SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 24, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Saxe, Richter, JJ.

8925 Manuel Angeles, Index 100091/09
Plaintiff-Respondent,

-against-

Jeffrey A. Aronsky,
Defendant-Appellant.

_____

Mauro Lilling Naparty LLP, Woodbury (Matthew W. Naparty of counsel), for appellant.

Sullivan, Papain, Block, McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 3, 2012, which denied defendant's motion for summary judgment dismissing the complaint alleging legal malpractice and breach of contract, unanimously modified, on the law, to grant the motion as to the cause of action for breach of contract, and otherwise affirmed, without costs.

Plaintiff Manuel Angeles commenced this legal malpractice and breach of contract action against defendant Jeffrey A. Aronsky alleging that defendant negligently represented plaintiff

in his underlying premises liability action arising from an attack on plaintiff in the lobby of an apartment building. Plaintiff also asserts that defendant breached the retainer agreement.

On December 7, 2007, at approximately 3:15 p.m., plaintiff entered the front entrance of the apartment building where he lived and, immediately upon reaching the lobby, was hit in the jaw. Although there were no witnesses to the actual attack, a neighbor who was standing outside the building around the time of the incident, saw three men run out the front entrance. Two of the men were holding baseball bats. The neighbor, who had lived in the building for about five years, did not recognize any of the men. Plaintiff also did not recognize the men, whom he observed briefly before he lost consciousness following the assault.

On the day of the incident, plaintiff admits that the door locked behind him when he left the building around 2:55 p.m. and that he had to unlock it with his key when he returned a short time later. On the side of the building there is a door to the laundry room, which is located in the basement. This door remains unlocked between 9:00 a.m. and 6:00 p.m. From the laundry room, a person can access the lobby without a key by

using the elevator.

Shortly after the attack, plaintiff retained defendant to represent him in a potential personal injury case. According to defendant, an investigator from his office initially interviewed plaintiff at the hospital. Defendant asserts that he later spoke with plaintiff over the phone to review the information plaintiff had given the investigator. Plaintiff told defendant that the front door was locking properly on the day he received his injuries and mentioned no other entrances. Defendant accepted plaintiff's statements concerning the security of the building, and did not send an investigator to inspect the premises or visit the premises himself. Also, he did not interview the superintendent.

Although a settlement agreement was reached with the owner of the building prior to the commencement of any personal injury action, plaintiff commenced a legal malpractice action against defendant, alleging, inter alia, that he negligently investigated plaintiff's premises liability claim. Defendant moved for summary judgment dismissing plaintiff's complaint and the motion court denied the motion.

For a claim for legal malpractice to be successful, "a plaintiff must establish both that the defendant attorney failed

to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence" (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007] [internal citation omitted]). A client is not barred from a legal malpractice action where there is a signed "settlement of the underlying action, if it is alleged that the settlement of the action was effectively compelled by the mistakes of counsel" (*Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435 [1st Dept 2011] [internal quotation marks omitted], quoting *Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]).

Plaintiff, a waiter with a sixth grade education, retained defendant to represent him in a premises liability claim, relying on defendant's expertise as a personal injury attorney to evaluate his claim and provide advice on the case. Plaintiff asserts that defendant only contacted him once after being retained, and only to ask him to go into defendant's office to sign paperwork for the case. Plaintiff, an unsophisticated client with no legal experience, states that defendant did not explain to him the strengths and weaknesses of his claim and did

not do a proper investigation. Defendant does not dispute that he never went to the building or spoke to the superintendent, but argues that he fulfilled his obligation by conveying the settlement offer to plaintiff.

In this specific case, given plaintiff's lack of sophistication and his limited education, defendant's statement that he never conducted any investigation, except for speaking to plaintiff for a very limited time, raises a question of fact as to whether defendant adequately informed himself about the facts of the case before he conveyed the settlement offer. Furthermore, defendant says he told plaintiff, when he conveyed the settlement offer, that it was a "difficult liability case." It is difficult to understand, on the record before us, how he made that assessment without going to the building, or speaking to the superintendent. Because the evidence on a defendant's summary judgment motion must be viewed in the light most favorable to plaintiff (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]), we find there are questions of fact as to whether the attorney failed to exercise the ordinary reasonable skill appropriate under the circumstances.

The motion court properly found that plaintiff raised a question of fact as to whether the underlying action would have

succeeded. To prevail on a premises liability claim, a plaintiff does not have "to exclude every other possible" explanation as to how the assailants entered the building, but only present "evidence [that] renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance" (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550-551 [1998]). In *Bello v Campus Realty, LLC* (99 AD3d 638, 639 [1st Dept 2012]), this Court found an issue of fact as to how the assailants entered the building where the plaintiff did not recognize her attackers as fellow tenants and the men were dressed as police officers. Similarly, in *Chunn v New York City Hous. Auth.* (83 AD3d 416, 417 [1st Dept 2011]), a factual issue was presented as to whether it was more likely than not that plaintiff's assailants were intruders where the men made no attempt to conceal their faces.

Here, plaintiff did not recognize his assailants. Further, a neighbor who had lived in the building for several years, saw three men she did not recognize running out of the building holding bats around the time of the attack.[1] The men made no

[1] The neighbor conveyed the information to plaintiff's girlfriend, but the girlfriend did not disclose it to defendant before the case was settled.

attempt to hide their faces during or after the attack. Thus, the record contains sufficient facts to support a reasonable conclusion that plaintiff was assaulted by intruders (*see Bello*, 99 AD3d at 639; *Chunn*, 83 AD3d at 417).

The breach of contract claim should have been dismissed as duplicative of the legal malpractice claim (*see Lusk v Weinstein*, 85 AD3d 445, 445-446 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]).

The Decision and Order of this Court entered herein on April 11, 2013 is hereby recalled and vacated (*see* M-2673 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 24, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, Feinman, JJ.

9649 Mark Lyman, Index 105517/09
Plaintiff-Respondent-
Appellant,

David Landfear,
Plaintiff,

-against-

Fr. Frank Genevive, et al.,
Defendants,

Superior Robert Campagna, et al.,
Defendants-Appellants-
Respondents.

_____

Appeals having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Richard F. Braun, J.), entered on or about December 20, 2011,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated August 29, 2013,

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

ENTERED: SEPTEMBER 24, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10219-
10219A

Julie Conason, et al.,
Plaintiffs-Respondents,

Index 106560/11

-against-

Megan Holding, LLC, et al.,
Defendants-Appellants.

_____

Loanzon Sheikh LLC, New York (Misha M. Wright of counsel), for appellants.

Fishman & Mallon, LLP, New York (James B. Fishman and Susan K. Crumiller of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Joan M. Kenney, J.), entered October 16, 2012 and October 17, 2012, which, inter alia, granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Julie Conason signed a rent-stabilized lease commencing in November 2003 for apartment 3 in defendant landlord Megan Holding's building at a monthly rent of $1,800, and signed renewal leases in 2005 and 2007 at rents of $1,899 and $1,955.97, respectively. Although the lease was for a rent-stabilized apartment, there was no rent-stabilized rider attached to it.

In December 2003, after plaintiffs had commenced occupancy, Megan registered the apartment with the New York State Division of Housing and Community Renewal (DHCR). The registration showed that the monthly rent for the previous tenant, Oki Suzuki, was $1,000 per month, and the monthly rent paid by the tenant preceding Suzuki was $475.24. In 2009, Megan brought a nonpayment summary proceeding against plaintiffs in Civil Court. Plaintiffs' answer alleged harassment, breach of the warranty of habitability, and rent overcharges, and sought attorneys' fees pursuant to Real Property Law § 234.

After trial,[1] the court found that Megan had fraudulently listed Suzuki, a nonexistent tenant, as the prior occupant, and claimed nonexistent improvements to the apartment to inflate the rent. The court also found that the base rent for the rent overcharge claim was affected by the fraud. However, the court dismissed the rent overcharge claim without prejudice because plaintiffs had not proved the amount of the legal regulated rent; they failed to submit evidence of the rent for any other

[1]Completion of the trial was delayed by the withdrawal of Megan's counsel and Megan's failure to retain new counsel during a seven week adjournment for that purpose. Although Megan's principal, defendant Ku, testified as the tenants' witness, Megan rested without presenting any evidence on its own behalf; new counsel submitted a post-trial memorandum on its behalf.

apartment in the building on the base date. The court awarded plaintiffs judgment for an abatement on their breach of the warranty of habitability claim, and, after a further hearing, attorneys' fees by separate judgment.

