SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 18, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15463 The People of the State of New York, Respondent, Ind. 58534/10

-against-

Eric Brown,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered October 18, 2010, convicting defendant, after a nonjury trial, of sexual abuse in the third degree, and sentencing him to a term of 90 days, unanimously affirmed.

The court properly exercised its discretion in admitting testimony that an officer saw defendant follow closely behind four women immediately prior to placing his groin on the victim's buttocks. This evidence was relevant to the contested issue of intent (*see People v Alvino*, 71 NY2d 233, 242 [1987]), and it tended to complete the narrative, explaining the events leading

up to defendant's arrest (*see People v Morris,* 21 NY3d 588 [2013]). Moreover, the court expressly stated that, as factfinder in this nonjury trial, it would not draw any inference of propensity, and the court is deemed capable of keeping that promise (*see People v Moreno*, 70 NY2d 403 [1987]).

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15464 & M-2388 Lydia Ortiz, Plaintiff-Respondent, Index 301103/12

-against-

424 Sheva Realty Associates LLC, et al., Defendants-Appellants.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about, July 31, 2014, and a motion having been made for a stay of trial,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 10, 2015,

It is unanimously ordered that said appeal and motion be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15465 In re Jahni Reese F.,

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

Joshua R. F.,
Respondent-Appellant,

Catholic Guardian Society
& Home Bureau,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

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

_____

Appeal from order, Family Court, New York County (Douglas Hoffman, J.), entered on or about June 10, 2014, which, upon appellant's default, terminated his parental rights to the subject child on the ground of permanent neglect and committed the custody and guardianship of the child to the Commissioner of Social Services of the City of New York and petitioner agency for the purpose of adoption, unanimously dismissed, without costs, as taken from a nonappealable order.

The appeal is dismissed because appellant failed to appear at both the fact-finding and dispositional hearings, without excuse, and never moved to vacate his default (*see* CPLR 5511;

Matter of Aaron C. [Grace C.], 105 AD3d 548, 548-549 [1st Dept 2013]). As the appeal is dismissed, the application by assigned counsel to withdraw as counsel is granted (*see Eric R. v Celena P.*, 121 AD3d 524 [1st Dept 2014]).

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15466 In re Richard Erdey, Index 100170/13
Petitioner-Appellant,

-against-

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

_____

The Law Offices of Fausto E. Zapata, Jr., P.C., New York (Fausto E. Zapata, Jr. of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered April 24, 2014, denying the petition, except for the second cause of action, on which relief was previously granted, inter alia, to compel respondents to expunge all materials placed in petitioner's personnel file related to a finding that he violated respondent Fire Department's (FDNY) Equal Employment Opportunity (EEO) policy or, in the alternative, to compel respondents to grant petitioner a full and fair opportunity to challenge the allegations that he violated the policy, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner waived any rights to the relief he seeks, the expungement of the subject materials from his personnel file or an opportunity to be heard on the allegations, in a September 27,

2011 agreement with FDNY settling disciplinary charges against him (*see Matter of Miller v Coughlin*, 59 NY2d 490 [1983]; *Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450, 455 [1979], *cert denied* 444 US 845 [1979]). His reliance on *Matter of D'Angelo v Scoppetta* (19 NY3d 663 [2012]) is misplaced, since there was no waiver in that case. Petitioner's arguments that the waiver provisions of the settlement agreement are inapplicable to the instant case were improperly raised for the first time in his reply brief.

Petitioner's contention that the court should have awarded him attorneys' fees is not properly before us since it was raised for the first time in his reply brief.

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: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15467 John Lombardi, et al., Index 156968/12
Plaintiffs-Respondents,

-against-

Partnership 92 West, L.P., et al.,
Defendants-Appellants.

_____

Perry, Van Etten, Rozanski & Primavera, LLP, New York (Amara S. Faulkner of counsel), for appellants.

The Taub Law Firm, P.C., New York (Bruce E. Wingate of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 10, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment insofar as it sought dismissal of the negligence and loss of consortium causes of action, unanimously affirmed, without costs.

Plaintiff Lombardi alleges that the drop-down ladder on defendants' fire escape malfunctioned as he was descending to the street, causing his foot to be trapped and injuring him. Defendants failed to make a prima facie showing of the absence of any defect in the fire escape, or that they lacked constructive notice of the alleged defect. Their manager and superintendent testified that they did not service or test the fire escape prior to plaintiff's accident, and defendants did not produce any

inspection reports (*see Del Carmen Cuaya Coyotl v 2504 BPE Realty LLC*, 114 AD3d 620 [1st Dept 2014]). Since defendants made no showing of inspections of the fire escape before the accident, they "failed to show lack of constructive notice as a matter of law, requiring denial of their motion regardless of the sufficiency of plaintiff's opposing papers" (*Showverer v Allerton Assoc.*, 306 AD2d 144 [1st Dept 2003]).

