SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 9, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16111 The People of the State of New York, Ind. 2249/11
Respondent,

-against-

Eugene Kindell,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Elizabeth Mosher and Susan Axelrod of counsel), for appellant.

Eugene Kindell, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J. at original and reopened suppression hearings; Rena K. Uviller, J. at jury trial and sentencing), rendered December 19, 2011, convicting defendant of burglary in the second degree, attempted burglary in the second degree and bail jumping in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 19½ years to life, unanimously affirmed.

This Court previously held this appeal in abeyance pending a

reopened suppression hearing (135 AD3d 423 [1st Dept 2016]). Upon remand, the court conducted the reopened hearing and again denied defendant's suppression motion. The record supports that determination. There is no basis for disturbing the court's credibility determinations. The evidence credited by the hearing court establishes that the search and seizure was lawful under the plain view doctrine. The record fails to support defendant's assertion that delay resulting from the original ineffective representation (*see id.*) prejudiced his ability to litigate the reopened proceedings.

We perceive no basis for reducing the sentence. We have considered and rejected the other claims raised, but not addressed, on the original appeal, including those contained in defendant's pro se supplemental brief.

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

ENTERED: MARCH 9, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

1337 In re Dennis Stavropoulos, Index 100269/14
Petitioner-Appellant,

-against-

William J. Bratton, etc., et al.,
Respondents-Respondents.

_____

Law Office of Jeffrey L. Goldberg, Port Washington (Eileen J. Goggin of counsel), for appellant.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered September 15, 2014, denying the petition seeking to annul the determination of respondents, dated November 19, 2013, which denied petitioner's request for an award of a World Trade Center accident disability retirement pension, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner, as an officer of the New York City Police Department, responded to the World Trade Center (WTC) on September 11, 2001, and worked for over 100 hours at the site. In May 2011, petitioner filed an application for enhanced accident disability retirement (ADR) benefits. In his application, petitioner contended that he was disabled by pulmonary hypertension, which had been diagnosed in 2009, and

that he was entitled to a statutory presumption that this condition had been caused by his exposure to contaminants at the WTC site under the Administrative Code of City of NY § 13-252.1(a) and Retirement and Social Security Law § 2(36). Respondent Board of Trustees of the Police Pension Fund, Article II (the Board of Trustees), following the recommendation of the Medical Board, ultimately denied petitioner's application for ADR benefits, while approving him for ordinary disability retirement, finding that his disability of pulmonary hypertension was not subject to a statutory presumption of WTC-related causation and had not otherwise been shown to have been caused by exposure to contaminants at the WTC site. In the order appealed from, Supreme Court rejected petitioner's article 78 challenge to the determination of the Board of Trustees. For the reasons discussed below, we affirm.

The record establishes that, long before the events of September 11, 2001, petitioner suffered from a number of medical conditions that are risk factors for the development of pulmonary hypertension. Like his father and sister, he was born with the blood disorder thalassemia trait, which affects the red blood cells' ability to circulate oxygen. In 1984, as a result of injuries incurred in a car accident, petitioner underwent an operation to remove his spleen. In 1990, he was diagnosed with

iron overload.

In 2009, after being hospitalized for symptoms of exertional shortness of breath and chest pain, petitioner was diagnosed with severe pulmonary arterial hypertension of unclear etiology. At the same time, x-rays and CT-scans of petitioner's chest revealed that his lungs were "clear." Moreover, pulmonary function tests were normal and clinical lung examinations were within normal limits.

Hypertension, or high blood pressure, can occur in either of the two major loops of the circulatory system: in the set of blood vessels distributing blood from the right side of the heart to the lungs, in which case it is called pulmonary hypertension, or in the set of blood vessels distributing blood from the left side of the heart to the rest of the body, in which case it is called systemic hypertension. Pulmonary hypertension is the less frequent of the two varieties of hypertension. Pulmonary hypertension may be diagnosed as idiopathic pulmonary hypertension if the cause is unknown, or secondary pulmonary hypertension if caused by an identified medical disorder.

Applying for ADR involves a two step process. Initially, the pension fund's Medical Board conducts a physical examination, interviews the applicant, and reviews the submitted evidence, before submitting a recommendation to the Board of Trustees. In

the second step, the Board of Trustees votes to either grant or deny ADR benefits. Ordinarily, an applicant for ADR has the burden to show an injury suffered in the line of duty caused the disabling condition. However, a police officer who worked the requisite hours at the WTC site, and is diagnosed with one of several statutorily enumerated conditions, is entitled to a statutory presumption that contaminants at the WTC site caused the condition. In this regard, § 13-252.1(a) of the Administrative Code provides in pertinent part:

> "[I]f any condition or impairment of health [of a service member] is caused by a qualifying World Trade Center condition as defined in [Retirement and Social Security Law § 2], it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence."

Retirement and Social Security Law § 2(36)(a) defines a "qualifying World Trade Center condition" as "a qualifying condition or impairment of health resulting in disability to a [service] member who participated in World Trade Center rescue, recovery or cleanup operations for a qualifying period, as those terms are defined below," subject to certain conditions that are not at issue in this case. Retirement and Social Security Law § 2(36)(c) provides that the physical conditions within this category include, in pertinent part:

> "(ii) diseases of the lower respiratory tract, including but not limited to trachea-bronchitis, bronchitis, chronic obstructive pulmonary disease, asthma, reactive airway dysfunction syndrome, and different types of pneumonitis, such as hypersensitivity, granulomatous, or eosinophilic; [and] . . .
>
> "(v) new onset diseases resulting from exposure as such diseases occur in the future including cancer, asbestos-related disease, heavy metal poisoning, and musculoskeletal disease."

Petitioner's application was considered by the Medical Board on three separate occasions. On July 15, 2011, petitioner appeared before the Medical Board for the first time. In support of his application, petitioner submitted his medical records and letters from three physicians, more fully discussed hereinafter, suggesting, without evidence, that there might be some connection between petitioner's pulmonary hypertension and his WTC exposure. Petitioner's medical records noted his various ailments including thalassemia, benign lung nodules, and pulmonary hypertension. Neither petitioner, nor any of his physicians, submitted medical studies linking exposure to contaminants to pulmonary hypertension, or reports of other WTC first responders diagnosed with pulmonary hypertension.

Petitioner appeared before the Medical Board again in March of 2012 and May of 2013, each time presenting new evidence that his pulmonary hypertension had deteriorated. On all three

occasions the Medical Board unanimously determined, based on their physical examinations, oral interviews of petitioner, and examination of petitioner's medical records and physicians' letters, that petitioner was disabled by pulmonary hypertension with an unknown cause. The Medical Board recommended denying ADR benefits on the ground that idiopathic pulmonary hypertension, as a blood circulatory disorder, is not included as a qualifying condition under the WTC statute, and petitioner had failed to submit sufficient evidence showing that WTC contaminants caused his pulmonary hypertension. On November 13, 2013, the Board of Trustees denied petitioner's application for ADR benefits by a 6-6 tie vote.

When reviewing a Board of Trustees determination denying ADR benefits pursuant to a 6-6 tie vote, we are not permitted to reverse the Board's determination "unless it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident" (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997] [internal quotation marks omitted]). "[A]s long as there was any credible evidence of lack of causation before the Board of Trustees, its determination must stand" (*id.* [internal quotation marks omitted]). Credible evidence is "evidentiary in nature and not merely a conclusion of

law, nor mere conjecture or unsupported suspicion" (*id.*).

