SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 30, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Andrias, Kahn, Gesmer, JJ.

3601-
3601A Matthew White,
Plaintiff-Respondent,

Index 652585/15

-against-

Brad Davidson, et al.,
Defendants-Appellants.

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Reitler Kailas & Rosenblatt LLC, New York (Edward P. Grosz of counsel), for appellants.

Law Office of Jeffrey M. Haber, New York (Jeffrey M. Haber of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about January 13, 2016, which, to the extent appealed from, denied defendants' motion to dismiss plaintiff's fraudulent inducement claim, unanimously affirmed, without costs. Appeal from so-ordered transcript, same court and Justice, entered on or about March 2, 2016, unanimously dismissed, without costs, as moot.

Plaintiff alleges that defendants fraudulently induced him to enter into an exclusive recording agreement and to provide $500,000 to them by making certain promises or claims, including

that (1) their record label was highly successful and that they had previously successfully represented famous recording artists; (2) they would promote plaintiff's music to radio broadcasting venues; (3) they would organize marketing events to promote plaintiff's single; (4) they would organize a radio tour; and (5) they would promote the re-release of the single around Valentine's Day 2015.

Plaintiff pleaded a cognizable claim for fraudulent inducement based on the first alleged misrepresentations (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see also GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]). The alleged misrepresentations were not mere opinion or puffery, but included specific misrepresentations concerning the Think Say defendants' experience in promoting performing artists (*see Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70-71 [1st Dept 2002]).

With respect to the other four alleged promises or claims, the complaint adequately alleges that defendants made specific representations concerning the actions that they would undertake to promote plaintiff's single in order to induce him to self-fund their promotional campaign while never intending to perform, and were, in effect, engaging in a Ponzi scheme. Although "[m]ere

promissory statements as to what will be done in the future are not actionable, . . . if a promise was actually made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of a material existing fact upon which an action for rescission may be predicated" (*Sabo v Delman*, 3 NY2d 155, 160 [1957] [internal quotation marks omitted]; *see Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 168-169 [1st Dept 2015]; *Neckles Bldrs., Inc. v Turner*, 117 AD3d 923, 925-926 [2d Dept 2014]). Such misrepresentations are collateral to the agreement, and can form the basis of a fraudulent inducement claim (*Laduzinski*, 132 AD3d at 169 [misrepresentations regarding nature of at-will employee's duties]).

Additionally, the merger clause in the agreement, which is virtually identical to that in *Laduzinski*,[1] is similarly too

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[1] The merger clause in question in *Laduzinski*, which this court found to be too general to bar the plaintiff's fraudulent inducement claim, provided:

> "This Agreement constitutes the entire agreement between the parties with respect to subject matter and supersedes all previous understandings, representations, commitments or agreements, oral or written" (*Laduzinski*, 132 AD3d at 169).

In language strikingly similar to that of the merger clause in *Laduzinski*, the merger clause in question in this case, as set forth in Section 23(a) of the agreement, provides:

> "This Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof

general to bar plaintiff's claim regarding the promotion-related promises since it "'makes no reference to the particular misrepresentations allegedly made here by [defendants]'" (*id.*, quoting *LibertyPointe Bank v 75 E. 125th St., LLC*, 95 AD3d 706, 706 [1st Dept 2012]).

In their pre-answer motion to dismiss, defendants failed to make a prima facie showing that plaintiff lacks standing to maintain this action (*Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59-60 [2d Dept 2015]; *see also Brunner v Estate of Lax*, 137 AD3d 553, 553 [1st Dept 2016]).

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: MAY 30, 2017

CLERK

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and supersedes all prior proposals, agreements, negotiations, representations, writings and all other communications, whether written or oral, between the parties."

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4126- Ind. 5848/10
4127-
4128 The People of the State of New York,
Respondent,

-against-

Richard Heisler,
Defendant-Appellant.

_____

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

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

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Judgment of resentence, Supreme Court, New York County (Robert M. Stolz, J.), rendered July 24, 2015, resentencing defendant, as a second violent felony offender, to an aggregate term of 22 years, and bringing up for review an order (same date, court and Justice), which granted the People's CPL 440.40 motion to set aside a resentence of the same court and Justice, rendered February 6, 2015, as amended March 2, 2015, resentencing defendant, as a first felony offender, to an aggregate term of 22 years upon a judgment of the same court (Rena K. Uviller, J.), rendered November 10, 2011, convicting defendant, upon his plea of guilty, of kidnapping in the second degree and criminal sexual act in the first degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 22 years to life,

unanimously affirmed. Appeals from the original judgment of conviction and the intervening judgments of resentence unanimously dismissed as academic.

The court correctly resentenced defendant as a second violent felony offender. The court's earlier determination, in vacating defendant's persistent violent felony offender adjudication, that defendant should be sentenced as a first felony offender (nonpredicate) had no collateral estoppel effect on the People's valid CPL 440.40 challenge to the legality of the nonpredicate sentence. We also find that defendant did not meet his burden of establishing that his predicate violent felony conviction was unconstitutionally obtained.

In 2011, defendant was sentenced as a persistent violent felony offender, based on a 1990 New Jersey conviction and a 1993 Rockland County conviction. Each of the predicate convictions arose from defendant approaching a teenage boy, falsely identifying himself as a police officer and thereafter committing a sexual assault upon the boy. The Rockland County conviction arose from two separate incidents with different victims committed within several weeks.

In 2013, defendant moved pursuant to CPL 440.20 to set aside his sentence as a persistent felony offender, claiming, among other things, that his 1990 New Jersey conviction should not have

been used as a predicate violent felony because the New Jersey crimes were not the equivalents of any violent felonies in New York, a claim that is undisputedly correct. In the course of the litigation over defendant's motion, defendant also challenged the use of his 1993 Rockland County conviction as a predicate violent felony on the ground that it had been obtained in violation of his constitutional rights to effective assistance of counsel and due process, in that his plea was allegedly the product of misinformation about his status and concomitant sentencing exposure. In their response, the People suggested that, as a way of disposing of the case without further litigation, the court simply forgo the predicate felony adjudication and sentence defendant as a nonpredicate to concurrent terms of 25 years on each count.

In February 2015, the court granted defendant's motion, noting that the parties and the court had determined that defendant was "not a mandatory persistent violent felon." In place of the original sentence of 22 years to life, the court resentenced defendant as a nonpredicate to an aggregate term of 22 years, with postrelease supervision. However, in March 2015, the Department of Corrections and Community Supervision notified the court and the parties that defendant was legally required to be sentenced as a second violent felony offender. That agency

also advised the court that if defendant was not sentenced as a second violent felon, the time he served on the prior sentence would be credited against his present sentence. Upon the People's timely CPL 440.40 motion to vacate the nonpredicate resentence as illegal, the court resentenced defendant as a second violent felony offender based on the Rockland County conviction.

Where a defendant is in fact a predicate offender, sentencing the defendant as a nonpredicate results in an illegal sentence. The provisions of CPL 400.15, governing second violent felony offender adjudications, are mandatory, and neither the People nor a court may ignore or waive a defendant's predicate status (*see People v Scarbrough*, 66 NY2d 673 [1985], *revg on dissenting mem of Boomer, J.*, 105 AD2d 1107, 1107-1109 [4th Dept 1984]; *People v Alcequier*, 43 AD3d 699 [1st Dept 2007], *lv denied* 11 NY3d 921 [2009]). The claim that defendant describes as a collateral estoppel argument is without merit. The defective resentencing of defendant as a nonpredicate had no collateral estoppel effect with regard to the People's timely CPL 440.40 motion, which was a permissible alternative to an appeal. "When the People seek to challenge a sentence as illegal, they may appeal . . ., *or*, within one year of the judgment, they may make a motion to set aside the sentence" (*People v Medina*, 35 AD3d

163, 164 [1st Dept 2006], *lv denied* 8 NY3d 925 [2007][emphasis added]). The very purpose of a (defendant's) CPL 440.20 motion or a (People's) 440.40 motion is to correct a substantively illegal sentence without the necessity of an appeal; obviously, the court deciding such a motion is not bound by a sentencing court's express or implied finding that the challenged sentence was legal.

Turning to the merits of defendant's second felony offender adjudication, we conclude that defendant did not meet his burden (*see People v Smith*, 28 NY3d 191, 202 [2016]) of establishing that his 1993 Rockland County guilty plea was obtained in violation of his federal constitutional rights to due process and effective assistance of counsel. The record establishes that his plea was made knowingly, intelligently and voluntarily, regardless of any misinformation about his sentencing exposure (*see People v Garcia*, 92 NY2d 869, 870 [1998]). Defendant has not established even a reasonable possibility that he would have rejected the Rockland plea offer and gone to trial had he known he was really a nonpredicate, and thus eligible, under the law at the time, for sentences where the minimum would be a third, rather than half of the maximum (*see Hill v Lockhart*, 474 US 52, 59 [1985]). Given the heinousness of defendant's Rockland crimes (as well as that of the prior New Jersey crimes, even if they

were not technically New York felonies) and the strength of the evidence against him in the Rockland case, defendant was highly likely to be convicted at trial and face lengthy, consecutive sentences, whether or not he was a predicate offender. Defendant had little reason to hope for leniency or early parole. We also find that the court properly exercised its discretion in determining the People's motion without holding a hearing on defendant's claim of unconstitutionality (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]; *People v Satterfield*, 66 NY2d 796, 799-800 [1985]).

We find it unnecessary to reach any other issues, including whether the constitutionality of the Rockland conviction is properly before us in the present procedural posture, and whether the court's alternative ground for resentencing defendant was valid.

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

ENTERED: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4129 Frances Brown, Index 111619/08
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

The New York City Transit,
et al.,
Defendants.

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Pollack, Pollack, Isaac & De Cicco, LLP, New York (Denise A. Rubin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered November 12, 2015, which granted the motion of defendant City of New York for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff alleges that, as she was exiting a bus, she tripped and fell over the stump of a pole sign protruding about three to four inches from the sidewalk near the bus stop. The City met its prima facie burden by showing that plaintiff did not plead that the City received prior written notice of the sidewalk defect as required by Administrative Code of City of NY § 7-201(c)(2) (*see Katz v City of New York*, 87 NY2d 241, 243 [1995]).

The City also submitted evidence showing the absence of

prior written notice; that the sign was in good condition two years before the accident; that the City received a citizen complaint through 311 less than 15 days before plaintiff's accident; and that it repaired the condition a few days after her accident. The complaint received before the accident, even if it were in writing, could not constitute prior written notice for purposes of the statute, since it was received within the 15-day grace period provided by the statute for the City to make repairs after receiving notice (*see Berrios v City of New York*, 114 AD3d 451 [1st Dept 2014]; *Silva v City of New York*, 17 AD3d 566, 567 [2d Dept 2005], *lv denied* 5 NY3d 705 [2005]).

As the City established there was no prior written notice, the burden shifted to plaintiff to demonstrate the existence of prior written notice or the applicability of one of two recognized exceptions to the rule (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Plaintiff failed to demonstrate either that she pled prior written notice or that the 311 complaint received by the City within the 15-day grace period constitutes such notice. Plaintiff's contention that the City affirmatively created the condition by removing the sign from the sleeve is unsupported by any evidence. The City's record search demonstrated that the sign was last repaired two years before plaintiff's accident, and plaintiff failed to present any

evidence to the contrary. Accordingly, she failed to raise an issue of fact as to whether the City may have caused the condition through affirmative negligence that "immediately result[ed]" in a dangerous condition (*Bielecki v City of New York*, 14 AD3d 301, 301 [1st Dept 2005]; *see Oboler v City of New York*, 8 NY3d 888 [2007]).

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

ENTERED: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4130 In re Genesis A., and Another,

Children Under Eighteen Years of Age, etc.,

Candido A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Daniel R. Katz, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Damion K. L. Stodola of counsel), for respondent.

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

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Order of fact-finding and disposition, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about February 9, 2016, which, inter alia, found that respondent father sexually abused the subject child Ada A., and derivatively neglected the subject child Genesis A., granted a final order of protection against the father to stay away from the children, except for court-ordered visitation, and directed the father to complete sex offender and parenting skills programs, and all services he was engaged in at Friends to Fathers, unanimously affirmed, without costs.

