SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**OCTOBER 17, 2017**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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.

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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. The Clerk is directed to enter judgment in the sum of $1,740,818.60, with interest.

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.

The Decision and Order of this Court entered herein on May 30, 2017 is hereby recalled and vacated (*see* M-4290 decided simultaneously herewith).

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

ENTERED: OCTOBER 17, 2017

CLERK

Acosta, P.J., Renwick, Webber, Oing, Moulton, JJ.

4594 Reina Flores, Index 307380/12
Plaintiff-Respondent-Appellant,

-against-

731 Southern Boulevard LLC,
Defendant,

New Hope Fund,
Defendant-Appellant-Respondent.

_____

Molod Spitz & Desantis, P.C., New York (Salvatore J. SeSantis of counsel), for appellant-respondent.

Burns & Harris, New York (Judith F. Stempler of counsel), for respondent-appellant.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about May 17, 2017, which, to the extent appealed from as limited by the briefs, in effect, denied defendant New Hope Fund's (New Hope) motion to enforce a high-low agreement in the amount of $200,000, and instead vacated the damages portion of the jury's verdict and directed a new trial solely on the issue of damages unless the parties stipulated to settle the matter, unanimously affirmed, without costs.

During jury deliberations, plaintiff's and New Hope's counsel entered into a written "high-low" agreement to settle the matter "in the respective amounts of" $200,000 to $1 million.

The parties further agreed to waive post trial motions and stated that "[i]n the event of a defense verdict or assessment of liability of up to 80% against the plaintiff, plaintiff shall receive [the] low of $200,000. Otherwise, % liability assessed against each party shall be used to determine [the] amount of exposure/recovery with maximum cap of $1,000,000.00." Immediately thereafter, the jury rendered its verdict and found New Hope liable for creating an unsafe condition and that New Hope's negligence was a substantial factor in causing plaintiff's injuries. The jury also found plaintiff comparatively at fault and apportioned liability at 51% against plaintiff, and 49% against New Hope. The jury did not award any damages for past pain and suffering and medical expenses, or future pain and suffering, but awarded plaintiff $70,000 for future medical expenses. Following the jury verdict, and the discharge of the jury, plaintiff tendered a release in the amount of $490,000. In response, New Hope moved to enforce the high-low agreement and deem the release a nullity, arguing that plaintiff was only entitled to $200,000. Although Supreme Court agreed with New Hope, it, sua sponte, vacated the jury's verdict on the ground that it was inconsistent, namely, that the jury's award of only future medical expenses had no legal basis given that it awarded

no damages for past pain and suffering and medical expenses, or future pain and suffering. Supreme Court directed a new trial on damages unless the parties agreed to settle the matter. Defense counsel's contentions that the trial court was without authority to order a new trial on damages given the parties' high-low settlement agreement, and because neither party raised the issue of an inconsistent verdict, are unavailing.

A high-low settlement between parties is a conditional settlement, triggered only when there is a proper verdict (*Cunha v Shapiro*, 42 AD3d 95, 98-99 [2d Dept 2007], *lv dismissed* 9 NY3d 885 [2007]). CPLR 4111(c) provides, inter alia, that a court "shall order a new trial" when a jury's answers to interrogatories "are inconsistent with each other and one or more is inconsistent with the general verdict." Here, Supreme Court properly vacated the jury award and ordered a new trial on

damages based on the clearly inconsistent verdict (*Bellinson Law, LLC v Iannucci*, 116 AD3d 401 [1st Dept 2014], *lv dismissed* 23 NY3d 1014 [2014]).

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4644-
4645 The People of the State of New York,
Respondent,

-against-

Alexander Adams,
Defendant-Appellant.

