SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 7, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Andrias, Acosta, Manzanet-Daniels, Román, JJ.

9147-
9148 — Index 652286/11

CIFG Assurance North America, Inc.,
Plaintiff-Appellant-Respondent,

-against-

Goldman, Sachs & Co., et al.,
Defendants-Respondents-Appellants,

M&T Bank,
Defendant-Respondent.

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Allegaert Berger & Vogel LLP, New York (Michael S. Vogel of counsel), for appellant-respondent.

Sullivan & Cromwell LLP, New York (William B. Monohan of counsel), for respondents-appellants.

Luskin Stern Eisler LLP, New York (Michael Luskin of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 3, 2012, which, granted defendant M&T Bank's motion to dismiss the complaint against it, granted defendant Goldman entities' motion to dismiss the complaint to the extent of dismissing the fraudulent inducement and accounting causes of

action against them and denied it with respect to the breach of contract causes of action, unanimously modified, on the law, to deny all defendants' motions with respect to the cause of action for fraudulent inducement, and otherwise affirmed, without costs. Judgment, same court and Justice, entered May 31, 2012, dismissing the complaint against M&T Bank, unanimously reversed, on the law, without costs, and the judgment vacated.

In this action by plaintiff arising from its financial guaranty of a residential mortgage-backed securities investment, the cause of action for fraudulent inducement should not have been dismissed. Plaintiff conducted its own due diligence, utilizing an outside consultant to analyze the characteristics of the underlying loans (*cf. Barneli & Cie SA v Dutch Book Fund SPC, Ltd.*, 95 AD3d 736 [1st Dept 2012]). The characteristics analyzed by plaintiff's consultant were the subject of written warranties that were not demonstrably known by plaintiff to be false when made (*see DDJ Mgt., LLC v Rhone Group, L.L.C.*, 15 NY3d 147, 154 [2010]). Under the circumstances, there is a question of fact as to whether plaintiff reasonably relied on defendants' representations. It was not required, as a matter of law, to

audit or sample the underlying loan files (*cf. Guar. Mtge. Indem. Co. v Countrywide Fin. Corp.*, 660 F Supp 2d 1163, 1189-1190 [CD Cal 2009]).

The motion court correctly determined that plaintiff lacked standing to sue for breach of the Master Mortgage Loan Purchasing and Servicing Agreement ("Sale Agreement"), as to which it was neither a party nor an express third party beneficiary. Although the Assignment, Assumption and Recognition Agreement ("AAR"), of which plaintiff was an express third party beneficiary, incorporated the warranties and representations of the Sale Agreement, this does not give plaintiff the right to enforce the Sale Agreement, which was executed before plaintiff's involvement in the transaction and makes no reference to the AAR (*see Applehead Pictures LLC v Perelman*, 80 AD3d 181, 189 [1st Dept 2010]). The motion court properly dismissed the cause of action against M&T Bank for breach of the AAR based on the unambiguous limitation of remedies provision in § 8(b) of the agreement, which provides that the cure and repurchase remedy for breach must be obtained from Goldman. Plaintiff's reliance on *Rubinstein v Rubinstein* (23 NY2d 293, 297-298 [1968]), holding that a liquidated damages provision does not bar specific performance, is misplaced in light of the specific sole remedy

language of the AAR (*see L.K Sta. Group, LLC v Quantek Media, LLC*, 62 AD3d 487, 492-493 [1st Dept 2009]).

The breach of contract causes of action against Goldman were properly upheld. Notice of breach was sufficiently alleged. The indemnification claim, which seeks indemnity against liability and not only loss, is not premature (*see Maryland Cas. Co. v Straubinger*, 19 AD2d 26, 28-29 [4th Dept 1963]; *Blair v County of Albany, New York*, 127 AD2d 950, 951 [3rd Dept 1987]).

