SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 5, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8162-
8163 Index 653859/15

Citibank, N.A.,
Plaintiff-Respondent,

-against-

Soccer for a Cause, LLC, et al.,
Defendants-Appellants,

Gordon V. Hartman,
Defendant.

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Law Office of Marisa Rauchway Sverdlov LLC, New York (Marisa Rauchway Sverdlov of counsel), for appellants.

Greenberg Traurig, LLP, New York (Michael P. Manning of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered February 5, 2018, awarding plaintiff the principal sum of $1,415,000, comprising a "success fee" of $1,400,000 and expenses in the amount of $15,000, and bringing up for review an order, same court and Justice, entered October 23, 2017, which granted plaintiff's motion for summary judgment and denied defendants' motion for summary judgment, unanimously modified, on the law, to vacate the success fee award

of $1,400,000, deny plaintiff's motion with respect to all of its causes of action other than its contractual claim for reimbursement of $15,000 of out-of-pocket expenses, and grant defendants' motion to the extent of dismissing all of plaintiff's causes of action other than the contractual claim for reimbursement of out-of-pocket expenses, and otherwise affirmed, without costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The parties entered into an agreement, dated December 8, 2014 (the first agreement), under which defendants retained plaintiff to help them find a purchaser and consummate the sale of certain assets (principally comprising a sports stadium) in San Antonio, Texas. The first agreement provided that plaintiff would be entitled to the fee "upon the consummation of a transaction" with a purchaser "introduced" to defendants by plaintiff. It provided that plaintiff would be entitled to a success fee if a "Transaction with a Recognized CPB Referral is consummated within six (6) months after" the expiration of the term. "Recognized CPB Referral" was defined as "any party introduced to [defendants] by [plaintiff] during the Term and who is later identified by [plaintiff] in writing within ten (10) days after the Term." The first agreement further provided that,

in the event a transaction were consummated "with a party other than a CPB Referral," plaintiff would be entitled to an "assistance fee" in the amount of $250,000. The term of the first agreement commenced December 8, 2014, and ended June 8, 2015.

The assets were not sold by the expiration of the first agreement. However, the parties entered into a second agreement, dated August 6, 2015 (the second agreement), which provided that plaintiff would "begin providing services" on August 3, 2015, and that the second agreement would remain in effect until January 31, 2016. Under the second agreement, plaintiff would be entitled to a $1,400,000 success fee upon the consummation of a transaction with a CPB Referral, which was defined as "any party introduced to [defendants] by [plaintiff] during the Term who consummates a Transaction and either is identified in (i) a Confidentiality Agreement executed by [defendants] during the Term or (ii) other written document executed by [defendants] specifically identifying a party as a CPB Referral." Unlike the first agreement, however, the second agreement contained no provision entitling plaintiff to an "assistance fee" in the event of the consummation of a transaction with a party other than a CPB Referral.

Ultimately, defendants sold the assets to an entity created

by the City of San Antonio and Bexar County (together, the local government), with which Spurs Sports and Entertainment (the Spurs) entered into a lease for the use of the purchased assets. The record establishes that defendants, before they retained plaintiff in December 2014, had begun discussing a possible deal for the disposition of the stadium with the local government and the Spurs.

This action ensued after defendants rejected plaintiff's demands for payment of a success fee. On the parties' opposing motions for summary judgment, the court granted plaintiff judgment on its claim for a $1,400,000 success fee under the second agreement and on its claim under the first agreement for reimbursement of $15,000 in out-of-pocket expenses. On defendants' appeal, we hold that, under the terms of the second agreement, plaintiff is not entitled to a success fee because it is undisputed that the local government and the Spurs were not "introduced" to defendants by plaintiff with respect to this transaction.

Under the second agreement, plaintiff was entitled to a success fee only if a transaction were consummated with a party that it "introduced" to defendants during the term of that agreement. Since, as previously noted, it is undisputed that defendants had already discussed a possible deal involving the

stadium with the Spurs and the local government before plaintiff was retained, plaintiff is not, as a matter of law, entitled to a fee under the second agreement. As to plaintiff's claim to a success fee under the first agreement, the motion court correctly determined that this claim was not viable, given that the first agreement had expired by its terms, no transaction was consummated within six months after its expiration, and the second agreement expressly provides that it "supersedes any prior understandings or agreements" concerning the same subject matter. Contrary to plaintiff's argument, the two agreements cannot be construed as a single continuing or extended agreement, because they do not reference each other, they cover different time periods, and they have different terms (*see Nau v Vulcan Rail & Constr. Co.*, 286 NY 188, 197 [1941]).

Plaintiff's unjust enrichment claim also fails because the relationship between the parties here was defined by a written contract, fully detailing all applicable terms and conditions, and thus plaintiff may not seek recovery on an alleged quasi-contractual theory (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

Plaintiff's motion for summary judgment on its claim under the first agreement for reimbursement of $15,000 in expenses was properly supported by documentary evidence attached as an exhibit

to counsel's affirmation (*see Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324, 325 [1st Dept 2004]).

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

ENTERED: FEBRUARY 5, 2019

CLERK

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

8221 Diana Pezzello, Index 160023/14
Plaintiff-Appellant,

-against-

Pierre Congress Apartments, LLC,
Defendant-Respondent,

Urban Associates, LLC,
Defendant.

_____

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

Greater New York Insurance Company Office of General Counsel, New York (Michael Fleming of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 16, 2017, which granted defendant Pierre Congress Apartments, LLC's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie that the condition of the steps on which plaintiff allegedly slipped and fell, a gradual and shallow depression of the surface toward the center of each step resulting from normal wear and tear, was a trivial and therefore nonactionable defect (*see Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Cintron v New York City Tr. Auth.*, 77 AD3d 410, 411-412 [1st Dept 2010]; *Santiago v United Artists Communications*, 263 AD2d 407 [1st Dept 1999]). In opposition,

plaintiff failed to raise an issue of fact as to the trivial nature of defeat. Plaintiff concedes that the handrails do not violate any code provisions, relying instead on a claim of common-law negligence that the stairs were hazardous. Although on this appeal defendant does not contest whether the condition was hazardous, it contends that plaintiff failed to establish causation. Plaintiff's testimony that she was holding the right side handrail at the moment of her fall, while stepping down from the fourth to the third step demonstrates that the absence of a handrail did not proximately cause her accident (see *Luna v CEC Entertainment, Inc.*, 159 AD3d 445 [1st Dept 2018]). At no time did she testify that she tried to reach for a handrail to break her fall and that there was none (*compare Gold v 35 East Assoc. LLC*, 136 AD3d 453 [1st Dept 2016]). Plaintiff's testimony that she told a triage nurse that "there was nothing for me to grab onto" does not create any issue of fact, especially in view of her factually irreconcilable direct testimony about the mechanics of the fall.

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8309 The People of the State of New York, Respondent, Ind. 986/12

-against-

Nino Lee, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Kirkland & Ellis LLP, New York (Daniel Herz-Roiphe of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (James M. Kindler, J.), rendered August 1, 2014, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of 5½ years, unanimously affirmed.

At a *Rodriguez* hearing (*see People v Rodriguez*, 79 NY2d 445 [1992]), a detective's testimony established that a witness was sufficiently familiar with defendant so that his identification of defendant was confirmatory. The People were not obligated to call the identifying witness (*see e.g. People v Espinal*, 262 AD2d 245 [1st Dept 1999], *lv denied* 93 NY2d 1017 [1999]), because the detective gave detailed testimony about the witness's relationship with defendant. The witness knew defendant, a frequent customer in the witness's store, by his first name, and

saw him several times a week over a period of three years.

Defendant's request that the witness testify at the *Rodriguez* hearing was insufficient to preserve his present claim that such testimony was constitutionally required under the Confrontation Clause, and we decline to review it in the interest of justice. As an alternative holding, we reject this claim on the merits, in light of the fundamental difference between a suppression hearing, where hearsay is generally admissible, and a trial (*see People v Terry*, 224 AD2d 202, 203 [1st Dept 1996], *lv denied* 88 NY2d 943 [1996]; *see also People v Mitchell*, 124 AD3d 912, 914 [2d Dept 2015]; *People v Brink*, 31 AD3d 1139, 1140 [4th Dept 2006], *lv denied* 7 NY3d 865 [2006]).

