SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 7, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Renwick, Saxe, JJ.

15618 In re Jahmeka W.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for presentment agency.

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Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about February 27, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree (two counts) and obstructing governmental administration in the second degree, and placed her on enhanced supervision probation for a period of 15 months, unanimously affirmed, without costs.

Appellant's allegedly spontaneous statement to the arresting officer, that she punched one of the two teacher victims in the face because he pushed her, should have been suppressed. Based

on the totality of circumstances, including appellant's age (*see Matter of Jimmy D.*, 15 NY3d 417, 421-23 [2010]), and the length and circumstances of her detention without *Miranda* warnings or the presence of a parent, we conclude that when the officer interviewed one of the victims by phone while appellant was handcuffed only a few feet away, this was reasonably likely to elicit a statement, and the ensuing statement was not voluntary (*see Rhode Island v Innis*, 446 US 291, 300-01 [1980]; *People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]). Nevertheless, after considering "both the overall strength of the case against [appellant] and the importance to that case of the improperly admitted evidence" (*People v Goldstein*, 6 NY3d 119, 129 [2005], *cert denied* 547 US 1159 [2006, we find the error harmless beyond a reasonable doubt. There was overwhelming evidence that appellant did in fact punch the teacher referred to in the statement, and there is nothing in the court's detailed decision after the fact-finding hearing to suggest a reasonable possibility that the statement contributed to the finding. Moreover, the statement was essentially exculpatory as to the more significant issue of intent.

The fact-finding determination 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]).

The victims' testimony, which was expressly credited by the court, established that appellant, among other things, punched one teacher in the face, causing his jaw to swell, and struggled with, punched and scratched the other teacher, causing him to fall to the ground and hurt his back. As to each victim, the evidence established the requisite physical injury (*see* Penal Law §§ 10.00[9]; 120.05[10][a]), and far exceeded the standards articulated by the Court of Appeals (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]). The evidence also supported the inference that appellant intended to cause physical injury, a natural and likely consequence of these acts (*see People v Getch*, 50 NY2d 456, 465 [1980]). The obstructing governmental administration charge was supported by evidence that appellant intentionally obstructed one teacher's performance of an official function when, among other things, she put her foot in the door to the dean's office, preventing the teacher from carrying out his duty of maintaining order, and then

punched the teacher in the face when he and the other victim attempted to close the door (*see* Penal Law § 195.05; *Matter of Manny P.*, 33 AD3d 330 [1st Dept 2006]).

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

ENTERED: JULY 7, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, DeGrasse, Manzanet-Daniels, JJ.

14107 Wyle Inc., et al., Index 653465/11
Plaintiffs-Respondents,

-against-

ITT Corporation, et al.,
Defendants-Appellants.

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Venable LLP, New York (Edmund M. O'Toole of counsel), for appellants.

Morrison Cohen LLP, New York (Donald H. Chase of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 23, 2013, which denied defendants' CPLR 3211(a)(1) and (7) motion to dismiss plaintiffs' amended complaint asserting fraudulent inducement, affirmed, without costs.

The court properly concluded that the fraudulent inducement claim was not duplicative of the breach of contract claim.

The underlying facts of this case are adequately set forth in the dissent and need not be repeated here. Moreover, we have little disagreement with our dissenting colleague's review of the two lines of cases addressing the issue of whether a fraudulent inducement claim alleged in a complaint is duplicative of a breach of contract claim. Where we differ is in the application of those precedents to the facts before us.

It is axiomatic that in order to state a claim for fraudulent inducement, "there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]). In the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim (*id.*). Moreover, these misrepresentations of present fact must be "collateral to the contract and [must have] induced the allegedly defrauded party to enter into the contract (*Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]). Therefore, "[a]s a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove a breach of duty distinct from, or in addition to, the breach of contract" (*Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1st Dept 1998] [internal quotation marks omitted]).

Here, defendants on appeal concede that the intentional failure to disclose an ongoing audit is a misrepresentation as to a present fact. They argue, however, that, since the nondisclosure is a breach of a contractual warranty contained in

a specific provision of the contract itself, the misrepresentation is not collateral to the contract, thus making plaintiff's fraudulent inducement claim duplicative of its breach of contract claim. Plaintiffs, on the other hand, contend that misrepresentation of a contractual warranty may form the basis of a separate fraudulent inducement claim, particularly where, as here, the misrepresentation concerns the core value of a business or asset in the contract. Both parties cite precedent in support of their positions. Therefore we must, as did the dissent, examine the two lines of cases cited to determine where this case falls.

We agree with the dissent that in order to sustain the fraud cause of action, there must be a breach of a duty separate from or in addition to the contract duty (*see e.g. J.E. Morgan Knitting Mills v Reeves Bros.* 243 AD2d 422 [1st Dept 1997]). Unlike the dissent, however, we find the cases cited by defendants turn on facts that distinguish them from the present case.

For example, in *ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC* (50 AD3d 397 [1st Dept 2008]), we held that the fraud causes of action were duplicative of the contract causes of action because they arose from the written provisions of the several agreements entered into by the parties (*id.* at 398).

Significantly, however, we also found that the misrepresentations were not extraneous to those agreements because "none of the misrepresentations caused the actual investment losses" (50 AD3d at 399). Here, the failure to disclose the General Services Administration audit as required by the contract directly resulted in the losses claimed. As discussed in further detail herein, a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim (*Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 120-121 [1969]).

Similarly, in *RGH Liquidating Trust v Deloitte & Touche LLP* (47 AD3d 516 [1st Dept 2008], *lv dismissed* 11 NY3d 804 [2008]), we found that the fraud claims were duplicative of the breach of contract claim because they were based on alleged fraudulent misrepresentations related to the defendants' obligation under the agreement to conduct audits of financial statement with reasonable care. However, this is not the factual case before us. The representation in *RGH* involved future performance, i.e., the duty to conduct reliable audits, which was, we found, "in essence a claim of professional malpractice" (47 AD3d at 517). The misrepresentation was thus not one of present fact, as we concededly have in this case, but one of future intent, and the cause of action for fraud in *RGH* was thus properly dismissed.

The second line of cases on this issue hews closer to the facts before us.

In *First Bank of Ams. v Motor Car Funding* (257 AD2d 287 [1st Dept 1999]), the plaintiff bought used car loans from defendant Motor Car Funding (MCF). The agreement contained warranties that the loans would comply with certain underwriting guidelines. MCF allegedly misrepresented the quality of the loans, inducing First Bank to purchase less valuable loans, which ultimately resulted in losses to the plaintiff. We sustained the fraud claim, finding that the allegations that the defendants misrepresented certain facts about the loans "cannot be characterized merely as an insincere promise of future performance." (*id.* at 292). We went on to hold that

> "a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. (*Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 118). For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstance also give rise to the plaintiff's breach of contract claim. . . Unlike a misrepresentation of future intent to perform, a *misrepresentation of present facts is collateral to the contract* (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty (*Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]. . . Nor is the fraud claim rendered redundant by the fact that these alleged misrepresentations breached the warranties made by MCF in the Agreement . . . The core of

> plaintiff's claim is that defendants intentionally misrepresented material facts about various individual loans so that they would appear to satisfy these warranties . . . This is fraud, not breach of contract. *A warranty is not a promise of performance, but a statement of present fact*. Accordingly, a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim (*see Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 120-121)" (257 AD2d at 291-292 [emphasis added]).

Similarly, in another case involving false representations involving present contract warranties as to the quality of certain loans which were relied on by an insurer of those loans in its decision to insure those loans, we held that "[a] fraud claim will be upheld when a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, even though the same circumstances also give rise to the plaintiff's breach of contract claim" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011], citing *First Bank*). In reaching our conclusion, we noted that the allegations in the complaint must, on a CPLR 3211 motion (like the one presently before us), be accepted as true. That being the case, we went on to hold that "[b]ecause MBIA alleges misrepresentations of present facts, and not future intent, made with the intent to induce MBIA to insure the securitizations, the fraud claim survives. It is of no consequence that some of the allegedly false representations are also contained in the

agreements as warranties and form a basis of the breach of contract claim" (87 AD3d at 294 [internal citations omitted]). Such a rule makes sense, for, as we noted in *MBIA*, "'It simply cannot be the case that any statement, no matter how false or fraudulent or pivotal, may be absolved of its tortious impact simply by incorporating it verbatim into the language of a contract'" (*id.*, quoting *In re CINAR Corp. Sec. Litig.*, 186 F Supp 2d 279, 303 [ED NY 2002]).

Although the dissent contends that the false representations in *First Bank* and *MBIA* were separate from the warranties contained in the contract, those representations were in fact warranted to be accurate at the time the contract was entered into and made for the purposes of inducing the plaintiffs to purchase those loans. They were designed to be relied on to arrive at an accurate value of the loans, and the value of the company being purchased here. These misrepresentations did not merely evince "an insincere promise of future performance [but were] instead . . . misrepresentation[s] of then present facts that were collateral to the contract, and thus plaintiff sufficiently alleged a cause of action sounding in fraud" (*GoSmile, Inc. v Levine*, 81 AD3d at 81; *see also Merrill Lynch & Co., Inc. v Allegheny Energy, Inc.*, 500 F3d 171, 184 [2d Cir 2007]; *RKB Enters. v Ernst & Young*, 182 AD2d 971, 972 [3d Dept

1992]). To hold otherwise would be a far too restrictive application of our precedents.

All concur except Moskowitz, J. who dissents in a memorandum as follows:

MOSKOWITZ, J. (dissenting)

The issue presented in this case is far less clear cut than the majority memorandum would suggest. In fact, when considering whether a misrepresentation of a contractual warranty can sufficiently support a separate cause of action for fraud, or whether the allegation of a fraudulent misrepresentation merely duplicates a claim for breach of contract, this Court has reached different results depending on the specific facts presented. Because I believe that under the applicable line of cases, the misrepresentation here supports a claim for breach of contract but not a separate claim for fraud, I respectfully dissent.

This action arises from alleged misrepresentations by defendant ITT Corporation in connection with its sale of nonparty CAS, Inc. to plaintiffs Wyle Inc. and Wyle Services Corporation (collectively, Wyle). According to the allegations in the complaint, ITT acquired CAS's parent company, nonparty EDO Corporation, but planned to sell CAS, as CAS was not profitable for ITT's business.[1]

CAS, a defense contractor, provided engineering, scientific, and technical services to the federal government, and earned most

[1] Defendants Exelis Inc. and Xylem Inc. are successor entities to defendant ITT; nonparty EDO, CAS's parent company, was a predecessor entity to Exelis. For ease of reference, all defendants are referred to collectively as "ITT."

of its revenue through defense contracts with the government. Payment for CAS's work under its contracts with the federal government was governed by a Professional Engineering Services schedule (PES schedule), which CAS negotiated with the government's General Services Administration (GSA). A PES schedule set forth the basic terms and conditions, including pricing and rate ceilings, by which the federal government was permitted to buy commercial products and services from companies holding the PES schedule. PES schedules generally had a defined period of performance, and gave the GSA the option to extend the period. Further, the GSA had the right to audit the PES schedules and adjust the rates set forth in them. Although contracting officers from the GSA usually performed the audits, the GSA's Office of Inspector General (OIG) would occasionally become involved. Audits by the OIG typically resulted in rate reductions, and therefore negatively affected the profitability of a contractor's business.

