SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 13, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

14946N Leon Baer Borstein, Index 112421/10
Plaintiff-Respondent,

-against-

Virginia Marie Henneberry,
Defendant-Appellant.

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Capuder Fazio Giacoia LLP, New York (Douglas Capuder of counsel), for appellant.

Law Offices Of Howard Benjamin, New York (Howard Benjamin of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered September 27, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion for attorneys' fees and sanctions, unanimously reversed, on the law and the facts, with costs, sanctions imposed on plaintiff in the amount of $5,000, payable to the Lawyers' Fund for Client Protection, pursuant to 22 NYCRR 130-1.2 and in accordance with 22 NYCRR 130-1.3; and defendant awarded reasonable costs and attorneys' fees associated with defending the action and with this appeal,

payable by plaintiff in an amount to be determined on remand.

The parties were divorced pursuant to a judgment entered in December 2009. Plaintiff husband is an experienced matrimonial lawyer and he represented himself in the divorce proceeding. He was sanctioned twice during the course of that action. The first time he was ordered to pay $7,500 in attorneys' fees in connection with defendant wife's motion to enforce a pendente lite order against him. He was later directed to reimburse the wife $10,000 in connection with his violation of an order directing that a boat that was marital property be sold in an arm's length transaction, with the proceeds to be shared by the parties.

The divorce action culminated in a six-day trial. The parties submitted posttrial memoranda, and in a section entitled "Assets and Liabilities Claimed to be Marital," the husband claimed that he loaned the wife "$27,000 during the years after the filing for divorce" to allow her to finance a business venture. He also listed the loan as the sixth of nine credits totaling $1,184,500, and stated that he had "loaned to [the wife] about $27,000 after the filing for divorce and should receive a credit for the full $27,000." In addition, his Statement of Proposed Disposition, dated December 5, 2008, listed the loan in

a section titled, "Assets claimed to be marital property."

The court (Gische, J.) issued a 51-page decision after trial and an order, both dated April 17, 2009, which addressed distribution of the parties' marital assets. The court noted the statutory rule that, in general, "marital property" is all property acquired by either or both spouses during the marriage but before the commencement of a matrimonial action (Domestic Relations Law § 236B[1][c]). It rejected the husband's argument that most of the parties' assets should be classified as separate, even if acquired during marriage, because they led financially independent lives. The court reasoned that his argument was relevant to the ultimate distribution of marital assets, but not to their initial classification as marital or separate property.

In a section titled "Miscellaneous Adjustments and Credits," the court addressed certain of the credits that the husband sought, but it did not specifically address the $27,000 loan. However, in the concluding paragraph to the decision the court stated that "[a]ny arguments raised by the parties which have not been expressly addressed in this decision are rejected." The court concluded that each party was entitled to a 50% share of certain marital assets and marital debt. The judgment of

divorce, which incorporated the findings, listed certain credits but did not refer to or list a credit for the loan. The husband appealed the judgment, but he did not address the loan.[1]

The husband then commenced this action against the wife. The complaint sought recovery of the same $27,000 sought by the husband as a credit in the divorce action. It did not refer to the divorce proceeding or the fact that the husband had sought repayment of the loan in a proceeding that had ended in a final judgment. The wife's counsel sent the husband a letter asking him to discontinue the action voluntarily because the divorce action had determined his rights regarding the loan in light of the court's ruling on the husband's request for credits. The husband replied by letter asking, "Where is the statutory or case law that supports your position that separate property debts or assets are determined by a divorce decision[]? . . . If it were so obvious and 'frivolous' why have you not brought a summary judgment motion already?" The wife's counsel

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[1] On appeal, this Court modified the divorce judgment only to the extent that it reclassified as marital property certain debt adjudged by Supreme Court to be the wife's separate property, and increased the wife's share of appreciation on a farm owned by the parties (*Henneberry v Borstein*, 87 AD3d 451 [1st Dept 2011]).

replied,"[T]he funds you promised and subsequently transferred to your then wife were marital property."

The wife did eventually move for summary judgment dismissing the complaint, arguing that the husband's claim was barred by res judicata principles because it had been fully litigated in the divorce action. She also argued that the loan was not enforceable because the funds that the husband transferred to her were marital property. The wife submitted excerpts from the husband's deposition testimony in the matrimonial action, in which he acknowledged that the loan funds were derived from compensation he received for an arbitration or mediation he completed while the parties were married. He also admitted that he had sought a credit for the loan in the divorce action.

Supreme Court (Mills, J.) granted the wife's motion and dismissed the complaint, concluding that the loan was "fully and actively litigated by [the husband]" in the divorce action. It rejected the husband's argument that the issue was never fully litigated because there was no formal finding that the source of the loan was marital property. The court noted that the husband sought specific relief for the loan in the divorce action in the form of a credit, which was denied, and that the husband sought to relitigate that same issue in the instant action. The court

also noted that in the decision after trial, the court in the divorce action stated that it rejected any argument raised by the parties that it had not expressly addressed. The court also rejected the husband's argument that he still had an independent cause of action because "the 'loan' w[as] never identified as a 'marital' asset and/or there was no specific discussion of offset of the 'loan' when marital assets were distributed." It cited his concessions in his filings in the divorce action that the source of funds for the loan was marital property.

The wife subsequently moved, pursuant to 22 NYCRR part 130 and Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.1(a) and (b), for an order awardin5g her attorneys' fees, costs, disbursements, and sanctions due to the husband's "frivolous and improperly motivated" lawsuit. She argued that the husband's pursuit of the action required the wife's counsel to conduct discovery, depose the husband, defend the wife's deposition, make related discovery motions, and spend time trying, unsuccessfully, to persuade the husband to discontinue the action without the expense of a summary judgment motion. The court held that the husband's conduct in seeking repayment of the loan was not so frivolous as to warrant sanctions pursuant to 22 NYCRR part 130; however, as the court had dismissed the action in its entirety,

it awarded the wife costs and disbursements in successfully defending the action.

A court may, in its discretion, award to any party costs in the form of reimbursement for expenses reasonably incurred and reasonable attorneys' fees resulting from "frivolous conduct," which includes: (1) conduct completely without merit in law, which cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) conduct undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; and (3) the assertion of material factual statements that are false (22 NYCRR 130-1.1[a], [c][3]). The court may also award financial sanctions on the same grounds (22 NYCRR 130-1.1[b]).

In determining whether conduct is frivolous, the court shall consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel" (22 NYCRR 130-1.1[c]).

Here, the husband made a claim in the divorce action for repayment of the $27,000 "loan," and Supreme Court rejected it.

He then failed to challenge that finding on direct appeal. Any argument that Supreme Court did not actually decide the issue of the "loan" because it did not specifically address it is rejected, since the court included the "catch-all" language that any claims not discussed were denied. In any event, the husband could have sought clarification from the court if he felt that the claim related to the "loan" had escaped the court's attention. Indeed, it would have behooved him to do so, as it is well settled that "res judicata bars a subsequent plenary action concerning an issue of marital property which could have been, but was not, raised in the prior matrimonial action" (*Boronow v Boronow*, 71 NY2d 284, 289 [1988]). Again, we are required to consider "the circumstances under which the conduct took place" when reviewing a sanctions motion (22 NYCRR 130-1.1[c]). Here, the circumstances are that the husband, an experienced divorce lawyer, ignored a long-standing principle of matrimonial jurisprudence. Thus, his decision to commence an action that he knew, or should have known, was futile from its inception, weighs heavily in favor of a finding that his conduct was intended solely to harass the wife.

We are mindful of the notion that a court must be careful not to confuse legal arguments that may appear at first blush to

be frivolous with good faith efforts to modify existing law (*see W.J. Nolan & Co. v Daly*, 170 AD2d 320, 321 [1st Dept 1991]). There is no cause for such concern here. The husband argues that an enforceable loan can be made from marital property, and that this Court has "strongly impl[ied]" this to be the case. However, the case he cites, *Popowich v Korman* (73 AD3d 515 [1st Dept 2010]), merely suggests that one spouse may enforce a loan to the other if the loan is pursuant to a written agreement signed by the parties and acknowledged, in accordance with Domestic Relations Law § 236(B)(3). Here, there is no question that no such agreement existed. Accordingly, the matrimonial court was unquestionably correct in hewing to the rule that property accumulated by the parties during the marriage but before commencement of a divorce action is marital property subject to equitable distribution.

In any event, the issue is not whether the husband should have prevailed on his claim in the matrimonial action, but whether he had any grounds for pursuing the matter after that action became final. It simply defies logic that, as the husband argues, the court in the matrimonial action would have implicitly ruled that the loan was separate property, when he conceded before it that the source of the funds was marital property.

Further, the husband utterly fails to account for the court's explicit statement that any arguments it did not address should be considered rejected.

Aside from the blatant lack of merit to the complaint, other factors justifying sanctions and attorneys' fees are present here. First, the wife expressly informed the husband that she considered the action barred by res judicata and urged him to discontinue it, but he pressed on, forcing her to expend unnecessary resources. Such unreasonable persistence in a position that has been demonstrated to be frivolous warrants the imposition of sanctions (*see Cattani v Marfuggi*, 74 AD3d 553 [1st Dept 2010] [plaintiff insisted on pursuing action against defendant that he had been advised was cloaked with absolute immunity from suit]). Further, we cannot ignore that this is not the first instance in which the husband has taken a position that is not legally tenable. He was ordered in the matrimonial action to pay the wife's legal fees in connection with his noncompliance with a temporary support order. While the court did not expressly opine that his conduct was frivolous, it can be presumed that he failed to present any good faith basis for his failure to abide by the order. Later in the action, however, the court explicitly stated that the husband had "frivolously" asked

it to "re-write its decision" regarding the forced sale of a boat so as to make his actions, which failed to comply with the decision, compliant nunc pro tunc. Coupled with these earlier incidents, the commencement of this action exhibits a "broad pattern . . . of delay, harassment and obfuscation" that warrants the imposition of sanctions and attorneys' fees (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33 [1st Dept 1999]).

The Decision and Order of this Court entered herein on June 23, 2015 is hereby recalled and vacated (*see* M-3503, M-4055 and M-3536 decided simultaneously herewith).

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

ENTERED: OCTOBER 13, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

15784N Randall Co. LLC, Index 100982/08
Plaintiff-Respondent,

-against-

281 Broadway Holdings LLC et al.,
Defendants-Appellants.

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Shafer Glazer, LLP, New York (Mika Mooney of counsel), for appellants.

Weg & Myers, P.C., New York (David McGill of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about April 16, 2015, which denied defendants' motion for a protective order, and directed defense counsel to produce its legal bills, unanimously reversed, on the law and in the exercise of discretion, without costs, and the motion granted.

