reported noise on that floor, and they saw defendants leaving an apartment on that floor carrying undescribed bags. The totality of this information failed to provide reasonable suspicion to support an immediate forcible seizure without any inquiry. The police learned additional information, but only after the unlawful seizure.

Therefore, the court properly suppressed all physical evidence as fruit of the illegality. Furthermore, the court also granted suppression, independently of the initial illegality, because the witness's recollection about the subsequent search of the contents of the bags, and about the recovery of gloves from the hallway floor, was so limited that the People did not meet their initial burden of coming forward with credible evidence to establish either a search of the bags incident to a lawful arrest or the abandonment of the gloves (*see generally People v Berrios*, 28 NY2d 361, 367 [1971).

The record also supports the court's determination to suppress an officer's lineup identification of Salkey, who had fled the scene, as the unattenuated fruit of the unlawful stop and frisk (*see e.g. People v Simpson*, 174 AD2d 348, 351 [1st Dept 1991]). The vague testimony provided no explanation of how Salkey came to be placed in a lineup, and no basis for finding attenuation from the initial illegality.

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

ENTERED: NOVEMBER 20, 2018

DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7674 West 70th Owners Corp., et al., Index 156272/15
Plaintiffs-Respondents,

-against-

Hiram Cohen & Son, Inc., et al.,
Defendants-Appellants.

____

Keidel, Weldon & Cunningham, LLP, White Plains (Darren P. Renner of counsel), for appellants.

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for respondents.

____

Order, Supreme Court, New York County (Andrea Masley, J.), entered on or about January 30, 2018, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint as against Hiram Cohen & Son, Inc., unanimously affirmed, without costs.

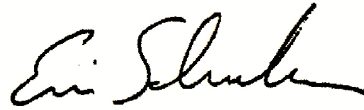
In opposition to defendants' prima facie showing that Hiram Cohen & Son, Inc. (HCS) was not negligent or in breach of a contract in connection with its procurement of an insurance policy, plaintiffs demonstrated the existence of issues of fact, namely, whether they made a specific request for particular insurance coverage, and whether they had a special relationship with HCS that would have obligated HCS to make certain that they were properly insured. HCS's claims that plaintiff failed to timely read and understand the policy only go to comparative negligence, but do not bar the action altogether (*see American*

Bldg. Supply Corp. v Petrocelli Group, Inc., 19 NY3d 730 [2012]). Additionally, this issue is factually disputed (*id.*).

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

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7675 The People of the State of New York, Ind. 2325/15
Respondent,

-against-

Luis Diaz,
Defendant-Appellant.

____

Arnold & Porter Kaye Scholer, New York (Ian Jay of counsel), and Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), for appellant.

Luis Diaz, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Noreen M. Stackhouse of counsel), for respondent.

____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered March 7, 2016, as amended April 27, 2016, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of five years, unanimously affirmed.

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

including its rejection of defendant's attempt to explain his confession of guilt.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se claims.

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

ENTERED: NOVEMBER 20, 2018

____
DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7676 Robert Malta, et al., Index 653647/15
Plaintiffs-Appellants,

-against-

Salvatore Gaudio, et al.,
Defendants-Respondents.

____

Catafago Fini, LLP, New York (Jacques Catafago of counsel), for appellants.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (William A. Rome of counsel), for Salvatore Gaudio and A&L 444 LLC, respondents.

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for 444 Park Avenue South Associates LLC, David Moinian and Moin Development Corp., respondents.

____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered August 26, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motions to dismiss the first, second, fourth, fifth, and seventh causes of action, unanimously affirmed, with costs.

Plaintiff Robert Malta and defendant Salvatore Gaudio are former business partners who owned companies for the purpose of investing in real estate in Manhattan. The first, second, and fourth causes of action (for breach of contract and a declaratory judgment) stem from Malta's and Gaudio's attempt to allocate between themselves the properties owned through one of these companies, and particularly from Gaudio's failure to disclose that one such property, located at 1420 Second Avenue, was

subject to a commercial lease.