Ind. 607/13

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margaret Bierer of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Bonnie Wittner, J. at suppression hearing; Ronald Zweibel, J. at plea, sentence, and re-sentence), rendered on or about January 8, 2015 and December 7, 2016,

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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: OCTOBER 17, 2017

CLERK

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

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4686 The People of the State of New York, Respondent, Ind. 5476/11

-against-

Rogelio Ferrer, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered April 9, 2014, as amended July 25, 2014, convicting defendant, after a jury trial, of robbery in the first degree (three counts), robbery in the second degree (six counts), burglary in the first degree (two counts), criminal impersonation in the first degree (two counts), burglary in the second and third degrees and assault in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 44 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be served concurrently, resulting in a new aggregate term of 22 years to life, and otherwise affirmed.

Defendant did not preserve his challenge to the prosecutor's inquiry, during defendant's cross-examination, about a novel

written by defendant that had an alleged nexus to the facts of this case, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. While the inquiry into a crime novel defendant wrote approximately five years before this crime was of little probative value regarding his motive, intent, or credibility, any error was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230, 242 [1975]).

Defendant also failed to preserve his arguments that the trial prosecutor, who participated in defendant's interrogation, acted as an unsworn witness during defendant's cross-examination, and that portions of defendant's recorded statement in which the trial prosecutor opined that defendant was not telling the truth should have been redacted, and we decline to review them in the interest of justice. As an alternative holding, we reject those arguments on the merits. The fact that the trial prosecutor also participated in defendant's interrogation was not in itself a basis for recusal, nor a basis for reversal here, where her investigative role was not a material issue at the trial, as defendant argued that his statement was coerced because he was threatened by detectives outside of that prosecutor's presence (*see People v Ortiz*, 54 NY2d 288, 292–293 [1981]*;People v Wynn*,

176 AD2d 443, 443 [1st Dept 1991], *lv denied* 79 NY2d 866 [1992]). Defendant, in arguing that his confession was coerced, opened the door to the admission of the unredacted confession, to allow the jury to make a determination, based on the surrounding circumstances, of its truthfulness (*see People v Mateo*, 2 NY3d 383, 424-27, *cert denied* 542 US 946 [2004]). The potential for prejudice did not substantially outweigh the probative value of the confession, as the prosecutor's comments, when read in context, were not unduly prejudicial to defendant, and redactions of the comments, which were intertwined with relevant parts of the interrogation, would have rendered the statement difficult to understand.

Defendant, who chose to represent himself, may not be heard to complain about standby counsel's failure to raise any of the above-discussed issues (*see People v Baghai-Kermani*, 84 NY2d 525, 533 [1994]; *see also People v Garcia*, 69 NY2d 903 [1987]). The record does not establish that the standby attorney's role in the trial included the responsibility to make objections during defendant's testimony, or at any other time. To the extent defendant is complaining about his representation by this attorney during pretrial proceedings before defendant undertook to proceed pro se, his claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained

by, the record. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims relating to pretrial proceedings may not be addressed on appeal.

The prosecutor's display to the jury of an item of electronically stored information that had not been received in evidence did not cause any prejudice under the circumstances of the case.

The court providently exercised its discretion within its wide latitude to impose reasonable limits on cross-examination. Defendant received a full opportunity to impeach the two witnesses at issue as to matters affecting their credibility, and defendant's right to confront witnesses and present a defense was not impaired (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

We find the sentences excessive to the extent indicated.

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4687 Felix Medrano, et al., Index 153442/14
Plaintiffs-Respondents,

-against-

Port Authority of New York
and New Jersey, et al.,
Defendants-Appellants.

Segal McCambridge Singer & Mahoney, Ltd., New York (Mary E. Adams of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for respondents.

Order, Supreme Court, New York County (David B. Cohen, J.), entered July 25, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim as against defendant Port Authority of New York and New Jersey (Port Authority), unanimously reversed, on the law, without costs, and the motion denied.