Plaintiff's accounting claim against Goldman was properly dismissed for lack of a predicate fiduciary relationship (*see Bradkin v Leverton*, 26 NY2d 192, 198 fn. 4 [1970]; *Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 434-435 [1st Dept 2010]).

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: MAY 7, 2013

CLERK

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

9813 In re Christine Rubino, Index 107292/11
Petitioner-Respondent,

-against-

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

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Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for appellants.

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered February 2, 2012, which granted the petition to set aside respondents' determination to terminate petitioner's employment with respondent Department of Education upon findings of misconduct to the extent of remanding the matter for the imposition of a lesser penalty, and denied respondents' cross motion to dismiss the petition, unanimously affirmed, without costs.

The record shows that petitioner teacher posted comments on a social media website alluding to a tragedy involving an unknown student at a different school. Although the comments were clearly inappropriate, it is apparent that petitioner's purpose was to vent her frustration only to her online friends after a

difficult day with her own students. None of her students or their parents were part of her network of friends and, thus, the comments were not published to them, nor to the public at large, and petitioner deleted the comments three days later. Despite petitioner's initial denials when confronted about the incident several months later, she admitted to making the comments at the disciplinary hearing, acknowledged that they were inappropriate and offensive, and repeatedly expressed remorse. Although the Hearing Officer found that petitioner engaged in a plan with her friend to mislead investigators right after the allegations surfaced, the court reasonably concluded that petitioner's actions were taken out of fear of losing her livelihood, rather than as part of a premeditated plan.

Under the circumstances, which includes the lack of a prior disciplinary history during petitioner's 15-year career, and her expression that she would never do something like this again, Supreme Court properly found the penalty of termination to be shocking to one's sense of fairness (*see e.g. Stoyer-Rivera v New York City Bd./Dept of Educ.*, 101 AD3d 584 [1st Dept 2012]; *Matter*

of Riley v City of New York, 84 AD3d 442 [1st Dept 2011]; *City School Dist. of the City of N.Y. v McGraham*, 75 AD3d 445 [1st Dept 2010], *affd* 17 NY3d 917 [2011]).

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

ENTERED: MAY 7, 2013

CLERK

Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9855 In re Karina L., and Others,

Children Under the Age
of Eighteen Years, etc.,

Israel R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (Fernando H. Silva, J.), entered on or about April 3, 2012, to the extent it brings up for review an order, same court and Justice, entered on or about March 2, 2012, which, following a hearing, found that respondent abused one of the subject children and derivatively neglected the others, unanimously affirmed, without costs, and the appeal therefrom otherwise dismissed, without costs, as abandoned.

A preponderance of the evidence supports the court's finding that respondent had sexual contact with one of the children (*see*

Family Court Act § 1046[b][i]). Two social workers testified that respondent admitted that he touched the child's breast and kissed her on the lips. The court properly found that the witnesses' out-of-court statements were corroborated by the social worker's notes and the records of the hospital containing the same allegations, and that the testimony of each witness corroborated the testimony of the others (*see Matter of Nicole V.*, 71 NY2d 112, 118 [1987]). That the purpose of respondent's conduct was sexual gratification was properly inferred from the conduct itself (*see Matter of Kwame H.*, 258 AD2d 424 [1st Dept 1999]).

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

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9984 The People of the State of New York, Ind. 453/94
Respondent,

-against-

Raul Castillo,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Anthony Lekas of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Burton G. Hecht, J.), rendered May 5, 1995, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 1⅓ to 4 years, unanimously affirmed.

The court properly declined to adjudicate defendant a youthful offender. At the time of defendant's guilty plea, the court promised YO treatment and probation on the conditions that defendant return for sentencing and avoid any further difficulties with the law. However, defendant absconded, and the court sentenced him in his absence. The sentence was executed in 2009 after defendant was brought back to court.