Although "recourse to an opposing attorney's time sheets may . . . be proper in an appropriate case" (*Match v Match*, 168 AD2d 226, 227 [1st Dept 1990]), plaintiff's request is premature. It has not made a sufficient showing of the relevance of such records at the present stage of the proceedings (*Matter of Goldstick*, 177 AD2d 225, 247 [1st Dept 1992]).

Should plaintiff establish at a later juncture the requisite

need for defendants' legal bills, we note that "bills detailing the work done by the attorneys are clearly privileged material" (*De La Roche v De La Roche*, 209 AD2d 157, 158 [1st Dept 1994] [internal quotation marks omitted]) and are therefore subject to redaction (*Teich v Teich*, 245 AD2d 41 [1st Dept. 1997]).

We have considered and rejected plaintiff's remaining contentions.

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15834 The People of the State of New York, Ind. 4222/10
Respondent,

-against-

Eliot Ocasio,
Defendant-Appellant.

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Robert DiDio & Associates, Kew Gardens (Danielle Muscatello of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered September 5, 2013, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree and criminal impersonation in the second degree, and sentencing him to an aggregate term of one to three years, unanimously modified, in the interest of justice, to reduce the sentence to five years probation, and otherwise affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The court properly exercised its discretion in admitting evidence that several months before the charged crime, defendant produced false identification as an Administration for Children's Services police officer during a traffic stop. This evidence was

relevant to the contested issue of defendant's intent and knowledge when, in the charged crime, he presented similar identification, and claimed to be an ACS officer (*see People v Alvino*, 71 NY2d 233, 242 [1987]). Given the defense theory that defendant had no knowledge that the identification card he possessed was forged, evidence of defendant having previously displayed the same card, or a similar card, to another police officer was highly probative of his intent and knowledge (*see People v Davis*, 127 AD3d 614 [1st Dept 2015). The court minimized any potential prejudice by giving the jury a proper limiting instruction.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15837 In re Thomas Cross, Index 401413/11
Petitioner-Appellant,

-against-

James Russo, etc., et al.,
Respondents-Respondents.

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Thomas Cross, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

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Judgment, Supreme Court, New York County (Paul Wooten, J.), entered April 3, 2012, denying the petition challenging respondents' denial of a Freedom of Information Law (FOIL) request and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

This proceeding is time-barred (CPLR 217[1]). On June 25, 2010, the New York City Police Department's Records Access Appeals Officer denied petitioner's request for records relating to a criminal investigation. Petitioner's article 78 proceeding challenging that determination was dismissed for lack of personal jurisdiction. His subsequent FOIL request, made on December 22, 2010, "was duplicative of his prior request, and therefore did not extend or toll his time to commence an article 78 proceeding"

(*Matter of Kelly v New York City Police Dept.*, 286 AD2d 581, 581 [1st Dept 2001]; *see also Matter of Andrade v New York City Police Dept.*, 106 AD3d 520 [1st Dept 2013]).

Petitioner also failed to exhaust his administrative remedies (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52 [1978]). At the time of the commencement of this proceeding, his request had not yet been denied, and no final administrative determination had been rendered (*see* Public Officers Law § 89[4][b]; *Matter of Tellier v New York City Police Dept.*, 267 AD2d 9 [1st Dept 1999]).

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15838-
15839 The People of the State of New York,
Respondent,

-against-

Juan Paulino Rosario,
Defendant-Appellant.

Ind. 1640/97

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

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

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Order, Supreme Court, New York County (Robert M. Mandelbaum, J.), entered on or about July 19, 2013, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered January 13, 1998, unanimously reversed, on the law, and the matter remanded for further proceedings.

Defendant made a sufficient showing to warrant a hearing on his claim that his attorney rendered ineffective assistance by providing erroneous and prejudicial advice about the immigration consequences of his guilty plea (*see People v McDonald*, 1 NY3d 109, 114-15 [2003]). Defendant's plea to attempted third-degree sale of a controlled substance was entered in exchange for a promised sentence of five years' probation with a certificate of

relief from civil disabilities. Defendant claims that his attorney misadvised him that even though a drug trafficking conviction would be likely to result in deportation, the certificate of relief would shield him from that consequence. The plea and sentencing minutes, including the attorney's statements to the court, appear to corroborate that claim.

Defendant also averred, among other things, that he would not have accepted this plea had he known that it plea permitted deportation notwithstanding the certificate of relief, and that he would have gone to trial if a plea without immigration consequences was not possible. Under all the circumstances present, defendant made a sufficient demonstration of prejudice to entitle him to a hearing (*see People v Hernandez*, 22 NY3d 972, 975-976 [2013]).

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15840 The People of the State of New York, Ind. 5744/11
Respondent,

-against-

Carlo Rastaldo,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 20, 2012, convicting defendant, after a nonjury trial, of burglary in the second and third degrees and two counts of petit larceny, and sentencing him to an aggregate term of 3½ years, unanimously modified, on the law, to the extent of vacating the third-degree burglary conviction and dismissing that count of the indictment, and otherwise affirmed.

The court properly denied defendant's motion to suppress statements made to the police prior to the administration of *Miranda* warnings. The record supports the court's finding that these statements were spontaneous, volunteered utterances that were not the product of police interrogation or its functional

equivalent (*see People v Ealey*, 272 AD2d 269 [1st Dept 2000], *lv denied* 95 NY2d 865 [2000]). In any event, the record also establishes that defendant's post-*Miranda* statements were attenuated from the statements at issue.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The evidence established the "dwelling" element of second-degree burglary (Penal Law § 140.25[2]; *see People v Joseph* 124 AD3d 437 [1st Dept 2015], *lv granted* 2015 NY Slip Op 70750[U][2015]).

As the People concede, the third-degree burglary count should be dismissed as a lesser included offense of second-degree burglary conviction.

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15841 In re Mesiah Elijah B.,

A Dependant Child under Eighteen Years of Age, etc.,

Taneez B.,
Respondent-Appellant,

New York City Administration for Children's Services,
Petitioner-Respondent.

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Patricia W. Jellen, Eastchester, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Karen Freedman, Law Offices Of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the child.

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Appeal from order of fact-finding and disposition, Family Court, New York County (Jane Pearl, J.), entered on or about January 13, 2014, which, upon inquest after respondent mother's default at the fact-finding hearing, determined that the mother had neglected the subject child, and transferred custody of the child to the Commissioner of Social Services until the next permanency hearing, unanimously dismissed, without costs.

The order was entered upon the mother's default and is therefore not appealable (*see* CPLR 5511; *Matter of Darren Desmond W.* [*Nirandah W.*], 121 AD3d 573 [1st Dept 2014]).

In any event, the finding of neglect is supported by a preponderance of the evidence (Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The mother's medical records and the testimony of the agency caseworker demonstrate that the mother suffers from untreated mental illness, and has a history of erratic and aggressive behavior, which continued in the hospital after the child's birth, which raised a substantial probability that the child would be at imminent risk of impairment if released to her care (*see Matter of Cerenithy Ecksthine B. [Christian B.]*, 92 AD3d 417 [1st Dept 2012]).

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15842 The People of the State of New York, Ind. 2780/13
Respondent,

-against-

Lamont Amos,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about October 23, 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: OCTOBER 13, 2015

CLERK

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

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

15843 The People of the State of New York, Ind. 6054/10
Respondent,

-against-

Kevin Vaughn,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Analisa Torres, J. at hearing; Lewis Bart Stone, J. at jury trial and sentencing), rendered December 19, 2012, convicting defendant of burglary in the first degree and robbery in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 20 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The police observed the occupants of a car rolling what appeared to be a marijuana cigarette, and the officers also detected the odor of marijuana. This provided probable cause to arrest the occupants and search the car (*see e.g. People v Rivera*, 127 AD3d 622 [1st Dept 2015]).

After conducting a suitable inquiry and determining that an absent juror would not appear within two hours after the time that the trial was scheduled to resume, the court properly exercised its discretion in substituting an alternate juror (see CPL 270.35[2][a]; *People v Jeanty*, 94 NY2d 507, 516 [2000]). The juror had called in from a doctor's appointment, stating she would not make it to court that day, and thereafter she was unable to be reached by cell phone. Under the circumstances, the court was not obligated to wait a full two hours before replacing the juror (*see e.g. People v Lopez*, 18 AD3d 233, 234 [1st Dept 2005], *lv denied* 5 NY3d 807 [2005]).

The court properly exercised its discretion when it used the language of the Criminal Jury Instructions on the subject of eyewitness identification, and related matters concerning expert witnesses, but denied defendant's request to add language from a

charge used in New Jersey (*see People v Washington*, 56 AD3d 258, 259 [1st Dept 2008], *lv denied* 11 NY3d 931 [2009]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15846 The People of the State of New York, Ind. 1378/09
Respondent,

-against-

Louis Parson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered March 10, 2011, convicting defendant, after a jury trial, of attempted robbery in the first degree and criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously modified, in the interest of justice to reduce the sentence for the robbery conviction to 16 years to life, and otherwise affirmed.

Since the court granted defendant's request for submission of attempted robbery in the third degree as a lesser included offense of attempted first-degree robbery, and the jury convicted him of the higher charge, defendant is foreclosed from challenging the court's ruling denying his request for submission

of the additional lesser included offense of attempted petit larceny (*see People v Boettcher*, 69 NY2d 174, 180 [1987]). In any event, there was no reasonable view of the evidence to support submission of attempted petit larceny.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15847 In re Heaveah-Nise Stephania Jannah H.,

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

Stephanie M.,
Respondent-Appellant,

The Children's Village,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about November 19, 2013, which, to the extent appealed from, determined that respondent mother had permanently neglected the subject child, terminated the mother's parental rights to the child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that despite the agency's scheduling of

visits, provision of referrals for services, and other diligent efforts to strengthen the parental relationship, the mother failed to maintain regular contact with the child or plan for the child's future (*see* Social Services Law § 384-b[7][a]; *Matter of Alexander B. [Myra R.]*, 70 AD3d 524, 524-525 [1st Dept 2010], *lv denied* 14 NY3d 713 [2010]). The mother testified that she had cancelled approximately fifty percent of the visits that were scheduled with the child, and that she had failed to complete substance abuse and mental health treatment programs within the relevant statutory time frame (*see Matter of Jenna Nicole B. [Jennifer Nicole B.]*, 118 AD3d 628, 629 [1st Dept 2014]). Moreover, the mother's testimony demonstrates that she failed to take responsibility for the child's placement in foster care (*Alexander B.*, 70 AD3d at 525).