On appeal, petitioner initially argues that pulmonary hypertension is a qualifying WTC condition as a "disease[] of the lower respiratory tract" (Retirement and Social Security Law § 2[36][c][ii]), because the arteries affected by pulmonary hypertension circulate blood from the heart to and within the lungs. However, the Medical Board specifically found that petitioner does not suffer from any disease of the respiratory tract, noting that, at the time of his pulmonary hypertension diagnosis, x-rays and CT-scans revealed that his lungs were clear and that the results of pulmonary function tests — which measure the lungs' capacity to hold and move air in the body — were normal. Further, the examples of "diseases of the lower respiratory tract" set forth in Retirement and Social Security Law § 2(36)(c)(ii) are all diseases of the actual pathways or passages through which air passes within the lung (*see* Stedman's Medical Dictionary 2010 [28th ed] [defining "respiratory tract" as "the air passages from the nose to the pulmonary alveoli through the pharynx, larynx, trachea and bronchi"]; *see also id.* 2008 [defining "tract," in pertinent part, as "a passage or pathway"]). The pulmonary arteries, although within the lung, are not part of the respiratory tract in this sense. Following the rule of statutory construction known as ejusdem generis (*see*

McKinney's Cons Laws of NY, Book 1, Statutes § 239[b]), we construe the statutory term "diseases of the lower respiratory tract" to be limited to diseases of the actual airways within the lung, like the specific examples of such diseases set forth in Retirement and Social Security Law § 2(36)(c)(ii). Accordingly, petitioner's pulmonary hypertension, although it is a disabling condition, is not a qualifying WTC condition. It follows that petitioner is not afforded the presumption that this condition is a result of his exposure to toxins at the WTC site.

Petitioner next urges us to recognize pulmonary hypertension as a new onset disease caused by his exposure to WTC contaminants under Retirement and Social Security Law § 2(36)(c)(v), which, to reiterate, contemplates extension of the presumption of WTC causation to "new onset diseases resulting from [WTC] exposure as such diseases occur in the future," and gives four examples of categories of possible "new onset diseases" (cancer, asbestos-related disease, heavy metal poisoning, and musculoskeletal disease). While this provision certainly does not limit "new onset diseases" to the aforementioned enumerated categories of illness (none of which affect petitioner), it merely recognizes that, in the future, additional diseases may be connected to exposure to contaminants at the WTC site. We are not persuaded that the legislature intended the "new onset" category to extend

the presumption to additional, non-enumerated illnesses based on mere speculation that such conditions may have been caused by exposure to WTC contaminants. Rather, an applicant asserting for the first time that a disease should be recognized as a new onset disease has the burden to submit evidence showing that the disease has been linked to exposure to WTC toxins and therefore qualifies as a new onset disease (*see Matter of Anastasio v Kelly*, 121 AD3d 466 [1st Dept 2014], *lv denied* 25 NY3d 907 [2015]; *Matter of Quinn v Kelly*, 92 AD3d 589 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]; *Matter of Fesler v Bratton*, 48 Misc 3d 444, 449 [Sup Ct, NY County 2015]). Once a court has recognized a disease as a new onset disease caused by exposure to WTC contaminants, subsequent applicants diagnosed with the disease will be entitled to the presumption as a matter of law. Here, however, pulmonary hypertension has never previously been recognized as related to exposure to WTC site contaminants and petitioner has not presented any evidence that such a connection exists.

The record is devoid of any medical study linking exposure to WTC site contaminants to pulmonary hypertension, nor does it contain any evidence that other WTC site responders have been diagnosed with this condition in numbers greater than would be predicted from general epidemiological experience. The sole

evidence petitioner relies upon to satisfy his burden of showing such a connection are brief and conclusory letters from three physicians which, in equivocal language, speculate, without referring to any supporting scientific or epidemiological evidence, that there may be a link between pulmonary hypertension and WTC exposure. For example, Dr. Karen Haglof, a hematologist, after deprecating thalassemia as a possible causes of petitioner's condition, concluded that she "d[id] not feel that his pulmonary hypertension can be incontrovertibly related to thalassemia as opposed to his 9/11 exposure." Similarly, Dr. Peter Rouvelas, a cardiologist, offered the view — without the slightest explanation or support — that petitioner's WTC exposure "appears to be etiologically the cause of his present condition and status." Finally, Dr. Evelyn Horn, another cardiologist, stated: "In the differential must [sic] still include WTC and any foreign body reaction that led to any inflammatory mediated disease."

None of the aforementioned three physicians, whose brief letters were submitted by petitioner, pointed to any scientific literature drawing a causal connection between exposure to contaminants present at the WTC site and petitioner's disabling condition, pulmonary hypertension. These physicians simply asserted, without support, that such a connection might exist.

Such equivocal, unsupported, and speculative statements, even if made by physicians, do not satisfy petitioner's burden to submit credible evidence showing that exposure to WTC contaminants caused his pulmonary hypertension (*see Anastasio*, 121 AD3d at 466; *Quinn*, 92 AD3d at 589; *Matter of Welch v Safir*, 293 AD2d 295, 296 [1st Dept 2002]; *Fesler*, 48 Misc 3d at 449).

Because petitioner's disabling condition of pulmonary hypertension does not fall within any category enumerated in the statute, and has never previously been causally connected to WTC exposure, there is no basis for applying the presumption in the first place, and it remains petitioner's burden to come forward with evidence showing that such a connection exists (*see Quinn*, 92 AD3d at 589 [affirming denial of petition for ADR benefits where the disabling condition of cardiomyopathy was not a qualifying condition under the statute and "there was no known association between exposure to toxins at the (WTC site) and the development of viral myocarditis"]). The equivocal and unsupported speculations of petitioner's physicians do not satisfy this burden. Accordingly, Supreme Court correctly decided, based upon a review of the credible evidence presented to the Medical Board, that it cannot be determined as a matter of law that the Board of Trustees erred by accepting the Medical Board's recommendation to deny petitioner's application for ADR.

Contrary to petitioner's contentions, this Court's decisions in *Matter of Sheldon v Kelly* (126 AD3d 138 [1st Dept 2015], *lv denied* 25 NY3d 908 [2015]) and *Matter of Dement v Kelly* (97 AD3d 223 [1st Dept 2012]) do not hold that the mere allegation of a link between a disease not within a category referenced in the statute and exposure to contaminants at the WTC site shifts to the Board of Trustees the burden of disproving such a connection. *Sheldon* involved diagnoses of fibromyalgia (a musculoskeletal disease) and heavy metal poisoning, both of which are categories of disease specifically referenced in the statute (Retirement and Social Security Law § 2[36][c][v]), unlike pulmonary hypertension, as previously discussed. Similarly, *Dement* involved diagnoses of heavy metal poisoning and severe gastrointestinal reflux disease, the latter of which is specifically referenced in Retirement and Social Security Law § 2(36)(c)(iii), which were linked through competent evidence to the applicant's disabling condition of sleep apnea, which had also been reported by other WTC responders (*see Dement*, 97 AD3d at 226-230). Neither does petitioner's position find support in *Matter of Bitchatchi v Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II* (20 NY3d 268 [2012]). Each of the three petitioners in *Bitchatchi* had developed cancer, a category of illness specifically identified in the statute as a possible

"new onset disease," and the issue considered by the Court of Appeals was whether the presumption of WTC causation had been successfully rebutted, not whether it applied.

Finally, petitioner's argument that the benign nodules that were found on his lungs qualify as a listed condition fails. Both the Medical Board and petitioner's own doctors agree that the benign lung nodules are not a disabling condition. Moreover, petitioner did not submit any evidence showing that the nodules contributed to his disabling condition of pulmonary hypertension (*see Matter of Appleby v Herkommer*, 165 AD2d 727, 729 [1st Dept 1990]).

In closing, we acknowledge the honor due petitioner for his service as a first responder at the WTC site, at great risk to himself. The hardship endured and sacrifices made by selfless public servants such as petitioner should always be remembered with gratitude. However, it is for the legislature, not this Court, to delineate the procedures by which to determine whether the disability of a particular first responder is the result of service at the WTC site. At this juncture, the legislature has not extended the presumption of WTC causation to all disabilities

subsequently developed by those who responded to the September 11th attacks. This Court is obligated to limit the applicability of the presumption to the scope the legislature has provided for it. Petitioner's remedy, if any, lies with the legislature.

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

ENTERED: MARCH 9, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3138 Genova Burns LLC, etc., Index 155282/15
Plaintiff-Appellant,

-against-

New Yorkers for Bill Thompson,
Defendant,

William C. Thompson, Jr., et al.,
Defendants-Respondents.

_____

Genova Burns LLC, New York (Angelo J. Genova of counsel), for appellant.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, Brooklyn (Susan Mauro of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered November 16, 2015, which granted the individual defendants' motion to dismiss the complaint as against them, unanimously affirmed, without costs.