The breach of contract and declaratory judgment causes of action were correctly dismissed because it is clear from the plain text of the relevant agreement that the lease did not constitute an "Encumbrance" that was required to be disclosed (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). Indeed, no other leases were disclosed as "Encumbrances." Contrary to plaintiffs' contention, the "Mortgage, Assignment of Leases and Rents, and Security Agreement" listed on Schedule 1 of the agreement is not a lease but a form of mortgage (*see 1180 Anderson Ave. Realty Corp. v Mina Equities Corp.*, 95 AD2d 169, 172-174 [1st Dept 1983]; *Poughkeepsie Sav. Bank v Sloane Mfg. Co.*, 84 AD2d 212, 214-18 [2d Dept 1981]).

The fifth and seventh causes of action (for breach of fiduciary duty and aiding and abetting breach of fiduciary duty) stem from the sale of plaintiffs' interests in property located at 444 Park Avenue, and particularly from defendants' alleged failure to disclose and/or misrepresentations regarding an opportunity to develop that property as a hotel.

The breach of fiduciary duty cause of action was correctly dismissed because it is barred by the release provision in the settlement agreement executed by the parties several months after the sale. This release is very broad, applying to all claims against Gaudio, "whether known or unknown," and not excepting

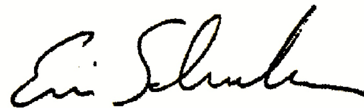
claims arising out of the 444 Park sale. Malta, a sophisticated principal represented by independent counsel, admitted in a separate action that he “no longer trusted Gaudio” at least one month before the sale’s closing, and thus was able to and did release Gaudio from claims based on fiduciary duty (*see Pappas v Tzolis*, 20 NY3d 228, 232 [2012]).

The dismissal of the breach of fiduciary duty cause of action is dispositive of the aiding and abetting breach of fiduciary duty cause of action (*see Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]).

We decline to award sanctions against plaintiffs.

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7677 In re Juliette S.,
Petitioner-Appellant,

-against-

Tykym S.,
Respondent-Respondent.

____

Curtis, Mallet-Prevost, Colt & Mosle LLP, New York (Elena Rizzo of counsel), for appellant.

Andrew J. Baer, New York, for respondent.

____

Order, Family Court, New York County (Adam Silvera, J.), entered on or about September 26, 2017, which granted respondent’s application to dismiss the petition to modify an order of custody and visitation, unanimously reversed, on the law, without costs, and the matter remanded to the Family Court for a hearing consistent with this decision.

Where a parent seeks to modify a formal custody agreement she has executed, she must show that there has been sufficient change in circumstances since the execution of the agreement, and that modification is in the best interests of the child *(Matter of Sergei P. v Sofia M.*, 44 AD3d 490 [1st Dept 2007]). The court entertaining such a petition need not hold a hearing where petitioner has failed to make a showing of changed circumstances sufficient to warrant one (*Matter of Ronald S. v Dierdre R.*, 62 AD3d 593, 594 [1st Dept 2009]). Even if the requisite prima facie showing of changed circumstances is made, the court need

not hold a hearing where it possesses sufficient information to make a comprehensive and independent review of the child's best interests (*Matter of Mohamed Z.G. v Mairead P.M.*, 129 AD3d 516, 517 [1st Dept 2015]).

Here, the parties executed a custody and visitation agreement on April 25, 2017. The mother filed a petition to modify it on June 29, 2017. The Family Court improperly dismissed the mother's petition without a hearing.

The Family Court's order dated September 26, 2017 dismissed both the mother's modification petition and the father's enforcement petition "due to withdrawal." Although the father withdrew his enforcement petition on the record on September 20, 2017, the Family Court's written order gives no other reason for dismissal of the mother's modification petition.

At the parties' first and only appearance on the petitions on September 20, 2017, the father presented to the court and the mother's attorney for the first time a copy of a letter from the New York State Office of Children and Family Services Child Abuse and Maltreatment Register to the father dated July 20, 2017 stating that the local child protective services office had determined that a report made against him on June 12, 2017 was "unfounded." The court then made clear that it was dismissing the mother's petition solely on the basis of that letter. This was not a sufficient basis upon which to dismiss the mother's

petition for three reasons.