A preponderance of the evidence supports the Family Court's determination that the child's best interests warrant termination of the mother's parental rights so as to free the child for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Since January 2011, the child has been living with her kinship foster mother and her two older half brothers, who have been adopted by the foster mother. The child has developed a strong bond with the foster mother and her siblings, and the

foster mother wants to adopt the child and has provided for her needs (*see Matter of Jada Serenity H.*, 60 AD3d 469, 470 [1st Dept 2009]). The record shows that a suspended judgment is not appropriate, because there is no evidence that the mother has a realistic and feasible plan to provide an adequate and stable home for the child or that she has made progress with her mental health and substance abuse problems (*see id.*; *see also Matter of Mercedez Alicia Dynasty F. [Alicia A.]*, 106 AD3d 519, 519-520 [1st Dept 2013]).

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15848 The People of the State of New York, Ind. 6121/82
Respondent,

-against-

Emiliano Marine,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Andrew J. Dalack of counsel), for appellant.

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

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Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about November 26, 2012, which denied defendant's CPL 440.30(1-a) motion for DNA testing, unanimously affirmed.

Regardless of the results of any testing, there is no reasonable probability, given the specific circumstances and the relationship of these items to the case, that DNA testing of a knife and certain clothing would have led to a verdict more

favorable to defendant (*see People v Concepcion*, 104 AD3d 442 [1st Dept 2007], *lv denied* 21 NY3d 1003 [2013]; *People v Figueroa*, 36 AD3d 458, 459 [1st Dept 2007], *lv denied* 9 NY3d 843 [2007]).

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15849 In re Lisa W.,
Petitioner-Respondent,

-against-

John M.,
Respondent-Appellant.

_____

Andrew J. Baer, New York, for appellant.

Lisa W., New York, respondent pro se.

Julian A. Hertz, Somers, attorney for the child.

_____

Order, Family Court, New York County (Fiordaliza A. Rodriguez, Special Referee), entered on or about May 20, 2014, which upon a fact-finding determination that respondent committed the family offenses of harassment in the second degree, criminal mischief in the fourth degree and disorderly conduct, granted a final order of protection against respondent in favor of petitioner and her son Aaron for a period of two years from the date of issuance, unanimously modified, on the law and the facts, to the extent of vacating the findings of criminal mischief in the fourth degree and disorderly conduct, and otherwise affirmed, without costs.

To the extent the order was based on criminal mischief and disorderly conduct, the determination was unsupported by the

record (*see Matter of Janice M. v Terrance J.*, 96 AD3d 482, 483 [1st Dept 2012]; Penal Law §§ 145.00, 240.20). However, the court's finding that respondent committed harassment in the second degree has a sound and substantial basis in the record (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]; Penal Law § 240.26 [3]). The court's finding that petitioner's testimony was more credible than respondent's testimony is entitled to great deference (*see Matter of Peter G. v Karleen K.*, 51 AD3d 541 [1st Dept 2008]). Accepting petitioner's version of the facts as true, petitioner was threatened, or at least seriously annoyed, by respondent's repeated, strange and threatening behavior in September and October of 2012.

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15850 The People of the State of New York, Ind. 4540/07
Respondent,

-against-

Alejandro Sierra,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered September 20, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 15 points for causing physical injury, because the victim's grand jury testimony describing the violent manner in which defendant inflicted bruises, and the resulting substantial pain, support a finding of such injury by clear and convincing evidence (*see People v Chiddick*, 8 NY3d 445, 447-448 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]). The court also properly assessed 15 points for defendant's failure to accept responsibility, in light of the People's proof that he was

expelled from a sex offender treatment program for poor progress, despite having been given three opportunities to complete the program, and that he refused further participation after his removal (*see People v Grigg*, 112 AD3d 802, 803 [2d Dept 2013], *lv denied* 22 NY3d 865 [2014]; *People v Thousand*, 109 AD3d 1149 [4th Dept 2013], *lv denied* 22 NY3d 857 [2013]).

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the guidelines, and the record does not establish any basis for a downward departure, given defendant's criminal history.

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15851 The People of the State of New York, Ind. 3158N/13
Respondent,

-against-

Devron Boston,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J. at plea; Robert Stoltz, J. at sentence), rendered on or about September 11, 2013, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15852N Canine Consulting, Inc., Index 650498/14
Plaintiff-Appellant,

-against-

563 East Tremont LLC,
Defendant-Respondent.

_____

Feinstein & Partners, PLLC, New York (Rika Khurdayan of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about February 9, 2015, which denied plaintiff tenant's motion to stay defendant landlord's Civil Court action to recover the premises for non-payment of rent or, in the alternative, to consolidate the Civil Court action with the instant action, unanimously affirmed, without costs.

Plaintiff's claims in this action may be asserted as either defenses or counterclaims in defendant's summary nonpayment proceeding in Civil Court (*see Simens v Darwish*, 105 AD3d 686 [1st Dept 2013]). Plaintiff has not shown that it could not obtain complete relief in Civil Court (*see Cox v J.D. Realty Assoc.*, 217 AD2d 179 [1st Dept 1995]). To the extent plaintiff

argues that its potential defenses or counterclaims will be compromised by the limited discovery available in Civil Court, we reject this argument (*see Brecker v 295 Cent. Park W., Inc.*, 71 AD3d 564 [1st Dept 2010]).

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15853 The People of the State of New York, Ind. 3209/11
Respondent,

-against-

Kelvin Perez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Thomas M. Nosewicz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alexander Michaels 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 (Edward McLaughlin, J.), rendered on or about January 18, 2012,

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: OCTOBER 13, 2015

CLERK

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

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15855 In re Charity Akosua A.,
Petitioner-Respondent,

-against-

Nana A.,
Respondent-Appellant.

_____

Larry S. Bachner, Jamaica, for appellant.

Julian A. Hertz, Somers, attorney for the child.

_____

Order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about November 19, 2013, which denied respondent-appellant's (hereinafter, respondent) objection to a final order of support and an order of filiation; order of filiation, same court (Mary Elizabeth Neggie, Support Magistrate), entered on or about October 25, 2013, which adjudged and declared respondent to be the father of the subject child; and order of support, same court and Support Magistrate, entered on or about October 25, 2013, which, among other things, ordered respondent to pay $181 semi-monthly for child support and 65% of any unreimbursed health related expenses for the child, unanimously affirmed, without costs.

The Support Magistrate correctly referred the equitable estoppel issue to a Family Court judge (*see* Family Court Act

§ 439[a], [b]). The Family Court Judge, in turn, properly recognized that a finding on equitable estoppel was unnecessary, and properly referred the matter back to the Support Magistrate (*see id.*).

The Family Court properly determined that there was clear and convincing evidence establishing respondent's paternity (*Matter of Lopez v Sanchez*, 34 NY2d 662, 663 [1974]; *see also Matter of Meaghan E.A. v John T.H.*, 293 AD2d 399, 400 [1st Dept 2002], *lv dismissed* 99 NY2d 531 [2002]). Testimony and evidence showed that respondent was named as the father on the child's birth certificate, that he had an ongoing father-daughter relationship with the child for 10 years, and that he had petitioned the court in 2009 to have the child's last name changed to match his own. In addition, he paid child support pursuant to a prior support order that ran from 2005 to 2009, when it was voluntarily terminated by both parties. Respondent never objected to the prior order of support.

The Support Magistrate did not deny respondent the right to counsel, as respondent was assigned counsel for the paternity hearing before the Family Court Judge (*see* Family Ct Act § 262[a][viii]). Contrary to respondent's contention, Family Court Act § 262(a) does not provide for the right to assigned

counsel on issues of support, and there is no constitutional right to assigned counsel in a support proceeding (*Matter of Commissioner of Social Servs. of City of N.Y. v Remy K.Y.*, 298 AD2d 261, 262 [1st Dept 2002]).

The presumption of legitimacy was rebutted by clear and convincing evidence of respondent's paternity (*see Montepagani v New York City Dept. of Health, Div. of Vital Records*, 85 AD3d 474, 475 [1st Dept 2011]).

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

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15857- Index 303123/10
15858 Irene Frydel Kim,
Plaintiff-Respondent-Appellant,

John Kim, et al.,
Plaintiffs,

-against-

Ross P. Solomon, etc., et al.,
Defendants-Appellants-Respondents.

_____

Law Offices Of Annette G. Hasapidis, Mount Kisco (Annette G. Hasapidis of counsel), for appellants-respondents.

Rossi & Crowley, LLP, Douglaston (Thomas J. Rossi of counsel), for respondent-appellant.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered November 25, 2014, which denied defendants commissions, denied their request that plaintiff Irene Frydel Kim pay a surcharge or submit an accounting, ordered them to return certain funds to the Amato 2004 Family Trust (Family Trust), removed them as trustees of the Family Trust and Amato Residence Trust, implicitly denied their request that the Family Trust reimburse the estate for overpayment of certain sale proceeds, awarded certain attorneys' fees, and implicitly denied Irene attorneys' fees, unanimously modified, on the law, the facts and in the exercise of discretion, to order the Family Trust to reimburse

the Amato estate $15,284.37 for the overpayment of the fractional share, direct defendant Frank Szymanski to repay an additional $8,474 to the Family Trust, remand for further proceedings on trial counsel Corsa's attorneys' fees, and otherwise affirmed, without costs.

The court providently exercised its discretion in denying defendants a commission because their conduct at times harmed the trust, while benefitting themselves (*Matter of Gregory Stewart Trust*, 109 AD3d 755 [1st Dept 2013]). Furthermore, in light of the defendants' conflict and resulting conduct, the court properly removed them as trustees (*see Matter of Hall*, 275 AD2d 979, 980 [4th Dept 2000]; *see also Pyle v Pyle*, 137 AD 568, 572 [1st Dept 1910], *affd* 199 NY 538 [1910]).

As the court noted, defendants transferred $151,250.66 from the Family Trust, of which they were trustees and Irene the beneficiary, to Anthony's estate, of which they were beneficiaries, without adequate justification, thus harming the Family Trust and benefitting themselves. Defendants assert that the transactions were repayments of "loans" Anthony made to the Family Trust to maintain the King Avenue home, the primary asset in the Family Trust; however, they failed to adequately explain why Anthony, who continued to live in the King Avenue home and

was previously paying such expenses outright, should abruptly loan the expenses to the Family Trust, only after defendants became trustees of the Family Trust and eventually, beneficiaries of his will. They also failed to explain why such "loans" were necessary when other funds, including Anthony's rent payments, were available to cover at least part of those expenses. Accordingly, the court properly ordered defendants to repay the $151,250.66 to the Family Trust.