Plaintiff alleges that in early 2010, the GSA notified CAS that it intended to extend one of CAS's PES schedules, which provided the labor rates for CAS's largest contract with the government. The GSA requested that CAS submit new proposed rates, and CAS did so. On March 1, 2010, the OIG sent CAS a letter apprising CAS that the government had chosen CAS's PES

schedule for a "pre-award" audit.

During the OIG audit, Wyle decided to buy CAS. The terms of the sale were memorialized in a Stock Purchase Agreement (SPA), dated August 7, 2010, under which Wyle agreed to pay EDO $235 million to acquire all of CAS's capital stock. Before agreeing to pay the purchase price, however, Wyle insisted that EDO agree to a series of representations allegedly designed to ensure that the potential risks associated with CAS's government contracts were disclosed. According to Wyle, these representations were important because anything that could negatively affect CAS would impair the value of the company.

Thus, Wyle alleged in the complaint, Wyle required EDO to disclose all audits that were ongoing when the parties entered into the contract. Specifically, Article III of the SPA governs "Representations and Warranties of the Seller [i.e., EDO] and the Company [i.e., CAS]." The SPA required EDO and CAS to make certain representations and warranties, including a representation that CAS would disclose whether any of its contracts were under audit as of the date of the SPA. To that end, the SPA stated:

> "Section 3.15(c)(v) of the [accompanying] Company Disclosure Schedule lists each Government Contract or Government Bid to which the Company is a party which, to the Company's knowledge, is as of the date hereof under audit by any Governmental Authority or any other

> Person that is a party to such Government Contract or Government Bid."

EDO, however, allegedly failed to disclose OIG's ongoing audit.

Ultimately, the sale transaction closed on September 8, 2010, without disclosure of the OIG audit. Six months later, on March 4, 2011, GSA announced the results of OIG's audit; the audit resulted in rates lower than CAS had submitted for the new PES schedule and a rate reduction under the then-current PES schedule, which was not due to expire until April 2011. CAS signed the new schedule on March 23, 2011.

In December 2011, after unsuccessful demands for contractual indemnification of the loses arising from EDO's breach of section 3.15(c)(v) of the SPA, Wyle commenced this action, asserting a breach of contract claim for breaching the warranty that required disclosure of the OIG audit, and for refusing to indemnify Wyle for losses caused by that breach. Wyle argued that had it known about the OIG audit, it would have paid less for CAS. By order entered November 14, 2012, the court granted ITT's motion to dismiss the complaint, concluding that Wyle failed to comply with the notice requirements of the indemnification clause.

Pending an appeal from that order, Wyle amended its complaint to add a second cause of action for fraudulent inducement, the subject of this appeal. In the amended

complaint, Wyle alleged that ITT had misrepresented in the SPA that all ongoing audits of every CAS government contract had been disclosed and that, relying on that misrepresentation, Wyle was induced to enter into the agreement and sustained damages in an amount more than $20 million. Wyle also sought punitive damages.

In April 2013, ITT moved to dismiss the amended complaint, arguing that the fraud claim was duplicative of the breach of contract claim because the alleged misrepresentation was a misrepresentation in the SPA itself, and was not collateral to the contract. In opposition, Wyle argued that the misrepresentation was one of present fact, and that the misrepresentation of present fact had induced it to enter into the contract. Wyle also pointed out that the notice requirements in the indemnification clause did not apply to situations of intentional misrepresentation or fraud. Further, Wyle argued, ITT had "superior knowledge" of the OIG audit and had made a partial, and thus misleading, disclosure.

In October 2013, the motion court denied ITT's motion to dismiss the fraud claim. The court concluded that ITT's misrepresentation of the existence of the OIG audit was one of present fact, and not one of future performance. The motion court also noted that a warranty was not a promise of performance, but one of present fact, and that a fraud claim can

be based on a breach of contractual warranties. The court also found that Wyle had sufficiently pleaded justifiable reliance and damages.

By a decision dated February 18, 2014, this Court reversed the motion court's November 2012 order and reinstated the breach of contract claim, finding that the indemnification clause applied (114 AD3d 505 [1st Dept 2014]). In so doing, we found that Wyle had stated a claim because the indemnification clause "excuses late notice by providing that 'no limitation or condition of liability provided for in this Article VIII shall apply in the event of ... intentional misrepresentation'" (*id.* at 507).[2] We further noted that ITT had "deliberately kept Wyle from learning about the audit before the sale, which constitutes intentional misrepresentation" (*id.*).

ITT concedes that its alleged misrepresentation – namely, its failure to disclose existence of the OIG audit – was one of present fact. The parties, however, dispute whether the misrepresentation was collateral to the SPA, or rather, whether it was part of the SPA itself. ITT argues that without allegation of a misrepresentation collateral and extraneous to

[2] The indemnification clause states in full: "no limitation or condition of liability provided for in this Article VIII shall apply in the event of fraud or intentional misrepresentation."

the contract, the claim was essentially a breach of contract claim, and the motion court should have dismissed it. ITT also asserts that Wyle sought the same measure of damages for both its breach of contract and fraud claims.

For its part, Wyle points to case law holding that misrepresentation of a contractual warranty constitutes a misrepresentation collateral to the contract. Wyle also asserts that the SPA itself contemplates a separate claim for fraud based on any intentional misrepresentation in the SPA, as the indemnification clause provides that the contractual damages and indemnification limitations do not apply "in the event of fraud or intentional misrepresentation." Finally, Wyle notes that the damages it seeks on the fraud claim are different from damages sought from the breach of contract claim, as it also seeks punitive damages.

To state a claim for fraudulent inducement, a plaintiff must allege "a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]; *see also Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). A viable claim for fraud concerning a contract must allege misrepresentations of present fact (as opposed to future intent)

that were collateral to the contract and that induced the allegedly defrauded party to enter into the contract (*Sabo v Delman*, 3 NY2d 155, 160 [1957]; *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1st Dept 1998]).

This Court has produced two lines of cases addressing breach of contract claims vis-a-vis fraud claims. One line of cases holds that a fraud claim is duplicative of a breach of contract claim where the fraud claim arises wholly from the written provisions of an agreement. For example, in *J.E. Morgan Knitting Mills v Reeves Bros.* (243 AD2d 422 [1st Dept 1997]), we held that the cause of action for fraud, alleging that the defendants had deliberately given false warranties that there were no undisclosed liabilities burdening the property, was properly dismissed as duplicative of the plaintiffs' cause of action for breach of contract. In so holding, we noted that the fraud alleged was based on the same facts as those that underlay the contract claim, and thus, were "not collateral to the contract," and that plaintiff had alleged "no damages . . . that would not be recoverable under a contract measure of damages" (*id.* at 423; *see also Varo, Inc. v Alvis PLC*, 261 AD2d 262, 265 [1st Dept 1999], *lv denied*, 95 NY2d 767 [2000]).

Likewise, in *ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC* (50 AD3d 397 [1st Dept 2008]), we dismissed a fraud

claim as duplicative of a breach of contract claim, as the fraud claim "arose directly from the written provisions" of the agreements; thus, the only misrepresentations appeared in the contract itself (*id.* at 399). Moreover, we held, there was no merit to the plaintiffs' contention that many of the alleged misrepresentations were extraneous to the contract, as none of the misrepresentations caused the actual investment losses (*id.*).

We took a similar view in *RGH Liquidating Trust v Deloitte & Touche LLP* (47 AD3d 516 [1st Dept 2008], *lv dismissed* 11 NY3d 804 [2008]), where we found that the motion court had properly dismissed the plaintiff's fraud claims as duplicative of the breach of contract claim. In so doing, we found that the fraud claims were based on allegedly fraudulent misrepresentations regarding the defendants' obligation under their agreements with the debtors to conduct audits of financial statements with reasonable care, but alleged no misrepresentations collateral or extraneous to the agreements (*see also Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998] [in dismissing fraud counterclaim, noting that the defendant was seeking nothing more than contract damages, and "far from being collateral to the contract, the purported misrepresentation was directly related to a specific provision of the contract"] [internal quotation marks omitted]).

On the other hand, another line of cases has applied the principle that a fraud claim can be maintained even where it is based on conduct that has some relation to the facts of a breach of contract claim. However, in that line of cases, courts have been obliged to look outside the contracts to determine whether the defendant had made an actionable misrepresentation. Stated another way, in cases where the plaintiffs were permitted to advance a separate fraud cause of action, the misrepresentations concerned matters outside the text of the parties' contracts.

For example, in *First Bank of Ams. v Motor Car Funding* (257 AD2d 287 [1st Dept 1999]), which the motion court cited, the plaintiff alleged in the complaint that it had bought car loans from the named defendant. The contract between the parties in *First Bank* gave the plaintiff a right to purchase certain loans over a period of time. In the contract, the defendant warranted that the loans would conform to certain underwriting guidelines. The allegedly false representations, however, concerned collateral for the loans; the plaintiff alleged that the defendants made the false representations after the parties had signed the contract, when the defendant sold the loans to the plaintiff (*id.* at 292).

Thus, in *First Bank*, the fraud claim was based upon representations entirely separate from the ones in the contract.

Here, in contrast to the situation in *First Bank*, the duty to disclose the audit arose solely from the terms of the parties' agreement. Therefore, the fraud cause of action here presents no duty separate from, or in addition to, the one created by the contract documents. On the contrary, the second cause of action is based on a duty having its only origin in the SPA; according to the SPA, ITT promised to inform Wyle of any ongoing audits, yet it did not so do. Thus, this case differs from *First Bank* in that Wyle alleges no misrepresentation outside the scope of the contract.

Similarly, in *MBIA Ins. Corp. v Countrywide Home Loans, Inc.* (87 AD3d 287 [1st Dept 2011]), the relevant misrepresentations were extraneous to the contract itself. In *MBIA*, the plaintiff entered into multiple insurance contracts with the defendants, agreeing to provide financial guarantee insurance for certain mortgage-backed securities that the defendant had sold to investors. After the defendants were unable to meet their payment obligations on those securities, the plaintiff was forced to pay out on its insurance policies. In its action against the defendants, the plaintiff alleged, among other things, that the defendant made material representations concerning the quality of the mortgage loans underlying the securitizations, and breached warranties in the contracts concerning the quality of those

loans. For example, the plaintiff alleged that the defendant had abandoned its underwriting guidelines by knowingly lending to borrowers who could not afford to repay the loans (*id.* at 291-292). Similarly, the plaintiff alleged that the defendants had provided false or inflated ratings for the proposed pools of mortgage loans (*id.* at 292), and the plaintiff also alleged that one defendant had made misleading statements in its Form 10-K and prospectuses. Thus, as in *First Bank*, these alleged misrepresentations constituted matters of fact outside the actual language of the parties' contracts. As a result, the relevant misrepresentations became evident only upon looking to matters lying outside the terms of the contract, and thus went beyond mere contractual misrepresentations.