First, the Family Court improperly denied the mother an opportunity to respond to the "unfounded" letter, which was hearsay. Moreover, although the father apparently had it in his possession for approximately two months, he did not provide it to her until the September 20 court appearance.

Second, in her petition, the mother alleged changed circumstances based in part on a school social worker's having advised her on June 12, 2017 that the social worker had made a child abuse report stating that the mother's 11-year-old son (the father's stepson) had reported that the father had assaulted him during a visit.[1] While that report may have been the subject of the "unfounded" letter, the mother's petition was also based on statements made to her by the parties' child and the older child on nine occasions between May 23 and June 16, 2017 that the father interrogated them about what they said to their therapist and pressured them to say they wanted to live with him; that they were afraid of the father and no longer wished to visit with him; and that they feared that the father would shoot the children with his gun. Accordingly, even if the "unsubstantiated" letter referred to the report made by the older child's school social

[1]The custody agreement provided that the older child could accompany the parties' son on visits, but did not condition visitation between the father and the parties' child on the older child's presence.

worker, that letter did not disprove the mother's uncontroverted assertion that, both before and after that report was made, the children had expressed fear of and a desire not to visit with the father. Indeed, if, as the father's attorney alleged, the attorney for the parties' child during the custody litigation had advocated for the child's preference to reside primarily with his father, this was a marked change in the child's attitude since the custody agreement. This was sufficient to require a hearing to determine the basis for the parties' son's expressed fear of his father, and whether modification of the father's parenting time was in the child's best interests.

Finally, to the extent that Family Court was making a determination that the parties' child's fear of his father was unfounded based on the "unsubstantiated" letter, and that modification was therefore not in the child's best interests, this was error. Since this was the parties' first appearance before this judge, the court did not have sufficient information about the parties and their child to make a comprehensive and

independent determination about the child's best interests (*Mohamed Z.G.*, 129 AD3d at 517).

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

ENTERED: NOVEMBER 20, 2018

DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7678-
7678A The People of the State of New York, Respondent,

Ind. 5817/12
1372/14

-against-

Emanuel Marks,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Brittany N. Francis of counsel), for appellant.

Emanuel Marks, appellant pro se.

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

Judgments, Supreme Court, New York County (Marcy L. Kahn, J.), rendered December 3, 2015, convicting defendant, upon his pleas of guilty, of identity theft in the second degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to withdraw his guilty plea. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]). The plea minutes demonstrate that defendant voluntarily, knowingly, and

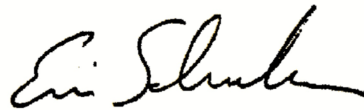
intelligently pleaded guilty in exchange for a favorable sentence (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). The court had sufficient information to determine that defendant's claim that his prior counsel's alleged ineffectiveness caused him to involuntarily plead guilty was without merit and did not warrant a hearing.

Defendant's excessive sentence argument is moot because he has completed his entire sentence.

We have considered and rejected defendant's pro se claims.

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7679 Kevin Glodek, Index 156177/16
Plaintiff-Appellant-Respondent,

-against-

Kadmon Holdings, LLC, et al.,
Defendants-Respondents-Appellants.

____

Golenbock Eiseman Assor Bell & Peskoe, LLP, New York (Martin S. Siegel of counsel), for appellant-respondent.

McKool Smith, P.C., New York (Christopher P. Johnson of counsel), for respondents-appellants.

____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 18, 2017, which, to the extent appealed from, granted defendants' motion to dismiss the complaint and denied defendants' and plaintiff's applications for sanctions, unanimously affirmed, with costs.

Plaintiff's claims are precluded under the terms of the broad general release of known and unknown claims in the parties' settlement agreement (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276-277 [2011]), and plaintiff has not sufficiently alleged that he was fraudulently induced to enter into that agreement. In fact, plaintiff assumed the risk of the exact reverse stock split that now forms the basis of his fraud claim, as this particular risk was specifically disclosed in Kadmon Holdings' limited liability agreement, which plaintiff admitted reviewing before entering

into the settlement agreement (*id.* at 278; *Pappas v Tzolis*, 20 NY3d 228, 233 [2012]).