In addition, trust documents require defendants, as trustees, to obtain the beneficiary Irene's consent before they may directly hire and compensate themselves, such as for legal and bookkeeping services. Accordingly, Szymanski must repay $8,474, paid to himself for his cleaning and bookkeeping services without Irene's consent, to the Family Trust.

Next, the court correctly concluded that monthly payments of $3,000 from Anthony to Irene were not loans, nor was there any reason to require Irene to repay any part of those payments. Neither the trust documents nor any other part of the record suggests that those payments were to Irene in her capacity as trustee, rather than as ongoing payments to compensate Irene and her husband John Kim for leaving their Vermont home, and moving to King Avenue to care for Anthony's ailing wife, Sally, and to

supplement their minimal salaries earned in helping Anthony run his business, the Amato Opera.

Next, as Irene concedes, the court correctly concluded that her refusal to promptly vacate the King Avenue home, resulting in prolonged Housing Court litigation, warrants her payment of the Family Trust's counsel Lorraine Corsa's legal fees in connection with that litigation. However, contrary to Irene's further assertions in her cross appeal, the Supreme Court proceedings were also clearly impacted by that conduct, as the parties litigated extensively regarding the maintenance and sale of the home while Irene remained there. The court also correctly noted defendants also complicated the Supreme Court litigation due to their conflict and self-dealing (*see e.g. Matter of Dana [Manufacturers Hanover Trust Co.]*, 45 AD2d 676, 676 [1st Dept 1974]). Thus, the court correctly concluded that both sides must pay Corsa's outstanding legal fees.

Defendants appear to be correct that the $151,250.66 that the court ordered defendants return to the Family Trust includes payment of Corsa's fees for the Housing Court proceedings, meaning defendants will have incurred the cost of those fees, rather than Irene, as the court had correctly ordered. While defendants assert that they paid $59,244.81 in fees within that

amount, their citations to the record demonstrate only that they paid $39,244.81, and it is unclear whether Anthony's estate or the Family Trust paid the further $20,000 in fees. Accordingly, the case should be remanded to determine what portion of Corsa's bill is encompassed in the $151,250.66 figure, what portion represents the Housing Court proceedings, which Irene should bear completely. The remaining unpaid outstanding amount, to the extent that it represents only Corsa's work in the Supreme Court, should be divided between Anthony's estate and the Family Trust, as the court ordered.

The court properly awarded $10,000 from the Family Trust to defendant Solomon in legal fees, and contrary to defendants' contentions, he is not entitled to more, as Corsa handled the bulk of litigation.

As Irene's conduct in remaining in the King Avenue home also impacted issues in the Supreme Court action, she is not entitled to payment of her legal fees in this action, as sought in her cross appeal.

Finally, defendants are correct that the Family Trust owes the estate an overpayment of $15,284.37 in the fractional share of sale proceeds of a building. Szymanski testified that in making the original payment, he neglected to apply a 25% discount

authorized in the relevant legal memoranda. Irene's speculation that Anthony wanted to bestow a greater sum to the Family Trust is unsupported by any written documents and belied by Anthony's conduct towards her, in seeking her eviction from her home and replacing her as trustee of the Family Trust and beneficiary of his will by the time the payment was made.

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15859 The People of the State of New York, Ind. 1532/10
Respondent,

-against-

Raymond Acosta, also knows as
Big Pun, etc.,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Darcel D. Clark, J. at suppression hearing; Caesar D. Cirigliano, J. at jury trial and sentencing), rendered April 10, 2012, convicting defendant of attempted assault in the second degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

Defendant's motion to suppress a statement was properly denied. Although defendant was in custody and had not yet received *Miranda* warnings, the record supports the hearing court's finding that his statement was spontaneous and not the product of custodial interrogation. Where a defendant's inquiry concerning the reason for an arrest is "immediately met by a

brief and relatively innocuous answer by the police officer," there is no interrogation or its functional equivalent (*People v Rivers*, 56 NY2d 476, 480 [1982]; *compare People v Lanahan*, 55 NY2d 711 [1981] [detailed recital of evidence held equivalent to interrogation]). The detective briefly responded to defendant's inquiry by referring to an incident that occurred at Richman Plaza in 2008, and pointing to a wanted poster containing defendant's photograph. This constituted an innocuous reply to defendant's question, and it was not reasonably likely to elicit an incriminating response (*see Rivers*, 56 NY2d at 480). Moreover, rather than being placed in the room in an effort to encourage defendant to make a statement, the poster had been placed there long before defendant's arrest.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The fact that the jury acquitted defendant of other charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

Defendant's argument that the court had a sua sponte obligation to disclose certain markings found on the jury's

verdict sheet is unavailing (*see People v Boatwright*, 297 AD2d 603, 604 [1st Dept 2002], *lv denied* 99 NY2d 533 [2002]; *see also Matter of Suarez v Byrne*, 10 NY3d 523, 528 n 3 [2008]["Marks on verdict sheets are not verdicts"]).

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15861 In re Alexei S.,
Petitioner-Appellant,

-against-

Michael M.,
Respondent-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

_____

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about March 19, 2014, which, after a fact-finding hearing, dismissed the petition for an order of protection and vacated a temporary order of protection, unanimously affirmed, without costs.

The court properly determined that petitioner failed to establish by a preponderance of the evidence that respondent committed the family offenses alleged in the petition (*see* Family Ct Act § 832). Although the parties each provided different

accounts of the event that transpired on the date in question, the court resolved the conflicting testimony in favor of respondent, and there is no basis to disturb the court's credibility determinations (*see Matter of Everett C. v Oneida P.*, 61 AD3d 459 [1st Dept 2009]).

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15862-
15862A RXR WWP Owner LLC,
Plaintiff-Appellant,

-against-

WWP Sponsor, LLC, et al.,
Defendants-Respondents,

WWP Holdings, LLC,
Defendant.

Index 653553/13

_____

Herrick Feinstein LLP, New York (John R. Goldman of counsel), for appellant.

Blank Rome LLP, New York (Harris N. Cogan of counsel), for WWP Sponsor, LLC, respondent.

Morrison Cohen LLP, New York (Mary E. Flynn of counsel), for American Realty Capital Properties, Inc., and American Realty Capital New York Recovery REIT, Inc., respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 14, 2014, which, to the extent appealed from as limited by the briefs, granted the motion of defendants American Realty Capital Properties, Inc. and American Realty Capital New York Recovery REIT, Inc. (together, ARC) to dismiss the tortious interference with contract and the tortious interference with prospective business relations causes of action as against them, limited damages on the breach of the confidentiality agreement cause of action against ARC, and

implicitly denied plaintiff's request to replead, unanimously modified, on the law, to remove the damage limitation on the breach of the confidentiality agreement cause of action, and otherwise affirmed, without costs. Appeal from order, same court, Justice, and date of entry, which, to the extent appealed from as limited by the briefs, granted the motion of defendant WWP Sponsor, LLC to dismiss the fraudulent misrepresentation, breach of the implied covenant of good faith and fair dealing, and unjust enrichment causes of action, and implicitly denied plaintiff's request to replead, deemed an appeal from judgment, same court and Justice, entered October 28, 2014, dismissing the amended complaint as against WWP with prejudice (CPLR 5501[c]), and, so considered, said judgment unanimously affirmed, without costs.

Plaintiff failed to state a claim for fraudulent misrepresentation against WWP, because "the documentary evidence . . . negates as a matter of law the element of justifiable reliance on [WWP's] alleged false promise" (*Schutty v Speiser Krause P.C.*, 86 AD3d 484, 485 [1st Dept 2011]; *see also Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]).

The court correctly dismissed the breach of the implied

covenant of good faith and fair dealing cause of action, because of the lack of actual damages (*see Able Energy, Inc. v Marcum & Kliegman LLP*, 69 AD3d 443, 444 [1st Dept 2010]). By plaintiff's own admission, the Contribution Agreement was terminated because plaintiff failed to satisfy certain conditions to closing and refused to waive the failure of those conditions, not because WWP failed to cooperate in obtaining Lender Consent.

Because the court correctly dismissed the breach of contract cause of action against WWP, the tortious interference with contract claim against ARC is not viable (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007] ["In a contract interference case [,] . . . the plaintiff must show the existence of its valid contract with a third party"]).

The court correctly dismissed the unjust enrichment cause of action against WWP, because there are actual agreements between the parties governing the subject matter at issue (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]), and because it is not against equity and good conscience to permit WWP's sale of an interest in former defendant WWP Holdings, LLC (Holdings) to ARC after plaintiff terminated the Contribution Agreement (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

Because ARC did not cross-appeal from the motion court's refusal to dismiss the fifth cause of action, for breach of the confidentiality agreement, we will not entertain its argument that that cause of action should be dismissed in its entirety (*see Hecht v City of New York*, 60 NY2d 57 [1983]).

ARC's arguments regarding plaintiff's ability to prove lost profits "are more appropriately addressed on a motion for summary judgment" and are "premature" on a motion to dismiss (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]; *compare Goodstein Constr. Corp. v City of New York*, 67 NY2d 990, 992 [1986] [motion to dismiss], *with Goodstein Constr. Corp. v City of New York*, 80 NY2d 366 [1992] [summary judgment]). In addition, unlike the plaintiffs in *Gordon v Dino De Laurentiis Corp.* (141 AD2d 435 [1st Dept 1998]), plaintiff plausibly alleges that ARC's breach of the confidentiality agreement caused plaintiff to lose its deal with WWP. Therefore, we delete the limitation on damages on the breach of the confidentiality agreement cause of action, without prejudice to limiting such damages on summary judgment.

The court correctly dismissed the eighth cause of action, which alleges that ARC tortiously interfered with plaintiff's prospective business relationship with WWP. "[C]onduct

constituting tortious interference with business relations is . . . conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship" (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]). Here, plaintiff alleges that WWP would have granted plaintiff further extensions of the closing under the Contribution Agreement if ARC had not offered WWP a higher price for an interest in Holdings, which ARC was able to do only because it wrongfully used plaintiff's confidential materials. Plaintiff's claim fails, because ARC engaged in no wrongful conduct directed at WWP, as opposed to plaintiff: it merely offered WWP a higher price for an interest in Holdings, which is not wrongful (*see id.*).

Plaintiff's request for leave to amend to add new claims is improperly raised for the first time on appeal; plaintiff merely sought leave to replead before the motion court.

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15863 The People of the State of New York, ex rel. Theophilus Burroughs, Petitioner-Appellant,

-against-

Warden, O.B.C.C., Correctional Facility, Respondent-Respondent.

Case 341021/13
Ind. 3216/10

Theophilus Burroughs, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

Judgment (denominated an order), Supreme Court, Bronx County (Steven Barrett, J.), entered on or about December 17, 2013, denying the petition for a writ of habeas corpus, unanimously affirmed, without costs.