In June 2011, plaintiffs commenced this action against Megan and its principal, Ku, in Supreme Court to recover the rent overcharges, treble damages pursuant to Rent Stabilization Code (RSC) (9 NYCRR) § 2526.1(a)(1), and attorneys' fees pursuant to the lease, Real Property Law § 234, Rent Stabilization Law (RSL) (Administrative Code of City of NY) § 26-516(a)(4), and RSC § 2526.1(d). Plaintiffs alleged that defendants had falsely registered the apartment as occupied by fictitious tenant Suzuki. They further alleged that Ku was liable because he had abused the corporate form by intermingling the assets of his numerous companies, including Megan, with his personal assets. Plaintiffs then moved for summary judgment based on the collateral estoppel effect of the factual finding of Civil Court that defendants had committed fraud. They submitted a copy of the certified DHCR rent roll to show, for overcharge calculations, the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building as the subject apartment, which was $180.92. As to Ku's liability, plaintiffs submitted evidence to

show that Ku used his numerous LLCs interchangeably, listed the subject building as solely owned by him, and did in fact own 99% of it, had sold the building from one of his other LLCs to Megan for nominal consideration, and used the building as collateral for a mortgage loan to both Megan and another LLC.

Defendants cross-moved for summary judgment dismissing the complaint on the ground that the rent overcharge claim accrued from the first overcharge in 2003 and was thus barred by the four-year statute of limitations (CPLR 213-a).

We are not persuaded that plaintiffs' overcharge claim is barred by the four-year statute of limitations. As we noted in *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (68 AD3d 29, 32, *affd* 15 NY3d 358, 366 [2010] [citations ommitted]), "while the applicable four-year statute of limitations reflects a legislative policy to 'alleviate the burden on honest landlords to retain rent records indefinitely,' and thus precludes us from using any rental history prior to the base date, where there is fraud . . . the lease is rendered void[,]" and the legal rent is to be determined by the default formula (*id.* [citation omitted]; see *also Thornton v Baron* (5 NY3d 175, 180-181 [2005]). We went on to note that "[s]anctioning the owner's behavior on a statute of limitations

ground 'can result in a future tenant having to pay more than the legal stabilized rent for a unit, a prospect which militates in favor of voiding agreements such as this in order to prevent abuse and promote enforcement of lawful regulated rents'" (*Matter of Grimm*, 68 AD3d at 32, quoting *Drucker v Mauro*, 30 AD3d 37, 40 [2006], *lv dismissed* 7 NY3d 844 [2006]; *see also Thornton*, 5 NY3d at 181 ["an unscrupulous landlord . . . could register a wholly fictitious, exorbitant rent and, as long as the fraud is not discovered for four years, render that rent unchallengeable"]). We thus hold that the four year statute of limitations is not a bar in a rent overcharge claim where there is significant evidence of fraud on the record (*cf. Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 [2010]).[2]

Supreme Court correctly found that defendants were collaterally estopped from arguing that no fraud existed (*Matter of Abady*, 22 AD3d 71, 83-84 [1st Dept 2005] since "Megan was represented by counsel during most of the trial, was afforded the opportunity to acquire new counsel when its lawyer withdrew for

[2]To the extent that *Direnna v Christensen* (57 AD3d 408 [1st Dept 2008]), decided two years before *Grimm*, is inconsistent with our ruling today we choose not to follow it inasmuch as there was no evidence of fraud on the record in *Direnna*.

ethical reasons, failed to obtain successor counsel, declined to present a defense, submitted a post-trial brief, and failed to appeal the determination." Supreme Court also properly determined the base rent based on the default formula (*see Grimm*, 15 NY3d at 366), and deferred the determination of the amount of the overcharge for a hearing.

The court properly pierced the corporate veil (*James v Loran Realty Corp.*, 20 NY3d 918 [2012]). There is evidence that Ku abandoned the corporate form. For instance, in a loan application Ku claimed 16 LLC properties, including the subject building, as his own property. There is also evidence of the habitual transfer of funds to and from Ku's individual account, which indicates the intermingling of funds. Ku also used personal funds for Megan expenditures and used Megan funds for expenditures by other LLCs. There is also evidence that, through Megan, Ku fraudulently set a rent for plaintiffs' apartment and that plaintiffs were financially injured thereby (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

Supreme Court properly awarded treble damages and attorneys' fees. Defendants failed to prove by a preponderance of the

evidence that the rent overcharge was not willful (*see* 9 NYCRR 2506.1[a][1]). Nor were they able to show that respondents are not entitled to an award of attorneys' fees pursuant to Real Property Law § 234, RSL § 26-516(a)(4) and RSC § 2526.1.

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

ENTERED: SEPTEMBER 24, 2013

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Gische, JJ.

10490 Eugenie Chen, Index 113381/11
Plaintiff-Appellant,

-against-

Tony Yan, etc., et al.,
Defendants-Respondents.

_____

Kenneth R. Fields, New York, for appellant.

Kevin Kerveng Tung, P.C., Flushing (Ruofei Xiang of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 23, 2012, which, to the extent appealed from as limited by the briefs, dismissed the complaint against defendant Yan, denied plaintiff's motion to dismiss defendants' affirmative defenses alleging the statute of frauds and Yan's lack of personal liability, failed to award interest against defendant PA Estate, LLC at the contractual rate of 10% per annum for the period from November 16, 2011 through August 21, 2012, and failed to refer the issue of the amount of plaintiff's collection costs and expenses to the Special Referee, unanimously modified, on the law, to reinstate the claims against Yan, to award plaintiff interest at the rate of 10% per annum through the date of the order (August 21, 2012), and to refer the matter of collection costs to the Special Referee, and otherwise affirmed, without

costs.

Tony Yan, the individual defendant, is the principal of defendant PA Estate LLC (the LLC). On October 18, 2009, Yan affixed his signature to a promissory note in favor of plaintiff Eugenie Chen which stated:

> "For value received, the undersigned hereby jointly and severally promise to pay to the order of the lender Eugenie Chen, the sum of . . . $50,000.00 . . . together with interest thereon at the rate of 10% per annum on the unpaid balance . . . The term of this investment loan is for 12 months. As a result, the undersigned borrower will be required to repay the entire principal. The lender has no obligation to refinance this loan at the end of its term. Provided, 6 months written advance notice given by either party to the other for termination or willing to refinance."

The signature page of the note had two signature lines, each next to the word "Borrower," and one on top of the other. Underneath the top line was typed the words "Tony Yan (Owner)," and Tony Yan's signature appeared above that line. Stamped immediately below the typed words "Tony Yan (Owner)," and covering the area immediately above and below the bottom signature line was a stamp stating: "E/I#20-3529181 PA Estate LLC 264-29 Grand Central PKWY. Little Neck, NY 11362-2526." On the same signature page was a section titled "Guaranty," but the two signature lines over the word "Guarantor" were left blank. A notary's signature and stamp

were affixed at the bottom of the signature page, under the words "For Tony Yan."

On or about July 9, 2010, plaintiff delivered a termination notice to Yan in which she informed him that she did not wish to extend the loan and in which she demanded repayment of the principal amount of the loan together with interest by December 31, 2010. In November 2011 plaintiff commenced this action, in which she asserted that defendants failed to repay the loan and that they were jointly liable to her. Plaintiff further alleged that defendants fraudulently induced her into extending the loan by representing to her that they would pay the balance if she terminated the loan on six months notice. Finally, plaintiff sought an award of her attorneys' fees, pursuant to a provision in the note providing for same in the event of a default.

Defendants filed an answer in which they denied the material allegations in the complaint and asserted 11 affirmative defenses. The first nine defenses were lack of jurisdiction based on improper service of the summons and complaint; failure to state a cause of action; estoppel; waiver; unclean hands; lapse; failure to mitigate damages; statute of frauds; and the parol evidence rule. The tenth defense asserted that Yan merely signed the note in his capacity as the manager of the LLC, and

bore no personal liability to plaintiff. Finally, the eleventh defense alleged that in August 2011 plaintiff agreed to forbear her right to enforce the note in exchange for defendants' promise to repay the principal amount upon the sale of certain real property.

Plaintiff moved to dismiss all of the affirmative defenses. With respect to the tenth defense, which sought to shield Yan from personal liability, she argued that the note was ambiguous because Yan signed in the space designated for the borrower, and because his signature was notarized. She asserted that Yan prepared the note, so any ambiguities are required to be construed against him. She pointed to evidence that Yan acknowledged personal liability, including an email dated December 9, 2010, in which Yan stated that he would begin paying her back when he received income from a food sales job, and further asserted:

> "Please think of the negative way, if you loan to some other guy and he/she is dis-appeared, what would you do? At least, I am still here facing to you and keep telling you my situation, admitting to owe you money and still accepting to pay you back."