In sum, there is a difference between cases in which appellate courts have upheld fraud claims, on the one hand, and cases in which courts have dismissed claims as duplicative of a breach of contract claim, on the other. Specifically, in cases when we have sustained a fraud claim on a motion to dismiss in addition to the breach of contract claim, the fraud claim has been based upon facts outside the contract terms.

Here, as noted above, the fraudulent inducement claim arises from, and is directly related to, section 3.15(c)(v) of the SPA, which governs representations and warranties. Indeed, Wyle

alleges no more and no less that ITT breached its contractual duties as set forth in the representations and warranties of the SPA by failing to disclose the pre-award audit. This allegation does not state any noncontractual misrepresentation; rather, the misrepresentation made under the relevant contract provision also forms the basis for the breach of contract claim (*see Torchlight Loan Servs., LLC v. Column Fin., Inc.*, 2012 WL 3065929, at *10, 2012 US Dist LEXIS 105895, *25 (SD NY 2012) ["it is not sufficient that the alleged misrepresentations are about then-present facts; rather, they also must be 'extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract'"], quoting *Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004]).

The majority notes that the allegedly false representations in this case were warranted to be accurate when the parties entered into the contract, and that EDO made the representations for the purpose of inducing Wyle to purchase the loans. Thus, the majority concludes, EDO made "misrepresentation[s] of then present fact that were collateral to the contract," thus sufficiently stating a cause of action sounding in fraud.

The majority's argument, however, misses the mark: the majority's characterization elides the fact that the contract language itself contains a specific reference to the disclosure

schedule, which supposedly listed every government contract or bid under audit. The fraud claim rests upon Wyle's assertion that despite the clause in the SPA specifically stating otherwise, EDO knew that one of the contracts was, in fact, under audit. Thus, the alleged misrepresentation was specifically addressed by one of the contract terms, and the complaint contains no allegation that EDO made any misrepresentations other than the one specifically referring to the clause in the SPA. This situation therefore presents a claim for breach of contract, not fraud.

Our holding in *First Bank* does not contradict this position. In that case, the warranties in the purchase and sale agreement stated that certain loans to be offered to the plaintiff would comply with certain underwriting guidelines. The fraudulent representations in *First Bank* involved subject matter – namely, quality of collateral, credit history, and amount of down payments – extraneous to the contract warranties themselves (*see First Bank*, 257 AD2d at 292). Although we held that the alleged misrepresentations breached the general underwriting warranty in the underlying agreement, the alleged misrepresentations in *First Bank* also concerned matters that related to the individual loans but that were *not* specifically addressed in the general warranty (*see id.*). The facts in *First Bank* are therefore unlike the ones

presented in the present case, where Wyle does not allege any misrepresentation other than the statement that the contracts were not under audit, and as noted above, the matter of audits was specifically and wholly contemplated by the SPA.

Thus, under the line of cases discussed above – namely, the line of cases beginning with *J.E. Morgan Knitting Mills* – I would hold that the motion court should have dismissed Wyle's fraud claim as duplicative of the breach of contract claim.

What is more, the measure damages Wyle is seeking here – namely, the difference between the price it paid and the price that it would have paid had ITT disclosed the OIG audit – is the same for both the fraud and breach of contract claims. This fact also supports the conclusion that the fraud claim merely duplicates the breach of contract claim (*see e.g. Coppola v Applied Elec. Corp.*, 288 AD2d 41 [1st Dept 2001] [fraud claim not cognizable where the plaintiff did not allege any damages, including those for foregone opportunities, that would not be recoverable under a contract measure of damages]; *Varo, Inc.*, 261 AD2d at 265 [fraud claim duplicative of breach of contract claim where "no damages are alleged that would not be recoverable under a contract measure of damages"] [internal quotation marks omitted]).

There is also no merit to Wyle's assertion that because it

seeks punitive damages on the fraud claim, that claim seeks damages different from those in the breach of contract claim. Indeed, it would make little sense to hold that merely asking for punitives necessarily creates a meaningful difference between a contract claim and a fraud claim; otherwise, a party could sustain a fraud claim merely by tacking on a request for punitive damages.

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15097 Progressive Realty Associates, L.P., Index 151260/14
Plaintiff-Appellant,

-against-

Jamal White,
Defendant-Respondent.

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Sperber Denenberg & Kahan, P.C., New York (Jacqueline Handel-Harbour of counsel), for appellant.

Jamal White, respondent pro se.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 6, 2014, which denied plaintiff's motion for summary judgement on its claims for an order of ejectment seeking to remove defendant from the subject premises and for dismissal of defendant's counterclaims, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff landlord seeks to eject defendant from a cellar apartment in a multiple dwelling. The apartment was leased to defendant's ex-wife in 1997. Defendant was listed as an occupant on the household composition form, but his name was removed in 2006.

In 2008, defendant's ex-wife advised plaintiff that she

wished to terminate the lease. Although defendant had not resided in the apartment for 5 years, he moved back into the unit after his ex-wife moved out. In December 2009, the Division of Housing and Community Renewal terminated defendant's proceeding seeking a renewal lease based on defendant's failure to provide requested information.

The certificate of occupancy designates the unit as a "SUPT'S APT." Defendant is not and has never been the building's superintendent. Plaintiff has offered defendant apartments of a comparable size in other buildings, which defendant refused.

Plaintiff is entitled to summary judgment on its ejectment claim, having established as a matter of law that residential occupancy of the cellar apartment is illegal (*see* Multiple Dwelling Law §§ 216 and 300[6]). Tenant did not controvert landlord's evidence that the unit could not be legalized (*see East 82 v O'Gormley*, 295 AD2d 173 [1st Dept 2002]). Nor has defendant offered any proof of any payments for rent.

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

ENTERED: JULY 7, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15377-
15378 Index 23810/04

Mariama A. Aziz,
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.

_____

Pops and Associates, New York (Jeffrey Mikel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry A. Schachner, J.), entered February 14, 2014 granting reargument, denying plaintiff's motion for an order lifting the stay, denying amendment of the caption to substitute the administrator of plaintiff's estate, and denying plaintiff an extension of time to file the note of issue, and granting defendant's cross motion, dismissing the complaint pursuant to CPLR 3126, unanimously modified, only to the extent that the stay is lifted, and the caption is amended to substitute the plaintiff's estate representative, and is otherwise affirmed, without costs. Appeal from order, same court and Justice, entered October 23, 2013, unanimously dismissed, without costs, as academic.

Plaintiff, who resided in Ghana, claims that while visiting

New York she was injured in front of a building owned by the defendant. Plaintiff returned to Ghana eight months after commencing this action in October 2004, never to return.

Although she was twice ordered by Supreme Court to appear for an independent medical examination (IME), and defendants scheduled her IME five (5) times, accommodating her schedule, plaintiff did not honor any of these scheduled appointments, claiming, at various times, she could not obtain a travel visa, she received notification of the appointment too late to make travel arrangement, or she gave no reason at all why she failed to appear. The deadline to file the note of issue was extended to December 31, 2009, by so-ordered stipulation of the parties dated May 28, 2009.

Plaintiff did not file the note of issue by December 31, 2009, and she moved for an extension of time to do so. The parties resolved that motion by so-ordered stipulation dated January 21, 2010, providing that "plaintiff is to appear for IME by June 10, 2010" and that her time to file the note of was extended to July 30, 2010. Plaintiff did not appear for the IME on or before June 10, 2010 or any time thereafter. She died in Ghana on September 3, 2010.

Plaintiff's son obtained limited letters of administration on April 12, 2012. A prior motion by the City to dismiss and

cross motion by plaintiff's son for substitution were denied by order dated March 7, 2013; the denial of plaintiff's son's motion was for technical reasons (the motion was unsigned) and the denial of the City's motion was on the basis that it was brought while the case was stayed due to plaintiff's death. Plaintiff's son moved a second time for an order lifting the automatic stay in place by reason of plaintiff's death (CPLR 1021 [a]), amending the caption for his substitution as administrator, as party plaintiff (CPLR 1015), and leave to serve the note of issue. Defendant cross moved to dismiss, based upon plaintiff's failure to appear for her IME, pursuant to CPLR 3216. Although the City opposed plaintiff's son's motion, to the extent he sought to file the note of issue indicating discovery was complete, the City did not oppose plaintiff's son's request to lift the stay to allow his substitution as party plaintiff and amendment of the caption.

In its order entered October 23, 2013, the motion court denied the motion by plaintiff's son and granted defendant's cross motion, dismissing the complaint on the basis that plaintiff had failed to appear for her scheduled IME's, thereby prejudicing defendant's defense. Plaintiff's son moved to reargue those motions and the motion court granted reargument. Upon reargument, the court adhered to its prior decision, dismissing the complaint, clarifying that the dismissal was a

discovery sanction for plaintiff's failure to appear for her IMEs that had been rescheduled numerous times prior to her death. Once again, the motion court denied plaintiff's son's motion in its entirety.

The motion court should have granted plaintiff's son's motion for an order lifting the automatic stay and allowing the caption to be amended to reflect the substitution of her estate representative, as required under CPLR 1015(a). Failure to do so divests the court of jurisdiction until a duly appointed personal representative is appointed (*see Griffin v Manning*, 36 AD3d 530 [1st Dept 2007]). However, the "jurisdictional issue can be waived under special circumstances where there has been active participation in the litigation by the personal representative who would have been substituted for the decedent under CPLR 1021" (*Silvagnoli v Consol. Edison Empl. Mutual Aid Soc'y*, 112 AD2d 819, 820 [1st Dept 1985]). Since the decedent's interests were vigorously represented by her son before the motion court (and now, on this appeal), and he should have been substituted as party plaintiff, in the absence of prejudice, we do so now (*see Schwartz v Montefiore Hosp. & Med. Ctr.*, 305 AD2d 174 [1st Dept 2003]). The caption should be amended to substitute Abdul Rashid Aziz, as administrator for the estate of Mariama A. Aziz, plaintiff.

