SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 14, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13164-
13165 Index 112036/11

In re Richard Kusyk, et al.,
Petitioners-Respondents,

-against-

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

Green 333 Corp.,
Respondent-Appellant.

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Stuart A. Klein, New York, for appellant.

Ween & Kozek, LLP, New York (Michael P. Kozek of counsel), for Kusyk respondents.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for municipal respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered August 7, 2012, which granted the City respondents' cross motion to dismiss as against them the petition for a declaration that the certificate of occupancy was unlawfully issued and for revocation thereof, denied as moot respondent Green 333 Corp.'s

motion to dismiss the petition, dismissed the proceeding, and directed respondent New York City Department of Buildings (DOB) to amend the certificate of occupancy forthwith, unanimously affirmed, without costs. Order, same court and Justice, entered December 9, 2013, which, insofar as appealed from as limited by the briefs, denied Green's motion to reargue and for leave to file an answer, unanimously affirmed, insofar as it denied the motion for leave to file an answer, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable paper.

The court properly directed DOB to amend the certificate of occupancy for the subject apartment, which is owned by Green and in which petitioners are tenants. It is undisputed that the only residential use permitted in the zoning district in which the apartment is situated is joint living/working quarters for artists; yet, the certificate of occupancy erroneously indicates a use group requiring purely residential use. Contrary to Green's argument that this matter requires the expertise of the New York City Board of Standards and Appeals, the City respondents properly sought the court's permission to amend the certificate of occupancy, pursuant to New York City Charter § 645(b)(3)(e), which permits a court of competent jurisdiction to

order such an amendment upon written application by DOB.

The court properly denied Green's motion, filed after the proceeding was dismissed, for leave to file an answer. A court need not permit a respondent to file an answer "if the 'facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer'" (*Matter of Kickertz v New York Univ.*, 25 NY3d 942, 944 [2015], quoting *Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 102 [1984]). In contrast to *Kickertz* and *Nassau BOCES*, here the submitted papers fail to disclose any possibility of a triable issue of fact.

We have considered Green's other contentions and find them unavailing.

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

ENTERED: JULY 14, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13896N-
13897N Index 350015/12

Adrienne Faye Saunders,
Plaintiff-Respondent,

-against-

Richard Mark Guberman,
Defendant.

- - - - -

Advocate & Lichtenstein, LLP,
Nonparty Appellant.

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Advocate & Lichtenstein, LLP, New York (Kari H. Lichtenstein of counsel), for appellant.

Law Office of Richard E. Lerner, P.C., New York (Richard E. Lerner of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered January 24, 2013, which, to the extent appealed from, denied defendant's motion for an award of $75,000 in interim counsel fees, and order, same court and Justice, entered on or about August 6, 2013, which, to the extent appealed from, denied defendant's motion for an award of $150,000 in interim counsel fees for trial, unanimously reversed, on the law and the facts, without costs, and the motions granted to the extent of awarding interim counsel fees totaling $125,000. **The Clerk is directed to enter judgment accordingly.**

Domestic Relations Law (DRL) § 237(a) authorizes the court in its discretion to direct either spouse to pay counsel fees

directly to the attorney of the other spouse in order to enable that spouse to carry on or defend certain matrimonial actions or proceedings. DRL § 237(a) further provides that any application for fees may be maintained by the attorney for either spouse in his or her own name in the same proceeding. Where the attorney of a less monied spouse is discharged without cause, the former attorney may seek counsel fees from the monied spouse in the same proceeding (*Frankel v Frankel*, 2 NY3d 601, 606 [2004]).

Contrary to plaintiff's assertions, nonparty appellant law firm has standing to appeal the denial of the January 24, 2013 order. The right to seek counsel fees under DRL § 237(a) includes the right to appeal the denial of such fees. Following the January 24, 2013 order, the firm timely served and filed a notice of appeal on defendant's behalf and may, on this basis, maintain the appeal even after having been granted leave to withdraw from representation for nonpayment of counsel fees. "If lawyers terminated without cause lose their right to petition the court for a fee award from an adversary spouse, the less affluent spouse would suffer the consequences" (*Frankel*, 2 NY3d at 607). The same holds true here. The firm was not required to file a separate notice of appeal to establish and maintain standing to appeal the January 24, 2013 order, and defendant may not cause

the firm, which timely served and filed a notice of appeal on its own behalf from the August 6, 2013 order, to lose standing by withdrawing his separately filed notice of cross appeal of that order.

