SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 25, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Richter, Moskowitz, Kapnick, JJ.

2909N Viktor Gecaj, Index 300014/11
Plaintiff-Appellant,

-against-

Gjonaj Realty & Management Corp., et al.,
Defendants-Respondents.

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Alexander J. Wulwick, New York, for appellant.

Ronald P. Berman, New York, for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered November 18, 2015, which granted defendants' motion to vacate a default judgment entered against them and set aside the assessment of damages after inquest, modified, on the law, the facts, and in the exercise of discretion, to the extent of denying the motion to vacate the default judgment, and remanding the matter for a new inquest to determine plaintiff's damages, and otherwise affirmed, without costs.

The motion to vacate the default judgment should not have

been granted since defendants failed to demonstrate a reasonable excuse for their delay in appearing. The record shows that plaintiff commenced this action by verified complaint dated December 27, 2010. An affidavit of service for defendant 28-47 Webb Realty Associates, LLC (Webb), dated January 19, 2011, indicates that service was made on January 18, 2011 upon the Secretary of State. An affidavit of service for defendant Gjonaj Realty & Management Corp. (Gjonaj), dated January 21, 2011, indicates that service was made on January 20, 2011 upon Maria Gjonaj, the managing agent for defendant Gjonaj. A second affidavit of service for Gjonaj dated June 10, 2011 indicates that service was personally made upon "Jane Smith," a managing agent who refused to give her name, on June 2, 2011.

In his complaint, plaintiff alleges that defendants retained plaintiff's employer to install cameras at the premises located at 28-47 Webb Avenue in the Bronx. Plaintiff further alleges that he was injured on May 7, 2010 when he fell from a defective ladder while performing work for his employer. Plaintiff contends that defendants violated Labor Law sections 200, 240, 241(6) and 241-a, and sections of the Industrial Code, and that by reason of such violations and defendants' negligence, he was severely injured.

After receiving no answer from either party, plaintiff moved by notice of motion dated December 26, 2011 for a default judgment, pursuant to CPLR 3215, which was denied on March 26, 2012, without prejudice, for plaintiff's failure to submit an affidavit of merit in support of the motion and to demonstrate that it complied with the follow-up mailing requirement of CPLR 3215(g) for defendant Webb. An affidavit of service, dated July 16, 2013, indicates that the order denying plaintiff's motion for a default judgment, along with notice of entry, were served on defendants pro se, via mail, on July 16, 2013. Thereafter, on or about October 8, 2013, plaintiff renewed his motion for a default judgment, which was granted on November 22, 2013, and an inquest was directed. On December 11, 2013, plaintiff pro se served the notice of entry of the default judgment on defendants. On February 12, 2014, defendants received a letter from the court in connection with the case.[1] On September 23, 2014, the court conducted the inquest and granted plaintiff an award of $900,000. Notice of entry of the award was served on defendants on or about October 20, 2014.

[1] This letter is not part of the record and defendants do not describe its contents. However, defendants' principal stated in his affidavit that he received a letter from the court on this date.

It was not until December 10, 2014, over 4½ years after the accident occurred, and almost four years since the action was commenced, that defendants finally moved, pursuant to CPLR 5015, to vacate the default judgment and to serve and file a late answer. The motion was supported by an affidavit from defendants' principal, Viktor Gjonaj (Mr. Gjonaj), an affirmation from Y. Albert Dauti, defendants' attorney, and an affidavit from David Sarasky, an insurance broker with ARM-Capacity of New York, LLC (ARM), who was ARM's designated representative to handle liability insurance coverage matters for defendants.

The motion court vacated the default judgment and granted defendants leave to serve and file the proposed verified answer with affirmative defenses, finding that defendants had presented a reasonable excuse for their default, that their default was not intentional, and that they had a meritorious defense to plaintiff's claims. Further, the motion court noted that it is "the preferred policy of the First Department to dispose of cases on their merits."

We agree that "[w]hat constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court" (*Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 510 [1st Dept 2010]). We also agree that "there exists

a strong public policy in favor of disposing of cases on their merits" (*Johnson-Roberts v Ira Judelson Bail Bonds*, 140 AD3d 509, 509 [1st Dept 2016]). However, the Appellate Division has the ability and authority to substitute its own discretion for that of the motion court, even in the absence of a finding of abuse of discretion (*Alliance Property Mgmt. & Dev. v Andrews Ave. Equities,* 70 NY2d 831, 833 [1987] [finding that the "Appellate Division is, of course, vested with the same power and discretion as Special Term, and can review a determination for abuse of discretion or substitute its own discretion"]). Here, under all the circumstances of this case, we disagree with the motion court and find that defendants failed to present a reasonable excuse for their default (*see* CPLR 5015[a][1]). "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors" (*Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2d Dept 2005]). We respectfully do not believe that the motion court correctly considered all the "relevant factors" in this particular case, and thus we reach the opposite conclusion.

Defendants' principal, a successful business person, owning over 15 multiple-dwelling properties, affirmed that he was served with "numerous legal papers on this matter," copies of which he

would forward to his insurance broker. Specifically, defendants' principal affirmed that he received the summons and complaint, both motions for a default judgment, a letter from the court, and a decision from the court containing a reference to a $900,000 judgment against his companies. Each time, he allegedly provided a copy of the respective document to his insurance broker, upon whom he relied to send the document to the appropriate insurance carrier. And each time, the insurance broker assured Mr. Gjonaj that "everything in this matter was under control," and the "claim was being handled by the proper insurance company." However, defendants did not take any further action to determine if the insurance carrier was in fact responding to plaintiff's claims, notwithstanding Mr. Gjonaj's receipt of numerous documents directly from plaintiff's counsel over the course of more than three years. It was not until October 2014, when Mr. Gjonaj received the decision granting plaintiff a monetary award, that he finally became "alarmed and reached out to an attorney," and even then, despite being "alarmed," it took an additional two months for defendants to file their motion to vacate the default.[2]

[2] This two-month gap, however, is not, as the dissent would suggest, the straw that broke the camel's back. Rather, it is

Sarasky affirmed that his practice was to provide the documents to the claims department, to then be sent to the insurance carrier for defendants. However, as it turns out, the documents were mistakenly being sent to the wrong insurance carrier (who apparently never notified the broker or the defendants of the mistake), and thus, no one was ever appointed to appear for defendants in this action.

While we concede that, generally, when a defendant provides the summons and complaint to its insurance broker, and the insurer, thereafter, fails to appoint counsel to appear in the action on behalf of defendant, this is considered to be a reasonable excuse (*see generally Rodgers*, 69 AD3d at 510-511) However, on the facts presented here, defendants did not establish a reasonable excuse for their default. An assertion by a defendant that it believed its insurer "was providing a defense is unsubstantiated and unreasonable in light of [the defendant's] conceded receipt of the plaintiff's motion for leave to enter a default judgment," as receipt of such a motion puts the defendant

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the totality of defendants' conduct that renders their excuse unreasonable here. To be clear, we are in no way, silently or otherwise, acknowledging that defendants' reliance on the assurances of the broker that the matter was being defended was excusable under these circumstances, thus warranting vacatur of the default.

on notice that the insurer has, in fact, *not* answered the complaint since the commencement of the action (*Trepel v Greenman-Pedersen, Inc.*, 99 AD3d 789, 791 [2d Dept 2012]; *see also Spitzer v Landau*, 104 AD3d 936, 937 [2d Dept 2013] [finding that the defendant's belief that the insurer was providing a defense was "unreasonable given that the defendant was served with the plaintiff's motion for leave to enter a default judgment"]).

As in *Trepel v Greenman-Pedersen, Inc.*, Mr. Gjonaj's assertion in this case that he believed his broker was forwarding the paperwork to the appropriate insurance carrier was unreasonable in light of his conceded receipt of the summons and complaint, *two* motions for a default judgment, a letter from the court and a court decision reflecting a $900,000 judgment against him. Surely Mr. Gjonaj knew that if his insurance company had retained a lawyer to appear for defendants, he and his corporations would not have continued to receive legal documents directly from plaintiff's attorney and the court *for over three years*. The fact that Sarasky kept assuring Mr. Gjonaj "that everything in this matter was under control and that the claim was being handled by the proper insurance company," does not help to establish reasonableness, objective or otherwise, on the part

of Mr. Gjonaj, who should have known that everything was *not* under control after years of receiving so many legal documents from plaintiff's counsel relating to the same lawsuit.

The dissent, however, would have us find that defendants presented a reasonable excuse for their delay because they forwarded all documents upon receipt to their insurance broker, and thus, were entitled to blindly rely on their belief that the insurer would take appropriate action. The cases cited by the dissent and the motion court in support of this proposition are readily distinguishable and do not dictate vacatur of the default judgment here. In *Romero v Alezeb Deli Grocery Inc.*(115 AD3d 496 [1st Dept 2014]*),* cited by the motion court, the defendant received the summons and complaint, which was then forwarded to its insurance broker, who delayed in forwarding the pleadings to the carrier; there is no indication that the defendant ever received any papers from the plaintiff other than the initial pleadings. In *Rodgers*, also cited by the Supreme Court, the defendant denied ever being served with process, and upon receiving a letter from the plaintiff's counsel containing a copy of the pleadings, immediately forwarded the correspondence and pleadings to its insurer (69 AD3d at 510-511). In the third case cited by the motion court, *Price v Boston Rd. Dev. Corp.* (56 AD3d

336 [1st Dept 2008), the court found that the defendant demonstrated that it did not receive notice of the action until its former managing agent was personally served with the plaintiff's motion for a default judgment, and that the prompt action the defendant took after receiving notice of the plaintiff's motion suggested that it lacked actual notice of the summons and complaint. These facts, where the defendants reacted promptly to their defaults, are very different from the facts in this case, where defendants continued to receive documents from plaintiff's counsel and the court for over three years after the pleadings were served, clearly rendering any reliance on the mere act of forwarding the documents to the broker or insurance carrier unreasonable (*see also Lirit Corp. v Laufer Vision World*, 84 AD2d 704, 704 [1st Dept 1981] [the defendant's default was reasonable where an "employee who received the summons mailed it to the insurance broker and it somehow was never heard of again," *and thereafter, at the "first indication defendant had that there was a default . . . defendant promptly moved to vacate it*"] (emphasis added); *Heskel's W. 38th St. Corp. v Gotham Constr. Co. LLC*, 14 AD3d 306 [1st Dept 2005] [finding that the defendant forwarded the summons and complaint to its insurer, who inadvertently failed to forward it to counsel, but once the

plaintiff's counsel spoke to the adjuster and the error was discovered, the defendants served their answer, only 4½ months later]).

The remaining cases relied upon by the dissent are also distinguishable because the facts are so different from the present case (*see Mendoza v Bi-County Paving*, 227 AD2d 302, 303 [1st Dept 1996] [finding that the defendant offered a reasonable excuse for its default, when its broker misdirected the complaint to the wrong insurer who misplaced it, that settlement negotiations made it prudent to delay service of the answer, and then the defendants never received notice of the motions for a default judgment or of the ensuing orders]; *Price v Polisner*, 172 AD2d 422, 423 [1st Dept 1990] [finding that neither the defendant nor the insurance carrier received notice of the motion for a default judgment until the order after inquest was served, and upon receipt of same, both the defendant and the insurance carrier took *prompt* action to seek relief]; *Wehringer v Kessler*, 56 AD2d 547, 548 [1st Dept 1977] [finding that the defendant denied "that he was served with a notice of default or any other papers before he received a copy of the default judgment," which was caused by the clerical oversight and inadvertence of his broker and/or his insurer, thus providing a reasonable excuse for

the default]. Here, as already noted, Mr. Gjonaj confirmed that he received the summons and complaint, both motions for a default judgment, as well as a letter from the court and the decision after inquest, and thus, defendants did not and cannot allege that they failed to receive notice of any of the pleadings, motions, or orders filed in this action.[3]

To the extent the dissent, which criticizes our occasional citation of Second Department cases, relies so heavily on the Second Department case of *Fire Is. Pines v Colonial Dormer Corp.* (109 AD2d 815 [2d Dept 1985]), contending that it presents facts so similar to the case before us that it dictates affirming the motion court's decision to vacate the default judgment, the case is, in fact, distinguishable, in that the Second Department there found that "[u]nder the totality of the circumstances...presented" the motion court's refusal to vacate the default judgment entered against the defendant was an improvident exercise of discretion because, inter alia, the

[3] While the particular facts of each one of these cases differ, the appellate courts, in every instance, in determining whether the motion court providently or improvidently exercised its discretion in vacating or failing to vacate a default based on reasonable excuse, or in substituting its own discretion, considered all the unique circumstances presented in that particular case.

insured defendant had acted promptly to protect itself as soon as the insurer or broker forwarded a letter to the defendant disclaiming coverage for the loss sued upon, which was less than 11 months after the action was commenced. Here, there was no issue raised by the insurer or the broker as to coverage being disclaimed, and defendant did not act at all promptly to protect himself throughout the proceedings, waiting almost two months after receiving notice of entry of the $900,000 award to move to vacate the default judgment, which was also almost three years after receiving the first motion for a default judgment (*cf. Price v Polisner*, 172 AD2d at 173 [where the court also found, as in *Fire Is. Pines*, that the defendant had acted promptly to protect himself]). Moreover, the *Fire Is. Pines* Court did not mention or make reference to a claim of prejudice by the plaintiff. The same cannot be said here, where plaintiff has, in fact, made a compelling argument that it will be prejudiced if the default is vacated, as discussed further below. Under all the circumstances presented here, we find that defendants failed to provide a reasonable excuse for their default.

Since we have concluded that defendants failed to set forth a reasonable excuse for their default, it is not necessary to consider whether defendants demonstrated a meritorious defense.

