SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 16, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12322 The People of the State of New York, Respondent, Ind. 3217/08

-against-

Willi Adames,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at suppression motion; Daniel P. Fitzgerald, J. at jury trial and sentencing), rendered June 24, 2011, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of eight years, unanimously reversed, on the law, and the matter remanded for a new trial.

The primary issue addressed on this appeal concerns whether defendant's written and videotaped statements should have been suppressed. For the reasons stated below, we find the People failed to establish a knowing and intelligent waiver of defendant's *Miranda* rights.

On June 24, 2008 at approximately 2:00 a.m., defendant, an 18-year-old with no prior criminal history, went to 200 Eldrige Street with his cousin Ricardo Martinez and three other men. Ricardo Martinez was armed with a loaded gun. Two days earlier, defendant had a fight in that neighborhood with several individuals, including Vincent Cruz. Defendant and the four men approached Diana Vargas in front of 200 Eldridge Street where a conversation ensued. Moments later, Cruz came out of a building on 200 Eldridge Street armed with several knives. Martinez then fired five shots at Cruz. One of the gunshots struck Cruz in the neck and severed his carotid artery, causing his death.

On July 10, 2008, the People filed a grand jury indictment charging defendant with manslaughter in the first degree, manslaughter in the second degree, gang assault in the first degree and two counts of criminal possession of a weapon in the second degree.

A *Huntley/Dunaway/Wade/Cruz* hearing was conducted in response to defendant's motion to suppress his statements made to the police and the District Attorney's Office. Detective William McNeeley testified that at approximately 1:00 p.m. on June 24, 2008, he and Detective Brian Macleod went to defendant's apartment in Brooklyn as part of the investigation into the shooting death of Vincent Cruz. Defendant agreed to return with

the detectives to the police station, and upon their arrival, he was placed in an interview room without handcuffs, was provided with a glass of water and was allowed to eat a container of food prepared by his grandmother. The detectives spoke in English, defendant responded in English and McNeeley testified that defendant had no trouble understanding anything that was said.

Before questioning commenced, McNeeley, in the presence of two other detectives, read defendant his *Miranda* rights from a preprinted sheet of paper. McNeeley testified that defendant remained uncuffed, no threats or promises were made to him by any of the detectives and none of the detectives had their weapons drawn. Prior to advising him of his *Miranda* rights, McNeeley instructed defendant that he would be asked a question after each right had been read, and defendant was to write down a response of either "yes" or "no." Defendant indicated that "he couldn't write." McNeeley then offered to write defendant's answers for him. Defendant answered "yes" each time he was asked if he understood a particular right, and he wrote his initials on the preprinted *Miranda* form next to where McNeeley had written "yes" on defendant's behalf. Thereafter, McNeeley commenced questioning and defendant gave a statement regarding his actions and whereabouts starting on June 23, 2008, in which defendant, among other things, indicated that he had not been in Manhattan.

At the conclusion of defendant's narrative, McNeeley asked if defendant was "sure" that he had given an "accurate account" because "he was seen over there [on Eldridge Street] by people he knows and doesn't know, and he was involved in an incident where there was a fight." In response, defendant stated that "he wanted to be truthful, and he [would] tell [McNeeley] everything that happened." Defendant then provided a second statement regarding his recent activities, in which he acknowledged, among other things, his involvement in an altercation that took place on Eldridge Street during which an individual named Jorge, armed with "three kitchen knives in his hands," confronted defendant and his friends causing them to flee. When McNeeley asked defendant if he had heard a gunshot as he ran away, defendant initially answered, "No." McNeeley then told defendant that the "guy that had the three kitchen knives was shot, and that there [wa]s no way [defendant] could have run far enough away [and defendant] was there because he was seen out there during the incident."

McNeeley asked defendant if he was the individual with the knives or was it somebody else who shot him, to which defendant responded that he "didn't know they shot him." McNeeley said to defendant that he had to have known that the individual was shot and defendant said that he did not shoot anybody. When McNeeley

asked "who did it if you didn't do it," defendant answered, "I don't know. Must have been Argenis because he had a shirt wrapped around his hand and I didn't see the gun."

McNeeley again asked defendant if he was being truthful "because his freedom depended upon it, and that he is looking at a heavy assault charge . . . and if [the man who was shot] dies you know it could be very serious." At that point in the interview, defendant said, "Oh, no. Oh, my God. I want to be so truthful with you, I'm ready to tell you the whole truth." McNeeley stopped the "verbal account" at that time.

McNeeley testified that he then asked defendant if he would like to give a written statement. Defendant responded that "he doesn't write, and he asked [McNeeley] if [he] would write it down." McNeeley told him that he would write it and then read it back to him to ensure that it was accurate. When McNeeley subsequently read back the written statement to defendant, he had no objections or corrections. McNeeley claimed that defendant "never asked for an attorney" and he could not recall if defendant had ever expressed any interest in speaking with the "[D]istrict [A]ttorney."

Approximately five hours after giving his written statement, defendant was questioned by Assistant District Attorney Elliot in a videotaped interview. Elliot began by introducing herself as a

"[D]istrict [A]ttorney" and stating, "I understand that you wanted to speak to me right?," to which defendant replied, "Yes, Miss." Elliot, although noting that she had been advised by the detectives that defendant had already been read his *Miranda* warnings, indicated that she was going to give them to him again to make sure that he was "aware" of them before they had a "conversation." Defendant acknowledged that he understood that he had the right to remain silent and that anything he said could be used against him. Next, Elliot asked him whether he understood that he had the right to consult an attorney before speaking to her and to have an attorney present during questioning. The following exchange took place:

> "ADA: You have a right to consult an attorney before speaking to the police or me and have an attorney present during any questioning. Do you understand that?
>
> "DEFENDANT: No. I want [sic] have a couple of questions.
>
> "ADA: Go ahead. What's your question?
>
> "DEFENDANT: I want my question privates [sic] though. It's gotta be me and you. If it's okay.
>
> "ADA: Uh. Well. Okay. If you want to --- I mean I'm here because you wanted to speak with me, right? And so I'm happy to answer any questions that you have. That's part of the reason why I'm here. My understanding is you might have some questions for me. These questions that I have for you are different. These are - you've already been asked these questions.