On the merits, the applications for interim counsel fees were improperly denied. DRL § 237(a) contains a rebuttable presumption that "counsel fees shall be awarded to the less monied spouse" (DRL § 237[a]). Here, the court erred by failing to designate defendant as the less monied spouse. The court's analysis unduly relied on the current incomes of the parties and did not sufficiently consider the value of their assets. Instead of focusing simply on their current incomes, the court should have also weighed the earning history and earning potential of both parties. Although plaintiff was unemployed at the time the motions were made, she earned considerably more than defendant during the course of their relationship, and according to the court's own finding, expects to earn more than defendant upon finding new employment. In addition, while the court recognized that plaintiff had more assets than defendant, it reasoned that the assets were "unlikely to produce an income that is equal to [defendant's]" and mistakenly exempted them from its analysis. As it does here, excluding assets merely because they do not

generate income can severely distort the financial positions of the parties.

We find defendant to be the less monied spouse and therefore presumptively entitled to counsel fees under DRL § 237(a). The purpose of interim counsel fees is to level the playing field while litigation is ongoing (*see O'Shea v O'Shea*, 93 NY2d 187, 190 [1999] ["The courts are to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet"]). Though the court noted that the parties owe similar amounts to their attorneys, plaintiff has vastly outspent defendant over the course of this action, incurring twice as many counsel fees as defendant, and paying five times more to her attorneys than defendant has paid to his.

The court made no indication that the firm provided anything less than effective representation and found it to have

"vigorously" represented defendant. Accordingly, we reverse the orders appealed from, and, based on our review of the record, grant the motions for interim counsel fees to the extent indicated.

The Decision and Order of this Court entered herein on January 6, 2014 is hereby recalled and vacated (*see* M-548 decided simultaneously herewith).

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

ENTERED: JULY 14, 2015

CLERK

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

14029 Jeffrey Silver, Index 100020/13
Plaintiff-Appellant,

-against-

Whitney Partners LLC, et al.,
Defendants-Respondents.

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Jeffrey Silver, appellant pro se.

Rottenberg Lipman Rich, P.C., New York (Robert Freilich of counsel), for Whitney Partners LLC and Alicia Lazaro, respondents.

Pick & Zabicki, LLP, New York (Eric C. Zabicki of counsel), for Douglas J. Pick, respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered December 23, 2013, which, among other things, granted the motion of defendant Whitney Group LLC's (Whitney Group) assignee, Douglas J. Pick, to dismiss the complaint as against the Whitney Group and dismissed the complaint as against all defendants, unanimously affirmed, without costs.

In 2002, plaintiff entered into a joint venture agreement with defendant Whitney Group to share fees for executive search and placement services in the financial industry. The agreement was extended and modified several times and, as relevant here, required Whitney Group to pay plaintiff a commission advance of

$40,000 on October 1, 2008. Neither party disputes that Whitney Group never paid the $40,000.

Because of financial difficulties, Whitney Group ceased operations, and by assignment for the benefit of creditors, under the Debtor and Creditor Law, Whitney Group assigned its assets to a trustee. By Asset Purchase Agreement (APA) dated November 26, 2008, the trustee sold substantially all of the Whitney Group's assets, including its computer hardware and intellectual property, to defendant Whitney Partners for $75,000. The trustee asserted that, although Whitney Partners had been formed by the Whitney Group's former CEO and defendant Alicia Lazaro, both "insiders" of assignor Whitney Group, the APA was the result of arms-length negotiations after competitive bidding. The APA expressly provided that purchaser Whitney Partners did not assume Whitney Group's liabilities, including its debts.

