SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 16, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8266 Audrey A. Appleyard, Index 24491/14E
Plaintiff-Respondent,

-against-

Russell G. Tigges, et al.,
Defendants-Appellants,

Vassar Brothers Hospital, et al.,
Defendants.

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Feldman, Kleidman, Coffey, Sappe & Regenbaum LLP, Fishkill (Wayne M. Rubin of counsel), for appellants.

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 8, 2018, which, to the extent appealed from, denied as untimely the motions of defendants Russell G. Tigges and Orthopedic Associates of Dutchess County, P.C. for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

This medical malpractice action was originally assigned to the Honorable Stanley Green on July 1, 2015. On October 24, 2016, Justice Green signed a so-ordered stipulation setting

February 16, 2017 as the date for a compliance conference before the Honorable Douglas E. McKeon. Plaintiff filed her note of issue on December 16, 2016. Justice Green's part rules required that motions for summary judgment be filed within 120 days of the filing of the note of issue, which would have made the deadline for filing such a motion April 17, 2017.

On December 31, 2016, Justice Green retired from the bench. The instant action was then administratively reassigned to the Honorable Wilma Guzman on January 7, 2017. Justice Guzman's part rules require that "pursuant to CPLR § 3212(a), a motion for summary judgment shall be made no later than sixty (60) days after the filing of the Note of Issue, except with leave of court on good cause shown" (McKinney's New York Rules of Court, Local Rules of Court, Twelfth Judicial District, Bronx County, Judges' Part Rules, Hon. Wilma Guzman, Part 1A-7). Thus, under Justice Guzman's part rules, in the absence of a showing of good cause, the deadline for filing a motion for summary judgment in this case was February 14, 2017.

Defendants' counsel avers that on February 10, 2017, he first learned of the reassignment of the case to Justice Guzman when a scheduling clerk in his office consulted the court system's e-Courts electronic calendar to confirm the previously scheduled February 16, 2017 conference. Counsel further

acknowledges that shortly thereafter, he reviewed Justice Guzman's part rules and noted the requirement that summary judgment motions be made within 60 days of the filing of the note of issue.

On March 29, 2017, some 43 days after the February 14 deadline, defendants filed a motion for summary judgment and, "if necessary," to extend the deadline to file same. Citing *Brill v City of New York* (2 NY3d 648, 652 [2004]), the motion court denied both motions as untimely, reasoning that defendants were aware of the reassignment of the matter to the motion court prior to the February 14 deadline, yet failed to move for an extension of time to file the motion for summary judgment prior to that date.

CPLR 3212(a) sets forth the statutory timeliness requirements for the filing of a summary judgment motion. That statute permits the court to "set a date after which no such motion may be made" (CPLR 3212[a]). If the court sets no such date, a summary judgment motion must "be made no later than [120] days after the filing of the note of issue, except with leave of court on good cause shown" (*id.*).

The Court of Appeals has made it clear that "statutory time frames -- like court-ordered time frames . . . are not options, they are requirements, to be taken seriously by the parties"

(*Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725, 726 [2014] [internal citation omitted], following *Brill v City of New York*, 2 NY3d at 651 [recognizing that the legislature statutorily authorized the courts "to fix a deadline for filing summary judgment motions"]).

Here, defendants' motions for summary judgment and alternatively an extension of time were properly denied. Although defendants concede that they became aware of the reassignment of this matter to Justice Guzman and the 60-day filing period provision of her published part rules in advance of the filing deadline, they waited 47 days after learning of Justice Guzman's timeliness rule and 43 days after the expiration of her statutorily authorized 60-day filing period to seek leave of court for additional time to file their motions, rendering their motions untimely (*see* CPLR 3212[a]; *Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d at 726; *Brill v City of New York*, 2 NY3d at 651).

Moreover, defendants have not established good cause for their belated filing. Defendants' argument that good cause was demonstrated by their having filed the motions within 120 days after the filing of the note of issue fails in light of their failure to comply with the court's own deadline (*see Giudice v Green 292 Madison, LLC*, 50 AD3d 506, 506 [1st Dept 2008] [good

cause not found where the parties failed to file their summary judgment motions by the court-imposed deadline, even if they were filed within the statutory 120-day period]). Defendants' failure to inform themselves of the identity of the new judge and her part rules does not constitute good cause for failing to adhere to them.

In light of the foregoing disposition of this appeal, we need not reach the parties' remaining arguments.

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

ENTERED: APRIL 16, 2019

CLERK

Friedman, J.P., Kapnick, Webber, Kahn, Kern, JJ.

7813 A.V. by His Mother and Natural Guardian Carmen F.-R., et al., Plaintiffs-Respondents,

Index 152667/12
595272/14
595638/14

-against-

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

Ferreira Construction Company, Inc., Defendant-Respondent-Appellant,

Applegate Associates, Inc., et al., Defendants.

- - - - -

Gandhi Engineering, Inc., Third-Party Plaintiff-Respondent,

-against-

Ferreira Construction Company, Inc., Third-Party Defendant-Appellant,

AECOM Technology, Third-Party Defendant.

- - - - -

The City of New York, Second Third-Party Plaintiff-Appellant,

-against-

AECOM Technology Corporation, et al., Second Third-Party Defendants-Respondents.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Alexander M. Tisch, J.), entered on or about March 5, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto filed March 28, 2019,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: APRIL 16, 2019

CLERK

Manzanet-Daniels, J.P., Gische, Gesmer, Singh, Moulton, JJ.

8796 The People of the State of New York, Respondent, Ind. 2196/15

-against-

Henry Francisco, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J. at suppression hearing; Neil E. Ross, J. at plea and sentencing), rendered June 21, 2016, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of three years, unanimously affirmed.