The court properly concluded that petitioner demonstrated by

a preponderance of the evidence that the father sexually abused Ada and derivatively neglected Genesis, based on Ada's in-court testimony, the testimony of the social worker, and the records of the Child Advocacy Center, despite the father's denials. The court's credibility determinations are accorded great weight on appeal (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

No corroboration was necessary for Ada's statements because she testified in court and was subjected to cross-examination (*see Matter of Karime R. [Robin P.]*, 147 AD3d 439, 440 [1st Dept 2017]). Although the court noted some discrepancies in how Ada had reported the abuse to others, the court found her explanation believable, and expert testimony was not required under Family Court Act § 1012 (*see Matter of Lonell J.*, 242 AD2d 58, 61 [1st Dept 1998]).

The court properly found that the father's sexual abuse of Ada demonstrated such an impaired level of parental judgment as

to create a substantial risk of harm to Genesis, despite the passage of time. The father presented no evidence that he underwent treatment or that his proclivities had changed (*see Matter of Nyjaiah M. [Herbert M.]*, 72 AD3d 567 [1st Dept 2010]).

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

ENTERED: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4131 Royal Equities Operating, LLC, Index 653201/16
Plaintiff-Appellant,

-against-

Joshua D. Rubin, et al.,
Defendants-Respondents.

_____

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for appellant.

The Shell Law Firm, PLLC, New York (Martin Shell of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered December 13, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's CPLR 3213 motion for summary judgment in lieu of complaint in the amount of $1,740,818.60, plus interest and attorney's fees, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for a hearing on the amount of reasonable attorney's fees to be awarded.

In moving for summary judgment in lieu of complaint to enforce absolute and unconditional guarantees on a commercial lease, plaintiff made a prima facie showing of the tenant's default and the amount owed — $1,740,818.60 — under the lease's accelerated rent provision. In opposition, the guarantor defendants failed to refute plaintiff's calculations as to the

amount owed, or challenge any specific line-item on the ledger submitted by plaintiff, entitling plaintiff to summary judgment as to the amount of damages (*Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 538 [1st Dept 2017]). Defendants' nonspecific argument that plaintiff's calculations were flawed and uncertain is conclusory, and insufficient to raise a triable issue (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004]). Further, defendants' claim that rent could not be accelerated because the premises had been re-let was properly rejected by the motion court, as defendants are foreclosed from raising all defenses which are personal to the obligor tenant, except a failure of consideration, which does not apply here, since it is conceded that the tenant is still in possession (*see I Bldg, Inc. v Hong Mei Cheung*, 137 AD3d 478 [1st Dept 2016]). As guarantors who expressly waived all rights and remedies generally accorded under law, defendants' liability can be greater than that of the obligor tenant, as the lease and guaranties were separate undertakings, and the latter are enforceable without

qualification or reservation (*see Raven El. Corp. v Finkelstein*, 223 AD2d 378 [1st Dept 1996], *lv dismissed* 88 NY2d 1016 [1996]).

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: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4133 The People of the State of New York, Respondent, Ind. 49/07

-against-

Miguel Joaquin, Defendant-Appellant.

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Law Office of Paul P. Martin, New York (Paul P. Martin of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J. at speedy trial motion and jury trial; Steven L. Barrett, J. at sentencing), rendered August 24, 2011, as amended December 20, 2011, convicting defendant of kidnapping in the second degree and robbery in the first and second degrees, and sentencing him to an aggregate term of 20 years, unanimously affirmed.

Defendant's legal sufficiency claims as to the robbery convictions are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. We also find that the remaining conviction was likewise based on legally sufficient evidence, and that the verdict, as to all charges, was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations.

There was extensive evidence to support the inference of accessorial liability as to each of the charges.

The court properly declined to strike any of the victim's testimony as a remedy for his repeated invocation of his Fifth Amendment privilege against self-incrimination during cross-examination, and it provided a suitable remedy by repeatedly instructing the jury that while the victim had the right to do so, the jury may consider his assertion of the privilege in determining the credibility and weight of his testimony (*see People v Siegel*, 87 NY2d 536, 544-45 [1995]). There was no impairment of defendant's right to confront this witness (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

The court's charge did not improperly shift the burden of proof when it reminded the jury that the victim had withdrawn his assertion of the privilege as to a cross-examination question about bribery, after which defense counsel declined to question him on that matter. The court properly instructed the jury to disregard that portion of the testimony, and reminded the jury that defendant did not have any burden of proof. In any event, any error involving the witness's assertion of his privilege or the court's charge was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court correctly denied defendant's CPL 30.30 speedy

trial motion on three alternative grounds. Pursuant to the fugitive disentitlement doctrine, defendant forfeited his right to make this motion by absconding after the motion was filed, but before the court issued its decision (*see People v Panico*, 130 AD2d 777, 778 [2d Dept 1987]; *see also People v Taveras*, 10 NY3d 227, 232 [2008]). The motion was also untimely. Counsel first filed the CPL 30.30 motion after both counsel had answered ready for trial, the case had been sent to and was pending in a trial part, the trial court had addressed several preliminary issues, and the trial court had announced it was ready to begin jury selection. Under these circumstances, "defense counsel's tactics deprived the prosecution of reasonable notice of the motion, and . . . defendant waived his speedy trial claim by announcing his readiness for trial and by failing to request an adjournment when the People moved the case to trial" (*People v Harvall*, 196 AD2d 553, 554-555 [2d Dept 1993], *lv denied* 82 NY2d 696 [1993]; *see also People v Dolan*, 54 Misc 3d 144(A) 2017 NY Slip Op 50239(U) [App Term, 1st Dept 2017]). Furthermore, the motion was without merit (*see People v Martinez*, 268 AD2d 354 [1st Dept 2000], *lv denied* 94 NY2d 922 [2000]).

Defendant's claim that his counsel was unconstitutionally ineffective in failing to file a timely speedy trial motion is unreviewable in the absence of a CPL 440.10 motion, since it

involves matters not fully explained by the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Insofar as this claim is reviewable, counsel was not ineffective in failing to file a timely motion, because, as the court correctly determined, the motion was without merit in any event.

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

ENTERED: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4134 In re John C. Leo, Index 153777/15
Petitioner-Respondent,

-against-

LD Holdings, Inc., formerly known as Leisure Direct, Inc.,
Respondent-Appellant.

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Carl E. Person, New York, for appellant.

Carmel, Milazzo & DiChiara LLP, New York (Ross David Carmel of counsel), for respondent.

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Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 2, 2016, directing respondent to, among other things, issue and deliver to petitioner 200 million shares of respondent's stock in satisfaction of an unpaid judgment, unanimously affirmed, with costs.

Supreme Court properly granted the petition for a turnover order for authorized but unissued shares to satisfy petitioner's judgment against respondent (*see Adelaide Prods., Inc. v BKN Intl. AG*, 39 AD3d 254 [1st Dept 2007]; *Guzov Ofsink, LLC v China Board Mill Corp.*, Sup Ct, NY County, Oct. 24, 2011, Solomon, J., index No. 110520/2011). Contrary to respondent's contention, these unissued shares are assets of respondent and can be reached under CPLR 5225 (*id.*).

Respondent's argument that Nevada law prohibits issuance of

shares to satisfy a debt is not supported by the statute cited (*see* Nev Rev Stat § 78.211). Nor does respondent's postjudgment attempt to thwart enforcement, by purporting to "de-authorize" the shares, bar enforcement of the judgment.

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: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4135-
4135A In re Ariella D., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.,

Sharon D.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

Bruce A Young, New York, for appellant.

Douglas H. Reiniger, New York, for respondent.

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

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Orders, Family Court, New York County (Susan Knipps, J.), entered on or about December 1, 2015, which, upon a fact-finding determination that respondent mother suffers from a mental illness as defined by Social Services Law § 384-b(6), terminated the mother's parental rights and transferred custody of the subject children to petitioner agency and the Commissioner of the Administration for Children's Services for purposes of adoption, unanimously affirmed, without costs.

The agency met its burden of establishing by "clear and convincing proof" that the mother is "presently and for the foreseeable future unable, by reason of mental illness . . . , to

provide proper and adequate care" for the subject children (Social Services Law § 384-b[3][g][i]; [4][c]; *accord Matter of Hime Y.*, 52 NY2d 242, 247 [1981]). The evidence included a report and testimony from a court-appointed psychiatrist who, after examining the mother and reviewing medical and other records, opined that the mother suffers from bipolar disorder and alcohol use disorder and that, as a result, if the children were returned to her care, they now and in the foreseeable future, would be at risk of becoming neglected (*see* Social Services Law § 384-b[6][e]; *see also Matter of Savannah Love Joy F. [Andrea D.]*, 110 AD3d 529, 529 [1st Dept 2013], *lv denied* 22 NY3d 858 [2014]). Under the circumstances here, where the expert's opinion was based on the mother's long history of mental illness, her non-compliance with substance abuse and psychiatric treatment, and the pervasive nature of her deficits, it was not necessary for the psychiatrist to observe interactions between the mother and children before reaching his conclusion (*see Matter of Brianna Monique F. [Monique F.]*, 129 AD3d 638, 639 [1st Dept 2015]). In addition, there was other evidence before the Family Court which supports the psychiatrist's opinion, including agency and medical records, a prior court-ordered psychological evaluation, and the testimony of two agency caseworkers and the mother's therapist (*see* Social Services Law § 384-b[6][e]; *Hime*

Y., 52 NY2d at 248; *Matter of Roberto A. [Altagracia A.]*, 73 AD3d 501, 501 [1st Dept 2010], *lv denied* 15 NY3d 703 [2010]). The mother failed to call any witnesses or offer any rebuttal evidence, and the court properly drew a negative inference from her failure to testify (*see Matter of Starlayjha S. [Kumica F.]*, 132 AD3d 571, 571 [1st Dept 2015]). Given the finding that the mother suffers from mental illness, which causes her "to be unable, at present and for the foreseeable future, to provide proper and adequate care for the children," a dispositional hearing was not required (*Matter of Laura* F., 18 AD3d 362 [1st Dept 2005]; *Matter of Thaddeus Jacob* C., 104 AD3d 558 [1st Dept 2013]; Matter *of Antonio V.*, 268 AD2d 341 [2000], *lv denied* 95 NY2d 751 [2000]).

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

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

ENTERED: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4136 Sally Chame, Index 24265/13E
Plaintiff-Respondent,

-against-

Sheldon Kronen,
Defendant-Respondent,

Andres Chame,
Defendant-Appellant.

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Varvaro, Cotter & Bender, White Plains (Rose M. Cotter of counsel), for appellant.

Greenberg Law P.C., New York (Jennifer A. Shafer of counsel), for Sally Chame, respondent.

Law Offices of John Trop, Yonkers (David Holmes of counsel), for Sheldon Kronen, respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered April 21, 2016, which, insofar as appealed from as limited by the briefs, denied the motion of defendant Andres Chame (Chame) for summary judgment dismissing the complaint and cross claims as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Chame established his entitlement to summary judgment by showing that there is no triable issue of fact as to whether his vehicle was stopped when codefendant Sheldon Kronen's vehicle rear-ended him. Plaintiff, Chame and Kronen all testified that

Chame's vehicle was stopped before the impact occurred, which renders Kronen's claim that Chame failed to activate his vehicle's turn signal irrelevant (*see Vespe v Kazi*, 62 AD3d 408, 409 [1st Dept 2009]). The motion court's determination that there is a question of fact as to whether Chame attempted to make a turn from an improper location fails for that same reason (*see Cabrera v Rodriguez*, 72 AD3d 553, 554 [1st Dept 2010]).

Kronen's argument that Chame's vehicle stopped abruptly in front of him before he rear-ended Chame's vehicle is insufficient to raise an issue of fact as to whether Chame was negligently operating his vehicle prior to the collision (*see Corrigan v Porter Cab Corp.*, 101 AD3d 471, 472 [1st Dept 2012]; *Rodriguez v Chapman-Perry*, 82 AD3d 638, 639 [1st Dept 2011]). Furthermore, even if Chame's vehicle did stop short, Kronen failed to provide evidence that he maintained a safe distance between his vehicle and Chame's vehicle (*see Williams v Kadri*, 112 AD3d 442, 443 [1st Dept 2013]; *Profita v Diaz*, 100 AD3d 481, 482 [1st Dept 2012]).