Plaintiff's retainer agreement, which engaged plaintiff for representation in connection with a post-campaign audit, was executed by defendant James Ross solely in his representative capacity as treasurer of defendant New Yorkers for Bill Thompson and was not executed by defendant candidate at all. Nor was the personal liability of the individual defendants contemplated. Accordingly, the individual defendants are not personally liable under the agreement (*see Seaver v Ransom*, 224 NY 233, 237 [1918];

Salzman Sign Co. v Beck, 10 NY2d 63 [1961]; *Richmond Adv./Reinhold Assoc. v Del Guidice*, 66 AD2d 701 [1st Dept 1978]).

Plaintiff has abandoned its claims for unjust enrichment, quantum meruit, and account stated (*see Hardwick v Auriemma*, 116 AD3d 465, 468 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]).

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

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

ENTERED: MARCH 9, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kahn, JJ.

3143 Fridrey O. Uwoghiren, Index 105662/09
Plaintiff-Appellant,

-against-

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

_____

Maduegbuna Cooper LLP, New York (Samuel O. Maduegbuna and Kyle D. Winnick of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered June 2, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that his former employer, defendant New York City Department of Juvenile Justice (DJJ), discriminated against him on the basis of his national origin (Nigeria) by failing to select him for two promotions and by paying him less than it paid a peer of a different national origin.

Plaintiff established prima facie that he was passed over for promotion under circumstances raising an inference of discrimination. Defendants then offered legitimate, nondiscriminatory reasons for promoting two employees who were not of Nigerian origin (*see Hudson v Merrill Lynch & Co., Inc.*,

138 AD3d 511, 514 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]). Decision-makers at DJJ testified to the effect that plaintiff limited his work to fulfilling the minimal requirements of his job, that he sometimes balked at assignments without good reason, and that he failed to meet all of his goals. Defendants demonstrated in contrast that the promoted employees had done outstanding work in positions relevant to the two vacancies at issue.

Plaintiff failed to raise triable issues of fact as to whether defendants' proffered reasons for these decisions were pretextual or incomplete, given the absence of any evidence from which a reasonable jury could infer that his national origin played a role in defendants' decision to pass him over for promotions (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 966 [1st Dept 2009], *lv denied* 14 NY3d 701 [2010]). Plaintiff admittedly never complained about the promotion process before commencing this action, and there is no indication that he raised any internal complaints of discrimination (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 309 [2004]). Even if the promotions contravened Civil Service Rules and Regulations § 3.3(a) because the promoted individuals were provisional rather than permanent

employees, this technical violation does not establish a discriminatory motive. Plaintiff's other claims that the promotions violated policies and regulations are unsupported. His testimony that the promoted employees were appointed based on friendship with the decision-makers is unavailing (*see Tomizawa v ADT LLC*, 2015 WL 5772106, *22, 2015 US Dist LEXIS 133649, *42 [ED NY 2015]).

DJJ's failure to advertise the positions "does not give rise to an inference of discrimination," but "merely relieves [] plaintiff of [his] burden to show that [he] applied for the position[s]" (*Giannone v Deutsche Bank Sec., Inc.*, 392 F Supp 2d 576, 590 [SD NY 2005]).

Plaintiff's deposition testimony recounting two occasions when one of the decision-makers allegedly shouted admonitions at him or another employee of Nigerian origin does not establish discrimination based on national origin (*see Forrest*, 3 NY3d at 309 ["mere personality conflicts must not be mistaken for unlawful discrimination, lest the antidiscrimination laws become a general civility code"] [internal quotation marks omitted]; *see also Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 125 [1st Dept 2012]).

Finally, plaintiff failed to make a prima facie showing in support of his claim that he was paid less than a peer of another

national origin. Although both he and the other employee had the same civil service title, they were not similarly situated in light of the differences in their experience (*see Loucar v Boston Mkt. Corp.*, 294 F Supp 2d 472, 479 [SD NY 2003]), the other employee's earlier salary (*see Kent v Papert Cos.*, 309 AD2d 234, 244 [1st Dept 2003]), and their differing job responsibilities.

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3346 Mary Murray, et al., Index 23282/12E
Plaintiffs-Respondents,

-against-

Villa Barone Ristorante, Inc., et al.,
Defendants-Appellants.

_____

Lewis Brisbois Bisgaard & Smith, New York (Nicholas P. Hurzeler of counsel), for appellants.

Mark B. Rubin, P.C., Bronx (Mark B. Rubin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about October 11, 2016, which, inter alia, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants' motion for summary judgment was properly denied in this action where plaintiff Mary Murray was injured when she fell while ascending the stairs in defendants' restaurant. Plaintiff testified that as she attempted to move her foot to the next step, it came in contact with the front lip of the second step, and contrary to defendants' assertion, plaintiff also testified that she had to bend down to grab the handrail, which was low. This evidence, as well as the affidavit of plaintiffs' expert engineer, who opined that the low positioning of the

handrails and the higher position of the step risers were in violation of various New York City Building Codes, sufficiently raised triable issues as to whether the riser height of the stairs and low handrail were proximate causes of plaintiff's injuries (*see Lievano v Browning School*, 265 AD2d 233 [1st Dept 1999]).

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3347 In re Nivek A. S., and Others,

Children Under the Age of Eighteen Years, etc.,

Juanita S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

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

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

_____

Order of fact-finding, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about January 21, 2015, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that respondent mother had neglected the subject children, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]), and the court's credibility determinations are entitled to deference (*Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Brianna R. [Maribel R.]*, 115 AD3d 403, 408 [1st Dept 2014]).

The chronic poor hygiene of the children is well documented

in the record and demonstrated that the children were at imminent risk of impairment (*see Matter of Naqi T. [Marlena S.]*, 129 AD3d 444, 444-445 [1st Dept 2015]; *Matter of Inbunique V.*, 22 AD3d 412, 413 [1st Dept 2005]). The mother also medically neglected one child's severe eczema, which resulted in a three-day hospitalization (*see Matter of Sahairah J. [Rosemarie R.]*, 135 AD3d 452, 453 [1st Dept 2016]; *Matter of Khelia B.*, 298 AD2d 132, 132 [1st Dept 2002]). In addition, two of the children had excessive absences from school and were excessively tardy, which detrimentally affected their education and contributed to poor grades (*see Matter of Jonathan M. [Gilda L.]*, 139 AD3d 438, 438-439 [1st Dept 2016]). The mother also prohibited one of the children from attending a school-recommended evaluation (*see Matter of Kiera R. [Kinyetta R.]*, 99 AD3d 565, 565 [1st Dept 2012]).

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3348-
3349 Winston Henvill,
Plaintiff-Appellant,

-against-

Metropolitan Transportation Authority,
et al.,
Defendants-Respondents.

- - - - -

In re Winston Henvill,
Petitioner-Appellant,

-against-

Metropolitan Transportation Authority,
et al.,
Respondents-Respondents.

Index 157634/15
652589/15

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Goldberg Segalla, LLP, New York (Hilary Dinkelspiel of counsel), for Metropolitan Transportation Authority, respondent.

Jakubowski, Robertson, Maffei, Goldsmith & Tartaglia, LLP, Saint James (Mark Goldsmith of counsel), for Metropolitan Transportation Authority Police Benevolent Association, respondent.

Orders, Supreme Court, New York County (Joan M. Kenney, J.), entered January 11, 2016, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7), and judgment (denominated an order), same court and Justice, entered March 4, 2016, denying the petition seeking to vacate the arbitration award which terminated petitioner's employment with respondent

Metropolitan Transportation Authority upon a finding of misconduct, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

Plaintiff failed to adequately plead a claim for breach of the duty of fair representation against defendant Metropolitan Transportation Authority Police Benevolent Association (PBA) because none of the allegations in the complaint demonstrated that PBA's conduct, in representing plaintiff at the arbitration hearing which resulted in his termination, was arbitrary, discriminatory or done in bad faith (*see Matter of Civil Serv. Bar Assn., Local 237, Intl. Bhd. of Teamsters v City of New York*, 64 NY2d 188, 196 [1984]; *Cox v Subway Surface Supervisors Assn.*, 69 AD3d 438, 438 [1st Dept 2010]). At most, plaintiff alleged that PBA was irresponsible or negligent, which is insufficient to show unfair representation (*Mellon v Benker*, 186 AD2d 1020, 1021 [4th Dept 1992]; *Matter of Civil Serv. Empls. Assn. v Public Empl. Relations Bd.*, 132 AD2d 430, 432 [3d Dept 1987], *affd* 73 NY2d 796 [1988]).