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

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8310 Rudranauth O. Toolasprashad, Index 152315/16
Plaintiff-Appellant,

-against-

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

_____

Thomas Torto, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered June 1, 2017, dismissing the complaint, pursuant to an order, same court and Justice, entered on or about May 3, 2017, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff, a former police officer, brings this plenary action to challenge the vesting date of his right to receive Police Pension Fund payments. The gravamen of plaintiff's claims is a review of the Police Pension Fund's administrative determination of his vesting date, which must be asserted in a CPLR article 78 proceeding (*see Hughey v Metropolitan Transp. Auth.*, 159 AD3d 596, 597 [1st Dept 2018]; *Purcell v City of New York*, 110 AD3d 535 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]). Because plaintiff did not assert his claims within the

four-month statute of limitations applicable to article 78 claims, they are time-barred (CPLR 217[1]).

In any event, the record shows that he failed to state a claim for breach of contract as the complaint does not make mention of a contract. Furthermore, even if plaintiff stated a claim for a declaratory judgment that his right to receive pension payments vested in or about June 2011, based particularly on the prior holding of this Court that the 30-day vesting period "began running anew following the Court of Appeals' denial of leave to appeal" in that action (*Matter of Toolasprashad v Kelly*, 110 AD3d 509, 510 [1st Dept 2013], *lv denied* 23 NY3d 902 [2014]), such declaration as to the vesting date of plaintiff's right to receive pension payments would not bear on the calculation of his pension payment (*see* Administrative Code of City of NY §§ 13-256 and 13-218).

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8311 Alex Rodriguez, Index 112644/09
Plaintiff-Respondent,

-against-

Larry Kaimun Sit,
Defendant-Appellant,

"John Doe,"
Defendant.

_____

Thomas Torto, New York, for appellant.

H. Bruce Fischer, P.C., Tappan (Zaheer A. Merchant of counsel), for respondent.

_____

Order, Supreme Court, New York County (Adam Silvera, J.), entered May 18, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established entitlement to judgment as a matter of law by submitting evidence showing that he was not involved in the subject motor vehicle accident. Defendant testified that on the day of the accident he was at home in Queens, his wife was at work, his car was in his garage, and that neither he, nor his wife, had ever been in the vicinity of the accident (*see Woods v Craig*, 41 AD3d 1260 [3d Dept 2007]; *see also* citing *Peele v Manhattan & Bronx Surface Tr. Operating Auth.*, 160 AD2d 602 [1st

Dept 1990]).

In opposition, plaintiff failed to raise a triable issue of fact. Such opposition, which consisted only of a police accident report listing a vehicle plate number, purportedly offered by an anonymous witness, was uncorroborated hearsay evidence, insufficient to rebut defendant's entitlement to summary judgment (*see Narvaez v NYRAC*, 290 AD2d 400 [1st Dept 2002]; *Matter of Allstate Ins. Co. v Stricklin*, 93 AD3d 717, 718-719 [2d Dept 2012]).

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8312 The People of the State of New York, Ind. 3526N/16
Respondent,

-against-

Darryl Lumpkin,
Defendant-Appellant.

Justine M. Luongo, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Katherine Kulkarni 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 (Neil Ross, J.), rendered March 26, 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: FEBRUARY 5, 2019

CLERK

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

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8313 The People of the State of New York, Respondent, Ind. 3041/15

-against-

Joshua Sanchez, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered June 15, 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: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, JJ.

8314 Bennett Sprecher, Index 158846/14
Plaintiff-Respondent-Appellant,

-against-

Marc Thibodeau,
Defendant-Appellant-Respondent.

_____

Nesenoff & Miltenberg LLP, New York (Philip A. Byler of counsel), for appellant-respondent.

Schlam Stone & Dolan LLP, New York (Erik S. Groothuis of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered September 10, 2018, which denied in part and granted in part defendant's motion for summary judgment dismissing plaintiff's cause of action for tortious interference with prospective business relations, unanimously affirmed, without costs.

There is no basis for re-examination of this Court's prior decision expressly sustaining plaintiff's tortious interference with business relations claim relating to defendant's interference with plaintiff's relationships with parties who would otherwise have been willing to work with him on theater projects causing damages to himself and his career (148 AD3d 654, 656 [1st Dept 2017]). Nevertheless, contrary to plaintiff's argument, the motion court properly dismissed so much of

plaintiff's tortious interference claim relating to defendant's interference with the relationship between corporate entities indirectly owned by plaintiff and a key investor, which was consistent with this Court's prior decision in the related action, *Rebecca Broadway L.P. v Hotton* (143 AD2d 71 [1st Dept 2016]).

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

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8315 In re George Sinopidis, Index 152427/17
Petitioner-Appellant,

-against-

Port Authority of New York
and New Jersey,
Respondent-Respondent.

_____

Advocates For Justice, Chartered Attorney, New York (Richard Soto of counsel), for appellant.

Port Authority of New York & New Jersey, New York (Cheryl N. Alterman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Erika M. Edwards, J.), entered July 12, 2017, denying the petition to direct respondent to promote petitioner from Police Sergeant to Police Lieutenant, effective March 18, 2016, to award him back pay and benefits, or, in the alternative, to order respondent to reconvene petitioner's interview on a pass-fail basis, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to demonstrate that respondent lacked the discretion to formulate and implement the promotional procedures used here, and failed to show that on their face the procedures were unlawful or arbitrary and capricious (*see Matter of Ruskin v Ward*, 167 AD2d 161 [1st Dept 1990]). Nor has petitioner raised

an issue as to whether the failing grade he received based on his performance at a Qualifications Review Meeting (QRM) was arbitrary and capricious. Respondents, such as Port Authority, have "broad discretion to select individuals for civil service appointment and promotion" and this Court shall "not interfere with the exercise of that discretion unless there is evidence of arbitrary or unlawful conduct by the appointing officer" (167 AD2d 161). Petitioner's argument that he was "essentially informed" by his superior officers that he had performed well on the QRM does not raise an issue as to the propriety of the failing grade he actually received.

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8316 In re Astoria General Contracting Corp., et al., Petitioners, Index 118/17

-against-

Scott Stringer, etc., et al., Respondents.

_____

Giaimo Associates, LLP, Manhasset (Joseph O. Giaimo of counsel), for petitioners.

Zachary W. Carter, Corporation Counsel, New York (Scott Glotzer of counsel), for respondents.

_____

Determination of respondents, dated August 9, 2017, which, on remand from this Court's order entered in a prior proceeding, modified respondents' prior determination, dated September 2, 2015, insofar as recalculating the amount of unpaid wages owed to three employees, interest, and penalty, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

Substantial evidence supports respondents' recalculation of the wages owed to three employees on remand from this Court's order in a prior original article 78 proceeding (*Matter of Astoria Gen. Contr. Corp. v Stringer*, 144 AD3d 603 [1st Dept 2016]). Petitioners are collaterally estopped by this Court's prior order, which held that substantial evidence supported the

findings that petitioners falsified payroll records and willfully failed to pay prevailing wages to the three employees (*see id.* at 603), from challenging those findings in the instant proceeding (*see generally Ryan v New York Tel. Co.*, 62 NY2d 494, 499-500 [1984]).

The five-year bar on petitioners' participation in any New York public work contract bidding was mandated by Labor Law § 220-b(3)(b)(1). The penalties are otherwise not shockingly disproportionate to the offenses (*see Matter of Gelco Bldrs. v Holtzman*, 168 AD2d 232, 233 [1st Dept 1990], *lv denied* 77 NY2d 810 [1991]).

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8317 In re Ivan R.,
Petitioner-Respondent,

-against-

Jabrienna R.,
Respondent-Appellant.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

_____

Order, Family Court, Bronx County (Annette Louise Guarino, Referee), entered on or about April 18, 2018, which denied respondent mother's motion to vacate an order granting petitioner father a final order of custody of the subject children upon the mother's default, unanimously reversed, on the law, without costs, and the matter remanded for further proceedings as to a determination of the children's best interests and a reappointment of counsel for the children.