Yan submitted an affidavit in opposition to the motion in which he stated that he "signed the promissory note, clearly and unequivocally in [his] capacity as owner of [the LLC]." Yan

attached a copy of the check representing the loaned funds, which shows that it was made payable to "PA Estate LLC/Tony Yan." The memo line of the check states "PA Estate, LLC." Yan further explained that all written correspondence between himself and plaintiff concerning the loan was made through the LLC's email account or under its letterhead. Yan also pointed out that there was no signature in the guaranty section of the note, so he could not be said to have personally guaranteed the LLC's debt to plaintiff.

The court struck the first, second, third, fourth, fifth, sixth, seventh, ninth and eleventh affirmative defenses as to both defendants, based on their failure to address those defenses on the merits. However, the court upheld the eighth defense (statute of frauds) and the tenth defense (asserting that Yan was not personally liable on the note), and sua sponte dismissed the complaint against Yan. The court stated:

> "Tony Yan ... is not personally liable for the repayment of the note (the 10th affirmative defense) as he neither signed a guaranty. Nor would an e-mail 'acknowledging' the debt constitute personal liability in this case where it is clear that the emails were in furtherance of the corporate defendant's business relating to the promissory note. Moreover, the lack of a written guaranty violates the statute of frauds (the 8th affirmative defense)."

The court directed judgment in favor of plaintiff against defendant LLC, in the amount of $50,000 on the note plus $2,500 for late charges, plus $5,416.67 for interest from October 16, 2010 through November 15, 2011 at the contractual rate of 10% annually, and further referred the issue of reasonable attorneys' fees against the LLC to a Special Referee to hear and determine.

A contract is ambiguous if "on its face [it] is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). The determination whether a contract is ambiguous is a question of law for the court (*South Road Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]). If the court deems a contract ambiguous, it may consult extrinsic evidence to resolve the ambiguity (*see Hambrecht & Quist Guar. Fin., LLC v El Coronado Holdings, LLC*, 27 AD3d 204 [1st Dept 2006]). However, where "the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact" (*Amusement Bus. Underwriters v American Intl. Group,* 66 NY2d 878, 880 [1985]).

Upon our review of the promissory note, we agree with the motion court that Yan does not have liability as a personal guarantor of a debt assumed by the LLC, because he did not

execute the guaranty section of the note, as required to satisfy the statute of frauds (*see* General Obligations Law § 5-701[a][2]). However, we cannot determine as a matter of law that Yan did not assume primary liability for the debt, in addition to the LLC. After all, the note expressly creates "joint and several liability" for "the undersigned." If the LLC was the sole obligor, this language would make no sense.

Further, the manner in which the signature page was executed raises questions as to whether Yan was signing in his individual capacity, or as the principal of the LLC. It is possible to conclude that Yan intended to sign strictly on behalf of the entity by placing the word "owner" next to his signature and placing the stamp of the entity directly below his name. However, a reasonable person could alternatively interpret the signature section as containing Yan's signature on one line, and the LLC's stamp on the other, indicating that they each intended to be a "borrower." Making the parties' intentions even murkier is the fact that the notary did not indicate that Yan appeared before him in his capacity as a principal of the LLC. Rather, next to the words "Notarized by:" is the statement "For Tony Yan."

While, as noted above, we are generally authorized to employ extrinsic evidence to resolve contract ambiguities, the evidence in this record does not permit us to rule, as a matter of law, that only the LLC assumed liability on the note. The loan proceeds themselves were paid with a check which names both Yan and the LLC as payees. Further, the various emails exchanged by the parties do not eliminate the possibility that Yan had borrowed the funds in his personal capacity. That Yan corresponded via an email address that included the name of the LLC, or that he used the LLC letterhead, is not dispositive of this issue. Because it is not possible to determine whether Yan intended to be liable under the note, it was error for the court to dismiss the complaint as against him individually. Further, we note that while the parties argue in their briefs whether plaintiff stated a cause of action for fraudulent inducement against Yan, that issue is not before us. The court dismissed the claims against Yan strictly on the basis that he was not a party to the promissory note, and did not discuss the merits of that claim.

Finally, to the extent that the court authorized the entry of judgment against the LLC, it should have awarded plaintiff interest at the rate of 10% per year through the date of its

decision (August 21, 2012) and not through November 15, 2011 (*see Spodek v Park Prop. Dev. Assoc.*, 96 NY2d 577, 581 [2001]). It is uncontested that the underlying loan has not been repaid, and the parties agreed that the loan should bear interest at the rate of 10% per annum on the unpaid balance. Further, pursuant to the terms of the promissory note, the court should have ordered not only that a Special Referee hear and determine plaintiff's application for attorneys' fees against the LLC, but also for costs attendant to plaintiff's collection efforts.

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10552 In re Luis F.,
Petitioner-Appellant,

-against-

Dayhana D.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Carol Kahn, New York, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Susan M. Cordaro of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about August 9, 2012, which, after a hearing, among other things, denied the father's petition for unsupervised visitation with his child, unanimously modified, on the law and the facts, to strike that portion of the order which, in effect, prohibits petitioner from seeking modification of the order until the end of 2013, and otherwise affirmed, without costs.

There is a sound and substantial evidentiary basis for the Family Court's determination that it is not in the subject child's best interest to award petitioner unsupervised visitation (*Matter of Craig S. v Donna S.*, 101 AD3d 505 [1st Dept 2012], *lv denied* 20 NY3d 862 [2013]). The evidence shows that petitioner had been convicted of assaulting the child's mother and

was required to participate in a six-month domestic violence program.

We find, however, that the Family Court should not have expressly limited petitioner from seeking modification of the order until "the end of 2013" (*see Matter of Smith v Smith*, 92 AD3d 791, 792-793 [2d Dept 2012]). A custody or visitation order may be modified at any time upon establishing that there has been a subsequent change of circumstances and that modification is in the child's best interest (*see Matter of Wilson v McGlinchey*, 2 NY3d 375, 380 [2004]).

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10553 In re Catapult Learning, LLC, Index 109158/11
Petitioner-Respondent,

-against-

New York City Department of Education,
Respondent-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (David A. Rosinus, Jr. of counsel), for appellant.

Genova Burns Giantomasi Webster LLC, New York (Jisha V. Dymond of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered January 24, 2012, granting the petition brought pursuant to CPLR article 78 seeking to compel the New York City Department of Education to redact information about pricing, budget, and insurance from petitioner's contract proposal and the resulting contract between the parties, unanimously affirmed, without costs.

The court correctly determined that disclosure of the aforementioned materials, which had been requested by a nonparty pursuant to the Freedom of Information Law, would likely result in substantial competitive injury to petitioner, by revealing essential

information about its previously successful approach to bidding for educational services contracts (*see Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410 [1995]).

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10554 The People of the State of New York, Ind. 3341/10
Respondent,

-against-

Helen Gunter,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Anthony Lekas 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 (John S. Moore, J.), rendered on or about May 5, 2011,

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: SEPTEMBER 24, 2013

CLERK

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

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

10556 Chong Min Mun, Index 604158/05
Plaintiff-Respondent,

SK New York, LLC,
Plaintiff,

-against-

Soung Eun Hong,
Defendant-Appellant.

_____

Buchanan, Ingersoll & Rooney, PC, New York (Stuart P. Slotnick of counsel), for appellant.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (John D. D'Ercole of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered December 17, 2010, which denied defendant's second motion for summary judgment dismissing the complaint, unanimously modified, on the law, to dismiss so much of the complaint as is based on defendant's alleged conspiracy with Daniel Lee, and otherwise affirmed, without costs.

"As a general rule, parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment" (*Debevoise & Plimpton LLP v Candlewood Timber Group LLC*, 102 AD3d 571, 572 [1st Dept 2013] [internal quotation marks and emendation omitted]). Defendant has not demonstrated that any of the

exceptions to this rule apply to his arguments that a June 10, 2005 sale and purchase agreement superseded a June 2, 2005 memorandum of understanding (MOU), that he did not prevent plaintiff from redeeming certain real property known as Seoul Plaza on August 18, 2005, and that even if he did, that does not state a cause of action. Furthermore, we disagree with defendant's contentions that plaintiff (1) conceded that the June 10 agreement superseded the June 2 MOU because he did not oppose this argument below and (2) abandoned his argument that defendant thwarted his attempt to redeem Seoul Plaza because he did not oppose it on appeal.