Because plaintiff cannot state an unfair representation claim against PBA, his claim against his employer, defendant Metropolitan Transportation Authority, alleging a breach of the collective bargaining agreement, must also fail (*see Mohan v United Univ. Professions*, 127 Misc 2d 118, 121 [Sup Ct, NY County

1984]).

As to the petition, petitioner failed to demonstrate the existence of any of the statutory grounds for vacating the arbitrator's award, such as, inter alia, fraud, bias or the failure to follow proper procedure (*see* CPLR 7511[b]; *Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154-155 [1995]). We reject petitioner's main argument that the arbitrator's fact-finding was irrational and required vacatur, in light of the well-settled principle that courts in considering a petition to vacate a voluntary arbitration may not review the arbitrator's findings of fact (*see Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]; *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 83 [2003]). Moreover, "even assuming that petitioner had a viable fair representation claim [,]. . . a proceeding to vacate the arbitration award [is] not the proper forum for asserting it" (*Matter of Obot [New York State Dept. of Correctional Servs.]*, 89 NY2d 883, 886 [1996]).

Finally, we perceive no reason to overturn the imposed penalty of termination (*see Matter of Tarantino v MTA N.Y. City Tr. Auth.*, 129 AD3d 738 [2d Dept 2015]).

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3351 The People of the State of New York, Respondent, Ind. 3651/09 36/14

-against-

Kenneth Minor, Defendant-Appellant.

_____

Lawrence Fleischer, New York (David S. Delbaum of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered October 20, 2014, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 12 years, unanimously affirmed.

Under the law of the case doctrine (*see Delgado v City of New York*, 144 AD3d 46, 51 [1st Dept 2016]), this Court's prior decision (111 AD3d 198 [1st Dept 2013]) bars defendant's contentions that the court improperly denied his motion to compel the People to resubmit the entire case to a new grand jury, and permitted prosecutorial misconduct in the first grand jury proceeding. Moreover, there was no taint of prosecutorial misconduct in the original indictment charging intentional murder, in the second indictment charging second-degree

manslaughter by assisting a suicide (Penal Law § 125.25[1][b]), or in the consolidation of the two indictments.

Unlike the situation in *People v Pelchat* (62 NY2d 97 [1984]), there was no "false" grand jury testimony. Upon reaching the conclusion that, notwithstanding circumstantial evidence of robbery presented in good faith to the first grand jury, defendant did not in fact rob the victim, the People abandoned the robbery theory and those counts of the original indictment based thereon, leaving in place the count of second-degree murder not based on robbery.

As explained in our prior opinion (111 AD3d at 203), the underlying evidence presented the alternative scenarios that defendant either committed intentional murder (at the request of the deceased, who wished to die), or second-degree manslaughter by assisting a suicide. After our reversal and remand based on an error in the court's charge, the People acted within their discretion in obtaining a second indictment charging only assisted-suicide manslaughter, without re-presenting the murder charge, and the court properly consolidated the two indictments, which were "based upon the same act or upon the same criminal transaction" (CPL 200.20[a]; *see People v Franco*, 86 NY2d 493, 500 [1995]). Furthermore, there was nothing legally defective about an indictment, consolidated or otherwise, containing these

two types of homicide.

Contrary to defendant's further contention, he was not entitled to plead guilty to only one of the two consolidated indictments (*see People v Cahill*, 2 NY3d 14, 43-44 [2003]). The record clearly establishes that the indictments had already been consolidated before defendant purported to plead guilty to second-degree manslaughter.

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3352 Juan Rivera, Index 304956/13
Plaintiff-Respondent,

-against-

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

_____

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

Sivin & Miller, LLP, New York (Edward Sivin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ruben Franco, J.), entered February 3, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the malicious prosecution claims, unanimously affirmed, without costs.

Plaintiff alleges that, while in the City to attend his sister's funeral, he was wrongfully arrested as part of a buy-and-bust operation and charged with criminal sale of a controlled substance, as well as resisting arrest and obstruction of governmental administration. Plaintiff was indicted on the drug charge, but all the charges were eventually dismissed by the District Attorney. Defendants established prima facie that there was probable cause to arrest and prosecute plaintiff through the undercover officer's identification of plaintiff as the person

who sold him crack cocaine during the buy-and-bust operation (*see Colon v City of New York*, 60 NY2d 78 [1983]).

In opposition, plaintiff raised a triable issue of fact as to probable cause through his deposition testimony and affidavit (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). He denied any involvement with a narcotics transaction, and explained that he attempted to flee only because, in the early morning hours in a Bronx park, he was unaware that the men chasing him were police officers. In addition, plaintiff averred that he did not resist arrest, but was assaulted by the police, and he supplied hospital records detailing his injuries. This evidence, if credited, could support a finding that the police witnesses did not make a "complete and full statement of facts" either to the grand jury or to the District Attorney, that they withheld, misrepresented or falsified evidence, or that they otherwise acted in bad faith (*see Mendez v City of New York*, 137 AD3d 468, 471 [1st Dept 2016]). Plaintiff's evidence also raises an issue of fact whether defendant police officers initiated the prosecution, since their alleged "failure to make a full and complete statement of the facts to the District Attorney or the court, or holding back information that might have affected the results," may be equated with the initiation of a malicious prosecution (*Ramos v City of New York*, 285 AD2d 284, 299-300 [1st

Dept 2001]).

We have considered defendants' remaining arguments and find them unpreserved for appeal or otherwise unavailing.

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3353 Daniel Santos, Index 23194/13
Plaintiff-Appellant,

-against-

Daniello Carting Co., LLC, et al.,
Defendants-Respondents.

_____

Jaroslawicz & Jaros PLLC, New York (Norman E. Frowley of counsel), for appellant.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Eugene O. Morenus of counsel), for Daniello Carting Co., LLC, respondent.

Galvano & Xanthakis, P.C., Staten Island (Craig A. Lamster of counsel), for Refuse Hydraulics, respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered August 10, 2016, which granted defendants' motions for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Defendants' motions for summary judgment were properly granted in this action where plaintiff was injured when he tripped over a metal plate that was installed by defendant Refuse Hydraulics (Refuse) to stabilize a dumpster owned by defendant Daniello Carting Co., Inc. (Daniello). There is no dispute that defendants did not own or manage the property where plaintiff fell and thus, had no duty to maintain the premises in a

reasonably safe condition (*cf. Basso v Miller*, 40 NY2d 233, 241 [1976]).

Plaintiff's argument that defendants were liable because they launched a force or instrumentality of harm *(see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]) is unavailing. No evidence was presented that either defendant determined the placement of the dumpster and metal plate, or that they made the area less safe than it was before they acted (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]). The metal plate installed by Refuse was not damaged and there was no evidence of prior accidents or complaints about it. Furthermore, although Daniello removed the dumpster and exposed the metal plate, no evidence was presented that this conduct rendered the area less safe.

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3354 Karen E. A., Infant by Mother and Natural Guardian Maria Mercedes M., et al.,
Plaintiffs-Respondents,

-against-

545 West 146th Street, Inc.,
Defendant-Appellant,

Jose Gonzalez,
Defendant.

Index 110605/08

Shapiro & Coleman PC, Mineola (Richard Coleman of counsel), for appellant.

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for respondents.

Judgment, Supreme Court, New York County (Shlomo Hagler, J.), entered February 2, 2016, awarding plaintiffs the total sum of $240,123.23, unanimously affirmed, without costs.