We find that the waiver of the right to appeal that defendant executed at the time of his guilty plea was ineffective to waive review of his suppression claim. Here, defendant pleaded guilty after receiving an adverse ruling at a suppression hearing. During the plea allocution, the court informed defendant that, by pleading guilty, he was waiving his right to "contest any search or seizure." This statement was incorrect in the posture of this case because, by pleading guilty, defendant

did not automatically waive the right to have this Court review the hearing court's suppression decision (*see* CPL 710.70[2]; *People v Fernandez*, 67 NY2d 686 [1986]). Defendant then executed a written waiver of appeal that correctly informed him that, by waiving his right to appeal as a condition of his plea, he would be foregoing the right to have the suppression decision reviewed (*see People v Kemp*, 94 NY2d 831, 833 [1999]). Taking the plea proceeding as a whole, we find that defendant did not knowingly waive his right to an appeal of the suppression decision. Waiver of this Court's review of the suppression decision was presented orally as an automatic consequence of the plea and, in writing, as an aspect of the waiver of right to appeal. Taken together, this was confusing and unclear and did not sufficiently demonstrate to defendant that, while he would normally have retained the right to have this Court review the hearing court's suppression decision following entry of a guilty plea, he was foregoing that right as a requirement of waiving his right to appeal.

We find that the court properly denied defendant's motion to suppress a pistol he discarded. As defendant does not appear to dispute, certain officers had reasonable suspicion to pursue defendant after they observed him display what appeared to be a firearm. Defendant argues that there was insufficient evidence

adduced at the hearing to establish that other officers, not involved in the initial pursuit, acted lawfully when they recovered the pistol. However, the evidence clearly established that defendant's abandonment of the pistol was not caused by any illegal police conduct. A police captain testified that he knew other officers were looking for a suspect who fit defendant's description, that he saw defendant running out of a tunnel a few blocks away from the initial pursuit, and that defendant made a throwing motion after which he slowed down to a walking pace. The captain later told one of the officers from the initial incident to look in the area where defendant had thrown what could have been a handgun, and this resulted in the recovery of the pistol. This testimony established that no officers acted unlawfully before defendant abandoned the pistol, and that it was lawfully retrieved. Any lack of evidence regarding the circumstances surrounding defendant's ultimate arrest, after he

discarded the pistol, is irrelevant to the suppression issues presented.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

8991 The People of the State of New York, Respondent, Ind. 5491/11

-against-

Nathaniel Taylor, Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Emma L. Shreefter of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Eduardo Padró, J. at plea; Edwina G. Mendelson, J. at sentencing), rendered November 4, 2016, convicting defendant of gang assault in the second degree, and sentencing him to a term of four years, unanimously reversed, on the law, and the indictment dismissed.

The People offer no excuse for more than one year of the delay in defendant's sentencing, a period that began when the prosecution received actual notice, provided by defense counsel, that defendant was in custody in another state and wished to be produced for sentencing on this case. Therefore, notwithstanding prior delays caused by defendant, we find that the delay attributable to the People was unreasonably long. Thus, the sentencing court should have granted defendant's motion to

dismiss the indictment pursuant to CPL 380.30(1) on the ground of delay in sentencing (*see People v Drake*, 61 NY2d 359 [1984]).

We find it unnecessary to reach any other issues.

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

8992 NYCTL 2015-A Trust, et al., Index 25211/16E
Plaintiffs-Respondents,

-against-

Diffo Properties Corp.,
Defendant-Appellant,

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

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Joseph A. Altman P.C., Bronx (Joseph A. Altman of cousnel), for appellant.

Law Offices of David P. Stich, New York (Stephanie L. Stich of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered May 24, 2018, which, to the extent appealed from as limited by the briefs, denied defendant's motion to vacate the judgment of foreclosure and sale against it, unanimously affirmed, without costs.

CPLR 317 is inapplicable here because this is an action to foreclose on a tax lien (*see* Administrative Code of the City of NY § 11-340).

Under CPLR 5015, "[t]o obtain relief from the default judgment entered against it, defendant was required to demonstrate both a reasonable excuse for the default and a meritorious defense to the action" (*Facsimile Communications*

Indus., Inc. v NYU Hosp. Ctr., 28 AD3d 391, 391 [1st Dept 2006]).

Defendant failed to demonstrate a reasonable excuse for its default. Defendant's alleged excuse for the default, that it did not receive service of process in time to defend the action, is unreasonable as the only reason it did not receive service of process was because it failed to keep a current address on file with the Secretary of State for five years (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., Inc.*, 67 NY2d 138, 143 [1986]; *Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9-10 [1st Dept 2002]).

Defendant also failed to demonstrate a meritorious defense to the action. Nothing in defendant's proposed answer or the affidavit of its principal amounts to anything more than "conclusory allegations or 'vague assertions'" (*id.*). Contrary to defendant's contention, a willingness to pay the tax lien a month after the property was sold is not a defense to a foreclosure action, as it was, at best, a postjudgment offer to settle the case. Likewise, with respect to the alleged "unconscionability" of the sales price, defendant did not submit evidence that the sales price was below market value or that the sales conditions were not aimed at obtaining market value (*see People ex rel. Gale v Tax Commn. of City of N.Y.*, 17 AD2d 225, 227 [1st Dept 1962], *affd* 12 NY2d 646 [1963]). Thus, the motion court properly denied defendant's motion to vacate the judgment

against it.

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

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

8993 In re Dajah S.,
Petitioner-Appellant,

-against-

New York City Administration
for Children's Services, et al.,
Respondents-Respondents.

_____

Carol L. Kahn, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondents.