Defendant now asserts that in explaining the terms of the

plea, the court stated, or ambiguously suggested, that failing to appear, unlike a new conflict with the law, would only result in forfeiture of probation but not forfeiture of YO treatment. At the in absentia sentencing, defense counsel requested YO treatment. However, he merely asserted, without explanation, that he "believe[d]" YO treatment "is possibly guaranteed." This was insufficient to alert the court to the specific legal claim defendant raises on appeal (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), and we decline to review this claim in the interest of justice. As an alternative holding, we find that the court's explanation of the plea conditions was objectively clear (*see People v Cataldo*, 39 NY2d 578, 580 [1976]) regarding the consequences of absconding, and that defendant's interpretation makes little or no sense.

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

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9985 Terry Grimes, Index 305114/08
Plaintiff-Appellant,

-against-

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

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Meagher & Meagher, P.C., White Plains (Christopher B. Meagher of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about April 6, 2012, which, upon renewal, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was searched after two women in the backseat of a livery cab told a police officer who had responded to a radio transmission reporting a road rage incident involving a gun that plaintiff had pulled a gun and threatened the cab driver. Plaintiff was arrested after the officer recovered a gun and ammunition, and criminal charges were brought against him. After the charges were dropped, plaintiff brought this action, alleging false arrest, false imprisonment, malicious prosecution and violation of his civil rights pursuant to 42 USC § 1983.

The false arrest, false imprisonment, and malicious prosecution claims were correctly dismissed because the statements of the two women, who were "upset" and "scared," provided the officer with probable cause to arrest (*see Hernandez v City of New York*, 100 AD3d 433 [1st Dept 2012]; *Marrero v City of New York*, 33 AD3d 556 [1st Dept 2006]). There is nothing in the record that suggests that the officer should have questioned the complainants' credibility (*see Medina v City of New York*, 102 AD3d 101, 104 [1st Dept 2012]; *People v Nichols*, 156 AD2d 129, 130 [1st Dept 1989], *lv denied* 76 NY2d 740 [1990]; *and see People v Colon*, 95 AD3d 420 [1st Dept 2012], *lv denied* 19 NY3d 1025 [2012]). Nor does plaintiff's denial of their allegations raise a triable issue of fact either as to probable cause or whether the allegations were made at all (*see Medina*, 102 AD3d at 105).

The 42 USC § 1983 claim was correctly dismissed, because plaintiff failed to allege that his injury resulted from the officer's execution of official custom or policy (*see Monell v*

Department of Social Servs. of the City of New York, 436 US 658 [1978]).

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

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

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9986 In re Gavin Martin W.,

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

Gary W.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

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Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Susan Knipps, J.), entered on or about March 16, 2012, which, to the extent appealed from as limited by the briefs, determined that respondent father's consent was not required for the subject child's adoption, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that the father did not meet the parental responsibility criteria set

forth in Domestic Relations Law § 111(1)(d) (*see Matter of Lambrid Shepherd C. [Jeffrey S.]*, 73 AD3d 496, 496 [1st Dept 2010]).

The Family Court's determination that the child's best interests would be served by freeing him for adoption is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that the father is currently incarcerated and will not be eligible for parole until 2015. Further, the child's foster parents wish to adopt him and have provided a loving and stable home since he was placed in their care in September 2009 (*see Matter of Shatavia Jeffeysha J. [Jeffrey J.]*, 100 AD3d 501, 501-502 [1st Dept 2012]). A suspended judgment is not warranted, because the father has not adequately planned for the child's future. Moreover, the persons proposed by the father as alternative

resources are virtual strangers to the child and have not shown that they are ready, willing and able to provide the child with a stable and loving home (*see Matter of Jenee Chantel R.*, 295 AD2d 291, 291-292 [1st Dept 2002]).

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

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9987 Elie International, Inc., Index 650811/11
Plaintiff-Appellant,

-against-

Macy's West Inc., et al.,
Defendants-Respondents.

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Wimpfheimer & Wimpfheimer, New York (Michael C. Wimpfheimer of counsel), for appellant.