This action for personal injuries was referred to a Special Referee for an inquest and report on the issue of damages. Defendant 545 West 146th Street, Inc. (defendant) waived its right to object to entry of the plastic surgeon's report, dated August 11, 2008, as a business record, as it is undisputed that plaintiffs served it with notice of their intention to enter the document into evidence, and defendant failed to object, as required by CPLR 3122-a(c) (*see Siemucha v Garrison*, 111 AD3d

1398, 1400 [4th Dept 2013]; *Streicker v Adir Rent A Car*, 279 AD2d 385 [1st Dept 2001]).

Defendant's failure to comply with CPLR 3122-a did not prevent it from objecting to the report's admissibility based on other rules of evidence (*see Bostic v State of New York*, 232 AD2d 837 [1996], *lv denied* 89 NY2d 807 [1997]). However, defendant's objection that the plastic surgeon's report was not admissible because it was prepared for the purpose of litigation and was not germane to diagnosis and the child's treatment is not preserved for appellate review (*see Benavides v City of New York*, 115 AD3d 518, 519 [1st Dept 2014]; *Braunstein v Taj Group of Hotels*, 235 AD2d 370 [1st Dept 1997], *lv denied* 89 NY2d 816 [1997]). Even if this Court were to find that the report was inadmissible, there was sufficient evidence adduced at the inquest to support the award for future pain and suffering because the Special Referee saw the child's scar and published what he observed for the

record (*see e.g. Bischert v Limousine Rental Serv.*, 33 AD2d 355, 357 [3d Dept 1970]).

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3355 The People of the State of New York, Ind. 5435/12N
Respondent,

-against-

Dushaun Holmes, also known as
Holmes Dushaun,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Sonberg, J.), rendered November 26, 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: MARCH 9, 2017

CLERK

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

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3359 The People of the State of New York, Respondent, Ind. 2265/11

-against-

Joey Colon, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (James Wen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered April 23, 2015, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of his right to appeal, we find that the court properly denied defendant's suppression motion. During a lawful traffic stop, the police had, at least, a founded suspicion of criminality warranting an inquiry into whether defendant had any weapons (*see generally People v Garcia*, 20 NY3d 317, 324 [2012]. The officer's suspicions were based on a combination of defendant's suspicious hand movements directed at his waistband, which is a place closely associated with weapons, and the fact that, when

directed to get out of the car, he turned his back toward the officer, which could reasonably be interpreted as an effort to hide something. The possibility of innocent explanations for each of defendant's actions, viewed in isolation, does not undermine the finding of founded suspicion.

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3360 Security Pacific National Bank, Index 22899/92
Plaintiff-Respondent,

-against-

Tracie Evans,
Defendant-Appellant,

Arnold Lepelstat, et al.,
Defendants.

_____

Tracie Evans, appellant pro se.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered April 14, 2015, which, among other things, granted plaintiff's motion to strike defendant Tracie Evans's jury demand, unanimously affirmed, without costs.

The motion court properly determined that defendant has no right to a jury trial on the triable issues identified by this Court on a prior appeal (62 AD3d 512, 514 [1st Dept 2009]). Since both parties sought equitable relief — that is, specific performance of their settlement agreement or injunctive relief — defendant is not entitled to a jury trial (*see Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 481, 482 [2d Dept 2009]; *Trepuk v Frank*, 104 AD2d 780, 781 [1st Dept 1984]; CPLR 4101, 4102[c]). Even if defendant now asserts a

claim for money damages, and even if she were to withdraw her equitable claims, that would not revive or create a right to a trial by jury that was waived by asserting equitable claims with respect to the same transaction (*see Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845, 846-847 [1st Dept 1990]; *Trepuk*, 104 AD2d 780; *cf.* CPLR 4102[c]).

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

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3361 Latipac Corp., Index 101213/09
Plaintiff-Appellant,

-against-

BHM Realty LLC, et al.,
Defendants-Respondents.

_____

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew E. Hearle of counsel), for appellant.

Greenblatt & Agulnick, P.C., Great Neck (Matthew W. Greenblatt of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 27, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's cross motion for summary judgment, unanimously affirmed, without costs.

Plaintiff purchaser failed to establish, as a matter of law, that it was entitled to a return of its deposit on a real estate contract (*see Donerail Corp. N.V. v 405 Park LLC*, 100 AD3d 131, 137 [1st Dept 2012]; *see also Martocci v Schneider*, 119 AD3d 746, 748 [2d Dept 2014]). Even if plaintiff had established that defendant seller was in breach of the contract, which it did not, it would still be obligated to tender performance so long as the seller had the ability to cure its default within a reasonable time (*see e.g. Illemar Corp. v Krochmal*, 44 NY2d 702, 703 [1978]; *see also Martocci*, 119 AD3d at 748). Plaintiff failed to tender

performance and did not afford the seller an opportunity to cure.

There are also issues of fact surrounding plaintiff's ability and willingness to proceed with the sale on the closing date (*see Donerail*, 100 AD3d at 138; *see also Martocci*, 119 AD3d at 748), most notably because it failed to present checks or other proof that it had funds to purchase the property (*Benhamo v Marinelli*, 82 AD3d 922, 923 [2d Dept 2011]).

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

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3363 The People of the State of New York, Respondent, SCI 3102/10

-against-

Hiram Ortega,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Robert McIver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J. at plea; Raymond L. Bruce, J. at sentencing), rendered December 10, 2015, convicting defendant of criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

The court should have granted defense counsel's request for a 24-hour adjournment to review the presentence report, which had not been provided in advance of the sentencing date (*see* CPL 390.50[2][a]).

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

ENTERED: MARCH 9, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3364-
3365N-
3365NA

Index 154573/12

Jaime Alberto Mejia-Gonzalez,
Plaintiff-Respondent-Appellant,

-against-

Oliver S. Storch,
Defendant-Appellant-Respondent.

_____

DeToffol & Associates, New York (David J. DeToffol of counsel), for appellant-respondent.

Leon I. Behar, P.C., New York (Leon I. Behar of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered August 8, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on liability and to dismiss defendant's affirmative defenses and counterclaim, and ruled that defendant must bear the cost of either traveling to depose plaintiff or conducting the deposition by video conference, unanimously modified, on the law, to grant the motion as to the second defense, and otherwise affirmed, without costs. Order, same court and Justice, entered September 3, 2013, which, to the extent appealed from, denied plaintiff's motion to seal certain documents, unanimously affirmed, without costs. Order, same court and Justice, entered on or about July 22, 2015, which

granted defendant's motion for partial summary judgment dismissing plaintiff's request for punitive damages, and denied defendant's motion for reargument of so much of his motion for summary judgment as sought dismissal of the complaint based on judicial estoppel, unanimously reversed, on the law, with respect to defendant's motion to dismiss the request for punitive damages, and that motion denied, and the appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

The order denying defendant's motion for reargument is not appealable (*see e.g. Fontanez v St. Barnabas Hosp.*, 24 AD3d 218 [1st Dept 2005]). Defendant's claim that he actually moved for renewal is without merit.

Plaintiff failed to show that the judicial estoppel defense "is not stated or has no merit" (CPLR 3211[b]). Plaintiff was a defendant in a federal criminal case in which he obtained relief (a lower fine and forfeiture amount) by omitting his claim that defendant owed him $200,000 from his sworn personal financial statement. Thus, defendant has stated a defense that plaintiff should be judicially estopped from claiming in the instant action that defendant owes him $200,000 (*see e.g. Manhattan Ave. Dev. Corp. v Meit*, 224 AD2d 191 [1st Dept 1996], *lv denied* 88 NY2d 803 [1996]).

As defendant concedes, his second defense, that "plaintiff is not entitled to any [of] the relief requested," is not an affirmative defense.

Plaintiff contends that he is entitled to summary judgment in the amount of $200,000 or, in the alternative, on liability. However, while nonrefundable retainer fee agreements are against public policy (*Matter of Cooperman*, 83 NY2d 465, 471 [1994]), defendant submitted an expert's affirmation saying that defendant's flat-fee retainer agreement was not a nonrefundable fee agreement. Furthermore, even if the agreement is found to be an unenforceable nonrefundable agreement, defendant will still be entitled to quantum meruit payment for services he actually rendered (*id.* at 475). In light of the parties' conflicting affidavits as to why plaintiff discharged defendant, plaintiff is not entitled to summary judgment on the ground that he discharged defendant for cause (*see Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 44 [1990]). Similarly, given the parties' conflicting affidavits about the work that defendant did, plaintiff has not established that defendant performed no services at all.