"DEFENDANT: Oh yeah.

"ADA: So I'm only - I want to just make sure that you understand.

"DEFENDANT: Yes.

"ADA: The - you know - your rights basically.

"DEFENDANT: Yes.

"ADA: So - do you - do you understand that you have the right to consult an attorney before speaking to the police or me? Do you - do you understand that?

"DEFENDANT: What does that mean?

"ADA: That means that - I know you asked to speak with me and I'm here. I'm here now to speak with you.

"DEFENDANT: Okay.

"ADA: But you have the right to consult an attorney before speaking to the police or me.

"DEFENDANT: What's an attorney is you [sic]. What's an attorney.

"ADA: I am an attorney.

"DEFENDANT: Okay.

"ADA: But you have the right to speak to a different attorney. Your own attorney if you would like before you speak to me.

"DEFENDANT: I can do that?

"ADA: You can do that.

"DEFENDANT: There's another one here?

"ADA: There is not another one here. The - the -

practically speaking, if you want to speak to an attorney before speaking to me we are not going to be able to have a conversation. We're not going to be able to talk now.

"DEFENDANT: Oh. Okay. So let's talk now. Let's - to see if I could . . .

"ADA: But do you understand that -

"DEFENDANT: Yes miss.

"ADA: Okay. Do you - do you want an attorney now or do you not want an attorney now and you would like to speak with me?

"DEFENDANT: No I will speak with you. It's alright.

"ADA: Okay. Now if you can't afford one do you understand that one would be provided for you?

"DEFENDANT: Oh. Okay.

"ADA: So you're obviously. You asked to speak with me so I assume that you have some questions for me. Right? You have questions for me?

"DEFENDANT: No. It's okay. Go ahead answer [sic] your questions first."

Thereafter, defendant gave a narrative similar to the written statement that he had previously given to the detectives, except that now he claimed that he saw Martinez, not Argenis, pull out a gun and shoot five times. At several points during the videotaped interview, Elliot expressed doubt as to the truth of defendant's statements and urged him to be honest.

The court issued a written decision finding McNeely to be a

credible witness. As for defendant's written statements, the court found no basis in the record for finding that defendant did not understand the *Miranda* warnings or the statements that he initialled, noting that defendant called no witnesses to support his contention that his illiteracy and low intelligence rendered him unable to understand the rights that he was waiving. As for defendant's videotaped statement, the court rejected defendant's contentions that he "was of too low intelligence" to understand the rights that he was waiving, and that Assistant District Attorney Elliot misled him into believing that speaking to her was the equivalent of speaking to his own attorney as unsupported by the record. The court determined that "there was no evidence introduced by either the People or Adames as to Adames' intelligence quotient or his cognitive abilities." The court rejected defendant's contention that he invoked his right to counsel, finding defendant's statements to be "equivocal." The court emphasized that the Assistant District Attorney had conveyed to defendant that they could stop speaking and obtain an attorney for defendant but he chose to continue speaking and to not consult an attorney.

After a jury trial, defendant was ultimately convicted of criminal possession of a weapon in the second degree.

We find the People failed to establish that defendant made a

knowing and intelligent waiver of his *Miranda* rights prior to giving his oral, written and videotaped statements. The People have a heavy burden to demonstrate that the defendant's waiver was knowing, intelligent, and voluntary (*People v Davis*, 75 NY2d 517, 523 [1990]). Here, the court credited hearing testimony that after each right was read aloud to defendant, he understood each one and memorialized his understanding by writing his initials next to each right on the preprinted *Miranda* waiver form even while considering defendant's illiteracy. Nevertheless, we find to the contrary and determine that defendant did not understand the "immediate import" of the *Miranda* warnings, especially when considering the video statement which established defendant did not understand the word "attorney" nor his right to consult an attorney before questioning (*People v Williams*, 62 NY2d 285, 289 [1984]). In light of our finding that defendant did not understand his right to counsel immediately before the video statement, it follows that defendant's previous statements made at the police precinct are also suppressed.

The video statement documents defendant's manner and speech, which indicates confusion surrounding the right to counsel. At the beginning of the video statement, defendant stated that he did not understand his right to counsel. ADA Elliot asked, "You have a right to consult an attorney before speaking to the police

or me and have an attorney present during any questioning. Do you understand that?" Defendant responded, "No." He followed up this declaration and stated, "I want [sic] have a couple of questions." ADA Elliot inquired, "What's your question?" Defendant stated, "I want my question privates [sic] though. It's gotta be me and you. If it's okay." This request to speak in private, immediately after expressing that he did not understand his right, indicates defendant's belief that the Assistant District Attorney was his counsel. ADA Elliot did not acknowledge this confusion. Instead, Elliot responded as follows:

> "Uh. Well. Okay. If you want to --- I mean I'm here because you wanted to speak with me, right? And so I'm happy to answer any questions that you have. That's part of the reason why I'm here. My understanding is you might have some questions for me. These questions that I have for you are different. These are - you've already been asked these questions."

Later in the colloquy Elliot acknowledged defendant's confusion and asked, "[D]o you understand that you have the right to consult an attorney before speaking to the police or me?" Defendant responded, "What does that mean?" Again, defendant indicated that he did not know or understand right to counsel.

Rather than restate or explain the right to counsel, Elliot stated, "That means that - I know you asked to speak with me and

I'm here. I'm here now to speak with you." Elliot further stated, "But you have the right to consult an attorney before speaking to the police or me." In response, defendant asked, "What's an attorney?" Elliot answered, "I am an attorney." Without further explanation, the People's answer to the defendant's questions failed to clarify his understanding of the right to counsel.