The custody order should have been vacated on the ground that the mother demonstrated a reasonable excuse for her default in failing to appear and a meritorious defense (*see* CPLR 5015[a]).

The matter should be remanded for further proceedings as to a determination of the children's best interests, particularly in

light of the fact that the children did not have the benefit of representation of their court-appointed counsel (*see e.g. Matter of K.G. v C.H.*, 163 AD3d 67 [1st Dept 2018]).

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8318 309 Bakery Corp., Index 159659/14
Plaintiff-Respondent,

-against-

Associated Mutual Insurance Cooperative,
Defendant-Appellant.

_____

Farber Brocks & Zane L.L.P., Garden City (James M. O'Hara of counsel), for appellant.

The Law Office of Craig A. Blumberg, New York (Craig A. Blumberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered July 17, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

In this insurance coverage action, defendant insurer sought summary judgment declaring that it has no obligation to reimburse plaintiff insured for rent payments made after the fire. Defendant argued that, under plaintiff's lease, plaintiff was not required to pay rent while the demised premises were wholly unusable or totally damaged and that testimony from plaintiff's president established that plaintiff was unable to use the premises for five months. We find that the motion court correctly determined that an issue of fact existed as to whether

the demised premises were totally damaged, or rendered wholly unusable, by the fire, and therefore whether defendant is obligated under the terms of the policy to reimburse plaintiff.

We decline to reach defendant's arguments, raised for the first time on appeal, that any obligation to reimburse plaintiff for rent is limited to three months or $226,500.

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8319 The People of the State of New York, Ind. 821/15
Respondent,

-against-

Hugo Rodriguez,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (David Billingsley of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Karen Schlossberg 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 (Robert M. Stolz, J.), rendered August 5, 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: FEBRUARY 5, 2019

CLERK

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

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8320 Daniel Bernstein, Index 850081/17
Plaintiff-Respondent,

-against-

Luiza Dubrovsky,
Defendant-Appellant,

The New York State Department
of Taxation and Finance, et al.,
Defendants.

_____

Woods Lonergan PLLC, New York (Annie E. Causey of counsel), for appellant.

Oved & Oved LLP, New York (Edwards C. Wipper of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith N. McMahon, J.), entered April 30, 2018, which, inter alia, granted plaintiff's motion for summary judgment dismissing defendant's affirmative defenses, and referring the matter to a referee to compute amounts due, unanimously affirmed, with costs.

Plaintiff met his prima facie burden in this foreclosure action by producing the mortgage documents and evidence of defendant's default, shifting the burden to defendant to raise a triable issue of fact regarding her affirmative defenses to foreclosure (*Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Her affirmative defenses, however, are precluded by a forbearance agreement in which defendant waived

any affirmative defenses in exchange for, inter alia, an extension of time to repay the loan (*see id.*; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]). Moreover, Supreme Court correctly refused to deny the motion as premature pursuant to CPLR 3212(f); because the affirmative defenses are precluded, no discovery could lead to facts that would warrant the denial of plaintiff's summary judgment motion.

Defendant was not entitled to a residential foreclosure settlement conference pursuant to CPLR 3408 because the loan secured by the mortgage was not primarily for personal, family, or household purposes (CPLR 3408; RPAPL 1304[6][a][1]; *Independence Bank v Valentine*, 113 AD3d 62, 66-67 [2d Dept 2013]).

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8321 Dynamic-Hakim, LLC, et al., Index 651765/17
Plaintiffs-Respondents,

JBLTZ Holdings, LLC, etc.,
Plaintiff,

-against-

Kevin Maloney, et al.,
Defendants-Appellants,

Franklin R. Kaiman, et al.,
Defendants,

QPP Venture LLC, et al.,
Nominal Defendants.

_____

Pryor Cashman LLP, New York (Ilene S. Farkas of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 31, 2018, which, to the extent appealed from, denied defendants' motion to dismiss the cause of action for fraud in the inducement, unanimously modified, on the law, to grant the motion as to defendant KM QPP Equity, LLC, and otherwise affirmed, with costs.

The complaint alleges that defendant Kevin Maloney induced plaintiffs to turn over to him and defendant Property Markets Group, Inc. for full financing, development and construction a

real estate project that plaintiffs Dynamic-Hakim, LLC and Brad Zackson had conceived of, created, and "made [] a reality," by misrepresenting to them that his and Property Markets Group's experience gave them the wherewithal to complete the project. Contrary to defendants' contention, the alleged misrepresentation is a misrepresentation of a material present fact, and is therefore sufficient to state a cause of action for fraud in the inducement against Maloney and Property Markets Group (*see White v Davidson*, 150 AD3d 610 [1st Dept 2017]). However, there are no facts alleged that would establish that this misrepresentation should be imputed to defendant KM QPP Equity, LLC. Although the complaint alleges that Maloney dominated defendant KM QPP Equity and controlled the project through KM QPP Equity as the managing member of one of the joint venture partners, it does not allege that defendant KM QPP Equity made any representations to plaintiffs to induce their participation in the project.

Contrary to defendants' further contention, the complaint also adequately pleads justifiable reliance by alleging that the facts underlying the fraud were peculiarly within Maloney and Property Markets Group's knowledge (*see China Dev. Indus. Bank v Morgan Stanley & Co. Inc.*, 86 AD3d 435 [1st Dept 2011]).

The fraud cause of action is not duplicative of the breach of contract cause of action, because it alleges that the

misrepresentation was made before the drafting of the contracts, to which plaintiffs are in any event not party, and thus is collateral to the promises to perform contained in the contracts (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986]).

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: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8322 The People of the State of New York, Ind. 3847/13
Respondent,

-against-

Harry Adams,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William I. Mogulescu, J.), rendered January 12, 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: FEBRUARY 5, 2019

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

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8323-
8324 Index 652183/13

Theodore F. Schroeder, et al.,
Plaintiffs-Appellants,

-against-

Brian S. Cohen, et al.,
Defendants-Respondents.

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Montgomery McCracken Walker & Rhoads, LLP, New York (Charles Palella of counsel), for appellants.

Jenner & Block LLP, New York (Brian J. Fischer of counsel), for respondents.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 20, 2017, which dismissed the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered November 27, 2017, which granted defendants' motions for summary judgment dismissing the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs allege that defendant Brian S. Cohen and, vicariously, defendant New York Angels, Inc. (NYA), stole their confidential design concepts and ideas and conveyed them to the nonparty creators of the website Pinterest.com. On this appeal, plaintiffs contend that their claims for misappropriation of trade secrets, ideas, and skills and expenditures, and for breach

of fiduciary duty, were improperly dismissed.

Plaintiffs' misappropriation of trade secrets and ideas claims were properly dismissed because plaintiffs failed to describe the allegedly misappropriated ideas with sufficient specificity (*see Schroeder v Pinterest Inc.*, 133 AD3d 12, 29-30 [1st Dept 2015]; *Heyman v AR. Winarick, Inc.*, 325 F2d 584, 590 [2d Cir 1963]; *Big Vision Private, Ltd. v E.I. Dupont De Nemours & Co.*, 1 F Supp 3d 224, 257-259 [SD NY 2014], *affd on other grounds* 610 Fed Appx 69 [2d Cir 2015]). It is difficult to identify the precise nature of plaintiffs' claims because their descriptions of what was misappropriated have shifted throughout the litigation (*see Big Vision*, 1 F Supp 3d at 262-263). Plaintiffs' ideas amount to nothing more than a collection of broad concepts, and there is very little information in the record about how those concepts were actually employed in practice (*see id.* at 265-266), nor is it clear that they were ever even used in combination in a single website.