However, in light of the dissent's contention that "it seems doubtful that there is any basis for a negligence or Labor Law § 200 claim against defendants," and that it is unclear whether plaintiff's work "falls within the scope of Labor Law § 240(1)," we point out that although some of the causes of action claimed by plaintiff may not have survived, Mr. Gjonaj explicitly stated in his affidavit that he remembers hiring a company to do some "security camera work/repair at 28-47 Webb Avenue, Yonkers, NY, on or about May 7, 2010," which is the date of plaintiff's accident, when he claims to have fallen from a defective ladder. It is irrelevant that Mr. Gjonaj asserted in his affidavit that he never employed plaintiff, and that plaintiff has never been employed by any of the defendants.[4] These were not plaintiff's claims; rather, he alleges that his employer was hired by defendants to perform work at the premises at 28-47 Webb Avenue, so there would have been no reason for Mr. Gjonaj to have met plaintiff personally. Although Mr. Gjonaj claims that defendants never directed or supervised plaintiff's work, or provided him with a ladder and/or scaffold to do any work, plaintiff alleges that he was involved in repairing/installing security cameras at

[4] He also claims that he never met plaintiff.

the premises when he fell from a defective ladder. This is sufficient to bring this case within the ambit of the Labor Law, and Mr. Gjonaj's claims that defendants never directed or supervised plaintiff's work, or provided him with a ladder and/or scaffold to do any work are irrelevant and unavailing.

Indeed, Labor Law § 240 "was enacted for the protection of workers from injury and 'is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed'" (*Tate v Clancy-Cullen Stor. Co.*, 171 AD2d 292, 295 [1st Dept 1991], quoting *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985]). Moreover, to the extent the dissent seeks to imply that plaintiff's installation of a security camera falls outside the purview of Labor Law § 240(1) ("erection, demolition, repairing, altering... of a building or structure"), other courts have found to the contrary (*see e.g. Guzman v Gumley-Haft, Inc.*, 274 AD2d 555, 556 [2d Dept 2000] [finding that, on a motion for summary judgment, the plaintiff's work of removing and reinstalling a security camera was covered by Labor Law § 240(1)]).

We find defendants' argument that they will be prejudiced if the default judgment is reinstated because their insurance carrier has disclaimed coverage, unavailing. In fact, a mere six

days after filing the motion to vacate at issue here, defendants filed a summons and complaint against ARM, their insurance broker, for negligent misrepresentation. It is rather plaintiff who will be prejudiced by having to first attempt to conduct discovery relating to an accident that took place in May 2010, over 6½ years ago, and for which plaintiff filed a summons and complaint in December 2010. Moreover, and despite the dissent's attempt to create a burden where there is none, plaintiff was not required to claim that "his counsel made any inquiry of defendants to learn why they had not answered or otherwise appeared in the action." Although there was admittedly a delay on plaintiff's part in moving for a default judgment the first time, and then between the denial of plaintiff's first motion for a default judgment and the making of the second motion for a default judgment, this does not excuse defendants' behavior or warrant vacating the default judgment.

However, on this record, we find that the award of $900,000 after inquest appears to be excessive and the case should be remanded for a new inquest to determine plaintiff's damages (*see Neuman v Greenblatt,* 260 AD2d 616, 617 [2d Dept 1999]). The court's decision and order after inquest refers to MRI studies but does not state that the films were actually reviewed or

admitted into evidence, or whether diagnostic testing was submitted at the inquest in support of plaintiff's additional claimed injuries. Indeed, plaintiff failed to annex any properly certified medical records or other proof of damages in opposition to defendants' motion. At the inquest, of course, defendant must have "'a full opportunity to cross-examine witnesses, give testimony and offer proof in mitigation of damages'" (*Ruzal v Mohammad*, 283 AD2d 318, 319 [1st Dept 2001], quoting *Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]).

All concur except Friedman, J.P.
who dissents in part in a memorandum
as follows:

FRIEDMAN, J.P. (dissenting in part)

Under the clear weight of authority in this Court, a party's default is excusable under CPLR 5015(a)(1) upon a substantiated showing that the party promptly forwarded all of the legal papers it received to its insurance broker or carrier, in reliance on the broker or carrier to take appropriate action, and that the default resulted from error on the part of the broker or carrier. Supreme Court, adhering to these precedents, exercised its discretion to grant defendants' motion to vacate the default judgment against them, based upon the affidavits of defendants' principal (Viktor Gjonaj) and of defendants' insurance broker (David Anthony Sarasky of ARM-Capacity of New York, LLC [ARM]), attesting that Gjonaj had forwarded to Sarasky at ARM all papers served in this action and had received assurances from Sarasky that the papers had been sent to the appropriate carrier, which was handling the matter. Unfortunately, however, ARM's claims department, unbeknownst to Gjonaj or Sarasky, had forwarded the papers to the wrong insurance company, resulting in the default from which Supreme Court relieved defendants in the order under review. As Sarasky candidly admits in his affidavit in support of the motion to vacate the default, "[I]t is not because of defendants' actions or inactions but it was due to the negligence

of ARM and its Claims Department that defendants have defaulted in this action."

In his affidavit, Gjonaj identifies each paper defendants received in this action (the summons and complaint, a motion for default judgment, a second motion for default judgment, a letter from the court, and the decision awarding plaintiff damages) and the approximate date on which each document was received. Gjonaj further avers that, in the case of each such paper, he "immediately forwarded a copy" of the document to Sarasky, his insurance broker at ARM. Upon receiving the court's decision in October 2014, Gjonaj became "alarmed" when he "noticed that the Decision contained a reference to a $900,000 judgment against my companies." At that point, he sought legal counsel on his own. Gjonaj offers the following detailed explanation of his reliance on ARM (paragraph numbers omitted):

> "I have a long term business relationship — over nine (9) years — with [ARM], who [sic] has procured, advised and handled all my insurance coverage needs for this and for other real estate properties owned/managed by myself and/or the corporate entities I own and/or manage.
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> "I own — through different corporate entities — over fifteen (15) multiple-dwelling properties and for the last nine years, it is ARM who [sic] has procured insurance coverage for numerous properties I control/manage and has acted as the liaison between myself and the respective insurance companies. All my

insurance needs and all my insurance matters have been handled by ARM. During the last nine years, whenever I needed insurance coverage for a property, I would reach out to ARM which would in turn shop around and choose an insurance company that would offer [the] best quote. I would simply proceed to pay the premium as per the [sic] ARM's instructions without even knowing which insurance company was providing insurance coverage for which property.

"During the almost-one-decade long business relationship with ARM, I have always forwarded any and all paperwork I have received regarding personal injury claims and/or any other claims and related notices and legal documents to ARM, which in turn has forwarded them to the insurance company with coverage for the respective location.

"During the almost-one-decade long relationship with ARM, I have always relied on the latter to forward any and all notices of claim, letters and legal papers I have received to the appropriate insurance company with coverage for the respective location."

Sarasky, defendant's insurance broker at ARM, submitted an affidavit corroborating Gjonaj's account in every respect. Sarasky avers (paragraph numbers omitted):

"I confirm that from January 21, 2011 through February 12, 2014, I have received numerous legal documents, from Victor Gjonaj, regarding [the] above-captioned matter — including but not limited to Summons and Complaint and Default Summary Judgment Motions.

"I also confirm that I forwarded these documents to our Claims Department to be sent to the insurance carrier for the defendants in this matter.

"I also confirm that each time I received the documents on this matter from Mr. Gjonaj, I forwarded them to our Claims Department and I assured Mr. Gjonaj

that all was being taken care of.

> "However, I figured out later that the documents were mistakenly being sent to the incorrect insurance company by one of our employees.
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> "During the last 8-9 years, we at ARM have purchased insurance coverage and handled the insurance claims paperwork for Mr. Gjonaj and for the numerous properties he controls. We have always forwarded the legal documents we received from Mr. Gjonaj to the proper insurance company, however, unfortunately, in this case our Claims Department dropped the ball and they inadvertently kept sending everything to the wrong insurance company. I was under the impression that our Claims Department was doing what they always did in the past, i.e., that they were sending the paperwork to the proper insurance carrier, so I kept assuring Mr. Gjonaj that everything in this matter was under control and that the claim was being handled by the proper insurance company. Therefore, no Counsel was appointed to interpose an answer and defend the defendants in this action."

Now, in spite of our precedents establishing that a default such as defendants' is excusable (as more fully discussed below), the majority, disregarding Supreme Court's broad discretion in this matter, modifies to reinstate the default judgment against defendants as to liability. In so doing, the majority unsuccessfully attempts to distinguish the case law cited by Supreme Court, while relying on two readily distinguishable decisions, neither of which was issued by this Court. I believe that we should adhere to our applicable precedents and defer to Supreme Court's provident exercise of its broad discretion in

determining that, under those precedents, the subject default was excusable (*see Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2d Dept 2005] ["Whether there is reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors"]; *accord Rickert v Chestara*, 56 AD3d 941, 942 [3d Dept 2008]; *see also Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003] [CPLR 5015(a) codifies courts' "inherent discretionary power" to vacate default judgments] [internal quotation marks omitted]). Accordingly, I would affirm the order vacating the default judgment in its entirety, and respectfully dissent from the majority's modification to reinstate the default judgment as to liability.

Strangely, the majority quotes the statement from *Harcztark* that whether to excuse a default is "a discretionary, sui generis determination" (21 AD3d at 876) in support of its reversal, as a matter of law, of Supreme Court's making of precisely such "a discretionary, sui generis determination." Contrary to the majority's upside-down view of the law, the discretionary and sui generis nature of the inquiry indicates that an appellate court should not disturb Supreme Court's exercise of its discretion in cases where reasonable minds may differ on whether the default is excusable. The majority itself abuses this Court's discretion,

and thus errs as a matter of law, in reversing Supreme Court's manifestly reasonable exercise of its discretion merely to require plaintiff to prove his case, as contemplated in the ordinary course of litigation.

I am, of course, fully cognizant of this Court's power to substitute its own discretion for that of Supreme Court. However, to the extent the majority purports to exercise this Court's power to substitute its own discretion for that of Supreme Court, that power should be sparingly exercised, and I see no grounds for doing so here. In this regard, it seems to me that, in this case, it is the majority, and not Supreme Court, that has not (to quote the majority) "correctly considered all the 'relevant factors'" (quoting *Harcztark*, 21 AD3d at 876-877).

In the most recent case upon which Supreme Court relied, we stated, in affirming an order vacating a default judgment, that "[t]he unexplained delay of defendant's insurance broker in forwarding the summons and complaint to defendant's insurance carrier constituted a reasonable excuse for defendant's failure to appear" (*Romero v Alezeb Deli Grocery Inc.*, 115 AD3d 496, 496 [1st Dept 2014]). In another decision cited by Supreme Court, we affirmed the vacatur of a default judgment where it was the defendant's insurer that failed to act in response to timely

notice by the defendant. In that case, we held that "it was reasonable for defendant to believe that its insurer would take appropriate action to appear and defend the action" where the defendant, upon its admitted receipt of the pleadings, had "immediately forwarded the correspondence and pleadings to its insurer" (*Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 511 [1st Dept 2010]). Supreme Court also cited *Price v Boston Rd. Dev. Corp.* (56 AD3d 336 [1st Dept 2008]), in which we held that "[the defendant's] insurance carrier's failure to act timely does not preclude defendant from vacating an unintentional default" (*id.*).

The three cases cited by Supreme Court are not alone among this Court's precedents in holding excusable a default due to the error or inaction of the defaulting party's insurance broker or carrier, as occurred here (*see Heskel's W. 38th St. Corp. v Gotham Constr. Co. LLC.*, 14 AD3d 306, 307 [1st Dept 2005] ["Excusable delay is sufficiently established since the failure to forward the complaint to counsel prior to December 1, 2003 was concededly due to the inadvertence of the insurer"]; *Mendoza v Bi-County Paving*, 227 AD2d 302, 302 [1st Dept 1996] ["Defendant offered a reasonable excuse for its default, namely, that its broker misdirected the complaint to the wrong insurer, (and) that

its insurer then misplaced it"]; *Price v Polisner*, 172 AD2d 422, 423 [1st Dept 1991] [affirming vacatur of default "where the insured defendant . . . acted promptly to protect himself," but the insurer failed to act]; *Lirit Corp. v Laufer Vision World*, 84 AD2d 704, 704 [1st Dept 1981] [the defendant's default was excusable where "the employee (of the defendant) who received the summons mailed it to the insurance broker and it somehow was never heard of again"]; *Wehringer v Kessler*, 56 AD2d 547, 548 [1st Dept 1977] [the defendant's default was excusable because "(i)t was caused by the clerical oversight and inadvertence of his broker and/or his insurer"]).

In *Fire Is. Pines, Inc. v Colonial Dormer Corp.* (109 AD2d 815 [2d Dept 1985]), the Second Department found a default excusable on facts very similar to those presented here. The *Fire Island* defendant, upon being served with the summons and complaint on November 30, 1982,

> "immediately forwarded [them] to [its] insurance broker, who forwarded them to defendant's insurance carrier, while assuring defendant the carrier would retain counsel to defend the action. All subsequent papers in the action were similarly forwarded, with similar assurances passing from the broker to defendant. No answer was ever served on behalf of defendant. On October 6, 1983, plaintiff entered a default judgment against defendant, and defendant passed a copy of that judgment, with restraining notice, on to its broker, receiving assurances that

> defendant was covered for such loss. Not until October 25, 1983, did the carrier or broker indicate to defendant the existence of any question as to whether defendant's policy covered the loss in question" (*id.* at 816).

On the defendant's appeal from the denial of its motion to vacate the default judgment, the Second Department reversed, explaining: "On this record, it cannot be said that defendant's reliance on its broker's assurances and its carrier's silence was not reasonable; therefore the default was excusable" (*id.*).[1]

The majority seizes upon various factual distinctions between the foregoing cases and this one, but does not come to grips with the fundamental principle they establish: that when a party receiving legal papers does not simply ignore them, but forwards them to an insurance broker or carrier, in reliance on the broker or carrier to take appropriate action, an ensuing default — even if the party's reliance on the broker or carrier was not entirely reasonable — is excusable, subject to Supreme

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[1]In asserting that I "rel[y] . . . heavily" on *Fire Island*, the majority ignores the fact that my position is supported, not only by that case, but by no less than seven of this Court's own decisions, as well as by the general principle of deference to Supreme Court's exercise of its own discretion and by the preference to decide actions on their merits. Meanwhile, the majority has apparently been able to locate only two decisions, neither decided by this Court, in which it claims to find support for its reversal of Supreme Court to foreclose defendants from contesting liability on the merits.