Although plaintiffs established their prima facie entitlement to partial summary judgment on their Labor Law § 240(1) claim (*see Faver v Midtown Trackage Ventures, LLC*, 150 AD3d 580 [1st Dept 2017]), Port Authority's evidence was sufficient to raise a triable issue of fact. The injured plaintiff testified that while he was applying fireproofing

material to a ceiling beam by hand he fell from an unsecured defective ladder that was supplied to him by his assistant foreman, to whom he had complained about the ladder. However, his assistant foreman averred that he had not supplied the ladder, and that plaintiff had not complained to him about it, and his coworker averred that plaintiff had worked from the ground all day. Thus, his affidavit contradicted the injured plaintiff's account of the accident, and called into question his credibility (*see Smigielski v Teachers Ins. & Annuity Assn. of Am.*, 137 AD3d 676, 676 [1st Dept 2016]; *Macchia v Nastasi White, Inc.*, 26 AD3d 225 [1st Dept 2006]).

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4690 Lourdes Guilbe, Index 301980/13
Plaintiff-Respondent,

-against-

Port Authority of New York
and New Jersey,
Defendant-Appellant.

_____

Rutherford & Christie LLP, New York (David S. Rutherford of counsel),for appellant.

Burns & Harris, New York (Jason Steinberg counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered March 29, 2016, which, in this action for personal injuries sustained in a slip and fall, 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 its entitlement to judgment as a matter of law by demonstrating that it was an out-of-possession landlord. The lease provisions cited by defendant show that it did not have a contractual obligation to maintain or repair the premises. Plaintiff argues that the lease attached to defendant's summary judgment motion expired before plaintiff's accident, and thus defendant cannot rely on those provisions.

However, defendant's senior property representative testified that there was a restated lease agreement in effect at the time of plaintiff's accident, which did not change defendant's obligations regarding repairs and maintenance of the premises. The restated lease agreement that was subsequently submitted confirmed the testimony (*see Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525, 527-528 [1st Dept 2017]).

In opposition, plaintiff failed to raise a triable issue of fact since she did not demonstrate that the allegedly defective condition that caused her fall constituted a structural or design defect contrary to a specific statutory provision (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011]).

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4691 The People of the State of New York, Ind. 976/12
Respondent,

-against-

Samuel Garcia,
Defendant-Appellant.

_____

Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered on or about November 26, 2013, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4693-
4694-
4695 Index 651962/14

Arrowhead Capital Finance, Ltd.,
Plaintiff-Appellant,

-against-

Cheyne Specialty Finance Fund L.P.,
et al.,
Defendants-Respondents.

_____

Barry L. Goldin, New York, for appellant.

Willkie Farr & Gallagher, LLP, New York (Jefrey B. Korn of counsel), for respondents.

_____

Judgment, New York County (Shirley Werner Kornreich, J.), entered August 12, 2016, dismissing the complaint with prejudice as against defendant Cheyne Specialty Finance Fund General Partner and without prejudice as against defendant Cheyne Specialty Finance Fund, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered on or about August 10, 2016, and on or about July 22, 2016, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The record supports the court's determination that plaintiff's counsel failed to maintain an in-state office at the time he commenced this action, in violation of Judiciary Law § 470 (*see e.g. Webb v Greater N.Y. Auto. Dealers Assn., Inc.*, 93

AD3d 561 [1st Dept 2012]). Plaintiff's subsequent retention of co-counsel with an in-state office did not cure the violation, since the commencement of the action in violation of Judiciary Law § 470 was a nullity (*Neal v Energy Transp. Group*, 296 AD2d 339 [1st Dept 2002]). The court properly permitted defendants to make a second dispositive motion to dismiss since at the time of the first motion defendants had no reason to suspect that plaintiff's counsel may have violated Judiciary Law § 470 (*see e.g. Lemberg v Blair Communications*, 258 AD2d 291 [1st Dept 1999]; *see also generally Barbarito v Zahavi*, 107 AD3d 416, 420 [1st Dept 2013]; *Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86 [1st Dept 1993]).