Defendants' contention that plaintiff's use of the fire escape to exit an apartment in a nonemergency situation was unforeseeable and unreasonable presents issues of fact for the jury (*see Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15468-
15469 Anthony Gordon, et al.,
Plaintiffs-Appellants,

-against-

476 Broadway Realty Corp.,
Defendant-Respondent,

Board of Managers of 476
Broadway Condominium,
Defendant.

Index 103951/12

_____

David E. Frazer, New York, for Anthony Gordon, appellant.

Ronald A. Hollander, New York, for Martina A. Gordon, appellant.

Gallet Dreyer & Berkey, LLP, New York (David L. Berkey of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered May 21, 2014, as amended by order, same court and Justice, entered July 2, 2014, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment on their ejectment counterclaim and for dismissal of plaintiffs' retaliatory eviction and bad faith affirmative defenses, and denied plaintiffs' motion for leave to amend their reply and/or for a stay pursuant to RPAPL 753(4), unanimously affirmed, without costs. Cross appeal by defendant 476 Broadway Realty Corp. (the cooperative) from order entered May 21, 2014, to the extent it dismissed its counterclaim for an injunction,

unanimously withdrawn before argument, without costs, pursuant to the parties' stipulation dated February 9, 2015.

Plaintiffs failed to raise an issue of fact as to whether the cooperative acted in bad faith, outside of its authority, or for an illegitimate corporate purpose by terminating plaintiffs' tenancy on the ground of objectionable conduct (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 155 [2003]). The record shows that, after notice and an opportunity to be heard, all shareholders, except plaintiffs, voted to terminate plaintiffs' tenancy based on, among other things, their interference with waterproofing testing and repair work in the apartment (*see id.* at 156).

The statutory presumption of retaliation does not apply here, since the cooperative terminated plaintiffs' tenancy based on their alleged violation of the terms and conditions of the proprietary lease (*see* Real Property Law § 223-b[5]). Moreover, as noted, there is no evidence of bad faith on the cooperative's part (*see 1050 Tenants Corp. v Lapidus*, 39 AD3d 379, 385 [1st Dept 2007], *lv denied* 9 NY3d 807 [2007], *lv dismissed* 10 NY3d 850 [2008]; *see also Walentas v Johnes*, 257 AD2d 352, 354 [1st Dept 1999], *lv dismissed* 93 NY2d 958 [1999]).

Plaintiffs are not entitled to a stay of their eviction in order to cure their alleged breach of the lease (*see* RPAPL 753[4]), as the cooperative validly terminated the lease on the

ground of their pattern of objectionable conduct (*see* RPAPL 753[3]; *Matter of Chi-Am Realty, LLC v Guddahl*, 33 AD3d 911, 912 [2d Dept 2006]; *205 E. 77th St. Tenants Corp. v Meadow*, 41 Misc 3d 134[A], 2013 NY Slip Op 51857[U], *1 [App Term, 1st Dept 2013]).

Plaintiffs' remaining contentions are unpreserved or otherwise unavailing.

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15470 The People of the State of New York, Respondent, Ind. 551/08

-against-

Jie Chen,
Defendant-Appellant.

_____

Stephen Shaiken, Flushing, for appellant.

Robert T. Johnson, District Attorney, Bronx (Katherine A. Gregory of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered September 16, 2009, convicting defendant, after a jury trial, of failure to disclose the origin of a recording in the first degree, and sentencing her to a term of five years' probation, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), including its acceptance of a specially trained officer's testimony that, before arresting defendant, he observed that the DVDs defendant was selling were counterfeit. Accordingly, the officer had probable cause for defendant's arrest.

Defendant's remaining suppression argument is unpreserved and we decline to review it in the interest of justice. We note

that the People were never placed on notice of any need to develop the record (*see People v Martin*, 50 NY2d 1029 [1980]; *People v Tutt*, 38 NY2d 1011 [1976]) as to the particular issue defendant now raises. As an alternative holding, we find that the hearing record, and the reasonable inferences to be drawn therefrom, support the conclusion that the search of defendant's bag was justified.

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15474 The People of the State of New York, Ind. 5773/12
Respondent,

-against-

Kierra Dixon,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about June 6, 2013,

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

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

ENTERED: JUNE 18, 2015

CLERK

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

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15477 Board of Managers of 147 Waverly Place Condominium,
Plaintiff-Respondent,

-against-

KMG Waverly, LLC, et al.,
Defendants,

BKSK Architects, LLP, et al.,
Defendants-Appellants.