Plaintiffs' misappropriation of trade secrets and ideas claims were additionally properly dismissed because plaintiffs' ideas were not sufficiently novel to merit protection (*see Schroeder*, 133 AD3d at 28-30; *Paul v Haley*, 183 AD2d 44, 52-53 [2d Dept 1992], *lv denied* 81 NY2d 707 [1993]). Plaintiffs do not dispute that each of their individual ideas was not new, but

contend that what was novel was their use of these ideas in combination. However, it is not clear that the ideas were ever actually combined in a single website. Even if they were, "a combination of pre-existing elements is not considered 'novel'" (*Brandwynne v Combe Intl., Ltd.*, 74 F Supp 2d 364, 376 [SD NY 1999]; *see also Paul*, 183 AD2d at 53).

In addition, plaintiffs' misappropriation and fiduciary duty claims were properly dismissed because plaintiffs' ideas were not confidential (*see Schroeder*, 133 AD3d at 22-23, 29-30).

It is undisputed that versions 1 and 2 of plaintiffs' Rendezvoo website were publicly available online. Although plaintiffs claim that there were additional features in version 2 and in their Skoopwire website that were never publicly launched, there is insufficient evidence in the record regarding what the nonpublic versions of plaintiffs' websites looked like and how they differed from the public versions.

Even if this were not the case, it is clear that plaintiffs shared the allegedly nonpublic aspects of their websites with third parties - including web designers, potential investors, public relations firms, and focus groups - without requiring them to sign confidentiality agreements or to affirm that they were not working on competing websites. Plaintiffs' uncorroborated claims that the third parties were subject to amorphous

confidentiality "understandings" are unavailing, as plaintiffs' own subjective, self-serving understandings do not create third-party obligations and it is not clear what, if anything, was communicated to the third parties with respect to confidentiality.

Plaintiffs' claims were also properly dismissed because there is no evidence in the record that Cohen actually conveyed their ideas to Pinterest. Although plaintiffs attempt to characterize Cohen's role in the development of Pinterest very broadly, they have offered no evidence that he was involved in product development in any way, or in anything other than marketing and communications, and indeed Pinterest's creators' express denial that he was, went unchallenged. When read in context, it is clear that Cohen's suggestion that Pinterest's creators use the word "curation" to describe their product was merely a suggestion about word choice, not about how the product should be designed. Plaintiffs' allegations of misappropriation are further undercut by the physical dissimilarity between their websites and Pinterest.

Because all claims against Cohen are dismissed, we need not reach the issue of NYA's vicarious liability for his actions. We have considered the remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8325N G & Y Maintenance Corp., Index 162458/14
Plaintiff-Appellant,

-against-

GLSC 48 Special, LLC,
Defendant-Respondent,

Core Continental Construction LLC,
Defendant.

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Jerry Geza Toth, Flushing, for appellant.

Kaufman Dolowich Voluck, LLP, Woodbury (Adam M. Marshall of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about July 13, 2017, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint, denied plaintiff's motion to amend the notice of lien, and discharged plaintiff's liens, unanimously affirmed, without costs.

The court properly determined that plaintiff had failed to substantially comply with Lien Law § 9. Although each of the defects in plaintiff's September 2014 lien, standing alone, could have been amended (*see* Lien Law § 12-a), here, where there are no fewer than four defects, it cannot be said that plaintiff substantially complied with the Lien Law (*see Matter of Diamond Architecturals v EFCO Corp.*, 179 AD2d 420 [1st Dept 1992], *appeal*

dismissed 80 NY2d 919 [1992]; *Empire Pile Driving Corp. v Hylan Sanitary Serv.*, 32 AD2d 563 [2d Dept 1969]).

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: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8326N Craig Crovato, Index 304191/10
Plaintiff-Respondent, 83792/11
83835/12

-against-

H&M Hennes & Mauritz, L.P., et al.,
Defendants-Appellants,

Diversified Construction Corp., also known as Grandview Contracting Corp., et al.,
Defendants.

- - - - -

[And Third-Party Actions]

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Carol R. Finocchio, New York, for appellants.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (David M. Schwarz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about May 1, 2018, which, after a residency hearing, denied defendants' motion to change venue from Bronx County to Westchester County and granted plaintiff's cross motion to retain venue in Bronx County, unanimously reversed, on the law and the facts, without costs, the motion granted and the cross motion denied.

Defendants established that the county designated by plaintiff was improper by submitting, inter alia, plaintiff's Department of Motor Vehicle records, hospital records, tax returns for 2007 through 2011, the accident report, plaintiff's

2009 employment records and his 2009 W-4 and W-2 forms, all of which indicated that he resided in Westchester County at the time he commenced the action (*see Gruenwald v Polatseck*, 114 AD3d 904 [2d Dept 2014]). Plaintiff failed to rebut defendants' showing that he was not residing in Bronx County with any degree of permanency at the time of the commencement of the action (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 115-116 [1st Dept 2016]; *Carobert v Baldor Elec. Co.*, 102 AD3d 905, 906 [2d Dept 2013]).

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

ENTERED: FEBRUARY 5, 2019

CLERK

Friedman, J.P., Mazzarelli, Webber, Kern, Oing, JJ.

8327N In re U.S. Specialty Insurance Company,
Petitioner-Respondent,

-against-

C. Lee Navarro,
Respondent-Appellant.

Index 260970/15

Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellant.

Sokoloff Stern, LLP, Carle Place (Kiera J. Meehan of counsel), for respondent.

Order (denominated Decision/Order and Judgment), Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about October 10, 2017, which granted the petition to stay an arbitration between petitioner and respondent, unanimously affirmed, without costs.

Petitioner commenced this proceeding pursuant to CPLR article 75, seeking a permanent stay of an arbitration between petitioner and respondent involving respondent's claim for supplementary uninsured/underinsured motorist (hereinafter SUM) benefits under a policy issued by petitioner. Respondent does not challenge the court's determination that a police vehicle does not fall within the scope of SUM coverage under petitioner's policy (*see Matter of State Farm Mut. Auto. Ins. Co. v*

Fitzgerald, 25 NY3d 799, 801 [2015]). Instead, respondent contends that petitioner is estopped from denying coverage because, among other things, petitioner did not deny or disclaim coverage until approximately four years after it first received notice of the claim.

The court properly determined that equitable estoppel may not be invoked to create coverage in this case, since respondent was not insured under the policy in the first instance (*see Matter of Progressive Ins. Co. v Dillon*, 68 AD3d 448, 448 [1st Dept 2009]; *Wausau Ins. Cos. v Feldman*, 213 AD2d 179, 180 [1st Dept 1995]; *Matter of U.S. Specialty Ins. Co. [Denardo]*, 151 AD3d 1520, 1523-1524 [3d Dept 2017], *lv denied* 30 NY3d 904 [2017]; *Ward v County of Allegany*, 34 AD3d 1288, 1290 [4th Dept 2006]). Moreover, petitioner's denial or disclaimer of coverage was not untimely, since a disclaimer is unnecessary where, as here, the claim falls outside of the coverage terms rather than being subject to a policy exclusion (*see Zappone v Home Ins. Co.*, 55 NY2d 131, 134 [1982]; *Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-649 [2001]; *Denardo*, 151 AD3d at 1524). Since the denial of coverage is based on noncoverage rather than an exclusion or defense, the denial was not untimely.

Finally, petitioner's minimal involvement in the arbitration process following service of the demand for arbitration was

insufficient to constitute a waiver of its right to seek a judicial determination of the arbitrability of the SUM coverage dispute (*see Matter of Arc Elec. & Mech. Contrs. Corp. v Invensys Bldg. Sys.*, 2 AD3d 314, 317 [1st Dept 2003]; *Cybex Intl. v Fuqua Enters.*, 246 AD2d 316, 317 [1st Dept 1998]; *Matter of County of Broome {Truesdell]*, 122 AD2d 314, 315 [3d Dept 1986]).

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

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

ENTERED: FEBRUARY 5, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Judith J. Gische
Peter Tom
Cynthia S. Kern
Anil C. Singh, JJ.

6695
Index 654655/16

_____x

Epiphany Community Nursery School,
Plaintiff-Appellant,

-against-

Hugh W. Levey, et al.,
Defendants-Respondents.
_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Shirley W. Kornreich, J.), entered August 7, 2017, which granted defendants' motions to dismiss the complaint as against them pursuant to CPLR 3211(a)(5).