Gilbride, Tusa, Last & Spellane LLC, New York (Bennett H. Last of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered May 18, 2012, which granted defendants' motion to dismiss the amended verified complaint asserting causes of action for breach of contract and account stated as time-barred, unanimously affirmed, with costs.

Plaintiff seeks to recover amounts allegedly due pursuant to a consignment agreement. However, plaintiff's May 18, 2011 customer statement indicates that the balance which it claims is due from defendant relates to three payments allegedly not made for goods sold prior to February 15, 2003. In contract actions, a claim generally accrues at the time of the breach (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]), and the statute of limitations is triggered when the plaintiff

had the right to demand payment (*see Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770-771 [2012]). Thus, the breach of contract claim brought in 2011 is barred by the six-year statute of limitations CPLR 213(2). The contract provision that makes receipt of an invoice a condition for requiring payment from the vendor, does not affect the accrual date of the breach of contract claim. While plaintiff argues that the amount sued for "did not become apparent until April 2008," this argument is immaterial, since the existence of a cause of action for breach of contract does not depend upon a party's knowledge that it has suffered an injury (*see Varga v Credit-Suisse*, 5 AD2d 289, 292 [1st Dept 1958], *affd* 5 NY2d 865 [1958]; *see also Westminster Props. v Kass*, 163 Misc 2d 773, 775 [App Term, 1st Dept 1995]).

The statute of limitations for a cause of action for an account stated is also six years (*see* CPLR 213 [2]; *Erdheim v Gelfman*, 303 AD2d 714 [2d Dept 2003], *lv denied* 100 NY2d 514 [2003]), and it accrues on the date of the last transaction in the account (*see* 75 NY Jur 2d, Limitations and Laches § 90; *Joseph Gaier, P.C. v Iveli*, 287 AD2d 375 [1st Dept 2001]). Plaintiff admitted that the items in the May 18, 2011 customer statement were not invoiced and payment demanded until July 2010.

Since the date of the last transaction in the account is February 15, 2003, the statute of limitations on the account stated claim ran no later than February 15, 2009.

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

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9988-
9989 Index 113585/08

Amy Chin,
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

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Law Offices of Stewart Lee Karlin, P.C., New York (Stewart L. Karlin of counsel), for appellant.

Kelly D. MacNeal, New York (Jeffrey Niederhoffer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Louis B. York, J.), entered August 16, 2011, dismissing the complaints in this consolidated action, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 12, 2011, which granted defendant's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, an accountant, born in China, alleges that defendant discriminated against her on the basis of race, national origin and ethnicity when it repeatedly bypassed her for promotions. However, the record belies her contention that no persons of Chinese descent were promoted within defendant's

Finance Department between 2002 and 2004, and plaintiff admits that numerous Chinese employees were promoted after 2006. Moreover, defendant produced evidence that it had legitimate, nondiscriminatory reasons for not promoting plaintiff to the positions of which she claims to have been wrongly deprived after August 2003, and plaintiff failed to raise an issue of fact whether defendant's reasons were merely a pretext for discrimination (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629-630 [1997]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35-36 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]).

Plaintiff also alleges that defendant retaliated against her for complaining that she had been discriminated against (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). She asserts that at times during a period spanning at least six years, she was variously yelled at, subjected to the occasional offensive remark, required to perform what she regarded as undesirable clerical tasks, and denied family and medical leave, and was overworked and subjected to excessive scrutiny. However, none of this alleged conduct on defendant's part either constituted an adverse employment action, under the New York State Human Rights Law (*see* Executive Law § 296[7]; *Silvis v City*

of New York, 95 AD3d 665, 665 [1st Dept 2012], *lv denied* __ NY3d __, 2013 NY Slip Op 67964 [2013]), or disadvantaged plaintiff, under the New York City Human Rights Law (*see* Administrative Code of City of NY 8-107[7]; *Fletcher*, 99 AD3d at 51-52). Plaintiff also asserts that defendant retaliated against her by transferring her from its headquarters in downtown Manhattan to a field office in Harlem. However, she failed to raise an issue of fact whether the legitimate, nondiscriminatory reasons proffered therefor by defendant were merely a pretext for discrimination.