The court properly found that it has territorial jurisdiction over the offenses based on petitioner's alleged sale of firearms to undercover officers in South Carolina, since they had planned this conduct in New York, and petitioner believed that the guns would be resold in New York. As the court found, the exception to New York jurisdiction set forth in CPL 20.30(1)

is inapplicable, since petitioner's possession and sale of firearms violated federal law (*see e.g.* 18 USC § 922[a][5]). We have considered petitioner's remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15867 In re Christian N.,
Petitioner-Respondent,

-against-

Shante Jovan B.,
Respondent-Appellant,

_____

Julian A. Hertz, Somers, for appellant.

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

_____

Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about August 26, 2014, as amended October 17, 2014, which, after a hearing, granted petitioner's motion for genetic marker testing, unanimously reversed, on the law, without costs, and the motion denied.

It is in the child's best interests to equitably estop petitioner from seeking genetic marker testing to determine if he is the biological father of the child (*see Matter of Jesus R.C. v Karen J.O.*, 126 AD3d 445, 445-446 [1st Dept 2015], *lv denied* 25 NY3d 906 [2015]). Although petitioner testified that he questioned whether he was the child's father, for the first three years of the child's life, the father maintained a father-son relationship with him, held himself out to be the father of the

child, permitted the child to call him "daddy," and provided the mother with support for the child (*see id.*). In addition, the child believes that petitioner is his father. Under the circumstances, equitable estoppel is appropriate even though petitioner did not see the child for approximately one year due to his incarceration when the child was three years old (*see generally Matter of Angelo A.R. v Tenisha N.W.*, 108 AD3d 561 [2d Dept 2013]).

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

ENTERED: OCTOBER 13, 2015

CLERK

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

15868 International Painters, etc., Index 650736/12
Plaintiff-Appellant,

-against-

Cantor Fitzgerald, L.P., et al.,
Defendants-Respondents,

BGC Partners, Inc.,
Nominal Defendant-Respondent.

_____

Wolff Popper LLP, New York (Eric L. Zagar of counsel), for appellant.

Mayer Brown LLP, New York (Michele L. Odorizzi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County, (Eileen Bransten, J.), entered April 10, 2014, dismissing the complaint with prejudice, and bringing up for review orders, same court and Justice, entered September 25, 2013 and on or about March 25, 2014, which, respectively, granted defendants' motion to dismiss the complaint and denied plaintiff's motion for reargument, unanimously affirmed, with costs.

This shareholder derivative action involving a Delaware corporation and governed by Delaware law was properly dismissed. Plaintiff failed to plead particularized facts that would, if proved, suffice to raise a reasonable doubt that defendant board

members were disinterested and independent, or that their approval of challenged transactions was other than the result of a valid exercise of business judgment, and, accordingly, failed to allege grounds for dispensing with a prelitigation demand upon the subject corporation's directors as an exercise in futility (*see* Del Ch Ct R 23.1; *Aronson v Lewis*, 473 A2d 805 [Del 1984]). Plaintiff's argument, that the entire fairness standard applies and demand is excused whenever a transaction is between a corporation and its putative controlling stockholder, is inconsistent with controlling Delaware authority (*see Teamsters Union 25 Health Servs. & Ins. Plan v Baiera*, 2015 WL 4237352, 2015 Del Ch LEXIS 185 [Del Ch, July 13, 2015, C.A. No. 9503-CB]; *but see Montgomery v Erickson Air-Crane, Inc.*, 2014 WL 2207409 [Del Ch, Apr 15, 2014, No. 8784-VCL]).

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15870 The People of the State of New York, Ind. 3282/12
Respondent,

-against-

Yoely Melendez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Natalia Bedoya-McGinn of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 31, 2013, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree and sentencing to him to a term of two years, unanimously modified, on the law, to the extent of vacating the sentence, and remitting the matter for resentencing and further proceedings in accordance herewith.

When defendant pleaded guilty, the court did not apprise him that if he was not a citizen, he may be deported as a consequence of his plea. Therefore, "defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had the court advised him of the possibility of deportation"

(*People v Fermin*, 123 AD3d 465, 466 [1st Dept 2014] [internal quotation marks omitted]). Accordingly, the matter is remitted for the remedy set forth in *People v Peque*, 22 NY3d 168, 200-201 [2013], *cert denied* 574 US ___, 135 S Ct 90 [2014]). "Since defendant did not know about the possibility of deportation during the plea and sentencing proceedings . . . [his] claim falls within [the] narrow exception to the preservation doctrine" (*Peque*, 22 NY3d at 183).

Further, the sentencing court's determination as to the applicability of the mitigating factors set forth in CPL 720.10(3) was not adequately set forth in the record (*see People v Middlebrooks*, 25 NY3d 516 [2015]), and defendant is entitled to a remand for that purpose.

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15871 The People of the State of New York, Ind. 543/13
Respondent,

-against-

William Dean,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered September 11, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of any alleged inconsistencies in police testimony and its rejection of a defense witness's attempt to provide an innocent explanation for defendant's possession of prerecorded buy money.

Defendant did not preserve his claim that the court excessively interfered with the trial proceedings, and we decline to review it in the interest of justice. As an alternate holding, we reject it on the merits. The gist of defendant's excessive-interference claim is that the court made a series of rulings with which defendant disagrees. However, we find that each of these rulings was a proper exercise of discretion, and that none of them was prejudicial.

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15872 In re Allyerra E.,

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

Alando E.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

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

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

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Order of fact-finding and disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about October 2, 2014, which to the extent appealed as limited by the briefs, determined, after a hearing, that respondent father had neglected the subject child, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1012[f][i][B]). The child's out-of-court statements, regarding respondent's use of violence against the mother, were corroborated by the testimony of the mother and the agency caseworker, and the mother's medical

records (*Matter of Carmine G. [Franklin G.]*, 115 AD3d 594, 594 [1st Dept 2014]; *Matter of Madison M. [Nathan M.]*, 123 AD3d 616, 617 [1st Dept 2014]

Respondent's argument that, since the alleged domestic violence was an isolated incident, the Family Court's finding of neglect was not based on a preponderance of the evidence, is unavailing, inasmuch as a single incident where the parent's judgment was strongly impaired and the child was exposed to a risk of substantial harm can sustain a finding of neglect (*Madison M.*, 123 AD3d at 616; *Matter of Kayla W.*, 47 AD3d 571, 572 [1st Dept 2008]). The Family Court properly discredited respondent's testimony that he does not have a history of violence against the mother, given that respondent admitted to pushing the mother on the date of the incident, and that there

was an order of protection against him based on a subsequent incident (*see e.g. Matter of Aaron C. [Grace C.]*, 105 AD3d 548 1st Dept 2013]).

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15873-
15874 The People of the State of New York,
Respondent,

-against-

Auvryn Scarlett,
Defendant-Appellant.

Ind. 4301/08

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Scott A. Rosenberg, The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered November 18, 2009, convicting defendant, after a jury trial, of murder in the second degree (two counts) and assault in the first degree, and sentencing him to an aggregate term of 20 years to life, unanimously modified, on the law, to the extent of reducing the murder convictions to second-degree manslaughter, reducing the assault conviction to second-degree assault and remanding the case for resentencing, and otherwise affirmed. Order, same court and Justice, entered on or about April 18, 2012, which denied defendant's CPL 440.10 motion to vacate the judgment of conviction, unanimously affirmed.

The evidence was insufficient to establish that defendant possessed the requisite depraved indifference to human life necessary to sustain his second-degree murder and first-degree assault convictions. Defendant's actions, in purposefully failing to take his anti-seizure medication and choosing to drive a commercial sanitation truck in Manhattan, after having obtained a commercial driver's license by concealing his disqualifying history of epilepsy, were unquestionably deplorable and reckless. However, they do not fit into the category of cases where the conduct is at least as morally reprehensible as intentional murder (*see People v Maldonado*, 24 NY3d 48, 53 [2014]). The People failed to establish that the defendant also possessed an "utter disregard for the value of human life" (*id.*). "What matters in a depraved indifference analysis is that a defendant -– even one willing to take a grossly unreasonable risk to human life –- does not care how the risk turns out" (*id.* at 56 [internal quotation marks omitted]). Nevertheless, the evidence clearly demonstrated that defendant's actions were reckless. Since defendant's reckless behavior occurred before the accident, but *resulted* therein, it is irrelevant that at the very moment of the fatal crash defendant may have become unconscious and unable to form any mens rea.

Based on our review of the record and the submissions on the CPL 440.10 motion, we find that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Initially, we note that to the extent any of defendant's trial counsel's alleged deficiencies may have contributed to the convictions of depraved indifference murder and assault, as opposed to crimes requiring the mens rea of recklessness, this aspect of the ineffective assistance claim has been rendered academic by our modification of the judgment. Otherwise, defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. Specifically, we find that counsel made strategic choices regarding defendant's medical condition and records that were reasonable under the circumstances of the case, and that defendant has not established prejudice under the state or federal standards.

Defendant's challenge to photographs of the decedents taken

while alive is unpreserved and we decline to review it in the interest of justice. The other evidentiary rulings challenged on appeal were proper exercises of discretion, and any errors were likewise harmless.

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15875 The People of the State of New York, Ind. 1239/11
Respondent,

-against-

Camilo Frontela,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Charles Solomon, J. at hearing; Daniel Conviser, J. at plea and sentence), rendered on or about June 28, 2013 as amended July 26, 2013, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on

reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15876N Josh Haron, Index 306866/12
Plaintiff-Respondent,

-against-

Leah Azoulay,
Defendant-Appellant,

Joseph W. Doonan, et al.,
Nonparty Respondents.

_____

Robert G. Smith, PLLC, New York (Robert G. Smith of counsel), for appellant.

Cardi & Edgar LLP, New York (Dawn M. Cardi of counsel), for respondent.

Hill Rivkins LLP, New York (James A. Saville, Jr. of counsel), for Joseph W. Doonan, respondent.

Marin Goodman, LLP, Harrison (Richard P. Marin of counsel), for Louis M. Lagalante and Gallagher Harnett & Lagalante LLP, respondents.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered April 8, 2014, which granted nonparty respondents' motions to quash discovery requests served on them by defendant, and denied defendant's cross motion to compel disclosure, unanimously affirmed, without costs.

The motion court properly found that the discovery requests are overly broad and improper and thus providently exercised its discretion in quashing them (*see Matter of Kapon v Koch*, 23 NY3d

32, 39 [2014]). Nonparty Doonan established that defendant had already received all relevant documentation regarding plaintiff's compensation and salary, including a neutral report on his earning capacity, that the subpoena is tantamount to a fishing expedition based on defendant's baseless speculation of plaintiff's true worth to his employer, and that any memoranda or writings regarding the hiring of plaintiff are "utterly irrelevant" and would not uncover any legitimate material (*id.* at 34, 38-39 [internal quotation marks omitted]).