The balance of plaintiff's motion, which was for permission to serve the note of issue and reconsideration of the court's dismissal of the complaint, was, however properly denied. Plaintiff failed to appear for an IME between the time of defendant's initial scheduled IME request in May 2005 and her death in September 2010, notwithstanding court orders and a so-ordered stipulation whereby she agreed to appear for an IME by a date certain and the latest stipulation dated January 21, 2010 wherein she was afforded a 6 month period in which to appear for IME. Such conduct provided a basis upon which the motion court, in its broad exercise of discretion (*see Zletz v Wetanson*, 67 NY2d 711, 713 [1986]), could conclude that plaintiff willfully declined to participate in an IME, and warranted dismissal of the complaint for conduct that materially frustrated the defendant's diligent attempts at seeking disclosure, without sufficient excuse (*see Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374 [1st Dept 1990]; *Xina v City of New York*, 13 AD3d 440 [2d Dept 2004]). Despite the apparent scrivener's error in mis-citing the applicable CPLR provision in the cross motion (i.e. CPLR 3216, versus CPLR 3126), it is clear from the body of the cross motion and arguments raised therein, that defendant was seeking dismissal of the complaint pursuant to CPLR 3126 as a discovery sanction. Since the court's order entered October 23, 2013 was

superceded by the February 14, 2014 order entered on reargument, plaintiff's appeal from the earlier order is dismissed as academic (*Guterding v Guterding*, 55 AD2d 614 [2d Dept 1976]).

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

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

ENTERED: JULY 7, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Richter, Gische, JJ.

15531 In re Ansonia Associates Limited Partnership, Petitioner-Appellant, Index 570033/14 L&T 50451/12

-against-

Marieliz Unwin, etc., Respondent-Respondent,

John or Jane Doe, Respondents.

_____

Duane Morris LLP, New York (Fran M. Jacobs of counsel), for appellant.

Schechter & Brucker, P.C., New York (David H. Ostwald of counsel), for respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered on or about April 9, 2014, which affirmed an order of the Civil Court, New York County (Sabrina B. Kraus, J.), entered October 11, 2013, denying petitioner's motion for summary judgment awarding it possession of the subject apartment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Petitioner established prima facie that the apartment is not respondent's primary residence (*see* Rent Stabilization Code [9 NYCRR] § 2524.4[c]) by submitting respondent's federal income tax returns for the years 2009, 2010, and 2011, on which she deducted the entire rent for the apartment as an expense of her S

Corporation. The instructions for the federal income tax return for an S Corporation (Form 1120S) disallow the deduction of rent "for a dwelling unit occupied by any shareholder for personal use." Thus, respondent's position that the apartment is her primary residence is "contrary to declarations made under the penalty of perjury on income tax returns," i.e. that she does not occupy the apartment for personal use (*see Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]).

Respondent argues that her tax returns are not dispositive because the Rent Stabilization Code states that in determining primary residence "no single factor shall be solely determinative" (9 NYCRR 2520.6[u]). However, we conclude that respondent may not claim primary residence because that claim is "logically incompatible" with the position she asserted on her tax returns (*see Katz Park Ave. Corp. v Jagger*, 11 NY3d 314, 317 [2008]). Respondent has made no showing that would undermine our conclusion.

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15628 The People of the State of New York, Respondent, Ind. 3799/72 4532/72

-against-

Curtis Johnson, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Jill Konviser, J.), entered on or about June 25, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, on the law, to the extent of vacating the designation as a sexually violent offender, and otherwise affirmed, without costs.

Defendant was properly adjudicated a level three sex offender. Clear and convincing evidence established that defendant was properly scored 30 points under the risk factor for number of victims (*see People v Mingo*, 12 NY3d 563 [2009]). The court properly considered highly reliable proof of a pattern of associated sex crimes, since neither the Board nor the hearing court was limited to the underlying convictions (*see People v*

Epstein, 89 AD3d 570 [1st Dept 2011]; *People v Johnson*, 77 AD3d 548 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

Defendant's contention that he should have received a downward departure is unpreserved because he made no such application to the hearing court (*see People v Gillotti*, 23 NY3d 841, 861, n 5 [2014]). In any event, we find no basis for such a departure.

As the People concede, a court making a redetermination under *Doe v Pataki* (3 F Supp 2d 456 [1998]) may not make a sexually violent offender designation (*People v Velez*, 100 AD3d 847 [2d Dept 2012], *lv denied* 21 NY3d 853 [2012]).

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15629 Sylford G. Davis, etc., Index 106956/08
Plaintiff,

-against-

Nyack Hospital, et al.,
Defendants.
- - - - -
Darren Epstein, et al.,
Nonparty Appellants,

-against-

Fellows Hymowitz, P.C.,
Nonparty Respondent.

_____

Law Office of Mark D. Lefkowitz, New City (Mark D. Lefkowitz of counsel), for appellants.

Daniel M. Kolko, White Plains, for respondent.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about May 9, 2014, which, to the extent appealed from as limited by the briefs, denied nonparties Darren Jay Epstein and Darren Jay Epstein, Esq., P.C.'s cross motion to enforce a confidentiality agreement and to seal motion papers, unanimously affirmed, with costs.

Darren Epstein was a partner/shareholder of Fellows, Hymowitz, & Epstein, P.C. until September 2012 when he left and established his own firm, Darren Jay Epstein, Esq., P.C. (DJE). After Epstein's departure, his former firm changed its name to

Fellows Hymowitz, P.C. (FH). In June 2013, Epstein, DJE, FH, and others entered into a stipulation globally settling their disputes before a special referee, and the terms of the settlement, including confidentiality and nondisparagement provisions, were read into the record and transcribed. The parties, through counsel, subsequently agreed that the Special Referee could so-order and file the transcript of the global settlement with the Clerk's office.

Thereafter, FH moved to enforce certain terms of the global settlement, which it annexed to motion papers. Epstein opposed and cross moved for, among other things, an order requiring FH to comply with the confidentiality and nondisparagement provisions of the settlement and damages for FH's alleged breach of those provisions by sending two letters. The first letter sought documents from a third party "[i]n advance of the institution of proceedings" against that party, and the second sought, through counsel, to compel Epstein to make a payment required by the settlement.

Supreme Court correctly found that neither letter breached the settlement's confidentiality and nondisparagement provisions. The first letter does not disparage Epstein, nor does it mention the settlement or any of its terms. Although the second letter mentions the settlement, pursuant to the settlement, FH was

permitted to disclose its terms in order to enforce it. Moreover, about two months before FH sent the second letter, Epstein waived the confidentiality provision by agreeing to the filing of the transcript setting forth the terms of the settlement (*see Gresser v Princi*, 128 AD2d 752, 752-753 [2d Dept 1987], *lv dismissed* 70 NY2d 693 [1987]).

Epstein failed to set forth a compelling reason to seal FH's motion (*see* 22 NYCRR 216.1; *Mosallem v Berenson*, 76 AD3d 345, 349 [1st Dept 2010]; *Liapakis v Sullivan*, 290 AD2d 393, 394 [1st Dept 2002]).

We decline to impose sanction or to award attorneys' fees incurred in defending the appeal (*see* 22 NYCRR 130-1.1[c][1]).

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15630-
15631-
15632 In re Imani G.,

A Child Under Eighteen Years
of Age, etc.,

Pedro G., et al.,
Respondents-Appellants,

Administration for Children's
Services,
Petitioner-Respondent.

_____

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

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for Marta C., appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about August 19, 2014, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about August 19, 2014, which found that respondent father had sexually abused the subject child and that respondent paternal grandmother had neglected the child, unanimously affirmed, without costs. Appeals from fact-finding order unanimously dismissed, without costs, as subsumed in the

appeal from the order of disposition.

The court's findings that the father had sexually abused the child in violation of various sections of article 130 of the Penal Law, and that the paternal grandmother had neglected her by failing to take action when the child reported the sexual abuse, are supported by a preponderance of the evidence, including the sworn testimony of the child, which the court found credible (*see* Family Ct Act § 1012[e][iii], [f][i][B]). There is no basis to disturb the court's credibility determination (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Daniela R. [Daniel R.]*, 118 AD3d 637, 637 [1st Dept 2014]). The child's testimony was competent evidence and was not required to be corroborated by other evidence (*see Matter of Marelyn Dalys C.-G. [Marcial C.]*, 113 AD3d 569 [1st Dept 2014]). In any event, the child's testimony was corroborated by medical records, which included the child's similar account of the sexual abuse and stated that she

had symptoms of depression, anxiety and post-traumatic stress disorder.

We have considered the father's and grandmother's remaining contentions and find them unavailing.

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15633- Ind. 6548/06
15634- 41/07
15635- The People of the State of New York,
Respondent,

-against-

Carl D. Wells,
Defendant-Appellant.

_____

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

Carl D. Wells, appellant pro se.

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

_____

Judgments, Supreme Court, New York County (Gregory Carro, J.), rendered March 9, 2011, convicting defendant, upon his pleas of guilty, of two counts of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 20 years to life, unanimously reversed, on the law, the pleas vacated, and the matter remanded for further proceedings consistent with this decision. Appeal from order, same court and Justice, entered on or about December 4, 2013, which denied defendant's pro se motion to vacate the judgment pursuant to CPL 440.10, unanimously dismissed, as academic.

Defendant's waiver of his right to counsel was invalid, since the court failed "to evaluate adequately defendant's

competency to waive counsel, to warn him of the risks inherent in proceeding pro se and to apprise him of the importance of the lawyer in the adversarial system of adjudication," before granting his request to proceed pro se (*People v Arroyo*, 98 NY2d 101, 104 [2002] [internal quotation marks omitted]). In the absence of adequate warnings, it does not avail the People to rely on any other factors, such as that defendant was in his 40s and had previously represented himself in criminal cases, particularly in light of defendant's history of mental illness and substance abuse. The court's warnings long after defendant began to proceed pro se, and represented himself at important proceedings, "were incapable of retrospectively 'curing' the ... court's error," since "[t]he critical consideration is defendant's knowledge at the point in time when he first waived his right to counsel" (*People v Crampe [Wingate]*, 17 NY3d 469, 483 [2011], *cert denied* 565 US __, 132 S Ct 1746 [2012]).

Since defendant's waiver of his right to counsel was not knowing, intelligent, and voluntary, neither were his guilty pleas. Defendant pleaded guilty after representing himself at his suppression hearing, and the court denied his suppression motion in its entirety. The "court's failure to warn defendant of the risks inherent in proceeding pro se requires a new suppression hearing" (*People v Slaughter*, 78 NY2d 485, 491

[1991]).

Since we are reversing the judgments and vacating the pleas, we find it unnecessary to reach defendant's alternative arguments for the same relief.

Defendant's constitutional speedy trial claim is unpreserved (*see People v Jeffries*, 62 AD3d 530 [1st Dept 2009], *lv denied* 13 NY3d 745 [2009]), and we decline to review it in the interest of justice. As an alternative holding, we find that it is without merit (*see People v Taranovich*, 37 NY2d 442 [1975]).

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15636 In re Carlos L.,
Petitioner-Appellant,

-against-

Diomaris C.,
Respondent-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Mirkin & Gordon, P.C., Great Neck (E. Lisa Forte of counsel), for respondent.