Index 159329/13

Menaker & Herrmann LLP, New York (Paul M. Hellegers of counsel), for appellants.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Jared E. Paioff of counsel), for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about January 23, 2015, which, to the extent appealed from, denied the architect defendants' motion to dismiss the fraud-in-the-inducement cause of action against them, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint against those defendants.

Plaintiff, the Board of Managers of a gut-renovated condominium located in Manhattan, alleges that the architect defendants knowingly made false statements in their written description of the property, and that their architect's certification contained false assurances as to the veracity of

the description. However, the description was prepared less than two weeks after the commencement of the demolition phase of the renovation project, and the architect's certification was made approximately one month after the project began. Because the renovation was in its early stages at those points, the statements in the description were predictions of future events and, therefore, cannot sustain an action for fraud (*see e.g. Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 403 [1st Dept 2008]).

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15478 The People of the State of New York, Respondent, Ind. 175/11

-against-

Nathaniel Robinson, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J. at suppression hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered May 23, 2012, convicting defendant of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of six years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The totality of the sequence of events supports the conclusion that defendant took part in the transaction as part of a team of drug dealers, and that he was a joint possessor of the additional drugs found at the scene (*see +*

People v Eduardo, 11 NY3d 484, 493 [2008]), *People v Branch*, 63 AD3d 631 [1st Dept 2009], *lv denied* 13 NY3d 794 [2009]). The jury could have reasonably inferred that the unidentified object defendant passed to a codefendant contained drugs (*see People v Bolden*, 6 AD3d 315 [1st Dept 2004], *lv denied* 3 NY3d 637 [2004]), and that either defendant or a codefendant prevented the recovery of the prerecorded buy money by taking some action that escaped the notice of the police (*see People v Hooper*, 48 AD3d 292 [1st Dept 2008], *lv denied* 10 NY3d 864 [2008]).

The court properly admitted expert testimony on street-level drug sales. Defendant's only objection to this testimony was a claim that it should have been elicited from one of the fact witnesses. While a fact witness may serve a dual role, "it may be preferable for testimony of this nature to come from a source other than a fact witness" (*People v Jamison*, 103 AD3d 537, 538 [1st Dept 2013], *lv denied* 21 NY3d 1016 [2013]). Defendant's remaining challenges to the expert testimony are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits (*see People v Brown*, 97 NY2d 500, 506-507 [2002]). In particular, there was a factual foundation for this testimony because the evidence clearly showed that there were multiple participants in the sale (*see People v Bolden*, 6 AD3d at 315), and the evidence relating

to intent to sell was within the scope of expert testimony permitted under *People v Hicks* (2 NY3d 750 [2004]).

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. Probable cause for defendant's arrest was established by the arresting officer's testimony that he received a "positive buy" transmission with descriptions of the participants, notwithstanding that the transmission did not spell out defendant's role in the transaction (*see e.g. People v Harris*, 305 AD2d 282 [1st Dept 2003], *lv denied* 100 NY2d 582 [2003]), and that defendant matched one of the descriptions. The hearing evidence also supported the conclusion that all the officers in the team heard the same transmissions, regardless of which officer initially stopped defendant (*see People v Gonzalez*, 91 NY2d 909, 910 [1998]; *People v Mims*, 88 NY2d 99, 113-114 [1996]).

We have considered and rejected defendant's argument that trial counsel rendered ineffective assistance by failing to

request a circumstantial evidence charge (*see People v Torres*, 108 AD3d 474, 475 [2013], *lv denied* 22 NY3d 998 [2013]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15479 The People of the State of New York, Respondent, Ind. 1134/12 3352/12

-against-

Ralph Edwards, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered March 6, 2013, convicting defendant, after a jury trial, of aggravated vehicular assault, assault in the second degree, criminal possession of a controlled substance in the seventh degree and resisting arrest, and sentencing him to an aggregate term of 7 to 15 years, unanimously affirmed.

After appropriate warnings by the court, defendant abandoned his request to proceed pro se, and there was no violation of his right to represent himself (*see People v Ramos*, 35 AD3d 247 [1st Dept 2006], *lv denied* 8 NY3d 924 [2007]). As jury selection was about to begin, defendant made a request for substitution of counsel, which the court denied. When defendant then asked if he could go pro se, the court inquired of defendant as to his experience and education, and warned him of the disadvantages of

self-representation, including the fact that an attorney would be more capable than a layperson of understanding the issues, cross-examining witnesses and dealing with evidence. The court ended the discussion by telling defendant to think about his choice over the weekend. Defendant never raised the issue again or expressed any further dissatisfaction with his attorney.