Plaintiff seeks to dismiss, pursuant to CPLR 3211, defendant's counterclaim for the $50,000 of the agreed-upon $250,000 that plaintiff did not pay. As indicated, issues of

fact as to the retainer agreement and defendant's discharge preclude summary judgment. A fortiori, plaintiff is not entitled to dismissal of the counterclaim on the pleadings.

With respect to his request for punitive damages, plaintiff claims that defendant tried to coerce him into admitting crimes that he did not commit. Plaintiff also claims that, after he discharged defendant and asked for a refund, defendant threatened to write a harmful letter to the judge presiding over plaintiff's criminal case. "It is for the jury to decide whether [defendant's] . . . dealings with [plaintiff] were so reprehensible as to warrant punitive damages" (*Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1st Dept 1996], *appeal withdrawn* 89 NY2d 983 [1997]). To obtain punitive damages for breach of fiduciary duty in a tort case, plaintiff was not required to allege that defendant's conduct was directed to the general public (*Don Buchwald & Assoc. v Rich*, 281 AD2d 329, 330 [1st Dept 2001]).

As the motion court noted, defendant did not argue that traveling to the state where plaintiff is incarcerated or conducting a video conference would cause him financial hardship (*see* CPLR 3116[d]).

Plaintiff utterly failed to show good cause for sealing the

remaining unsealed documents (*see Mosallem v Berenson*, 76 AD3d 345, 349 [1st Dept 2010]). For example, the sample proffer agreement does not even mention him, and the indictment against him was unsealed by the federal court in October 2009.

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

ENTERED: MARCH 9, 2017

CLERK

Friedman, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

2142 Natixis Real Estate Capital Trust 2007-HE2, etc., Plaintiff-Respondent, Index 153945/13

-against-

Natixis Real Estate Holdings, LLC, Defendant-Appellant.

_____

Davis & Gilbert LLP, New York (Bruce M. Ginsberg of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Andrew Dunlap of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about July 2, 2015, affirmed, with costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Paul G. Feinman
Judith J. Gische
Barbara R. Kapnick, JJ.

2142
Index 153945/13

_____x

Natixis Real Estate Capital Trust
2007-HE2, etc.,
Plaintiff-Respondent,

-against-

Natixis Real Estate Holdings, LLC,
Defendant-Appellant.
_____x

Defendant appeals from an order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about July 2, 2015, which, insofar as appealed from, denied defendant's motion to dismiss the complaint pursuant to CPLR 3211.

Davis & Gilbert LLP, New York (Bruce M. Ginsberg, Joseph Cioffi, James R. Serritella and Massimo Giugliano of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Andrew Dunlap, Philippe Z. Selendy, Maya D. Cater and Stephen Schweizer of counsel), for respondent.

RENWICK, J.

This appeal stems from a transaction involving residential mortgage backed securities (RMBS). Plaintiff, the administrator of the securitized trust, seeks to enforce the loan repurchase rights, more commonly referred to as putback rights, against defendant sponsor of the securitized transaction for breach of the representations and warranties defendant made regarding the quality of the mortgage loans. This action raises a number of issues that regularly recur in putback actions, including whether the action was timely commenced, whether or not the action is unripe for failing to comply with a condition precedent to commencement of the action, and whether plaintiff adequately pleaded a cause of action for breach of the representations and warranties. This action also raises an issue of first impression of whether enforcement of putback rights is within the exclusive domain of a RMBS's trustee so as to deny plaintiff Securities Administrator standing to commence this action.

Factual and Procedural Background

In its role as sponsor of the securitization that is at the core of this case, defendant Natixis Real Estate Holdings, Inc. (Natixis) purchased 4,704 residential mortgage loans worth more than $877 million pursuant to a Mortgage Loan Purchase Agreement (MLPA). The MLPA contains numerous representations and

warranties from the loan originators (Originators' Warranties) about the quality of the loans. Natixis then sold the loans to a passthrough deposit entity, Morgan Stanley ABC Capital I, Inc. (Depositor), pursuant to an Unaffiliated Seller Agreement (SA). In the SA, Natixis made several representations and warranties to the Depositor, which were separate and independent from those issued by the Originators in the MLPA.

Morgan Stanley then deposited the loans, including its representation and warranties in the MLPA and SA, into a securitized trust pursuant to a pooling and servicing agreement (PSA). The parties to the PSA included Morgan Stanley, as Depositor, Deutsche Bank National, as the Trustee, and Wells Fargo, NA, as Securities Administrator. The individual mortgage loans served as collateral for the certificates issued by the Trustee, who paid principal and interest to certificate holders from the cash flow generated from the mortgage loan payments. Thus, the certificate holders made money when the borrowers made payments to the loans. The trust held legal title to the mortgages and the Trustee was responsible for servicing them. The servicing administrator is the trust's collection agent pursuant to the PSA.

Putback actions are typically brought by a trustee on behalf of the trust (securitization vehicle) asserting claims of breach

of contract (*see 4C Commercial Litigation in New York State Courts* § 91:9 at 888 [4th ed 2015]). In this case, however, it is the Securities Administrator who brings the breach of contract claims against the sponsor, Natixis.[1] The complaint alleges that the PSA transaction imposes an obligation upon Natixis to repurchase the loans because it breached the SA representations and warranties. In addition, plaintiff avers that Natixis had the "backstop" obligation to repurchase defective loans that breached the Originators' representations and warranties, once the Originators failed to cure or repurchase them.

As indicated, the complaint alleges breaches of two sets of representations and warranties, each of which independently triggers a duty to repurchase the defective loans: (i) the warranties made by the Originators in the MLPAs and the Assignment and Recognition Agreements (Originator Warranties); and (ii) the warranties made by Natixis in the SA (SA Warranties).

The Originator Warranties in the MLPAs include, among others, that "[n]o fraud, error, omission, misrepresentation,

---

[1] On June 5, 2013, Wells Fargo appointed Computershare as Separate Securities Administrator. The appointment authorized Computershare to take actions on behalf of the trust for purposes of enforcing repurchase obligations, including commencing and prosecuting this litigation.

negligence or similar occurrence" had occurred on the part of any person; that borrowers "had a reasonable ability to make timely payments" on the mortgage; that each pool of loans complied with the relevant Originators' underwriting guidelines; and that "the information set forth in the mortgage loan schedule was true and correct[.]" According to the MPLA, the complaint continues, if any of these Originator Warranties were false, the relevant Originator was required to repurchase any affected loans within 60 days of the Originators' discovery or receipt of notice of that breach. As backstop duties, the PSA required Natixis to repurchase any loan that breached the MLPA representations and warranties if the Originators failed to repurchase the defective loans pursuant to the MPLA.

Finally, the complaint avers that Natixis and the Depositor also executed the SA on the closing date. In the SA, Natixis transferred the loans to the Depositor and made the SA Warranties. The SA Warranties include, among other things, that no event had occurred that would render the Originators' warranties untrue, that the loans were not selected in a manner adverse to the trust; and that the loans complied with all applicable law. The PSA required Natixis to repurchase all loans that breach the SA's representations and warranties within 90 days of its discovery or receipt of notice of such breach.

Natixis moved to dismiss the complaint arguing that plaintiff: 1) as Securities Administrator, lacked standing to sue; 2) failed to comply with certain conditions precedent prior to commencing the action; 3) failed to timely commence the action; and 4) failed to sufficiently plead a breach of contract claim based upon a breach of the SA representations and warranties. Supreme Court declined to dismiss the action (or any claim) on such grounds. We now affirm for the reasons explained below.