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

ENTERED: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4138 Cayetano Ortiz-Cruz, et al., Index 306821/09
Plaintiffs-Respondents,

-against-

Irma L. Evers as trustee of the
Irma L. Evers Revocable Trust,
et al.,
Defendants-Appellants,

Fiedler Roofing Co.,
Defendant-Respondent.

_____

Law Office of James J. Toomey, New York (Colin Rathje of counsel), for appellants.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for Cayetano Ortiz-Cruz and Idalia Del Carmen Taxilagas, respondents.

Casone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for Fiedler Roofing Co., respondent.

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Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered July 27, 2016, which granted plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) cause of action, and denied the cross motion of defendant owners for summary judgment on their cross claim for common-law indemnification as against defendant Fiedler Roofing Co. (Fielder), unanimously affirmed, without costs.

The motion court correctly determined that plaintiffs were entitled to partial summary judgment against defendant owners on

the issue of section 240(1) liability because the ladder that plaintiff Cayetano Ortiz-Cruz was using to take measurements in preparation for work to be performed on the roof of defendant owners' building broke, causing him to fall to the ground (*see Weber v Baccarat, Inc.*, 70 AD3d 487 [1st Dept 2010]). Contrary to defendant owners' contention, the work that plaintiff was engaged in was a protected activity within the meaning of Labor Law § 240(1) (*see e.g. Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004]).

Defendant owners' cross motion for summary judgment on their cross claim for common-law indemnification as against Fiedler was properly denied. Although defendant owners hired Fiedler to perform roof repairs and Fiedler subcontracted the work to plaintiff's employer, the evidence does not establish as a matter of law that Fiedler directed or controlled plaintiff's work (*see e.g. McCarthy v Turner Constr. Inc.*, 17 NY3d 369, 377-378 [2011]).

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

ENTERED: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4139 BBCN Bank, formerly known as Nara Bank, Index 159880/13
Plaintiff-Respondent-Appellant,

-against-

12th Avenue Restaurant Group Inc.,
et al.,
Defendants,

Robert N. Swetnick,
Defendant-Appellant-Respondent.

_____

Lewis Brisbois Bisgaard & Smith, LLP, New York (Jamie R. Wozman of counsel), for appellant-respondent.

Harfenist Kraut & Perlstein LLP, Lake Success (Andrew C. Lang of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 16, 2016, which denied defendant Robert N. Swetnick's motion for summary judgment dismissing the complaint as against him, and denied plaintiff's motion for summary judgment on the third and tenth causes of action, unanimously modified, on the law, to grant Swetnick's motion, and otherwise affirmed, without costs. The clerk is directed to enter judgment accordingly.

On appeal, plaintiff concedes that it seeks to hold Swetnick liable for aiding and abetting a fraudulent conveyance, not for aiding and abetting fraud generally. The cause of action for

aiding and abetting a fraudulent conveyance also should have been dismissed, because there is no cause of action for aiding and abetting a fraudulent conveyance against a person, such as Swetnick in this case, who is alleged merely to have assisted in effecting the transfer, in a professional capacity, and who is not alleged to have been a transferee of the assets or to have benefited from the transaction (*see Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842 [1990]; *Cantor Fitzgerald & Co. v 8am Capital Partners Master Fund, L.P.*, 132 AD3d 402, 402 [1st Dept 2015]; *Estate of Shefner v De La Beraudiere*, 127 AD3d 442 [2015]; *Cahen-Vorburger v Vorburger*, 41 AD3d 281, 282 [1st Dept 2007]; *Gallant v Kanterman*, 198 AD2d 76, 80 [1st Dept 1993]; *see also Roselink Investors, L.L.C. v Shenkman*, 386 F Supp 2d 209, 226-227 [SD NY 2004]; *Goren v Quantum Chemical Corp.*, 832 F Supp 728, 736 [SD NY 1993], *affd* 99 F3d 401 [2d Cir 1995]; *In re Parker*, 399 BR 577, 580-581 [Bankr ED NY 2009]). Since the substantive claim

against Swetnick fails as a matter of law, the tenth cause of action, for attorney's fees pursuant to Debtor and Creditor Law § 276-a, must also be dismissed as against him.

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

ENTERED: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4140 The People of the State of New York, Ind. 838/15
Respondent,

-against-

Robert Atkins,
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 (Alan Gadlin 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 (Richard Carruthers, J.), rendered July 15, 2015,

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: MAY 30, 2017

CLERK

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

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4141 Audrey McCullough, Index 20429/14E
Plaintiff-Respondent,

-against-

Riverbay Corporation,
Defendant-Appellant.

_____

Malapero & Prisco, LLP, New York (Jeffrey N. Rejan of counsel), for appellant.

Mallilo & Grossman, Flushing (Joanna J. Lambridis of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered September 30, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established entitlement to judgment as a matter of law by demonstrating that the defect in the sidewalk that allegedly caused plaintiff to trip and fall was trivial, and that there were no surrounding circumstances that magnified the dangers it posed (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77-78 [2015]). Defendant submitted photographs and measurements, which showed that the height differential between the expansion joint and the sidewalk flags was less than half an inch. The photographs did not depict any jagged edges or any

rough, irregular surface, and the expansion joint was not difficult to see or pass over safely on foot, given plaintiff's testimony that the accident occurred on a sunny day and she was the only person traversing the pathway. Plaintiff's testimony that the defect was two-to-four inches high was speculative, since she did not measure the defect (*see Vazquez v JRG Realty Corp.*, 81 AD3d 555 [1st Dept 2011]).

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

ENTERED: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4142 The People of the State of New York, Respondent, Ind. 250/14

-against-

Jose Herrera, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered February 28, 2014, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to a term of two years, unanimously affirmed.

Because defendant had an opportunity to move to withdraw his plea, but did not do so, his challenge to the voluntariness of the plea is unpreserved (*see People v Conceicao*, 26 NY3d 375, 381 [2015]), and we decline to review it in the interest of justice. The narrow exception to the preservation rule (*see People v Lopez*, 71 NY2d 662, 666 [1988]) does not apply, because "[d]efendant said nothing during the plea colloquy or the sentencing proceeding that negated an element of the crime or raised the possibility of a justification [or intoxication] defense" (*People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]). As

an alternative holding, we find that the sentencing court had no obligation to conduct a sua sponte inquiry into postplea statements by defendant that were reflected in the presentence report (*see e.g. People v Bryan*, 129 AD3d 524 [1st Dept 2015], *lv denied* 26 NY3d 965 [2015]). In any event, there is no indication in the postplea statements, or elsewhere in the record, to suggest that defendant had any viable defenses.

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

ENTERED: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4143N Peg Bandwidth, LLC, Index 154391/15
Plaintiff-Appellant,

-against-

Optical Communications,
Defendant-Respondent.

_____

Eckert Seamans Cherin & Mellott, LLC, White Plains (Thomas M. Smith of counsel), for appellant.

Law Offices of Victor A. Worms, New York (Victor A. Worms of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered November 4, 2015, which denied plaintiff's motion for summary judgment or a default judgment, and granted defendant's motion for an extension of time to answer, unanimously affirmed, without costs.

While plaintiff satisfied the requirements of CPLR 3215(f) for a default judgment, we decline to disturb the motion court's exercise of its broad discretion in finding that defendant's excuse for its delay in answering the complaint, i.e., law office failure, was reasonable (*see e.g. Metropolitan Prop. & Cas. Ins. Co. v Braun*, 120 AD3d 1128 [1st Dept 2014]). In addition, the delay was relatively short, plaintiff failed to demonstrate prejudice, and there is a strong preference that matters be decided on the merits (*see Gantt v North Shore-LIJ Health Sys.*,

140 AD3d 418 [1st Dept 2016])).

On its motion for summary judgment, plaintiff failed to tender sufficient evidence to eliminate material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Issues of fact as to whether plaintiff properly terminated the agreement pursuant to its terms arise from the face of the agreement and the affidavit by plaintiff's vice chairman. Moreover, there are issues of fact as to which party breached the agreement, and there has been no discovery yet (*see* CPLR 3212[f]).

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: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4144N South Shore D'Lites, LLC, et al., Index 650827/12
Plaintiffs-Appellants,

-against-

First Class Products Group, LLC,
et al.,
Defendants-Respondents.

- - - - -

Greenbaum, Rowe, Smith & Davis LLP,
Nonparty Respondent.

_____

The Law Office of Russell D. Morris PLLC, New York (Russell D. Morris of counsel), for appellants.

The Law Offices of Brian K. Bernstein, P.C., New York (Brian K. Bernstein of counsel), for First Class Products Group, LLC, Todd Coven and Magda Abt, respondents.

Greenbaum Rowe Smith & Davis LLP, New York (Christopher J. Ledoux of counsel), for Greenbaum, Rowe, Smith & Davis LLP, respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered April 18, 2016, which denied plaintiffs' motion to compel defendants and nonparty law firm to create and turn over a "limited privilege log" relating to communications between the firm and defendants regarding the alleged "markup" in the price of the product sold by defendants to plaintiffs, unanimously reversed, on the law, without costs, and plaintiffs' motion granted.

The motion court improvidently exercised its discretion in denying the motion (*Those Certain Underwriters at Lloyds, London*

v Occidental Gems, Inc., 11 NY3d 843, 845 [2008]). As the record shows, on May 13,2015, defendants signed a stipulation specifically agreeing to provide "the documents and materials requested in the February 26, 2015 and March 13, 2015 letters from Russell Morris to Christopher Ledoux. The March 13 letter requested "a limited privilege log which logs all documents - created or exchanged on or before May 2, 2011 - relating to or dealing with the markup." Those were the precise documents requested in the motion on appeal. Defendants have not shown any reason why they should be released from their agreement to produce the log. Accordingly, the motion should have been granted.

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: MAY 30, 2017

CLERK

Acosta, P.J., Friedman, Andrias, Webber, Gesmer, JJ.

4145 In re Cory Reid, OP 100/17
[M-1979] Petitioner,

-against-

Katherine Bajuile, et al.,
Respondents.

Cory Reid, petitioner pro se.

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

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

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

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

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

ENTERED: MAY 30, 2017

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2401 The People of the State of New York, Respondent, Ind. 2742/11

-against-

Nicholas Hill, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Gregory Carro, J. at suppression hearing; Rena K. Uviller, J. at plea and sentencing), rendered March 8, 2012, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of two years, affirmed.

The court properly denied defendant's motion to suppress. A team of police officers was assigned as part of a conditions unit to the Polo Grounds, a New York City Housing Authority development. As this development was in a high crime area known for violence and drugs, the officers were patrolling the area to determine whether people other than tenants and invited guests were present, and were therefore trespassing. From a rooftop, police observed defendant coming in and out of the building

several times, for short periods of time. An officer next observed defendant enter a car near the building, move something around, and then exit seconds later. Defendant left the area for a few minutes before returning to the front of the building. Two police officers exited their vehicle and approached defendant, stating, "[C]an I ask you a question?," and defendant replied, "[W]hat?" During this time, defendant looked nervous, was looking around, was sweating, and kept grabbing his groin area. The officers asked defendant what he was doing in the building and whether he knew anyone in the building, and defendant told the officers that he was visiting his girlfriend at her apartment in the building. The officers asked defendant for identification, and defendant provided it. Defendant, in his testimony, stated that he informed the officers he had keys to the building, and that if the officers wanted, they could escort defendant to the apartment he had visited.

While defendant waited nearby with the officers, the police investigated his explanation by sending a third officer to the apartment that defendant claimed he was visiting. The police retained defendant's identification[1] to verify if the occupant of the apartment knew defendant. The occupant of the apartment told

[1] The record is unclear as to what type of identification defendant gave the police.

the police that she did not know anyone by defendant's name or recognize defendant from his identification. The third officer returned "a short time later" after leaving to investigate. Once defendant's explanation for being in the building was proven false, there was probable cause to arrest defendant for criminal trespass.