By order to show cause to be served on all known creditors of Whitney Group, the trustee sought approval of the proposed sale. The trustee explained that Whitney Group had become insolvent from over $7 million in losses caused by the defalcations of a former officer. On January 26, 2009, the sale was approved; in addition to the $75,000 price under the APA, the court authorized the sale to another purchaser, in the amount of

$40,000, of a portion of Whitney Group's database.

Plaintiff communicated with defendants more than three years later, by e-mail dated May 9, 2012, addressed to the Whitney Group's former CEO at Whitney Group and Whitney Partners. In his email, plaintiff noted that Whitney Group had not paid the $40,000 due under their agreement. Plaintiff's e-mail was forwarded to the trustee, who immediately responded that there had been an assignment for the benefit of Whitney Group's creditors, and that a notice to file claims had been published and mailed to all creditors.

In January 2013, plaintiff commenced this action against Whitney Group, Whitney Partners, and Alicia Lazaro, an alleged co-founding owner of the Whitney entities. The first cause of action sought recovery of the $40,000 on the theory of breach of contract. The second cause of action sought that amount, and punitive damages, on a fraud theory. Plaintiff alleged, among other things, that defendants created a false impression of the company's financial soundness by concealing a pattern of the managers' personal use of company assets and cash and excessive payments to the CEO for personal travel. Plaintiff further alleged that defendants had concealed their practice of paying executive search commissions to the CEO and Lazaro immediately,

rather than adhering to the stated policy of paying those commissions on a deferred basis.

As to both causes of action, plaintiff alleged that defendant Whitney Partners was the alter ego of Whitney Group, sharing an address, telephone number, domain name, management, employees and business, using the two names interchangeably, and holding Whitney Partners out to the public as a continuation of and successor to Whitney Group. Plaintiff further alleged that defendant Lazaro routinely intermingled personal and company assets and siphoned off funds for personal use, without accounting and disclosure, proper record-keeping or observing corporate formalities.

Defendants interposed a joint answer, asserting an affirmative defense that plaintiff's claims were barred by the assignment for the benefit of creditors, as whatever claims plaintiff may have had were against assignor Whitney Group only, and that in 2008, the Whitney Group had made an assignment for the benefit of creditors under the Debtor and Creditor Law.

After defendants served a document request and plaintiff partially responded, defendant Whitney Group moved to dismiss the complaint under CPLR 3211(a)(4) based on the pending assignment proceeding. On the motion, the trustee conceded that plaintiff’s

claim was not included among the liabilities that Whitney Group had provided him, so the claim was not included in the schedule of liabilities filed in the assignment proceeding, and plaintiff apparently did not receive a notice to file claims. The trustee further conceded that plaintiff's $40,000 claim was valid. However, the trustee asserted that plaintiff was long aware of the assignment proceeding, but chose to do nothing, and had made no inquiry after Whitney Group ceased operations in 2008.

The motion court granted the motion, finding that the decision whether to dismiss a claim in favor of an assignment proceeding was a matter of judicial discretion. In this proceeding, the court found, public policy required dismissal of the complaint, as permitting creditors to bring individual actions would frustrate the purpose of the assignment proceeding and result in expenditure of unnecessary time, money, and judicial resources.

The motion court properly exercised its discretion in determining that plaintiff's claims against defendant Whitney Group LLC should be adjudicated in the pending assignment proceeding, rather than in a plenary action (*see Hynes v Alexander*, 2 App Div 109, 111 [2d Dept 1896]), despite the different legal theories of the claims and the lack of complete

identity of the parties (*see Shah v RBC Capital Mkts. LLC*, 115 AD3d 444, 444-445 [1st Dept 2014]; *Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 95-96 [1st Dept 2013]).

The court also properly exercised its discretion in dismissing the complaint as against all defendants, including the nonmoving parties (*see Barclay Arms, Inc. v Barclay Arms Assoc.*, 74 NY2d 644, 646 [1989]).

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 14, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14062 Greenman-Pedersen, Inc., et al., Index 403085/09
Plaintiffs-Appellants,

-against-

Berryman & Henigar, Inc., et al.,
Defendants-Respondents.