Defendant may raise the argument that plaintiff failed to submit evidence in admissible form that would raise a triable issue of fact as to whether defendant conspired with Lee. The IAS court denied defendant's first summary judgment motion because Lee's deposition had not been completed and the deposition of Hong K. Jung (a/k/a Henry Jung) had not been taken. After those depositions were taken, defendant properly made his second summary judgment motion (*see Freeze Right Refrig. & A.C. Servs. v City of New York*, 101 AD2d 175, 181 [1st Dept 1984]).

The "evidence" that plaintiff submitted in opposition to defendant's motion was either inadmissible – such as newspaper

articles (*see Young v Fleary*, 226 AD2d 454, 455 [2d Dept 1996]), a transcript of an interview that was not notarized (*see Rue v Stokes*, 191 AD2d 245, 246-247 [1st Dept 1993]), and an alleged statement by Jung about what some unidentified man told him – or failed to raise an issue of fact as to whether defendant told Lee how much plaintiff would bid for Seoul Plaza at a public auction on August 19, 2005, thus enabling Lee to make a higher, winning bid. The fact that Lee and defendant were social acquaintances does not create an issue of fact as to whether they conspired to acquire Seoul Plaza (*see Murray v North Country Ins. Co.*, 277 AD2d 847, 850 [3d Dept 2000]). Plaintiff's circumstantial evidence that defendant had an interest in Seoul Plaza in October 2005 does not raise an issue of fact as to whether defendant leaked plaintiff's bid to Lee before August 19, 2005 (*see generally Frankie v Glen Cove Hous. Auth.*, 276 AD2d 668, 669 [2d Dept 2000]). Plaintiff's claim that defendant was the only

person who knew that plaintiff would be attending the auction with only $2 million to bid is belied by his own affidavit, which shows that another person (nonparty Jin Soo Kim, a/k/a Gene J.S. Kim) also knew this (*see Freeze Right*, 101 AD2d at 186).

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10558 The 20 Pine Street Homeowners Association, et al., Plaintiffs-Appellants, Index 102920/11

-against-

20 Pine Street LLC, et al., Defendants-Respondents,

Giorgio Armani Corporation, et al., Defendants.

_____

Mavronicolas Mueller & Dee LLP, New York (Peter C. Dee of counsel), for appellants.

Goulston & Storrs, P.C., New York (Jonathan A. Grippo of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered May 16, 2012, which, insofar as appealed from as limited by the briefs, granted, pursuant to CPLR 3211(c), summary judgment dismissing the first and seventh causes of action for breach of contract against defendants-respondents Jeshayau Boymelgreen a/k/a Shaya Boymelgreen, Pinchas Cohen, Richard Marin, Tamir Kazaz, 20 Pine Street Managers, LLC, and AI Properties and Developments (USA) Corp., Africa Israel Investments International 1997 Limited, and Africa Israel Investments Limited (Sponsor's Principals), the fifth, sixth, thirteenth and seventeenth causes of action against defendant-

respondent 20 Pine Street LLC (Sponsor) and Sponsor's Principals, and the nineteenth cause of action against defendants-respondents Richard Marin, Jim Pershing, Ari Schwebel, Andy Ashwal, Gennyene Brugger, Damien Stein, Andrew Faulds, Gabe Rubin, Rena Batash, Getzy Felig, Paz Kaspi, Lori Levine, Gal Back, Liron Hen-Brenner, Jack Jemal, Joseph Damanti and Adam Bienelpe (Board Members), unanimously modified, on the law, to delete the provision converting defendants' CPLR 3211(a) motions to dismiss into CPLR 3211(c) motions for summary judgment, and to substitute for the provision granting summary judgment a provision granting the motions pursuant to CPLR 3211(a), and otherwise affirmed, without costs.

The trial court's "Interim Order," which notified the parties that the court "may treat all pending motions to dismiss as motions for summary judgment conversion pending consideration of support or opposition by the parties" and invited the parties to submit papers "in support or opposition," did not provide adequate notice to the parties of the Court's intention to convert the motions pursuant to CPLR 3211(c). Given this, as well as the fact that none of the exceptions to the notice requirement were applicable (*see Wiesen v New York Univ.*, 304 AD2d 459, 460 [1st Dept 2003]), the court erred in converting the

motions into summary judgment motions. Nonetheless, applying the standards governing a motion to dismiss pursuant to CPLR 3211, dismissal of the challenged claims was appropriate.

The court properly dismissed the sixth cause of action alleging that Sponsor breached a statutory or common law implied housing merchant warranty. In *Fumarelli v Marsam Dev.* (92 NY2d 298 [1998]), the Court of Appeals held that the codification of General Business Law article 36-B, pursuant to which a builder-vendor may exclude or modify all express warranties provided that the purchase agreement contains a limited warranty in accordance with the provisions of General Business Law § 777-b, has superseded the common law implied housing merchant warranty previously recognized in *Caceci v Di Canio Constr. Corp.* (72 NY2d 52 [1988]). The statutory housing merchant warranty scheme codified under Article 36-B applies only to buildings less than five stories, and not to the condominium at issue here, and we find that the ruling in *Fumarelli* abrogates whatever common law implied housing merchant warranty, if any, that may have existed with respect to buildings taller than five stories prior to the statutory codification.

The court also properly dismissed the fifth cause of action for damages in connection with Sponsor's alleged breach of

express warranties to correct construction defects, as the offering plan here included a valid and specific limited warranty in accordance with the provisions of General Business Law § 777-b, which, as provided in General Business Law article 36-B, entitled Sponsor to exclude or modify all express warranties, including the preclusion of any claim for damages based on their breach.

The court properly dismissed the fraud claims here (causes of action thirteen and seventeen) because plaintiffs failed to allege tortious conduct separate and distinct from their breach of contract claim (*see 767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 [1st Dept 2004]; *Modell's N.Y. v Noodle Kidoodle*, 242 AD2d 248, 249 [1st Dept 1997]; *see also Board of Mgrs. of Riverview at Coll. Point Condominium III v Schorr Bros. Dev. Corp.*, 182 AD2d 664 [2d Dept 1992]). The negligent misrepresentation claim was also properly dismissed given the absence of allegations sufficient to plead a special relationship of trust or confidence.

The claims against Sponsor's principals were properly dismissed. Other than conclusory statements that Sponsor's principals dominated and controlled Sponsor and each other, plaintiffs failed to allege particularized facts to warrant

piercing the corporate veil so as to allow the claims against the principals to continue (*see Barneli & Cie SA v. Dutch Book Fund SPC, Ltd*, 95 AD3d 736, 737 [1st Dept 2012]; *Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407 [1st Dept 2007]; *Albstein v Elany Contr. Corp.*, 30 AD3d 210 [1st Dept 2006], *lv denied* 7 NY3d 712 [2006]). In addition, as noted above, the fraud claims were not adequately pled so as to provide a basis to hold the principals liable.

Finally, the breach of fiduciary duty claim against the individual Board members was properly dismissed. Contrary to plaintiffs' contention, the complaint does not allege any individual wrongdoing by the members of the Board separate and apart from their collective actions taken on behalf of the condominium (*see Granirer v Bakery, Inc.*, 54 AD3d 269, 272 [1st Dept 2008]).

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10559 The People of the State of New York, Ind. 2127/07
Respondent,

-against-

Dolores Abreu,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Arroyo 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 (Thomas A. Farber, J.), rendered on or about December 7, 2010,

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: SEPTEMBER 24, 2013

CLERK

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

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

10560 In re Jeremiah M.,

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

Sabrina Ann M., etc.,
Respondent-Appellant,

SCO Family of Services,
Petitioner-Respondent.

_____

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

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

George E. Reed, Jr., White Plains, attorney for the child.

_____

Order, Family Court, Bronx County (Anne-Marie Jolly, J.), entered on or about December 7, 2011, which, upon a fact-finding determination that respondent-appellant mother suffers from a mental illness, terminated her parental rights to the subject child, 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.