Dawne Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Gilbert A. Taylor), entered on or about August 31, 2017, which, inter alia, granted respondents' motion to dismiss the petition for custody of the subject child, unanimously affirmed, without costs.

Family Court properly dismissed the petition of the child's adult half-sister seeking custody because the child had already been freed for adoption, and his custody and guardianship awarded to respondents (*see Matter of Carmen P. v Administration for Children's Servs.*, 149 AD3d 577 [1st Dept 2017]; *see also* 148 AD3d 420 [1s Dept 2017], *lv denied* 30 NY3d 930 [2017]). Moreover, petitioner's prior guardianship petition had been dismissed with prejudice.

Contrary to petitioner's contention, she was not entitled to participate in a best interests hearing on the child's proposed adoption by his foster parents. There was no adoption petition before Family Court to warrant a hearing. Indeed, Family Court properly dismissed the petition for custody without a hearing, as petitioner's recourse was to seek adoption, not custody of the child (*see Matter of Boyd v Westchester County Dept. of Social Servs.*, 149 AD3d 1069, 1070 [2d Dept 2017]).

In any event, other than her kinship tie with the child, which did not afford her greater standing than the child's foster parents (*see* Social Services Law § 383[3]; *Matter of Diane T. v Shawn N.*, 147 AD3d 463 [1st Dept 2017], *lv denied* 29 NY3d 986 [2017]), petitioner failed to show that awarding her custody would be in the child's best interests. The record shows that the child, who has special needs, was loved and well cared for in the foster home, and would be adversely affected by being removed

from the only home he has ever known (*see Matter of Rochon Lela D.*, 37 AD3d 311 [1st Dept 2007], *lv denied* 8 NY3d 815 [2007]).

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

8994 Cornwall Warehousing, Inc., et al., Index 153561/14
Plaintiffs-Appellants,

-against-

Jonathan C. Lerner, et al.,
Defendants-Respondents.

_____

Berg & David, PLLC, Brooklyn (Shane Wax of counsel), for appellants.

Bressler, Amery & Ross, P.C., New York (Michael T. Hensley of counsel), for respondents.

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Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered on or about November 27, 2017, which denied plaintiffs' motion to vacate an order, same court (Paul Wooten, J.), entered on or about November 13, 2015, granting, on default, defendants' motion to strike the complaint, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, the motion granted and the complaint reinstated.

Plaintiffs demonstrated a reasonable excuse for their default (CPLR 5015[a][1]), based on law office failure, as detailed in the affirmation of their former counsel who miscalendared the motion (CPLR 2005; *People's United Bank v Latini Tuxedo Mgt., LLC*, 95 AD3d 1285, 1286 [2d Dept 2012]). Plaintiffs then moved to vacate the order entered on their default, showing that they had a meritorious defense to the

underlying motion to strike their complaint pursuant to CPLR 3126 ©, since they were not in default of any disclosure order (*see John Quealy Irrevocable Life Ins. Trust v AXA Equit. Life Ins. Co.*, 151 AD3d 592, 593 [1st Dept 2017], *lv dismissed* 30 NY3d 1091 [2018]; *DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581, 582 [1st Dept 2011]). Plaintiffs also demonstrated a potentially meritorious cause of action by providing the affidavit of their president setting forth the basis of their legal malpractice claim (*see Cheri Rest., Inc. v Eoche*, 144 AD3d 578, 579-580 [1st Dept 2016]).

In light of the strong public policy of this State to dispose of cases on their merits, the court improvidently exercised its discretion in denying plaintiffs' motion to vacate the order entered on default (*DaimlerChrysler Ins. Co. v Seck*, 82 AD3d at 582; *see Chelli v Kelly Group, P.C.*, 63 AD3d 632 [1st Dept 2009]).

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

8995 T-Mobile Northeast LLC, Index 102198/10
Plaintiff-Respondent,

-against-

133 Second Avenue, LLC,
Defendant-Appellant.

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Steven Raison, New York, for appellant.

Rapaport Law Firm PLLC, New York (Marc A. Rapaport of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Margaret A. Chan, J.), entered November 8, 2017, to the extent it granted plaintiff's motion for summary judgment declaring that plaintiff's rights under the parties' 1995 lease and 2002 amendment with respect to a portion of the roof located at 133 Second Avenue in Manhattan remain in full force and effect and that defendant shall not deny, limit or otherwise interfere with plaintiff's right of access pursuant to the 1995 lease and 2002 amendment through the initiation of frivolous legal action, and dismissing defendant's counterclaim for waste, and declared as above-stated, unanimously affirmed, with costs. Appeal from the foregoing order, to the extent it ordered a hearing on the imposition of sanctions against defendant, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiff established prima facie that defendant's waste counterclaim should be dismissed because the damage to the roof was unrelated to plaintiff's equipment. Defendant's managing agent, director of management, architect, and waterproofing contractor all exonerated plaintiff for the tilting parapet and the leaks. Defendant's expert affidavit failed to raise an issue of fact, because the expert's theories were refuted by factual evidence and the testimony of defendant's witnesses (*see Romano v Stanley*, 90 NY2d 444, 451 [1997]).

Contrary to defendant's contention, its superintendent's affidavit and deposition testimony raise no issues of fact as to whether it denied plaintiff access to the demised premises. The superintendent did not expressly deny that he threatened to call the police, and his testimony that he could not drop everything to provide access to plaintiff's agents belied his statement that the agents had a key and the code to enter. Moreover, plaintiff's contractor testified that the superintendent instructed him to call whenever he wanted access because the landlord wanted to know who was on the roof. In any event, it is undisputed that plaintiff had the right under the lease and the amendment to round-the-clock access to its facilities.