Defendant was not seized when he provided his identification to the police so they could investigate his explanation for visiting the building. The police did not engage in any other coercive or intimidating conduct that would elevate the encounter to a seizure (*see People v Shands*, 85 AD3d 583 [1st Dept 2011], *lv denied* 17 NY3d 821 [2011]). Defendant's identification was only used for a short time to investigate and defendant provided the identification voluntarily. Moreover, he was not in handcuffs or threatened during this time, and the officers did not draw their weapons.

This Court has repeatedly held that in a trespass situation, a police officer may conduct a brief investigation to ascertain whether a defendant's explanation was credible, and this does not rise to a level three forcible detention or seizure (*see e.g. People v Montero*, 130 AD3d 474 [1st Dept 2015], *lv denied* 26 NY3d 970 [2015] [the officer's request that the defendant remain in the lobby while the officers investigated whether the defendant

was a resident or guest of the building was not a seizure]; *People v Donald R.*, 127 AD3d 575 [1st Dept 2015], *lv denied* 25 NY3d 1162 [2015] [the officer's request that the defendant step outside so they could talk to him did not elevate the encounter to a seizure]; *People v Lozado*, 90 AD3d 582 [1st Dept 2011], *lv denied* 18 NY3d 925 [2012] [the officer's request for permission to accompany the defendant to the apartment he was visiting and the defendant agreeing to the request, did not subject the defendant to a level two inquiry]; *People v Francois*, 61 AD3d 524 [1st Dept 2009], *affd* 14 NY3d 732 [2010] [the officer asking the defendant to accompany him to a nearby wall of a subway station and physically grasping the defendant by his elbow, did not elevate the encounter to a seizure requiring reasonable suspicion]).

In determining the lawfulness of police encounters, New York has long followed the four-level test illustrated in *People v De Bour* (40 NY2d 210, 223 [1976]). To determine a seizure under *De Bour*, "[t]he test is whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom" (*People v Bora*, 83 NY2d 531, 535 [1994], citing *People v Hicks*, 68 NY2d 234, 240 [1986]). The dissent cannot point to any New York State case applying the *De Bour* standard to support the broad proposition

that a seizure occurs whenever an officer retains a person's identification. Although the dissent cites to several federal and out-of-state cases, those cases present different factual scenarios compared to the circumstances here, and are not controlling.

For example, the dissent cites to *United States v Lambert*, in which the Tenth Circuit held that the defendant was seized when agents of the DEA approached the defendant as he was heading to his car, asked for his driver's license, and began questioning him (46 F3d 1064, 1068 [10th Cir 1995]). However, as the Tenth Circuit explained, the purpose for requesting the defendant's driver's license was to establish his identity, which the agents completed almost immediately after receiving the license, and therefore their 30-minute retention of the license constituted a seizure (*id.* at 1067, 1068 n 3). Here, in contrast, the officers' retention of defendant's identification was brief. There is no indication they did not intend to return it, assuming they could verify that defendant was a guest of a resident of the building where he was seen by the police. Moreover, the officers requested defendant's identification to verify his contention that he lawfully was on the premises, something they could not ascertain without either the identification or bringing defendant with them to the apartment.

In *United States v Battista*, also cited by the dissent, the court focused on a number of factors which it concluded would have led the defendant to be seized (876 F2d 201, 204-205 [DC Cir 1989]). These factors included that the officers roused the defendant from his bed at 6:30 a.m., the defendant was in a state of undress because of the early morning, the defendant was in a city that was neither home nor his ultimate destination, the defendant was traveling on a train, and the defendant gave his driver's license to the officers (*id.* at 204). Here, except for the brief retention of identification, none of these other factors are present.

Although the dissent contends it is not seeking to create a rule that a seizure occurs whenever a defendant's identification is retained, the fair import of the dissent's analysis is that retention of a defendant's identification always constitutes a seizure. The cases cited by the dissent hold that the taking of identification is but one factor of several to be considered (*United States v Glover* 957 F2d 1004, 1008-1009 [2d Cir 1992] [enumerated certain factors that might suggest a seizure occurred][2]; *Battista* at 205 ["Although none of these factors

[2] In *Glover*, the officers took the defendant to a security room for further questioning and retained his identification (957 F2d at 1009). *Glover* does not support a holding that the retention of identification alone is enough to constitute a

taken individually is necessarily determinative, due regard to the totality of the circumstances leads us to conclude that the 'interview' with [the defendant] constituted a 'seizure'"]). Even if we were to consider the multi-factor test set forth in the cases cited by the dissent, we see no reason to find a seizure occurred here.

Defendant voluntarily gave the officer his identification[3] and raised no objection when the police brought the identification to the apartment he had identified.[4] Defendant even volunteered to be escorted by the officers to the apartment that he claimed he was visiting. Therefore, defendant knew the officers were going to verify his explanation for being in the building, and defendant raised no objection to the officers

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seizure.

[3] The dissent suggests that the identification provided by defendant was a document of significant importance. However, the record does not show what the identification was, or whether it was easily replaceable.

[4] Contrary to the dissent's position, the fact that defendant voluntarily gave his identification to the officers, and that they subsequently took it upstairs, does not involve a legal issue that required preservation. Rather, it is a fact established by the hearing testimony, and is consistent with our analysis that the encounter does not rise to the level of a forcible seizure until the officers confirmed defendant was trespassing. We also note that the voluntary aspect of defendant's provision of his identification was alluded to by the prosecutor in her closing argument at the suppression hearing.

retaining his identification for this limited purpose. The dissent's claim that the encounter became nonconsensual when a officer went upstairs with the identification has no support in the record.

Furthermore, the dissent's position is irreconcilable with recent decisions of this Court. Surely, retaining a defendant's identification that was provided voluntarily for a short time, is less of a limitation on his or her freedom than escorting a defendant with several officers to the apartment that he claimed he was visiting, which this Court found was not even a level two inquiry under *De Bour*, much less a seizure (*see Lozado* at 583). It also is less restrictive than police officers physically grasping a defendant by the elbow and guiding him to a wall, and having an officer ask defendant to accompany them away from the area (*see Francois* at 524-525). Likewise, a request by officers that a defendant step outside of a vestibule is more restrictive than the police action that occurred here (*see Donald R.* at 575).

Our decision in *Montero* stands for the proposition that in circumstances such as those here, it is not a seizure when a police officer asks a defendant to wait while they conduct a brief investigation of his reasons for being in a building. The dissent's attempt to distinguish *Montero* by noting that identification was not specifically mentioned in the decision,

unnecessarily narrows the holding (*see Montero* at 475). The dissent's focus on whether defendant here could have walked away without his identification ignores the fact that defendant gave the item to the officers in the first instance, so that they could briefly investigate his alleged explanation for his presence in the building. The instant case does not present a situation where the police take someone's identification from them over his or her objection or by force, which would raise different legal issues.

Accordingly, because we conclude that defendant was not seized until the officers were unable to verify his explanation, at which point probable cause existed, we need not reach any of the People's alternative arguments.

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

GESMER, J. (dissenting)

I respectfully dissent.

Identification is a necessity for navigating daily life in contemporary society. Accordingly, I would find that the police officers' retention of defendant's identification while they undertook an investigation was a significant limitation on his freedom, and thus elevated their encounter with defendant to a seizure. Since the People did not argue that the officers' actions were justified by a reasonable suspicion of criminal conduct, I would grant defendant's motion to suppress the crack cocaine recovered from him, reverse his conviction, and dismiss the indictment

BACKGROUND

Defendant was stopped by uniformed Police Officers Aguilar and Beegan outside of the entrance to 2971 Eighth Avenue, one of the buildings making up the NYCHA Polo Grounds complex. When Officer Aguilar asked defendant what he was doing and if he knew anyone at the Polo Grounds, defendant stated he was visiting his girlfriend S. in an apartment on the 11th floor. Officer Aguilar requested defendant's identification, which defendant provided.

Officer Ng, another uniformed police officer, joined defendant and Officers Aguilar and Beegan, about 20 yards from the entrance to 2971 Eighth Avenue. Officer Beegan handed

defendant's identification card to Officer Ng and instructed him to take it up to the apartment defendant had identified to investigate defendant's claim.

With defendant's identification card in his possession, Officer Ng entered the building and rode the elevator to the 11th floor. When he knocked on the door of the apartment identified, a woman opened the door. Officer Ng showed the woman defendant's identification card and asked if she recognized defendant and if someone named S. lived in the apartment. The woman answered no to both questions. Officer Ng then rode the elevator back to the lobby, exited the building, and told the other officers what he had learned.[1] Defendant was placed under arrest for trespassing. When he was searched at the precinct, 42 bags of crack cocaine were recovered from him.

At the suppression hearing, defense counsel argued, "[O]nce they took his identification and gave it to another police officer he was no longer free to leave. He was seized.

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[1] The majority has characterized the retention of defendant's identification as "brief." While the record does not state how many minutes Officer Ng was away, it was long enough for him to complete all of these actions while in possession of defendant's identification. Moreover, the People concede that defendant was left waiting with Officers Aguilar and Beegan while Officer Ng was away investigating: "To be sure, during the course of that inquiry, Ng took defendant's identification up to [the] apartment, while defendant stayed behind with Aguilar and Beegan."

[Defendant] can't just abandon his property to the police."[2] The hearing court concluded that there was "clearly no evidence that the defendant was not free to leave" and denied defendant's motion to suppress the crack cocaine recovered from him.[3] The People did not argue, in the alternative that, the officers' actions were supported by reasonable suspicion.

ANALYSIS

I. New York Law Broadly Defines a Seizure as the Third of Four Rising Levels of Police Intrusion

The Fourth Amendment to the United States Constitution and Article One, Section 12 of the New York State Constitution protect against "unreasonable searches and seizures" (US Const, art IV; NY Const art I § 12). New York courts analyze searches and seizures arising from civilian-law enforcement interactions under the four-level framework enunciated in *People v De Bour* (40 NY2d 210, 223 [1976]). At level one, a police officer may make a request for information when it is supported by an objective, credible reason not necessarily indicative of criminality (*De*

[2] Defendant also argued that the police were not justified in conducting a level one request for information. Defendant is not pursuing that argument on appeal.

[3] The hearing court also denied defendant's motion to suppress his statements. Defendant does not challenge that decision on this appeal.

Bour, 40 NY2d at 223). At level two, a police officer may, based on "a founded suspicion that criminal activity is afoot," interfere with an individual to the extent necessary to obtain information, provided that the interference does not rise to the level of a seizure (*id.*) At level three, an officer may seize an individual based on reasonable suspicion that he or she is committing or is about to commit a felony or misdemeanor offense (*id.; see also* CPL 140.50[1]). At level four, an officer may arrest an individual based on probable cause to believe that he or she has committed a crime (*De Bour* at 223*)*

The *De Bour* framework is fundamental to New York State's search and seizure jurisprudence. By setting a standard for scrutinizing police encounters that fall short of a seizure, it affords more rights than those provided under federal law (*compare Florida v Bostick*, 501 US 429, 434 [1991] [Fourth Amendment applies only to police encounters which constitute seizures] *with People v Hollman*, 79 NY2d 181, 195-196 [1992] [rejects *Bostick* and holds police encounters short of a seizure implicate privacy rights]). In addition, *De Bour*'s four-tiered analysis "provide[s] clear guidance for police officers seeking to act lawfully in what may be fast-moving street encounters and a cohesive framework for courts reviewing the propriety of police conduct in these situations" (*People v Moore*, 6 NY3d 496, 499

[2006]).

When confronted with either a level one request for information or a level two common-law inquiry, a person has a right to be "let alone" and may refuse to engage with the police (*see People v Howard*, 50 NY2d 583, 590 [1980], *cert denied* 449 US 1023 [1980] [the defendant was permitted to refuse to answer a level one request for information]; *Moore*, 6 NY3d at 500 [the defendant was free to "continue about his business without risk of forcible detention" when police only possessed a founded suspicion that criminality was afoot], citing *People v May*, 81 NY2d 725, 728 [1992]). Indeed, the right to be let alone significantly distinguishes the limited intrusion allowable under a level two common-law inquiry from a level three seizure:

> "If . . . a suspect who attempted to move could be required to remain in place at the risk of forcible detention[,] the common-law right of inquiry would be tantamount to the right to conduct a forcible stop and the suspect would be effectively seized whenever only a common-law right of inquiry was justified" (*Moore*, 6 NY3d at 500).