As to plaintiff's hostile work environment claim, the alleged conduct and remarks plaintiff point to were not "sufficiently severe or pervasive to alter the conditions of [her] employment" under the New York State Human Rights Law (*see Forrest*, 3 NY3d at 310-311, quoting *Harris v Forklift Sys., Inc.*, 510 US 17, 21 [1993]; *Ferrer v New York State Div. of Human Rights*, 82 AD3d 431 [1st Dept 2011]). Nor has the plaintiff demonstrated that she has been treated less well than other employees because of her protected status; or that discrimination was one of the motivating factors for the defendant's conduct (*Williams v. New York City Housing Authority, 61 A.D.3d 62, 75-*

76, 79-80 [*1st Dep't*], *lv denied, 13 N.Y.3d 702* [*2009*]).

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

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

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9990 Franklin Oleh, Sr., etc., et al., Index 350130/09
Plaintiffs-Respondents,

-against-

Anlovi Corporation, et al.,
Defendants-Appellants.

_____

Rappaport, Hertz, Cherson & Rosenthal, P.C., Forest Hills (Milan Dey-Chao and Jeffrey M. Steinitz of counsel), for appellants.

Elliot H. Fuld, Bronx, for respondents.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about June 1, 2011, which, to the extent appealed from, granted plaintiffs' cross motion to amend the complaint to add as a defendant the Estate of Anthony Viaer as sole shareholder of Anlovi Corporation, unanimously affirmed, without costs.

Plaintiff Franklin Oleh, Sr.'s two infant sons allegedly sustained personal injuries as a result of a dangerous condition in the apartment where they lived, in a building then owned by defendant Anlovi Corporation. In 2009, plaintiffs commenced this action against Anlovi, and obtained a default judgment against it. After this action was commenced, Anlovi's sole shareholder, Anthony Viaer, authorized the sale of the building, which was

Anlovi's only asset. Viaer died shortly thereafter, and it is undisputed that Viaer's estate now controls proceeds of that sale. Subsequently, Anlovi's insurer disclaimed coverage on the ground that Anlovi failed to provide timely notice of plaintiffs' claim.

Supreme Court providently exercised its discretion in granting plaintiffs' cross motion to add the estate as a defendant, since the proposed amendment is not palpably improper or clearly lacking merit (CPLR 3025[b]). The estate is a necessary party to this action because it controls the proceeds of the sale. Further, if the estate is not a party, plaintiffs cannot be accorded "complete relief" (CPLR 1001[a]), because the sale of Anlovi's assets has rendered it insolvent (*see Ed Moore Adv. Agency v Shapiro*, 124 AD2d 696, 696-697 [2d Dept 1986]). The estate's rights to Anlovi's assets may also "be inequitably affected by" plaintiffs' default judgment against Anlovi (*Genger v Genger*, 87 AD3d 871, 874 [1st Dept 2011]; *see Swezey v Merrill*

Lynch, Pierce, Fenner & Smith, Inc., 87 AD3d 119, 128-130 [1st Dept 2011], *affd* 19 NY3d 543 [2012]).

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

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

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9991-
9992 Miller & Wrubel, P.C., Index 107655/09
Plaintiff-Respondent,

-against-

Todtman, Nachamie, Spizz & Johns, P.C.,
Defendant-Appellant.

_____

Nachamie Spizz Cohen & Serchuk, P.C., New York (Alex Spizz of counsel), for appellant.