The part of the order that directed that a hearing on sanctions be held does not affect a substantial right and is

therefore not appealable as of right (*see* CPLR 5701[a][2][v]).

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

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

8996 Christopher D'Ariano, Index 150079/13
Plaintiff-Appellant,

-against-

SL Green Realty Corp., et al.,
Defendants-Respondents,

Metropolitan Life Insurance Company, et al.,
Defendants.

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Wingate, Russotti, Shapiro & Halperin, LLP, New York (Brielle C. Goldfaden of counsel), for appellant.

Wechsler & Cohen, LLP, New York (Mitchell S. Cohen of counsel), for respondents.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered July 20, 2017, which, inter alia, granted the motion of defendants SL Green Realty Corp. and Landgray Associates for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendants failed to meet their prima facie burden of demonstrating that they did not have constructive notice of the alleged icy condition. It cannot be said, as a matter of law, that the large patch of black ice that plaintiff fell on was not visible or could not be reasonably detected (*see Dominguez v 2520 BQE Assoc., LLC*, 112 AD3d 55 [1st Dept 2013]). Furthermore, defendants failed to present proof as to the adequacy of the ice

removal efforts actually undertaken prior to plaintiff's fall (*see Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412 [1st Dept 2013]).

Even were we to find that defendants met their burden on the motion, we would find that plaintiff raised triable issues of fact as to whether defendants had constructive notice of the icy condition. The affidavits of plaintiff, a witness to the accident and a meteorologist raised the inference that the icy condition was present for a number of days (*see Sikora v Earth Leasing Prop., LLC*, 132 AD3d 600 [1st Dept 2015]; *Rodriguez* at 413).

We have considered all other issues and find them to be unavailing.

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

8997 The People of the State of New York, Respondent, Ind. 4805/16

-against-

Keenan Gates, Defendant-Appellant.

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Law Offices of Lawrence H. Schoenbach, New York (Lawrence H. Schoenbach of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered October 26, 2017, convicting defendant, after a jury trial, of burglary in the first degree, coercion in the first degree, criminal obstruction of breathing or blood, assault in the third degree (two counts) and strangulation in the second degree, and sentencing him, as a second felony offender, to an aggregate term of eight years, unanimously affirmed.

We reject defendant's arguments concerning the sufficiency and weight of the evidence supporting his burglary conviction (*see People v Danielson*, 9 NY2d 342, 348-349 [2007]). The evidence supports inferences that after the victim revoked any license that defendant may have had to be in her apartment, defendant remained unlawfully with the contemporaneous intent to commit a crime (*see generally People v Gaines*, 74 NY2d 358, 363

[1989]). This was not a case like *People v Swinson* (154 AD3d 533 [1st Dept 2017]) and the similar cases cited therein, where a defendant who, during an argument, spontaneously attacked a victim upon being told to leave the premises was found not to have committed burglary. Here, there was an extended encounter, during which defendant refused to leave, menaced the victim and threatened to kill her, before he ultimately attacked her. The jury could have reasonably inferred, particularly in light of defendant's prior similar acts of domestic violence against the victim (*see People v Melendez*, 206 AD2d 270, 271 [1st Dept 1994], *lv denied* 84 NY2d 870 [1994]), that he remained in the apartment with criminal intent.

Defendant's challenge to the court's response to a jury note regarding the intent element of burglary is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. The supplemental charge was correct as a whole, as was the main charge, and the court's slight misstatement of the law in the

supplemental charge could not have misled the jury (*see People v Umali*, 10 NY3d 417, 426-427 [2008], *cert denied* 556 US 1110 [2009]).

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

8998 Anejandro Antonio Roque, Index 305076/14
Plaintiff-Respondent,

-against-

475 Building Co., LLC,
Defendant-Appellant,

475 Managing Member, LLC,
Defendant.

_____

Wade Clark Mulcahy LLP, New York (Valeria Prizimenter of counsel), for appellant.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered on or about September 20, 2017, which, to the extent appealed from, denied the motion of defendant 475 Building Co., LLC for summary judgment dismissing that part of plaintiff's Labor Law § 241(6) claim that is premised upon a violation of 12 NYCRR 23-1.8(a), unanimously affirmed, without costs.

Plaintiff was injured when, while in the process of demolishing a sidewalk bridge at premises owned by defendants, a nail he was attempting to remove with a hammer struck him in the eye. Industrial Code 23-1.8(a) states that eye protection equipment "suitable for the hazard involved shall be provided for and shall be used by all persons . . . while engaged in any . . . operation which may endanger the eyes." The issue of whether demolishing a sidewalk bridge and removing nails are activities

covered by 12 NYCRR 23-1.8(a) is an issue of fact (*see Fresco v 157 E. 72nd St. Condominium*, 2 AD3d 326, 328 [1st Dept 2003]; *Cappiello v Telehouse Intl. Corp. of Am.*, 193 AD2d 478, 480 [1st Dept 1993]). The record further presents triable issues of fact as to whether plaintiff was the sole proximate cause of his injury (*see Galawanji v 40 Sutton Place Condominium*, 262 AD2d 55 [1st Dept 1999], *lv denied* 94 NY2d 756 [1999]).

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

8999 Elsa Sarmiento, Index 150294/11
Plaintiff-Respondent,

-against-

Ampex Casting Corporation, et al.,
Defendants-Appellants.

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Gerstman Schwartz & Malito, LLP, Garden City (David M. Schwartz of counsel), for appellants.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 15, 2017, which denied defendants' motion to renew their prior CPLR 3216 motion to dismiss the complaint, unanimously affirmed, with costs.