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Howard R. Birnbach, Great Neck, for appellants.

Bracewell & Giuliani LLP, New York (Michael C. Hefter of counsel), for respondents.

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Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered August 1, 2013, after a jury verdict finding against plaintiffs on the cause of action for fraud, dismissing the cause of action for breach of contract, and dismissing the action in its entirety, and awarding defendants costs and disbursements in the amount of $1,125.70, unanimously reversed, on the law, without costs, the judgment vacated, the breach of contract claim reinstated, and the matter remanded for a new trial on the breach of contract claim.

This action arises out of an Asset Purchase Agreement (APA) entered into in 2006, between plaintiff GPI Southeast, Inc. (GPISE), as the buyer, and defendant Berryman and Henigar (B&H), as the seller, concerning the sale of "assets" consisting

primarily of customer contracts relating to engineering services. GPISE is a domestic corporation that provides engineering services in many states. GPISE is a wholly owned subsidiary of plaintiff Greenman Pederson, Inc. B&H is an engineering consulting company that markets itself directly to cities and municipalities. B&H is based in Florida and is owned by defendant Bureau Veritas North America, Inc.

In 2010, plaintiffs commenced this action against defendants alleging claims sounding in fraud and breach of contract, among others.[1] The breach of contract claim alleges that defendants made misrepresentations of material facts in the APA. The fraud claim avers that defendants failed to disclose certain documents concerning alleged adverse contract information during the due diligence period prior to the execution of the APA. Essentially, plaintiffs allege that defendants intentionally concealed or misrepresented the status of several projects in which defendants were performing poorly or in breach.

A jury trial of plaintiffs' fraud and contract claims was held over six days between April 23 and May 1, 2013. The trial

[1] The claims sounding in negligent misrepresentation and quantum meruit have been dismissed and are not the subject of this appeal.

court, however, dismissed the contract claim, and submitted only the fraud claim for the jurors' consideration. As to the latter, the jury found in favor of defendants, upon answering "no" to the following interrogatory in the verdict sheet: "In the course of due diligence, did employees of defendant intentionally fail to provide information, i.e., the letters and e-mails designated as plaintiffs' exhibits 10, 12, 16, 18, 19, 23 and 26 [the adverse contract information], and was such information material?" Plaintiffs appeal both the jury verdict dismissing the fraud claim and Supreme Court's dismissal of the breach of contract claim.

We find that plaintiffs are not entitled to a new trial on their fraud claim, the only claim submitted to the jury. Plaintiff raises a plethora of contentions relating to various alleged errors in the court's jury charge. For the most part, the alleged contentions as to the jury charge are not preserved, and to the extent they are preserved, all but one plaintiffs' arguments are devoid of merit. We find that the trial court erred in refusing to charge the jury on the special facts doctrine. The error, however, does not require a new trial for the reasons explained below.

Despite defendants' current protestations, it cannot be

seriously disputed that the special facts doctrine was applicable to the facts of this case. In addition to claiming breach of contract (i.e., that defendant made misrepresentations of material fact in the APA), plaintiffs alleged a claim of fraudulent concealment under the special facts doctrine. Specifically, as indicated, plaintiffs claimed that defendants had a duty to disclose certain documents concerning alleged adverse contract information. The "special facts" doctrine holds that "absent a fiduciary relationship between parties, there is nonetheless a duty to disclose when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (*Pramer S.C.A. v Abaplus Int. Corp.*, 76 AD3d 89, 99 [1st Dept 2010]; *Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 [1st Dept 2005]). As a threshold matter, the doctrine requires satisfaction of a two-prong test: that the material fact was information peculiarly within the knowledge of one party and that the information was not such that could have been discovered by the other party through the exercise of ordinary intelligence (*Jana L.*, at 278).

Despite the applicability of the doctrine to the fraud allegations in this case, the failure to provide a jury charge on the special facts doctrine was harmless. As indicated, if it had

been given, the Pattern Jury Instructions on the special facts doctrine would have informed the jury that in order to prevail under this doctrine, plaintiff needed to prove to the jury by clear and convincing evidence the aforementioned two elements, which would have established that the adverse contract information was peculiarly within defendants' knowledge (*see* 2A NY PJI2d 3:20 at 180 [2015]). If plaintiffs had proven to the jury's satisfaction that the adverse contract information was peculiarly within defendant's knowledge, the next issue for the jury would have been to decide whether defendants had actually failed to disclose the alleged adverse contract information.