Next, Elliot attempts to explain the right to counsel by stating, "But you have the right to speak to a different attorney. Your own attorney if you would like before you speak to me." Defendant expressed surprise and quizzically responded, "I can do that?" To this point, it is self-evident that defendant could not have understood his right to counsel prior to his written or oral statement.

Given defendant's failure to comprehend his right to counsel, we must examine whether Elliot informed defendant of his right to counsel in "clear and unequivocal terms" before the video statement (*Miranda v Arizona*, 384 US 436, 467-468 [1966]). Defendant asked Elliot, "There's another [attorney] here?" Elliot states, "There is not another one here . . . if you want to speak to an attorney before speaking to me we are not going to be able to have a conversation." This statement provides defendant some information about his right to counsel, but viewed

in light of defendant's prior statements which indicate that he did not fully comprehend his right to counsel or the word "attorney," Elliot's attempt to provide further explanation was insufficient.

Eventually, defendant does respond that he will speak with ADA Elliot. However, it is not clear that this 18-year-old defendant with no prior criminal history, who could not read or write, ever understood his right to counsel nor the consequences of waiver. The evidence shows that defendant responded "yes" to questions when asked if he understood his rights. Then, immediately afterwards, defendant expressed confusion in understanding his right to counsel. As such, the People failed to present evidence that established defendant sufficiently understood the immediate import of the *Miranda* warnings. Moreover, ADA Elliot's explanations failed to clarify for defendant the concept of his right to counsel. Thus, given defendant's age, illiteracy, unfamiliarity with the criminal justice system, and statements expressing confusion about his *Miranda* rights, it is evident that the People failed to establish a knowing and intelligent waiver of *Miranda* rights (*see e.g. People v Santos*, 112 AD3d 757 [2d Dept 2013]).

Moreover, under the facts of this case, the erroneous admission of defendant's statements into evidence at trial was

not harmless beyond a reasonable doubt (*see People v Crimmins*, 36 NY2d 230, 237 [1975] *lv denied* 22 NY3d 1158 [2014]).

In view of the foregoing, we find it unnecessary to reach defendant's remaining contentions.

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

ENTERED: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Kapnick, JJ.

12665 Ambac Assurance Corporation, et al., Index 651013/12
Plaintiffs-Appellants,

-against-

EMC Mortgage LLC, etc., et al.,
Defendants-Respondents.

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Patterson Belknap Webb & Tyler LLP, New York (Peter W. Tomlinson of counsel), for appellants.

Sullivan & Cromwell LLP, New York (Sharon L. Nelles of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 18, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the second and third causes of action of the amended complaint, unanimously affirmed, without costs.

This action relates to seven residential mortgage-backed securities (RMBS) transactions that originated between March 2006 and November 2006 (the transactions). Plaintiffs Ambac Assurance Corporation and the Segregated Account of Ambac Assurance Corporation (collectively, Ambac) partially insured the transactions, defendant EMC Mortgage LLC (EMC) sponsored them, and Bear, Stearns & Co. Inc. (Bear Stearns) underwrote them.[1]

[1] Defendants J.P. Morgan Securities LLC and JPMorgan Chase Bank, N.A. did not participate in the transactions; Ambac has

As sponsor, EMC purchased the underlying loans from third-party originators and sold and assigned its entire interest in the loans to an affiliated special purpose entity (the depositor). The depositor then sold the mortgage loans into securitization trusts under loan purchase agreements. Each transaction had an independent trustee (the trustee) who, under a pooling and servicing agreement, was responsible for acting on the certificate holders' behalf. Ambac claims that a later investigation of the transactions revealed that EMC and Bear Stearns had engaged in fraud and breached the contracts, causing plaintiffs hundreds of millions of dollars in damages.

A series of interlocking agreements governs the transactions. The relevant documents in this case are the Mortgage Loan Purchase Agreements (MLPAs) and the Pooling and Servicing Agreements (PSAs); the agreements set forth the various parties' rights and obligations.

Section 7 of the MLPAs contains a series of representations and warranties by EMC concerning the characteristics of the individual mortgage loans. Section 8 of the MLPAs also contains a series of representations and warranties, including section 8(vii); in that section, EMC represented that the transactions'

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sued them solely as successors to Bear Stearns and EMC, respectively.

prospectus supplements describing the mortgage loans did not include untrue statements of material fact.

The PSAs that govern the transactions relate to the sale of the mortgage loans from the depositor to the securitization trusts. Together, the MLPAs and the PSAs create a repurchase protocol, or procedure (the repurchase protocol), under which certain parties to the agreements could compel EMC to repurchase loans that were in breach of the MLPAs' representations or warranties provisions.

Section 7 of the MLPAs states that the repurchase protocol is the "sole and exclusive" remedy available to the "Purchaser" (also known as the depositor), the "Trustee" and the "Certificateholders" for a breach of representations or warranties:

> "The obligations of the Mortgage Loan Seller [EMC] to cure, purchase or substitute a qualifying Substitute Mortgage Loan shall constitute the Purchaser's, the Trustee's and the Certificateholders' sole and exclusive remedies under this Agreement or otherwise respecting a breach of representations or warranties hereunder with respect to the Mortgage Loans, except for the obligation of the Mortgage Loan Seller to indemnify the Purchaser for such breach . . . ."

Under the PSAs, Ambac, as insurer, is expressly named as a third-party beneficiary with respect to the rights of the insured

certificateholders.[2] Under section 2.03 of the PSAs, the trustee is expressly named as the party with authority to enforce the repurchase protocol. Also under that section, the depositor, "on behalf of the Trust for the benefit of the Certificateholders and the Certificate Insurer [Ambac]," assigned to the trustee all of its rights under the MLPAs.