We decline to consider defendants' argument that plaintiff's affidavit of merit is inadmissible because it was not supported by a translator's affidavit, since it is raised for the first time on appeal (*see e.g Diarrassouba v Consolidated Edison Co. of N.Y. Inc.*, 123 AD3d 525 [1st Dept 2014]).

The court did not abuse its discretion in denying the motion to renew (*see Central Amusement Intl. LLC v Lexington Ins. Co.*, 162 AD3d 452, 453 [1st Dept 2018]; CPLR 2221[e]). Defendants' application lacks a sufficient factual or legal basis, and is an

indirect attempt to challenge the truth of the allegations in the complaint, which is more appropriately left for at trial.

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9000 35 West Realty Co., LLC, Index 653674/15
Plaintiff-Respondent,

-against-

Booston LLC,
Defendant-Appellant,

Friedphil Realty Corp.,
Defendant.

_____

David Rozenholc & Associates, New York (Gary N. Horowitz of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered March 27, 2018, which, to the extent appealed from as limited by the briefs, denied defendant Booston LLC's motion for summary judgment dismissing the complaint as against it, and granted plaintiff's cross motion for summary judgment declaring that the term of the lease between plaintiff and Booston dated October 10, 2000 expires October 31, 2020 and that the purported amendment to the lease dated March 29, 2005 is null and void and of no force or effect, and awarding plaintiff its reasonable attorneys' fees and expenses to be paid by Booston, declared as described above, and directed the Sheriff of New York County to remove Booston from the premises in the

event Booston fails to vacate and surrender possession of the premises to plaintiff on or before October 31, 2020, unanimously modified, on the law, to deny plaintiff's motion and vacate the declarations and the direction to the Sheriff, and otherwise affirmed, without costs.

The doctrine of judicial estoppel does not bar Booston from asserting that its lease with plaintiff expired after October 31, 2020, although it represented in the verified complaint and an affidavit in a prior *Yellowstone* action that the lease expired on that date, because Booston did not obtain a favorable ruling or judgment in the *Yellowstone* action as a result of that position (*see e.g. Herman v 36 Gramercy Park Realty Assoc., LLC*, 165 AD3d 405, 406 [1st Dept 2018]; *Tilles Inv. Co. v Town of Oyster Bay*, 207 AD2d 393, 394 [2d Dept 1994]). The *Yellowstone* court did not rely on Booston's representation as to the expiration date of the lease in deciding that matter. The representations in the verified complaint and affidavit are, at most, informal judicial admissions, which are not conclusive but may be used at trial as some evidence of the facts as represented (*see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 11 [1st Dept 2009]).

The parties' conflicting reasonable interpretations of the February 14, 2008 amendment to the lease present an issue of fact whether the amendment nullified and voided the purported March

25, 2005 amendment at issue (*Yanuck v Patson & Sons Agency*, 209 AD2d 207 [1st Dept 1994]; *Dermot Co., Inc. v 200 Haven Co.*, 41 AD3d 188, 192 [1st Dept 2007]). Moreover, Booston's principal's affidavit showing that he authenticated the 2005 amendment raises an issue of fact whether that amendment was, as plaintiff alleges, a forgery.

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

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9001 In re Micah T.,

A Child Under Eighteen Years
of Age, etc.,

Josette D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

In re Jahknai K. -C. D.,
and Others,

Dependent Children under Eighteen
Years of Age, etc.,

Josette D.,
Respondent-Appellant,

Children's Aid Society,
Petitioner-Respondent.

_____

Larry S. Bachner PC, New York, (Larry S. Bachner of counsel), for appellant.

Rosin Steinhagen Mendel, PLLC, New York (Melissa Wagshul of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (John A. Newbery of counsel), attorney for the children.

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Order, Family Court, New York County (Clark V. Richardson, J), entered on or about March 16, 2018, which, upon a finding of neglect against respondent mother as to her daughter Micah, awarded custody of Micah to her father, and which found a violation of the suspended judgment and terminated the mother's

parental rights as to her children Jahknai, Jericho, and Kymahni, and committed them to the care and custody of the Commissioner of Social Services and petitioner agency for purposes of adoption, unanimously affirmed, without costs.

The Family Court's finding that respondent failed to comply with material terms of the suspended judgment is supported by a preponderance of the evidence (*see In re Kendra C.R. [Charles R.]*, 68 AD3d 467 [1st Dept 2009], *lv dismissed and denied* 14 NY3d 870 [2010]). Respondent failed to ensure that her children attend court-ordered family therapy on a weekly basis (*see Matter of Lourdes O.*, 52 AD3d 203 [1st Dept 2008]), failed to attend required individual therapy, failed to sign releases for the agency to obtain the children's medical records, and failed to attend required conferences with the agency, all of which were required terms of the suspended judgment. In addition, her act of relocating all four children to Florida, and enrolling them in school there, without prior knowledge or approval of the court, or the agency, and failing to provide an accurate address in Florida were violations of the suspended judgment, as the mother was aware that she could not relocate the children before the conclusion of this action.

A preponderance of the evidence supported the Family Court's finding that termination of the mother's parental rights to

Jahknai, Jericho, and Kymahni was in these children's best interests, given the evidence that the children were well-cared for in their kinship foster home and wished to be adopted by their maternal aunt *(Kendra C.R.*, 68 AD3d at 468).