_____

Order, Family Court, Bronx County (Erik S. Pitchal, J.), entered on or about June 25, 2013, which denied petitioner's objections to the Support Magistrate's order, dated April 4, 2013, amending an order of support, unanimously affirmed, without costs.

Family Court correctly denied petitioner's objections to the Support Magistrate's sua sponte amendment of the written order of support to include provisions that had been inadvertently omitted from the order. The amendment was supported by both the transcript of the proceedings and the Support Magistrate's written findings of fact (*see* CPLR 5019[a]; *McCaffery v 924 Food Corp.*, 295 AD2d 151, 152 [1st Dept 2002]; *Crain v Crain*, 109 AD2d 1094, 1094 [4th Dept 1985]).

Petitioner was present in court on August 18, 2011 when the Support Magistrate granted his petition for a downward modification of the support granted in a judgment of divorce, and his inquiry at that time reflected his understanding that he would be required to pay $12 per week in child support until January 14, 2012, when his original support obligation of $170 weekly would be reinstated. Accordingly, the omission of this provision from the written order of support was nothing more than inadvertence and did not affect a substantial right (*Crain*, 109 AD2d at 1094).

At the outset of the proceedings on August 18, 2011, petitioner was properly advised of his right to counsel and to an adjournment in order to hire or speak to counsel (*see* Family Ct Act §§ 433[a], 435[b]). The record shows that petitioner explicitly waived these rights (*see Matter of Miranda v Vasquez*, 14 AD3d 566, 566 [2d Dept 2005]).

Since petitioner's communications with the court did not reflect an "obvious" lack of understanding of the English language, the Support Magistrate had no obligation to provide him with an interpreter (*Matter of Catholic Guardian Socy. of Diocese of Brooklyn v Elba V.*, 216 AD2d 558, 559 [2d Dept 1995] [internal quotation marks omitted]). Moreover, petitioner declined the Support Magistrate's offer of a Spanish interpreter during the

proceedings.

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

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15637 El-Ad 250 West LLC, Index 652964/13
Plaintiff-Appellant,

-against-

Zurich American Insurance Company,
Defendant-Respondent.

_____

Dickstein Shapiro LLP, New York (James R. Murray of counsel), for appellant.

Mound Cotton Wollan & Greengrass, New York (Philip C. Silverberg and Mark S. Katz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 30, 2014, which denied plaintiff's motion for partial summary judgment, and granted defendant's motion for partial summary judgment declaring that the builders risk insurance policy defendant issued to plaintiff limited the amount defendant must pay for delay in completion losses caused by the peril of flood to $5 million, and that the policy's flood deductible applied to such payments, unanimously affirmed, with costs.

The plain language of the delay in completion coverage form, which incorporated the policy terms by reference (*see AIU Ins. Co. v American Motorists Ins. Co.*, 292 AD2d 277, 278 [1st Dept 2002]), applied the $5 million flood sublimit to "all" losses, including nonphysical damage losses, such as those resulting from

a delay in completion. Reading the coverage in such a way as to find that flood losses do not apply to delay in completion losses would render the flood limit meaningless with respect to that coverage (*see Executive Risk Indem., Inc. v Starwood Hotels & Resorts Worldwide, Inc.*, 98 AD3d 878, 881 [1st Dept 2012], *lv denied* 21 NY3d 851 [2013]; *see also Altru Health Sys. v American Protection Ins. Co.*, 238 F3d 961, 964 [8th Cir 2001] [applying flood coverage sublimit to business interruption and extra expense coverages]; *Gilbert/Robinson, Inc. v Sequoia Ins. Co.*, 655 SW 2d 581, 586 [Mo Ct App 1983] [finding flood endorsement's limit applied to reduce business interruption coverage]).

In light of the policy language, plaintiff's contention that the flood limit applies solely to losses resulting from physical damage, is unavailing. The fact that the main policy and the coverage form may have separate deductibles or coverage periods pertains to the type of losses at issue, and does not preclude a single overriding flood limit.

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15638 In re Roy T. Richter, etc., Index 101447/13
Petitioner-Appellant,

-against-

Michael A. Cardozo, etc., et al.,
Respondents-Respondents.

_____

Ungaro & Cifuni, LLP, New York (Nicholas Cifuni of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered November 12, 2014, denying petitioner's article 78 petition seeking, inter alia, an order prohibiting respondent Corporation Counsel of the City of New York from providing statutory interpretation and legal direction to the New York City Police Pension Fund Medical Board regarding the application of Administrative Code of City of NY § 13-254, and dismissing the proceeding, unanimously modified, on the law, to vacate so much of the judgment as indicates that the Board of Trustees may not engage in statutory interpretation, and otherwise affirmed, without costs.

In his article 78 petition, petitioner, a trustee on the Police Pension Fund (PPF) Board of Trustees, sought an order prohibiting respondent Corporation Counsel from conveying to the

PPF's Medical Board a memorandum outlining his interpretation of the applicable standard under the so-called "safeguards statute" (Administrative Code § 13-254). The statute provides a mechanism for a police officer retired on disability to be reexamined by the Medical Board with an eye toward returning to City employment, either at the retiree's own request or by application of the Board of Trustees. We agree with respondent that the Medical Board is his client and that such a communication falls well within his broad duty to "conduct [] all the law business of the city and its agencies" (New York City Charter § 394[a]), and PPF in particular (*see* Administrative Code § 13-216[e][5][ii]). Contrary to petitioner's argument, the communication is not barred by attorney-client privilege attaching to either the Board of Trustees or petitioner individually.

However, the court erred in concluding that the Board of Trustees is not empowered to differ with its counsel on matters of statutory interpretation and reach its own position on such questions (*see Matter of Seiferheld v Kelly*, 16 NY3d 561, 568 [2011] ["Of course the trustees should weigh the advice of the City's Law Department in deciding the question, but the decision is theirs, subject to appropriate judicial review."]). Indeed, the Board implicitly interprets the governing statute with each of its individual determinations in the regular course of

business. While the Trustees' autonomy in this regard has limited value in the circumstances of this case, in that they are bound by the determinations of the Medical Board under the safeguards statute, the proposition that respondent's interpretation of any statute always trumps the interpretation of an agency is untenable and inconsistent with the basic role of counsel. Accordingly, the court's decision is modified to the extent of vacating the holding that the Board of Trustees is prohibited from engaging in statutory interpretation.

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15639 The People of the State of New York, Ind. 6818/03
Respondent,

-against-

Christopher Timmons,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

_____

Appeal from judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about July 23, 2010, unanimously dismissed, as moot.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15640- Index 303448/10
15640A Dana Jackson,
Plaintiff-Appellant,

-against-

Whitson's Food Corp., et al.,
Defendants-Respondents.

_____

Isaacson, Schiowitz & Korson, LLP, Rockville Centre (Jeremy Schiowitz of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for Whitson's Food Corp. and Whitson's Food Service Corp., respondents.

Kaufman Dolowich & Voluck, LLP, New York (Rohit K. Mallick of counsel), for Camba, Inc., respondent.

_____

Orders, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered May 16, 2014, which, to the extent appealed from, granted defendants' motions for summary judgment dismissing the complaint, and denied plaintiff's cross motion to strike defendant Camba, Inc.'s answer for spoliation of evidence, unanimously modified, on the law, to deny defendants' motions, and otherwise affirmed, without costs.

Plaintiff alleges that she sustained personal injuries after she slipped and fell on liquid that was on the hallway floor of a homeless women's shelter operated by defendant Camba. Defendants Whitson's Food Corp. and Whitson's Food Service Corp.

(collectively Whitson's Food) delivered prepared meals to the shelter on the day of the accident. Plaintiff alleges that she routinely observed liquid at the accident location after Whitson's Food completed its food deliveries and that she complained about the liquid to Camba's maintenance staff.

Camba failed to make a prima facie showing that it lacked constructive notice of the liquid on the floor. Although Camba's employee testified that she completed her inspection of the building about an hour before the accident, and that it was her usual custom and practice to pass by the area where plaintiff claims she fell, she could not recall whether she inspected the accident location itself that afternoon when she made her rounds (*see Jahn v SH Entertainment, LLC*, 117 AD3d 473, 473 [1st Dept 2014]). Her affidavit stating that she did not observe a slippery substance or liquid on the hallway floor during her daily rounds did not satisfy Camba's burden of showing it had no actual or constructive notice of the dangerous condition alleged and that it did not exist for a sufficient length of time prior to the accident to permit Camba employees to discover and remedy it (*see Gordon v Am. Museum of Natural History*, 67 NY2d 836 [1986]). Camba also failed to present evidence regarding the shelter's cleaning schedule, and Camba's employee lacked personal knowledge regarding the shelter's maintenance (*see Rodriguez v*

Board of Educ. of the City of N.Y., 107 AD3d 651, 651-652 [1st Dept 2013]).

Even if Camba had met its initial burden, the record shows that there exists a question of fact as to whether it had notice of a recurring condition. Plaintiff's testimony that she frequently would see liquid leaking from Whitson's Food's delivery crates at the accident location, and that she complained to Camba's maintenance staff about the liquid, is sufficient to raise a triable issue of fact as to a recurring condition (*see Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107, 107 [1st Dept 2003]).

Whitson's Food, which had a contract with Camba to provide cooked meals for the shelter, failed to make a prima facie showing that it did not launch a force or instrument of harm by dropping liquid on the floor when it delivered food to the shelter on the day of the accident (*see Jenkins v Related Cos., L.P.*, 114 AD3d 435, 436 [1st Dept 2014]). The deposition testimony from an employee of Whitson's Food was insufficient to show that Whitson's Food did not cause or create the liquid condition, since he lacked personal knowledge as to whether the floor was clean after Whitson's Food delivered the food (*Jackson v Manhattan Mall Eat LLC*, 111 AD3d 519, 520 [1st Dept 2013]).

The court providently exercised its discretion in determining that plaintiff was not entitled to sanctions. Plaintiff failed to establish that her case has been fatally compromised as a result of Camba's alleged spoliation of surveillance video footage of the hours before her accident. Plaintiff has sufficient evidence to prove her case, including her own testimony, surveillance footage showing the accident itself, and documents defendants provided during discovery (*see Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 476 [1st Dept 2010]). Plaintiff's February 9, 2010 letter requesting that Camba preserve the surveillance footage of the accident did not indicate that plaintiff wanted Camba to retain the surveillance footage for the hours preceding the accident (*see Duluc v AC & L Food Corp.*, 119 AD3d 450, 452 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]). Therefore, Camba should not be penalized for failing to retain such footage (*id.*).

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15642-
15643 The People of the State of New York
Respondent,

-against-

Jason Lara,
Defendant-Appellant.