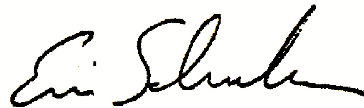
The unjust enrichment claim was also correctly dismissed because the settlement agreement governs the parties' rights and responsibilities (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.,* 70 NY2d 382, 388 [1987]).

The motion court did not abuse its discretion in denying defendants' motion for sanctions.

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

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7680 DLJ Mortgage Capital, Index 36033/15E
Plaintiff-Appellant,

-against-

Hardayal Mahadeo also known as
Hardy Mahadeo,
Defendant-Respondent,

Harryam Mahadeo also known as
Harry Mahadeo, et al.,
Defendants.

____

Peter T. Roach & Associates, P.C., Syosset (Michael C. Manniello of counsel), for appellant.

Hardy Mahadeo, respondent pro se.

____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered December 18, 2017, which denied plaintiff's motion for a default judgment and to appoint a referee to compute the amount due and owing to plaintiff, and granted defendant/borrower, Hardayal Mahadeo a/k/a Hardy Mahadeo's cross motion to dismiss the complaint pursuant to, inter alia, CPLR 3211(a)(1), (2) and (7), with prejudice, unanimously modified, on the law, to deny defendant's cross motion, and otherwise affirmed, without costs.

The court should not have found that plaintiff failed to establish its standing by submission of documentary evidence proving the chain of ownership of the note at issue. Since defendant was moving for dismissal of the complaint, the burden was on him to make a prima facie demonstration that plaintiff

lacked standing. In order to defeat the motion, plaintiff did not need to affirmatively establish its standing, but only to raise a triable issue of fact as to its standing (*Deutsche Bank Natl. Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59-60 [2d Dept 2015]). Defendant did make a prima facie showing of lack of standing by calling into question the validity of the note in plaintiff's possession, as it is not the same as the note in two prior actions commenced by a different plaintiff, both voluntarily discontinued, purportedly seeking to foreclose on the same note.

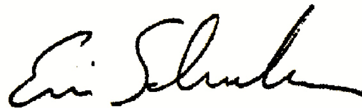
Nevertheless, plaintiff has raised issues of fact as to its standing. "[T]o have standing, it is not necessary to have possession of the mortgage at the time the action is commenced . . . . [T]he note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law" (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). Plaintiff raised a question of fact as to its possession of the note prior to commencement of the action through the affidavit of Anthony D'Addona, who averred that he reviewed the books and records of plaintiff, kept in the ordinary course of business, and that plaintiff was the holder of the note and mortgage. This affidavit was sworn to on September 28, 2015, prior to commencement of this action. "It is well settled that a business entity may admit a business record through a person

without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files" (*DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146, 146 [1st Dept 2003]). The issue of standing cannot be determined on the record before this Court based on the apparently conflicting notes, raising issues of fact as to whether plaintiff is the lawful holder of the subject note. Thus, the matter is remanded for further proceedings (*see US Bank N.A. v Faruque*, 120 AD3d 575, 578 [2d Dept 2014]).

The court should not have dismissed the complaint based on prior actions pending, pursuant to CPLR 3211(a)(4). First, no party sought such relief, and defendant never argued this issue. Moreover, the prior actions were no longer "pending" and the parties were not "the same" (*id.*).

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7681 The People of the State of New York, Ind. 3379/11
Respondent,

-against-

Andre Paul,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered March 6, 2012, unanimously affirmed.

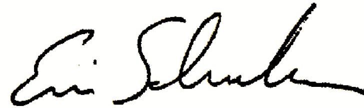
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: NOVEMBER 20, 2018



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DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7682 People of the State of New York, Ind. 1879/10
Respondent,

-against-

Darrell Joe,
Defendant-Appellant.