The evidence amply supports Family Court's neglect finding with respect to the child Micah. The mother's untreated mental health condition placed Micah at imminent risk of harm (*see Matter of Catherine M. [Catherine L.]*, 151 AD3d 517, 517 [1st Dept 2017], *lv denied* 30 NY3d 927 [2017]). The record included evidence that the mother had a diagnosis of personality disorder NOS with narcissistic and borderline traits, but refused to attend individual counseling, and, in the months immediately prior to the petition, made bizarre, delusional statements to the family therapist. Moreover, as noted, the mother impulsively moved herself, Micah, and the other three children to Florida, without providing notice to Micah's father, the agency, or the court. In taking these steps, respondent disregarded Micah's emotional health, as she was suddenly removed from her usual surroundings and prevented from seeing her father, who had been awarded temporary custody and with whom she lived on a regular basis *(see Matter of Sayeh R.*, 91 NY2d 306 [1997]). The evidence provided a sound and substantial basis for the Family Court to find it was in this child's best interests to award custody to

the father (*see Matter of Bunita B. v Mark P.*, 166 AD3d 565 [1st Dept 2018]).

Respondent's due process arguments are unavailing in light of the fact that six different attorneys had been appointed to represent her, all of whom were relieved because she refused to work with them, such that she effectively exhausted her right to assigned counsel (*see Matter of Montrell A.D. [Miguel D.]*, 161 AD3d 411, 411-12 [1st Dept 2018], *lv denied* 31 NY3d 913 [2018]). Moreover, the Family Court sufficiently advised respondent of the risks of self-representation and ensured that her waiver of the right to counsel was made knowingly, willingly, and voluntarily (*see Matter of Emma L.*, 35 AD3d 250, 252 [1st Dept 2006], *lv dismissed and denied* 8 NY3d 904 [2007]).

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

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9003 The People of the State of New York, Ind. 1367/16
Respondent,

-against-

Milton Tillery,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at plea; Ellen Biben, J. at sentencing), rendered January 24, 2017, 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: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9004 In re Cynthia Johnson, Index 652696/15
Petitioner-Appellant,

-against-

Board of Education of the
City School District of the
City of New York, et al.,
Respondents-Respondents.

_____

Robert T. Reilly, New York (Michael J. Del Piano of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kathy C. Park of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered on or about May 2, 2017, which denied the petition to vacate an arbitration award terminating petitioner's employment as a schoolteacher, and confirmed the award, unanimously affirmed, without costs.

The court properly denied the petition and confirmed the award. Petitioner failed to meet her burden of showing any ground that would warrant vacatur (Education Law § 3020-a[5]; CPLR 7511[b][1]) or that the award was arbitrary and capricious or unsupported by adequate evidence (*see City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011]; *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 418-419 [1st Dept 2013]). The Hearing Officer's determination sustaining

charges of incompetency is amply supported by the evidence, including six written reports of formal and informal observations of petitioner's teaching over the course of two years. While the Hearing Officer found that the testimony of the assistant principal was not credible, he did credit her written contemporaneous reports of formal observations, as well as the testimony and observation reports of the school principal and a peer intervention observer, all of whom consistently found petitioner's teaching and classroom management skills to be unsatisfactory. There exists no basis to disturb the Hearing Officer's credibility determinations and his weighing of the evidence (*see Matter of Asch* at 420), and petitioner's assessment of the quality of her lessons was insufficient to overcome the evidence of her deficiencies.

Under the circumstances presented, the penalty of termination does not shock our sense of fairness (*see e.g. Matter of Broad v New York City Bd./Dept. of Educ.*, 150 AD3d 438 [1st

Dept 2017]; *Matter of Ajeleye v New York City Dept. of Educ.*, 112 AD3d 425 [1st Dept 2013]).

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9005 J.H. An Infant under the Age of Fourteen Years, etc., Plaintiff, Index 24634/16E

-against-

1288 LLC, et al., Defendants.

- - - - -

1288 LLC, et al., Third-Party Plaintiffs-Respondents,

-against-

1288 Washington, LLC, et al., Third-Party Defendants,

BX Washington LLC, Third-Party Defendant-Appellant.

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Ahmuty, Demers & McManus, New York (Frank J. Wenick of counsel), for appellant.

Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 13, 2018, which, to the extent appealed from as limited by the briefs, denied third-party defendant's motion to dismiss the causes of action for common-law indemnity and contribution as against it, unanimously affirmed, without costs.

Plaintiff alleges that he sustained injuries in connection with a bedbug infestation of his apartment. He commenced this

action against defendants (collectively, Chestnut), the owners of the building, which brought a third-party action against the former owner (BX). Chestnut alleges that plaintiff's injuries were caused by BX's negligence or breach of contract while BX owned and controlled the building and was responsible for removing the bed bugs from plaintiff's apartment, and that any liability attributed to it, Chestnut, will be purely vicarious, without actual fault on its part. These allegations state a cause of action for common-law indemnity (*see 17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 81-82 [1st Dept 1999]; *Elkman v Southgate Owners Corp.*, 246 AD2d 314 [1st Dept 1998]). Chestnut further alleges that, if it is found negligent in fact, the greater or sole responsibility for plaintiff's injuries is attributable to BX, and BX should pay its proportionate share of the judgment. These allegations state a cause of action for contribution (*see Fendley v Power Battery Co.*, 167 AD2d 260, 261 [1st Dept 1990]).

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9006 The People of the State of New York, Respondent, Ind. 5044/14

-against-

Ames Figueroa, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered September 23, 2016, convicting defendant, after a jury trial, of burglary in the first degree and robbery in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 10 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). Moreover, we find that the evidence was overwhelming. There is no basis for disturbing the jury's determinations concerning identification and credibility. The victim made a prompt and reliable identification of defendant, who was wearing the same distinctive clothing that the victim had observed during the robbery. In addition, the evidence supported the inference that when

defendant encountered the police, he discarded the victim's phone and earphones, which the police found nearby. The victim's credible testimony also established that defendant displayed what appeared to be a firearm.