Court's discretion. The majority, however, apparently believes that if defendants' reliance on the assurances of their broker was not objectively reasonable in its entirety, their default cannot be excused, as a matter of law. The majority cites no case law in support of its position that any deviation from an objective standard of due care by a defaulting party is inexcusable. This omission is not surprising, since it is plain that the legislature's intent in enacting CPLR 5015(a)(1) was to the contrary. The legislative report on the provision subsequently enacted as CPLR 5015(a)(1) explains: "The words 'excusable default' are substituted for the present words '*mistake*, *inadvertance* [sic], surprise or *excusable neglect*' [in former Civil Practice Act § 108] *with no change in meaning intended*" (1959 NY Legis Doc No. 17 at 205 [emphasis added]). Thus, neglect that results in a default may be excusable under CPLR 5015(a)(1) (*see* Weinstein-Korn-Miller, NY Civ Prac ¶ 5015.04). Here, Gjonaj's conduct in promptly sending the legal papers he received to his insurance broker, and then relying on the broker's assurances that the matter was being handled by the appropriate carrier, was perhaps less than astute, but he was acting in subjective good faith to address the matter, rather than simply ignoring it. If this was neglect, the neglect was

excusable.

While, as the majority notes, Gjonaj apparently has attained some success in the real estate business, we have no information about his background that would justify presuming him to be sophisticated in matters of civil procedure. Thus, I strongly disagree with the majority's statement that Gjonaj "[s]urely . . . knew" that he would not have continued to receive legal papers concerning this action if a lawyer had been retained by the insurer. A lawyer surely would know that, of course, but not necessarily a layperson. Pertinent here is this Court's observation that "[i]t is not unusual for lay persons to mail process to an insurance company and not to be surprised to hear nothing from the broker or insurance company for some time" (*Lirit Corp.*, 84 AD2d at 704).

In reversing Supreme Court's discretionary determination that defendants' inadvertent default was excusable, the majority relies chiefly upon two cases, neither of which is from this Court, and both of which are readily distinguishable on the ground that, in each of them, the defaulting party's claim of reliance on the broker or insurer was conclusory and unsubstantiated (*see Spitzer v Landau*, 104 AD3d 936 [2d Dept 2013] [the defendant's claims to have believed that his broker

had forwarded the summons and complaint to his insurer, and that the insurer was providing a defense, were "unsubstantiated"]; *Trepel v Greenman-Pedersen, Inc.*, 99 AD3d 789, 791 [2d Dept 2012] [the defaulting defendant's "assertion that it believed that its insurer . . . was providing a defense is unsubstantiated"]). *Trepel* is rendered further inapposite by the fact that there is no indication that the defaulting defendant in that case received assurances from an insurance professional that the matter was being handled by the appropriate carrier, as Gjonaj obtained from Sarasky in this case. Moreover, the defaulting defendant in *Trepel* failed to appear at the inquest even though it had by that time received notice that its insurer had been declared insolvent (*id.* at 790, 791).

The unsubstantiated claims of reliance in *Spitzer* and *Trepel* stand in sharp contrast to this case, in which defendants' claim of reliance on the broker is not only supported by the sworn account of their principal (Gjonaj) of when he received each document and sent it to the insurance broker (ARM), but is also corroborated by the affidavit of the particular ARM broker who serviced defendants' account. The ARM broker (Sarasky) acknowledges having received the papers from Gjonaj, having forwarded the papers to ARM's claims department, and having

assured Gjonaj "that all was being taken care of." Sarasky further admits the error of ARM's claims department in sending the papers to the wrong carrier — very much as occurred in *Mendoza*, in which we held excusable a default that resulted when the defendant's "broker misdirected the complaint to the wrong insurer" (227 AD2d at 302). Moreover, defendants' reliance on their ARM broker and his assurances was certainly reasonable, since, as attested by both Gjonaj and Sarasky, it had been Gjonaj's practice for years prior to these events to send all legal papers he received to ARM, in the expectation that ARM would forward the documents to the appropriate liability carrier, as it had done consistently in all previous cases.

It is undisputed that defendants moved to vacate their default two months after Gjonaj received a copy of the post-inquest order directing entry of judgment in the amount of $900,000. Unaccountably, in spite of plaintiff's own dilatory conduct in prosecuting this action (he waited nearly a year to move for a default judgment and then, after that motion was denied based on the lack of an affidavit of merit, another year to make a second motion), the majority seizes on the two-month gap between Gjonaj's receipt of the order and the motion to vacate as somehow constituting evidence of gross negligence on

defendants' part.[2] Of course, once Gjonaj realized from the order awarding damages that the matter was not being defended, some time was required to determine whether defendants' carrier would undertake the defense, for defendants to retain counsel on their own, and for that law firm to familiarize itself with the action and to prepare motion papers. I believe that, seen in this context, the two-month gap was not unreasonable.

The remaining factors to be considered on a motion to vacate a default also support affirming the order granting that motion. As to whether defendants have a meritorious defense, it seems doubtful that there is any basis for a negligence or Labor Law § 200 claim against defendants, who apparently retained plaintiff's employer and did not supervise or control his work, and it is not at all clear from the face of the complaint whether plaintiff's work as a "camera installer" falls within the scope of Labor Law § 240(1).[3] Further, I see no merit in the majority's assertion

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[2]Notwithstanding the majority's claim that its result is based on "the totality of defendants' conduct," the emphasis it places on the final two months before defendants moved to vacate their default suggests that the majority itself silently recognizes that defendants' prior reliance on the assurances of their insurance broker that the matter was being defended was, even if negligent, excusable.

[3]The majority can find only one decision, which is from the Second Department and has never been cited by this Court, to

that plaintiff would be prejudiced if the action were now required to be decided on the merits. Plaintiff was allegedly injured on May 7, 2010, and commenced the instant action on December 27, 2010. As previously noted, plaintiff proceeded to wait *almost an entire year*, until December 26, 2011, to move for a default judgment, and then did so without submitting an affidavit of merit. After plaintiff's defective initial motion for a default judgment was denied, *he waited almost another year,* until October of 2013, to execute an affidavit of merit and renew the motion for a default judgment. Plaintiff offers no excuse for either of these delays, nor does he claim that his counsel made any inquiry of defendants to learn why they had not answered or otherwise appeared in the action. Given plaintiff's own dilatory prosecution of this matter and "the strong public policy of this State to dispose of cases on their merits" (*Rodgers*, 69 AD3d at 511), I would give short shrift to plaintiff's present assertion that he will somehow be prejudiced if we affirm Supreme

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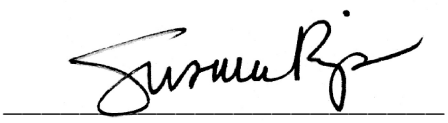
support its view that this case is "within the ambit of the Labor Law." Whether camera installation — the activity plaintiff claims to have been performing — falls within one of the categories of work covered by Labor Law § 240(1), namely, "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure," is a question that defendants should have an opportunity to litigate on the merits in this action.

Court's order requiring him to prove his case.

In sum, while I agree with the majority to the extent it vacates the $900,000 judgment and directs that a new inquest be held, I believe that we should simply affirm Supreme Court's provident exercise of its discretion to vacate defendants' default in its entirety and allow the matter to be adjudicated on the merits as to both liability and damages. To the extent the majority does otherwise, I respectfully dissent.[4]

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

ENTERED: APRIL 25, 2017



CLERK

[4]It bears noting that the majority, even while it emphatically denies that defendants' default was excusable, actually excuses that default, in part, by vacating the award of damages and directing that a new inquest be held.

Friedman, J.P., Andrias, Gische, Webber, JJ.

3390N Erika Klauer, Index 350037/11
Plaintiff-Respondent-Appellant,

-against-

Asa Abeliovich,
Defendant-Appellant-Respondent.

_____

Grant & Appelbaum, P.C., New York (Patricia Ann Grant of counsel), for appellant-respondent.

Bikel & Mandarano, New York (Dror Bikel of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered October 16, 2015, which, to the extent appealed from, upon the parties' motions, confirmed in part and rejected in part a special referee's report which, among other things, determined defendant's child support obligations, awarded plaintiff a separate property credit of $350,000, divided certain marital property by awarding 70% to plaintiff and 30% to defendant, and awarded defendant $500,000 in counsel fees, unanimously modified, on the law and the facts, to eliminate the separate property credit of $350,000, to award plaintiff artwork entitled "Hamburger Hill" as her separate property not subject to distribution, to award interest on the distributive award pursuant to CPLR 5002, for a determination of equitable

distribution regarding the $1,350,000 in increased value in the East Tenth Street condo which was sold after the court's order, and with respect to child support, to remit the matter to Supreme Court for further analysis regarding and clarification of defendant's obligations with respect to summer and/or any other extracurricular activities not specifically agreed to, and how such expenses are to be allocated among the parties, if at all, and otherwise affirmed, without costs.

The parties were married in December 2008 and there is one child of the marriage, born in 2010. The Child Support Standards Act (*see* Domestic Relations Law § 240[1-b]) (CSSA) sets forth a method or formula for how basic child support must be calculated. This entails using the combined adjusted gross income of the parents up to a statutory cap, and then applying a fixed percentage to reflect how many children the support award is for (*see e.g. Holterman v Holterman*, 3 NY3d 1, 11 [2004]). Here, the statutory cap is $141,000 and the applicable percentage is 17%. Where there is income over the cap, the final step in calculating basic child support entails application of the "paragraph (f)" factors (Domestic Relations Law § 240[1-b][f]). Such factors include the financial resources of the parents and child, the health of the child and any special needs, the standard of living

the child would have had if the marriage had not ended, the disparity in the parents' incomes, and any other factors the court deems are relevant.

Although the parties had income in excess of $2 million in 2012, defendant's prorata share of basic child support, based on his income of $217,826 only accounts for 10.5% of that combined parental income. Supreme Court correctly rejected the Referee's recommendation as to basic child support and it did not abuse its discretion or misapply the law when it determined that in setting the basic child support obligation the parties' combined income above the $141,000 statutory cap should be taken into consideration (Domestic Relations Law § 240 [1-b][f]). In deciding to utilize the parties' combined income up to $800,000 in setting support, the court examined whether the capped support "adequately reflects a support level that meets the needs and continuation of the child['s] lifestyle" and concluded that it did not (*Beroza v Hendler*, 109 AD3d 498, 500-501 [2d Dept 2013]). During the marriage, the child shared in the bounty of his parents' very comfortable standard of living, which included residence in a luxury apartment, a garaged car at their disposal, a full-time nanny, regular use of a weekend sitter, and dinners outside the home. The court observed that rote application of

the statutory cap would have resulted in defendant only having to pay $209.74 per month in basic child support ($141,000 x 17% for one child x 10.5%), clearly less than his financial contributions during the marriage. By moving the income cap upwards to $800,000, defendant's pro-rata share of basic support increased to $1,190 per month ($800,000 x 17% for one child x 10.5%). The court correctly applied the three step process in the support guidelines and also the paragraph "f" factors. It also articulated a proper basis for applying the CSSA guidelines to the combined parental income in excess of the statutory cap (*see* [Domestic Relations Law] § 240[1-b][f]; *Matter of Cassano v Cassano*, 85 NY2d 649, 653 [1995]). Although defendant's income is far less than plaintiff's, he still enjoys a relatively high income, and has the financial means to pay more than just $209.74 per month in basic child support, an amount that even defendant agrees would not comport with the parties' lifestyle and income. Contrary to defendant's contention, Supreme Court, under the circumstances, providently exercised its discretion in ordering that he pay 20% of the child's educational expenses, including college, until the child attains age 21 (*see Cimons v Cimons*, 53 AD3d 125, 131 [2d Dept 2008]). The court did not lightly make this determination, rather it took into consideration several

factors, including the high educational achievements of both parties and their professions. Plaintiff, a financial analyst, has a B.A. from Georgetown and an MBA from Columbia Business School; she also holds series 3 and 7 licenses. Defendant, an associate professor of medicine at Columbia University Medical School, has a B.A. from Massachusetts Institute of Technology and a M.D./Ph.D. from Harvard. During the marriage the parties agreed the child would be privately educated and their enrollment of the child in a private nursery school when he was only nine months old reflects their agreement. There is no indication that defendant cannot afford to pay his share of private school tuition, and his argument that the child is too young for the court to have addressed higher education issues does not warrant modification of Supreme Court's order. There is no reason to delay resolution of the issue of higher education, including college, because it appears to be an inevitable expense for this child, given the parties' apparent commitment to an enriched education, the parties' means and their high level of educational achievements (*see e.g. Cimons*, 53 AD3d at 129). We affirm the award because it was not an improvident exercise of the court's discretion.

We also affirm Supreme Court's order that defendant pay

10.5%, his pro rata share, for a full-time nanny. Although plaintiff has a baby born during this litigation, not of the marriage, and the parties' child, now age 6, is in kindergarten, plaintiff is employed full-time and needs reliable child care to meet her work commitments (Domestic Relations Law § 240[1-b][c][4]; *see Michael J.D. v Carolina E.P.*, 138 AD3d 151, 153 [1st Dept 2016]; *Iarocci v Iarocci*, 98 AD3d 999 [2d Dept 2012]). Defendant has not shown that this childcare expense would be any less costly were the nanny only responsible for taking care of one child, not two.