In this case, however, the trial court submitted to the jury, via an interrogatory, the question of whether defendant had failed to disclose the adverse contract information, in lieu of submitting a jury instruction on the special facts doctrine, pursuant to PJI 3: 20. As a result, plaintiffs were never put to their burden of establishing by clear and convincing evidence that the adverse contract information was peculiarly within defendants' knowledge. In any event, the jury ultimately decided against plaintiffs on the issues of whether defendants had failed to disclose the adverse contract information and its materiality. Thus, under these circumstances, it cannot be said that the

failure to charge on the special facts doctrine prejudiced plaintiffs in any way (*cf. Weingarten v Landesman,* 137 AD2d 520 [2d Dept 1988] [in a personal injury action, the court properly denied the plaintiffs' motion to set aside the verdict in favor of the defendant even though the court's instructions to the jury on the standard of conduct to be applied to the infant plaintiff were erroneous since the jury found the defendant free of negligence and did not reach the question of the infant plaintiff's negligence]).

Plaintiffs are, however, entitled to a new trial on the breach of contract claim. We find that the trial court erred in dismissing plaintiffs' cause of action for breach of contract. Even assuming that plaintiffs are only able to show nominal damages on their contract claim (a matter as to which we express no opinion), such damages will suffice to support an award of attorneys' fees under Section 8.02 of the parties' contract (*see Ross v Sherman*, 95 AD3d 1100, 1100-1101 [2d Dept 2012]).

Finally, plaintiffs have not shown any basis for reassignment of the case to a different justice for the new trial.

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

ENTERED: JULY 14, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14291 The People of the State of New York, Respondent, Ind. 1381/09

-against-

Oman Gutierrez, Defendant-Appellant.

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Kushner Law Group, PLLC, Brooklyn (Michael P. Kushner of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered December 14, 2010, as amended March 8, 2011, convicting defendant, after a jury trial, of murder in the first and second degrees, conspiracy in the second degree, and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 52½ years to life, unanimously affirmed.

Defendant is accused of orchestrating a conspiracy in which he hired his trusted friend, codefendant Jose Inoa, to return from Georgia to murder Edward Contreras, a rival drug dealer who had taken over defendant's territory after defendant and several of his associates were imprisoned. Contreras was shot and killed on January 11, 2005, and one of his associates was wounded.

Defendant and Inoa were tried together in June and July 2010. Inoa was convicted of murder in the first and second degrees, attempted murder in the second degree, conspiracy in the second degree, assault in the first degree, and criminal possession of a weapon in the second and third degrees. His conviction was recently affirmed by the Court of Appeals (*see People v Inoa*, __ NY3d __, 2015 NY Slip Op 04790 [2015]).

The court properly received evidence that the conspiracy to commit murder was intended to eliminate a rival drug dealer, Contreras, and thus to regain control of drug trafficking in a particular area. There was no variance between the murder conspiracy charged in the indictment and the one proved at trial (*see People v Grega*, 72 NY2d 489, 496 [1988]). There was no need for a multiple conspiracies charge, because the evidence clearly established a single conspiracy to kill a particular victim (*see People v Alfonso*, 35 AD3d 269 [1st Dept 2006], *lv denied* 8 NY3d 878 [2007]). It was clear from the court's charge that the People were required to prove a murder conspiracy, and the jury could not have been misled to believe that a drug conspiracy would serve as a basis for conviction.

Although the Court of Appeals determined in *People v Inoa* (2015 Slip Op 04790), that considerable portions of Detective

Rivera's testimony as an expert in decoding phone conversations were admitted in error, here, as in *Inoa*, the proof of defendant's commission of the charged crimes was overwhelming and we perceive no significant probability that, but for the error, the verdict would have been less adverse (*see People v Crimmins*, 36 NY2d 230 [1975]).