Ind. 5117/08

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

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at preclusion motion; Marcy L. Kahn, J. at suppression hearing; Laura A. Ward, J. at jury trial and sentencing), rendered July 31, 2012, convicting defendant of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 18 years to life, unanimously modified, on the law, to the extent of vacating the sentence and remanding for new persistent violent felony offender proceedings and resentencing in accordance with this decision, and otherwise affirmed. Order, same court and Justice, entered December 2, 2013, which denied defendant's CPL 440.20 motion to set aside his sentence, unanimously reversed, on the law, and the motion granted as indicated above.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). A reasonable interpretation of the victim's testimony, taken together with defendant's own trial testimony about the incident, supports an inference that defendant made an unlawful entry into the victim's apartment that was separate from defendant's prior consensual entry. The jury could have reasonably concluded that defendant went out of the apartment, but struggled with the victim in the doorway in an effort to reenter, and that defendant intruded into the apartment to an extent that satisfied the unlawful entry element of burglary (*see People v King*, 61 NY2d 550, 555 [1984]). The jury could also have found, based on defendant's violent and unlawful course of conduct, and without resort to speculation, that the defendant reentered with intent to commit a crime in the apartment.

The court's charge, viewed as a whole, adequately conveyed the proper legal standards relating to the elements of burglary and the jury's evaluation of witness credibility (*see People v Drake*, 7 NY3d 28, 33-34 [2006]), and the court's refusal to add language suggested by defendant did not deprive defendant of a fair trial. The court sufficiently explained the criminal intent element of burglary, and elaboration on this point would not have

been helpful to the jury. The court's thorough instructions on assessing the credibility of witnesses listed interest or lack of interest as only one of many factors to weigh. Although the court omitted the specific language that the jury was not required to reject the testimony of an interested witness or accept that of a disinterested witness, there is no possibility that the jurors, after hearing the entire charge, could have been misled on this issue.

The court properly denied defendant's motion to preclude identification testimony on the ground of lack of CPL 710.30(1)(b) notice. The chain of events leading directly to the crime began when defendant and the victim met in a store and agreed to go to the victim's apartment. Shortly after the crime, the police showed the victim a store surveillance videotape depicting both defendant and the victim. Although the video only showed the very beginning of the events leading up to the crime, rather than the crime itself, the victim's viewing of the video did not constitute an identification requiring notice, because the victim, who was depicted together with defendant in the relevant portion, was "simply ratifying the events as revealed in the videotape" rather than selecting defendant as the perpetrator (*see People v Gee*, 99 NY2d 159, 162 [2002]). Moreover, although the video was played for the jury, the People neither intended to

offer it as evidence of an identification, nor actually did so.

We have considered defendant's various arguments regarding the suppression decision, and we find no basis for reversal.

Defense counsel rendered ineffective assistance at defendant's persistent felony offender adjudication by failing to ascertain that, in violation of *People v Catu* (4 NY3d 242 [2005]), defendant was not advised about postrelease supervision at the time of a prior plea, and by failing to litigate whether the *Catu* violation rendered the prior conviction unconstitutional for predicate felony purposes (*see People v Fagan*, 116 AD3d 451 [2014]). In the present procedural posture, as in *Fagan*, we do not decide the underlying issue of whether a *Catu*-violative conviction may serve as a predicate felony (*see People v Agard*, 127 AD3d 602 [1st Dept 2015]). We only hold that defendant is entitled to a hearing on the issue at which counsel can fully develop a record and arguments.

Defendant's excessive sentence claim is academic because we are ordering a plenary sentencing proceeding.

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15644 Liberty Mutual Insurance Company, et al., Plaintiffs-Appellants, Index 21705/13E

-against-

Five Boro Medical Equipment, Inc., Defendant-Respondent.

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Burke, Gordon, Conway & Loccisano, White Plains (Philip J. Dillon of counsel), for appellants.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered September 4, 2014, which, to the extent appealed from, denied plaintiffs' motion for a default judgment seeking a declaration that they were not obligated to pay defendant for the submitted claims at issue, unanimously reversed, on the law, without costs, the motion granted, and it is declared that plaintiffs are not obligated to pay defendant for the claims at issue.

Plaintiffs are no-fault automobile insurers in New York State. Defendant is a provider of durable medical equipment in New York City. Defendant provides such equipment to claimants under plaintiffs' policies. Plaintiffs came to suspect that defendant was over-billing them for the equipment. Accordingly, as was their right under the policy and the relevant regulations (11 NYCRR § 65, *et seq.*), plaintiffs requested an examination

under oath (EUO) of defendant in order to verify the billings.

Defendant never appeared for the scheduled EUOs. Plaintiffs then commenced this declaratory judgment action. Defendant never answered or appeared. Plaintiffs then moved for a default judgment. Defendant failed to oppose the motion. The IAS court denied plaintiffs' motion for a default judgment, concluding that plaintiffs had not submitted sufficient proof of mailing the letters notifying defendant of the scheduled EUOs We note that defendant has not submitted opposition to the instant appeal.

We reverse. The affirmation of plaintiffs' counsel submitted in support of plaintiffs' motion for default clearly set forth the mailing procedures to defendant. Indeed, counsel represented, under penalty of perjury, that he personally verified the mailing process for every EUO letter sent. This was

adequate proof that the EUO letters were mailed to defendant (*see e.g. Olmeur Med. P.C. v Nationwide Gen. Ins. Co.*, 41 Misc 3d 143 [A][App Term, 2d Dept 2013]); *Longevity Med. Supply, Inc. v IDS Prop. & Cas. Ins. Co.*, 44 Misc 3d 137[A] [App Term, 2d Dept 2014]).

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

ENTERED: JULY 7, 2015

CLERK

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

15645 LAIG, Index 160103/14
Plaintiff-Appellant,

-against-

Medanito S.A.,
Defendant-Respondent.

_____

Emery Celli Brinckerhoff & Abady LLP, New York (O. Andrew F. Wilson of counsel), for appellant.

Becker, Glynn, Muffly, Chassin & Hosinski LLP, New York (Zeb Landsman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 10, 2014, which denied plaintiff's motion for a preliminary injunction, unanimously affirmed, with costs.

In November 2013, plaintiff and defendant began negotiating the potential joint purchase of shares of an Argentine company (CHASA). The parties entered into a Confidentiality Agreement, which included a provision that defendant would refrain from acquiring CHASA shares without plaintiff for a period of one year, unless plaintiff decided not to continue with the acquistion. Subsequently, the parties jointly submitted a binding offer to the shareholders of CHASA to purchase the CHASA shares. While the binding offer contained a merger clause, this clause did not cause the binding offer to supersede the Confidentiality Agreement, as the binding offer does not govern

the relationship or terms between the parties.

Nevertheless, plaintiff failed to sustain its "particularly high" burden of proof with respect to the likelihood of its success on the merits (*Council of City of N.Y. v Giuliani*, 248 AD2d 1, 4 [1st Dept 1998], *lv dismissed and denied* 92 NY2d 938 [1998]; *see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Given the numerous documents and text messages showing that plaintiff did not have the financial ability to purchase the CHASA shares, plaintiff failed to provide sufficient evidence to refute defendant's assertion that plaintiff decided not to continue with the transaction.

Plaintiff also failed to show the prospect of irreparable harm if the injunction is not granted, and the balance of equities in its favor (*Giuliani*, 248 AD2d at 4).

Given the foregoing determination, we need not consider plaintiff's remaining contention regarding an undertaking.

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15646 Mary Theresa Ward, Index 115058/10
Plaintiff-Respondent,

-against-

Ruppert Housing Company, Inc.,
Defendant-Appellant,

Kristina Rios,
Defendant.

_____

Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for appellant.

Weiser & Associates, LLP, New York (Edward Spark of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 28, 2015, which denied defendant Ruppert Housing Company, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured when she tripped over her neighbor's doormat that was in front of plaintiff's apartment door. According to plaintiff, the accident occurred when she first stepped out of her apartment and was looking straight ahead into the hallway. The record presents triable issues of fact as to whether the doormat was an open and obvious condition. Although plaintiff testified she had previously observed the doormat in

the hallway prior to her accident, she also stated that the doormat had never been placed in front of her apartment door. Under these circumstances, there is an issue as to whether the doormat's location was likely to be overlooked (*see Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 93 [1st Dept 2011]*; Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 70-72 [1st Dept 2004]).

Furthermore, defendant was aware of the tripping hazards of having doormats in the common hallways, and informed the tenants that they were prohibited, and that defendant retained the authority to remove them. Plaintiff testified that she complained about the doormat in the hallway, and that defendant failed to act. Thus, the evidence also raises issues of fact as to whether defendants breached their common-law duty to maintain the area in a reasonably safe condition (*see DiVetri v ABM Janitorial Serv., Inc.*, 119 AD3d 486, 488 [1st Dept 2014]; *Westbrook*, 5 AD3d at 72-75).

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15647 The People of the State of New York, Ind. 36054/12
Respondent,

-against-

Frank Pannizzo,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered August 17, 2012, convicting defendant, after a nonjury trial, of attempted possession of burglar's tools, and sentencing him to a term of 90 days, unanimously reversed, on the law and the facts, and the accusatory instrument dismissed.

A police officer testified that on May 7, 2012, at approximately 1:25 p.m., he and his partner briefly observed defendant riding his bicycle in the wrong direction on a one way street, dipping between two or three cars and stopping to peer into their front driver's side windows. The cars were parked at an angle with their rear tires against the curb. When the officers stopped their vehicle and motioned defendant to come over to them, they noticed an open pouch on the front of his bicycle with tools hanging out of it, including wire cutters, a

wrench, three sets of gloves and a screwdriver.

The officer asked defendant, who was fully cooperative and did not attempt to flee, whether he had ever been arrested for robbery, grand larceny or burglary. Defendant admitted that he had two prior burglary convictions, for which he was sentenced to 3 to 6 years and 8 years respectively, and that he was currently on parole.

Defendant testified that he used the tools to collect scrap metal, which was a source of his income, and to fix his bicycle. He claimed that on the day in question he was surveying the area as a source of scrap metal, and that he had looked at the cars from the middle of the street to see if there were drivers in them for safety purposes.

"In conducting its weight of the evidence review, a court must consider the elements of the crime, for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007]). The court must determine, viewing the evidence in the light most favorable to the prosecution, whether there is a valid line of reasoning and permissible inferences from which the fact-finder could have found the elements of the crime proved beyond a reasonable doubt (*see People v Steinberg*, 79 NY2d 673, 681-682 [1992]).

"A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime" (Penal Law § 110.00.) "While the statutory formulation of attempt would seem to cover a broad range of conduct--anything 'tend[ing] to effect' a crime--case law requires a closer nexus between defendant's acts and the completed crime" (*People v Acosta* 80 NY2d 665, 670 [1993]). The accused must engage in conduct that comes "dangerously close" to a completed crime before it can be combined with a criminal intent to constitute an attempted crime (*id.*; *see also People v Nardzay*, 11 NY3d 460, 466 [2008]).