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

Darrell Joe, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Robert McIver of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered September 22, 2014, convicting defendant, upon his plea of guilty, of conspiracy in the second degree, and sentencing him, as a second felony offender, to a term of 7 to 14 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to withdraw his plea, and in declining to appoint new counsel. "[T]he nature and extent of the fact-finding procedures on such motions rest largely in the discretion of the court" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). Here, the parties' written submissions, the plea minutes and the court's recollection of the plea negotiations were sufficient to determine the motion. The allegedly coercive conduct by defense counsel amounted to nothing more than frank

advice about the consequences of going to trial (*see e.g. People v Fulton*, 125 AD3d 511 [1st Dept 2015], *lv denied* 25 NY3d 1072 [2015]).

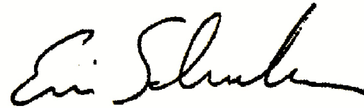
By correcting a factual misstatement by his client, counsel did not take an adverse position on the motion (*see People v Mitchell*, 21 NY3d 964, 967 [2013]). When defendant asserted that his counsel was the law partner of another attorney potentially involved in the case and was thereby conflicted, counsel explained that the partnership had ended years before defendant's case arose. Counsel's explanation, even if inartfully stated, fell far short of taking an adverse position.

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant

received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7683 The People of the State of New York, Ind. 2358/14
Respondent,

-against-

Miguel Moza also known as
Miguel Nozo Tepo,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (William Mogulescu, J.), rendered December 19, 2014, unanimously affirmed.

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

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

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

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

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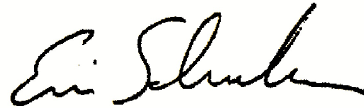

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DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7684 Split Rail Holdings LLC, Index 652417/16
Plaintiff-Respondent,

-against-

176 Grand St. Corp.,
Defendant-Appellant.

Blank Rome LLP, New York (Samuel D. Levy of counsel), for appellant.

Herrick Feinstein LLP, New York (Avery S. Mehlman of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 23, 2018, which granted plaintiff Split Rail Holdings LLC's (Split Rail) motion for summary judgment for specific performance, dismissed Split Rail's cause of action for breach of contract as moot, denied 176 Grand's cross motion for summary judgment on its ninth affirmative defense and its first and second counterclaims, and dismissed the counterclaims, unanimously affirmed, with costs.

Construing the lease according to its plain meaning, and harmonizing the contractual provisions (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 133 [1st Dept 2017]), Article 43.A of the lease, titled "Option to Purchase Fee Ownership of the Landlord," which specifically stated that "the Tenant shall have the option to acquire Landlord's fee interest in the Demised Premises" created

an option to purchase the subject property. Nor was the lease void under the statute of frauds, as the lease was signed by the corporate president, pursuant to the executed consent of all shareholders (*see* General Obligations Law § 5-703).

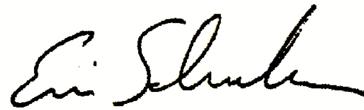
The purchase price was calculated based on ten times the annual rent during the year Split Rail exercised the purchase option, i.e., "Year 15 times ten," equating to a purchase price of $6,355,477.40, as Article 2(a) lists base rent as rent per year. As with any contract, a lease should also be construed in a commercially reasonable manner (*see E-Z Eating 41 Corp. v H.E. Newport L.L.C.*, 84 AD3d 401, 409 [1st Dept 2011]). It would not make economic sense for 176 Grand to delay its opportunity to compel the purchase of the subject property beyond year six, as provided in Article 43.B of the lease, since it would be entitled to a better price at that time. A single provision should not render the lease ambiguous, when other provisions of the lease support a conclusion that the purchase price is based on annual rent (*see Eighth Ave. Coach Corp. v City of New York*, 286 NY 84, 88-89 (1941)].

Contrary to 176 Grand's contention, specific performance is

available on the sale of commercial property (*see Bright Stone Corp. v J&J Assoc. II, LLC*, 161 AD3d 628, 628-629 [1st Dept 2018]) and was appropriate here where, as the trial court noted, Split Rail lost "a bargained-for contractual right to exercise an option to purchase the Property" (*see Matter of Lamberti v Angiolillo*, 73 AD3d 463, 464 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]). For these reasons, the grant of summary judgment in favor of plaintiff, and the denial of summary judgment as to defendant's ninth affirmative defense and counterclaims was correct.