To their credit, the parties resolved custody without a hearing, and in their parenting agreement they set forth some details about how certain extracurricular expenses would be scheduled and paid for. They agreed that each parent bears financial responsibility for the activity he or she enrolls the child in, and also agreed the child would participate in sports once he is old enough. Their agreement refers to summer activities and camp, and the parties agreed that in the event they cannot reach a decision as to these activities, plaintiff will be the decision maker. The agreement distinguishes those activities from the issue of sleepaway camp. If sleepaway camp is more than six weeks, the decision will be made by a tie-

breaker. Aside from the activities described in their agreement, the parties do not otherwise resolve or address how summer activities will be paid for. Absent an agreement to the contrary, or without engaging in a proper analysis under the paragraph "(f)" factors of the Domestic Relations Law, the court should not have ordered defendant to pay for these summer and/or extracurricular activities (Domestic Relations Law § 240[1-b][f]; *Michael J.D.*, 138 AD3d at 154). Unlike health care and child care expenses, these "add-on" expenses are not separately enumerated under the CSSA and it is usually anticipated that they will be paid from the basic child support award ordered by the court (*Michael J.D.*, at 153-154). Furthermore, without explaining why, Supreme Court allocated these add-ons in the same manner it allocated educational expenses (i.e. 20% to defendant as opposed to 10.5%). Because the court made its determination before this Court's decision in *Michael J.D.*, where we clarified how these add-ons should be analyzed and separately justified under paragraph (f), we remit to Supreme Court the issue of how summer and/or any other extracurricular activities not specifically agreed to by the parties will be allocated between them, if at all.

Each side appeals from Supreme Court's separate property

credit award to plaintiff arising from the parties' purchase of a cooperative apartment at 1136 Fifth Avenue (Fifth Avenue coop). The coop, which was purchased in both parties' names, was bought in May 2009. It was not the marital residence when this action was commenced in May 2011; the Fifth Avenue coop was sold in January 2011 and part of the proceeds were used to purchase a condominium apartment on East 10th Street. East 10th Street, also in both parties' names, was the martial residence when this action was commenced. We now modify to eliminate the award of the separate property credit to plaintiff in the amount of $350,000 and otherwise affirm Supreme Court's denial of any further separate property credit to plaintiff in the amount of $932,000 for payments toward the principal and/or renovation costs of the Fifth Avenue coop.

Marriage is an economic partnership and "marital property" should be broadly construed to effectuate that concept (*Fields v Fields*, 15 NY3d 158, 162-163 [2010]). Conversely, separate property, which is an exception to this concept, "should be construed 'narrowly'" (*Fields*, 15 NY3d at 163). Were courts to engage in the kind of precise financial tracing plaintiff invokes, they would be paralyzed by divorcing parties "seeking review of every debit and credit incurred" during their marriage

(*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 421 [2009]). The economic decisions made by parties in an intact marriage should be respected, and rather than using a scalpel to finely adjust for separate property contributions dollar-for-dollar over the course of the entire marriage, a court should effectuate an equitable distribution of marital assets, taking into account all relevant factors, including relative or disproportionate financial contributions (*Mahoney-Buntzman*, 12 NY3d at 420, 421).

Plaintiff is not entitled to a separate property credit for the $350,000 downpayment or the additional sum of $932,000 the parties applied towards the purchase price of the Fifth Avenue coop. Even if any of these funds had once been separately titled accounts or her separate premarital assets they lost that character once she committed them to the purchase of the coop in both their names and thereafter used a significant portion of the sales proceeds to purchase another apartment in both their names. The fact that some monies were deposited into the U.S. Trust account before defendant's name was added to it does not justify treating some of the money as separate and other money as marital. Not only did the parties jointly take title of the Fifth Avenue coop, they committed themselves as an intact unit to its renovation, they lived in it together before "flipping" it,

and then reinvested the net profits of the coop sale into yet another apartment that became the parties' marital residence. The conveyance of separate funds under these circumstances resulted in the separate assets becoming presumptively marital and partial use of separate funds to acquire a marital asset does not mandate that plaintiff be credited for any separate funds she committed (*see Fields*, 15 NY3d at 167). Although plaintiff claims she conveyed the funds for convenience purposes only, specifically to facilitate board approval, these broad claims are belied by the parties' activities as a cohesive marital unit, leading us to conclude that plaintiff is not entitled to the separate property credits with regard to the Fifth Avenue coop. Accordingly, we modify the court's award of a separate property credit in the amount of $350,000 and affirm Supreme Court's denial of a further separate property credit in the amount of $932,000.

While in some cases a spouse who contributes separate property towards the downpayment of a jointly titled residence may be allowed a separate property credit (*see Heine v Heine*, 176 AD2d 77, 84 [1st Dept 1992] *lv denied* 80 NY2d 753 [1992]), the Fifth Avenue coop was not only sold before this action was commenced, plaintiff also failed to rebut the statutory

presumption that the separate property was not commingled or committed to the marriage (*see Fields*, 15 NY3d at 165-166). There is no basis to credit plaintiff for the downpayment under these circumstances.

Although we modify to deny the separate property credits with respect to the purchase of the Fifth Avenue coop, we affirm the court's equitable distribution of the net proceeds from the sale of the East 10th Street condo. In deciding that plaintiff is entitled to 70% and defendant 30% of the net proceeds of the sale, Supreme Court considered and properly balanced the parties' respective, uneven, contributions, both economic and noneconomic, that made it possible for them to acquire the marital residence, a luxury condominium apartment. For instance, the court credited plaintiff's talents as a knowledgeable and skillful "flipper" of real property as one of the reasons, if not the "driving force," for why the Fifth Avenue coop was sold at a net profit of $2,819,430, a significant portion of which was then applied towards the purchase of the parties' East 10th Street condo. The court also took into account the parties' respective payments towards the upkeep and monthly costs of the apartment. Plaintiff paid the mortgage on the condo and kept it insured; she also paid for some minor improvements before they moved in. The court

credited defendant with his financial contributions to the East 10th Street condo, which were significant relative to his salary and income. For instance he paid the maintenance and utilities. The court's distribution of the East 10th Street condo 70% to plaintiff and 30% to defendant was not an improvident exercise of its discretion. To the contrary, the court carefully weighed and credited each side's economic and noneconomic contributions. Under the circumstances, the distribution of this marital asset is fair and equitable (*Mahoney-Buntzman* at 420).

Although the court originally ordered an appraisal of the condo, it has since been sold at a much higher price than its appraisal (it sold for $6.85 million as compared to the $5.5 million appraisal price). While a valuation close to the date of trial is appropriate in most situations, the parties disagree on what manner, if any, the increase in value should be distributed. Since information regarding the sale is outside the record, we remit the issue to the Supreme Court for a determination of equitable distribution regarding the $1,350,000 in increased value.

Supreme Court did not improvidently exercise its discretion in awarding defendant a $20,931 credit representing mortgage payments he made on plaintiff's premarital real property in

Washington, Connecticut. While the property is indisputably separate, defendant is entitled to any appreciation of that asset during the marriage as a result of his direct and/or indirect efforts (*Hartog v Hartog*, 85 NY2d 36 [1995]). The credit represents 30% of the difference between the mortgage balance on the date of the marriage and on the date of commencement of these proceedings (i.e. 30% of $69,770) (*see Bernholc v Bornstein*, 72 AD3d 625, 628-629 [2d Dept 2010]). The credited amount is a proxy for the increase in value of the separate property during the parties' marriage.

We also affirm Supreme Court's distribution equal to 30% of the $1,840,000 in loans plaintiff made to Wykeham Rise. Said loans were funded in part by the proceeds of the sale of the Fifth Avenue coop, which are marital funds. The distribution, that is the amount defendant may recoup as a credit, coincides with the court’s distribution of the marital residence on East 10th Street.

The court also correctly determined that plaintiff's bonus, although paid after this action was commenced, was compensation for her past performance, not tied to future performance (*see DeJesus v DeJesus*, 90 NY2d 643, 652 [1997]). As a general rule, bonuses paid as compensation for past services are marital

property and subject to equitable distribution *(see Ropiecki v Ropiecki*, 94 AD3d 734, 736 [2d Dept 2012]). In awarding defendant 30% of plaintiff's 2011 employment bonus, or the sum of $25,952.76, the court accounted for payments that plaintiff made to reduce marital debt using that money. The court also prorated the bonus to reflect that although it was paid for the 2011 calendar year, the parties separated in May 2011, meaning only 40% of the total amount could be considered marital (*see Kriftcher v Kriftcher*, 59 AD3d 392, 392-393 [2d Dept 2009]). We reject plaintiff's arguments that defendant's allocation of this marital property should be reduced to 10% because his economic contributions to the marriage were far inferior or less extensive than plaintiff's and because she made extraordinary efforts to improve the economic condition of the family. This argument disregards the very essence of the equitable distribution law, which is to recognize the direct and indirect contributions of each spouse, whether they are economic or noneconomic (*see e.g. Hartog,* 85 NY2d at 45). The unequal distribution reflects the court's consideration of the parties' respective contributions to the marriage and there is no basis to disturb Supreme Court's equitable distribution of the bonus (*see Huffman v Huffman*, 84 AD3d 875, 877 [2d Dept 2011]).

Both parties have a longstanding interest in artwork, and prior to the marriage, plaintiff founded Steep Rock Foundation, a not-for-profit organization. Steep Rock offers a residence to one or more artists and they are also paid $10,000 stipends to subsidize their living costs while in residence. Plaintiff is on the board of directors and had more direct contact on a regular basis with the artists in residence than defendant, but when plaintiff made financial contributions to Steep Rock during the marriage, she used the joint U.S. Trust account to fund them. Upon completion of their residency, artists would typically give their benefactor artwork as a parting gift. Some artworks were gifted solely to plaintiff, but defendant contends some artwork was gifted to both of them. Before this action was commenced and throughout these proceedings plaintiff also bought and sold some artwork. Although defendant maintains such transactions were in violation of automatic orders, Supreme Court credited plaintiff's claim that she bought and sold artwork to meet household expenses because they exceeded her base income of $400,000 per year, rendering any proceeds thereof marital, but leading to the parties' further disagreement with the court's allocation of these assets (90% to plaintiff and 10% to defendant).

Whereas plaintiff contends defendant should be credited with

no value of any of the artwork obtained, bought, sold or remaining, defendant seeks an increased distribution of 40%. We affirm the distribution as is, but modify with respect to one piece, "Hamburger Hill." This artwork was acquired by plaintiff after this action was commenced and purchased with some of the 2011 bonus money. Since defendant is being credited with an equitable share of that bonus, to also award him an equitable share of Hamburger Hill would be to double-count the proceeds used to purchase it. Hamburger Hill is, therefore, plaintiff's separate property and not subject to equitable distribution.

The court did not improvidently exercise its discretion in apportioning the value of the artwork sold or still remaining in the manner it did. The 90/10 apportionment (10% to defendant), reflects the respective parties' involvement in the acquisition and disposal of artwork throughout the marriage and use of marital assets to make some of the purchases; it also takes into account plaintiff's more substantial contributions, relative to defendant's, as well as the short duration of the marriage.

The court properly accepted plaintiff's position that the $400,000 payment to her father from the net proceeds of the sale of the Fifth Avenue coop was in repayment of a loan, representing monies he had lent the parties to accomplish the renovations to

the apartment. It is undisputed that the Fifth Avenue coop underwent extensive, high end renovations at a cost of almost $800,000, and the coop ultimately sold at a significant profit, part of which was then applied towards the purchase of the marital residence. Plaintiff testified that she borrowed $450,000 from her father to finance part of the renovations and used the remainder to meet the parties' expenses. Despite defendant's claim that plaintiff's $400,000 payment to her father is a dissipation of marital assets, there is no evidence to discredit plaintiff's explanation for why she made this payment. Domestic Relations Law § 236(B)(1)(c) provides that outstanding financial obligations incurred during the marriage, that are not solely the responsibility of the spouse who incurred them, may be offset against the total marital assets to be divided. Defendant has not come forward with any evidence that the costly renovations were paid for differently, or that plaintiff's father did not provide the parties with a loan that was repaid once the Fifth Avenue coop was sold, or that, as he claims, somehow this repayment solely benefitted her.

Turning to the issue of legal fees, the Referee concluded that neither side has demonstrated an entitlement to legal fees. The court rejected that conclusion and ordered that plaintiff pay

to defendant's counsel legal fees of $373,000 in twelve equal installments. Domestic Relations Law § 237(a) contains a rebuttable presumption that "counsel fees shall be awarded to the less monied spouse," and plaintiff is clearly the more monied spouse, earning close to ten times the amount that defendant does. Each side has incurred approximately $1 million in legal fees and although the court ordered that plaintiff pay interim legal fees of $127,000, that award barely scratched the surface of defendant's expenses. It was not an improvident exercise of the court's discretion to award defendant the additional sum of $373,000 in legal fees, making the total amount awarded $500,000, payable in installments. The award and manner of payment balances the inequities in their income and takes into consideration the equitable distribution that defendant will receive, as well as the relative merits of the legal arguments that were advanced during the course of the proceeding.