Loeb & Loeb, LLP, New York (John A. Piskora, Jason R. Lilien and Helen Gavaris of counsel), for appellant.

Harter Secrest & Emery LLP, Rochester (Peter H. Abdella, Samantha A. Maurer, Brian M. Feldman and Lauren R. Mendolera of counsel), for Hugh W. Levey, Claire Gruppo, Gruppo, Levey & Co., Gruppo, Levey Holdings Inc., January Management, Inc., and Frog Pond Partners L.P., respondents.

Woods Oviatt Gilman LLP, Rochester (Brian J. Capitummino of counsel), for Davie Kaplan CPA, P.C, respondent.

SINGH, J.

There are two central issues on this appeal. The first involves the application of the statute of limitations. The second is whether plaintiff has pleaded the element of justifiable reliance to support its cause of action sounding in fraud pertaining to unauthorized bank transfers made by defendants between 2007 and 2013. We find the fraud claim relating to the bank transfers is not time-barred and that justifiable reliance has been sufficiently pleaded. Accordingly, we reinstate plaintiff's fraud claims relating to the bank transfers.

The facts are taken from plaintiff Epiphany Community Nursery School's (Epiphany) complaint. For the purposes of defendants' motion to dismiss we "accept as true the facts as alleged in the complaint [and]. . . accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

In 1973 Wendy Levey (Wendy) married defendant Hugh Levey (Hugh). Two years later Wendy founded Epiphany, a not-for-profit corporation that operates a kindergarten and nursery school on the Upper East Side of Manhattan.

Hugh is an investment banker with an undergraduate degree from Yale University and a M.B.A. from Harvard. Hugh and defendant Claire Gruppo co-founded defendant Gruppo Levey & Co. (GLC), a small investment banking firm that provides strategic advice and private capital raising services to businesses, financial sponsors and management teams throughout the United States. Defendant Gruppo, Levey Holdings Inc. (GLH) is GLC's parent company, and defendant Frog Pond Partners L.P. (Frog Pond) is a limited partnership owned indirectly by Hugh and Gruppo. Of this group, all but Hugh are the "collateral defendants." Defendant Davie Kaplan CPA, P.C. (Davie Kaplan) was an outside auditor for Epiphany from 2010 to 2012.

The complaint alleges two sets of fraudulent acts. These acts were allegedly uncovered in a matrimonial action between Wendy and Hugh that was settled in October 2016. Wendy and Hugh are now divorced.

The first series of fraudulent acts occurred between 2002 and 2003 when Hugh induced Epiphany to sell its extracurricular programs to nonparty Magic Management LLC (Magic) for an unreasonably low price. At that time, Hugh had a 100% ownership interest in defendant January Management, Inc., general partner of nonparty January Partners, L.P., which was the sole member of Magic.

Pursuant to an asset purchase agreement dated February 12, 2003, Epiphany sold its extracurricular programs to Magic for $300,000, $30,000 of which was paid in cash and the remaining $270,000 was to be paid pursuant to a promissory note payable over 10 years in installments of $27,000, plus interest. Magic also agreed to pay monthly rent to use Epiphany's facilities. Hugh claimed that although Magic occupied less than 10% of Epiphany's space, Magic's rent would be $481,026. Magic's rent was represented to be more than $100,000 above Epiphany's rent for the building.

Wendy, Epiphany's Executive Director, did not have a financial background. She believed it was in the school's best interest to have someone with Hugh's financial expertise to assist with Epiphany's financial affairs. Wendy signed the asset purchase agreement on Epiphany's behalf without obtaining her own appraisal or verifying whether Magic paid the school what it owed.

The complaint alleges that the $300,000 purchase price was based on a fraudulent valuation commissioned by Hugh, which was "substantially inaccurate." By applying false figures, Hugh allegedly reduced the purchase price by $1.5 million. The complaint further alleges that if the valuation had been properly calculated the purchase price would have exceeded $1.8 million.

In addition, Magic failed to pay rent or the amount owed on the promissory note. The complaint alleges that Hugh manipulated Epiphany's corporate and financial records to hide Magic's failure to pay.

The second set of fraudulent acts allegedly took place between 2007 and 2013. Hugh made unauthorized transfers of over $5.9 million from Epiphany's bank accounts to himself and some of the collateral defendants by linking the bank accounts to his private banking portfolio. Hugh, with the assistance of Davie Kaplan, falsely recorded these transfers in Epiphany's general ledgers as "loans." However, there were no documents to memorialize these "loans." Nor were any loan payments ever made. The "loans" were subsequently characterized as "other receivables." At the end of each year, the other receivables were offset by fake charges Epiphany owed GLC or GLH for "consulting fees" and "lease commissions."

In September 2010, Hugh allegedly arranged for his long-time personal accountant, David Pitcher, who was employed by defendant Davie Kaplan to serve as Epiphany's outside auditor. Davie Kaplan delivered 2010, 2011, and 2012 audit reports. Davie Kaplan also performed an audit for fiscal year 2013 but it did not issue a 2013 audit report.

Epiphany commenced this action on August 31, 2016. It

alleges 13 causes of action, including: (1) fraud by Hugh and Davie Kaplan; (2) aiding and abetting fraud by collateral defendants and Davie Kaplan; (3) breach of fiduciary duty by Hugh; and (4) aiding and abetting breach of fiduciary duty by the collateral defendants and Davie Kaplan.

Defendants moved to dismiss the complaint. Supreme Court granted the motion and dismissed the complaint with prejudice. The motion court held that the first set of fraud claims were time-barred. The second set of fraudulent acts constituted conversion and were also time-barred. Supreme Court also found that the nonfraud claims sounded in accounting malpractice and were time-barred as well. Epiphany appealed.

A fraud claim must be commenced within "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213[8]).

On a motion to dismiss a fraud claim based on the two-year discovery rule, a defendant must make a prima facie case that a plaintiff was on inquiry notice of its fraud claims more than two years before it commenced the action, in this case, before August 31, 2014. The burden then shifts to the plaintiff to establish that even if it had exercised reasonable diligence, it could not have discovered the basis for its claims before that date (*see*

Berman v Holland & Knight, LLP, 156 AD3d 429, 430 [1st Dept 2017]; *Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d 685, 689 [1st Dept 2016]).

> "The issue of when a plaintiff, acting with reasonable diligence, could have discovered an alleged fraud . . . involves a mixed question of law and fact, and, where it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might be reasonably inferred, the cause of action should not be disposed of summarily on statute of limitations grounds. Instead, the question is one for the trier-of-fact"

(*Berman*, 156 AD3d at 430 [internal quotation marks omitted]; *see also Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]; *Trepuk v Frank*, 44 NY2d 723, 725 [1978]).

Turning first to the sale of Epiphany's extracurricular programs in 2002 and 2003, the Supreme Court properly dismissed as time-barred this branch of the fraud claim. The action was commenced more than six years after this cause of action accrued. Accordingly, to be timely, the action must have been brought within two years from the time that Epiphany discovered the alleged fraud, or from when it could have discovered it in the exercise of reasonable diligence.

We find that Epiphany could have discovered the alleged fraud when Wendy, as Epiphany's Executive Director, signed the asset purchase agreement on Epiphany's behalf in 2003. She signed it without obtaining her own appraisal. Further, Epiphany

did not question the disproportionally high rent, which was the basis for the undervaluation of the asset. Nor did Epiphany verify whether Magic paid the rent due or made payments on the promissory note (*see Aozora Bank, Ltd*, 137 AD3d at 689; *Gutkin v Siegal*, 85 Ad3d 687, 688 [1st Dept 2011]).

As for the second set of fraudulent acts relating to the unauthorized bank transfers that occurred between 2007 and 2013, we find that the unauthorized transfers sound in fraud, not conversion and that the fraud claim is timely under the two-year discovery rule.