Discussion

Standing

We begin by examining the threshold question of standing. We find that Supreme Court properly held that the Securities Administrator has standing to prosecute this action. To be sure, we recognize that an RMBS trust is not unlike a typical common-law trust in which the trustee (rather than the trust itself, which is a legal fiction) holds the asset for the benefit of the certificate holders (who are the beneficiaries of the trust) *(see Beck v Manufacturers Hanover Trust Co.*, 218 AD2d 1, 12 [1st Dept 1995). Under such legal structure, we agree with Natixis, that the trustee itself is recognized under New York Law as the party in interest for the purpose, among others, of defending the interest of the trust. We disagree, however, with Natixis's

argument that only a trustee of an express trust has the authority to commence an action in a RMBS trust.

Natixis's argument is based on a misunderstanding of the role of the securities administrator of a RMBS trust. A trust holds legal title to the mortgage, but delegates equitable ownership to the special servicer, the securities administrator, who administers the trust pursuant to a pooling and servicing agreement (PSA) (*see CWCapital Asset Mgt., LLC v Chicago Prope. LLC*, 610 F3d 497 [7th Cir 2010]). Here, the Securities Administrator is not claiming standing by virtue of the Trustee's delegation of its discretionary power, but rather based on the authority of the PSA (*id.; see also Hildene Capital MGT., LLC v Bank of N.Y. Mellon*, 105 AD3d 436 [1st Dept 2013] [party had standing based upon the contractual duties it assumed under the indenture]*; cf. Sprint Communications Co. v APCC Servi., Inc.*, 554 US 269, 128 SCT 2531 [2008] [Supreme Court held that an assignee for collection has standing to sue, within the meaning of Article III of the Constitution]). Thus, in answering the question of whether the Securities Administrator can bring suit, on its own, on behalf of the Trust and Certificate Holders, the Court must look at the language of the relevant PSA.

Here, under the plain language of the PSA, the Securities Administrator has broad authority to act alone in performing its

servicing duties, including the right to prosecute legal action. Specifically, section 10.02(viii) of the PSA provides in pertinent part:

> "The Securities Administrator shall have no obligation to appear in, prosecute or defend any legal action that is not incidental to its duties hereunder and which in its opinion may involve it in any expense or liability; provided, however that the Securities Administrator may in its discretion undertake any such action that it may deem necessary or desirable in respect of this Agreement and the rights and duties of the parties hereto and the interests of the Trustee, The Securities Administrator and the Certificate holders hereunder."

Natixis, however, argues that the PSA's full power and authority granted to the Securities Administrator to act alone, and which includes prosecuting or defending any action, is limited by section 2.03(g) of the PSA, which provides in pertinent part:

> "It is understood and agreed that the obligation under this Agreement of any Person to cure, repurchase or replace any Mortgage Loan as to which a breach has occurred and is continuing shall constitute the sole remedy against such Persons respecting such breach available to Certificate holders, the Depositor, the Unaffiliated Seller, the Custodian, The Securities Administrator or the Trustee on their behalf. In the event such required repurchase or replacement does not occur, the Securities Administrator shall take such actions as directed upon written direction from the Depositor and the provision of reasonable indemnity satisfactory to the Securities Administrator in accordance with sections 6.03 and 10.02."

In our view, however, such language does not constitute any

limitation on the Securities Administrator's full power and authority to act alone pursuant to its duties. "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). The agreement must be "read as a whole to determine its purpose and intent" (*W.W.W. Assoc., v Giancontieri*, 77 NY2d 157, 162 [1990]). "It is a cardinal rule of contract construction that a court should 'avoid an interpretation that would leave contractual clauses meaningless'" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004]). Moreover, "conflicting contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect . . ." *(Isaacs v Westchester Wood Works*, 278 AD2d 184, 185 [1st Dept 2000]).

Applying these principles, this Court interprets the PSA according to its terms because it is clear and complete (*see W.W.W. Assocs., Inc.*, 77 NY2d at 160-161). Based upon its plain language, Section 2.03(g) of the PSA simply requires the Securities Administrator to take action as directed by the Depositor, subject to indemnity. Nothing contained in section 2.03 of the PSA limits the Securities Administrator's right to act under other provisions of the PSA, such as section

10.02(viii), which broadly authorizes the Securities Administrator to take action in its discretion in the interest of the Trust and Certificate Holders.

Contrary to Natixis's allegations, there is nothing conflicting or inconsistent about section 2.03 and section 10.02[viii]. The sections are complementary; the former is mandatory, while the latter is permissive. In other words, the Securities Administrator is required to act (and entitled to indemnification) when directed by the Depositor. Otherwise, the Securities Administrator is free to act on its own initiative, in the interest of the Trust and Certificate Holders, where the Depositor has not issued a written direction.

Statute of Limitations

We next examine Natixis's argument that the entire action must be dismissed as untimely commenced. A breach of contract cause of action generally must be commenced within six years of the breach (*see* CPLR 203[a]; 213[2]; *Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1030 [2013]). Natixis contends that this action is time-barred because the PSA is dated "as of April 1, 2007," but plaintiff did not sue until April 30, 2013, i.e., more than six years later. This type of argument has been rejected by this Court.

This Court has held that a claim for breach of warranty

accrues at the time the contract is executed, not on its "as of" date (*U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 121 AD3d 535, 536 [1st Dept 2014] ["If a contractual representation or warranty is false when made, a claim for its breach accrues at the time of the execution of the contract. This is true even where the contract states that its 'effective date' is earlier"] [internal citation omitted]).

Here, the PSA was executed on April 30, 2007. The Trust at issue closed on April 30, 2007. Moreover, the PSA defines "Closing Date" as April 30, 2007. Thus, April 30, 2013 (the date plaintiff commenced this action) was the last day on which plaintiff could sue, and the action is therefore timely *(see ACE Sec. Corp. v DB Structured Prods., Inc.*, 112 AD3d 522, 523 [1st Dept 2013], *affd* 25 NY3d 581 [2015], ["[T]he claims accrued on the closing date of the MLPA, March 28, 2006 . . . The certificate holders commenced an action . . . on March 28, 2012, the last day of the limitations period"]).

Natixis sets forth no convincing reason why this Court should depart from stare decisis. On the contrary, this Court's rationale in *U.S. Bank N.A.* makes perfect sense:

> "The claim cannot accrue earlier [than the date the contract is executed], because until there is a binding contract, there can be no claim for breach of warranty. Additionally, in the residential mortgage-backed securities . . . context, . . . the claim cannot

> generally accrue before the contract, because the trust that is the recipient of the representations and warranties typically does not come into existence prior to the closing of the transaction. Furthermore, the representations and warranties were made as of the closing date" (121 AD3d at 536 [citations omitted]).

Pleading Deficiencies Argument With Regard to Breach of the SA Representations and Warranties

As a prelude to examining Natixis's argument that the repurchase obligations are not yet ripe for adjudication, this Court must examine Natixis's pleading deficiencies argument as to the repurchase claim. Natixis concedes that plaintiff has sufficiently pleaded the required factual predicate for its backstop repurchase obligations, namely a breach of the Originators' representations and warranties. Defendant, however, argues that plaintiff did not sufficiently plead the required factual predicate for the repurchase obligations, namely Natixis's breach of the SA representations and warranties.

Pursuant to CPLR 3211(a)(7), a motion to dismiss for failure to state a cause of action lies if the pleading is defective on its face. When a motion attacks the pleading on its face, the allegations of the pleading are deemed to be true (*see Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]). More than that, the pleading will be deemed to allege whatever may be implied from its statements by reasonable intention (*id.* at 65). The pleader is entitled to every favorable inference that might be drawn

(*Westhill Exports v Pope*, 12 NY2d 491, 496 [1963]). Hence, to succeed on a CPLR 3211(a)(7) motion to dismiss, the moving party "must convince the court that nothing the plaintiff can reasonably be expected to prove would help; that the plaintiff just doesn't have a claim" (Siegel, New York Pract. § 265 at 462 [5th ed 2011]; *accord* John R. Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions-Pitfalls and Pointers*, 83 NY ST BJ 32, 33-34 [Nov./Dec. 2011]).