The victim's statements during a 911 call did not qualify under the present sense impression exception to the hearsay rule (*see People v Brown*, 80 NY2d 729, 732-736 [1993]), which was the only theory under which they were offered and received. The 911 call was not substantially contemporaneous with the robbery, but was made after an intervening chain of events that permitted some time for reflection (*see People v Vasquez*, 88 NY2d 561, 578-579 [1996]). See generally Guide to NY Evidence rule 8.29 (Present Seuse Impression), http://www.nycourts.gov/judges/evidence/8-HEARSAY/8.29_PRESENT%20SENSE%20IMPRESSION.pdf). Nevertheless, the error in admitting the 911 call was harmless, in light of the overwhelming evidence of guilt, and because "prior consistent statements are notably less prejudicial to the opposing party than other forms of hearsay, since by definition the maker of the statement has said the same thing in court as out of it, and so credibility can be tested through cross-examination" (*People v Ludwig*, 24 NY3d 221, 230 [2014]).

Defendant did not preserve his claim that the court should have excluded portions of the 911 call in which the victim's

mother, who was not a witness, relayed information provided by her son, and we decline to review it in the interest of justice. As an alternative holding, we conclude that the mother's comments were inadmissible, but that there was no possibility of prejudice because the court's limiting instructions told the jury to disregard these parts of the call in that the mother was not a witness, as well as because of the overwhelming evidence already noted.

The court's charge on reasonable doubt does not warrant reversal. Although the Criminal Jury Instructions contain the "preferred phrasing," the court's charge, viewed as a whole, adequately conveyed the appropriate standard (*People v Cubino*, 88 NY2d 998, 1000 [1996]; *see also People v Radcliffe*, 232 NY 249, 254 [1921]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9007 US Suite LLC, et al., Index 152576/17
Plaintiffs-Respondents,

-against-

Baratta, Baratta & Aidala LLP, et al.,
Defendants-Appellants.

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Abrams Garfinkel Margolis Bergson, LLP, New York (Robert J. Bergson of counsel), for appellants.

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

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Order, Supreme Court, New York County (Erika M. Edwards, J.), entered December 26, 2017, which denied defendants' motion to dismiss the complaint for failure to state a cause of action, unanimously modified, on the law, to dismiss the third cause of action for violation of Judiciary Law § 487, and the fourth cause of action under the Debtor and Creditor Law, and otherwise affirmed, without costs.

"[A] court may consider affidavit facts as a supplement to the complaint to show the cause of action to be valid" (*Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993]). Plaintiffs' complaint here, as supplemented, sufficiently states a cause of action that defendants aided and abetted another person's removal of funds belonging to plaintiffs, hid the funds

in their escrow account, and used those funds to pay the other person's personal and business expenses (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010]).

Plaintiffs have sufficiently pled a cause of action for an accounting (*Matter of Schneider*, 131 AD3d 175, 182 [2d Dept 2015], citing *Matter of Vagionis*, 217 AD2d 175, 177 [1st Dept 1995]; NY St Bar Assn Comm on Prof Ethics Op 532, *2 [1981]). Defendants' assertion that they have provided an accounting is of no avail, as the document provided is an unsworn, unverified spreadsheet prepared by an unidentified person, without explanation.

Plaintiff did not adequately plead a claim under the Debtor and Creditor Law. The claim pursuant to the Judiciary Law § 487 must also be dismissed, as the alleged deceit did not occur during a pending judicial proceeding (*see Jacobs v Kay*, 50 AD3d 526, 527 [1st Dept 2008]).

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9008-
9009-
9010 Index 151776/14

PF2 Securities Evaluations, Inc.,
Plaintiff-Appellant,

-against-

Guillaume Fillebeen, et al.,
Defendants-Respondents.

- - - - -

Guillaume Fillebeen, et al.,
Counterclaim Plaintiffs-Respondents,

-against-

PF2 Securities Evaluations, Inc., et al.,
Counterclaim Defendants-Appellants.

_____

Carmel, Milazzo & Dichiara LLP, New York (Christopher P. Milazzo of counsel), for appellants.

Law Office of Robert Steckman, P.C., New York (Robert M. Steckman of counsel), for respondents.

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Orders, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about March 26, 2018, which, insofar as appealed from, denied counterclaim defendants' motions to dismiss the counterclaim asserted against PF2 Securities Evaluations, Inc. for breach of contract, the counterclaim asserted against the individual counterclaim defendants (Gene Phillips and Robin Phillips) for breach of fiduciary duty, and the counterclaims asserted against all counterclaim defendants for unjust enrichment and fraudulent inducement, unanimously affirmed, with

costs.

The counterclaim for breach of contract pleads the requisite terms of the agreement, consideration, performance by defendants, basis of the alleged breach of the agreement by PF2 (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]), and resulting damages (*see Noise in the Attic Prods., Inc. v London Records*, 10 AD3d 303, 307 [1st Dept 2004]). It alleges that defendant Guillaume Fillebeen, a minority shareholder in PF2, agreed to sell his shares for an amount significantly less than their agreed upon or actual fair market value and to stay on for a time on a consulting basis (as a result of misrepresentations made to him about the company's financial state by Gene and Robin, who are brothers and the controlling shareholders), that "Fillebeen timely and properly performed all conditions on his part to be performed pursuant to his obligations to [PF2]," and that counterclaim defendants "breached various terms of the Agreement, including, but not limited to its payment obligations to Fillebeen."