Section 2.03 further provides that EMC's obligations to substitute or repurchase a mortgage loan "shall be the Trustee's and Certificateholder's sole remedy for any breach thereof." To that end, section 2.03 states that at the trustee's request, "the Depositor shall take such actions as may be necessary to enforce the . . . right, title and interest on behalf of the Trust and the Certificateholders or shall execute such further documents as the Trustee may reasonably require in order to enable the Trustee to carry out such enforcement." Finally, section 2.03 states, "If the Depositor . . . or the Trustee discovers a breach of any of the representations and warranties set forth in the Mortgage Loan Purchase Agreement . . . the party discovering the breach shall give prompt written notice of the breach to the other parties."

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[2] Ambac maintains that it is also a third-party beneficiary of the MLPAs, with the direct right to enforce breaches of those agreements, although there is no similar language in the MLPAs.

Because Ambac is not a direct party to the MLPAs or the PSAs, its contractual rights, to the extent they existed, arose from its status as a third-party beneficiary of the agreements. Unlike other transactions where Ambac acted as a certificate insurer, these transactions did not include separate insurance and indemnity agreements specifically setting forth Ambac's rights.

Since the nationwide mortgage crisis, Ambac has suffered enormous losses on the transactions and has paid more than $300 million to certificateholders under the relevant insurance policies. As a result, Ambac, a Wisconsin corporation, is under court-supervised statutory rehabilitation in that state.

In August 2012, in an attempt to recover its losses, Ambac brought this action against defendants. In its complaint, Ambac alleged that Bear Stearns, EMC, and their affiliates perpetrated a massive fraud by representing to Ambac that the mortgage loans were originated under established underwriting guidelines and were of good quality. Ambac further alleged that defendants breached the section 7 representation and warranty provisions and section 8(vii) of the MLPAs, causing Ambac "compensatory, consequential and/or equitable damages."

Ambac argues on appeal, as it did before the motion court, that the "sole remedy" language of Section 7 of the MLPAs does

not apply to it, as it was not identified in the PSAs as a party whose rights were limited to enforcement of EMC's loan repurchase obligation. Moreover, Ambac argues, the repurchase protocol appears in section 7 of the MLPAs, and thus applies only to the warranties set forth in section 7. This interpretation makes good sense, according to Ambac, because the section 7 warranties are made as to each individual loan, whereas the section 8 warranties concern the transaction as a whole. Ambac also asserts that the motion court effectively read the section 8 warranties out of the MLPAs, thus stripping Ambac of its rights as a third-party beneficiary to the agreements. To the extent the PSAs created an ambiguity concerning the scope of the limitation on remedies, Ambac argues that the ambiguity should not be resolved on a motion to dismiss, and therefore, that the second cause of action should be reinstated.

Further, Ambac states that it had full rights to enforce the repurchase protocol for breaches of section 7 of the MLPAs because there is no language in the agreements explicitly barring it from doing so. To support this argument, Ambac relies on our recent decision in *Assured Guaranty Municipal Corp. v DLJ Mortgage Capital, Inc.* (117 AD3d 450 [1st Dept 2014]), pointing to that case to support its argument that, absent express limiting language, its remedial rights as a third-party

beneficiary are not limited. Additionally, Ambac argues, the assignment to the trustee does not deprive Ambac of standing.

We find that the "sole and exclusive" remedy provision applies to alleged breaches of section 8(vii), as well as to breaches of section 7. Moreover, as discussed below, Ambac does not have standing to bring those claims because the agreements transferred Ambac's rights to the trustee. Thus, the motion court properly dismissed plaintiffs' second cause of action, for defendants' alleged breach of the representation and warranty provisions contained in section 8(vii) of the MLPAs, and the third cause of action, for breach of the representation and warranty provisions contained in section 7 of the MLPAs.

To begin, section 7 of the MLPAs provides that the repurchase protocol is the "sole and exclusive remedy" "under this Agreement or otherwise respecting a breach of representations or warranties hereunder with respect to the Mortgage Loans." Contrary to Ambac's contention, section 7 does not state that the repurchase protocol is the sole and exclusive remedy "under this Section 7." On the contrary, the omission of a term from the sentence at issue in a contract, especially when that term is used multiple times in the same paragraph, must be deemed an intentional choice of the parties to the agreement – a category to which Ambac does not even belong (*see Assured Guar.*

Mun. Corp., 117 AD3d at 450-451).

Indeed, a reasonable reading of section 7 shows that the contracting parties knew how to limit certain remedies to that section. With the repurchase protocol, however, they simply chose not to. For example, the MLPAs state that any cause of action for breach "of any representations and warranties *made in this Section* 7 shall accrue as to any Mortgage Loan upon (i) discovery of such breach . . . and (ii) failure . . . to cure" (emphasis added). The repurchase protocol contractual language, however, states that it is the sole and exclusive remedy "under this Agreement . . . ." Similarly, section 2.03(b) of the PSAs provides that the repurchase protocol applies to "a breach of any of the representations and warranties set forth in the [MLPAs]," not only to the section 7 representations and warranties.

Ambac further argues that the section 8 representations and warranties are materially different from the section 7 warranties, and therefore, that a breach of those warranties cannot be subject to the same remedies. However, as the motion court properly found, the section 8 warranties "largely relate to, and overlap with, the . . . section 7 warranties." In making its argument, Ambac relies solely on the section 8(vii) warranty, addressing the accuracy of the information in the prospectus supplements concerning the mortgage loans in the transactions.

However, section 7(xx) of the MLPAs contains essentially the same warranty: "the information set forth in . . . the Prospectus Supplement with respect to the Mortgage Loans is true and correct in all material respects." This provision refers to information concerning the entire pool of mortgage loans, and therefore contradicts Ambac's argument that section 7 contains only "loan-level" warranties while section 8 contains "transaction-level" warranties concerning the characteristics of the mortgage loans as a whole.