The record fails to support defendant's contention that the court improperly frightened or coerced him into foregoing his right of self-representation. Instead, the court acted appropriately when it "warned defendant forcefully" of the risks of proceeding pro se (*People v Vivenzio*, 62 NY2d 775, 776 [1984]; *see also People v Latimer*, 220 AD2d 223 [1st Dept 1995], *lv denied* 87 NY2d 923 [1996]).

The court properly exercised its discretion when, rather than ruling immediately on the pro se request, it offered defendant time to think it over. By doing so, the court was

exercising caution to ensure that any waiver by defendant of his right to counsel was knowing, intelligent and voluntary (*see e.g. People v Moore*, 126 AD3d 561 [1st Dept 2015]).

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15480 The Diversified Group, Inc., et al., Plaintiffs-Appellants, Index 450286/10

-against-

Marcum & Kliegman LLP, et al., Defendants-Respondents.

_____

Wachtel Missry LLP, New York (Howard Kleinhendler of counsel), for appellants.

L'Abbate, Balkan, Colavita & Contini L.L.P., Garden City (Anthony P. Colavita of counsel), for Marcum & Kliegman LLP and M&K Rosenfarb LLC, respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Thomas W. Hyland of counsel), for Kostelanetz & Fink, LLP, respondent.

Ropers Majeski Kohn Bentley P.C., New York (Jung H. Park of counsel), for Weiss & Company, respondent.

Lawler Mahon & Rooney LLP, New York (James J. Mahon of counsel), for Gerald Cohen, respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about April 17, 2014, which denied plaintiffs' motions for summary judgment and granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, with costs.

In this breach of contract action, plaintiffs may not seek contribution from defendants pursuant to General Obligations Law §§ 15-108(c) and 15-108(d) because they settled their dispute

with the investors for monetary consideration prior to the court entering judgment against them (*see Gonzales v Armac Indus.*, 81 N.Y.2d 1, 5-6 [1993]; *Carlin v Patel*, 99 AD3d 1220, 1221 [4th Dept 2012]). To the extent the pre-2007 decisions cited by plaintiffs conflict with the plain language of General Obligations Law § 15-108(d), they are no longer good law.

Contrary to plaintiffs' contention, whether defendants settled pre-judgment or post-judgment, General Obligations Law § 15-108(c) provides that "[a] tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." The settlement agreement also effectively ended the underlying litigation, thereby triggering the waiver of contribution set forth in General Obligations Law §15-108(c), even though, pursuant to the settlement agreement, the parties had ongoing obligations to fulfill their duties under the agreement (*see Gonzalez v Armac Industries*, 81 NY2d at 6-7). Defendants did not waive General Obligations Law § 15-108(c) because it was not included as an affirmative defense in their respective answers. Plaintiffs failed to establish surprise and prejudice in this purely legal inquiry (*see Arteaga v City of New York*, 101 AD3d 454, 454 [1st Dept 2012]), and in any event, prejudice and surprise are "ameliorated when it is shown that the

plaintiff has had a full and fair opportunity to respond and oppose the defense being asserted in connection with summary judgment" (*Kirilescu v American Home Prods. Corp.*, 278 AD2d 457, 457-58 [2d Dept 2000], *lv denied* 96 NY2d 933 [2001]).

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15481 The People of the State of New York, Respondent, Ind. 3258/12

-against-

Khalid Rahman, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered August 7, 2013, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, criminal possession of a weapon in the second degree (two counts) and reckless endangerment in the first degree, and sentencing him to an aggregate term of 19 years, unanimously affirmed.

Defendant was not deprived of his right to conflict-free counsel. The court providently exercised its discretion in denying defendant's motion to substitute counsel, as defendant's conclusory assertions that he lacked confidence in his attorney, and did not know what the defense strategy would be, did not establish good cause, particularly when the motion was made on the eve of trial, after counsel had been representing defendant for approximately a year (*see People v Linares*, 2 NY3d 507

[2004]). Defense counsel's brief comments to the court describing his extensive investigation and communications with defendant did not create a conflict of interest, as counsel joined in defendant's motion and made no statements adverse to defendant's interests (*see People v Nelson*, 27 AD3d 287 [1st Dept 2006], *affd* 7 NY3d 883 [2006]; *People v Quintana*, 15 AD3d 299 [1st Dept 2005], *lv denied* 4 NY3d 856 [2005]; *People v Silva*, 15 AD3d 263 [1st Dept 2005], *lv denied* 4 NY3d 857 [2005]). Moreover, at the plea proceeding itself, defendant stated that he was satisfied with his counsel's performance, that he was pleading guilty voluntarily, and that his lawyer had not convinced him to plead guilty against his will.