La Reddola, Lester & Associates, LLP, Garden City (Steven M. Lester of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered May 8, 2012, awarding plaintiff law firm damages, and bringing up for review an order, same court and Justice, entered May 3, 2012, which, after a nonjury trial, found, inter alia, that plaintiff was entitled to payment of its accrued malpractice defense fees as a third-party beneficiary to the insurance agreement between defendant law firm and its malpractice insurance carrier, unanimously reversed, on the law, without costs, the judgment vacated, and the complaint dismissed. The Clerk is directed to enter judgment accordingly. Appeal from above order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff lacked standing to bring the instant action as it

was an incidental beneficiary to its client's malpractice insurance policy with a nonparty insurer (*see generally State of Cal. Pub. Employees' Retirement Sys. v Sherman & Sterling*, 95 NY2d 427 [2000]; *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38 [1985]). There was no language in the subject insurance policy that identified plaintiff as an intended third-party beneficiary of such policy, or that indicated that plaintiff would be the lone third party that would have an interest in the retention amount sought to be paid under the insurance agreement (*see Artwear, Inc. v Hughes*, 202 AD2d 76, 81-82 [1st Dept 1994]).

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

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9993 In re Ciro Dellaporte, Index 111622/11
Petitioner-Appellant,

-against-

New York City Department of Buildings, et al.,
Respondents-Respondents.

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The Rosenthal Law Firm, P.C., New York (Douglas Rosenthal of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 26, 2012, denying the petition to annul a determination of respondent, dated June 13, 2011, which denied petitioner's application to renew his stationary engineer license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, the petition granted, and the matter remanded to respondent for further proceedings consistent herewith.

The determination to deny petitioner's renewal application for a stationary engineer license lacked a rational basis. Respondent arbitrarily concluded that petitioner's federal conviction for theft of funds bore a direct relationship to the duties and responsibilities attendant to a stationary engineer,

the license for which he sought renewal after having his license renewed 15 consecutive times (*see* Correction Law § 750[3]; § 752[2]). Petitioner committed the "kickback" scheme underlying his prior conviction by utilizing the administrative powers in his former position, which granted him control over hiring, payroll, and selection of vendors. Such actions bear no direct relationship to the equipment maintenance duties and responsibilities inherent in the stationary engineer license, and thus do not satisfy the first exception to the general prohibition of discrimination against persons previously convicted of criminal offenses (*see* Correction Law § 752[1]).

The record further shows that respondent failed to afford petitioner the mandatory presumption of rehabilitation attendant to his certificate of relief from disabilities (*see* Correction Law § 753[2]), and appeared to have disregarded the additional evidence of rehabilitation submitted by petitioner. Respondent declared that petitioner's evidence of rehabilitation was insufficient, in clear contravention of the statutory presumption, but did not raise any independent evidence in rebuttal, which, under the circumstances, demonstrates that its determination was arbitrary and capricious (*see Matter of Bonacorsa v Van Lindt*, 71 NY2d 605, 612, 614 [1988]).

We further find that respondent could not have rationally found petitioner to pose an unreasonable risk to public safety or welfare so as to satisfy the second exception to the general prohibition (*see* Correction Law § 752[2]). Petitioner disclosed his 2006 conviction, based on acts occurring in 2005 and earlier, on his license renewal applications from 2007 through 2010, all of which were granted. It is also undisputed that he performed without incident at several jobs during this period, and each of his renewal applications included letters from his employers verifying his character and fitness for the jobs, and documentation from the City's Department of Citywide Administrative Services noting the conviction, indicating that he was qualified for the license. In contrast, respondent offered only "speculative inferences unsupported by the record" to raise an issue concerning any potential risk to the public (*Matter of Marra v White Plains*, 96 AD2d 17, 25 [2d Dept 1983] [internal quotation marks omitted]).

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

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9994-
9994A The People of the State of New York,
Respondent,

-against-

Bruce Ascher,
Defendant-Appellant.

Ind. 6287/09

Joelson & Rochkind, New York (Kenneth Joelson of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered February 18, 2011, convicting defendant, upon his plea of guilty, of possessing a sexual performance by a child, and sentencing him to 10 years' probation, unanimously affirmed. Order, same court and Justice, entered on February 18, 2011, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously reversed, as a matter of discretion in the interest of justice, without costs, and the matter remanded for a de novo risk level determination.