Ambac alternatively argues that any ambiguity in the agreements, when read together, concerning whether the "sole and exclusive remedy" provision is limited to section 7 breaches, should not be resolved in the context of a motion to dismiss (*Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 403 [1st Dept 2010]). Ambac notes – correctly, in light of our recent *Assured Guaranty* decision – that the "sole and exclusive" repurchase protocol remedy does not apply to it because the sole remedy provisions do not explicitly mention that they bind Ambac (*Assured Guar. Mun. Corp.*, 117 AD3d at 450, 451). Indeed, section 7 of the MLPAs states that the repurchase protocol shall be the sole and exclusive remedy of the purchaser, trustee and certificateholders, but does not state that it applies to Ambac, the certificate insurer (*compare Syncora Guar. Inc. v EMC Mtge.*

Corp., 2011 WL 1135007, 2011 US Dist LEXIS 31305 [SD NY 2011] [insurer bargained for broader rights in a separate insurance and indemnity agreement, and therefore was not limited by the "sole and exclusive" remedy clause]).

Nevertheless, under the PSAs, the depositor's "right, title and interest" in the MLPAs, including its right to pursue breaches of the representation and warranty provisions of the agreements, was assigned into the securitization trust; the trust confers upon the trustee the full responsibility for enforcing those claims on behalf of the certificateholders and, expressly, on behelf of the certificate insurer – namely, Ambac. The trustee is responsible for pursuing claims for "breach of any of the representations and warranties set forth in the [MLPAs]," whether found in section 7 or section 8. Thus, while the "sole and exclusive" remedy clause does not, on its face, technically limit Ambac, Ambac does not have standing to pursue its claims because section 2.03 of the PSAs prevents it from doing so. Rather, that right is vested with the trustee, who is listed as a party that the sole remedy provision does bind.

Ambac further argues that, as a third-party beneficiary, it has standing to enforce the repurchase protocol because the agreements do not "explicitly bar" it from doing so. This argument is unpersuasive because, as discussed above, section

2.03 of the PSAs provides that the depositor's "right, title and interest" in the MLPAs, including the repurchase protocol, is assigned into the securitization trust "on behalf of" both the certificateholders and the certificate insurer and confers upon the trustee the full responsibility for enforcing the repurchase protocol on their behalf. New York state and federal courts have, in fact, rejected monoline insurers' attempts to enforce repurchase obligations where the relevant contracts conferred the right to enforce those obligations on other parties (*see e.g. CIFG Assur. N. Am., Inc. v Goldman Sachs & Co.*, 2012 NY Misc LEXIS 3986 [Sup Ct May 1, 2012], *mod* 106 AD3d 437 [1st Dept 2013] [modification was to reinstate fraudulent inducement claims]; *Assured Guar. Mun. Corp. v UBS Real Estate Sec., Inc.*, 2012 WL 3525613, 2012 US Dist LEXIS 115240 [SD NY Aug 15, 2012]).

For example, in *Assured Guaranty* (2012 WL 3525613, *4, 2012 US Dist LEXIS 115230, *12-13), the PSA for the relevant transaction required that the monoline insurer give notice of breach to the trustee, who in turn was to give notice to the sponsor and enforce the sponsor's repurchase obligations. The court dismissed the insurer's claim against the sponsor for breach of the repurchase obligation because the PSAs did not confer direct enforcement rights upon it (*id.* at *13-14; *id.* at *4). Ambac attempts to distinguish this case by arguing that the

contracts in *Assured Guaranty* and *CIFG*, unlike here, contained language stating that the trustee "shall enforce" the repurchase protocol "at the direction of" the certificate insurer. This contention, however, is unpersuasive. Identical language is not necessary because, as discussed above, the detailed procedures set forth in section 2.03 of the PSAs state that the responsibility to enforce the repurchase protocol falls to the trustee on Ambac's behalf.

Finally, Ambac argues that the motion court's decision leaves it "without a remedy" at all for defendants' alleged contract breaches. This argument is also unpersuasive. As defendants aptly note, trustees may, and often do, seek repurchase of mortgage loans where they are dissatisfied with a sponsor's response. However limited Ambac's remedies may be, they are what the plain language of the agreements provide. Ambac is not entitled to rewrite the agreements simply because it dislikes, in hindsight, the agreements' terms.

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

ENTERED: OCTOBER 16, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Moskowitz, Manzanet-Daniels, JJ.

13135-
13135A In re Anthony Battisti, Index 103234/12
Petitioner-Appellant,

-against-

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

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Friedman Harfenist Kraut & Perlstein LLP, Lake Success (Steven Harfenist of counsel), for appellant.

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

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Determination of respondent New York Police Commissioner, dated March 13, 2012, which, after a hearing, found petitioner guilty of misconduct and terminated his employment, unanimously confirmed, the petition denied, and that portion of the CPLR article 78 proceeding (transferred to this Court by order of the Supreme Court, New York County [Geoffrey D. Wright, J.], entered March 26, 2013), dismissed, without costs. Order, same court, Justice and date, which denied the petition and dismissed the aforementioned article 78 proceeding insofar as it seeks an order directing respondents (NYPD) to credit petitioner with certain days withheld from the calculation of his service for pension purposes and declaring that he had accrued twenty years of service as a member of the NYPD prior to his termination,

unanimously reversed, on the law, without costs, the petition granted to the extent of finding that the NYPD improperly suspended petitioner without pay beyond the period permitted by Civil Service Law § 75(3), and it is declared that petitioner accrued twenty years of service prior to his termination.