Among other evidence, Eldia Duran, another participant in the alleged conspiracy, testified that in April 2004, defendant began speaking to her about murdering Contreras and that in December 2004 and January 2005, following defendant's commencement of work release, she was present for several more conversations during which defendant and his associates discussed having Inoa commit the murder. She also testified as to her understanding of the recorded phone calls defendant made to her from prison, and recounted that prior to the murder defendant and Randy Gutierrez discussed that Inoa would be paid for committing the murder as soon as defendant "ha[d] money." Particularly, she testified that Orlando Torres, Contreras's partner, had offered defendant $20,000 to "invest," and in turn, defendant was going to give $10,000 of that to Inoa for killing Contreras.

Duran recounted that when Inoa arrived in New York City, defendant insisted on keeping him secluded and that, in

preparation for the murder, Inoa and members of defendant's crew surveilled Contreras to determine the best place to commit the crime. She also testified that defendant was displeased with the progress of the plan and that during a telephone conversation between defendant and Inoa on January 9, 2005, days before the murder, Inoa reassured defendant that he would get the job done. Duran further testified that, after the shooting, defendant wanted Inoa to stay in Georgia (where he had returned), but that Inoa had threatened to come to New York to get his money directly from Torres. In ensuing telephone conversations, defendant unsuccessfully attempted to convince Inoa to remain in Georgia. In May 2005, after Inoa had been shot in New York City, defendant advised him during a recorded conversation that he was about to receive "ten," that his brother would give Inoa "five" of that, and that the balance would be paid after Inoa returned to Georgia.

As the Court of Appeals observed in *People v Inoa*, "Ms. Duran's testimony, that it was understood that defendant would be paid for carrying out the assassination, was powerfully confirmed by the manifest content of the taped conversations. Detective Rivera's imprimatur was entirely dispensable to the already overdetermined conclusion that the substantial sum earmarked for

and expressly promised [Inoa] by his incarcerated co-defendant [Oman Gutierrez], could have been referable only to his murder of Contreras" (2015 NY Slip Op 04790).

We have considered defendant's other arguments and find them unavailing.

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

ENTERED: JULY 14, 2015

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Kapnick, JJ.

15181-
15182 The People of the State of New York, Respondent,

-against-

Gary Sanders,
Defendant-Appellant.

Ind. 3679/11
722/12

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

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

Judgments, Supreme Court, New York County (Gregory Carro, J. at withdrawn pleas; Daniel P. FitzGerald, J. at subsequent pleas and sentencing), rendered August 31, 2012, convicting defendant of two counts of attempted robbery in the second degree, four counts of robbery in the third degree, and two counts of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of five years, unanimously affirmed.

In October 2011, defendant pleaded guilty to grand larceny in the fourth degree in exchange for a sentence of 1½ to 3 years' imprisonment. In November 2011, he pleaded guilty to five additional counts of grand larceny in the fourth degree under a

Superior Court Information in exchange for a sentence of 1½ to 3 years' imprisonment on each count, to run concurrently with each other and with the sentence he would receive under indictment no. 3679-11.

At a December 2011 court appearance following the plea, defense counsel informed the court that defendant had given her a pro se motion to withdraw his guilty pleas. In the motion, defendant stated that he was innocent and that defense counsel had coerced him into pleading guilty. The court warned defendant to "be careful of what [he] ask[ed] for," and defendant stated, "I know exactly what I asked for." Defense counsel did not address defendant's claim that she coerced him, and did not say anything after informing the court of the nature of the motion. The court vacated the pleas and informed defendant that he would be assigned new counsel.

In January 2012, defendant's second attorney appeared and moved to dismiss the SCI "[f]or the same reasons[] the defendant moved to vacate the plea[s]." Although that motion was granted, in February 2012 defendant was charged in a 12-count indictment with second-degree robbery, third-degree robbery, and fourth-degree grand larceny for incidents that were the subject of the SCI. In August 2012, while represented by a third attorney,

defendant pleaded guilty to two counts of attempted second-degree robbery, four counts of third-degree robbery, and two counts of fourth-degree grand larceny, all in exchange for an aggregate five-year prison term plus five years of postrelease supervision.