The Lagalante nonparties similarly established that their billing statements related to a FINRA action are utterly irrelevant to this divorce action. In addition, they established that those documents are confidential and protected by the attorney-client privilege (*De La Roche v De La Roche*, 209 AD2d 157, 158 [1st Dept 1994]). Defendant failed to establish that the requested documents are material and necessary (*see Kapon*, 23 NY3d at 34), as she merely speculated that plaintiff's employer was paying the FINRA legal fees as additional compensation to plaintiff. In any event, the court correctly noted that the payment of those legal fees do not constitute "personal economic

benefits" (Domestic Relations Law § 240[1-b][b][5][iv][B]; *see Kahn v Oshin-Kahn*, 43 AD3d 253, 256 [1st Dept 2007]).

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: OCTOBER 13, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15877 In re Nekadam Yusapov, et al., Index 31/15
[M-2742] Petitioners, 178/10

-against-

Hon. Rita Mella, etc.,
Respondent.

_____

David Bellon, Brooklyn, for petitioners.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for 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,

And said proceeding having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated September 18, 2015,

It is unanimously ordered that the application be and the same hereby is deemed withdrawn in accordance with the terms of the aforesaid stipulation, without costs or disbursements.

ENTERED: OCTOBER 13, 2015

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Kapnick, JJ.

15524- Index 653783/12
15525- 651124/13
15526- 652614/12
15527 650337/13

Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, National Association, solely in its capacity as Trustee,
Plaintiff-Respondent-Appellant,

-against-

Nomura Credit & Capital, Inc.,
Defendant-Appellant-Respondent.

- - - - -

Nomura Home Equity Loan, Inc., Series 2007-3, by HSBC Bank USA, National Association, solely in its capacity of Trustee,
Plaintiff-Respondent-Appellant,

-against-

Nomura Credit & Capital, Inc.,
Defendant-Appellant-Respondent.

- - - - -

Nomura Asset Acceptance Corporation Mortgage Pass-Through Certificates, Series 2006-AF 2, by HSBC Bank USA, National Association, as Trustee,
Plaintiff-Appellant-Respondent,

-against-

Nomura Credit & Capital, Inc.,
Defendant-Respondent-Appellant.

- - - - -

Nomura Home Equity Loan, Inc.,
Home Equity Loan Trust, Series 2007-2
by HSBC Bank USA, National Association,
as Trustee,
Plaintiff-Appellant-Respondent,
-against-

Nomura Credit & Capital, Inc.,
Defendant-Respondent-Appellant.

_____

Shearman & Sterling LLP, New York (Agnès Dunogué of counsel), for Nomura Credit & Capital, Inc., appellant-respondent/respondent-appellant.

Holwell Shuster & Goldberg LLP, New York (Michael S. Shuster counsel), for Nomura Asset Acceptance Corporation Mortgage Pass-Through Certificates, Series 2006-AF2, by HSBC Bank USA, National Association, as Trustee, and Nomura Home Equity Loan, Inc., Home Equity Loan Trust, Series 2007-2, by HSBC Bank USA, National Association, as Trustee, appellants-respondents.

Kasowitz, Benson, Torres & Friedman LLP, New York (Christopher P. Johnson of counsel), for Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, National Association, solely in its capacity as Trustee, and Nomura Home Equity Loan Inc., Series 2007-3, by HSBC Bank USA, National Association, solely in its capacity as Trustee, respondents-appellants.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 18, 2014 in *2006-FM2* (No. 15524), modified, on the law, to deny the motion as to the third cause of action, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about July 18, 2014 in *2007-3* (No. 15525), modified, on the law, to deny the motion as to the third cause of action, and otherwise affirmed, without costs. Order, same court

and Justice, entered July 22, 2014 in *2006-AF2* (No. 15526), modified, on the law, to permit plaintiffs to seek damages on the first cause of action for breach of the No Untrue Statement Provision (section 7 of the MLPA) and for failure to give prompt written notice after discovering material breaches of the representations and warranties in section 8 of the MLPA, and otherwise affirmed, without costs. Order, same court and Justice, entered July 22, 2014 in *2007-2* (No. 15527), modified, on the law, to permit plaintiffs to seek damages on the first cause of action for breach of the No Untrue Statement Provision (section 7 of the MLPA) and for failure to give prompt written notice after discovering material breaches of the representations and warranties in section 8 of the MLPA, and otherwise affirmed, without costs.

Opinion by Sweeny, J. All concur

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Barbara R. Kapnick, JJ.

15524-15525-15526-15527
Index 653783/12
651124/13
652614/12
650337/13

_____x

Nomura Home Equity Loan, Inc.,
Series 2006-FM2, by HSBC Bank USA,
National Association, solely in its
capacity as Trustee,
Plaintiff-Respondent-Appellant,

-against-

Nomura Credit & Capital, Inc.,
Defendant-Appellant-Respondent.

- - - - -

Nomura Home Equity Loan, Inc.,
Series 2007-3, by HSBC Bank USA,
National Association,
solely in its capacity of Trustee,
Plaintiff-Respondent-Appellant,

-against-

Nomura Credit & Capital, Inc.,
Defendant-Appellant-Respondent.

- - - - -

Nomura Asset Acceptance Corporation Mortgage
Pass-Through Certificates, Series 2006-AF 2,
by HSBC Bank USA, National Association, as
Trustee,
Plaintiff-Appellant-Respondent,

-against-

Nomura Credit & Capital, Inc.,
Defendant-Respondent-Appellant.
- - - - -
Nomura Home Equity Loan, Inc.,
Home Equity Loan Trust, Series 2007-2
by HSBC Bank USA, National Association,
as Trustee,
Plaintiff-Appellant-Respondent,

-against-

Nomura Credit & Capital, Inc.,
Defendant-Respondent-Appellant.
_____x

Cross appeals from the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered July 18, 2014 in *2006-FM2* (No. 15524), which granted defendant's motion to dismiss the complaint as to the third and fourth causes of action, and denied the motion as to the first and second causes of action; the order of the same court and Justice, entered on or about July 18, 2014 in *2007-3* (No. 15525), which granted defendant's motion to dismiss the complaint as to the third and fourth causes of action, and denied the motion as to the first and second causes of action; the order of the same court and Justice, entered July 22, 2014 in *2006-AF2* (No. 15526), which to the extent appealed from as limited by the briefs, limited the relief available under the first cause of action to specific performance of the repurchase protocol or, if loans cannot be repurchased, to damages consistent with its terms, limited the first cause of action to

the alleged breaches of the Mortgage Representations, granted defendant's motion to dismiss the second cause of action; and the order of the same court and Justice, entered July 22, 2014 in *2007-2* (No. 15527), which, to the extent appealed from as limited by the briefs, limited the relief available under the first cause of action to specific performance of the repurchase protocol or, if loans cannot be repurchased, to damages consistent with its terms, limited the first cause of action to the alleged breaches of the Mortgage Representations, granted defendant's motion to dismiss the second cause of action, and denied the motion as to the third cause of action.

Shearman & Sterling LLP, New York (Agnès Dunogué and Joseph J. Frank of counsel), for Nomura Credit & Capital, Inc., appellant-respondent/respondent-appellant.

Holwell Shuster & Goldberg LLP, New York (Michael S. Shuster, Dwight A. Healy and Daniel M. Sullivan of counsel), for Nomura Asset Acceptance Corporation Mortgage Pass-Through Certificates, Series 2006-AF2, by HSBC Bank USA, National Association, as Trustee, and Nomura Home Equity Loan, Inc., Home Equity Loan Trust, Series 2007-2, by HSBC Bank USA, National Association, as Trustee, appellants-respondents.

Kasowitz, Benson, Torres & Friedman LLP, New York (Christopher P. Johnson, Zachary W. Mazin and Jenny H. Kim of counsel), for Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, National Association, solely in its capacity as Trustee, and Nomura Home Equity Loan Inc., Series 2007-3, by HSBC Bank USA, National Association, solely in its capacity as Trustee, respondents-appellants.

SWEENY, J.

These appeals stem from the securitization of residential mortgage-backed securities (RMBS) by Nomura Credit & Capital, Inc., the defendant in each case. The allegations and arguments advanced in the parties' briefs are, with certain exceptions, materially similar throughout these four cases. Therefore, the factual and legal issues will be addressed in a unified manner, with pertinent differences noted where necessary.

As a starting point, it is necessary to understand how the debt instruments involved in these cases were created. Generally, the securitization process involves packaging numerous mortgage loans into a trust, which in turn issues debt securities, which it then sells to investors. The payments made by the borrowers of the underlying mortgages are "passed through" to the investors holding the securities, who in turn receive distributions to the extent and in the priority provided for in the securitization documents. (*See MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 290 [1st Dept 2011].)

More specifically, a "sponsor," which is an affiliate of a bank (such as defendant herein), acquires mortgage loans from the institutions that actually made the loans to individual borrowers. The sponsor selects the loans it wishes to purchase and has unrestricted access to the underlying documentation

associated with each loan. It then sells the loans via a Mortgage Loan Purchase Agreement (MLPA) to a special-purpose entity affiliated with the sponsor known as the "depositor." The depositor immediately transfers or "deposits" the mortgage loans into a trust, which then issues securities to the depositor, which in turn sells them to investors through an underwriter. The proceeds of the sale of these securities ultimately finance the purchase of the mortgage loans. A trustee then holds the loans and administers the trust for the benefit of the investors. The depositor, trustee and sponsor then enter into a Pooling and Servicing Agreement (PSA) with a "servicer," which is engaged to collect payments on the underlying loans in a manner consistent with the securitization documents. (*See ACE Securities Corp. Home Equity Loan Trust Series 2007-HE3 v DB Structured Products, Inc.*, 5 F Supp 3d 543, 547-548 [SD NY 2014]). This process was followed in each of these four cases.

Certain provisions of the MLPAs form the core of the disputes between these parties. In section 7 of each MLPA, defendant represented and warranted as follows:

> "The written statements, reports and other documents prepared and furnished or to be prepared and furnished by [defendant] pursuant to this Agreement or in connection with the transactions contemplated hereby taken in the aggregate do not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements

contained therein not misleading."