Substantial evidence supports the findings of the Assistant Deputy Commissioner for Trials that petitioner was guilty of the proffered charges, including that he hired and conspired with an assailant to attempt to murder his ex-wife (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). Petitioner's arguments concerning the assailant's credibility and motive to lie at the hearing are beyond the review of this Court (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Petitioner commenced service with the NYPD on January 13, 1992 and was terminated effective March 13, 2012. Between January 2009, when he was initially charged with disciplinary violations, and the date of his termination following a hearing, petitioner was suspended without pay for a total of 99 days. The initial 30-day suspension followed allegations that he had "knowingly associated" with the assailant, an individual reasonably believed to have engaged in criminal activity, and that the assailant had alleged that petitioner paid him to attack his ex-wife. The second 69-day suspension without pay followed

petitioner's arrest in Nassau County, and the NYPD then issued amended specifications based on the criminal charges proffered against him.

Petitioner argues that because Civil Service Law § 75(3-a), as well as Administrative Code of City of NY § 14-115, cap suspensions without pay of public employees awaiting hearing and determination of disciplinary charges at 30 days, he is entitled to be credited with 69 days of service, and is therefore entitled to a pension (*see* Administrative Code § 13-256.1[a]). Respondents' answer demonstrates that NYPD issued a check to petitioner, reflecting its internal determination that petitioner had been improperly suspended without pay for 39 days, and was entitled to compensation for those days, leaving just 60 days of suspension without pay. Respondents do not dispute that all days for which a member is paid are to be included in the calculation of time for purposes of all benefits, including pension.

Assuming arguendo that the NYPD properly suspended petitioner without pay for two 30-day periods based on distinct offenses, resulting in 60 days of suspension without pay, by respondent NYPD's calculations, it appears that petitioner had completed twenty years of creditable service as of the effective date of his termination. Respondent NYPD has not set forth any legal basis for its subsequent internal determination to treat

nine of the 39 days that had been credited to petitioner as suspensions without pay, notwithstanding the limit set by Civil Service Law § 75(3-a). Absent such explanation for excluding the nine days from the calculation of creditable service, the determination to deny petitioner a pension was arbitrary and capricious, in that it was taken "without regard to the facts" (*see Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

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

ENTERED: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13228 The People of the State of New York, Ind. 3424/09
Respondent,

-against-

Jason Bonilla,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael McLaughlin of counsel), for respondent.

Robert T. Johnson, District Attorney, Bronx (Diane A. Shearer of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Judith Lieb, J.), rendered on or about September 24, 2012,

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

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

ENTERED: OCTOBER 16, 2014

CLERK

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

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13229-
13230 In re Isaac P.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

_____

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

Zachary W. Carter, Corporation Counsel, New York (Kathy H. Chang of counsel), for presentment agency.

_____

Orders of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about May 17, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute petit larceny and criminal possession of stolen property in the fifth degree, and revoked a prior dispositional order that had placed him on probation, and placed him with the Administration for Children's Services' Close to Home for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request to convert his juvenile delinquency and violation of probation proceedings into person in need of

supervision proceedings. Appellant had already been adjudicated a juvenile delinquent and placed on probation, and by violating his probation he had demonstrated that a PINS disposition would not control his behavior (*see Matter of Amari D.*, 117 AD3d 522 [1st Dept 2014]). Appellant exhibited a pattern of repeated thefts, including uncharged thefts that he admitted. In addition, he absconded from his home, frequently failed to comply with his curfew, did not regularly attend school, failed to attend or complete rehabilitation programs, and admitted to daily marijuana and alcohol use.

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

ENTERED: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13231 Antonia Derezeas, Index 101568/12
Plaintiff-Respondent,

-against-

Robert H. Glover & Associates, Inc.
Defendant-Appellant.

_____

Barry, McTiernan & Moore, LLC, New York (David H. Schultz of counsel), for appellant.

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Brian J. Isaac of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered March 24, 2014, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant's motion for summary judgment was properly denied in this action where plaintiff pedestrian was injured when an individual participating in defendant's running class ran into her causing her to fall to the ground. The record shows that defendant supervised the group run, selected the route on an enclosed promenade at a relatively busy time of day, and provided coaches whose responsibilities included making sure the runners stayed to the left and warning of pedestrians or other hazards. According to the individual who ran into plaintiff, his position in the group of more than 50 runners made it impossible to see

plaintiff until it was too late. Under the circumstances presented, defendant owed a duty of reasonable care to pedestrians sharing the esplanade with its running class, and triable issues of fact exist as to whether such duty was breached(*see e.g. Hores v Sargent*, 230 AD2d 712 [2d Dept 1996].

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

ENTERED: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13232 The People of the State of New York, Respondent, Ind. 2368/12

-against-

Yucef Colley, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered January 16, 2013, convicting defendant, upon his plea of guilty, of criminal sexual act in the first degree, and sentencing him to a term of 10 years, with 20 years' postrelease supervision, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea. There is nothing in the record to cast doubt on the voluntariness of the plea. The plea allocution minutes establish that the court advised defendant of the 20-year postrelease supervision component of his sentence, and that defense counsel had thoroughly explained to her client the terms of the plea, including the PRS term, in conversations both in prison and at court. Accordingly, defendant's vague complaint that PRS had not been explained to him with sufficient precision did not warrant a

hearing, and the court's limited inquiry was permissible (*see People v Mitchell*, 21 NY3d 964, 967 [2013]; *People v Frederick*, 45 NY2d 520 [1978]), given that the consequences of violating PRS are merely collateral (*People v Monk*, 21 NY3d 27, 32 [2013]). Defendant made a valid waiver of his right to appeal (*see People v Caviness*, 95 AD3d 622 [1st Dept 2012], *lv denied* 19 NY3d 995 [2012]), which forecloses review of his remaining arguments. Regardless of whether defendant made a valid waiver of his right to appeal, we perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13233 The People of the State of New York, Ind. 5123/11
Respondent,

-against-

Harry Villevaleix,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J. at plea; Carol Berkman, J. at sentencing), rendered on or about August 14, 2012,

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

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

ENTERED: OCTOBER 16, 2014

CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.
Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13238-
13239-
13240 In re Eric R.,
Petitioner-Appellant,

-against-

Celena P.,
Respondent.