The complaint alleges that Hugh – with assistance from Davie Kaplan's employee, David Pitcher – devised a fraudulent scheme to intentionally falsify the financial statements and books and records of Epiphany and kept the knowledge of these transfers from the school. Hugh made the alleged illicit and unauthorized transfers from Epiphany's bank accounts and fraudulently concealed them by falsely designating the entries in Epiphany's books and records as "loans", by falsely manipulating Epiphany's books and records to convert the purported "loans" into "other receivables", and offsetting the loans by falsely claiming monies owed by Epiphany for consulting services that were never provided.

Since the acts were allegedly concealed from Epiphany,

defendants have not established a prima facie case that the school was on notice of the unauthorized transfers. Moreover, even if defendants have established a prima facie case, it does not conclusively appear that Epiphany had knowledge of the facts from which the fraud could reasonably be inferred.

Furthermore, the complaint sufficiently states a cause of action sounding in fraud. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). In contrast, "[a] conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]).

Here, the alleged manipulation is not simply Hugh controlling or interfering with funds that rightfully belong to Epiphany. Rather, the claim is that defendants knowingly made material representations of fact relating to Epiphany's books and records that were false.

The dissent takes issue with plaintiff's failure to allege that Wendy, as founder and director, or other agents of the

school justifiably relied upon Hugh's misrepresentations. It views this omission as a failure to plead fraud with particularity pursuant to CPLR 3016(b).

We disagree. CPLR 3016(b) requires that "the circumstances constituting the wrong shall be stated in detail." The statutory provision is satisfied when the facts suffice to permit a "reasonable inference" of the alleged misconduct (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]; *see also Eurycleia Partners, LP*, 12 NY3d at 559; *Credit Suisse Fin. Corp. v Reskakis*, 139 AD3d 509 [1st Dept 2016]). Further, "in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud" (*Pludeman*, 10 NY3d at 493). This requirement is to inform a defendant of the acts that the plaintiff is complaining about (*id.* at 491; *see also DDJ Mgt., LLC v Rhone Group LLC*, 78 AD3d 442, 443 [1st Dept 2010]). Here, the complaint states in detail Hugh's fraudulent misconduct and meets the requirements of CPLR 3016(b).

Epiphany alleges that it justifiably relied on Hugh's "material misrepresentations and omissions based on his position as a director, his financial expertise, and the expectation that he would act solely in the interests of [Epiphany], its students, and faculty, consistent with his fiduciary obligations." The allegations in the complaint are not bare legal conclusions. Nor

are they inherently incredible. Epiphany alleges that Wendy relied on Hugh's representations because of their familial relationship and his position as director of Epiphany. From the mid-1990s, Hugh began to involve himself in the financial matters of Epiphany. He became a member of the Board of Directors and held the position until 2013. Wendy trusted her husband. He was an experienced investment banker who had consulted on multi-billion dollar transactions. She believed that Hugh would use his skills to further the financial interests of Epiphany. Wendy had no reason to believe that he would loot Epiphany's funds, treating it as one of his businesses. Epiphany alleges that Hugh's explanation for his conduct was that he had helped set up Epiphany and had a 50% interest in it.

The dissent's conclusion that Epiphany cannot prove that Wendy actually relied on the fraudulent ledger entries is an impermissible factual finding, not warranted on a pleading motion. Moreover, the dissent completely ignores the close familial relationship between Hugh and Wendy, which impacts on whether Wendy's reliance on Hugh properly managing Epiphany's finances was justifiable.

In determining whether justifiable reliance is sufficiently alleged, we consider two relevant circumstances: first, the existence of a relationship of trust or confidence and second,

the superior knowledge or means of knowledge on the part of the person making the representation.

In *Braddock v Braddock* (60 AD3d 84, 89 [1st Dept 2009]), we held that since the plaintiff and the defendant were cousins, the plaintiff's reliance on the defendant's good faith "may be found to be reasonable even where it might not be reasonable in the context of an arms' length transaction with a stranger." We noted that "[f]amily members stand in a fiduciary relationship toward one another in a co-owned business venture" (*id.*; *compare Castellotti v Free*, 138 AD3d 198, 209 [1st Dept 2016]; *Genger v Genger*, 121 AD3d 270, 278 [1st Dept 2014]).

Here, the complaint alleges that Hugh went to great lengths to conceal the unauthorized transfers and therefore, Epiphany - and Wendy, in her capacity as Executive Director of Epiphany - could not have discovered the alleged fraud with reasonable due diligence.[1] In particular, Hugh "caused [Epiphany's] bank statements to be diverted to the offices of Gruppo Levy and GLH" so that his fraudulent scheme would not be discovered. He also allegedly initiated these transfers at meetings with the

[1] The dissent maintains that the complaint does not sufficiently plead a claim for fraud by concealment or constructive fraud. However, the complaint does not assert either cause of action. Rather, the concealment alleged in the complaint is pertinent to justifiable reliance.

employees of Gruppo Levy and GLH, not Epiphany. Additionally, he recorded the transfers as loans on the books and records, before offsetting them by services that were allegedly not provided so that Epiphany would not be alerted to the transfers. The complaint alleges that Hugh and Davie Kaplan's actions prevented the public and government regulators from uncovering the fraud.

The dissent acknowledges that whether plaintiff's reliance was justifiable generally raises factual issues inappropriate for resolution on a motion to dismiss (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045; *Braddock*, 60 AD3d at 88; *Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004]; *Knight Sec. v Fiduciary Trust Co.*, 5 AD3d 172, 173 [1st Dept 2004]).

The breach of fiduciary duty by Hugh as to the transfers between 2007 and 2013 should also be reinstated as "[t]he discovery accrual rule also applies to fraud-based breach of fiduciary duty claims" (*Kaufman v Cohen*, 307 AD2d 113, 122 [1st Dept 2003]; *see also Yatter v William Morris Agency*, 268 AD2d 335, 336 [1st Dept 2000]; *Unibell Anesthesia P.C. v Guardian Life Ins. Co. of Am.*, 239 AD2d 248 [1st Dept 1997]).

The aiding and abetting fraud claim as against the collateral defendants should be reinstated (*see Stanfield Offshore Leveraged Assets, Ltd v Metropolitan Life Ins. Co*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009] [the

elements of an aiding and abetting claim include: "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud"] [internal quotation marks omitted]).

Here, the complaint states with specificity that the collateral defendants had knowledge of the fraud, permitted discussions of the bank transfers to take place at the offices of GLC and GLH, that January Management was formed to facilitate the transfers, that Epiphany's bank statements were diverted to the offices of GLC and GLH so that the fraud would be concealed and that ultimately the transfers were made to the bank accounts of the collateral defendants.

However, the aiding and abetting breach of fiduciary duty claim against the collateral defendants should be dismissed as the allegations in the complaint are conclusory (*see Kaufman*, 307 AD2d at 125 ["a claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach"]). The defendants must have actual knowledge, and not constructive knowledge of the breach of fiduciary duty (*id.*).

Epiphany does not allege any facts in support of its claim that the collateral defendants aided and abetted the breach of fiduciary duty owed by Hugh. Instead, it merely states that the collateral defendants assisted, facilitated and accepted the bank transfers.

Finally, we affirm Supreme Court's dismissal of the fraud, aiding and abetting fraud and breach of fiduciary claims against Davie Kaplan as duplicative of Epiphany's untimely accounting malpractice claim (*see Murray Hill Invs. v Parker Chapin Flattau & Klimpl, LLP*, 305 AD2d 228 [1st Dept 2003] [affirming dismissal of fraud claim as duplicative of the untimely legal malpractice claim, and noting that it was asserted in an attempt to circumvent the legal malpractice limitations period]).

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

Accordingly, the order of the Supreme Court, New York County (Shirley W. Kornreich, J.), entered August 7, 2017, which granted defendants' motions to dismiss the complaint as against them pursuant to CPLR 3211(a)(5), should be modified, on the law, to deny Hugh W. Levey's motion as to fraud and breach of fiduciary duty, and to deny the collateral defendants' motion as to the claims for aiding and abetting fraud for the bank transfers, and otherwise affirmed, without costs.

All concur except Friedman, J.P. and Tom, J. who dissent in part in an Opinion by Friedman, J.P.