The court properly denied defendant's motion to withdraw his guilty plea. At sentencing, defendant asserted that when he pleaded guilty he was under the influence of PCP that was allegedly smuggled into his place of incarceration. The record supports the court's determination that this claim, which did not appear in defendant's written plea withdrawal motion, was incredible and contradicted by the court's observations and defendant's responses during the plea proceeding (*see People v Bess*, 299 AD2d 263 [1st Dept 2002], *lv denied* 99 NY2d 580 [2003]).

Defendant made a valid and enforceable waiver of his right

to appeal. The court discussed the waiver in detail and sufficiently ensured that defendant understood that the right to appeal is separate and distinct from the other rights automatically forfeited by pleading guilty (*see People v Lopez*, 6 NY3d 248 [2006]). The court also confirmed that defendant discussed the waiver with defense counsel, and defendant signed a written waiver confirming that fact.

The waiver forecloses review of defendant's excessive sentence claim. As an alternative holding, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15482N-
15483N Barry E. Crawford,
Plaintiff-Respondent,

-against-

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

John Does, etc.,
Defendants.

Index 303800/11

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for appellants.

Rubenstein & Rynecki, Brooklyn (Kliopatra Vrontos of counsel), for respondent.

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered May 27, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff's cross motion to amend the complaint to add Officer William Phillips, Officer Brian Pinnick and Captain Reginald Patterson as defendants, in place of the John Does, pursuant to the "relation-back" doctrine, unanimously reversed, on the law, without costs, and the cross motion denied. The Clerk is directed to enter judgment in favor of the individual defendants. Appeal from order, same court and Justice, entered December 19, 2014, which, to the extent appealed from as limited by the briefs, denied reargument of the order granting plaintiff's cross motion to amend the complaint,

unanimously dismissed, without costs, as taken from a nonappealable order.

The court improvidently granted plaintiff's motion to amend to add the individual defendants, pursuant to the relation-back doctrine, after the statute of limitations expired. Plaintiff does not deny that he was aware of the proper identity of these defendants four-and-one-half months prior to the expiration of the statute of limitations. He nevertheless waited another two years to move to amend the complaint, after he had filed a note of issue. Under these circumstances, there was no "mistake" by plaintiff as to the proper identity of the parties, within the meaning of the relation-back doctrine, and these defendants had every reason to believe that plaintiff had no intent to sue them and that the matter had been laid to rest as far as they were concerned (*see Buran v Coupal*, 87 NY2d 173, 181 [1995]; *Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615 [1st Dept 2014]; *Soto v*

Bronx-Lebanon Hosp. Ctr., 93 AD3d 481 [1st Dept 2012]; *Meralla v Goldenberg*, 89 AD3d 645, 646 [1st Dept 2011]; *Goldberg v Boatmax://, Inc.*, 41 AD3d 255, 256 [1st Dept 2007]).

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15484N Wathne Imports, Ltd., Index 603250/05
Plaintiff-Appellant,

-against-

PRL USA, Inc., et al.,
Defendants-Respondents.

_____

Manatt, Phelps & Phillips, LLP, New York (L. Peter Parcher of counsel), for appellant.

Kelley Drye & Warren LLP, New York (Robert I. Steiner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 7, 2015, which granted defendants' motion to strike plaintiff's jury demand, unanimously affirmed, without costs.

The court properly granted defendants' motion, as the primary relief sought in the complaint — an injunction enjoining defendants from further interference with plaintiff's licensing rights — is equitable in nature, and the claims for damages are "incidental" (*Krulwick v Posner*, 272 AD2d 160 [1st Dept 2000]).

We have considered plaintiff's remaining arguments, including that defendants should be judicially estopped from arguing that plaintiff is not entitled to a jury trial, and find them unavailing.

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

ENTERED: JUNE 18, 2015

CLERK

Gonzalez, P.J., Tom, Friedman, Kapnick, JJ.

15485 In re James Barlow, Ind. 5640/14
[M-1855] Petitioner,

-against-

Hon. Charles Solomon, etc.,
et al.,
Respondents.

_____

James Barlow, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Charles Solomon, respondent.

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

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

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: JUNE 18, 2015

CLERK

Tom, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

13661-
13662 Edith Wiener,
Plaintiff-Appellant,

-against-

Laura Spahn,
Defendant-Respondent.

Index 652735/12

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Schlam Stone & Dolan LLP, New York (Jeffrey M. Eilender of counsel), for appellant.

Anderson & Ochs, LLP, New York (Mitchell H. Ochs of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 17, 2013, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the first through third causes of action, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 7, 2014, which denied plaintiff's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

Since the parties' mother's will contains no language indicating that noncompliance with the terms of paragraph 7 will result in forfeiture of a bequest thereunder, the first cause of action, which seeks forfeiture of all bequests defendant received under paragraph 7, fails to state a cause of action (*Allen v*

Trustees of Great Neck Free Church, 240 AD 206 [2d Dept 1934], *affd* 265 NY 570 [1934]).