"A person is guilty of attempted possession of burglar's tools when, with the intent to possess burglar's tools, he tries to possess any tool, instrument or other article adapted, designed or commonly used for committing or facilitating offenses involving larceny by a physical taking, and the surrounding circumstances evince an intent to use same in the offense of such character" (*People v Coleman*, 28 Misc 3d 24, 27-28 [App Term, 2d Dept 2005]; *see* Penal Law §§ 110.00, 140.35).

Although the element of intent may be satisfied by circumstantial evidence (*see People v Borrero*, 26 NY2d 430, 434 [1970]), under the particular circumstances of this case the

officer's testimony that he observed defendant, in broad daylight, stopping his bicycle between two or three cars and looking through the driver's side front window, is not, in and of itself, sufficient to support the inference that defendant intended to use the tools to steal any items from the cars. The officer admitted, inter alia, that during the 15 seconds that he observed defendant, he never saw him touch either a tool in the pouch or any of the cars and that the screwdriver set had to be assembled to be usable (*compare People v Coleman*, 28 Misc 3d 24, supra, [conviction for attempted possession of burglar's tools not against the weight of the evidence where the arresting officer testified that when he initially approached the vehicle, defendant was in front seat and appeared to be attempting to remove the vehicle's dashboard]).

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15648 Carey & Associates LLC, Index 650165/08
Plaintiff-Appellant,

-against-

521 Fifth Avenue Partners, LLC, et al.,
Defendants-Respondents,

Green 521 Fifth Avenue LLC,
Defendant.

_____

Carey & Associates LLC, New York (Michael Q. Carey of counsel), for appellant.

Klapper & Fass, White Plains (Joshua H. Klapper of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 25, 2014, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion for summary judgment dismissing plaintiff's first three causes of action, and denied plaintiff's motion for summary judgment on those causes of action, unanimously affirmed, with costs.

The court correctly dismissed plaintiff's rent overcharge claim. Pursuant to the applicable lease agreement, plaintiff's responsibility to pay rent began on March 21, 2003 — the date it signed the substantial completion letter without objection and began occupying the premises for business purposes. Defendant did not allow plaintiff to occupy the premises before the rent

commencement date.

The court correctly dismissed the actual eviction and breach of the covenant of quiet enjoyment causes of action. The additional renovation work about which plaintiff now complains, which included, among other things, the complete removal and reinstallation of carpeting, was specifically requested by plaintiff. Thus, the work does not amount to an eviction or ouster (*Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 250 [1st Dept 2005], *lv denied* 7 NY3d 704 [2006]; *see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82-83 [1970]).

Plaintiff has abandoned its appeal with respect to its unjust enrichment and negligence causes of action, as it did not address the dismissal of those claims in its appellate briefs (*Furlender v Sichenzia Ross Friedman Ference LLP*, 79 AD3d 470, 470 [1st Dept 2010]).

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: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15649N- Index 155308/13
15650N- 100807/13
15651N-
15652N-
15652NA-
15652NB Joan C. Lipin,
Plaintiff-Appellant,

-against-

Danske Bank, et al.,
Defendants-Respondents.

- - - - -

Joan C. Lipin,
Plaintiff-Appellant,

-against-

Danske Bank, et al.,
Defendants-Respondents,

David E. Hunt,
Defendant.

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Joan C. Lipin, appellant pro se.

Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., New York (Francis J. Earley of counsel), for Danske Bank, respondent.

Allegaert Berger & Vogel LLP, New York (Lauren J. Pincus of counsel), for ULF Bergquist, Bergquist Advokatbyrå AB, David A. Berger, Allegaert Berger & Vogel LLP, Evelyn F. Ellis, Krainin Real Estate, Dana A. Sawyer, Robert Gary Lipin and Ann Susan Markatos, respondents.

Preet Bharara, New York (Mónica P. Folch of counsel), for Catherine O'Hagan Wolfe, respondent.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Mark K. Anesh of counsel), for Joseph R. Mazziotti, respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered June 24, 2014, which denied plaintiff's motion for a default judgment against defendants in action number one (index # 100807/13) on the ground that the court lacked jurisdiction due to removal of the action to federal court, and enjoined plaintiff from making additional motions in the action without the court's consent, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 18, 2013, which denied another motion for a default judgment on the same ground, unanimously dismissed, without costs, as untimely taken. Appeal from order, same court and Justice, entered September 24, 2013, which denied plaintiff's motion to reargue a motion for default judgment on the same ground, unanimously dismissed, without costs, as taken from a nonappealable paper. Order, Supreme Court, New York County (Louis B. York, J.) entered June 19, 2014, which denied plaintiff's four motions for default judgments against defendants in action number two (index # 155308/13) also on the ground of lack of jurisdiction due to removal of the action to federal court, and also enjoined plaintiff from making additional motions in the action without the court's consent, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 23, 2013, which denied another motion for default judgment on the same ground, unanimously

dismissed, without costs, as untimely taken. Appeal from order, same court and Justice, entered September 25, 2013, which denied plaintiff's motion to reargue her prior motion for default judgment on the same ground, unanimously dismissed, without costs, as taken from a nonappealable paper.

In these two related actions, the motion court properly denied plaintiff's motions for default judgments on the basis of lack of jurisdiction. Once the underlying actions were removed to the United States District Court for the Southern District of New York by the filing of the notice of removal with the state court, the state court no longer had jurisdiction to rule on plaintiff's motions (*see* 28 USC § 1446; *Clayton v American Fedn. of Musicians*, 243 AD2d 347 [1st Dept 1997]). The notice of removal was timely and properly filed (*see* 28 USC § 1446), and the District Court has original jurisdiction over claims alleging violations of federal statutes, as well as supplemental jurisdiction over the state claims, including the Judiciary Law § 487 claims, since they arose out of the same case or controversy (*see* 28 USC §§ 1331, 1367[A], 1441[a]; *Eastern States Health & Welfare Fund v Philip Morris, Inc.*, 11 F Supp 2d 384, 388 [SDNY 1998]).

Furthermore, the court properly exercised its discretion in enjoining plaintiff from making any further motions in these

actions without prior court approval given the frivolous motions she continued to file even after the action was removed to federal court, and after the motion court concluded that it lacked subject matter jurisdiction (*see Bikman v 595 Broadway Assoc.*, 88 AD3d 455 [1st Dept 2011], *lv denied* 21 NY3d 856 [2013]*; Jones v Maples*, 286 AD2d 639 [1st Dept 2001], *lv dismissed* 97 NY2d 716 [2002]).

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15653N- Index 401189/08
15654N- 401190/08
15655N In re Metropolitan Transportation Authority, etc. 401191/08

196 Bway Food Court, Inc.,
Claimant-Appellant,

-against-

Metropolitan Transportation Authority,
Condemnor-Respondent.

- - - - -

196 Bway KFC, Inc.,
Claimant-Appellant,

-against-

Metropolitan Transportation Authority,
Condemnor-Respondent.

- - - - -

196 Bway TGI, Inc.,
Claimant-Appellant,

-against-

Metropolitan Transportation Authority,
Condemnor-Respondent.

_____

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

Berger & Webb, LLP, New York (Kenneth J. Applebaum of counsel), for respondents.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered November 5, 2014, which granted three consolidated motions by condemnor Metropolitan Transportation Authority for

"an order striking from [claimants'] trade fixture claims those items which became the property of DLR Properties, LLC (DLR) under the terms of the [] leases," to the extent of precluding claimants from offering valuation evidence as to those fixtures at trial, unanimously affirmed, without costs.

Because the relief sought by MTA was ultimately to limit evidence at trial of those fixtures which, under the terms of the leases, claimants had no right to remove from the demised premises, these were motions *in limine* which were timely made by MTA.

A reading of the plain terms of the leases, most particularly Article 54(B) thereof, indicates that claimants were not entitled to remove from the demised premises existing fixtures, furniture or new furniture, and were only entitled to remove their "movables." Thus, to the extent claimants seek just compensation related to fixtures they had no right to remove from the premises at the expiration of the leases, those claims are precluded under the lease and claimants were properly precluded from submitting evidence at trial with respect thereto (*accord Matter of City of New York [G&C Amusements]*, 55 NY2d 353, 359 [1982]).

Contrary to claimants' arguments, the motions were not barred by the law of the case doctrine (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]).

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

ENTERED: JULY 7, 2015

CLERK

Tom, J.P., Friedman, Andrias, DeGrasse, Gische, JJ.

14168 The People of the State of New York Ind. 1727/08
Respondent,

-against-

Luis Paulino,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc Eida of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered April 20, 2012, affirmed.

Opinion by DeGrasse, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Richard T. Andrias
Leland G. DeGrasse
Judith J. Gische, JJ.

14168
Index 1727/08

_____x

The People of the State of New York
Respondent,

-against-

Luis Paulino,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Troy K. Webber, J.), rendered April 20, 2012, convicting him, after a jury trial, of criminal possession of a weapon in the second degree, and criminal possession of a controlled substance in the second degree, and imposing sentence.

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

Robert T. Johnson, District Attorney, Bronx (Marc Eida and Stanley R. Kaplan of counsel), for respondent.

DEGRASSE, J.

The primary issue before us is whether defendant's right to be free from an unlawful search and seizure was violated when the police entered his home without a warrant. We conclude that the court below correctly determined that exigent circumstances justified the warrantless entry under the particular facts of this case.

The following evidence was adduced at the suppression hearing. On March 24, 2008 at 12:30 a.m., New York City Police Department Detectives Suarez, McCrosson, Lovera and others went to a bar on Jerome Avenue, the scene of a shooting that had occurred 15 minutes earlier. One man was shot dead and another seriously wounded. Witnesses to the shooting told the detectives that the assailant was a man named Luis who drove a large black SUV. After further investigation, defendant, the registered owner of a black Nissan Armada, was determined to be the suspect in the shooting. At approximately 5:00 a.m., eight witnesses identified defendant from a series of photo arrays generated by the Police Department's photo manager system.

At 5:30 a.m., Detective McCrosson and six other detectives went to defendant's East 179th Street apartment. No one in the apartment responded to McCrosson's knock on the door. Defendant's next door neighbor opened her door and confirmed to

the detectives that defendant occupied the apartment with his wife and children. The neighbor allowed McCrosson to pass through her apartment and climb onto a fire escape that was accessible from her apartment as well as defendant's. McCrosson then knocked on defendant's bedroom window and Marisol Santiago, defendant's wife, opened the curtain. At McCrosson's direction, Santiago went to the front of the apartment and opened the door.

As Santiago opened the door, the detectives identified themselves. The detectives requested and received Santiago's permission to enter the apartment. In response to their question, Santiago told the detectives that defendant was inside. Detective Suarez then called out to defendant, who did not respond. The detectives eventually directed Santiago and her three children to a neighbor's apartment and then called the Police Department's Emergency Services Unit (ESU) for the risky task of searching for defendant in the dark apartment. Defendant was arrested after the responding ESU canine team found him hiding in a shower stall behind a piece of sheetrock.