FRIEDMAN, J.P. (dissenting in part)

I understand the majority's reluctance to affirm in its entirety Supreme Court's dismissal of this action on the ground of the statute of limitations. The complaint alleges that plaintiff, a not-for-profit corporation operating a preschool, was fleeced of millions of dollars by defendant Hugh W. Levey (Hugh), a financial professional who was, during the relevant period, the husband of nonparty Wendy Levey (Wendy), plaintiff's founder and (at the time) principal officer and director. Wendy allegedly entrusted plaintiff's financial management to Hugh from some point in the 1990s until 2013, when Hugh filed for divorce. Assuming the truth of the allegations of the complaint, as a court is required to do upon a CPLR 3211 motion to dismiss, Hugh's conduct with respect to plaintiff was reprehensible.

The majority reinstates the complaint to the extent it alleges that Hugh — acting in concert with, or aided and abetted by, certain of his codefendants — simply transferred large sums of money from plaintiff's bank account to the bank accounts of entities he controlled. These defalcations — the first of which allegedly occurred in 2007, and the last of which allegedly occurred during plaintiff's fiscal year that ended June 30, 2013 — were covered up by false accounting entries characterizing the withdrawals as "loans" that were completely offset by "fees"

charged to plaintiff for fictional "services" purportedly provided by Hugh's entities. It is further alleged that the "loans" were then hidden under the category of "Other Receivables" on plaintiff's financial statements. In the majority's view, the fraud claim against Hugh based on these alleged withdrawals is governed by the six-year statute of limitations for fraud (CPLR 213[8]). The majority further finds, pursuant to that statute's provision that a claim may be asserted "two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it" (*id.*), that a factual issue exists as to whether the claim is timely with respect to all of the withdrawals, from 2007 to 2013. I respectfully disagree.

Plaintiff's allegations concerning Hugh's misappropriations from its bank account state a cause of action, not for fraud, but for conversion — a claim subject to a strict three-year statute of limitations that contains no discovery provision (CPLR 214[4]). Accordingly, plaintiff's claim is time-barred, since the three-year limitation period for conversion expired no later than June 30, 2016, two months before this action was commenced. Absent from the complaint is any well-pleaded allegation that any faithful agent of plaintiff — whether officer, director or employee — actually read or heard, much less relied upon, a false

representation made by Hugh or any other defendant concerning the wrongful transfers.[1] True, the complaint alleges that plaintiff relied on Hugh personally to manage its financial affairs honestly and competently. But there is no allegation that any agent of plaintiff actually relied on Hugh's written misrepresentations — because no such agent is alleged ever to have read those misrepresentations.

Particularly noteworthy is the complaint's failure to allege that Wendy — plaintiff's founder and the director of its school — read or relied upon the alleged misrepresentations in plaintiff's books and records and financial statements. Presumably, the complaint does not allege reliance on Wendy's part because Wendy admits, in the affidavit she submitted in opposition to the motion to dismiss, that she did not become aware of Hugh's scheme until 2016, when it was uncovered by forensic accountants

[1]It appears from the record that, during the relevant period, nonparties Evan Levey (the son of Hugh and Wendy) and Len Frattellone performed plaintiff's internal accounting functions, under Hugh's direction, as employees of one of Hugh's entities. For part of that time, Evan Levey was a member of plaintiff's board of directors. Plaintiff does not argue in its appellate briefs that any reliance by Evan Levey or Frattellone on the alleged misrepresentations could satisfy the reliance element of its fraud cause of action. In fact, plaintiff's reply brief takes the position that Evan Levey and Frattellone "were employed by Hugh Levey . . . and acted as his agents."

retained by plaintiff's counsel.[2] In the affidavit, Wendy does not say that she was misled about the transfers; she says that she was unaware of them. In addition, the record shows that Wendy testified at her deposition in the divorce case that it was not her practice even to review plaintiff's audit reports.

To be clear, while the false accounting entries and financial statements alleged in the complaint certainly constitute misrepresentations that could support a fraud cause of action, the complaint fails to identify any particular individual acting as plaintiff's agent who, at any point in time, read and relied on these misrepresentations. In the 36 pages and 172 paragraphs of the complaint, all that is alleged concerning the reception of the falsehoods in plaintiff's accounting records and financial statements is the unsubstantiated conclusion that plaintiff itself — a legal entity capable of acting only through real-world human agents — "justifiably relied" on the statements of Hugh. Specifically, the complaint alleges in pertinent part:

> "83. [Plaintiff] justifiably relied on Hugh Levey's material misrepresentations and omissions based on his position as a director, his financial expertise, and the expectation that he would act solely in the

[2]Notably, Wendy admits that she was first told that the scheme (although not its full extent) had been uncovered in January 2016. Nonetheless, plaintiff waited another seven months, until the end of the following August, to commence this action.

> interests of [plaintiff], its students and faculty, consistent with his fiduciary obligations."[3]

If plaintiff did, in fact, "justifiably rely" on the alleged misrepresentations, the identity of the agent or agents through whom plaintiff placed such reliance is information peculiarly within plaintiff's knowledge and must be pleaded with particularity under CPLR 3016(b). After all, if plaintiff cannot name any agent through whom it relied on the subject statements, how can it claim to have relied on those statements? Yet, the complaint offers only boilerplate to satisfy the reliance element of a fraud claim. This does not suffice to state a cause of action for fraud (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009] [a complaint alleging that the defendant "attempted to deceive" the plaintiff, but failing to allege that the plaintiff "was actually duped," failed to state a fraud claim]; *Cusack v Greenberg Traurig, LLP*, 109 AD3d 747, 748 [1st Dept 2013] [no fraud claim was stated where the complaint "failed to allege that (the plaintiff) relied on (the alleged

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[3]The complaint alleges that plaintiff "justifiably relied" on defendant Davie Kaplan, CPA, P.C. (Davie Kaplan), its auditor, in similarly conclusory terms. The majority correctly affirms the dismissal of the complaint as against Davie Kaplan, however, on the ground that all claims against the auditor are untimely under the three-year statute of limitations applicable to professional malpractice claims (CPLR 214[6]). I concur in this aspect of the majority's decision.

misrepresentation) to his detriment"]).

I recognize that (as the majority notes) "the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss" (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015]). The deficiency of the instant complaint, however, is that it fails to allege any reliance, reasonable or otherwise, by any identified human being acting on plaintiff's behalf. Logically, a complaint must allege with particularity that some natural person or persons (whether identified by name or by the function they performed) actually relied on a false statement before any question of the reasonableness or justification of such reliance can arise. Notwithstanding that the identity of any agent who relied on the misrepresentations would be information peculiarly available to plaintiff, and ignoring the requirement that fraud be pleaded with particularity (CPLR 3016[b]), the complaint sets forth only the legal conclusion that plaintiff — a legal entity that exists only on paper — somehow "relied" on defendants' misrepresentations. The complaint fails to allege even the position, whether with plaintiff or with an outside vendor, held by the person who, as plaintiff's agent, relied on Hugh's false statements. In my view, this does not state a cause of action for fraud. The allegations of

misappropriations amount, rather, to a cause of action for conversion, which is, as the majority agrees, time-barred.

The majority asserts that I make an "impermissible factual finding" by reaching (in their words) the "conclusion that [plaintiff] cannot prove that Wendy actually relied on the fraudulent ledger entries." This is a distortion of my position. First, the question on a pleading motion is not what plaintiff can or cannot prove, but what plaintiff has alleged or has not alleged. To reiterate, what plaintiff has not sufficiently alleged is actual reliance, whether justifiable or not, by any particular person on the false statements in question — a matter peculiarly within plaintiff's knowledge. Indeed, plaintiff has not alleged that any faithful agent in its employ even read those false statements. The question of proof does not arise in the absence of a pleading that sufficiently alleges the matter to be proved. Further — putting aside the fact that (as previously discussed) Wendy has admitted under oath that she did not read Hugh's false statements (and thus could not have relied on them) — the complaint does not allege that she, or any other agent of plaintiff not complicit in the scheme, actually read and relied on the false statements.[4]

[4]Needless to say, for plaintiff to state a fraud claim, it would not be necessary for the complaint to allege that Wendy, in

The majority emphasizes that Hugh's ability to perpetrate his despicable scheme depended upon Wendy's reliance — not on any particular false statement he made — but on Hugh personally, as her husband, as a director of plaintiff, and as a financial professional. In so doing, the majority only highlights the fact that what the complaint alleges is not common-law fraud (which requires reliance on some false representation) but Hugh's abuse of his position of trust, in which he operated free of oversight, to empty plaintiff's bank accounts — in other words, conversion. If the complaint alleged that Wendy had actually read Hugh's false statements, her familial relationship with him might well be relevant to determining the reasonableness of her reliance on his misrepresentations. But, again, it is not alleged that Wendy read the false accounting entries or financial statements.