Thus, once a police officer forces a person to stop and engage, the encounter is elevated from a lower level intrusion to a level three seizure.

For a seizure under level three of *De Bour*, "[t]he test is whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant

limitation on his or her freedom" (*People v Bora*, 83 NY2d 531, 535 [1994]). In *Bora*, the Court of Appeals explained that it was not constrained to interpret the search and seizure provisions of the New York State Constitution as identical to the Fourth Amendment (*Bora*, 83 NY2d at 534), and stated that "we have not required that an individual be physically restrained or submit to a show of authority before finding a seizure . . . . [O]ne may be seized if the police action results in a significant interruption [of the] individual's liberty of movement" (*id.* [internal quotation marks omitted]).

Consistent with this, the Court of Appeals has characterized a variety of police actions as seizures including, for example, police pursuit (*People v Holmes*, 81 NY2d 1056, 1057-1058 [1993], citing *People v Martinez*, 80 NY2d 444, 447 [1992]).[4] Similarly, it held that a defendant who voluntarily entered a police car after being asked for information about a homicide was seized when an officer began driving away slowly and told the defendant to "just keep his hands where [he] could see them," thus restraining his freedom of movement (*People v Boodle*, 47 NY2d

[4] In contrast, the United States Supreme Court rejected mere police pursuit as constituting a seizure in *California v Hodari D.* (499 US 621, 629 [1991] ["(A)ssuming (the) pursuit in the present case constituted a 'show of authority' enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled"]).

398, 400-401 [1979], *cert denied* 444 US 969 [1979]).

However, no published New York State decision has reached the exact issue presented by the facts of this case: when a pedestrian has voluntarily turned over his identification in a level one encounter, whether the officer's retention of the identification without the pedestrian's consent, for the purposes of conducting an investigation, elevates that interaction into a seizure under level three of *De Bour*.

II. Federal Appellate Courts Have Analyzed the Retention of a Defendant's Identification in a Manner Consistent with *De Bour*

Two federal appellate courts have applied analyses consistent with the *De Bour* framework to hold that the taking and retaining of a pedestrian-defendant's identification is a fact to consider in determining whether a seizure has occurred (*see United States v Lambert*, 46 F3d 1064, 1066 [10th Cir 1995]; *United States v Battista*, 876 F2d 201, 205 [DC Cir 1989]). These holdings are important for two reasons. First, as discussed above, the Court of Appeals has adopted "more protective standards under the State Constitution" than are required under federal law (*People v Torres*, 74 NY2d 224, 228 [1989]). Therefore, these federal cases, although not binding on us, serve as a useful baseline from which to analyze the issue before this Court.

Second, these decisions specifically weighed the retention of a pedestrian-defendant's identification as a factor in concluding that the defendant was seized. This distinguishes these cases from those cases holding that the retention of a defendant's identification following a traffic stop constituted a seizure where the driver would have been violating the law to drive away without a license (*see People v Banks*, 85 NY2d 558, 562 [1995], *cert denied* 516 US 868 [1995] [retention of the defendant's driver's license during a traffic stop elevated the encounter to *De Bour's* third level; *United States v Walker*, 933 F2d 812, 816-817 [10th Cir 1991], *cert denied* 502 US 1093 [1992] [the defendant was seized when his license and registration were retained during a traffic stop]). In contrast, these federal cases hold that retention of the defendant's identification was a fact to consider in determining whether the defendant was seized, even though the defendant would not have been violating the law by walking away.

In *United States v Lambert*, the United States Court of Appeals for the Tenth Circuit held that defendant Lambert was seized when DEA Agents retained his identification in an airport parking lot while they questioned him (46 F3d at 1068). As Lambert was walking to his car in the airport parking lot, DEA agents asked to see his identification and his plane ticket.

Lambert voluntarily complied. The DEA agents then retained Lambert's identification during their 20-to-25 minute conversation with him. The Tenth Circuit held that the retention of Lambert's identification transformed the encounter into a seizure because "Mr. Lambert would not reasonably have felt free to leave or otherwise terminate the encounter with the agents because his driver's license had not been returned to him" (*Lambert,* 46 F3d at 1068). The decision included two statements relevant to this case.

First, the Tenth Circuit stated, "While we agree with the government that Mr. Lambert could have left the airport by plane, taxi, or simply walking down the street, as a practical matter he was not free to go" (*id.*). The Tenth Circuit thus recognized that, while a motorist-defendant stopped on the road is literally stranded until his or her driver's license is returned, the freedom of a pedestrian-defendant deprived of his or her identification is also substantially infringed despite the fact that he or she could theoretically walk away. As the Tenth Circuit stated, "The question is not . . . whether it is conceivable that a person could leave [the] encounter . . . . [W]hen law enforcement officials retain an individual's driver's license in the course of questioning him, that individual, as a general rule, will not reasonably feel free to terminate the

encounter" (*id.* at 1068). This analysis is in line with New York's rule that a seizure may flow from a significant interruption of a defendant's liberty of movement (*Bora*, 83 NY2d at 534).

Second, the Tenth Circuit's statement that Lambert would not reasonably have felt free to "leave or otherwise terminate the encounter" while his driver's license was being retained echoes the distinction in our New York State standard between the right "to be let alone" at levels one and two of *De Bour* and the greater deprivation of liberty upon escalation to level three. Indeed, the Tenth Circuit explicitly stated that the issue before the court was whether Lambert was the subject of a "consensual encounter" (the federal equivalent under *Bostick* of *De Bour*'s level one and two intrusions) or an "investigative detention" (*Lambert*, 46 F3d at 1067). In this way, the holding in *Lambert* highlights that the retention of a person's identification forces the person to stop (*see May*, 81 NY2d at 728 [requiring reasonable suspicion before interfering with the defendant's right to be let alone and "forc[ing] [the defendant] to stop"]).

In *United States v Battista*, an Amtrak police officer and a DEA Special Agent retained defendant Battista's identification while they interviewed him at the entrance to his train roomette (876 F2d 201, 205 [DC Cir 1989]). The interview began when

Battista was roused from sleep at 6:30 a.m., when he was in a state of partial undress and in a place that was neither his home nor his final destination (*Battista*, 876 F2d at 204). Under these circumstances, the deprivation of Battista's identification did not impede him from accomplishing some task; indeed he was simply located on a moving train. Nonetheless, the United States Court of Appeals for the District of Columbia Circuit recognized, even under the narrower federal standards, that the retention of Battista's identification was a factor to consider in determining whether he was seized (*id.* at 205).

In reaching its conclusion, the District of Columbia Circuit employed a tiered analysis similar to the *De Bour* framework. While the Court found that questioning Battista at an early hour, in a foreign location, while he was partially undressed "may not be enough to render the contact a seizure at its inception, it surely became one after Battista was asked for his identification and upon perusal the identification was not returned" (*id.* at 205). Thus, the District of Columbia Circuit recognized that the retention of a person's identification is an action that may elevate an otherwise low-level police interaction to a seizure requiring reasonable suspicion.[5]

[5] The Court also stated, "It is well established that the mere request for identification does not inevitably give rise to

III. Holding that Defendant Was Seized is Consistent With *De Bour* and Prior Decisions of this Court

Defendant acknowledges that New York law has not addressed whether the retention of a defendant's identification may elevate a police encounter to level three of the *De Bour* framework. However, I would hold that, under *De Bour* and its progeny, the officers' retention of defendant's identification elevated this police-civilian encounter to a level three seizure.

In *De Bour*, the Court of Appeals stated, "We are cognizant of the fact that police-citizen encounters are dynamic situations during which the degree of belief possessed at the point of inception may blossom by virtue of responses or other matters which authorize and indeed require additional action as the scenario unfolds" (*De Bour*, 40 NY2d at 225). Therefore, "the tone of police-initiated encounters with civilians can be subtle and ever-shifting . . ." (*Hollman*, 79 NY2d at 191). In describing a *De Bour* analysis, this Court has cautioned that, "The latter part of th[e] scenario must not be considered in isolation but viewed in its entirety as a dynamic encounter where

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a seizure. But once the identification is handed over to police and they have had a reasonable opportunity to review it, if the identification is not returned to the detainee we find it difficult to imagine that any reasonable person would feel free to leave without it" (*Battista*, 876 F2d at 205 [internal citation omitted])

compelling considerations are cast in competing roles" (*People v Rivera*, 78 AD2d 327, 329 [1st Dept 1981], *appeal dismissed* 54 NY2d 1021 [1981]). Thus, we must examine the totality of defendant's encounter with Officers Aguilar, Beegan and Ng to determine whether it rose to a higher level intrusion requiring a heightened degree of suspicion under *De Bour*.

Here, defendant's interaction with the police officers began when Officer Aguilar asked defendant what he was doing at the Polo Grounds complex. Merely asking a suspected trespasser about his or her reasons for being at an apartment building is a level one intrusion under *De Bour*, and only requires the support of an objective, credible reason (*see People v Greene*, 271 AD2d 235, 236 [1st Dept 2000], *lv denied* 95 NY2d 853 [2000]).

Next, Officer Aguilar requested to see identification, which defendant provided. A mere request to see identification only implicates level one of *De Bour* as well (*see Hollman*, 79 NY2d at 185). Thus, the encounter between defendant and the officers began at level one of the *De Bour* framework.

However, the encounter shifted once Officer Beegan handed defendant's identification to Officer Ng and instructed him to take it into the building to investigate. This action significantly interrupted defendant's liberty of movement in that it prevented defendant from going about his business and deprived

him of the right to be let alone. Accordingly, it raised the encounter from level one of the *De Bour* framework to level three and required the support of reasonable suspicion.

New York law does not require an explicit submission to authority in order to find a seizure under *De Bour*'s third level (*Bora*, 83 NY2d at 534). A significant interruption of one's liberty of movement will suffice (*id.; see also Holmes*, 81 NY2d at 1057-1058 [police pursuit requires reasonable suspicion because it significantly impedes a defendant's liberty of movement]). It is undisputed that defendant was left waiting with Officers Aguilar and Beegan while Officer Ng was in the building investigating with his identification. The fact that defendant had to wait for Officer Ng to finish investigating, in order to have his identification returned, constituted a significant interruption of his liberty of movement. Indeed, a reasonable person in defendant's position would have perceived that his identification would only be returned upon Officer Ng's completion of the investigation, and that he would only be certain to obtain the return of his identification if he remained close to Officers Aguilar and Beegan. Therefore, the interaction met the test for a seizure, because "a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom" (*Bora*

at 535).[6]

The retention of defendant's identification by Officer Ng also prevented defendant from going about his business or refusing to continue engaging with the officers. If defendant had walked away from Officers Aguilar and Beegan while Officer Ng was away investigating, he would have abandoned his identification.[7] Accordingly, defendant did the only reasonable thing anyone in his position would have done; he remained waiting

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[6] The majority has highlighted that the record is unclear as to what exact identification was taken from defendant. Officer Ng implied that the identification card had a photograph of defendant on it because he showed the identification card to the woman who answered the door, and asked her if she recognized defendant. In any event, the specific form of the identification is not dispositive of whether or not a reasonable person in defendant's position would have found his or her freedom significantly limited. The form of the identification retained has not been determinative of whether the court determined that its retention constituted a seizure (*see United States Glover,* 957 F2d 1004, 1009 [2d Cir 1992] [retention of photocopied social security document and handwritten work identification]; *State v Holmes*, 569 NW2d 181, 185 [Minn 1997] [university identification card retained]).

[7] The view that a reasonable person whose identification has been retained by law enforcement would simply walk away and abandon the identification has been rejected by two state appellate courts, including one state supreme court (*see People v Mitchell*, 355 Ill App3d 1030, 1034, 824 NE2d 642, 647 [2005], *appeal denied* 215 Ill2d 611, 833 NE2d 7 [2005] ["A reasonable person simply would not leave his identification behind and go about his business"]; *State v Daniel*, 12 SW3d 420, 427 [Tenn 2000] ["Abandoning one's identification is simply not a practical or realistic option for a reasonable person in modern society"]).

with Officers Aguilar and Beegan for his identification to be returned.