While it was a provident exercise of the court's discretion to permit plaintiff to make payments to defendant of his distributive share of the marital assets in installments, defendant correctly argues that post-decision interest is mandatory on the distributive award pursuant to CPLR 5002, and

thus should be awarded (*see Moyal v Moyal*, 85 AD3d 614, 615 [1st Dept 2011]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 25, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3477 The People of the State of New York, Ind. 3049/13
Respondent,

-against-

Johnny Traylor,
Defendant-Appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered April 30, 2014, as amended on May 21, 2014, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

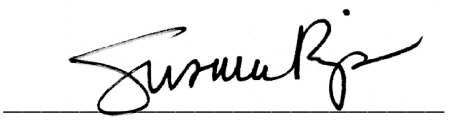
Although defendant's procedural challenges to his second violent felony offender adjudication are unpreserved, under the circumstances presented here, vacatur of the sentence in the interest of justice is warranted. In contrast to *People v Bouyea* (64 NY2d 1140 [1985]), here, defendant never admitted the prior

felony conviction upon which his second violent felony adjudication was predicated, and the court never adjudicated defendant a second violent felony offender. Moreover, there is no record evidence that the predicate felony statement was filed prior to sentencing, as required by CPL 400.15(2) (*see People v Camble*, 17 AD3d 235 [1st Dept 2005], *lv denied* 5 NY3d 786, 790, 796 [2005]; *People v Chevere*, 17 AD3d 193, 194 [1st Dept 2005]). Further, the record does not reflect that defendant was given a copy of the predicate felony statement, as CPL 400.15(3) requires. Thus, the record is devoid of any indication that defendant received adequate notice that the prior felony conviction in question would be used as the basis for enhancement of his sentence or had an opportunity to be heard as to the validity of that conviction (*see People v Fields*, 79 AD3d 1448 [3d Dept 2010]). The brief, incidental, logistical comments made by Supreme Court, the clerk and the prosecutor in defendant's presence during the plea proceedings concerning the existence of a predicate felony statement are insufficient to constitute substantial compliance with CPL 400.15 requirements (*see Fields*, 79 AD3d at 1449; *People v Anthony*, 52 AD3d 864, 865 [3d Dept 2008], *lv denied* 11 NY3d 733 [2008]). Thus, remanding this matter for resentencing proceedings conducted in compliance with

those requirements would not be "futile and pointless" (*Bouyea*, 64 NY2d at 1142), but is warranted under the circumstances presented here (*see People v Camble*, 17 AD3d at 236; *People v Chevere*, 17 AD3d at 194; *People v Jenkins*, 248 AD2d 486 [2d Dept 1998], *lv denied* 91 NY2d 1008 [1998]; *People v Colon*, 122 AD2d 150, 151 [2d Dept 1986], *lv denied* 68 NY2d 999 [1986]).

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

ENTERED: APRIL 25, 2017



CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3495 The People of the State of New York, Ind. 5096N/04
Respondent,

-against-

Carlos Diaz also known as Carlos Victor-Sanchez,
Defendant-Appellant.

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

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

Appeal from judgment, Supreme Court, New York County (Lewis Bart Stone, J. at plea; Larry R.C. Stephen, J. at sentencing), rendered October 23, 2013, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of two to four years, held in abeyance pending the trial court's hearing and decision on defendant's pro se motion to dismiss the indictment on the ground of unreasonable delay in sentencing.

Defendant was arrested in 2004 and pleaded guilty in 2005, but was not sentenced until 2013. In 2013, defendant moved pro se to dismiss the indictment, citing the nearly nine-year delay between his plea and his sentencing. This delay was originally

the result of defendant's failure to appear for sentencing, followed by his Westchester County robbery arrest and conviction under a different name and date of birth. In opposing defendant's motion, however, the People conceded that by 2009 they had learned that defendant was in state custody.

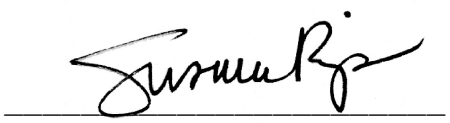
Defendant contends on appeal that the delay between 2009 and 2013 was excessive and lacked a plausible excuse. Accordingly, defendant concludes, the delay violated his right to prompt sentencing under CPL 380.30(1), thus depriving the court of jurisdiction and requiring dismissal of the indictment (*see People v Drake*, 61 NY2d 359, 364-367 [1984]).

The People argue that defendant has not preserved his claim regarding violation of his right to prompt sentencing. This argument is unavailing, in light of defendant's 2013 motion for postjudgment relief from his drug conviction. The sentencing court never addressed the motion during the sentencing proceeding. Thus, under the unique circumstances presented here, the People did not have an adequate opportunity to respond to the

issues raised in defendant's motion. Accordingly, we remand the matter to Supreme Court for a hearing and decision on that motion.

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

ENTERED: APRIL 25, 2017



CLERK

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

3799 The People of the State of New York, Ind. 2498/08
Respondent,

-against-

Antoine Lewis,
Defendant-Appellant.

_____

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

Antoine Lewis, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered February 17, 2012, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 22 years to life, unanimously affirmed.

Defendant's challenges to the People's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that the challenged remarks generally constituted permissible rhetoric that fairly commented on the evidence and responded to defense arguments, that to the extent there were any improprieties they were not so egregious as to compel reversal, and that the summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d

133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

Defendant's pro se claim regarding a material witness proceeding, and his pro se Confrontation Clause claim are waived

or unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 25, 2017

CLERK

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

3800 AG Super Fund International Partners, L.P., et al., Plaintiffs-Appellants, Index 650865/15

-against-

Winthrop Realty Trust, Defendant-Respondent.

Milbank, Tweed, Hadley & McCloy LLP, New York (Andrew M. Leblanc of counsel), for appellants.

Ballard Spahr LLP, New York (James Mitchell and Stephen J. Kastenberg of the Commonwealth of Pennsylvania and the State of New Jersey, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 19, 2016, which, inter alia, granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs seek a judgment declaring that a fee-shifting bylaw adopted by defendant is unenforceable. Supreme Court correctly determined that plaintiffs' challenge to the bylaw is not a justiciable controversy, because the applicability of the bylaw depends on a future event that is beyond the parties' control and may never occur (*see New York Pub. Interest Research Group v Carey*, 42 NY2d 527 [1977]). The fee-shifting bylaw is triggered only if plaintiffs sue defendant and fail to obtain "a

judgment on the merits that substantially achieves, in substance and amount, the full remedy sought." While the commencement of a suit is within plaintiffs' control, the outcome of such a suit is not; whether plaintiffs are entitled to the declaratory judgment they seek is dependent upon that outcome (*see Prashker v United States Guar. Co.*, 1 NY2d 584, 590 [1956]). Moreover, a declaration would have immediate effect only if it were in plaintiffs' favor; if the declaration were in defendant's favor, plaintiffs would face the same economic disincentive to commencing an action against defendant as they face in the absence of a declaration. Thus, unlike cases upon which plaintiffs rely, a declaratory judgment would not quiet the parties' dispute (*see generally Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

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

ENTERED: APRIL 25, 2017

CLERK

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

3802-
3802A In re Izrael J.,

A Child Under Eighteen Years
of Age, etc.,

Lindsay F.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner,

Cassius J.,
Respondent.

- - - - -

In re Cassius J.,
Petitioner-Respondent,

-against-

Lindsay F.,
Respondent-Appellant,

Administration for Children's Services,
Respondent.

_____

Carol L. Kahn, New York, for appellant.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 28, 2016, which, to the extent appealed from as limited by the briefs, granted respondent mother visitation supervised by a responsible adult acceptable to

petitioner father, unanimously modified, on the law, to remand the matter for a determination of a visitation schedule and choice of appropriate supervisors, and otherwise affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about March 28, 2016, which granted the father custody of the child, unanimously dismissed, without costs, as abandoned.

The Family Court is required to structure a visitation schedule that results in "frequent and regular access" by the noncustodial parent (*Matter of Aida B. v Alfredo C.*, 114 AD3d 1046, 1049 [3d Dept 2014]). "A court may not delegate its authority to determine visitation to either parent or a child" (*William-Torand v Torand*, 73 AD3d 605, 606 [1st Dept 2010]). Here, while the Family Court wanted to allow these largely cooperative parents flexibility to make their own visitation schedule, the order effectively delegated the court's authority to set a schedule completely to the father.

In view of the parties' ability to work together and their need for flexibility to accommodate scheduling supervisors and the mother's need for drug and/or alcohol rehabilitation, Family Court's responsibility to set a schedule can be satisfied by mandating the frequency and duration of visitation, even if

particular days of the week or times of the day are not specified. The Family Court also should have determined the category of individuals who were appropriate visitation supervisors.

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

ENTERED: APRIL 25, 2017

CLERK

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

3803 The People of the State of New York, Ind. 4453/12
Respondent,

-against-

Oscar Schaffino,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered November 26, 2013, convicting defendant, after a jury trial, of 11 counts of attempted disseminating indecent material to minors in the first degree, and sentencing him to concurrent terms of one to three years, unanimously affirmed.

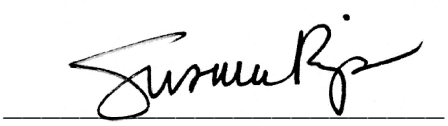
The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Initially, we find that there was overwhelming evidence, from multiple sources, establishing defendant's identity as the person who engaged in sexually-related communications with an undercover police officer posing as a 14-year-old girl, and defendant's arguments to the contrary are unavailing. Defendant did not preserve his argument that the

evidence was insufficient to meet the statutory requirement that he "importune, invite or induce" a minor to, as pertinent here, engage in sexual acts with him (Penal Law § 235.22[2]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits, and likewise reject defendant's weight of the evidence argument on this issue. Defendant expressly and repeatedly asked his intended victim to meet him for sexual contact, and the context clearly shows that defendant was not merely engaging in fantasy, but was trying to lure the victim into meeting with him for sexual activity (*see People v Foley*, 94 NY2d 668, 681 [2000], *cert denied* 531 US 875 [2000]). Defendant's contentions notwithstanding, beyond "importuning, inviting, or inducing," the statute does not require that the defendant have taken concrete steps to meet the minor. In any event, in Internet and phone

communications, defendant repeatedly asked the intended victim about the possibility of arranging a meeting.

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

ENTERED: APRIL 25, 2017



CLERK

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

3804 Thomas Trinajstic, Index 108341/10
Plaintiff-Respondent, 590198/13
590296/14

-against-

St. Owner, LP, et al.,
Defendants-Appellants,

Insignia Residential Group. Inc.,
Defendant.

- - - - -

St. Owner, LP, et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

Q's Marble & Stone Inc.,
Third-Party Defendant,

Pat Pellegrini Flooring Corporation,
Third-Party Defendant-Appellant.

- - - - -

[And a Second Third-Party Action]

_____

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for Pat Pellegrini Flooring Corporation, appellant.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Michael R. Manarel of counsel), for St. Owner, LP and Tishman Speyer Properties, L.P., appellants/respondents-appellants.

Sacks and Sacks LLP, New York (Scott N. Singer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered August 16, 2016, which, inter alia, denied the motion of defendants St. Owner, LP and Tishman Speyer Properties, L.P. for

summary judgment dismissing plaintiff's Labor Law § 241(6) claim and on their third-party claim for common-law indemnification against third-party defendant Pat Pellegrini Flooring Corporation (Pellegrini), and denied the motion of Pellegrini for summary judgment dismissing the third-party action as against it, unanimously affirmed, without costs.

The court correctly found that questions of fact as to whether workers employed by Pellegrini, a flooring refinisher at defendants' premises, created the dust that allegedly contributed to plaintiff's fall barred dismissal of his claim pursuant to Labor Law § 241(6) (*see* 12 NYCRR 23-1.7[d], [e]). Plaintiff, a laborer for the general contractor on a gut renovation project at the premises, was in the process of placing protection over the newly refinished floors at the time of his fall, and was thus entitled to the protections of the Labor Law (*see Bajor v 75 E. End Owners Inc.*, 89 AD3d 458 [1st Dept 2011]; *Tornello v Beaver Brook Assoc., LLC*, 8 AD3d 7 [1st Dept 2004]). The fact that plaintiff's job duties on the project also included some cleaning and debris removal does not bar his claim, as the record indicates that he was not engaged in cleaning the dust or broken tiles that caused him to fall (*see Lopez v Fordham Univ.*, 69 AD3d 532, 533 [1st Dept 2010], *lv dismissed* 15 NY3d 821 [2010]).

The court also correctly determined that summary resolution of defendants' claim for common-law indemnification against Pellegrini would be premature. While the record contains evidence that plaintiff's fall was caused by the presence of dust created by Pellegrini, plaintiff also pointed to broken tiles as a cause of his fall, tiles unrelated to Pellegrini's work. In any event, defendants failed to make a prima facie showing of a lack of any negligence on their part (*see Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

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

ENTERED: APRIL 25, 2017

CLERK

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

3806 The People of the State of New York, Ind. 719/14
Respondent,

-against-

Allen Bell,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

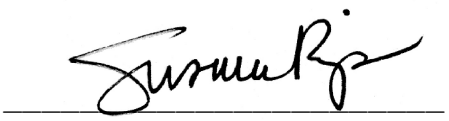
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel Fitzgerald, J. at plea; Richard Carruthers, J. at sentencing), rendered August 13, 2014,

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: APRIL 25, 2017



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

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

3811 The People of the State of New York, Ind. 3618/13
Respondent,

-against-

Omar Salas,
Defendant-Appellant.

_____

The Law Firm of Cèsar de Castro, P.C., New York (Cèsar de Castro of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered June 2, 2016, convicting defendant, upon his plea of guilty, of criminal sexual act in the first degree, and sentencing him to a term of eight years, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). The record establishes the voluntariness of the plea. That record included a lengthy and thorough plea colloquy in which defendant, among other things, stated that he was not coerced in any way to plead guilty, stated that he was satisfied with his attorney, acknowledged the constitutional rights he was foregoing by pleading guilty, and admitted to committing the crime to which he was pleading guilty. Defendant failed to substantiate his claims

that his plea was coerced by the prosecutor or defense counsel, or that counsel rendered ineffective assistance. There is no indication that counsel provided anything less than sound advice to plead guilty under all the circumstances of the case, including a new development that might have led to damaging evidence against defendant. Finally, defendant's claim that he was under the influence of cocaine at the time of the plea was refuted by his responses during the allocution and the court's recollection of his demeanor.

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

ENTERED: APRIL 25, 2017

CLERK

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

3812 Josefina Valle, et al., Index 653936/12
Plaintiffs-Respondents,

-against-

Popular Community Bank formerly known as
Banco Popular North America., etc.,
Defendant-Appellant.

_____

Lupkin & Associates PLLC, New York (Andrew E. Nieland of counsel), for appellant.