Petitioner met its burden of proving by clear and convincing evidence that respondent is mentally ill within the meaning of Social Services Law § 384-b(4)(c) and (6)(a) (*see Matter of Joyce T.*, 65 NY2d 39, 46 [1985]; *Matter of Genesis S. [Irene Elizabeth*

S.], 70 AD3d 570 [1st Dept 2010]). The report and testimony from a psychologist who reviewed respondent's medical records and conducted a clinical interview, finding that respondent suffers from schizophrenia and her prognosis is very poor, supports the determination that she is incapable of caring for the child presently and for the foreseeable future (*see Matter of Justin Javonte R. [Leticia W.]*, 103 AD3d 524 [1st Dept 2013]; *Matter of Marlyn J'ace A. [Lynora A.]*, 101 AD3d 646 [1st Dept 2012], *lv denied* 21 NY3d 851 [2013]; *Matter of Sharon Crystal F. [Nicole Valerie D.]*, 89 AD3d 639 [1st Dept 2011], *lv denied* 18 NY3d 808 [2012]). The court was permitted to draw a negative inference from the fact that the mother, while present at the hearing, did not testify (*see Matter of Alford Isaiah B. [Alford B.]*, 107 AD3d 562 [1st Dept 2013]).

Respondent's argument that the court erred in failing to hold a separate dispositional hearing is not preserved for appellate review, and we decline to review it in the interest of justice (*see id.*). Alternatively, we reject it on the merits, as a separate dispositional hearing was not required since this is a

case of termination for mental illness *(see Matter of Joyce T.*, 65 NY2d at 46-50; *Matter of Faith D.A. [Natasha A.]*, 99 AD3d 641 [1st Dept 2012]; *Matter of Ashanti A.*, 56 AD3d 373, 373-374 [1st Dept 2008]).

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10563 The People of the State of New York, Ind. 3589/09
Respondent,

-against-

Melvin Porter,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Cassandra M. Mullen, J., at jury trial and sentencing), rendered January 5, 2011, as amended January 13, 2011, convicting defendant of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police executed a search warrant, the validity of which is not at issue, at the barbershop where defendant worked. The warrant authorized a search of the shop as well as the person of a described "John Doe" subject. When the police entered, they

immediately observed that defendant generally matched the detailed description contained in the warrant, notwithstanding minor discrepancies. Based on all the circumstances, the police reasonably believed that defendant was the target of the warrant (*see Hill v California*, 401 US 797, 802 [1971]; *People v Fernando*, 184 AD2d 413, 414-415 [1st Dept 1992]). Defendant asserts that the reasonableness of the search was undermined by the presence at the shop of a codefendant who allegedly was the actual target of the warrant and who allegedly matched the description as well as, or better than, defendant did. However, the hearing record fails to support these claims.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations regarding the circumstances of defendant's possession of drugs. Furthermore, the chemist used a reliable sampling method to establish the weight of the drugs (*see People v Hill*, 85 NY2d 256, 261 [1995]; *People v Argro*, 37 NY2d 929 [1975]), and we have considered and rejected defendant's challenges to her testimony.

Defendant did not preserve his challenge to the court's supplemental instructions to the deliberating jury, and we decline to review it in the interest of justice. As an

alternative holding, we also reject it on the merits. The court provided a correct and meaningful response to the jury's inquiry (*see generally People v Almodovar*, 62 NY2d 126, 131-132 [1984]), and there is no reasonable possibility that the instructions could have led the jury to convict defendant on an improper theory. We have considered and rejected defendant's related claim of ineffective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10565 The People of the State of New York, Ind. 2456/10
Respondent,

-against-

Aaron Dotson,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about June 30, 2010, 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.

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10566 In re Mary Ginther, Index 112272/11
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

_____

Chet Lukaszewski, P.C., Lake Success (Chester Lukaszewski of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Inga Van Eysden of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. S. Wright, J.), entered April 23, 2012, denying the petition to annul respondents' denial of World Trade Center accidental disability retirement ("ADR") benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition to annul the determination granted, and the matter remitted to the Police Board of Trustees for recomputation of the appropriate level of benefits.

Respondents failed to meet their burden of providing competent evidence rebutting petitioner's medical evidence that she suffered from post-traumatic stress disorder and depression following her service as a police officer at the World Trade

Center site from September 12, 2001 until November 28, 2001 (*see Matter of Bitchatchi v Board of Trustees of N.Y. Police Dept. Pension* Fund, Art. II, 20 NY3d 268, 282 [2012]). Although the Medical Board rejected the conclusion of petitioner's doctors based on her delay in seeking diagnosis and treatment for her medical condition, and concluded, instead, that petitioner suffered from a personality disorder, no credible or competent medical evidence was cited in support of this diagnosis. Moreover, the Medical Board failed to provide credible evidence or research concerning the onset of a personality disorder in middle age, a conclusion disputed by petitioner's doctor. Although the Medical Board is empowered to resolve conflicting evidence, it may not ignore medical evidence and speculate as to other causes of disabling medical conditions in order to rebut the statutory presumption (*see Matter of Samadjopoulos v New York City Employee's Retirement Sys.*, 104 AD3d 551, 553 [1st Dept 2013]).

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10567 In re Endrich Realty Corp. Index 102900/12
Petitioner-Appellant

-against-

John B. Rhea, etc.,
Respondent-Respondent.

_____

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Lawrence T. Schiro of counsel), for appellant.

Kelly D. MacNeal, New York (Megan E. Kimball and Nancy M. Hamett of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered September 20, 2012, denying the petition seeking to compel respondent New York City Housing Authority to reinstate Section 8 housing subsidy payments for July and August 2011 and granting respondent's cross motion to dismiss the proceeding brought pursuant to CPLR article 78 as time-barred, unanimously affirmed on the law, without costs.

We need not decide what the earliest accrual date would be in this case. There can be no doubt that the limitations period began to run as of November 2011, if not sooner, when respondent failed to pay all past due amounts (*see Best Payphones, Inc. v Dept. of Info. Tech. & Telecom.*, 5 NY3d 30 [2005]). Although the total payment did not specify which months' payments were being

withheld, it should have been clear to petitioner that it had not received all the funds owed. Because petitioner did not commence the proceeding within four months of November 2011, the proceeding must be dismissed as time-barred.

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10568 The People of the State of New York, Ind. 1/10
Respondent,

-against-

Stanley Griffin,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Lawrence Marks, J. at hearing; A. Kirke Bartley, Jr., J. at jury trial and sentencing), rendered December 13, 2010, convicting defendant of robbery in the second degree and sentencing him, as a second felony offender, to a term of six years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony. The photo array from which defendant was identified was not unduly suggestive, because there was no substantial likelihood that defendant would be "singled out for identification" (*People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The victim identified defendant from a computer-generated group of 69 photos. The fact that the victim selected an old photo of defendant, which depicted him at

younger age than his age at the time of the crime, did not render the procedure suggestive. We have considered and rejected defendant's remaining arguments concerning the identification procedure.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The victim's initial difficulty in making an in-court identification was satisfactorily explained, and his testimony was corroborated by evidence that the jury could have reasonably interpreted as evincing defendant's consciousness of guilt.

The consciousness-of-guilt evidence, consisting of telephone calls and letters in which defendant discussed bribing the victim to "drop the charges," was properly admitted (*see e.g. People v McLaurin*, 27 AD3d 399, 400 [1st Dept 2006], *lv denied* 7 NY3d 815 [2006]). Any ambiguity as to whether this evidence demonstrated

consciousness of guilt, as opposed to a fear of wrongful conviction, presented a factual issue for the jury (*see People v Yazum*, 13 NY2d 302 [1963]).

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10569 In re Diamond Tyneshia B.,

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

Aisha K.,
Respondent-Appellant,

Daniel B.,
Respondent,

Administration for Children Services,
Petitioner-Respondent.

_____

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

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

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

_____

Order of fact-finding, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about April 19, 2012, which, to the extent appealed from, following a hearing, found that respondent-appellant mother had neglected the subject child, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The record shows that there was an extensive history of domestic violence between the mother and father, including an incident in

which the father broke down a door and hit the mother in front of the child, causing the child to tell the father to "stop" (*Matter of Jeaniya W. [Jean W.]*, 96 AD3d 622 [1st Dept 2012]). Further, there is unrefuted evidence that the mother repeatedly exposed the child to the risk of witnessing such violence by allowing the father to either visit or reside with them, despite the existence of an order of protection against him. The child's out-of-court statements about the incident she witnessed were corroborated by the mother's out-of-court statements and a domestic incident report (*see* Family Court Act § 1046[a][vi]). The mother waived her argument that the Family Court improperly considered the domestic incident reports, since she failed to timely object to

the admission of the reports (*see Matter of Dyandria D.*, 22 AD3d 354, 354 [1st Dept 2005], *lv denied* 6 NY3d 704 [2006]).