Defendant's level two adjudication turns on an assessment of points under risk factor seven for a "stranger" relationship to

the child pornography victims. After defendant's adjudication, the Board of Examiners of Sex Offenders issued a June 1, 2012 position statement relating to child pornography offenders (*see People v Marrero*, 37 Misc 3d 429 [Sup Ct, NY County 2012]). As indicated by the position statement, scoring every child pornography case for a stranger relationship produces an anomalous result because the majority of offenders convicted of child pornography offenses will be scored the same even though there are vast differences among these types of offenders. The document states that it was intended to address the concerns expressed by the Court of Appeals in *People v Johnson* (11 NY3d 416, 420-421 [2008]) and to provide more a accurate determination of an offender's risk of recidivism and threat to public safety. In pertinent part, the statement sets forth a list of factors to be considered in child pornography cases in departing from the presumptive point score for a stranger relationship.

We conclude that it would be appropriate for defendant's risk level to be reevaluated in the light of this position statement. Since there is to be a new hearing and determination, we find it unnecessary to decide the procedural issues raised by defendant concerning his adjudication.

There is no basis for reversal of the judgment of conviction. Defendant's challenges to the indictment and grand jury proceedings, none of which fall within the limited exception to forfeiture contained in *People v Plunkett* (19 NY3d 400, 405-407), are forfeited by his guilty plea (*see People v Hansen*, 95 NY2d 227, 230 [2000]), and are in any event unavailing.

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

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9996 In re Henry Santana, Index 402539/11
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Henry Santana, petitioner pro se.

Kelly D. MacNeal, New York (Byron S. Menegakis of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority, dated August 3, 2011, which terminated petitioner's tenancy on the grounds of nondesirability and breach of respondent's rules and regulations, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Cynthia S. Kern, J.], entered January 12, 2012), dismissed, without costs.

Respondent's determination is supported by substantial evidence, including that petitioner's female companion, on two occasions, sold heroin to a confidential police informant from petitioner's apartment. Upon execution of a search warrant, police recovered 52 glassine envelopes of heroin, quantities of

another controlled substance, and a large amount of cash from petitioner's bedroom (*see Matter of Zimmerman v New York City Hous. Auth.*, 84 AD3d 526 [1st Dept 2011]). The finding that the woman was an unauthorized occupant of the apartment is also supported by substantial evidence, including mail addressed to her there. The Hearing Officer's decision not to credit petitioner's testimony that she did not live there and that he was unaware of her illegal activity, is entitled to deference (*see Matter of Berenhaus v Ward,* 70 NY2d 436, 443-444 [1987]).

Under the circumstances presented, the penalty of termination does not shock our sense of fairness (*see e.g. Matter of Smith v New York City Hous. Auth.*, 40 AD3d 235 [1st Dept 2007], *lv denied* 9 NY3d 816 [2007]; *Matter of Satterwhite v Hernandez*, 16 AD3d 131 [1st Dept 2005]).

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

ENTERED: MAY 7, 2013

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Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9998 Athena Resources Limited, et al., Index 650442/10
Plaintiffs-Appellants,

-against-

Geraldine Wu,
Defendant-Respondent.

_____

Garvey Schubert Barer, New York (Andrew J. Goodman of counsel), for appellants.

Sloman Blum Heymann LLP, New York (Andrew W. Heymann of counsel), and Holland & Knight LLP, New York (Faith L. Carter of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 10, 2012, which granted defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, with costs.

The court properly rejected enforcement of the Hong Kong judgment, as the record is devoid of any evidence that defendant here, who was not a party to the Hong Kong action, was ever properly served, or even notified of that action (*see Sung Hwan Co., Ltd. v Rite Aid Corp.*, 46 AD3d 288 [1st Dept 2007]; *see also CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 93-95 [1st Dept 2002]).