The absence here of an allegation that Hugh's misrepresentations were actually read by any agent of plaintiff contrasts strikingly with *Braddock v Braddock* (60 AD3d 84 [1st Dept 2009]), a case the majority cites as support for the relevance of a familial relationship to the reasonableness of

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particular, was the agent who relied on Hugh's false statements. Rather, it would have sufficed for the complaint to allege that some particular agent — whether some other officer or employee of plaintiff, or a person working for an outside vendor engaged by plaintiff — relied on the statements. The complaint contains no such allegation.

reliance. In *Braddock*, the complaint alleged that the plaintiff (an individual) relied on specific oral representations and promises made to him by the defendant, his cousin (*see id.* at 86-87). The complaint in this case does not identify any person who, while acting on behalf of plaintiff, actually read and relied on Hugh's misrepresentations. Thus, while *Braddock* is, in certain respects, teasingly similar to our case, that which distinguishes it points our case to the opposite result.

I further note that the fraud cause of action cannot be salvaged under the rubric of fraud by concealment or constructive fraud.[5] The plaintiff is required to have relied on some affirmative statement by the defendant to recover damages on a claim for constructive fraud (*see Del Vecchio v Nassau County*, 118 AD2d 615, 618 [2d Dept 1986] [in dismissing a constructive fraud claim by an infant plaintiff because the defendants "made no representations, false or otherwise, to (her)," the court noted that constructive fraud, unlike actual fraud, requires that "the parties (be) in a fiduciary or confidential relationship" but "the plaintiff need not prove actual knowledge of the falsity

[5]As the majority notes, the complaint does not explicitly set forth theories of fraud by concealment or constructive fraud. I nonetheless consider whether the facts alleged make out such a claim because the question on a motion to dismiss is whether the plaintiff has a claim, not whether the claim has been properly characterized.

of the representation by the defendant"]; *see also People v Credit Suisse Sec. (USA) LLC*, 31 NY3d 622, 640 n 2 [Feinman, J., concurring]). The same requirement applies to a claim for fraud by concealment (*see ACA Fin. Guar. Corp.*, 25 NY3d at 1044 ["To plead a claim for . . . fraudulent concealment, plaintiff must allege facts to support the claim that it justifiably relied on the alleged misrepresentations"]; *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003] ["A cause of action for fraudulent concealment requires, in addition to the four . . . elements (of fraud, i.e., material misrepresentation of fact, scienter, reasonable reliance, and damages), an allegation that the defendant had a duty to disclose material information and that it failed to do so"]).

Given that the complaint fails to allege that any faithful agent of plaintiff actually relied on Hugh's alleged misrepresentations, I have no occasion to consider whether reliance on those misrepresentations, as alleged in the complaint, could have been justifiable. I note, however, that the majority mischaracterizes the complaint in describing the fraud, as alleged by plaintiff, as one that "could not have [been] discovered . . . with reasonable due diligence." In fact, the complaint alleges just the opposite. Paragraph 64 of the complaint, for example, in support of the claims against Davie

Kaplan, states: "On their face, the consulting fees [used to offset the purported loans to Hugh's entities] were *blatantly false, full of red flags, and would have been objected to by even the most novice of accountants*, had the accountant been acting in the best interests of its client" (emphasis added). Thus, as alleged by the complaint, the scheme was effective, not because it was sophisticated (on the contrary, it was glaringly amateurish), but because it was never probed by any honest person with even the most basic competence in bookkeeping. As for the conclusory allegation that Hugh and his cohorts prevented "the public[] and government regulators from uncovering the fraud," the complaint does not allege that any regulators or representatives of the interested public ever investigated plaintiff's finances or would have been fooled by Hugh's flimsy artifice (as described by plaintiff) if they had. Presumably, plaintiff, with its responsible officers and directors entirely unaware of the scheme, failed to call the matter to the attention of competent legal counsel, much less the government or the public, until 2016. In this regard, I reiterate that Wendy, by her own admission, was not fooled by the scheme, but was simply unaware of it. Wendy further states that, once forensic accountants retained by plaintiff's counsel examined plaintiff's books and records in 2016, the scheme was uncovered.

The majority allows the fraud claim to go forward even as to defalcations committed more than six years before this action was commenced based on the provision of CPLR 213(8) extending the limitation period for fraud to two years from the time the fraud was discovered or could have been discovered with due diligence. Since, in my view, the claim is one for conversion, not fraud, and the three-year statute of limitations applicable to conversion claims (CPLR 214[4]) does not have a discovery provision, I have no occasion to consider what effect, if any, the discovery rule applicable to fraud claims would have on this action had plaintiff stated a legally sufficient cause of action for fraud. I note, however, that it is difficult to see how it can be said that Hugh's scheme could not have been discovered earlier, even "with due diligence," when the complaint specifically alleges that the fraudulent consulting fee entries used to offset the loans on plaintiff's books "would have been objected to by even the most novice of accountants." Nor would the diversion of plaintiff's bank statements to Hugh's offices have insulated the scheme from discovery, since due diligence certainly requires the review of bank statements as they are issued. If bank statements were not being delivered to plaintiff's offices, a diligent agent would have noticed that and taken steps to obtain the statements.

Because the cause of action against Hugh for breach of fiduciary duty is based on allegations of conversion, not of fraud, that claim is also barred by the three-year statute of limitations (*see IDT*, 12 NY3d at 139). Further, because the underlying claims for fraud and breach of fiduciary duty are untimely, the causes of action for aiding and abetting those torts are similarly time-barred. In this regard, while I concur with the majority's affirmance of the dismissal of the claims against the collateral defendants for aiding and abetting breach of fiduciary duty, I do not follow its logic in dismissing those claims while reinstating the claims against the same defendants for aiding and abetting fraud. Plaintiff contends that the same acts allegedly aided by the collateral defendants — Hugh's withdrawals from plaintiff's bank accounts — form the basis of both its fraud claim and its breach of fiduciary duty claim (although, in my view, plaintiff has not stated a claim for fraud). As previously stated, I concur with the majority's affirmance of the dismissal of the claims against Davie Kaplan, plaintiff's outside accounting firm, as untimely under the statute of limitations governing professional malpractice.

For all of the foregoing reasons, but especially because a party cannot rely on a representation of which it is unaware, I would affirm the order granting defendants' motions to dismiss

the complaint in its entirety. In sum, the majority significantly alters the settled requirements for pleading a fraud cause of action by reinstating a fraud claim in which no human being is alleged to have received and actually relied upon the misrepresentations. The majority's motivation seems to arise from the familial relationship between Wendy and Hugh, but no fraud claim (as opposed to a conversion claim) can arise unless Wendy, or someone else acting on plaintiff's behalf, actually examined the documents setting forth the misrepresentations. Accordingly, while I concur with the majority to the extent it affirms the order appealed from, I respectfully dissent from its modification of that order to reinstate the portions of the complaint indicated in the decretal paragraph.

Order, Supreme Court, New York County (Shirley W. Kornreich, J.), entered August 7, 2017, modified, on the law, to deny Hugh W. Levey's motion as to fraud and breach of fiduciary duty, and to deny the collateral defendants' motion as to the claims for aiding and abetting fraud for the bank transfers, and otherwise affirmed, without costs.

Opinion by Singh, J. All concur except Friedman, J.P. and Tom, J. who dissent in part in an Opinion by Friedman, J.P.

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

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

ENTERED: FEBRUARY 5, 2019

CLERK