The counterclaim for unjust enrichment pleads, in the alternative, counterclaim defendants' enrichment at Fillebeen's expense and the inequity of permitting them to retain what Fillebeen seeks to recover (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]; *Sergeants Benevolent Assn.*

Annuity Fund v Renck, 19 AD3d 107, 111 [1st Dept 2005]). It alleges that counterclaim defendants underpaid Fillebeen for his PF2 shares and also failed to compensate him for their appropriation of the computer models that he had developed for projecting return on investment products such as collateralized debt obligations (CDOs). The claim is pleaded with the requisite specificity (*see* CPLR 3013; *Flamingo Telefilm Sales v United Artists Corp.*, 22 AD2d 778 [1st Dept 1964]).

The counterclaim for breach of fiduciary duty states a cause of action by alleging that, as controlling shareholders of PF2, a closely held corporation, Gene and Robin stood in a fiduciary relationship to Fillebeen, a minority shareholder (*see Gjuraj v Uplift El. Corp.*, 110 AD3d 540, 541 [1st Dept 2013]), and that Gene and Robin, who controlled the company's finances, abused their position by falsely representing the company's financial state in order to induce Fillebeen to part with his shares at a price below fair value. The claim is pleaded with the requisite particularity (*see* CPLR 3016[b]; *Burry v Madison Park Owner LLC*, 84 AD3d 699 [1st Dept 2011]).

In support of their counterclaim for fraudulent inducement, defendants allege, in sum, that Gene and Robin falsely told Fillebeen that PF2's finances were in a "dire state," that its profits were not sufficient to continue in the CDO modeling

business in which Fillebeen's expertise resided, and that they wanted to change PF2's business focus to litigation consulting, an area outside of Fillebeen's expertise but in line with Robin's expertise as an attorney, and that Gene and Robin made these representations to induce Fillebeen to sell his PF2 shares, for less than fair market value, for the purpose of cutting him out of future profits distributions. These allegations plead the misrepresentation and scienter elements of the claim (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Given the allegations that PF2 was a closely held corporation in which Gene and Robin had control of finances, while Fillebeen handled technical issues and lacked insight into the company's finances, the claim adequately pleads justifiable reliance (*see generally Knight Sec. v Fiduciary Trust Co.*, 5 AD3d 172, 173 [1st Dept 2004]). The claim is pleaded with the requisite particularity (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). Defendants are not required to plead their damages with particularity (*see A.S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 383 [1957]; *Kensington Publ. Corp. v Kable News Co.*, 100 AD2d 802 [1st Dept 1984]).

We have considered counterclaim defendants' remaining contentions, including the contention that certain of the alleged

misrepresentations underlying the fraud claim are nonactionable opinion, and find them unavailing.

We deny the parties' requests for sanctions.

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9011N In re Michael James DiNapoli, Index 653787/16
Petitioner-Respondent,

-against-

UBS Financial Services Inc., et al.,
Respondents-Appellants.

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Lagalante PLLC, New York (James L. Komie of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellants.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 19, 2017, vacating a Financial Industry Regulatory Authority (FINRA) arbitration award dated May 12, 2016, unanimously reversed, on the law, without costs, and the award confirmed.

The court granted the petition to vacate the arbitration award on the ground that petitioner was not properly served with notice of the arbitration. Under New Jersey arbitration law, the application of which both parties agree applies, lack of proper service "so as to substantially prejudice the rights of a party to the arbitration proceeding" is a ground for vacatur of an arbitration award (NJ Stat Ann § 2A:23B-23[a][6] [footnote omitted]).

We conclude that the arbitrator correctly found that petitioner was properly served with notice (*see Selective Ins.*

Co. v Coach Leasing, Inc., 2008 WL 2404183, *7, 2008 NJ Super Unpub LEXIS 1104, *18 [NJ Sup Court, App Div, June 16, 2008] ["actual knowledge of the notice is not required by our statute provided service was made at a location held out by the person as a place of delivery of such a notice (internal quotation marks omitted)]). The record demonstrates that, in accordance with its rules, FINRA served respondents' Statement of Claim on petitioner by sending it to him by regular mail at one of the three residential addresses he had provided to FINRA in a filing six weeks earlier. Under the rules, it was petitioner's obligation to keep his address information current via supplemental amendments. No amendments supplementing petitioner's residential information were submitted between the date of the aforementioned filing and the date of the arbitration award six weeks later. Nor was the Statement of Claim returned to FINRA as undeliverable.

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

ENTERED: APRIL 16, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Moulton, JJ.

9012N FYM Millbrook, LLC, Index 850003/16
Plaintiff-Appellant,

-against-

Sarah Weinberg, et al.,
Defendants-Respondents.

_____

Kriss & Feuerstein LLP, New York (Michael J. Bonneville of counsel), for appellant.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered September 5, 2017, which, to the extent appealed from as limited by the brief, denied plaintiff's motion for summary judgment for foreclosure and to strike certain affirmative defenses and the counterclaim, unanimously affirmed, with costs.

Summary judgment was properly denied since triable issues of fact exist as to the identity of the indebted party. Although plaintiff claimed that the party named as maker on the note was a mere scrivener's error, it did not bring a claim for reformation of the note, nor did it provide clear and convincing evidence of such error *(see Nash v Kornblum*, 12 NY2d 42, 46 [1962]; *cf. VNB N.Y. Corp. v Chatham Partners, LLC*, 125 AD3d 517 [1st Dept 2015], *lv denied* 25 NY3d 910 [2015]). Without evidence from someone with direct knowledge of the preparation of the loan documents,

or any other documentary evidence that the parties at the time of the contracting intended solely that defendant, in her individual capacity, was the maker of the note and the named recipient of the loan proceeds, plaintiff has not made a prima facie showing that it was entitled to judgment of foreclosure on the debt. The motion court correctly rejected plaintiff's claim that the mortgage was sufficient to dispel any factual issues regarding the maker of the note.

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: APRIL 16, 2019

CLERK