Defendants did not waive their right to argue that plaintiff's counsel violated Judiciary Law § 470 (*see* CPLR 3211[e]). Contrary to plaintiff's contention, the court properly considered evidence submitted in defendants' reply papers that was responsive to plaintiff's claims in opposition to defendants' motion. Contrary to defendants' further contention, the court was not bound by the holding of a federal district court at the time of the commencement of this action that Judiciary Law § 470 was unconstitutional (*see generally Sue/Perior Concrete & Paving, Inc. v Lewiston Golf Course Corp.*, 24 NY3d 538, 551 [2014]).

The court correctly dismissed the breach of trust claim as

duplicative of the breach of fiduciary duty claim, and correctly dismissed the action with prejudice as against Cheyne Specialty Finance Fund General Partner (GP), since the complaint contains no factual allegations of wrongdoing against GP.

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

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4696 The People of the State of New York Ind. 1754/14
Respondent,

-against-

Jeffrey Taylor,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about December 4, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Regardless of whether the court properly assessed points for sexual contact under clothing, the record supports the court's alternative finding that an upward departure was warranted. Even without the points disputed on appeal, the point score of 105 is nearly enough for a level three adjudication, and the risk assessment instrument did not adequately account for defendant's criminal history, significant risk of recidivism as demonstrated

by his pattern of similar behavior, and prior level two adjudication (*see People v Hatcher*, 132 AD3d 407 [1st Dept 2015], *lv denied* 26 NY3d 915 [2016]; *People v Grassi*, 123 AD3d 602 [1st Dept 2014], *lv denied* 25 NY3d 902 [2015]).

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4697 Centre Lane Partners, LLC, et al., Index 651721/16
Plaintiffs-Appellants,

-against-

Skadden, Arps, Slate, Meagher, & Flom LLP, et al.,
Defendants-Respondents.

_____

Kaufman & Company PLLC, New York (Steven S. Kaufman of counsel), for appellants.

Cooley LLP, New York (William J. Schwartz of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered October 28, 2016, dismissing the complaint pursuant to an order, same court and Justice, entered October 26, 2016, which granted defendants' motion to dismiss the action as time-barred, unanimously affirmed, with costs.

In this legal malpractice action, plaintiffs, who are investors in companies that filed for bankruptcy on December 31, 2013, were authorized by the bankruptcy court to sue derivatively on behalf of the bankrupt companies (debtors) as against attorney defendants for alleged conflicted representation provided to the debtors in two transactions where asset transfers allegedly personally benefitted the debtors' principal and controlling shareholder to the debtors' financial detriment.

Where the alleged injury is economic in nature, the cause of action is generally deemed to accrue in the state "where the plaintiff resides and sustains the economic impact of the loss" (*Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529 [1999]; *see Kat House Prods., LLC v Paul, Hastings, Janofsky & Walker, LLP*, 71 AD3d 580 [1st Dept 2010]). Here, the debtors' principal places of business are in Oregon, and their financial losses were allegedly incurred in that state. Contrary to plaintiffs' claim, the motion court's application of Oregon's two-year statute of limitations via New York's borrowing statute (CPLR 202) in light of, inter alia, the situs of debtors' Oregon-based businesses, the legal relationships existing between plaintiffs, debtors and defendants, and the nature of the instant action, was proper and the result would not be "absurd," notwithstanding defendants' place of business being located in New York (*Insurance Co. of N. Am. v ABB Power Generation*, 91 NY2d 180, 186 [1997]; *see 2138747 Ontario, Inc. v Samsung C&T Corp.*, 144 AD3d 122 [1st Dept 2016]).

The two challenged asset transfers were completed in April 2013 and May 2013 whereas plaintiffs' malpractice action was not commenced until March 31, 2016. Plaintiffs, as well as the debtors, were in a position to know of the alleged adverse impact of the asset transfers upon the debtors, as well as the alleged conflict in legal representation provided by defendants.