The second cause of action, which arises from defendant's attempt to sell her interests in two Bronx properties in breach of the terms of the will, and the third cause of action pertaining to all the partnership interests, are barred by the doctrine of res judicata.

The Decision and Order of this Court entered herein on December 4, 2014 is hereby recalled and vacated (*see* M-31 decided simultaneously herewith).

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

ENTERED: JUNE 18, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14802 Jacobson Family Investments, Inc., et al., Plaintiffs, Index 601325/10

MDG 1994 Grat, LLC, Plaintiff-Respondent,

-against-

National Union Fire Insurance Company of Pittsburgh, PA, Defendant-Appellant,

Continental Casualty Company, et al., Defendants.

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Bressler Amery & Ross, P.C., New York (Douglas K. Eisenstein of counsel), for appellant.

Kasowitz Benson Torres & Friedman, LLP, New York (Adam S. Ziffer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 8, 2014, after a non-jury trial, awarding plaintiff MDG 1994 Grat, LLC, damages as against defendant National Union Fire Insurance Company of Pittsburgh, PA, unanimously reversed, on the law, without costs, and it is declared that Rider 14 of the financial institution bond issued by defendant does not provide for coverage for plaintiff's loss and alternatively that Exclusion x of the financial institution bond issued by defendant excludes coverage for plaintiff's loss. The Clerk is directed to enter judgment accordingly.

Former plaintiff Jacobson Family Investments, Inc. (JFI) manages the assets of various limited liability companies, including MDG 1994 Grat, LLC (MDG), the sole remaining plaintiff in this action[1]. In 2007, JFI submitted an application for, and purchased, a Financial Institution Bond from defendant National Union Fire Insurance Company of Pittsburgh, PA. In 2008, JFI filed a claim with National Union for alleged losses it sustained as a result of the dishonest acts of Bernard L. Madoff (Madoff). Madoff was arrested in December 2008 for running a Ponzi scheme. He subsequently pleaded guilty to various charges involving securities fraud and is currently incarcerated.

At trial, the coverage dispute had distilled down to two issues, the first being whether the losses claimed were covered losses under Rider 14 of the bond and, second, if they were, whether the claim was nonetheless barred by the exclusion contained in paragraph 2.(x) of the bond (Exclusion x).

Rider 14 provides that the bond will cover:

> "Loss resulting directly from the dishonest acts of any Outside Investment Advisor, named in the Schedule below, solely for their duties as an Outside Investment Advisor, on behalf of the Insured, committed alone or in collusion with

[1]This is the result of certain prior decisions and orders, including our prior order of December 11, 2012 (102 AD3d 223 [1st Dept 2012], affirming order, Sup Ct, NY County [Lowe, J.] 2011, NY Slip Op 33628 [U]).

> others . . . provided, however, the Insured shall first establish that the loss was directly caused by dishonest acts of any Outside Investment Advisor which results in improper personal financial gain to such Outside Investment Advisor and which acts were committed with the intent to cause the Insured to sustain such loss."

Madoff is among the individuals and companies identified in the schedule to Rider 14 as being an Outside Investment Advisor. In its application for the bond, JFI represented that Madoff managed an estimated $123,506,945 in assets for it.

Exclusion x of the bond provides:

> "This bond does not cover:...loss resulting directly or indirectly from any dishonest or fraudulent act or acts committed by any non-Employee who is a securities, commodities, money, mortgage, real estate, loan, insurance, property management, investment banking broker, agent or other representative of the same general character."

Following a nonjury trial, the trial court determined that MDG had met its prima facie burden of proving it had suffered a loss within the meaning of the policy, that such loss was caused by Madoff's fraudulent acts and that as Madoff was a named Outside Investment Advisor, such loss came within the ambit of the coverage in Rider 14. The trial court rejected National Union's argument, that MDG had not met its burden of proving the alleged losses were committed by Madoff acting "solely" in his capacity as an Outside Investment Advisor, but were of a hybrid

nature, and therefore outside the coverage of Rider 14. The trial court reasoned that such an interpretation would render Rider 14 meaningless because Madoff, although expressly listed as an investment advisor in the related bond schedule, was both a registered securities broker and investment advisor, and could never satisfy the claimed coverage condition. The trial court's decision hinged on its contractual interpretation of Rider 14. The trial court went on to conclude that National Union had not proven that the losses otherwise fell within Exclusion x because it did not prove that they were caused by Madoff acting as a securities broker.