On appeal, defendant challenges the court's failure to assign effective, conflict-free counsel to advise him during his plea withdrawal hearing. He argues that he was prejudiced because he lost the opportunity for the favorable plea and ultimately had to accept a less favorable disposition. Defendant asks this Court to vacate his conviction and remand the case to the trial court, where he argues he should have the opportunity to plead to the original terms of the plea bargain notwithstanding that he was indicted for additional charges.

As a result of his ultimate guilty plea, which he entered into while represented by new, conflict-free counsel, defendant forfeited his claim that he was denied effective assistance of counsel during his plea withdrawal hearing (*see People v Petgen*, 55 NY2d 529, 534-535 [1982]). Following the plea withdrawal, defendant had two more attorneys and does not argue that either of them complained about the issue he now raises on appeal. Defendant's reliance on *People v Griffin* (20 NY3d 626 [2013]) is misplaced. In *Griffin*, the Court distinguished *Petgen*,

explaining that "[a]n ineffective assistance of counsel claim is not the legal equivalent to a claim based on deprivation of counsel of choice" (20 NY3d at 631). Defendant was not without counsel at the time his plea withdrawal motion was granted,[1] and moreover, by granting the motion, the court gave defendant, who contended that he was innocent, the specific relief he requested.

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

ENTERED: JULY 14, 2015

CLERK

[1] Because counsel did not take a position adverse to defendant when the motion was made, there was not an actual conflict (*see People v Washington*, __ NY3d __, 2015 NY Slip Op 05511 [2015]).

Tom, J.P., Friedman, DeGrasse, Richter, Kapnick, JJ.

15196 Gansevoort 69 Realty LLC, Index 651010/13
Plaintiff-Respondent,

-against-

Remi Laba,
Defendant-Appellant,

Vincent Lugonnard-Roche,
Defendant.

_____

McCue Sussmane & Zapfel, P.C., New York (Kenneth Sussmane of counsel), for appellant.

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

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 27, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff Gansevoort 69 Realty LLC's (Gansevoort 69) motion for summary judgment, and denied defendant Laba's cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]).

Plaintiff creditor met its initial burden on the motion with evidence satisfying each of these requisites of its claim.

In opposition, Laba failed to create an issue of fact. Laba claims that the parties entered into an oral agreement to release Laba from any claims arising from the guaranty, provided Laba introduced plaintiff to a buyer that purchased the subject building. Laba's reliance on this purported oral agreement fails in light of the parties' agreement that all modifications to the guaranty were to be in writing, and Laba's failure to point to any performance of the purported oral agreement that is "unequivocally referable to the modification" (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 [1977]).

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

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

ENTERED: JULY 14, 2015

CLERK

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

15032 Linda P. Nash, Index 129074/93
Plaintiff-Appellant,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Respondent.

_____

Louis A. Mangone, New York, for appellant.

Weil, Gotshal & Manges LLP, New York (Gregory Silbert of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered November 10, 2014, reversed, on the law and the facts, without costs, and the motion denied.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Dianne T. Renwick
Sallie Manzanet-Daniels
Darcel D. Clark, JJ.

15032
Ind. 129074/93

_____x

Linda P. Nash,
Plaintiff-Appellant,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Respondent.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered November 10, 2014, which, upon remittitur from the Court of Appeals, granted defendant's motion to vacate the judgment, same court and Justice, entered January 15, 2010, in plaintiff's favor.

Louis A. Mangone, New York, for appellant.

Weil, Gotshal & Manges LLP, New York (Gregory Silbert, Richard A. Rothman and Karin S. Portlock of counsel), for respondent.

MANZANET-DANIELS, J.