Contrary to the majority's characterization, holding that defendant was seized is not equivalent to holding that the retention of a person's identification always constitutes a seizure. The *De Bour* analysis requires that the entirety of a police encounter be analyzed to determine whether the challenged police conduct was justified by the appropriate level of suspicion (*Rivera*, 78 AD2d at 327-329). Moreover, determining whether a seizure has occurred involves the "most subtle aspects of our constitutional guarantees" (*Bora*, 83 NY2d at 535 [internal quotation marks omitted]). Of course, there are certain police actions that by their nature tend to significantly interrupt a defendant's liberty of movement and therefore require reasonable suspicion (*see e.g. Holmes*, 81 NY2d at 1057-1058, citing *Martinez*, 80 NY2d at 447 [police pursuit requires reasonable suspicion because it significantly impedes liberty of movement]). I would not hold that the retention of a defendant's identification is such an action, but rather that it is a fact suppression courts must consider when analyzing the entirety of a police encounter to determine whether an officer's actions were justified.

Since I would hold that defendant was seized, I must

consider whether his seizure was supported by reasonable suspicion. Here, the People did not argue at the suppression hearing that the officers' actions toward defendant were supported by reasonable suspicion. Therefore, we may not make that determination on this appeal (*see* CPL 470.15[1]; *People v LaFontaine*, 92 NY2d 470, 744-745 [1998]).

In addition, on this record, we cannot conclude that defendant consented to the retention of his identification. On the issue of consent, "the burden of proof rests heavily upon the People to establish the voluntariness of that waiver of a constitutional right" (*People v Whitehurst*, 25 NY2d 389, 391 [1969]), and the People may not raise the issue for the first time on appeal (*People v Dodt*, 61 NY2d 408, 416 [1984]). At the suppression hearing, the People only argued that defendant voluntarily provided his identification in response to Officer Aguilar's level one inquiry. The People never argued that defendant consented to the retention of his identification or that its retention was within the scope of defendant's response to Officer Aguilar's request for information. The People raised neither of these unpreserved theories of consent on appeal. Therefore, we should not sua sponte consider whether defendant consented to the retention of his identification.

Holding that defendant was seized is consistent with *People*

v Montero (130 AD3d 474, 475 [1st Dept 2015], *lv denied* 26 NY3d 970 [2015]). In *Montero*, we only addressed the legal implications of an officer asking a person to wait in a NYCHA building's lobby while that person's reasons for being there are investigated.[8] *Montero* did not reach the issue of whether the retention of the person's identification during that investigation would have constituted a seizure.

As this court has stated, "A case . . . is precedent only as to those questions presented, considered and squarely decided" (*People v Bourne*, 139 AD2d 210, 216 [1st Dept 1988], *lv denied* 72 NY2d 955 [1988]). Therefore, *Montero* held only that a person suspected of trespassing is not seized when an officer merely asks the person to wait while an investigation is conducted. *Montero* does not answer whether, under *De Bour*, an officer must have reasonable suspicion in order to take the additional step of retaining a person's identification while the investigation is conducted. (*see People v Garcia*, 20 NY3d 317, 322 [2012]; *Martinez*, 80 NY2d at 447).[9]

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[8] Our initial holding was that we declined to apply our interests of justice jurisdiction to consider this unpreserved issue (*see Montero*, 130 AD3d at 475).

[9] The City of New York recently acknowledged this distinction as part of its settlement of a federal civil rights suit dealing with alleged unlawful police conduct on NYCHA grounds (*see generally Davis v City of New York*, 902 F Supp 2d

Holding that defendant was seized is also consistent with the remaining cases cited by the majority, in which we held that various types of police intrusions did not amount to a level three seizure. In *People v Donald R.* (127 AD3d 575 [1st Dept 2015], *lv denied* 25 NY3d 1162 [2015]), we held that a request by police officers that a person step outside of a public housing vestibule in order to talk was not a seizure and need only be supported by a founded suspicion of criminal activity. In *People v Francois*, 61 AD3d 524 [1st Dept 2009]), *affd* 14 NY3d 732 [2012], officers asked to speak with the defendant and guided him to a nearby wall by briefly grasping his elbow without force, which we held was a level two intrusion and not a seizure.[10]

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405 [SD NY 2012]). As part of the settlement reached with the *Davis* plaintiffs, the City agreed to revise the lesson plans used to train police officers on how to patrol at NYCHA buildings. The revised lesson plan instructs officers that holding onto a person's identification could lead a reasonable person to believe that he or she is no longer free to walk away. Therefore, the lesson plan instructs that an officer may not hold onto a person's identification unless the officer has reasonable suspicion (*see Davis v City of New York*, Case 1:10-cv-00699-SAS-HBP, Document 339 [Final Order of Approval of Settlement and Dismissal with Prejudice]; 330; 322-21 [Stipulation of Settlement and Order page 9]; 329-2 [NYPD Lesson Plan page 22; 27] *available at* http://nypdmonitor.org/wp-content/uploads/2015/10/Davis-v.-City-of-New-York-Settlement-and-Exhibits.pdf [accessed March 29, 2017]).

[10] The People argued at the suppression hearing only that the police officers' conduct constituted a permissible level one request for information and the hearing court so found. If the majority's citation to *Donald R. and Francois* may be read as

Finally, in *People v Lozado* (90 AD3d 582 [1st Dept 2011], *lv denied* 18 NY3d 925 [2012]), we held that asking for permission to accompany a person to an apartment he claims to be visiting in a NYCHA building is not a level two intrusion.

In each of these cases, the defendant was able to extricate himself from the police encounter. Therefore, each defendant retained the "right to be let alone" characteristic of levels one and two of *De Bour*, and these police intrusions did not evolve into seizures. In *Donald R.*, the defendant was free to choose not to accompany the police officer out of the building and to walk away from the entire encounter. In *Francois*, the defendant could have freely walked away from the guiding of his elbow without force. In *Lozado*, the defendant was free to elect not to go with the police officer up to the apartment that he claimed to have been visiting and to walk away. Unlike in this case, none of these defendants was deprived of his identification by an officer who was away investigating. Therefore, none of these defendants risked abandoning his identification by walking away or refusing to engage with the officers. Similarly, none of

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implying that the officers' actions constituted a level two intrusion, then the suppression motion should have been granted as the People did not argue that the police had a founded suspicion of criminal activity (*see* CPL 470.15[1]; *LaFontaine*, 92 NY2d at 474).

these defendants was forced to remain waiting in order to have his identification returned.

In light of these significant differences, these cases do not address police actions comparable to those undertaken in this case. Contrary to the majority's suggestion, the retention of defendant's identification is not equivalent to accompanying a person to an apartment he claims to be visiting, or merely asking a person to step outside of a vestibule to speak. These sorts of actions are among the many options available to a police officer investigating a suspected trespass on public housing grounds. However, neither of these options require a person to surrender his or her property to an officer's exclusive possession while an investigation is conducted, the issue at stake on this appeal.

Accordingly, holding that defendant was seized in this case is a conclusion supported by New York law and consistent with our prior cases, and would not run the risk of overruling or limiting our prior holdings. Rather, it would recognize, in a manner consistent with *De Bour*, that the retention of defendant's identification, under the circumstances of this case, significantly interrupted his liberty of movement. Therefore, it required reasonable suspicion.

IV. The Crack Cocaine Should Be Suppressed and the Indictment Dismissed Because the People Failed to Address Whether

Defendant's Seizure Was Supported By Reasonable Suspicion

At a suppression hearing, the People bear "the burden of going forward to show the legality of the police conduct in the first instance" (*People v Berrios*, 28 NY2d 361, 367 [1971] [internal quotation marks and emphasis omitted]). Here, the People failed to meet their initial burden because they did not argue at the suppression hearing that, if defendant was seized, his seizure would have been legally permissible because it was supported by reasonable suspicion.

The People argue, in the alternative, that if this Court holds that defendant was seized, the hearing court's ruling should be affirmed because the evidence in the record shows that the officers possessed reasonable suspicion at the time that they retained defendant's identification. However, this Court may not affirm a suppression decision on a ground that was neither decided adversely to defendant nor reached by the hearing court (CPL 470.15[1]; *LaFontaine*, 92 NY2d at 474-475). In addition, we may not reach an argument for affirmance that the People did not preserve (*Dodt*, 61 NY2d at 416; *see also People v Wilson*, 175 AD2d 15, 16 [1st Dept 1991], *lv denied* 78 NY2d 1015 [1991] [People could not argue for the first time on appeal that officers conducted a lawful stop and frisk when the People only argued at the suppression hearing that the officers conducted a

lawful arrest]).[11]

Accordingly, I would grant defendant's motion to suppress the crack cocaine recovered from him, and dismiss the indictment against him (*People v Cameron*, 48 AD2d 783 [1st Dept 1975]).

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

ENTERED: MAY 30, 2017

CLERK

[11] The People have also argued that this Court should remand this matter for further proceedings on the issue of reasonable suspicion if it finds that defendant was seized. However, the People had a full and fair opportunity to litigate the issues raised at the suppression hearing and neglected to address whether defendant's seizure would have been supported by reasonable suspicion. Accordingly, they are not entitled to a remand to correct their omission (*see People v Havelka*, 45 NY2d 636, 644 [1978] ["Having had a full opportunity to be heard, the People should not be heard again on the same issue"]).

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

3403 & M-602 The People of the State of New York, Respondent,

-against-

Tysean Saigo, Defendant-Appellant.

Ind. 1915/14

Center for Appellate Litigation, New York (Robert S. Dean 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 (Patricia M. Nuñez, J.), rendered May 14, 2015, convicting defendant, after a jury trial, of attempted robbery in the first degree, and sentencing him, as a second felony offender, to a term of eight years, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

The charges against defendant arise out of the theft of sunglasses from a Sunglass Hut store. The store clerk testified that shortly after he opened the store, defendant entered. After trying on several pairs of sunglasses, defendant asked the clerk to step toward him, and informed him that he was going to take a few pairs of sunglasses without paying for them and that if the clerk tried to prevent him from doing so he would break his jaw. When the clerk told defendant to leave, defendant pulled a silver

and black "flip knife" out of his pocket. The clerk testified that, although the knife was in the closed position, he could see the silver blade in the casement, and that the knife appeared to be six to seven inches long.

According to the clerk's further testimony, after he stepped away from defendant and put his hands up, defendant put the knife back in his pocket, and began putting sunglasses into his backpack. When defendant saw the clerk looking toward the door, he told the clerk he would stab him in the back if he ran out of the store, and that he also had a gun. Defendant then grabbed the clerk by the arm and tried to push him to the back of the store. At that moment, the store's cordless phone began to ring, but defendant blocked the clerk's effort to pick it up. The clerk told defendant that the phone call was from someone in the company, and that if he did not answer the company would send the police. Defendant then ran out of the store. The clerk locked the door and called 911, reporting that defendant had come into his store and that he was armed. He told the 911 dispatcher that defendant "had a knife but I mean he said he had a gun too, but I don't know."

According to their testimony, several police officers responded to a radio transmission about the robbery, which gave the robber's description and stated that he had "a knife or

possibly a firearm." Two of the officers arrived at the store within five minutes of the clerk's 911 call, and stated that the clerk was "jittery, shaking" and "sweaty, nervous" and that it looked like "adrenaline was definitely pumping." The clerk showed the officers footage from security cameras that were in the store. Other officers, after canvassing the area, spotted defendant a few blocks from the store. Defendant noticed them and fled, but was stopped by other officers, who patted him down for weapons but found none. After the clerk was brought to the spot where defendant had been captured and identified him as the robber, he was transported back to the store, where the officers finished watching the surveillance video. The video did not capture much of the interaction between the clerk and defendant because one of the cameras was not recording and because the camera system only recorded when it sensed motion. As a result, no camera recorded the part of the interaction beginning from when defendant asked the clerk to approach him. Meanwhile, one of the officers returned to the area where they first spotted defendant, to search for the knife. However, despite checking in the wheel wells of vehicles, speaking to some construction workers in the vicinity, looking in garbage cans and down sewer grates, no knife was found.