_____

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

_____

Order, Family Court, Bronx County (Paul A. Goetz, J.), entered on or about July 15, 2013, which, after a fact-finding hearing, declined to exercise jurisdiction over the visitation petition, and stayed dismissal of the petition on condition, inter alia, that petitioner-appellant commence a visitation proceeding in Ohio, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about September 6, 2013, dismissing the aforementioned petition upon the appellant's default, unanimously dismissed, without costs, as taken from a nonappealable order. Appeal from order, same court and Judge, entered on or about March 12, 2013, which denied the motion to dismiss the aforementioned petition pending the factfinding hearing, unanimously dismissed, without costs, as not appealable as of right (Family Ct Act § 1112), and as academic.

Application by petitioner-appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967];

People v Saunders, 52 AD2d 833 [1976]). We have reviewed this record and agree with petitioner-appellant's assigned counsel that there are no nonfrivolous issues which could be raised on this appeal. The Family Court did not abuse its discretion in determining that it would decline jurisdiction on the grounds that Ohio is the more appropriate forum to decide whether petitioner should have visitation with the subject children. The record demonstrates, among other things, that appellant has had virtually no contact with the children since September 2008, over three years before the children and their mother moved to Ohio, and that the evidence as to the children's care, well-being, and personal relationships is more readily available in that state (*see Matter of McCarthy v Brittingham-Bank*, 117 AD3d 1060, 1060-1061 [2d Dept 2014]; *see* DRL § 76-f[1]).

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

ENTERED: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13241 The People of the State of New York, Respondent, Ind. 4307/12

-against-

Keith Gittens, Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Joanne Legano of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about January 30 2013, unanimously affirmed.

Application by appellant'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 appellant'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: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13244 In re Genesis F., and Others,

Children under the Age of
Eighteen Years, etc.,

Xiomaris S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Lisa H. Blitman, New York for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Adira Hulkower of counsel), attorney for the children.

_____

Order, Family Court, New York County (Jody Adams, J.), entered on or about December 13, 2010, which, following a fact-finding hearing, determined that respondent mother neglected the subject children, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that respondent neglected her three children by inflicting excessive corporal punishment on them (*see* Family Court Act §§ 1012[f][i][B]; 1046[b][i]; *Matter of Alex R. [Maria R.]*, 81 AD3d 463 [1st Dept 2011]). The children's independent, out-of-court statements to the caseworker, describing how respondent grabbed them by their clothing causing their clothing to rip, threw them

on the bed, scratched them, punched them, and bit the oldest child on her back, cross-corroborated each other's statements (*see id.*; *Matter of Devante S.*, 51 AD3d 482 [1st Dept 2008]).

The children's out-of-court statements were further corroborated by the caseworker's own observation of a cut on the oldest child's lip and a bite mark on her back, as well as scratch marks on the middle child's hand, and an old belt mark on the youngest child's leg and photographs of the children's bruises (*see Matter of Harrhae Y. [Shy-Macca Ernestine B.]* , 112 AD3d 512, 512 [1st Dept 2013]), as well as respondent's own admission that she grabbed two of the children, ripped their clothing, hit her oldest child in the mouth and bit her on her back (*see Matter of Joshua J.P. [Deborah P.]*, 105 AD3d 552 [1st Dept 2013]).

There is no merit to respondent's argument that the finding of neglect is unsupported by the evidence because this was a "single" or isolated incident. The children told the caseworker about prior incidents. In any event, a single incident of excessive corporal punishment may be sufficient to sustain such a finding (*see Matter of Cevon W. [Talisha W.]*, 110 AD3d 542 [1st Dept 2013]).

We have considered respondent's remaining argument and find it unavailing.

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

ENTERED: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13245 Ae Ran Kang, Index 153187/13
Plaintiff-Respondent,

-against-

Hyung Kook Kim,
Defendant-Appellant.

Jean Jeeyun Kim et al.,
Defendants.

_____

Rottenstreich & Ettinger LLP, New York (Dan Rottenstreich and Frank Salzano of counsel), for appellant.

Janice Y. Chung, P.C., New York (Jake Chung of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about January 10, 2014, which, insofar as appealed from, denied the motion of defendant Hyung Kook Kim to dismiss the complaint, unanimously affirmed, without costs.

The subject action is not a matrimonial action and is thus not barred by the parties' matrimonial action in South Korea. Nor is there a conflict of laws presented.

Supreme Court properly exercised its discretion in finding that New York was a proper forum and determined that defendant failed to meet his burden to dismiss the action on inconvenient forum grounds (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). The court

considered the appropriate factors including that the dispute concerns real property in New York and the actions and transactions that gave rise to the claim occurred in New York, the mortgage payments on the properties and rent collected from the properties go to a New York bank, there is no alternative forum in which to litigate this claim because South Korea does not recognize constructive trusts, and defendant has demonstrated his availability to this forum by his prior business activities here (*see Aon Risk Servs. v Cusack*, 102 AD3d 461, 463 [1st Dept 2013]).

Plaintiff has stated a cause of action for constructive trust (*see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). She alleged that the parties shared a confidential relationship by virtue of their de facto marriage, which is legally recognized in Korea, that defendant promised to buy the subject properties as marital property for the parties' benefit, that, in reliance on that promise, she transferred her share of jointly held bank accounts to purchase and manage the properties and made deposits into the joint account, and that defendant was unjustly enriched because he holds sole title to the properties.

There is no basis to cancel the notices of pendency which were appropriately filed (see CPLR 6501; *Don v. Singer*, 73 AD3d 583 [1st Dept 2010].