Tusa, P.C., Southhold (Joseph S. Tusa of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about February 18, 2016, which, to the extent appealed from, denied in part defendant's motion to dismiss the cause of action under General Business Law § 349, unanimously affirmed, without costs.

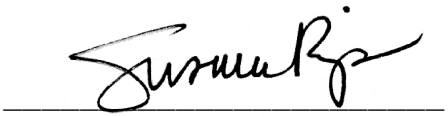
The complaint states a claim under General Business Law § 349 by alleging that defendant employed a deceptive and misleading consumer-oriented policy, not disclosed to plaintiff, of high-to-low reordering of ATM transactions that resulted in plaintiffs' being charged an additional overdraft fee on April 18, 2012 (*see Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 344 [1999]; *Levin v HSBC Bank USA, N.A.*, 2012 NY Slip Op

33164[U], *32-33 [Sup Ct, NY County 2012], *compare Feld v Apple Bank*, 116 AD3d 549 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]). The claim is also properly supported by allegations that defendant provided plaintiffs with inaccurate balance information, often showing a positive balance when in fact their account balance was negative, and failed to provide real-time notice that a given transaction would overdraw the account, despite the feasibility of doing so, and that these practices also resulted in additional overdraft fees.

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

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

ENTERED: APRIL 25, 2017



CLERK

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

3813 The People of the State of New York, Ind. 2885/13
Respondent,

-against-

Vincent Ziegler,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered January 14, 2015, convicting defendant, upon his plea of guilty, of criminal sale of controlled substance in the third degree and criminal facilitation in the fourth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of six years, with 1½ years of postrelease supervision, unanimously reversed, on the law, the plea vacated, and the matter remanded for further proceedings.

Although the court warned defendant that the enhanced sentence he would, and did, receive, upon his violation of the plea conditions would include a term of postrelease supervision, the court did not specify the length of that term. This entitles

defendant to vacatur of the plea (*see People v McAlpin*, 17 NY3d 936 [2011]). The People's argument regarding preservation is unavailing. The prosecutor's recommendation of a specific term of PRS at certain court appearances, and immediately before sentencing, "was not the type of notice under *People v Murray* (15 NY3d 725 [2010]) that would require defendant to preserve the issue" (*People v Singletary*, 118 AD3d 610, 611 [1st Dept 2014]).

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

ENTERED: APRIL 25, 2017

CLERK

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

3814 The People of the State of New York, Ind. 267/11
Respondent,

-against-

Joshua Moody,
Defendant-Appellant.

_____

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

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

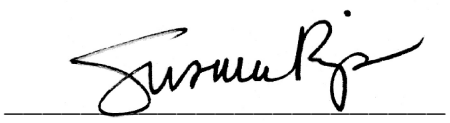
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ruth Pickholz, J.), rendered June 3, 2015,

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

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

ENTERED: APRIL 25, 2017



CLERK

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

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

3815 50 Gramercy Park North Owners Corp., Index 103736/11
Plaintiff-Appellant,

-against-

GPH Partners LLC (Sponsor), et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]

_____

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellant.

O'Toole Fernandez Weiner Van Lieu, LLC, New York (Tomas B. Lim of counsel), for respondents.

_____

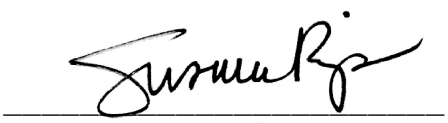
Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 13, 2016, which denied plaintiff's motion for partial summary judgment on the first, eighth through tenth, twelfth through seventeenth, and twenty-third causes of action, unanimously affirmed, without costs.

Defendants' denials in their answer were not improper and do not entitle plaintiff to summary judgment. Further, insofar as plaintiff relied on affidavits and documentary evidence in support of its motion, given the early stage of discovery,

Supreme Court did not err in denying summary judgment as premature (*see* CPLR 3212[f]).

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

ENTERED: APRIL 25, 2017



CLERK

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

3816 Judith Ziman-Scheuer, Index 150912/13
Plaintiff-Respondent,

-against-

Golden Touch Transportation
of NY, Inc., et al.,
Defendants-Appellants.

_____

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas Hurzeler of counsel), for appellants.

Robert G. Goodman, P.C., New York (Robert G. Goodman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 13, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff contends that she slipped and fell while exiting a charter bus because of an oily condition on the bottom step, the uneven condition of the steps, the lack of an adequate handrail, and/or the failure of defendant driver to assist her.

Assuming that plaintiff adequately identified the cause of her fall as an oily substance, defendant driver testified that he saw no such condition before or after plaintiff fell, and there

was no evidence sufficient to raise an issue of fact as to whether such a condition existed and, if so, whether it existed for a sufficient time for defendants to remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014]).

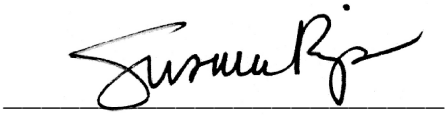
In opposition to defendants' showing through their expert's opinion that the stairs and handrails were safe, plaintiff's expert failed to raised an issue of fact, since the expert's opinion rested on statutes, codes, regulations, and industry standards that applied to buildings, as opposed to buses (*see Johnson v 301 Holdings, LLC*, 89 AD3d 550, 551 [1st Dept 2011]; *Azzaro v Super 8 Motels, Inc.*, 62 AD3d 525 [1st Dept 2009]). Furthermore, any claim that the handrail was defective because it did not extend to the last step, is unavailing since that step was not accessible unless the door was opened, and the handrail could not extend beyond closed doors of the bus (*see Hyman v Queens County Bancorp, Inc.*, 3 NY3d 743, 745 [2004]).

Defendant driver had no duty to assist plaintiff off the bus. Although the internal rules of defendant corporation required such assistance, internal rules that "go beyond the

standard of ordinary care. . .cannot serve as a basis for imposing liability" (*Gilson v Metropolitan Opera*, 5 NY3d 574, 577 [2005]).

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

ENTERED: APRIL 25, 2017



CLERK

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

3818 Cynthia O'Neal, etc., Index 154898/13
Plaintiff-Appellant,

-against-

Muchnick Golieb & Golieb, P.C., et al.,
Defendants-Respondents.

_____

The Law Office of Perry M. Grossman, New York (Perry M. Grossman of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Connor V. McDonald of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered on or about February 17, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion pursuant to CPLR 3211 to dismiss the legal malpractice claims based on the assumption of a lease and the failure to oppose summary judgment in an underlying action, the breach of fiduciary duty claims, and the Judiciary Law § 487 claims, and denied plaintiff's application for leave to amend the complaint to add the Good Service Company, Inc. as a nominal defendant, unanimously modified, on the law, to deny defendants' motion as to the fiduciary duty and Judiciary Law § 487 claims and so much of the malpractice claim as arose in connection with the

assignment of a lease, and to grant plaintiff's application to amend, and otherwise affirmed, without costs.

The allegation that, while representing plaintiff in the assignment-of-lease negotiations, counsel secretly represented the counterparty so as to obtain favorable terms for the counterparty, which resulted in a lower-than-market price for the assignment, states a claim for legal malpractice (*see Leggiadro, Ltd. v Winston & Strawn, LLP*, 119 AD3d 442 [1st Dept 2014]).

Defendants' decision not to oppose summary judgment in the action by the bank creditor does not constitute malpractice. The decision was a strategic choice made in light of the lack of a meritorious defense (*see Dweck Law Firm v Mann*, 283 AD2d 292 [1st Dept 2001]). Moreover, the fact that replacement counsel was able to re-open the briefing and submit opposition to the motion and still lost demonstrates the lack of a causal connection between defendants' decision not to oppose and any alleged damages.

The breach of fiduciary duty claim is not duplicative of the malpractice claims, since it is based on actions taken after the termination of the representation (*see Dinhofer v Med. Liab. Mut. Ins. Co.*, 92 AD3d 480 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]).

The allegation that defendants advised plaintiff to transfer her assets, in violation of a court order about which they had not informed her, to draw the ire of creditors so that they would seek collection against her before pursuing her co-defendants is sufficient to state a claim under Judiciary Law § 487 (*see generally Kurman v Schnapp*, 73 AD3d 435 [1st Dept 2010]).

Given that all the other elements of the derivative claims are pleaded in the body of the complaint, and there is no prejudice to defendants, we grant plaintiff leave to amend the caption to add the corporation as a party.

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

ENTERED: APRIL 25, 2017

CLERK

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

3819-
3820-
3821 In re Cerenithy B., and Others,

Dependent Children Under the Age of
Eighteen Years, etc.,

Ecksthine B., et al.,
Respondents-Appellants,

Good Shepherd Services,
Petitioner-Respondent.

_____

Steven Feinman, White Plains, for Ecksthine B, appellant.

Larry S. Bachner, Jamaica, for Christian B., appellant.

Law Office of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Aleza Ross, Patchogue, attorney for the children Cerenithy B. and Anthalys B.

Andrew J. Baer, New York, attorney for the child Christialys B.

_____

Orders (one for each subject child), Family Court, New York County (Douglas E. Hoffman, J.), entered on or about February 17, 2016, which, upon findings of permanent neglect, terminated respondents' parental rights to the subject children and transferred custody of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that despite the agency's diligent efforts to encourage and strengthen the parental relationship, respondents failed to plan for the children's future (*see* Social Services Law § 384-b[7][a]). The agency made diligent efforts by, among other things, referring respondents for various parenting programs and mental health services, as well as by scheduling visitation with the children (*see* Social Services Law § 384-b[7][f]; *see also Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512, 512 [1st Dept 2015]).

Despite these efforts, the mother continually failed to respond to the agency's attempts to make contact with her (*see Matter of Star Leslie W.*, 63 NY2d 136, 144 [1984]; *Matter of Travis Devon B.*, 295 AD2d 205, 205 [1st Dept 2002]), and failed to undergo a mental health evaluation, engage in mental health treatment and visit with the children consistently (*Matter of Jaileen X.M. [Annette M.]*, 111 AD3d 502 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]). She also gained no insight into the reasons for the children's placement in foster care, nor benefitted from the limited services with which she complied (*id.*).

The father, despite being diagnosed as bipolar, likewise failed to remain consistently engaged in mental health services,

nor was there any update as to his mental health status, other than that he was severely depressed and not taking medication (*see Matter of Jonathan Jose T.*, 44 AD3d 508, 509 [1st Dept 2007]). While he visited with the children consistently, on alternate weekends, his visitation never progressed beyond supervised visits at his mother's home, during which his mother primarily cared for the children (*see id.*).

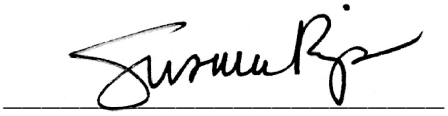
The record supports Family Court's determination that the children's interests would best be served by terminating respondents' parental rights to free the children for adoption by their long-term foster mother, who has met all of their needs (*see Matter of Star Leslie W.*, 63 NY2d at 147-148). Despite engaging in services, some belatedly, there was no indication that the mother was able to care for the children or would be able to do so in the future. Similarly, the father's home was found to be unsuitable for the children, and there was no evidence that he was ready to care for them (*see Matter of Olushola W.A.*, 41 AD3d 179, 180 [1st Dept 2007]). Under the circumstances, a suspended judgment is not warranted (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]).

The father failed to preserve his argument regarding the

Americans with Disabilities Act of 1990 (*see Matter of Toshea C.J.*, 62 AD3d 587, 587 [1st Dept 2009]). Were we to review it, we would find it unavailing.

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

ENTERED: APRIL 25, 2017



CLERK

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

3822 John Jones, et al., Index 305875/12
Plaintiffs-Appellants,

-against-

K&C Limousines of New York, LLC, et al.,
Defendants,

Adam R. Johnson,
Defendant-Respondent.

_____

Bernstone & Grieco LLP, New York (Peter B. Croly of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered April 25, 2016, which granted defendant Adam Johnson's motion for summary judgment dismissing the complaint and any cross claims against him, unanimously affirmed, without costs.

Defendant Johnson made a prima facie showing of his lack of negligence, by submitting evidence that the limousine driven by defendant Cara Elliot rear-ended the limousine driven by Johnson after Johnson's vehicle came to an abrupt stop (*see* Vehicle and Traffic Law § 1129[a]; *Maisonet v Roman*, 139 AD3d 121, 123 [1st Dept 2016], *appeal dismissed* 27 NY3d 1062 [2016]; *Morgan v Browner*, 138 AD3d 560, 560 [1st Dept 2016]).

In opposition, plaintiffs, who were passengers in the limousines, failed to raise a triable issue of fact. The affidavits submitted by plaintiffs were insufficient to raise an issue of fact, as they contradicted the affiants' deposition testimony (*see Peralta-Santos v 350 W. 49th St. Corp.*, 139 AD3d 536, 537 [1st Dept 2016]). Moreover, defendant Elliot did not offer a nonnegligent explanation for rear-ending Johnson's limousine (*see Morgan*, 138 AD3d at 560). Rather, she admitted that the collision occurred almost immediately after seeing Johnson's brake lights activate.

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

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

ENTERED: APRIL 25, 2017

CLERK

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

3823N Shatima Turner, et al., Index 20229/12E
Plaintiffs-Appellants,

-against-

Owens Funeral Home, Inc., et al.,
Defendants-Respondents.

_____

C. Robinson & Associates, LLC, New York (W. Charles Robinson of counsel), for appellants.

McCarthy & Associates, New York (Eleanor R. Goldman of counsel), for Owens Funeral Home, Inc, Isaiah Owens and Andrew Cleckley, respondents.

Decorato Cohen Sheehan & Federico LLP, New York (Anthony Lugara of counsel), for North Shore-Long Island Jewish Medical Center, North Shore-Long Island Jewish Health System, Inc., North Shore-Long Island Jewish Medical Care, PLLC and North Shore-Long Island Jewish Medical Group, respondents.