The parties refer to this as the "No Untrue Statement Provision." The "other documents" referenced in this provision included prospectuses, mortgage loan files and loan tapes.[1]

In section 8 of each MLPA, defendant made specific representations and warranties about each loan, including, as pertinent to these appeals, the following:

> (i)/(1)[2] "Information provided to the Rating Agencies . . . is true and correct according to the Rating Agency requirements";
>
> (ii)/(2) "No fraud has taken place on the part of the Mortgagor or any other party involved in the origination or servicing of the Mortgage Loan";
>
> (xxix)/(29) "The Mortgage File contains an appraisal of the related Mortgaged Property which was made by a qualified appraiser, duly appointed by the related originator and was made in accordance with the Financial Institutions Reform, Recovery and Enforcement Act of 1989 and the Uniform Standards of Professional Appraisal Practice";
>
> (xli)/(42) "Each Mortgage Loan is and will be a mortgage loan arising out of the originator's practice in accordance with the originator's underwriting

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[1]Loan tapes contain "key statistics about each underlying loan in the pool" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d at 292).

[2]The numbering of the subsections is Roman in three of the MLPAs and Arabic in the remaining MLPA. Also, subsection (xli) in the three MLPAs is subsection (42) in the remaining MLPA. The language, however, is the same.

guidelines."[3]

The parties reference this as the "Mortgage Representations."

Section 9(a) of each MLPA contains the following remedy for missing documents and breaches of the Mortgage Representations:

> "Upon discovery by the Seller . . . or any assignee, transferee or designee of the Purchaser of any materially defective document in, or that any material document was not transferred by the Seller, . . . or of a breach of any of the representations and warranties contained in Section 8 that materially and adversely affects the value of any Mortgage Loan . . . the party discovering such breach shall give prompt written notice to the Seller. . . . [T]he Seller promptly shall deliver such missing document or cure such defect or breach in all material respects or, in the event the Seller cannot deliver such missing document or cannot cure such defect or breach, the Seller shall . . . repurchase the affected Mortgage Loan at the Purchase Price."

The term "Purchase Price" is defined as "an amount equal to the sum of (i) 100% of the outstanding principal balance of the Mortgage Loan as of the date of such purchase plus, (ii) 30 days' accrued interest thereon."

Section 9(c) of each MLPA contains the following limitation on remedies: "[T]he obligations of the Seller set forth in this

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[3]"[U]nderwriting guidelines require an originator to evaluate the borrower's ability and willingness to repay a mortgage loan" (*Fed. Hous. Fin. Agency v Nomura Holding Am., Inc.*, 2015 WL 2183875, *6, 2015 US Dist LEXIS 61516, *23 [SD NY May 11, 2015, No. 11cv6201 [DLC]).

Section 9 to cure or repurchase a defective Mortgage Loan . . . constitute the sole remedies of the Purchaser against the Seller respecting a missing document or a breach of the representations and warranties contained in Section 8." This is the "sole remedy" provision.

Finally, section 13 of each MLPA provides that "[a]ll rights and remedies of the Purchaser under this Agreement are distinct from, and cumulative with, any other rights or remedies under this Agreement or afforded by law or equity and all such rights and remedies may be exercised concurrently, independently or successively."

In section 2.03 of each of the PSAs, defendant made certain representations and warranties, including a statement that "[t]he representations and warranties set forth in Section 8 of the [MLPA] are true and correct as of the Closing Date." Section 2.03 further provided the following remedy for a breach:

> "Upon discovery by any of the parties hereto of a breach of a representation or warranty set forth in . . . Section 8 of the [MLPA] that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such breach shall give prompt written notice thereof to the other parties. The Sponsor [defendant] hereby covenants with respect to the representations and warranties set forth in . . . Section 8 of the [MLPA], that within ninety days of the discovery of a breach of any representation or warranty set forth therein that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, it

> shall cure such breach in all material respects and, if such breach is not so cured, . . . repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee at the Purchase Price."

Finally, section 2.03 tracks the language of section 9(c) of each MLPA by providing that the Sponsor's obligation to cure or repurchase any mortgage loan to which a breach has occurred "shall be the sole remedies against the Sponsor for any such breach.

The closing date for the Series 2006-FM2 deal (appeal No. 15524) was October 31, 2006. The closing date for the Series 2007-3 deal (appeal No. 15525) was April 30, 2007.

We turn now to the specific facts of each case in the order in which they were commenced.

Appeal No. 15526

On April 19, 2012, the trustee of the Series 2006-AF2 trust gave written notice to defendant of breaches affecting 454 loans. Defendant failed to either cure the breaches or repurchase the loans within the required 90 days, and the trustee commenced an action on July 27, 2012. Plaintiff filed an amended complaint on February 26, 2013. The complaint alleged, among other things, that a forensic review of 1004 of the 2717 mortgage loans in the trust revealed that in excess of 45% of the loans breached defendant's representations and warranties, which, because of the

large number of defective loans, made "recourse to the repurchase remedy impractical." The complaint alleged that defendant conducted due diligence on these loans and, because of the systemic nature of the breaches, it had to have been aware of the defects and failed to give notice to plaintiff as required by section 9(a) of the MLPA. The three causes of action in the complaint relevant to this appeal are (1) breach of the MLPA and PSA with respect to the 454 loans mentioned in the breach notice, as well as for breach of the duty of good faith and fair dealing, entitling plaintiff to damages not limited to the contractual repurchase remedy; (2) rescissory damages; and (3) in the alternative, specific performance requiring defendant to repurchase the breaching mortgage loans.

Appeal No. 15524

On July 20, 2012, the trustee of the Series 2006-FM2 trust gave written notice to defendant regarding missing documentation with respect to specific loans and requested that defendant repurchase those loans. On August 6, 2012, the trustee gave written notice to defendant of breaches affecting 23 loans, as well as defective documentation with respect to 87 loans, and demanded that defendant repurchase all loans in the trust due to the "systemic nature of the breaches." This was followed on August 22 by written notice of breaches affecting 2429 loans,

with another demand to repurchase all loans in the trust. On October 29, written notice was given regarding breaches affecting an additional 96 loans, as well as defective documentation with respect to 88 loans.

The trustee commenced an action on October 29, 2012 by service of a summons with notice. Additional breach notices were thereafter sent to defendant on February 20, March 5, April 1, April 4 and April 15, 2013.

On April 16, 2013, plaintiff filed its complaint, alleging that at least 2,080 of the 5,714 loans in the trust did not conform to the mortgage representations in a manner that materially and adversely affected the value of those loans. The complaint further alleged that "at least 2,554 Mortgage Loan Files could not even be reviewed," as the loan servicer either did not have the files or was missing critical documentation. The complaint also alleged that, due to the systemic nature of the breaches, defendants had to have been aware of the defects and failed to give plaintiff notice as required by the MLPA.

The complaint stated four causes of action seeking the following relief: (1) specific performance of defendant's obligation under the PSA and MLPA to repurchase the defective loans; (2) damages for defendant's breach of the obligation to repurchase; (3) damages for defendant's alleged violation of the

No Untrue Statement Provision; and (4) rescission or, in the alternative, rescissory damages.

Appeal No. 15527

On August 17, 2012, the trustee of the Series 2007-2 trust gave written notice to defendant of breaches affecting 256 loans, followed on August 24 with a written notice of breaches affecting an additional 609 loans. On September 6 and 7, additional breach notices were sent to defendant.

On January 30, 2013, the trustee commenced an action, alleging, inter alia, that of the 5,136 loans in the trust, at least 2,652 breached defendant's representations and warranties. It further alleged that a forensic review determined that at least 2,652 of the 3,189 loan files reviewed — some 83% — failed to comply with at least one of defendant's representations and warranties. The four causes of action stated and requested relief similar to those in appeal No. 15524.

Appeal No. 15525

On November 8, 2012, the trustee of the series 2007-3 trust gave written notice to defendant of breaches affecting 121 loans, as well as defective documentation with respect to 594 loans, and demanded repurchase of all the loans in the trust. Written notices were sent to defendant on December 12, 2012 (breaches of 43 loans, defective documentation for 27 loans, missing

documentation on 1167 loans), January 17, 2013 (breaches on 42 loans, defective documentation on 25 loans), and February 22 (breaches on 54 loans). Each notice demanded repurchase of all loans.

On March 28, 2013, the trustee commenced an action. The complaint alleged four causes of action and sought relief similar to that requested in appeal No. 15524.

In each of the above actions, defendant moved to dismiss the complaints pursuant to CPLR 3211(a)(1) and (7).

The motion court rejected plaintiffs' contention that the failure to comply with the repurchase obligation under the sole remedy provision of the contracts gave rise to an independent breach of contract cause of action. However, it also rejected defendant's contention that damages are never available under the sole remedy provision, and that the only relief available is specific performance of the repurchase obligations contained in the agreements. It also rejected defendant's argument that liquidated loans are not subject to the repurchase protocol.

Concerning the claims based on the breach of the No Untrue Statement Provision of the MLPA (section 7), the motion court dismissed those claims as duplicative of the breach of the Mortgage Representations provision of the MLPA and PSA (section 8). The court dismissed the causes of action for rescission or

rescissory damages, holding that those claims were waived by plaintiff's agreeing to the sole remedy provision of the MLPA. It did find, however, that plaintiff's allegations as to defendant's discovery of the breaches of the Mortgage Representations and its failure to notify plaintiff pursuant to its obligations under the contracts were sufficient, at this pleading stage, to survive defendant's motion to dismiss.

It is axiomatic that, on a motion brought pursuant to CPLR 3211, our analysis of a plaintiff's claims is limited to the four corners of the pleading. The allegations contained in the complaint must be given a liberal construction and accepted as true (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015], citing *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Moreover, the plaintiff must be given "the benefit of every possible favorable inference" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 5 [2013] [internal quotation marks omitted]). If there are any ambiguities in the allegations in the complaint, they must be resolved in favor of the plaintiff (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]; *Snyder v Bronfman*, 13 NY3d 504, 506 [2009]). A reviewing court must "bear in mind that '[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss'" (*Johnson v Proskauer Rose LLP*,

129 AD3d at 67 [alteration in original], quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Rather, a court's duty is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88; *Faison v Lewis*, 25 NY3d 220, 224 [2015]).

The crux of the dispute between these parties in all these cases concerns the scope and application of the "sole remedy" language set forth above. Defendant contends that, in the remedy limitations contained in sections 9(c) of the MLPAs and 2.03 of the PSAs, that being repurchase or cure of the defective loan, the motion court erred by allowing plaintiffs to seek monetary damages if cure or repurchase of a defective mortgage loan was impossible. Under defendant's interpretation of the "sole remedy" clause, loans that have been foreclosed upon or liquidated cannot be repurchased and, by agreeing to those provisions, plaintiff accepted the risk of loss such an event would entail. However, such an interpretation would leave plaintiffs without a remedy with respect to those loans, as their only recourse would be to commence an action for specific performance, which would be impossible to fulfill. The present state of the law does not support defendant's contention.