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

ENTERED: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13246 The People of the State of New York, Respondent, Ind. 3506/87

-against-

Porfirio Santiago, also known as German Arias, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered November 9, 2011, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him to a term of 30 days, unanimously affirmed.

Since defendant did not move to withdraw his plea, there was nothing to require the court to conduct a sua sponte inquiry into whether the plea's voluntariness had been impaired by inadequate advice by counsel concerning its deportation consequences. At sentencing, defense counsel indicated that there was an issue under *Padilla v Kentucky* (559 US 356 [2010]), but expressly stated that this issue would be the subject of "another motion for another proceeding." Accordingly, there was no challenge to

the voluntariness of the plea, and no application for the court to rule upon. In any event, we note that the plea was taken in 1987, and that sentencing was delayed for over 24 years because of defendant's failure to appear. There is nothing in the record to suggest that the plea was involuntary, or that defendant has a valid *Padilla* claim.

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

ENTERED: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13247 The People of the State of New York, Ind. 5230/12
Respondent,

-against-

Gabriele Devosa,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about January 8, 2013, unanimously affirmed.

Application by appellant'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 appellant'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: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13248N M&E 73-75 LLC, Index 153655/12
Plaintiff-Appellant,

-against-

57 Fusion LLC,
Defendant-Respondent.

_____

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle and Jeffrey S. Berkowitz of counsel), for appellant.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Ethan A. Kobre of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered March 12, 2013, which denied plaintiff's motion for a default judgment against defendant (CPLR 3215), unanimously affirmed, without costs.

The IAS court providently exercised its discretion by denying plaintiff's motion (*see e.g. Nutley v Skydive the Ranch*, 65 AD3d 443, 444 [1st Dept 2009]). Defendant made the requisite showing of a reasonable excuse for failing to answer the complaint (*see Whittemore v Yeo*, 99 AD3d 496, 496-497 [1st Dept 2012]). The factors to be considered in determining the sufficiency of the excuse all weigh in defendant's favor (*see New Media Holdings Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012]). Defendant did not willfully default, as it claims that it did not receive plaintiff's summons and complaint. Further,

shortly after plaintiff served defendant, defendant filed its own action against plaintiff (index No. 154700-12), which evidenced its intent to defend plaintiff's action (*see Arrington v Bronx Jean Co., Inc.*, 76 AD3d 461, 463 [1st Dept 2010]). The order dismissing defendant's action did not collaterally estop defendant from arguing that it had a reasonable excuse for defaulting in this action. Indeed, whether defendant had a reasonable excuse was neither material nor essential to that decision (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Further, defendant was not required to submit an affidavit of merit in opposition to plaintiff's motion (*Arrington*, 76 AD3d at 462). Moreover, the motion court had the power to sua sponte allow defendant to interpose a late answer (*see Higgins v Bellet Constr. Co.*, 287 AD2d 377 [1st Dept 2001]), and plaintiff does not claim that it has been prejudiced by defendant's delay in responding to its complaint.

Defendant also demonstrated "a potentially meritorious defense" to plaintiff's action for, among other things, specific performance of the parties' contract of sale (*New Media*, 97 AD3d at 465; *see Taieb v Hilton Hotels Corp.*, 60 NY2d 725, 728 [1983]) — namely, that plaintiff buyer materially breached the contract by refusing to pay the agreed-upon purchase price, that defendant

seller made no misrepresentation to plaintiff about the tax classification of the subject property, and that defendant did not agree to lower the purchase price (*see Grace v Nappa*, 46 NY2d 560, 567 [1979]).

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

ENTERED: OCTOBER 16, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13249N LGC USA Holdings, Inc., Index 654481/13
Plaintiff-Appellant,

-against-

Taly Diamonds, LLC,
Defendant,

Taly Diamonds (N.Y.) Ltd., et al.,
Defendants-Respondents.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Olga L. Fuentes-Skinner and Andrew K. Glenn of counsel), for appellant.

Morrison Cohen LLP, New York (Jeffrey D. Brooks of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 15, 2014, which, inter alia, denied plaintiff's motion for a preliminary injunction, unanimously affirmed, with costs.

The motion court properly exercised its discretion in denying the preliminary injunction on the ground that the alleged harm is compensable by money damages and therefore is not irreparable (*see Doe v Axelrod*, 73 NY2d 748, 750 [1998]). Contrary to plaintiff's contention, the provision in the operating agreement entitling a party to specific performance in the event of the other's breach does not render the alleged harm irreparable. Unlike the operating agreements in the cases relied

on by plaintiff, the operating agreement at issue here does not provide that any loss resulting from a breach is irreplaceable or that the damage is irreparable (*see Matter of Reed Found. v Franklin D. Roosevelt Four Freedoms Park, LLC*, 108 AD3d 1 [1st Dept 2013] [provision expressly stated that a breach or threatened breach would constitute irreparable harm]; *Seitzman v Hudson Riv. Assoc.*, 126 AD2d 211 [1st Dept 1987] [provision authorizing non-breaching purchaser to obtain specific performance stated that apartment and its possession cannot be duplicated]). Plaintiff failed to submit evidentiary proof showing a clear right to the relief sought (*see 1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 AD3d 18, 23 [1st Dept 2011]), in light of the largely speculative assertions in the affidavit of its president and the fact that they were sharply contradicted by defendants' affidavits.

Moreover, plaintiff failed to establish a likelihood of success on the merits. As the motion court correctly reasoned, the operating agreement does not give the liquidator the power to conduct the daily operations of the business, but rather, provides for limited duties, including giving notice of the dissolution and determining how to distribute assets.

Additionally, the injunction sought seeks to change the

status quo, plaintiff having requested verbatim the ultimate relief sought in the complaint pendente lite (*see St. Paul Fire and Mar. Ins. Co. v York Claims Serv., Inc.*, 308 AD2d 347, 349 [1st Dept 2003]).

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

ENTERED: OCTOBER 16, 2014

CLERK