Defendant was charged with attempted robbery in the first

degree, based on the threat of immediate use of a dangerous instrument, and with criminal possession of a weapon in the third degree. During the charge conference, the court asked the parties if they had any requests to charge, specifically, "anything that isn't already contained in the standard charge." Defendant and the People both stated that they had no additional requests. After summations, the court charged the jury and, in instructing it on the elements of the crime of attempted robbery in the first degree, defined the completed crime of robbery in the first degree as "when [the defendant] forcibly steals property and when, in the course of the commission of the crime, that person uses or threatens the immediate use of a dangerous instrument." The court asked if there were any exceptions to the charge and both parties answered no. The court asked if either party wanted any additional instructions. Defendant's only request was for an adverse inference charge, which the court denied. During deliberations, the jury asked the court to read back the definitions of the two charges. After consulting with the parties, who did not request any change to the initial charge, the court repeated its initial instructions. Ultimately, the jury convicted defendant of attempted first-degree robbery but acquitted him of third-degree weapon possession.

Defendant does not dispute that he failed to preserve his

objection to the jury charge on attempted robbery. Accordingly, he asks us to exercise our interests-of-justice jurisdiction to reach the issue. There is precedent for exercising such jurisdiction in cases where a jury instruction was "manifestly incorrect" (*People v Sandoval*, 56 AD3d 253, 255 [1st Dept 2008], *lv denied* 11 NY3d 930 [2009]). Defendant urges us to follow that precedent, arguing that the jury charge misstated the elements of the crime of first degree robbery. Defendant is correct in this regard. On its face, Penal Law § 160.15(3), under which defendant was charged, would appear to require conviction even if a person threatened to use a dangerous instrument that he did not in fact possess. However, the requirement for actual possession is an essential element that has been judicially engrafted onto the statute (*see People v Ford*, 11 NY3d 875, 878 [2008]). The People argue that the court technically issued a correct charge, because the CJI pattern jury instruction for "Attempt to Commit a Crime" provides for the court to merely "read [the] statutory definition of [the completed] crime and any defined terms as set forth in CJI for that crime" (CJI 2d [NY] Penal Law § 110.00). Because the statutory definition of robbery in the first degree does not, as stated above, require actual possession, they argue, the court's instruction cannot be criticized. We reject this reasoning, because it reads out of the CJI instruction the words

"as set forth in CJI for that crime" (*id.*). The current version of the CJI charge for Penal Law § 160.15(3) expressly refers to the possession requirement by stating, in pertinent part:

> "In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case beyond a reasonable doubt, both of the following two elements: 1. That on or about (date), in the county of (*county*), the defendant, (defendant's name), forcibly stole property from (specify); and 2. That in the course of the commission of the crime [*or* of immediate flight therefrom], the defendant [or another participant in the crime] possessed a dangerous instrument and used or threatened the immediate use of that dangerous instrument" (CJI 2d [NY] Penal Law § 160.15 [3]) (emphasis added).

Defendant contends that the court's failure to give the proper instruction was not harmless error, based on the fact that the jury acquitted him of the possession charge. The People counter that the fact of the acquittal is not dispositive, because it is likely that the jury believed that defendant actually possessed the knife (which would make irrelevant the court's omission on the attempted robbery charge), but acquitted him of possession because it did not believe the prosecutor satisfied her burden of proving that defendant intended to use the knife unlawfully against the store clerk. We reject this argument as too speculative to justify excusing the court's erroneous charge. This is especially so where the failure of police to recover the knife and its absence from the video

footage allows for the reasonable possibility that the jury did not believe defendant possessed one. Further, the People's theory that the jury believed defendant possessed the knife, but acquitted him of the possession count because it did not believe that he intended to use it unlawfully, conflicts with the jury's finding, implied in its conviction of defendant for attempted robbery in the first degree, that he threatened the clerk with the knife. Accordingly, there is sufficient reason to believe that the erroneous jury charge had a prejudicial effect on defendant, and we exercise our interest-of-justice jurisdiction to remand for a new trial.

M—602 - ***The People of the State of New York v Tysean Saigo***

Motion to file a letter granted.

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

ENTERED: MAY 30, 2017

CLERK

Friedman, J.P., Richter, Feinman, Gische, Gesmer, JJ.

3801 Robert Chapman, also known as Chapman Roberts, et al., Plaintiffs-Appellants, Index 157736/15

-against-

Pierre Daniel Faustin, et al., Defendants-Respondents.

Marc Law Associates, PLLC, New York (Patrick Marc of counsel), for appellants.

Gage Spencer & Fleming LLP, New York (Joseph B. Evans of counsel), for respondents.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 25, 2016, which granted defendants' motion to dismiss the amended complaint, unanimously affirmed, without costs.

The motion court properly dismissed the amended complaint on res judicata grounds (*Matter of Josey v Goord*, 9 NY3d 386, 389-390 [2007]). The instant action, like the small claims action brought by plaintiff Robert Chapman, seeks relief for defendants' alleged failure to render proper accounting services. That plaintiffs now seek different damages than sought in the small claims action does not alter this conclusion, as plaintiffs could have pursued all relief in a single action in the Supreme Court, but opted instead to pursue the claim in the Small Claims

Part of the Civil Court, where any recovery would be capped at $5,000, "exclusive of interest and costs" (NY City Civ Ct Act § 1801). New York City Civil Court Act § 1808 does not divest the small claims judgment of its res judicata, or claim preclusion, effect (*Chin v Interboro Petroleum Transporter, Inc.*, 28 Misc 3d 78 [App Term, 2d Dept 2010]). "[W]here a plaintiff in a later action brings a claim for damages that could have been presented in a prior . . . proceeding against the same party, based upon the same harm and arising out of the same or related facts, the claim is barred by res judicata" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347-348[1999]). Accordingly, plaintiff's Small Claims Court judgment against defendant Pierre D. Faustin for failure to provide proper accounting services bars the instant action, even though, were plaintiff to have brought and proven his claims in Supreme Court in the first instance, he could have sought a larger award.

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: MAY 30, 2017

CLERK

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

3583 Frank Boye, Index 115987/09
Plaintiff-Appellant,

-against-

Rubin & Bailin, LLP, etc., et al.,
Defendants,

Eric Vaughn-Flam, P.C., et al.,
Defendants-Respondents.

_____

Andrew Lavoot Bluestone, New York, for appellant.

Ortoli Rosenstadt LLP, New York (Eric Vaughn-Flam of counsel), for respondents.

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Judgment, Supreme Court, New York County (Kathryn E. Freed, J.), entered October 28, 2015, affirmed, with costs, including actual expenses and costs including reasonable attorneys' fees incurred by defendants in defending this frivolous appeal (22 NYCRR 130-1.1) imposed on plaintiff's counsel, and the matter remanded to Supreme Court for determination of the expenses and costs including reasonable attorneys' fees.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Karla Moskowitz
Paul G. Feinman
Judith J. Gische
Barbara R. Kapnick, JJ.

3583
Index 115987/09

_____x

Frank Boye,
Plaintiff-Appellant,

-against-

Rubin & Bailin, LLP, etc., et al.,
Defendants,

Eric Vaughn-Flam, P.C., et al.,
Defendants-Respondents.
_____x

Plaintiff appeals from the judgment of the Supreme Court, New York County (Kathryn E. Freed, J.), entered October 28, 2015, to the extent appealed from as limited by the briefs, dismissing the complaint as against defendant Eric Vaughn-Flam, P.C. (the firm), and bringing up for review, an order of the Supreme Court, New York County (Louis B. York, J.), entered January 17, 2012, which, upon granting leave to reargue, partially granted the firm's CPLR 3211(a)(1) and (a)(7) motion to dismiss the claims against it to the extent of dismissing the legal malpractice claims based on the firm's alleged withdrawal of certain claims previously asserted on plaintiff's behalf in the underlying federal suit, and an order of

the same court (Louis B. York, J.), entered July 24, 2012, which granted the firm's CPLR 3212 motion for summary judgment dismissing the remaining claims against it.

Andrew Lavoot Bluestone, New York, for appellant.

Ortoli Rosenstadt LLP, New York (Eric Vaughn-Flam of counsel), for respondents.

TOM, J.P.

This action seeks damages for alleged legal malpractice committed by, as is relevant to this appeal, defendants Eric Vaughn-Flam, PC (the firm) and Eric Vaughn-Flam, Esq. We find that Supreme Court properly dismissed the legal malpractice claims against defendants based on, inter alia, defendants, alleged withdrawal of certain causes of action previously asserted on plaintiff's behalf in an underlying federal suit. Separately, our review of the history of this litigation contained in the record and this frivolous appeal persuades us to impose sanctions on plaintiff's counsel.

Plaintiff, a Danish citizen, owned or was the authorized agent for many works of fine art that he brought to New York to sell. He contracted with Jurdem Associates, Inc., a public relations firm, to facilitate the sales, and, on its recommendation, contracted with Jan Amory to display the art in her Manhattan apartment. In March 2003, plaintiff realized numerous works of art were missing from the apartment.

Plaintiff retained defendants to commence the underlying federal action. On March 20, 2006 – more than three years after plaintiff discovered the missing art – defendants filed a complaint (the federal complaint) on his behalf in the Southern District of New York against Jurdem Associates, its sole

shareholder, Arnold Jurdem (collectively the Jurdem defendants), and Amory, in connection with approximately 47 works of art that were improperly taken or lost. The federal complaint alleged fraud, conversion, and breach of the "Amory Contract" against all the defendants, and an additional claim of breach of the "Jurdem Contract" against the Jurdem defendants.

On November 1, 2006, after their relationship with plaintiff had deteriorated, the firm moved to withdraw as his counsel in the federal action, and on November 14, 2006, the Southern District granted the motion.

On January 18, 2007, successor counsel Jan Meyer of Jan Meyer & Associates P.C. filed a notice of appearance in the federal action on plaintiff's behalf. On August 2, 2007, Meyer filed an amended federal complaint, which alleged seven causes of action which included the four counts in the original complaint filed by Vaughn-Flam, and the additional claims of negligence, breach of fiduciary duty, and piercing the corporate veil against the Jurdem defendants.

On November 26, 2007 the Jurdem defendants moved for summary judgment dismissing all claims against them. On December 17, 2007, Meyer - plaintiff's successor counsel - opposed the motion in part, and voluntarily withdrew the conversion and breach of the Armory contract claims against the Jurdem defendants.

In an order dated August 27, 2008, the Southern District (Kevin Castel, J.), granted the Jurdem defendants' motion in part. Initially, the court deemed the voluntarily withdrawn conversion and breach of the Amory contract claims dismissed. The court also dismissed in part the negligence and breach of fiduciary duty claims against the Jurdem defendants as time-barred. Because the court found both were tort claims, and the statutes of limitations began to run "upon injury," the court dismissed as time-barred those negligence and breach of fiduciary duty claims "that are based on the sale or other removal of Artwork from Amory's apartment that occurred prior to March 20, 2003," i.e., more than three years before the complaint was filed. The Southern District also denied summary judgment on the breach of the Jurdem contract, fraud, and piercing the corporate veil claims against Jurdem Associates. However, it dismissed the breach of the Jurdem contract, negligence, breach of fiduciary duty, and fraud claims against Arnold Jurdem individually. On February 4, 2009 Boye settled the case with the Jurdem defendants.

In the meantime, Amory never appeared or answered the complaint, so claims against her were not addressed in the motion papers in the federal action. Yet, successor counsel never sought a default judgment against her on the conversion and

breach of the Amory contract claims (which successor counsel had not withdrawn), or on the fraud claim.

On March 6, 2010, plaintiff, through his attorney, Andrew Lavoott Bluestone, who represents him on this appeal, commenced this action against defendants, alleging legal malpractice and breach of fiduciary duty. Significantly, the complaint alleges, inter alia, that defendants "negligently failed to render competent legal service when, they unilaterally, without notice and without consent, voluntarily withdrew all claims of conversion and breach of contract against [the Jurdem defendants]." It also alleges that they failed to file the federal complaint in a timely manner. The malpractice complaint alleges that, but for the withdrawal of the conversion and breach of contract claims, plaintiff would have prevailed in the federal action.

Defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) based on documentary evidence and failure to state a claim, for leave to amend its verified answer to assert an affirmative defense of documentary evidence, and for sanctions pursuant to 22 NYCRR 130-1.1. With regard to both the grounds for dismissal and the basis for sanctions, defendants argued that the public record established that it was successor counsel (Meyer) who withdrew the conversion and breach of contract claims

in the federal action and not defendants. Defendants also stressed that successor counsel also failed to move for a default judgment against Amory in the federal action and settled with the Jurdem defendants, and that such actions were the proximate cause of plaintiff's alleged damages.