Appeal from order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered June 30, 2015, which, among other things, granted the hospital defendants' motion and the funeral defendants' motion for a change of venue from Bronx County to Nassau County, unanimously dismissed, without costs.

Because plaintiffs did not submit any opposition to the motions to change venue, and the order granting the motions was entered without consideration of any arguments by plaintiffs, whether oral or written, the order was entered upon plaintiffs' default, and is not appealable (*see* CPLR 5511; *Liberty Community*

Assoc., LP v DeClemente, 139 AD3d 532, 532 [1st Dept 2016]; *cf. Matter of 144 Stuyvesant, LLC v Goncalves*, 119 AD3d 695, 696 [2d Dept 2014] [order was not entered upon the respondent's default where, among other things, the court addressed the arguments presented by the respondent in her oral opposition to the motion]).

Plaintiffs' arguments addressed to orders that denied their motions for an adjournment and to reargue are not properly before this Court on this appeal.

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

ENTERED: APRIL 25, 2017

CLERK

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

3824 The People of the State of New York, Ind. 2495/15
Respondent,

-against-

Eli Auslander,
Defendant-Appellant.

_____

Gallet Dreyer & Berkey, LLP, New York (Roger L. Stavis of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 15, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly determined that probable cause existed for the issuance of the search warrants at issue. Although defendant challenges the proof of the reliability of the registered confidential informant, the warrant affidavit satisfied the requirement of a "minimum, reasonable showing that the informant was reliable" (*People v Griminger*, 71 NY2d 635, 639 [1988]). The affiant, who was entitled to rely on information from fellow officers where applicable, provided specific

information about how the informant had assisted the police in several ways that tended to demonstrate his ongoing reliability. The affiant had also met the informant personally, and had verified some of the information he provided.

Defendant's request for a hearing under *People v Darden* (34 NY2d 177 [1974]) did not encompass a request for a summary report of the hearing. Since defendant never asked for such a report, its absence provides no basis for reversal (*see People v Clark*, 54 NY2d 941, 943 [1981]; *People v Lowen*, 100 AD2d 518, 519 [2d Dept 1984], *lv denied* 62 NY2d 808 [1984]).

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

ENTERED: APRIL 25, 2017

CLERK

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

3825-
3826 LV Construction Services LLC,
Plaintiff-Appellant,

-against-

Manhattan Professional Group, Inc.,
doing business as the Tax Club, et al.,
Defendants,

Empire State Land Associates LLC, et al.,
Defendants-Respondents.

- - - - -

In re Empire State Land Associates, LLC,
Petitioner-Respondent,

-against-

LV Construction Services LLC,
Respondent-Appellant.

Index 654100/13
159734/14

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William V. DeCandido, P.C., Forest Hills (William V. DeCandido of counsel), for appellant.

Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, Uniondale (Parshhueram T. Misir of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about April 3, 2015, which (1) cancelled and discharged the lien filed by LV Construction Services LLC (LV) against the 60th floor of 350 Fifth Avenue in the sum of $275,000, (2) cancelled the undertaking filed by defendant Berkley Regional Insurance Company (Berkley) to discharge the

mechanic's lien, (3) granted defendants Empire State Land Associates LLC and Berkley's motion for summary judgment dismissing LV's complaint, and (4) denied as moot LV's motion for a default judgment against defendants the Tax Club, Inc. and Manhattan Professional Group; and order, same court (Joan M. Kenney, J.), entered on or about June 10, 2015, which cancelled and discharged the mechanic's lien and discharge bond, based on LV's failure to provide a proper accounting for the services and materials supporting the lien, unanimously affirmed, without costs.

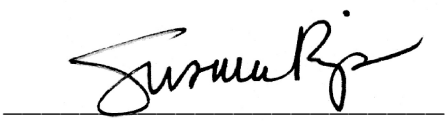
The liens that LV attempted to place on the 60th floor of the Empire State Building were properly vacated and cancelled. In the first action, the IAS court correctly determined that LV had failed to properly serve the notice of lien on all of the appropriate interested entities, warranting vacatur of the lien (Lien Law § 11; *146 W. 45th St. Corp. v McNally*, 188 AD2d 410, 410-411 [1st Dept 1992]; *Matter of Hui's Realty v Transcontinental Constr. Servs.*, 168 AD2d 302, 302-303 [1st Dept 1990], *lv denied* 77 NY2d 810 [1991]). In the second action, which proceeded during the pendency of the first action's appeal, prior to this Court's consolidation of the appeals, the IAS court correctly, again, cancelled and discharged the lien based on LV's

repeated failures to properly itemize the charges forming the basis for the lien (Lien Law § 38; *Matter of DePalo v McNamara*, 139 AD2d 646 [2nd Dept 1988]).

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 25, 2017



CLERK

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

3827 M.V., an Infant by His Father and Natural Guardian, etc., et al.,
Plaintiffs-Appellants,

-against-

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

_____

Susan R. Nudelman, New York, for appellants.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 23, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was proper in this action where the infant plaintiff was injured when, while he was participating in a game of tag, a fellow classmate "accidentally bumped" into him, causing him to crash into the wall of the gymnasium. Plaintiff's own testimony as to how the accident occurred demonstrates that no additional supervision could have prevented his injury (*see Jorge C. v City of New York*, 128 AD3d 410, 411 [1st Dept 2015].

Furthermore, the infant plaintiff's accident was caused by the "spontaneous act of one student running directly into another

student in effort to avoid being tagged," which could not reasonably have been foreseen or prevented, and thus would not result in the school being held liable (*Lizardo v Board of Educ. of the City of N.Y.*, 77 AD3d 437, 438 [1st Dept 2010]).

The affidavit of plaintiff's expert contained opinions not based in the record (*see Chung v New York City Bd. of Educ.*, 136 AD3d 608, 609 [1st Dept 2016]), and was otherwise insufficient to raise a triable issue as to the adequacy of defendants' supervision or the safety of the facilities (*see David v County of Suffolk*, 1 NY3d 525 [2003]; *Greenberg v Peekskill City Sch. Dist.*, 255 AD2d 487, 488 [2nd Dept 1998]).

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

ENTERED: APRIL 25, 2017

CLERK

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

3828-
3829-
3830 In re Nephra P., I., and Others,

Children Under the
Age of Eighteen, etc.,

John Lee P., et al.,
Respondents-Appellants,

Forestdale Inc., et al.,
Petitioners-Respondents.

_____

Law Office of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for John Lee P., appellant.

Steven N. Feinman, White Plains, for Shanel N., appellant.

Rosin Steinhagen Mendel, New York (Sarah H. Falik of counsel), for, respondents.

Karen Freedman, Lawyers for Children Inc., New York (Shirim Nothenberg of counsel), attorney for the children Nephra P., I, and Nephra P., IV.

Larry S. Bachner, Jamaica, attorney for the children Nephra P., II, Nephra P., VI and Nephra P., VII.

Tennille M. Tatum-Evans, New York, attorney for the children. Nephra P., III and Nephra P., V.

Andrew J. Baer, New York, attorney for the child Nefertiti P.

_____

Orders (one for each child), Family Court, New York County (Jane Pearl, J.), entered on or about July 30, 2015, which, upon a determination of permanent neglect, terminated respondents'

parental rights and transferred custody and guardianship of the subject children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Family Court's determination that respondents permanently neglected the subject children is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]; [3][g][i]). The agency engaged in diligent efforts to encourage and strengthen respondents' relationship with the children by, among other things, developing individualized plans tailored to fit their situation and needs, and providing referrals for, among other things, parenting skills, anger management, and individual counseling (*id.* § 384-b[7][f]; *Matter of Adam Mike M. [Jeffrey M.]*, 104 AD3d 572, 573 [1st Dept 2013]). Despite these efforts, respondents only partially complied with the service plan and failed to benefit from the services offered, as they continue to deny responsibility for the conditions necessitating the children's removal from their care (104 AD3d at 573; *see also Matter of Samantha C.*, 305 AD2d 167, 168 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]).

Moreover, after respondents completed some services, they knowingly orchestrated the unauthorized removal of the children

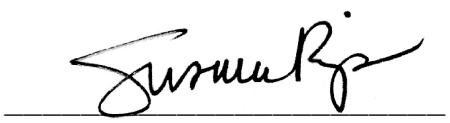
from the agency, setting off a week-long manhunt that only ended when the van they and the children were in was surrounded by police officers who had their guns drawn. Respondents embarked on this journey without the children's medications, and the children reported that they did not have enough to eat, that they were forced to sleep in the van and to urinate in bottles, and that at least two of them were beaten. Respondents' decision to subject the children to this harrowing ordeal and their inability to appreciate the traumatic effect it had on the children — as well as the father's inability to spend even one week with the children without resorting to corporal punishment – constituted clear and convincing evidence that respondents did not benefit from services (*id.*).

The preponderance of the evidence supports Family Court's determination that termination of respondents' parental rights is in the best interests of the children, as the children have been in stable and loving foster homes for several years, all of their basic needs are being met and their foster parents want to adopt

them (*Matter of Jayvon Nathaniel L. [Natasha A.]*, 70 AD3d 580 [1st Dept 2010]). The circumstances presented do not warrant a suspended judgment (*id.*).

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

ENTERED: APRIL 25, 2017



CLERK

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

3831-
3832 Index 652055/10

Mill Financial, LLC, et al.,
Plaintiffs-Appellants,

-against-

George N. Gillett, Jr., et al.,
Defendants,

The Royal Bank of Scotland, PLC,
Defendant-Respondent.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Paul M. O'Connor, III of counsel), for appellants.

Goodwin Procter LLP, New York (Marshall H. Fishman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 12, 2016, which granted defendant Royal Bank of Scotland, PLC's motion for summary judgment dismissing the remaining cause of action, for breach of contract, against it, unanimously modified, on the law, to reinstate the claim only insofar as based on an alleged inability to refinance, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered October 7, 2016, which denied plaintiffs' motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

Defendants George Gillett and Thomas Hicks each owned a 50%

share of the Liverpool Football Club of the English Premier League through a series of entities. In January 2008, defendant Royal Bank of Scotland, PLC (RBS) extended loan facilities to defendant Gillett, Hicks, and certain entities through which they owned the Club to refinance the debt with which the Club had been purchased. Simultaneously, plaintiffs Mill Financial, LLC and Mill Football Holdings, PLC (collectively, Mill) made loans to Gillett Football, LLC, an entity through which Gillett owned his 50% share of the Club. Mill, RBS, and another lender also entered into an intercreditor agreement, which required them to provide prior notice to the other parties to the agreement of any action they took to enforce their applicable loan documents.

On April 16 and again April 30, 2010, RBS extended the maturity of its loan facilities, with a new maturity date in October 2010. However, pursuant to one April 16, 2010 "side letter" and two April 30 "side letters," RBS imposed conditions upon the extensions, including a public announcement that the club was for sale and appointment of an independent director to manage the sale process. RBS did not provide prior notice of the conditions, as required by the intercreditor agreement.

Eventually, the Club was sold for a sum that was insufficient to repay the Mill loan, and Mill commenced this

action alleging, inter alia, breach of the intercreditor agreement against RBS. Although RBS failed to provide notice of the conditions of its forbearance to Mill, as required by the intercreditor agreement, Supreme Court concluded that its failure to do so did not cause any damages, and in any event, because Mill could not prove any diminution in the value of the Club as a result of the side letters, any damages were speculative.

Mill argues on appeal that, had it received notice of the side letters from RBS as required by the intercreditor agreement, it could have protected its interest by seizing Gillett Football's 50% interest in the Club, purchasing the Club, or refinancing the Club's debt to RBS. Supreme Court correctly concluded, however, that because RBS had a superior interest in shares of the Club, any attempt by Mill to seize Gillett Football's interest in the Club would not have protected its interest. Moreover, Mill's proposal to purchase the Club in August 2010, after it claims the value was substantially diminished by the April 2010 side letters, was unsuccessful. Thus, Supreme Court correctly concluded that its argument that it could have protected its interest by purchasing the Club had it been given prior notice of the side letters is unavailing.

With regard to refinancing the RBS debt, although RBS may

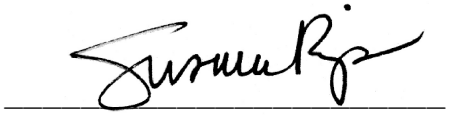
have sought a sale of the Club rather than refinancing after execution of the side letters, Mill argues that RBS was willing to accept a refinancing prior to the April letters, and had Mill received prior notice of the April letters, it could have refinanced at that time. RBS failed to address this argument. Accordingly, an issue of fact exists regarding whether the failure to provide prior notice of the April side letters foreclosed any opportunity Mill may have had prior to the side letters to refinance the RBS loan. Similarly, on appeal RBS fails to address Mill's specific argument that the effect of the side letters caused a diminution in value of the Club. Accordingly, an issue of fact exists regarding whether the April side letters contributed to a diminution in value of the Club.

Mill's appeal from the order denying reargument must be dismissed as no appeal lies from an order denying argument

(*Kitchen v Corona Park W. Hous. Dev. Fund Corp.*, 145 AD3d 521 [1st Dept 2016]). We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 25, 2017



CLERK

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

3835 The People of the State of New York, Ind. 2687/12
Respondent,

-against-

Ivan Diaz,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

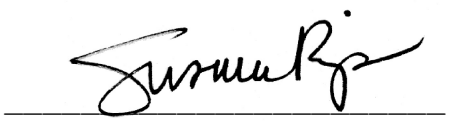
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Frank P. Milano, J.), rendered July 25, 2013,

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: APRIL 25, 2017



CLERK

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

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

3836 Michael A. Serao, Index 311542/14
Plaintiff-Appellant,

-against-

Jonathan Bench-Serao,
Defendant-Respondent.

_____

Eric Ole Thorsen, New City, for appellant.