We now reverse. We find that there was indisputable evidence at trial that Madoff, in perpetrating his Ponzi scheme, was acting in a hybrid capacity as both an investment advisor and a securities broker. Consequently, the bond requirement that the loss be attributable to the defrauder acting solely in his or her investment advisory capacity was not satisfied.

Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy defeats coverage (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]). Consequently, it is MDG's burden to

establish that the losses fall within Rider 14, and if they do then the burden shifts to National Union to establish that the losses are otherwise excluded under Exclusion x. We agree with the trial court, that Rider 14, in itself, is not ambiguous (*see Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 354-355 [1978]). Consequently, the parties' rights and obligations under the rider to the policy must be based on the specific language contained therein (see *TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 513 [2008]).

Applying these well established legal principles, we find that Rider 14 limits coverage to losses where the identified Outside Investment Advisor acts "solely" in that capacity. Any other interpretation would completely negate and render superfluous the significant term "solely" contained in Rider 14. MDG's interpretation of Rider 14, that losses caused by any person or entity identified in the schedule as an Outside Investment Advisor are covered, regardless of the capacity in which such person or entity is acting when incurred, impermissibly broadens the scope of coverage. Rider 14 does not provide loss coverage for "any" dishonest act undertaken by an individual named as an Outside Investment Advisor and the parties' agreement may not be altered to obtain a different

result (*see White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). Nor does restricting coverage to situations where the loss results directly from the dishonest act of an outside investment advisor "solely for their duties as an Outside Investment Advisor" effect a blanket preclusion of coverage for any act by Madoff simply because he happened to be both a registered securities broker and investment advisor. In evaluating what capacity someone otherwise identified as an Outside Investment Advisor acted, a close examination of the actions actually undertaken that created the loss is necessary.

The only issue is whether MDG met its burden of proving that it incurred losses arising from Madoff acting "solely" in his capacity as an Outside Investment Advisor. The overwhelming and largely undisputed evidence adduced at trial is that MDG's losses were due to Madoff acting not only as an investment advisor, but also as a securities broker. In perpetrating the Ponzi scheme resulting in MDG's losses, Madoff not only provided fraudulent investment advice, he also serviced a securities brokerage account that MDG created in 2006 with Bernard L. Madoff Investment Services, LLC (BLMIS), an entity wholly owned by Madoff. In creating the accounts, certain agreements were signed, including a Customer Agreement and a Trading

Authorization. The Customer Agreement, in particular, expressly refers to the creation of a broker/customer relationship between BLMIS and MDG. In connection with the creation of the brokerage accounts, MDG also designated Madoff, individually, to act as its agent for purchases, sales or trades of securities on its behalf. MDG supplied investment funds which were deposited into a Chase Manhattan bank account titled solely in Madoff's name. Although the funds provided were supposed to be used by Madoff to execute the purchases, sales or trades authorized under the brokerage agreement, they never were. Instead, Madoff, acting through BLMIS, provided MDG with false brokerage account statements purporting to show deposits and withdrawals in MDG's brokerage account, various false purchases and sales of stocks and other securities as well as nonexistent interest, dividends and requested withdrawals from its brokerage account, which money actually came from later deposits into the Chase account. Compensation was paid to Madoff and BLMIS in the form of commissions on the falsely reported trades. After criminal charges were brought against Madoff, MDG filed a customer claim for compensation with BLMIS's trustee pursuant to the Securities Investor Protection Act (SIPA), asserting that its funds were stolen by BLMIS, as securities broker. MDG was awarded $500,000

which it then assigned to the SIPA trustee to satisfy "claw back claims" asserted against MDG by other affiliated JFI investors.

Given these facts, there is simply no way to separate Madoff's activities as an investment advisor from his activities as a securities broker insofar as they produced the losses claimed. The duality of the services Madoff provided places MDG's claims outside Rider 14 and National Union has no duty to cover the loss asserted because the extended coverage in Rider 14 is "solely for their [a named Outside Investment Advisor] duties as an Outside Investment Advisor . . . " (*see Columbia Equities v Underwriters at Lloyd's, London*, 186 AD2d 486, 486 [1st Dept 1992]). Alternatively, even if there were coverage under Rider 14, we hold that Exclusion x, which excludes coverage for "loss resulting directly or indirectly from any dishonest or fraudulent act or acts committed by any non-Employee who is a securities . . . broker," would otherwise exclude coverage under the facts of this case. Exclusion clauses by their nature subtract from rather than grant coverage (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 163 [2005]). Exclusion x does not provide that the nonemployee must have actually been "acting as" a securities broker at the time of the loss, it only

requires that the nonemployee "is" a securities broker. It is undisputed that Bernard Madoff was not plaintiff's "Employee" (as that term is defined in the bond) and that he was a registered broker-dealer during the entire period he dealt with plaintiff.