While searching for defendant's Nissan Armada, the detectives were told by the attendant of a nearby parking lot that he also drove a black BMW that was owned by Fabian Martinez, his friend. While in the apartment, the detectives saw keys to the BMW on a table. The keys were given to Detective O'Neal by Santiago who

confirmed that defendant drove the car. Santiago also directed the detectives to the BMW which was parked across the street from the apartment building.

After his arrest, defendant was taken to the 52nd Precinct where he met with Detective Suarez, who interviewed him after giving *Miranda* warnings. It is not disputed that after waiving his *Miranda* rights, defendant wrote and signed a statement detailing the events that led to his arrest. In his statement, defendant admitted that he got into an argument with two men at the bar. Feeling humiliated by the men, defendant left, went home and returned to the bar with a gun. One man broke a bottle and defendant told the men to arm themselves. According to defendant, the men struck him, and he had to defend himself. Lastly, defendant admitted that he went home, placed the gun in a bag with some drugs and then hid the gun and drugs in a car that he had borrowed from a friend. At about 11:00 a.m., defendant wrote and signed an additional statement by which he gave the police permission to search his friend's car, the black BMW. During a videotaped statement, however, defendant asserted that the BMW had already been searched when he signed the consent statement. McCrosson testified that at approximately 11:40 a.m., he along with Detective O'Neal and Sergeant Omloft searched the BMW and found the pistol with two loaded magazines and the drugs

that defendant moved to suppress. By contrast, defendant's son testified at the suppression hearing that he saw police officers searching the BMW when he, his mother and his sisters were escorted from the apartment building at a time before defendant was taken to the precinct where he executed the consent statement. The differing accounts given by McCrosson and defendant's son created an issue as to whether the police searched the BMW before or after defendant consented to the search.

Defendant argued below that the gun, the drugs and his statements should have been suppressed as the fruit of an unreasonable warrantless entry into his home to effect his arrest (*see Payton v New York*, 445 US 573, 586 [1980]). He also challenged the validity of his consent to the vehicle search. Citing *People v McBride* (14 NY3d 440 [2010], *cert denied* 562 US 931 [2010]), the motion court resolved the *Payton* issue, finding the detectives' entry into defendant's home justified by exigent circumstances.

Factors to be considered in determining whether exigent circumstances are present include

> "(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause ... to believe that the suspect committed the crime; (4) strong reason to

> believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry" (*McBride*, 14 NY3d at 446 [citations omitted]).

This list of factors is illustrative and not exhaustive (*id.*). The court's finding of exigent circumstances is supported by evidence in the record that defendant had been identified by name and from a photograph as the assailant who shot the two men at the bar only hours before. Accordingly, there was probable cause for defendant's arrest. Moreover, the Nissan Armada was traced to defendant's nearby address where there was reason to believe he could be found. There was reason to believe defendant was armed inasmuch as he was said to have left the bar with his weapon. The record also supports the court's conclusion that the circumstances of the Police Department's entry into the apartment were peaceful.

Defendant correctly argues that the motion court failed to make the essential finding of fact as to whether the search of the BMW was conducted before or after defendant consented to the search. The court was required to make the finding under CPL 710.60(4), which provides that a court conducting a suppression hearing must "make findings of fact essential to the determination thereof." Nonetheless, on our own examination of the record, we credit the testimony of Detective McCrosson and

find that the police obtained defendant's consent before they searched the BMW and recovered the pistol and drugs (*see e.g. People v Antonetti*, 251 AD2d 118 [1st Dept 1998], *lv denied* 92 NY2d 922 [1998]; *People v Morgan*, 226 AD2d 398, 400 [2d Dept 1996], *lv denied* 88 NY2d 939 [1996]). In light of the overwhelming evidence of defendant's guilt, the admission of his statements, even if erroneous under *Payton*, would have been harmless beyond a reasonable doubt (*see e.g. People v Minley*, 68 NY2d 952 [1986]; *People v Maldonado*, 75 AD2d 558 [1st Dept 1980]). We particularly note that, as shown below, defendant was convicted of nothing more than crimes he admitted during his trial testimony. Accordingly, we conclude that defendant's motion to suppress the physical evidence and his statements was properly denied.

At trial, a jury acquitted defendant of murder in the second degree, assault in the first degree and the other counts related to the shootings. Defendant was convicted of criminal possession of a weapon in the second degree, and criminal possession of a controlled substance in the second degree. These two counts relate solely to the gun and drugs that the police recovered from the BMW.[1]

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[1]Against the advice of counsel, defendant testified at trial that after shooting the two men, he hid the gun and drugs in the BMW.

Defendant argues that he "was deprived of his right to counsel when the trial court summarily denied his oral request for reassignment of counsel without conducting any inquiry or ... giving him an opportunity to discuss the grounds for his motion." The argument lacks merit. During jury selection, defense counsel advised the court that he and defendant disagreed with respect to the use of peremptory challenges. The court indicated that it would not appoint new counsel. Upon requesting and receiving permission to address the court, defendant stated the following:

> "Your Honor, I would like to tell your Honor that I have spoken with my lawyer about the case here about issues that I believe would be favorable to me and I think he disagrees with what I have to say. This is not the first time. It has happened about five times already. He never agrees with what I'm saying."

Whether counsel is substituted is within the discretion of the trial court (*People v Porto*, 16 NY3d 93, 99 [2010]). Once a seemingly serious request for the assignment of new counsel is made the court must make at least a "minimal inquiry" as to "the nature of the disagreement or its potential for resolution" (*id.* at 99-100, quoting *People v Sides*, 75 NY2d 822, 825 [1990]). Based on the foregoing colloquy, we find that the court made the minimal inquiry required by *Porto* and *Sides* and allowed defendant to air his disagreement with counsel. Although the court initially denied defendant's application without inquiry, there was no abuse of discretion because defendant was later allowed to

voice his concerns about defense counsel (*see People v Nelson*, 7 NY3d 883, 884 [2006]). In any event, defendant's expressed disagreement with his attorney's strategy did not constitute good cause for the reassignment of counsel (*see People v Newell*, 200 AD2d 451 [1st Dept 1994]).

Defendant next argues that the court erred in failing to conduct an inquiry pursuant to *People v Buford* (69 NY2d 290 [1987]) with respect to a juror's absence on a trial day. On February 7, 2012, during the third week of trial, juror number nine failed to appear at court and could not be reached by court personnel. With the consent of counsel, the court adjourned the trial for two days in order to enable a court officer to check on the juror at his home. On the adjourned date, the court officer reported that she met with juror number nine who told her that he wasn't feeling well and that he had told Justice Webber that he would return to court on February 9, 2012. It was undisputed that no such conversation between the court and the juror occurred. The court decided to continue with the trial and address the juror's conduct at its conclusion. Defense counsel stated that he was concerned about the juror's fitness to continue with the trial. The court declined to conduct the requested inquiry and the trial continued to verdict. Defendant argues that the court erred in denying his request for a *Buford*

inquiry. We disagree.

To the extent applicable, CPL 270.35(1) provides that a court must discharge a sworn juror where "the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature, but not warranting the declaration of a mistrial . . ." Defendant does not argue on appeal that the juror was grossly unqualified or that his apparent misconduct was substantial. Defendant's only claim of error stems from the court's refusal to conduct a *Buford* inquiry. Viewed in light of the request made before the trial court, defendant's argument is based on a misconstruction of *Buford.* As stated by the Court of Appeals, the purpose of *Buford* was the creation of "a framework by which trial courts could evaluate sworn jurors who, for some reason during the trial, may 'possess[] a state of mind which would prevent the rendering of an impartial verdict'" (*People v Mejias*, 21 NY3d 73, 79 [2013]). A juror with such a state of mind would be "grossly unqualified" (*Buford*, 69 NY2d at 298). Defendant did not request an inquiry contemplated by *Buford*. Instead, defense counsel's request was that the juror be brought into the courtroom and questioned "to see if he repeats these obvious lies" under oath. This request, in actuality, was for the court to set the stage for the juror to

perjure himself and thereby engage in substantial misconduct if he chose to do so. Such ensnarement would not serve the purpose of CPL 270.35.

Moreover, not every misstep by a sworn juror is indicative of substantial misconduct or renders the juror grossly unqualified (*cf. People v Rodriguez*, 100 NY2d 30, 35-36 [2003]). It follows that a determination of whether an inquiry by the court is warranted should be based on the unique facts of each case (*cf. Buford*, 69 NY2d at 299-300). For this reason we distinguish *People v Ventura* (113 AD3d 443 [1st Dept 2014], *lv denied* 22 NY3d 1203 [2014]), a case defendant cites. In *Ventura*, a New York County case, the trial court denied defense counsel's request for an in camera inquiry with respect to a sworn juror who disclosed toward the end of the trial that she had been invited to attend a breakfast at which the New York County District Attorney was scheduled to speak (*id.* at 444). We reversed, finding that the disclosure of the breakfast invitation "indicated a possible issue related to that juror's continued ability to serve in an impartial manner" (*id* at 444-445). Our focus in *Ventura* was on the possibility of juror bias as we did not "know when the breakfast invitation arrived or whether it impacted on the juror's ability to assess the case in an evenhanded manner" (*id.* at 445-446). By contrast, it cannot be

seriously argued in this case that juror number nine's temporary absence from the trial and his inaccurate statement to the court officer indicated bias one way or the other. Defendant also misplaces his reliance upon *Dyer v Calderon* (151 F3d 970 [9th Cir 1998], *cert denied* 525 US 1033 [1998]), in which it was held that a juror who perjured herself during voir dire was unfit to serve (*id.* at 983). Unlike juror number nine's out-of-court statement, the voir dire involved in *Dyer* was presumably conducted under oath (*see e.g. People v Cissna*, 182 Cal App 4th 1105, 1115, 106 Cal Rptr 3d 54 [Cal App 4th Dist 2010]). Accordingly, we also distinguish *People v LaFontaine* (190 AD2d 609 [1st Dept 1993], *lv denied* 81 NY2d 1015 [1993]), in which we held that the trial court did not err in discharging a sworn juror who, among other things, "*committed perjury* in his explanation for an unexcused absence" (*id.* at 610 [emphasis added]).

Finally, in light of the nature of defendant's crimes and his criminal record, we find no reason to disturb the sentence imposed by the court. We have considered defendant's remaining contentions and find them unavailing.

Accordingly, the judgment of the Supreme Court, Bronx County (Troy K. Webber, J.), rendered April 20, 2012, convicting defendant, after a jury trial, of criminal possession of a weapon

in the second degree, and criminal possession of a controlled substance in the second degree, and sentencing him to an aggregate term of 22 years, should be affirmed.

All concur.

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

ENTERED: JULY 7, 2015

CLERK