New York law has long held that contracting parties are generally free to limit their remedies. "A limitation on

liability provision in a contract represents the parties' agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor" (*Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 436 [1994]). Therefore, by the terms of the "sole remedy" clause, the agreements limit plaintiffs to seeking an order of specific performance requiring defendant to repurchase the defective loans at the purchase price defined in those agreements, or to cure the defects in those loans.

However, specific performance is an equitable remedy. In the RMBS context, most courts have repeatedly held that "while a provision providing for equitable relief as the 'sole remedy' will generally foreclose alternative relief, 'where the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy'" (*The Bank of New York Mellon v WMC Mtge., LLC*, 2015 WL 2449313, *2, 2015 US Dist LEXIS 67367, *6 [SD NY, May 22, 2015 12cv7096, (DLC)], quoting *Doyle v Allstate Ins. Co.*, 1 NY2d 439, 443 [1956]; *see also ACE Sec. Corp. Home Equity Loan Trust, Series 2007-HE3 v DB Structured Products, Inc.*, 5 F Supp 3d at 554; *MASTR Adjustable Rate Mortgages Trust 2006-OA2 v UBS Real Estate Sec. Inc.*, 2013 WL 4399210, *3, 2013 US Dist LEXIS 115532,

*10-11 [SD NY, Aug. 15, 2013, No. 12-Civ-7322 (HB)]; *Wiebusch v Hayes*, 263 AD2d 389, 391 [1st Dept 1999])[4]. Such a rule makes sense, for to hold otherwise would create a "perverse[]" incentive for a sponsor "to fill the trust with junk mortgages that would expeditiously default so that they could be released, charged off, or liquidated before a repurchase claim is made" (*ACE Sec. Corp. v DB Structured Prods., Inc.*, 40 Misc 3d 562, 569 [Sup Ct, NY County 2013], *revd on other grounds*, 112 AD3d 522 [1st Dept 2013], *affd* 25 NY3d 581 [2015]).

Here, the sheer volume of defective loans in each of these trusts proves the rectitude of the foregoing precedents. As noted above, it was alleged in No. 15526 that 45% of the loans reviewed in a forensic sampling revealed breaches of defendant's warranties and representations. The allegations in No. 15524 were even more startling: 2,080 of 5,714 loans did not conform to defendant's representations and another 2,554 loans could not even be reviewed because of missing files and/or documentation. Of the 5,136 loans in the trust in No. 15527, 2,652 breached the representations and warranties and approximately 83% of the files

[4]*But see Citigroup Mtge. Loan Trust 2007-AMC3 v Citigroup Global Markets Realty Corp.*, 2014 WL 1329165, *5, 2014 US Dist LEXIS 47252, *16 (SD NY, Mar. 31, 2014, No. 13-Civ-2843 [GBD]) (holding that the sole remedy provision of the MLPA precludes an action for monetary damages).

reviewed failed to comply with at least one representation or warranty. Similar numbers of defective loans were alleged in No. 15525. The allegations by plaintiffs that these breaches could hardly have escaped defendant's notice because of the systemic nature of these defects only lends additional support for the precedents cited above. Again, at this stage of the proceedings, these allegations must be accepted as true; whether plaintiffs may ultimately prevail need not be addressed now.

The motion court therefore correctly held that plaintiffs may pursue monetary damages with respect to any defective mortgage loan in those instances where cure or repurchase is impossible.

However, the court erred in not allowing plaintiffs to pursue damages for breach of section 7 (as opposed to section 8) of the MLPA. By its plain language, section 9(c) says that "[t]he obligations of the Seller [i.e., defendant]. . .to cure or repurchase a defective Mortgage Loan...constitute the sole remedies of the Purchaser against the Seller *respecting a missing document or a breach of the representations and warranties contained in Section 8"* (emphasis added). Similarly, in section 2.03(e) of the PSA, which states that "the obligation under this Agreement of the Sponsor [i.e., defendant] to cure [or] repurchase...any Mortgage Loan as to which a breach has occurred

or is continuing shall constitute the sole remedies against the Sponsor respecting such breach available to Certificateholder... or the Trustee," "such breach" refers back to "a breach of any representation or warranty set forth [in *Section 8 of the MLPA*] that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan" (emphasis added). By contrast, the sole remedy provisions in *Ambac Assur. Corp. v EMC Mtge. LLC* (121 AD3d 514 [1st Dept 2014]), relied on by defendant, were more broadly worded, stating that those provisions were applicable to "this Agreement," not as here, to specific sections of the MLPA. (*see id.* at 516, 518). Had these "very sophisticated parties" desired to have the sole remedy provisions apply to both section 8 *and* section 7 breaches, "they certainly could have included such language in the contracts. They did not do so, and this Court will not do so now 'under the guise of interpreting the writing'" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 105 AD3d 412, 413 [1st Dept 2013], quoting *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). In any event, section 13 of the MLPA provides that remedies are cumulative.

With respect to plaintiffs' causes of action for rescission, even if section 9(c) of the MLPA and section 2.03(e) of the PSA did not waive plaintiffs' right to seek such relief, rescission

would be unwarranted because damages are available (*see Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]).

With respect to *2006-AF2* (No. 15526) and *2007-2* (No. 15527), the court correctly declined to permit plaintiffs to pursue damages for breach of the implied covenant of good faith and fair dealing since the claim is duplicative of the breach of contract claim (*see e.g. MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d at 297). It also correctly declined to permit plaintiffs to pursue damages for defendant's failure to repurchase defective loans (*see ACE Sec. Corp.* 25 NY3d at 589). However, the court erred in not allowing plaintiffs to pursue damages for defendant's failure to give prompt written notice after it discovered material breaches of the representations and warranties in section 8 of the MLPA.

Concerning *2006-FM2* (No. 15524) and *2007-3* (No. 15525), the court correctly refused to dismiss claims relating to loans that plaintiffs failed to mention in their breach notices or that were mentioned in breach notices sent less than 90 days before plaintiffs commenced their actions. Unlike the situation in *ACE* (112 AD3d at 522-523), there were some timely claims in these cases. Hence, a complaint amended to add the claims at issue would have related back to the original complaints (*see Koch v Acker, Merrall & Condit Co.*, 114 AD3d 596, 597 [1st Dept 2014]).

Plaintiffs' presuit letters put defendant on notice that the certificateholders whom plaintiffs (as trustees) represented were investigating the mortgage loans and might uncover additional defective loans for which claims would be made. Furthermore, in addition to sending defendant notices of breach, plaintiffs allege that defendant already knew, based on its own due diligence, that certain loans in the trusts at issue breached its representations and warranties (*see ACE Sec. Corp. Home Equity Loan Trust, Series 2007-HE3 v DB Structured Prods., Inc.*, 5 F Supp 3d at 559).

Additionally, with respect to these two cases, the court correctly found that plaintiffs stated claims for breach of subsections (i)/(1), (ii)/(2), (xxix)/(29), and (xli)/(42) of section 8 of the MLPA. Unlike the plaintiffs in *Newman v Wells Fargo Bank, N.A.* (85 AD3d 435 [1st Dept 2011]) and *Mandarin Trading Ltd. v Wildenstein* (65 AD3d 448 [1st Dept 2009], *affd* 16 NY3d 173 [2011]), relied on by defendant, the plaintiffs here do not bring fraud claims based on inflated appraisals; rather, they allege that defendant breached a representation and warranty because at least some appraisals were not made in accordance with the Uniform Standards of Professional Appraisal Practice. Unlike *Footbridge Ltd. Trust v Countrywide Home Loans, Inc.* (2010 WL 3790810, 2010 US Dist LEXIS 102134 [SD NY, Sept. 28, 2010, No.

09- civ-4050(PKC)]), on which defendant also relies, the cases at bar do not involve claims of securities fraud and common-law fraud, which must meet heightened pleading requirements. Plaintiffs are suing for breach of contract, not fraud (*see LaSalle Bank Natl. Assn. v Citicorp Real Estate, Inc.*, 2002 WL 31729632, *3, 2002 US Dist LEXIS 23323, *10-11 [SD NY, Dec. 5, 2002, No. 01-civ-4389(AGS)] [rejecting defendant's attempt to transform plaintiff's breach of warranty claim into a fraud claim]; *ACE Sec. Corp. v DB Structured Prods., Inc.*, 41 Misc 3d 1229[A], 2013 NY Slip Op 51933[u],*3 [Sup Ct, NY County 2013] ["investor put-back actions are not fraud cases"]).

We have considered the appealing parties remaining contentions for affirmative relief and find them to be without merit.

Accordingly, the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered July 18, 2014 in *2006-FM2* (No. 15524), which granted defendant's motion to dismiss the complaint as to the third and fourth causes of action and denied the motion as to the first and second causes of action, should be modified, on the law, to deny the motion as to the third cause of action, and otherwise affirmed, without costs. The order of the same court and Justice, entered on or about July 18, 2014 in *2007-3* (No. 15525), which granted defendant's motion to dismiss the

complaint as to the third and fourth causes of action and denied the motion as to the first and second causes of action, should be modified, on the law, to deny the motion as to the third cause of action, and otherwise affirmed, without costs. The order of the same court and Justice, entered July 22, 2014 in *2006-AF2* (No. 15526), which, to the extent appealed from as limited by the briefs, limited the relief available under the first cause of action to specific performance of the repurchase protocol or, if loans cannot be repurchased, to damages consistent with its terms, limited the first cause of action to the alleged breaches of the Mortgage Representations, granted defendant's motion to dismiss the second cause of action, and denied the motion as to the third cause of action, should be modified, on the law, to permit plaintiffs to seek damages on the first cause of action for breach of the No Untrue Statement Provision (section 7 of the MLPA) and for failure to give prompt written notice after

discovering material breaches of the representations and warranties in section 8 of the MLPA, and otherwise affirmed, without costs. The order of the same court and Justice, entered July 22, 2014 in *2007-2* (No. 15527), which, to the extent appealed from as limited by the briefs, limited the relief available under the first cause of action to specific performance of the repurchase protocol or, if loans cannot be repurchased, to damages consistent with its terms, limited the first cause of action to the alleged breaches of the Mortgage Representations, granted defendant's motion to dismiss the second cause of action, and denied the motion as to the third cause of action, should be modified, on the law, to permit plaintiffs to seek damages on the first cause of action for breach of the No Untrue Statement Provision (section 7 of the MLPA) and for failure to give prompt written notice after discovering material breaches of the representations and warranties in section 8 of the MLPA, and otherwise affirmed, without costs.

All concur.

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

ENTERED: OCTOBER 13, 2015

CLERK