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7685 In re Abass D., and Others,

Children under the Age of
Eighteen Years, etc.,

New York City Administration for
Children's Services,
Petitioner-Appellant,

Mamadou D., et al.,
Respondents-Respondents,

Sitan D.,
Respondent.

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

Michele Cortese, Center for Family Representation, Inc., New York (Claibourne Henry of counsel), for Mamadou D., respondent.

Neighborhood Defender Service of Harlem, New York (Jessica Brierly-Snowden of counsel), for Karidja D., respondent.

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

Order, Family Court, New York County (Patria Frias-Colon, J.), entered on or about May 11, 2018, which expanded respondents' visitation with the subject children to unsupervised day visits on the condition that no other adults are present unless cleared by petitioner, unanimously reversed, on the law, without costs, and the order vacated.

Petitioner's appellate arguments were adequately preserved.

Family Court's determination that respondents should have

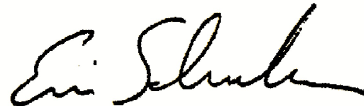
unsupervised visitation with the children lacks a sound and substantial basis in the record, which, to the contrary, shows that unsupervised visitation is not in the children's best interests (*see* Family Court Act § 1030[c]; *Matter of Daniel O. [Jaquan O.]*, 141 AD3d 434 [1st Dept 2016]). Respondents continue to refuse to admit or even to acknowledge the possibility that the children, all of whom tested positive for sexually transmitted diseases (STD), were sexually abused. Even as recently as May 2018, and although they ostensibly had participated in various services and counseling, the parents continued to offer implausible explanations for the children's medical condition. This failure, coupled with the father's argument that his negative STD test results exonerate him from any culpability for the children's condition, compels the conclusion that the parents will not acknowledge their role in the children's contracting STDs and thus that they continue to pose a risk to the children (*see Matter of Joseph P. [Cindy H.]*, 112 AD3d 553 [1st Dept 2013]). While the father may have been out of the country, as he asserts, when his daughter Djeneba tested positive, there is no evidence in the record of the date on which she, or any of her siblings, contracted the STD. Nor is it possible on this record to determine whether the father was treated for STDs before testing negative.

In November 2017, Family Court (Ta-Tanisha James, J.) denied

the parents' application pursuant to Family Court Act § 1028 to have the children returned to their care. Since then there has been no change in the circumstances upon which the denial of that application was based. The court (Frias-Colon, J.) issued the instant order without benefit of a full fact-finding hearing, apparently to avoid delay and stagnation in the proceeding. This justification is inadequate. The permanency reports and treatment updates before the court reiterated the parents' ongoing inability to acknowledge that their children had been sexually abused and did not advocate unsupervised visitation. In view of the gravity of the allegations and the parents' attitude toward, and role in, the events at issue, we find that the court abused its discretion in ordering unsupervised visitation on the record before it.

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7686 The People of the State of New York, Ind. 501/14
Respondent,

-against-

Bobby Johnson,
Defendant-Appellant.

____

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

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

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert E. Torres, J.), rendered June 16, 2015,

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

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

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

ENTERED: NOVEMBER 20, 2018

____
DEPUTY CLERK

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

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7687 In re John A. Healy, et al., Index 160850/17
Petitioners-Appellants,

-against-

The Carriage House Condominium,
et al.,
Respondents-Respondents.

____

Healy LLC, New York (Valeria Calafiore Healy of counsel), for appellants.

Braverman Greenspun P.C., New York (Maria Boboris of counsel), for respondents.

____

Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered May 29, 2018, which granted the petition brought pursuant to CPLR article 78 to direct respondents to produce certain of the condominium's books and records, enjoin them from paying certain subpoena-related legal expenses, and direct them to recoup any such expenditures already made, only to the extent of directing respondents to produce documents described in items (a)-(f) of the petition, unanimously modified, on the law and the facts, to direct respondents to produce the documents sought in items (g), (h), (i), and (j), and otherwise affirmed, without costs.