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

ENTERED: JUNE 18, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15312 Jericho Group, Ltd., et al., Index 101105/13
Plaintiffs-Respondents,

-against-

Mid-Town Development Limited Partnership, et al.,
Defendants-Appellants,

Michael A. Szegda, et al.,
Defendants.

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Phillips Nizer LLP, New York (Perry S. Galler of counsel), for appellants.

Cohen Tauber Spievack & Wagner P.C., New York (Ira Daniel Tokayer of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 12, 2014, which denied as moot defendants-appellants' motion to dismiss the complaint with prejudice and for an injunction against further related litigation and costs and sanctions against plaintiffs, and permitted plaintiffs to discontinue the action without prejudice, unanimously reversed, on the law, without costs, plaintiffs' notice of discontinuance deemed a nullity, the complaint reinstated, defendants' motion granted to the extent of dismissing the action as against them with prejudice, and the action remanded for further proceedings consistent herewith. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

The motion court erred in denying defendants' motion as moot. Plaintiffs' notice of withdrawal of the action, in effect a discontinuance, was untimely because it was served well after defendants filed their motion to dismiss (*see* CPLR 3217[a][1]) and "was apparently served to avoid an adverse decision on the pending motion to dismiss the complaint with prejudice" (*Rosenfeld v Renika Pty. Ltd.*, 84 AD3d 703 [1st Dept 2011]). Thus, the notice was ineffective and a nullity (*see BDO USA, LLP v Phoenix Four, Inc.*, 113 AD3d 507, 511 [1st Dept 2014]; *Citidress II Corp. v Hinshaw & Culbertson LLP*, 59 AD3d 210, 211 [1st Dept 2009]).

The instant case is the third action commenced by plaintiffs against essentially the same defendants, setting forth the same allegations concerning a contract between the parties from 2002. The first action was commenced in 2004. After defendants' motion to dismiss was denied, an appeal ensued. We reversed and dismissed the complaint (*Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294 [1st Dept 2006]). Plaintiffs thereafter moved in Supreme Court to vacate the judgment of dismissal, which motion was granted. We again reversed, finding there were no grounds to vacate the judgment (*Jericho Group, Ltd. v Midtown Dev., L.P.*, 47 AD3d 463 [1st Dept 2008], *lv dismissed* 11 NY3d 801 [2008]).

In 2007, plaintiffs commenced a second action against the same defendants along with two additional defendants regarding the same contract and same issues as in the 2004 action. Defendants again moved to dismiss, which motion was granted. We affirmed (*Jericho Group, Ltd. v Midtown Dev., L.P.*, 67 AD3d 431 [1st Dept 2009], *lv denied* 14 NY3d 712 [2010]). In that decision, we found that the 2007 action was barred by collateral estoppel and res judicata, since the 2004 action, based on the same transaction, had been dismissed on the merits.

This action, with the addition of additional defendants, seeks the same relief as the 2004 and 2007 actions. Defendants' motion to dismiss was made on the grounds that the action is barred by collateral estoppel and res judicata. Plaintiffs did not submit opposition, despite several extensions of time to respond, and then they attempted to file a discontinuance of the action without prejudice on the day before the final return date of the motion. To remit this matter to the trial court to resolve this aspect of the motion would be a waste of judicial resources, given the history of the litigation between these parties and the fact that the doctrines of collateral estoppel and res judicata would warrant the granting of defendants' motion.

Accordingly, exercising our power to review questions of law and fact (CPLR 5501[c]), defendants' motion to dismiss the complaint with prejudice is granted.

With respect to defendants' motion for a litigation injunction, sanctions and costs, that matter is remanded to Supreme Court to conduct further proceedings as to those issues (*BDO USA, LLP v Phoenix Four, Inc.*, 113 AD3d at 512).

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

ENTERED: JUNE 18, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15403 The People of the State of New York, Ind. 401/11
Respondent,

-against-

Michael C. Williams,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and Cahill Gordon & Reindel LLP, New York (Daniel R. LeCours of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Daniel McCullough, J.), rendered August 10, 2012, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 90 days, concurrent with 5 years' probation, unanimously affirmed.

In this case involving events that followed a political demonstration, the court properly exercised its discretion in permitting the prosecutor to cross-examine defense witnesses about their positions on certain controversial issues, because, under the particular circumstances of the case, these matters were relevant to bias (*see generally United States v Abel*, 469 US 45 [1984]) and were responsive to issues raised by the defense. However, the court should have exercised its discretion to

control the manner and extent of examination of the witnesses to avoid excessive questioning relevant only to the witnesses' credibility and potential bias. In any event, any error was harmless and a mistrial was not warranted (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: JUNE 18, 2015

CLERK