The Family Court properly denied the mother's request for an adjournment to call the father as a witness.

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10570N Antoine Khalife, et al, Index 652058/12
Plaintiffs-Appellants,

-against-

Audi Saradar Private Bank SAL,
Defendant-Respondent.

_____

Schlam Stone & Dolan LLP, New York (Paul Batista of cousnel), for appellants.

Dechert LLP, New York (Gary J. Mennitt of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered January 10, 2013, which granted defendant's motion to set aside plaintiffs' service of a summons with notice that had been made upon defendant's counsel in a pending federal court action pursuant to CPLR 303, unanimously affirmed, with costs.

In order to invoke CPLR 303, plaintiffs were required to show that defendant, a foreign entity, commenced the federal action in New York, and that plaintiffs' claims in this action "would have been permitted as . . . counterclaim[s]" had the federal action been brought in the Supreme Court (CPLR 303; *see Evergreen Systems, Inc. v Geotech Lizenz AG*, 697 F Supp 1254, 1257 [ED NY 1988]). Plaintiffs failed to show either requirement.

Although defendant moved to intervene in the federal action and obtained a temporary restraining order precluding the instant plaintiffs' counsel from transferring disputed monies from an escrow account, defendant's motion to intervene was ultimately withdrawn on consent of all parties before it was ever decided. Defendant had not filed a complaint in the federal action, as would be necessary to commence an action in federal court (*see* Fed Rules Civ Proc rule 3; *see generally* CPLR 304[a]); therefore, the action-commencement requirement of CPLR 303 was not satisfied.

Plaintiffs' argument, in essence, that CPLR 303 should be interpreted more broadly to subject a foreign person or entity to the jurisdiction of New York State courts if the foreign person or entity is seeking some form of affirmative relief in New York courts, as opposed to commencing an action, is unavailing, as the plain meaning of the statute does not authorize such power (*see generally Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394 [1995]).

Since there was no pleading by the defendant in the federal action defendant did not become a party in that litigation.

Therefore, plaintiffs would not have been permitted to counterclaim against defendant had the federal action been brought in the Supreme Court, thereby precluding plaintiffs from meeting the "counterclaim" element of CPLR 303.

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10571N Gary Smoke, Index 113051/11
Plaintiff-Appellant,

-against-

Windermere Owners, LLC, et al.,
Defendants-Respondents.

_____

Marc Bogatin, New York, for appellant.

Cullen & Troia, P.C., New York (Kevin D. Cullen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 20, 2012, which denied plaintiff's motion for a default judgment, unanimously affirmed, without costs.

By submitting the affirmation of their attorney, stating that defendants' verified answer was served two days late due to a calendaring error by their counsel, defendants have shown excusable default for the untimely service of that pleading (*see* CPLR 2005, 3012[d]; *Barsel v Green*, 264 AD2d 649 [1st Dept 1999]; *Tutuianu v State of N.Y. Dept. of Social Servs.*, 242 AD2d 476 [1st Dept 1997]). In response, plaintiff has not shown, or even alleged, that he suffered any prejudice as a result of the two-day delay in receiving defendants' answer (*see Tak Kuen Nagi v Sze Jing Chan*, 159 AD2d 278 [1st Dept 1990]).

Although defendants were not required to show a meritorious defense, we note that they have made such a showing (*see Guzetti v City of New York*, 32 AD3d 234, 234 [1st Dept 2006]; *Nason v Fisher*, 309 AD2d 526 [1st Dept 2003]).

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

ENTERED: SEPTEMBER 24, 2013

CLERK

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

10572 [M-3244] In re Stephen Robinson, Petitioner,

-against-

Hon. Megan Tallmer, et al., Respondents.

Ind. 2232/09

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

And said proceeding having been heard, and due deliberation having been had thereon, and upon the submission of the parties,

It is unanimously ordered that the application be and the same hereby is deemed withdrawn, without costs or disbursements.

ENTERED: SEPTEMBER 24, 2013

CLERK

Tom, J.P., Andrias, Saxe, Gische, JJ.

9722 The People of the State of New York, Ind. 843/08
Respondent,

-against-

Matthew Keschner,
Defendant-Appellant.

- - - - -

9723 The People of the State of New York, Ind. 843/08
Respondent,

-against-

Aron Goldman,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for Matthew Keschner, appellant.

Jenner & Block LLP, New York (Peter B. Pope of counsel), for Aron Goldman, appellant.

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

_____

Judgments, Supreme Court, New York County (Rena K. Uviller, J.), rendered March 15, 2011 and April 8, 2011, affirmed.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
David B. Saxe
Judith J. Gische, JJ.

9722
9723
Ind. 843/08

_____x

The People of the State of New York,
Respondent,

-against-

Matthew Keschner,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Aron Goldman,
Defendant-Appellant.

_____x

Defendants appeal from the judgments of the Supreme Court, New York County (Rena K. Uviller, J.), rendered March 15, 2011 and April 8, 2011, following a joint jury trial, convicting defendant Keschner of enterprise corruption, scheme to defraud in the first degree, two counts of grand larceny in the first degree, money laundering in the second degree, four counts of insurance fraud in the fourth degree, and two counts of falsifying business records in the first degree, and convicting defendant Goldman of enterprise corruption,

scheme to defraud in the first degree, two counts of grand larceny in the first degree, money laundering in the first and second degrees, five counts of insurance fraud in the third degree, three counts of insurance fraud in the fourth degree, and one count of falsifying business records in the first degree, and imposing sentence.

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for Matthew Keschner, appellant.

Jenner & Block LLP, New York (Peter B. Pope and Kenyanna M. Scott of counsel), for Aron Goldman, appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Susan Axelrod and Alan Gadlin of counsel), for respondent.

TOM, J.P.

Defendants ask this Court to alter the definition of "enterprise corruption" to include a criterion not contained in the statute — namely, that the "criminal enterprise" (Penal Law § 460.10[3]) must be so structured as to permit it to continue its existence without the involvement of one or more key participants. Because the statute expressly requires only "a continuity of existence, structure and criminal purpose beyond the scope of individual criminal *incidents*" (*id.* [emphasis added]), not criminal "*participants*," we reject this construction. Defendants' remaining contentions are largely unpreserved and otherwise devoid of merit.

The evidence adduced against defendants Aron Goldman and Matthew Keschner supports the jury's conclusion that they were knowing participants in a fraudulent scheme concocted by Gregory Vinarsky, and the verdict is not against the weight of the evidence. Vinarsky utilized health care clinics to fraudulently obtain money from insurance companies by submitting claims for unnecessary medical tests, procedures and medical devices or equipment on behalf of injured persons entitled to receive no-fault automobile insurance benefits. Vinarsky, who testified under a cooperation agreement, employed runners to find and solicit patients and hired medical personnel — including Goldman,

an internist, and Keschner, a chiropractor — to supply medical services. Goldman and Keschner had both worked at a no-fault clinic set up by Vinarsky in 2001 in the Yorkville section of Manhattan. Since New York State regulations require that a medical clinic be owned by a physician, it was Goldman's name that appeared on the relevant paperwork for the Yorkville clinic.

In 2002, Vinarsky closed the Yorkville operation and opened the St. Nicholas Clinic, the facility involved in this prosecution, located on St. Nicholas Avenue in upper Manhattan. Goldman again signed as the owner of the corporate entity, St. Nicholas Avenue Medical Care, P.C., while Vinarsky owned all of the businesses associated with the clinic's operation, encompassing real estate, billing and administrative services. Keschner was hired as the clinic's chiropractor and received, as remuneration, 35% of the profits he generated, with the remainder going to Vinarsky. Vinarsky instructed Keschner to direct patients to visit the clinic three times a week for chiropractic treatments and offered Keschner $5 to $10 for each water circulating unit he prescribed (for which Vinarsky received a $50 kickback from the unit's distributor). As to Goldman, Vinarsky stated that since the doctor had worked at the Yorkville clinic, there was no need to explain what was expected of him.

Vinarsky devised a five-page, printed "initial evaluation"

form, which listed a series of tests and treatments the doctors were expected to order and included prepared diagnostic impressions. The form concluded with sections dealing with the treatment plan and consultation referrals, including one advising that the patient receive physical therapy at least three times a week, the maximum frequency of treatments reimbursed by insurance companies. Included was a list of durable medical equipment that could be ordered and a preprinted section providing that the patient's prognosis was "guarded." Many of the prescribed medical tests were performed at the St. Nicholas clinic, and Vinarsky received kickbacks for tests administered at outside facilities.