Brian M. DeLaurentis, P.C., New York (Brian M. DeLaurentis of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about July 28, 2016, which, insofar as appealed from as limited by the briefs, granted defendant's motion to vacate the divorce judgment solely to the extent necessary to resolve issues of equitable distribution, and denied plaintiff's cross motion to dismiss defendant's forgery claim, unanimously affirmed, without costs.

Defendant established prima facie that the judgment of divorce must be vacated because it is devoid of any provision addressing the equitable distribution of the parties' marital assets or debts (*see* Domestic Relations Law § 236[B][5][a]; *Wong v Wong*, 300 AD2d 473 [2d Dept 2002]). In opposition, plaintiff argued that the parties had voluntarily agreed to distribute all

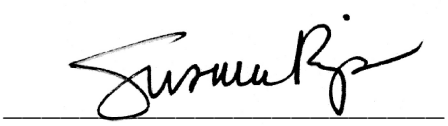
assets and debts, but he failed to present a written agreement to opt out of the equitable distribution provisions sufficient to satisfy the formal requirements of Domestic Relations Law § 236(B)(3) (*see* Domestic Relations Law § 236[B][5][a]; *see also* CPLR 2104; General Obligations Law § 5-703). Accordingly, the judgment was correctly vacated to the extent necessary to determine equitable distribution (*see Conti v Conti*, 199 AD2d 985 [4th Dept 1993]).

Plaintiff's cross motion to dismiss defendant's forgery claims was correctly denied under CPLR 3211(a)(7) or (a)(1). Defendant alleges that plaintiff fraudulently forged his name on two loan documents, without his knowledge or consent, and that he only learned of the loans nearly two years later, when he was contacted by debt collectors. These allegations are sufficiently specific to state a claim (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382 [1st Dept 2006]). Plaintiff's motion relied on affidavits disputing defendant's allegations. However, factual affidavits do not constitute documentary

evidence within the meaning of the statute (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]).

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

ENTERED: APRIL 25, 2017



CLERK

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

3837 Maria Liz, Index 306997/12
Plaintiff-Appellant,

-against-

Eduardo Munoz,
Defendant-Respondent.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Russo & Toner, LLP, New York (Alexandra L. Alvarez of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A. M. Aarons, J.), entered April 13, 2016, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint alleging that plaintiff suffered a serious injury to her right shoulder within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated to that extent.

In opposition to defendant's prima facie showing that plaintiff did not suffer a serious injury to her right shoulder as a result of the subject motor vehicle accident, plaintiff submitted the affirmed report of her orthopedic surgeon, which was sufficient to raise a triable issue of fact. He observed a

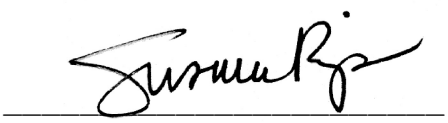
type I SLAP tear during arthroscopic surgery, measured limitations in range of motion both before surgery and over two years later, and provided a sufficient opinion that there was a causal relationship to the accident based on the plaintiff's history, his own treatment of plaintiff, his review of the MRI report, and observations during surgery (*see Burgos v Diop*, 140 AD3d 521, 522 [1st Dept 2016]; *Daniels v S.R.M. Mgt. Corp.*, 100 AD3d 440 [1st Dept 2012]). The measured limitations, in multiple planes, were not so slight as to be insignificant as a matter of law (*cf. Stevens v Bolton*, 135 AD3d 647 [1st Dept 2016]).

Contrary to defendant's argument, plaintiff's orthopedic surgeon was not required to use any particular instruments to measure the ranges of motion (*see Frias v Son Tien Liu,* 107 AD3d 589, 589 [1st Dept 2013]), and any discrepancies between his reports raise issues of credibility for the factfinder (*see Sung v Mihalios*, 44 AD3d 500 [1st Dept 2007]).

We have considered defendant's remaining grounds for affirmance and find them unavailing.

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

ENTERED: APRIL 25, 2017



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

3838 The People of the State of New York, Ind. 566/11
Respondent,

-against-

Charles Flow,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (George Villegas, J.), rendered October 24, 2013, convicting defendant, after a jury trial, of robbery in the first and third degrees, and sentencing him, as a persistent violent felony offender, to a term of 20 years to life, consecutive to a sentence imposed in New York County on April 27, 2010, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that the sentence be served concurrently with the New York County sentence, and also modified, on the law, to the extent of dismissing the third-degree robbery count as a lesser included offense, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). On the

contrary, the evidence of defendant's guilt was overwhelming. Two bank tellers and a customer made reliable identifications, defendant left his fingerprint on a envelope in a teller's drawer, and the bank surveillance videotape depicted a man resembling defendant. Defendant was properly convicted of first-degree robbery under the theory of displaying what appeared to be a weapon (*see People v Smith*, __NY3d__, 2017 NY Slip Op 02362 [Mar 28, 2017]), which does not require any proof of possession of an actual firearm. The affirmative defense set forth in Penal Law § 160.15(4) was neither raised nor supported by any evidence.

Even if defense counsel improperly deferred to defendant the decision not to exercise a peremptory challenge to a juror (*see People v Colon*, 90 NY2d 824, 825-826 [1997]), harmless error applies (*see People v Colville*, 20 NY3d 20, 32-33 [2012]), and we find that any error was harmless. In addition, the court providently exercised its discretion in denying defendant's belated attempt to peremptorily challenge the juror (*see* CPL 270.15; *People v Brown*, 52 AD3d 248 [1st Dept 2008], *lv denied* 11 NY3d 735 [2008]).

The court providently exercised its discretion in admitting carefully limited evidence that tended to connect defendant, by way of fingerprint and description evidence, to a bank robbery

committed in Manhattan the day before the robbery at issue. This constituted necessary background material to complete the narrative of events and explain how defendant came to be identified (*see People v Morris*, 21 NY3d 588 [2013]), and the probative value of this evidence exceeded its potential for prejudice, which was minimized by the court's limiting instructions. In any event, regardless of whether the court erred in admitting evidence of an uncharged crime, we find that any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court also properly exercised its discretion in limiting the scope of defense counsel's summation by sustaining the prosecutor's objections and striking certain arguments that strayed from the evidence or did not bear on any legitimate issues in the case (*see People v Smith*, 16 NY3d 786, 787-788, [2011]), and there was no violation of defendant's right to present a defense with the aid of counsel. Furthermore, the court generally permitted counsel to make arguments that were similar to the excluded arguments, but in different form. In any event, any error in this regard was also harmless.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not

reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713–714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel's failure to make a constitutional speedy trial motion (where a statutory speedy trial motion not at issue on appeal yielded only 45 days of includable time), or to pursue the affirmative defense to first-degree robbery, were objectively unreasonable, or that they resulted in any prejudice.

We find the sentence excessive to the extent indicated.

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

ENTERED: APRIL 25, 2017

CLERK

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

3840 In re Matter of Mark L. Goodman, File 2991/11
Grantor.

Van Kirk Reeves,
Petitioner-Respondent,

-against-

Valerie Anne Goodman, et al.,
Objectants-Appellants.

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Law Office of Annette G. Hasapidis, White Plains (Annette G. Hasapidis Of counsel), for appellants.

Greenfield Stein & Senior, LLP, New York (Elana L. Danzer of counsel), for respondent.

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Order, Surrogate's Court, New York County (Rita S. Mella, S.), entered on or about July 15, 2015, which, to the extent appealed from, upon petitioner's motion, granted petitioner summary judgment dismissing objections 10 and 12, unanimously affirmed, without costs.

The Surrogate's Court correctly dismissed objection 10, which states, among other things, that petitioner trustee improperly distributed principal to or on behalf of the grantor, and that petitioner failed to consider other resources available to the grantor. Under the terms of the trust deed at issue, petitioner had the discretion, but was not required, "to take the

beneficiary's independent income into account before invading principal" (*Matter of Flyer*, 23 NY2d 579, 586 [1969]; *see also id.* at 584). In particular, the deed states that "the Trustees shall distribute to the Grantor or in the Trustees' discretion shall apply for [the Grantor's] benefit from the principal of the trust property so much of said principal as in Trustees' discretion shall be deemed advisable for the maintenance of the Grantor in comfort and good health and for any of his emergency needs."

Where, as here, a trustee has discretionary power, "the exercise of that power is not to be the subject of judicial interference, at least if exercised reasonably and in good faith" (*Matter of Preiskel*, 275 AD2d 171, 181 [1st Dept 2000] [internal quotation marks omitted], *lv denied and dismissed* 96 NY2d 812 [2001]). Petitioner made a prima facie showing that he acted reasonably, in good faith, honestly, and from a proper motive in making the payments to the grantor and his ex-wife. He explained that the grantor was an unsuccessful artist and needed to invade the principal of the trust for basic living expenses. Petitioner also explained that if the grantor did not pay his ex-wife alimony that had been ordered by a French court, the grantor could be sentenced to up to two years in prison and fined 15,000

Euros. Thus, petitioner's payments were a proper exercise of his discretion to make payments "for the maintenance of the Grantor in comfort and good health and for any of his emergency needs." In opposition, objectants failed to raise a triable issue of fact.

Objection 12 states that an amendment to the trust deed constituted a breach of the trust. Objectants are estopped from making this objection, because the objectants themselves signed the amendment and agreed therein to "hold the Trustees harmless for their compliance with the terms of this amendment" (*see Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443, 448 [1958]; *Gray v Met Contr. Corp.*, 4 AD2d 495, 497 [1st Dept 1957]).

Objectants limited their appeal to objections 10 and 12. Therefore, their argument about petitioner's alleged failure to remedy his predecessor's breach of trust, which is not encompassed by those objections, "is not properly before this

Court" (*Commissioners of the State Ins. Fund v Ramos*, 63 AD3d 453 [1st Dept 2009]).

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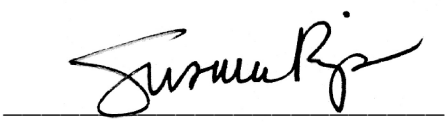

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Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Webber, JJ.

3841 The People of the State of New York, Ind. 3549/14
Respondent,

-against-

Francisco Santos,
Defendant-Appellant.

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

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

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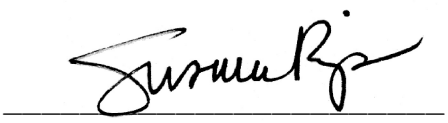
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered November 6, 2014,

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: APRIL 25, 2017



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

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

3842 The People of the State of New York, Respondent, Ind. 342/05 3943/04

-against-

Alfie Richardson, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

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Order, Supreme Court, New York County (Patricia M. Nuñez, J.), entered December 20, 2012, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Based on reliable information (*see People v Mingo*, 12 NY3d 563 [2009]), the court correctly assessed 20 points under the risk factor for continuing course of sexual misconduct, and also correctly determined that a presumptive override applied because of the facts underlying defendant's out-of-state conviction. In any event, regardless of whether defendant's correct point score is 180, as the court found, or 160, as he contends, and regardless of any override, defendant remains a level three

offender, and there is no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant, including relatively recent compliance with supervision and treatment, were outweighed by the seriousness of defendant's overall history, which demonstrates that he presents a grave danger to young children.

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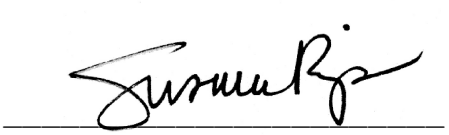

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Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Webber, JJ.

3843 The People of the State of New York, Ind. 3606/11
Respondent,

-against-

Jose Macaiba,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Amanda Katherine Regan of counsel), for respondent.

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Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered November 20, 2012, convicting defendant, after a jury trial, of two counts each of grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree and identity theft in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a provident exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Pavao*, 59 NY2d 282, 292 [1983]). Out of defendant's extensive record, the court only permitted inquiry into two theft-related convictions, without permitting inquiry into the underlying facts. Although defendant asserts

that the People should only have been permitted to elicit defendant's conviction of unspecified felonies, these theft-related crimes were highly probative of credibility, and it was an appropriate exercise of the court's discretion to permit these convictions to be identified in order to assist the jury in evaluating defendant's testimony.

The court providently exercised its discretion in permitting the People to introduce evidence that, in addition to using two debit cards that had been in the victim's lost wallet, as charged in the indictment, defendant also attempted to use a credit card from the same wallet. The evidence concerning the third card was relevant and probative since it went to the issue of defendant's knowledge that the first two cards were stolen (*see People v Radoncic*, 259 AD2d 428 [1st Dept 1999], *lv denied* 93 NY2d 1005 [1999]), and the third card had minimal, if any, prejudicial effect under the circumstances. Defendant did not preserve his claim that the court should have given a limiting instruction regarding the use of the third card, and we decline to review it

in the interest of justice. As an alternative holding, we find the lack of such an instruction to be harmless.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 25, 2017

CLERK

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

3845 JSBarkats PLLC, Index 159434/14
Plaintiff-Respondent,

-against-

Response Scientific Inc., et al.,
Defendants-Appellants.

_____

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Joseph P. LaSala of counsel), for appellants.

Gene W. Rosen, Kew Gardens Hills, for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about May 6, 2016, which denied defendants' motion to compel arbitration, unanimously affirmed, without costs.

The motion court properly decided the issue of waiver (*see Cusimano v Schnurr*, 26 NY3d 391, 401 n 3 [2015]) and properly determined that defendants had waived arbitration. Defendants' participation in the lawsuit, in both state and federal court, for approximately 11 months before moving to compel arbitration manifested an affirmative acceptance of the judicial forum and caused plaintiff unnecessary delay and expense (*see id.* at 400-401; *see also De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]; *Thyssen, Inc. v Calypso Shipping Corp., S.A.*, 310 F3d 102, 105

[2d Cir 2002], *cert denied* 538 US 922 [2003]).

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

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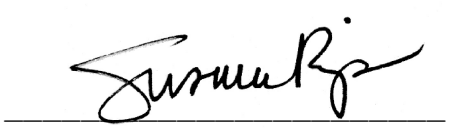

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