As a threshold matter, petitioners' contention that the Board was not validly elected, and therefore had no jurisdiction to act on behalf of the Condominium, is unpreserved (*see Recovery*

Consultants v Shih-Hsieh, 141 AD2d 272, 276 [1st Dept 1988]).

Respondents expressly do not object to producing the documents requested in items (h) and (i) in the petition. Thus, the disputed items are (g) and (j).

In item (j), petitioners seek "all correspondence with . . . NY Urban [or its principal] from 2011 to the present." This body of correspondence is relevant and necessary to petitioners' investigation into NY Urban's dealings with respondents, and therefore is a proper subject of the common-law right of inspection (*see Pomerance v McGrath*, 143 AD3d 443, 444 [1st Dept 2016]; *Matter of Tatko v Tatko Bros. Slate Co.*, 173 AD2d 917, 919 [3d Dept 1991]).

In item (g), petitioners seek "[a]ll documents and records relating to the Condominium's settlement agreement with the Condominium sponsor." We agree with petitioners that understanding how the Condominium reached the settlement agreement is a valid purpose. Indeed, respondents concede that petitioners are entitled to receive a copy of the final settlement agreement itself. The documents specified in item (g) following the word "including" are also reasonably relevant and necessary to the stated purpose of exploring the settlement process. We reject respondents' conclusory assertion that some unknown number of documents are protected by the attorney-client privilege or work product doctrine.

In paying the subpoenaed parties' legal expenses, respondents were acting within the scope of their authority and in furtherance of the legitimate purpose of resisting litigation disclosure of Condominium documents, and there is no evidence that they were acting in bad faith (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 155 [2003]). The Condominium's bylaws empowered the Board to pay subpoena-related legal expenses on behalf of certain past and present Board members, and the Condominium was contractually obligated to pay such expenses for its managing agent. The fact that one of the past Board members may have been unqualified to serve (because he was not a unit owner) does not negate the Board's authority to pay his legal expenses, as there is no evidence that his service on the Board was the product of bad faith, rather than oversight. Petitioners' argument based on the conflict of interest inherent in the fact that the subpoenaed parties who were on the Board at the time voted to pay for their own legal fees is unpreserved.

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

ENTERED: NOVEMBER 20, 2018

DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7688N Angelena Lucheux, Index 160641/13
Plaintiff-Appellant,

Benjamin Lucheux,
Plaintiff,

-against-

William Macklowe Company LLC,
et al.,
Defendants,

Elite Terrazzo Flooring, Inc.,
Defendant-Respondent.

Peter H. Paretsky, Attorney at Law, PLLC, New York, (Peter H. Paretsky of counsel), for appellant.

Correia, King, Fodera, McGinnis & Liferiedge, New York (Jose M. Gomez of counsel), for respondent.

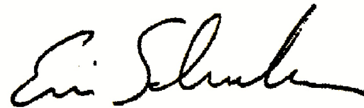
Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered May 16, 2017, which, to the extent appealed from, denied plaintiff's motion for sanctions against defendant Elite Terrazzo Flooring, Inc. (Elite), unanimously affirmed, without costs.

In this slip and fall action, defendant Elite cross-moved for summary judgment on the ground that other defendants, who cleaned up the lobby floor after Elite's workers left, were an intervening cause that broke the causal connection between Elite's work on the lobby floor and the dusty condition on which plaintiff later slipped. Elite refused plaintiff's request that it withdraw the motion as frivolous. The motion court

providently exercised its discretion in determining that Elite’s cross motion, however unpersuasive on the merits, was not frivolous, and did not warrant the imposition of sanctions (*see Hunts Point Term. Produce Coop. Assn, Inc. v New York City Economic. Dev. Corp.*, 54 AD3d 296, 296 [1st Dept 2008]; *Venom Corp. v 155 Wooster St. Inc.*, 33 AD3d 67, 70 [1st Dept 2006]; 22 NYCRR 130-1.1[c]).

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

ENTERED: NOVEMBER 20, 2018



DEPUTY CLERK