In the complaint in the instant case, plaintiff cites to two types of SA representations and warranties, a breach of either allegedly triggers Natixis's repurchase obligations. First, plaintiff cites to section 3.01(J) of the SA in which Natixis represents and warrants that the mortgage loans it selected to include in the RMBS Trust were "not intentionally selected [by it] in a manner so as to affect adversely the interest of the Depositor." On appeal, however, plaintiff no longer contends that a breach of such representations and warranties triggers a duty to repurchase any defective loan (*see* PSA Section 2.03).

Second, the complaint cites to section 3.03 of the SA, a breach of which does trigger a duty to repurchase defective loans. The section states:

> "Section 3.03 Further Representations and Warranties. (a) The Unaffiliated Seller represents and warrants to the Depositor and its assignees that with respect to

> each representation and warranty made by an Originator who is a party to an Assignment and Recognition Agreement as of a date earlier than the Closing Date, no event has occurred from the applicable date as of which such representation and warranty is made to the closing Date, including, but not limited to, the passage of time, which would render such representation and warranty untrue in any material respect as of the Closing Date."

Contrary to Natixis's contention, the complaint contains sufficient factual allegations as to the type of "event" that occurred prior to the closing date that rendered the Originators' representations and warranties "untrue in [a] material respect as of the closing date." Specifically, plaintiff alleges that "based on the due diligence [Natixis] conducted on the loans and/or the Originators, Natixis discovered that certain loans breached the representations." Such factual allegations are sufficiently particular to give the court and parties notice of the material elements of the repurchase claim predicated upon a breach of the SA representations and warranties.

Condition Precedent

Having found the pleadings sufficient -- with regard to the repurchase obligations based upon the breach of SA representations and warranties, and the backstop repurchase obligations based upon the breach of the Originators' representations and warranties -- we must next examine Natixis's argument that such well-pleaded claims were unripe because

plaintiff failed to demonstrate compliance with a condition precedent to commencement of the action. Natixis's argument centers on Section 2.03(d) of the PSA, the repurchase protocol, which provides in pertinent part:

> "Within 90 days of the earlier of either discovery by or notice to the Unaffiliated Seller of any breach of a representation or warranty set forth in Section 3.01 (3.01(h), 3.01(n), 3.01(o), 3.01(p) or 3.03 of the Unaffiliated Seller's Agreement that materially and adversely affects the value of the Mortgage Loans or the interest of the Trustee or the certificate holders therein, the Unaffiliated Seller shall use its best efforts to cure such breach in all material respects and, if such breach cannot be remedied, the Unaffiliated Seller shall, (i) if such 90-day period expires prior to the second anniversary of the related Delivery Date, remove such Mortgage Loan from the Trust Fund and substitute in its place a Substitute Mortgage Loan, in the manner and subject to the conditions set forth in this Section 2.03; or (ii) repurchase such Mortgage Loan at the Repurchase Price . . . ."

> "In the event there is a breach of a representation or warranty by an Originator with respect to a Mortgage Loan originated or acquired by such Originator that materially and adversely affects the value of such Mortgage Loan or the interest of the Trustee and the Certificateholders therein, and, upon discovery or receipt of notice, such Originator fails to cure, substitute or repurchase such Mortgage Loan within the period specified in either the applicable Assignment and Recognition Agreement, if any, or the applicable Mortgage Loan Purchase Agreement, the Unaffiliated Seller shall cure, substitute or repurchase such Mortgage Loan subject to the conditions set forth in this Section 2.03 . . . . Notwithstanding the unaffiliated Seller's lack of knowledge, in the event it is discovered by the Unaffiliated Seller, the Depositor or the Trust (including the Trustee and the Servicer acting on the Trust's behalf), that the

> substance of a representation or warranty was inaccurate as of the applicable date of such representation or warranty and such inaccuracy materially and adversely affects the value of the related Mortgage Loan, the Unaffiliated Seller shall use its best efforts to cure such breach or substitute or repurchase such Mortgage Loan in accordance with this Section 2.03(d)."

To Natixis, this dual repurchase protocol operates as an express condition precedent to suing because it indicates that plaintiff may not enforce Natixis's repurchase obligations unless it complies with the 90-day demand-and-cure period. That is, a plaintiff must provide notice and await the required amount of time. We agree with Natixis that this type of cure and repurchase provision constitutes a procedural condition precedent to suit as it acts as a means of obtaining relief (*see ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 598 [2015]; *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 141 AD3d 431, 432 [1st Dept 2016]).

However, we reject Natixis's contention that it was entitled to a 90-day cure-and-demand period irrespective of whether it discovered any breach of the representations and warranties. On the contrary, the repurchase protocol (Section 2.03[d] of the PSA cited above), explicitly provides that Natixis's repurchase obligations are triggered by "either *discovery* by or notice to [Natixis] of any breach of [emphasis added]" the SA

representations and warranties. Similarly, the same repurchase protocol explicitly provides that Natixis's backstop repurchase obligations are triggered: "If upon *discovery* or receipt of notice, such Originator fails to cure, substitute or repurchase such Mortgage Loan within the period specified . . . [emphasis added]."

This Court has recognized that these alternative contractual obligations give rise to separate and distinct claims for breach of contract (*Morgan Stanley Mtge. Loan Trust 2006-2013 ARX v Morgan Stanley Mtge. Capital Holdings LLC*, 143 AD3d 1, 3 [1st Dept 2016]); *Nomura Home Equity Loan v Nomura Credit & Capital*, 133 AD3d 96, 108 [1st Dept 2015]). Thus, under the PSA's repurchase protocol a discovery of a breach of the pertinent representations and warranties and the failure to cure them triggered Natixis's repurchase and backstop repurchase obligations.

Additionally, Natixis's argument fails common sense. Carried to its logical conclusion, Natixis's argument amounts to the position that even where Natixis discovered its own breach of representations and warranties or where a discovery of a breach of the Originators' representations and warranties triggered Natixis's duties to cure or repurchase the defective loans, failure to do so carried no contractual repercussions unless

someone other than Natixis also concomitantly discovered the breaches of representations and warranties and provided Natixis notice thereof. Thus, Natixis's reading of the repurchase protocol allows it to sit on its hands after discovery of its own breaches or breaches by the Originators merely because no one else has discovered them. Of course, this would effectively nullify the discovery language of the repurchase protocol contained in section 2.03(d) of the PSA. It would turn a blind eye to the cardinal principle of contract interpretation that "[a] contract should not be interpreted to produce a result that is absurd . . . commercially unreasonable[,] or contrary to the reasonable expectations of he parties" *(Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003] [internal citations omitted]).

Still, Natixis argues that even if this action is ripe for adjudication, the complaint must be dismissed because it fails to sufficiently plead Natixis's discovery of the breach of the pertinent representations and warranties with regard to the loans. The complaint in the instant action alleges that "Natixis purchased the Loans from the Originators, had the loan files in its possession, and hand-picked the Loans it securitized and sold to the Trust." The complaint goes further to aver that Natixis's due diligence included "reviewing select financial information

for credit and risk assessment, conducting an underwriting guideline review, and performing senior level management interviews and/or background checks." Moreover, the complaint alleges that at least 60% of the loans in the Trust are defective, and that Natixis's due diligence "would have revealed that Loans were plagued with defects." In addition, the complaint alleges that a forensic study into the credit quality and characteristics of the loans revealed pervasive misrepresentations, "widespread underwriting guideline violations" by the Originators, and "material inaccuracies in the Mortgage Loan Schedule."

We find such allegations sufficient to adequately plead that Natixis's repurchase and backstop repurchase obligations were triggered by defendant's discovery of its own breaches of the SA representations and warranties and the breaches of the Originators' representations and warranties with regard to the mortgage loans. Indeed, these allegations are factual allegations, not just legal conclusions. The complaint does not simply assert, without more, that a certain number of loans breached the Originators' representations and warranties. Instead, the complaint avers which representations and warranties were breached and how. Thus, plaintiff's allegations that Natixis discovered the aforementioned breaches are sufficient to

survive a motion to dismiss on the pleadings.

Accordingly, the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about July 2, 2015, which, insofar as appealed from, denied defendant's motion to dismiss the complaint pursuant to CPLR 3211, should be affirmed, with costs.

All concur.

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

ENTERED: MARCH 9, 2017

CLERK