Plaintiffs' fraudulent conveyance and conversion claims,

both of which rely upon the foreign default judgment, also fail and, in any event, are barred by their applicable statutes of limitations (*see Miller v Polow*, 14 AD3d 368 [1st Dept 2005]; *see also Komolov v Segal*, 96 AD3d 513, 513-514 [1st Dept 2012]).

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

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ENTERED: MAY 7, 2013

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Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

10002 O. Aldon James, Jr., etc., Index 150450/11
Plaintiff-Respondent,

-against-

Dianne Bernhard, et al.,
Defendants-Appellants.

Sercarz & Riopelle, LLP, New York (Roland G. Riopelle of counsel), for appellants.

Foley & Lardner LLP, New York (Barry G. Felder of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 16, 2013, which denied defendants' motion pursuant to CPLR 1021 to remove plaintiff in this derivative action and substitute the special litigation committee of the board of governors of the National Arts Club ("Club") as plaintiff, unanimously reversed, on the law, with costs, and the motion granted.

Defendants have established a "persuasive case" that "the proper protection of the corporation's interest or the proper conduct of the litigation would be better served by the elimination or a change in the identity" of the plaintiff (*Tenney v Rosenthal*, 6 NY2d 204, 209-210 [1959]), due to a conflict of interest. Plaintiff was expelled from the Club on whose behalf

he is suing and the entire complaint in this derivative action alleges waste of corporate assets and breach of fiduciary duties by defendants, current and former directors of the Club, based entirely on their decision to investigate and expel him. We note that, although a complaint filed against plaintiff by the Attorney General alleging waste and misuse of corporate assets is not proof of any misconduct, it reinforces the existence of a conflict.

Furthermore, plaintiff filed this derivative suit in October 2011, two months after the Club filed a Statement of Charges against him and shortly before internal disciplinary proceedings were scheduled to continue, suggesting that he was motivated not by the Club's interests but by a desire to gain leverage to force the Club to reinstate his membership and end the litigation *(see Gilbert v Kalikow*, 272 Ad2d 63 [1st Dept 2000], *lv denied* 95 NY2d 761 [2000]).

As defendants propose to substitute plaintiff with a special litigation committee comprised of newly elected directors who are

not named in the derivative suit and were not involved in the underlying investigation of plaintiff, they have established that substitution is warranted at this stage and is not premature (*see Tenney v Rosenthal*, 6 NY2d at 209-210).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

10003 The People of the State of New York, Ind. 523/11
Respondent,

-against-

Darren Edwards,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Abraham Clott, J.), rendered on or about March 9, 2011, unanimously affirmed.

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

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

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 7, 2013

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

10004N Dalma Gonzalez, Index 103910/11
Plaintiff-Respondent,

-against-

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

Racson Group Inc.,
Defendant-Appellant,

_____

Law Offices of Todd M. McCauley, LLC, New York (David F. Tavella of counsel), for appellant.

Law Offices of Alan M. Greenberg, P.C., New York (Robert J. Menna of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 17, 2012, which denied defendant Racson Group Inc.'s motion to vacate the default judgment entered against it, unanimously affirmed, without costs.

The court properly determined that defendant failed to demonstrate that its default should be vacated under either CPLR 317 or 5015(a)(1). The record indicates that an affidavit of a process server stated that defendant was served through the Secretary of State. Under CPLR 317, defendant was required to demonstrate, inter alia, that it did not receive notice of the summons in time to defend, and that it had a meritorious defense

(*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). However, defendant provided only a conclusory affidavit denying receipt of the pleadings, without further explanation, which was insufficient to rebut the presumption of service created by the process server's affidavit *(see Grinshpun v Borokhovich*, 100 AD3d 551 [1st Dept 2012]).

Defendant also failed to satisfy the requirements of CPLR 5015(a)(1) by failing to provide a reasonable excuse for its default (*see Rugieri v Bannister*, 7 NY3d 742, 744 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: MAY 7, 2013

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