The Court of Appeals, on appeal from the prior order (102 AD3d 420 [1st Dept 2013]), held that this Court and the motion court had erred to the extent we construed CPLR 5015(a) as mandating vacatur of plaintiff Nash's judgment (22 NY3d 220, 226 [2013]). The Court accordingly remitted the matter to the motion court for a consideration of the Port Authority's application to vacate pursuant to CPLR 5015(a) (*id.*). The motion court, upon remand, vacated Nash's affirmed, final judgment in the exercise of its discretion. We now hold that the motion court acted improvidently in vacating Nash's final judgment.

The motion court's assessment of the relevant factors -- the facts of the particular case, the equities affecting each party and others affected by the judgment or order, and the grounds for the requested relief -- was flawed. The motion court stated that the facts of Nash's case are "no different" from other plaintiffs who suffered personal injuries as a result of the 1993 World Trade Center terrorist attack. However, one critical fact distinguishes Nash's case from that of the *Ruiz* plaintiffs -- the Port Authority elected to forgo an appeal in Nash's case.

The motion court was also incorrect in stating that Nash "participated" in the *Ruiz* appeal. The Port Authority itself did not believe Nash to be a party respondent to the *Ruiz* appeal.

Indeed, when Nash requested to be declared a respondent to the Port Authority's appeal from Ruiz's final judgment, the Port Authority opposed the request, stating that

> "[Ms. Nash] is not a respondent [on the *Ruiz*] appeal because the Port Authority did not seek (and was not granted) leave to appeal from a judgment in favor of Ms. Nash."

The Court of Appeals noted that the *Nash* action was "beyond the scope of [the *Ruiz*] appeal," as "[a] judgment in the Nash action was recently affirmed by the Appellate Division (17 NY3d 428, 441 n 7 [2011]). Further, the Court of Appeals unanimously "dismissed" the Port Authority's motion for a "stay" of the Nash action on the ground that it lacked "jurisdiction to entertain [it]," inasmuch as "no appeal or motion for leave to appeal in the Nash action [was] pending before th[e] Court (*see* CPLR 5519)" (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 856 [2011]).

The Port Authority made a strategic decision not to appeal either the liability or the damages determination in *Nash*, but to prosecute the *Ruiz* case instead. The Port Authority thereafter abandoned any claim that it was not liable to Nash, and represented to the Court of Appeals that a reversal in *Ruiz* would not affect cases like Nash's that had been finally determined. Having failed to seek leave to appeal from Nash's affirmed final judgment, the Port Authority ought not to profit from its

misrepresentations to the detriment of Nash, whose judgment was indisputably final.

As Professor Siegel noted in the Practice Commentaries accompanying CPLR 5513, "[t]he time in which to appeal or to move for leave to appeal if leave is necessary is one of the most rigid in all of procedure. Its passing without the proper step being taken forfeits the appeal and puts an end to the matter . . ." (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5513:1).

While a court under CPLR 5015(a) might possess some limited jurisdiction to vacate a final judgment -- for example, where the court purporting to enter judgment lacked subject matter jurisdiction -- that discretion must be sparingly exercised lest final judgments be subject to never-ending attack, undermining the sanctity and finality of judgments. As Justice Graffeo noted in her partial dissent, "We generally do not reward litigants for failing to assert arguments in a timely fashion -- with few exceptions, claims not promptly advanced are deemed waived or forfeited and this proposition applies to the right to seek reversal of a judgment on the ground that it is erroneous on the facts or law (i.e., the type of argument made on direct appeal) . . . Simply stated, when a party allows its appellate rights to lapse, it forfeits the right to challenge any issue it could have

raised on direct appeal" (22 NY3d at 227). The Port Authority's motion to vacate the *Nash* judgment was predicated on an issue that had been litigated in *Nash* and would have been reviewable on appeal. The Port Authority ought not to be permitted a second bite at the apple at the expense of the elderly plaintiff, who suffered traumatic brain injuries over 20 years ago, and will now never see a penny of her $5.2 million final judgment.

Accordingly, the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered November 10, 2014, which, upon remittitur from the Court of Appeals, granted defendant's motion to vacate the judgment, same court and Justice, entered January 15, 2010, in plaintiff's favor, should be reversed, on the law and the facts, without costs, and the motion denied.

All concur.

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

ENTERED: JULY 14, 2015

CLERK