The jury heard testimony from patients who were given tests and prescribed treatment despite never having complained of pain in the particular area of the body corresponding to the diagnosis. The jury also heard from investigators for various insurance carriers, who testified concerning the receipt of claims forms and medical reports. In the case of one patient, bills were submitted for injuries he had allegedly sustained in connection with three successive automobile accidents, without mention of any preceding accident or an even earlier motorcycle accident. Testimony was also heard from undercover officers and a confidential informant, who presented themselves at the clinic

for evaluation, and from a forensic accountant and a statistician, who analyzed the clinic's treatment and financial records.

Defendants were tried jointly and convicted of enterprise corruption and related offenses, including grand larceny, scheme to defraud, money laundering and insurance fraud. Goldman was sentenced to a term of 2½ to 7½ years and an $800,000 fine, and Keschner to a term of 1½ to 4½ years and a $750,000 fine. Defendants remain free on bail pending appeal.

Both defendants contend that their convictions of enterprise corruption are unsupported by legally sufficient evidence and are against the weight of the evidence. In particular, they argue that because Vinarsky was essential to the operation of the St. Nicholas facility, it lacked the structure to maintain the necessary continuity of existence in his absence. Thus, they conclude, the clinic did not meet the statutory requirements of a criminal enterprise essential to sustain conviction for their participation in its operation.

While Keschner moved to dismiss the enterprise corruption count on this basis, Goldman did not, thereby failing to preserve the issue for appellate review (*see People v Vargas*, 236 AD2d 258 [1st Dept 1997], *lv denied* 90 NY2d 865 [1997] [objection by one codefendant does not preserve an issue for the other]). In any

event, the argument is without merit. Defendants rely on *People v Yarmy* (171 Misc 2d 13 [Sup Ct, NY County 1996]), in which the court correctly found that the People had not established the existence of a criminal enterprise to support the defendant's conviction of enterprise corruption.[1] The court reasoned that the arrangement between Yarmy, the licensed firearms dealer who supplied weapons, and his accomplice, who acted as a distributor by selling them to local gang members, did not constitute "a

---

[1] Penal Law § 460.20(1)(a) provides as follows:

> "A person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he:
>
> (a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity; or
>
> (b) intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or
>
> (c) participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise."

Penal Law § 460.10(3) defines "criminal enterprise" as

> "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents."

structured organization" but merely two persons acting in concert (with the occasional assistance of a family member) to advance their respective interests (*id.* at 18-19). Absent was "any semblance of a hierarchical organization beyond what is minimally necessary to effectuate the individual sales" (*id.* at 17). The court noted that the asserted criminal enterprise, Yarmy Sporting Goods, had no independent capacity to purchase arms since the license was personal to the defendant, noting this as "further evidence that there was no separate enterprise" (*id.* at 20).

In addition to finding the absence of any criminal enterprise, the court proceeded to address its continuity, examining the association between Yarmy and his accomplice. The court cited cases finding a sufficient structure where "the enterprise continues with the same purpose and any new members joining the enterprise fill roles previously performed by former members" (*id.*). The court then opined, in dictum, that "one important factor in determining continuity is whether the organization could exist after the removal -- by arrest or otherwise -- of any of the participating member(s)" (*id.*). The court concluded that the organization consisting of Yarmy and his accomplice "could not continue to exist as a criminal enterprise independently of the defendant" (*id.* at 20-21).

The cases cited by the court, however, state only that an

organization's identity as a criminal enterprise is not *defeated* simply because there is some exchange of personnel. The cited authority does not support the inverse proposition that interchangeability of personnel is *essential* to statutory recognition of an organization as a criminal enterprise. To the contrary, the Court of Appeals has stated that the statutory requirement of "continuity of existence, structure and criminal purpose" (Penal Law § 460.10[3]) is met when an organization exhibits "constancy and capacity exceeding the individual crimes committed under the association's auspices or for its purposes" (*People v Western Express Intl., Inc.*, 19 NY3d 652, 658 [2012]). Defendants argue, nevertheless, that *Yarmy* has been endorsed by the Second Department. Indeed, in discussing its memorandum decision in *People v Nappo* (261 AD2d 558, 559 [2d Dept 1999], *revd on other grounds* 94 NY2d 564 [2000]), that Court stated that "the People failed to establish either an 'existing organized crime entity' or any continuity of existence wherein the said entity was capable of continuing without the participation of William S. Nappo and William K. Nappo" (*People v Conigliaro*, 290 AD2d 87, 89 [2d Dept 2002], *lv denied* 98 NY2d 650 [2002]). The *Nappo* decision, however, like *Western Express*, holds only that the evidence before the grand jury was "insufficient to establish that the respondents engaged in any structure, business,

activity, or continuity of criminal purpose beyond the scope of the criminal *incidents* alleged in the indictment" (*id.* at 559 [emphasis added]). To the extent that *Conigliaro* may be read as holding that the involvement of one or more irreplaceable participants removes an organization from the statutory definition of "criminal enterprise," we decline to follow it.

The evidence before the jury amply demonstrates that defendants were engaged in a criminal enterprise overseen by Vinarsky. It embraced more than one clinic, extended over a period of years, and involved a succession of patients whose medical history was used to procure income by an organization structured to facilitate the fraudulent billing of insurers, which paid some $6 million for services allegedly provided by the St. Nicholas clinic. Thus, the jury was warranted in concluding that the criminal enterprise had a continuity that extended beyond any individual patient or transaction.

Defendants raise a variety of claims that are unpreserved by objection at trial, and this Court declines to reach them in the interest of justice. In any event, we perceive no merit to the arguments they now put forward.

Goldman asserts that his conviction for grand larceny by false pretenses — by misrepresenting himself on insurance forms as the "owner" of the clinic — must be overturned because the

corporate filing lists him as the registered owner. This argument was never presented to the trial court. Furthermore, defendants misrepresented themselves as providing treatment actually administered by others and by ordering procedures merely purporting to offer some therapeutic benefit to the patient, representations which likewise constitute false pretenses sufficient to sustain conviction for larceny.

Goldman also complains that the statistical analysis presented by Dr. Shing Lee, the People's biostatistician expert witness, while showing a higher incidence of treatment by Goldman than his colleagues, failed to identify the reason for the difference as a deviation from the appropriate standard of care. Although Goldman moved to preclude Dr. Lee's testimony altogether, he never made the argument now advanced; nor did he object to the use made by the prosecutor of Dr. Lee's evidence on opening and summation. Moreover, this evidence is relevant to testimony given by Vinarsky and tends to demonstrate an intent to maximize profit from the enterprise by ordering as many procedures as possible. Thus, it was admissible (*see People v Yazum*, 13 NY2d 302 [1963]).

Similarly, with respect to Vinarsky's testimony concerning the Yorkville clinic, Goldman interposed only a general claim of prejudice (*People v Molineux*, 168 NY 264 [1901]; *see People v*

Resek, 3 NY3d 385, 389 [2004]). He did not complain, as he now does, that it was irrelevant and prejudicial because Vinarsky failed to testify concerning conversations demonstrating Goldman's knowledge that the Yorkville clinic was operated illegally, as described by the prosecutor in his offer of proof. Be that as it may, both defendants asserted their ignorance of wrongdoing at the Yorkville facility and its fraudulent billing practices, and Vinarsky's testimony was relevant to that issue. Furthermore, had a timely objection been interposed, the court could have considered appropriate corrective action, including whether to strike objectionable testimony.

Goldman contends, generally, that the proof against him is insufficient to demonstrate either his intent to commit any crime or his knowledge of criminal wrongdoing at the St. Nicholas clinic, denigrating the probative value of the evidence adduced by the prosecutor. While Goldman is correct that certain evidentiary items, taken in isolation, are insufficient to establish guilt — particularly, his mere presence at the clinic (*see People v Cabey*, 85 NY2d 417, 421 [1995]) and his denial, under oath, that he knew Keschner was working as a chiropractor at the Yorkville clinic (*see People v Bierenbaum*, 301 AD2d 119, 139 [1st Dept 2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]) — the jury was entitled to draw reasonable

inferences based on the totality of the proof to infer intent "from the defendant's conduct and the surrounding circumstances" (*People v Bracey*, 41 NY2d 296, 301 [1977][internal quotation marks omitted]). Indeed, the evidence showing that Goldman overprescribed tests and treatment, allowed Vinarsky to use his professional license to obtain regulatory approval, abdicated control over the St. Nicholas clinic's operation, and was previously employed at the Yorkville clinic run by Vinarsky, warrants the reasonable inference that he knowingly and willingly participated in the fraudulent scheme.