Although plaintiff's counsel submitted opposition to the motion, he did not address the relevant points made by defendants regarding the facts established by the public record. Nor did he make any efforts to correct the record or withdraw claims he knew or should have known were frivolous.

Supreme Court granted defendants' motion in part to dismiss plaintiff's claim against defendants for unilaterally withdrawing the conversion and breach of contract claims pursuant to CPLR 3211(a)(1), based on documentary evidence, because it was brought against the wrong attorney, as it was successor counsel Meyer who withdrew those claims in the federal action.

However, Supreme Court denied the motion to dismiss the claims for failure to state a cause of action, and concluded that although defendants had "raised serious doubts about the accuracy of [plaintiff's] description of events including ... whether Boye would have been able to achieve a better result but for the actions of the [Firm]," such arguments raised issues of fact more appropriately dealt with on a motion for summary judgment.

The court also denied the request for sanctions, finding that although the withdrawal of certain claims in the federal action was clearly performed by successor counsel, plaintiff's "misstatements [do not] rise to a level sufficient to impose sanctions."

Defendants thereafter moved for summary judgment dismissing the complaint and for sanctions, arguing that the conversion and breach of contract claims it had alleged in the original federal complaint were not time-barred, and that, as the court had ruled, successor counsel had withdrawn those claims. They also argued that they were not legally obligated to accommodate all possible causes of action, including those that might be raised by successor counsel. Moreover, they noted that plaintiff had admitted in the verified complaint that the conversion and breach of contract claims would have been successful, which barred plaintiff from alleging legal malpractice against them.

Reiterating the frivolous nature of plaintiff's claims, defendants advised the court that there had been a "substantial cost" to defending the "recklessly, perhaps maliciously, filed action" and suggested that "it would be fair to compensate [defendants] for the legal fees expended in this wasteful exercise."

Once again, although plaintiff's counsel - Mr. Bluestone -

opposed the motion for summary judgment, he focused his response on his position that there was no reasonable explanation for defendants' delay in commencing the federal action. He further claimed there were issues of fact presented in this matter, that further discovery was necessary, and that defendants' motion failed in the absence of an expert affidavit.

Notably, Mr. Bluestone did not address that it was well established by the record and Supreme Court's prior order that it had been successor counsel who had withdrawn the conversion and breach of contract claims in the federal action. Nor did he make any efforts to correct the record or withdraw claims he most certainly knew were frivolous. Moreover, in plaintiff's affidavit, plaintiff asserted that defendants were improperly asking for sanctions, and intimated that defendants might be subject to sanctions for "wrongfully asking over and over for sanctions."

Supreme Court granted the motion for summary judgment and dismissed the remaining claims against defendants. The court noted that it had previously dismissed that portion of the legal malpractice claims alleging that defendants had withdrawn the federal conversion and breach of contract claims.

Regarding any alleged malpractice arising from the failure to timely commence the federal complaint or plead other claims,

the court held that there was merit to the conversion and breach of contract claims against Amory and Jurdem Associates, and fraud against all the federal action defendants, and it cited the Southern District's refusal to dismiss certain related claims against Jurdem Associates. The court reasoned that defendants' failure to allege claims of negligence and breach of fiduciary duty, later asserted by successor counsel, was not legal malpractice. More important, the court found that even if the firm had acted negligently, plaintiff failed to raise a material issue of fact regarding proximate cause, since it was successor counsel's withdrawal of the conversion and breach of contract claims, and his failure to seek a default judgment against the major tortfeasor, Amory, that led to the ultimate result in the federal case.

Thus, the motion court dismissed the legal malpractice claims against the firm. It also dismissed the breach of fiduciary duty claim as duplicative of the legal malpractice claim, and noted that plaintiff had not opposed its dismissal. The court acknowledged that it already had dismissed the complaint against defendant Vaughn-Flam on March 7, 2011.

As for the request for sanctions, the court agreed that plaintiff should have known that successor counsel withdrew the conversion and breach of contract claims in the federal action,

but noted that it previously refused to punish plaintiff's conduct of predicating his claims against defendants on actions wrongly attributed to defendants. Although the court was "not impressed" with the performance of plaintiff's attorney, it refused to sanction him or plaintiff.

In a judgment entered October 28, 2015, the court dismissed the complaint in its entirety pursuant to the orders described above.

On appeal, plaintiff contends that Supreme Court improperly dismissed the legal malpractice and breach of fiduciary duty claims. In particular, he argues that defendants' affidavit was insufficient to support summary judgment and that an expert affidavit was necessary. He also argues that defendants failed to timely commence the federal action. However, although the record is clear that successor counsel, not defendants, withdrew the breach of contract and conversion claims at issue, and Supreme Court found that to be the case in two orders and repeatedly alerted plaintiff to this error, even on appeal, Bluestone continues to make the same materially false claim about the withdrawal of those claims. He states in the brief, inter alia, that defendants, before withdrawing as counsel, "withdrew or discontinued causes of action for conversion and breach of contract against Arnold Jurdem and Jurdem Associates," and

continued to repeat that defendants "unilaterally, without notice and without consent, voluntarily withdrew all claims of conversion and breach of contract against Jurdem and Jurdem Associates, Inc."

As an initial matter, we find that, contrary to plaintiff's assertion, defendant Vaughn-Flam's affidavit sufficed to support the summary judgment motion on behalf of the defendant firm. Defendant Vaugh-Flam, as counsel to the firm, submitted an affidavit which states that it was based on his personal knowledge and review of certain attached documents. More importantly, since he personally prepared and filed the federal complaint, he certainly had personal knowledge of the facts (*see* CPLR 3212[b]; *LaRusso v Katz*, 30 AD3d 240, 243 [1st Dept 2006]). Nor was any expert affidavit required (*Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 69 [1st Dept 2002]). Issues regarding whether defendants timely commenced the federal action, and who withdrew what claims, can be adequately judged based on the ordinary experience of the factfinder, without expert testimony (*see Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 283 [1st Dept 1999]).

Turning to the merits of plaintiff's legal malpractice claim, as detailed above, the record clearly establishes that the

allegation regarding the withdrawal of certain claims is inaccurate and false. The record is clear that successor counsel, not the defendant firm, withdrew the conversion and breach of contract claims against the Jurdem defendants. As for the allegation relating to additional potential claims, by plaintiff's own admission in the complaint, plaintiff would have prevailed on the claims defendants initially pleaded in a timely manner, consisting of conversion, two counts of breach of contract, and fraud against all defendants in the underlying federal action.

Further, while the firm did not commence the suit sooner, which might have avoided the dismissal as time-barred of two claims added by successor counsel, it appears defendants were not formally retained to sue on plaintiff's behalf until 2006. Indeed, record evidence demonstrates that defendants repeatedly advised plaintiff that they needed to be retained and paid before commencing a suit on plaintiff's behalf. Thus, plaintiff's claim that defendants somehow agreed to commence the action in 2003 or 2004, and failed to do so, is belied by the record evidence.

In any event, in choosing to pursue certain claims in the federal action, the firm chose among several reasonable courses of action, and its decision not to raise all possible causes of action does not constitute malpractice (*see Rosner v Paley*, 65

NY2d 736, 738 [1985]; *Rodriguez v Lipsig, Shapey, Manus & Moverman, P.C.*, 81 AD3d 551 [1st Dept 2011]). As to causation, "a plaintiff must show that he or she . . . would not have incurred any damages, but for the lawyer's negligence" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271-72 [1st Dept 2004]). Further, a legal malpractice claim cannot be sustained where "[i]t is clear that the proximate cause of any damages sustained by plaintiff was not the alleged malpractice of defendants, but rather the intervening and superseding failure of plaintiff's successor attorney[]" (*Pyne v Block & Assoc.*, 305 AD2d 213, 213 [1st Dept 2003]). Here, as successor counsel withdrew two meritorious claims against the Jurdem defendants, and failed to seek a default judgment against the main tortfeasor - Amory - who did not answer or appear, it is clear that the proximate cause of any damages sustained by plaintiff was caused by the intervening and superseding failure of plaintiff's successor attorney and not by any alleged malpractice of defendant. Thus, the court properly dismissed the claims against the firm (*see Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]).

In addition, the breach of fiduciary duty cause of action was properly dismissed as duplicative of the legal malpractice

claims because it is based on the same allegations as the other claims (*see e.g. Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 416 [1st Dept 2011]).

We now consider whether sanctions are appropriate for the prosecution of this appeal, and specifically, for counsel continuing to make the same materially false claims to this Court about defendants withdrawing the conversion and breach of contract claims in the federal action.

Pursuant to 22 NYCRR 130-1.1 (a), a court "in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct[,]" and, in "addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part."

> "Under part 130 of the Rules, frivolous appellate litigation may be found to exist where the appellate arguments raised are completely without merit in law or fact, where the appeal is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another, or where the party or attorney asserts material factual statements that are false (22 NYCRR 130-1.1 [c])" (*Yenom Corp. v 155 Wooster St. Inc.*, 33 AD3d 67, 70 [1st Dept 2006]).

After a careful review of the appellate record and the parties' briefs, we draw the only conclusion such record permits — the bases for the legal malpractice claim have been without merit in law or fact since their inception. More concerning, however, is that despite it having been apparent from the record that successor counsel was the one who withdrew the conversion and breach of contract claims in the federal action and not defendants, and despite being alerted to this fact by the record of this case and Supreme Court on multiple occasions, counsel persists in repeating a materially false claim to this Court.

There can be no good faith basis for the repetition of this materially false claim on appeal, and we find that counsel's behavior would satisfy any of the criteria necessary to deem conduct frivolous. In fact, the only fair conclusion is that the prosecution of this appeal and knowing pursuit of a materially false and meritless claim was meant to delay or prolong the litigation or to harass respondents.

> "Among the factors we are directed to consider is whether the conduct was continued when it became apparent, or should have been apparent, that the conduct was frivolous, or when such was brought to the attention of the parties or to counsel (22 NYCRR 130-1.1 [c]), circumstances that are replete in this record as noted above" (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999]).

We also consider that sanctions serve to deter future frivolous

conduct "not only by the particular parties, but also by the Bar at large" (*id.* at 34). The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics.

Here, counsel was ethically obligated to withdraw any baseless and false claims, if not upon his own review of the record, certainly by the time Supreme Court advised him of this fact. Instead, counsel continued to repeat a knowingly false claim in what could only be described as a purposeful attempt to mislead this Court, and pursued claims which were completely without merit in law or fact.

The appropriate remedy for maintaining a frivolous appeal is the award of sanctions in the amount of the reasonable expenses and costs including attorneys' fees incurred in defending the appeal (*see Matter of Levine*, 82 AD3d 524, 527 [1st Dept 2011]). Thus, we remand the matter to Supreme Court for a determination of the amount of expenses and costs including attorneys' fees incurred by defendants in defending this appeal, and for entry of an appropriate judgment as against plaintiff's attorney.

Accordingly, the judgment of the Supreme Court, New York County (Kathryn E. Freed, J.), entered October 28, 2015, to the extent appealed from as limited by the briefs, dismissing the complaint as against defendant Eric Vaughn-Flam, P.C., and

bringing up for review, an order of the Supreme Court, New York County (Louis B. York, J.), entered January 17, 2012, which, upon granting leave to reargue, partially granted the firm's CPLR 3211(a)(1) and (a)(7) motion to dismiss the claims against it to the extent of dismissing the legal malpractice claims based on the firm's alleged withdrawal of certain claims previously asserted on plaintiff's behalf in the underlying federal suit, and an order of the same court (Louis B. York, J.), entered July 24, 2012, which granted the firm's CPLR 3212 motion for summary judgment dismissing the remaining claims against it, should be affirmed, with costs, including actual expenses and costs including reasonable attorneys' fees incurred by defendants in defending this frivolous appeal (22 NYCRR 130-1.1) imposed on plaintiff's counsel, and the matter remanded to Supreme Court for determination of the expenses and costs including reasonable attorneys' fees.

All concur.

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

ENTERED: MAY 30, 2017

CLERK