Both defendants take issue with the court's supplemental instructions on accessorial liability.[2] However, this Court finds that "the charge, in its entirety, conveys an appropriate legal standard and does not engender any possible confusion" (*People v Wise*, 204 AD2d 133, 135 [1994], *lv denied* 83 NY2d 973 [1994]). The trial court initially informed the jury that the burden of proof never shifts to the defendant and that each defendant can be held responsible for the acts of another person only if the evidence proves that the "defendant had knowledge of

[2] Pursuant to Penal Law section 20.00, a person is criminally liable for the conduct of another person "when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."

the crime and intentionally aided or assisted the other defendant, or others who are not on trial at this time, in committing the crime, or if the defendant under consideration requested or directed that the crime be committed." The court then quoted the pertinent pattern jury instruction in its entirety.

Defendants take issue with the court's response to a jury note asking (1) whether grand larceny must encompass the entire St. Nicholas clinic or merely one doctor's individual practice and (2) for an explanation of "accomplice culpability." After the court delivered supplemental instructions, counsel objected that the court had not mentioned that the pertinent crime was grand larceny nor that defendants "must have the mental culpability of grand larceny in order to have accessorial liability." It is clear from the first question, however, that the jury was well aware of the nature of the underlying offense, and the court responded that, to be guilty as an accessory, a defendant must have "had knowledge of a crime, intended that it be committed and did something to intentionally direct or assist in its commission." The court's emphasis on intent sufficiently conveyed the need to find the requisite culpability (Penal Law §§ 15.00[6]; 15.05[1]). Moreover, a remark that is merely amenable to interpretation as shifting the burden of proof, when

made in the context of explicit instructions properly imposing the burden on the People, does not obviate the need to raise a specific objection to preserve the issue for review (*People v Thomas*, 50 NY2d 467, 472 [1980]).

On appeal, defendants assign error to the court's use of the conjunctive in stating, with respect to accessorial liability, that a defendant

> "is either guilty because he had knowledge of a crime, intended that it be committed and did something to intentionally direct or assist in its commission. Or, he is not guilty, because he had no knowledge of the crime, had no intent to commit it and did not intentionally engage in any conduct or act to direct or assist in it."

Defendants urge that the court's use of the word "and" in the second sentence confused the jury by implying that it could not acquit either a defendant with no knowledge of a crime who unknowingly committed an intentional act that advanced it or a person with mere knowledge of a crime who took no steps to assist in its commission. Again, the court's instructions, when viewed in their entirety, conveyed the appropriate legal standard (*Wise*, 204 AD2d at 135).

Upon review of a criminal conviction, it is the function of an appellate court to examine errors brought to the attention of the trial justice at a time when remedial action is still

possible (*People v Gray*, 86 NY2d 10, 20-21 [1995]). Reversal is not available for error identified only after belated, albeit meticulous, examination of the trial transcript in preparation for appeal (CPL 470.05[2]). It has been observed that "parties to litigation, even parties to a criminal prosecution, may adopt their own rules at trial by the simple expedient of failing to object to evidence offered or to except to instructions given [to] the jury" (*People v Lawrence*, 64 NY2d 200, 206 [1984]). This principle applies even where, as here, the asserted error implicates the sufficiency of the evidence supporting conviction (*Gray*, 86 NY2d at 21).

Both defendants now complain that the People's opening remarks were prejudicial. The prosecutor informed the jury that only a "representative sample" of the many patients treated at the St. Nicholas clinic would testify and provided reasons why more witnesses would not be called. Goldman now claims that these comments improperly suggested that the uncalled witnesses, if required to take the witness stand, would have invoked the Fifth Amendment privilege against self-incrimination. Keschner additionally asserts that the remarks transgressed the unsworn witness rule.

Neither argument was raised at trial and both lack merit. The prosecutor's explanation as to why, of the thousands of

patients treated at the clinic, only a few would testify does not offend the unsworn witness rule, since a prosecutor is obliged to deliver an opening statement that addresses the charges against the accused, what the facts are anticipated to demonstrate and, as pertinent here, the supporting evidence that is to be introduced (*see People v Kurtz*, 51 NY2d 380, 384 [1980], *cert denied* 451 US 911 [1981]). Nor are the prosecutor's comments subject to attack for intimating that uncalled witnesses would have invoked the Fifth Amendment privilege against self-incrimination, since no witness was ever called to the stand for that purpose (*see People v Berg*, 59 NY2d 294, 298-299 [1983]). The People were entitled to explain why only three clinic patients would be testifying, both to address potential jury concerns and to obviate a missing witness charge (*see generally People v Macana*, 84 NY2d 173 [1994]).

There is no merit to Keschner's unpreserved assertion that the court's charge on fourth degree insurance fraud limited the offense to a claim submitted to an insurer based on an actual, as opposed to a purported, "policy" of insurance (that is, claims submitted on behalf of an undercover officer or insurance investigator as opposed to an actual patient). Notably, the statutory definition of "insurance policy" includes a "purported" policy (Penal Law § 176.00[1]). Nor is there merit to Keschner's

similarly unpreserved assertion that the evidence is insufficient to sustain his conviction for money laundering because the "monetary instrument" (Penal Law § 470.00[1]) involved in the underlying "financial transaction" (Penal Law § 470.00[7])[3] was neither a personal check nor a bank check but a check drawn on a business account. Keschner fails to explain why a business check does not qualify as a "personal" (as opposed to a "bank") check, nor why the use of a business check should not be regarded as entailing either "the movement of funds by wire or other means" or "the use of a financial institution" (Penal Law § 470.00[7][a], [d]) so as to come within the ambit of the statute.

With regard to summation, neither defendant raised the objection both now assert — that the prosecutor's comment concerning their failure to rebut Dr. Lee's statistical analysis shifted the burden of proof to the defense. Despite the omission, the court immediately reminded the jury that "the burden is always on the prosecutor to show that the elements of the crime have been proven," and neither defendant complained

[3] Penal Law § 470.00(7) defines "financial transaction" as one involving "(a) the movement of funds by wire or other means"; "(b) one or more monetary instruments"; "(c) the transfer of title to any real property, vehicle, vessel or aircraft"; or "(d) the use of a financial institution."

that this curative instruction was inadequate. Thus, the claim is unpreserved (*People v Gonzalez*, 39 AD3d 434, 434 [1st Dept 2007], *lv denied* 9 NY3d 876 [2007]). In any event, the prosecutor's remarks were responsive to Goldman's attack on Dr. Lee's analysis as "worthless" and consisting of "lies" (*see People v Halm*, 81 NY2d 819, 821 [1993]). The People were entitled, in rebuttal, to point out the lack of substance to the attack, observing that Goldman had not proposed any alternative conclusion than the one proposed by Lee — namely, that Goldman had ordered far more tests than his colleagues at the clinic. Merely pointing out the lack of evidentiary support for a claim made by a defendant does not shift the burden of proof (*see People v Gurley*, 28 AD3d 347, 348 [1st Dept 2006], *lv denied* 7 NY3d 813 [2006]). Goldman concedes that the numerous prosecutorial comments about which he now complains are virtually all unpreserved. Moreover, they fall within the wide latitude afforded a prosecutor in commenting upon the evidence and in drawing fair inferences therefrom (*People v Galloway*, 54 NY2d 396 [1981]).

Defendants' other contentions have been examined and found to be without merit.

Accordingly, the judgments of the Supreme Court, New York County (Rena K. Uviller, J.), rendered March 15, 2011 and April

8, 2011, following a joint jury trial, convicting defendant Keschner of enterprise corruption, scheme to defraud in the first degree, two counts of grand larceny in the first degree, money laundering in the second degree, four counts of insurance fraud in the fourth degree, and two counts of falsifying business records in the first degree, and convicting defendant Goldman of enterprise corruption, scheme to defraud in the first degree, two counts of grand larceny in the first degree, money laundering in the first and second degrees, five counts of insurance fraud in the third degree, three counts of insurance fraud in the fourth degree, and one count of falsifying business records in the first degree, and sentencing Keschner to an aggregate term of 1½ to 4½ years and a $750,000 fine, and Goldman to an aggregate term of 2½ to 7½ years and an $800,000 fine, should be affirmed, and the matter remitted to Supreme Court, New York County for further proceedings pursuant to CPL 460.50(5).

All concur.

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

ENTERED: SEPTEMBER 24, 2013

CLERK