Plaintiffs were not only significant holders of unsecured debt in one of the primary debtors, but they were also the controlling shareholder in the company that purchased the largest of the two asset transfers in question. Moreover, the amended complaint alleged that the person who was the controlling principal of the debtor entities, and whose personal interests defendants had sought to promote in their handling of the debtor entities' legal affairs, had, in May 2013, strong-armed one of the debtors into purchasing assets that it did not want from another unrelated entity controlled by the individual, all for purposes of including those assets in one of the challenged asset-transfers. The amended complaint further alleged that for nearly 20 years defendants had represented the interests of the debtors and the debtors' controlling owner, and that in the two transactions in question, defendants represented parties with adverse interests.

Given such factual pleadings, the motion court properly rejected plaintiffs' argument that Oregon's discovery/tolling rule for legal malpractice claims rendered this malpractice action timely commenced. The court properly concluded that a reasonable person, knowing the facts that the debtors had available to them at the time of the two challenged transfers, should have been aware of a substantial possibility of defendants' conflicted representation, as well as the harm that

such negligent representation had caused, and such knowledge could not have been gained later than when the debtors filed for Chapter 7 bankruptcy on December 31, 2013 (*see Kaseberg v Davis Wright Tremaine, LLP*, 351 Ore 270, 277-278, 265 P3d 777, 781-782 [2011]).

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

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4700-
4701 In re Alissa E.,
Petitioner-Respondent,

-against-

Michael M.,
Respondent-Appellant.

_____

Daniel D. Molinoff, Larchmont, for appellant.

Law Office of Deana Balahtsis, New York (Deana Balahtsis of counsel), for respondent.

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about August 17, 2015, which found that the $45,000 purge amount was received and satisfied, and confirmed a Support Magistrate's finding that respondent father had willfully failed to pay child support and arrears, and order, same court (Stewart H. Weinstein, J.), entered on or about April 29, 2016, which, to the extent appealed from as limited by the briefs, denied the father's motion for an enlargement of time to file objections to a May 29, 2014 child support order and a June 29, 2015 order of disposition, and denied his request for sanctions, unanimously affirmed, without costs.

Family Court providently exercised its discretion in denying the father's motion for an enlargement of his time to file objections to the May 2014 support order and the June 2015 order

of disposition (*see* CPLR 2004). The motion was made more than a year after his objections were found to be untimely and his motion to reargue was denied.

The objection procedure does not apply to the June 2015 order of disposition finding the father's willful violation of the child support order (*see* Family Ct Act § 439[a], [e]). The father had ample opportunity to present arguments and objections when the matter was referred to a Family Court Judge for confirmation. Although the father now contends that the Judge should have determined whether the purge amount was fair and appropriate, the father paid the purge amount without seeking a reduction. He offers no grounds to disturb the determination of willfulness on the merits (*see Matter of Maria T. v Kwame A.*, 35 AD3d 239 [1st Dept 2006]).

Family Court providently exercised its discretion in denying the father's request for sanctions (*see* 22 NYCRR 130-1.1[a]; *Grozea v Lagoutova*, 67 AD3d 611 [1st Dept 2009]). The father has not shown on the record here that the mother falsified child care expenses or otherwise shown grounds for this Court to disturb the Family Court's determination that the mother's motion papers were not frivolous. The issue of child care expenses is still being litigated between the parties in an ongoing trial on the father's downward modification petition.

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

The father's appeal is not frivolous; accordingly, we deny the mother's request for sanctions.

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4702 The People of the State of New York, Ind. 1387/13
Respondent,

-against-

Jose Velez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J. at hearing; Richard Carruthers, J. at plea and sentencing), rendered January 8, 2014, convicting defendant of robbery in the third degree, and sentencing him, as a second felony offender, to a term of three to six years, unanimously affirmed.

The court properly denied defendant's suppression motion. We conclude that the police had probable cause to arrest defendant for robbery. After seeing a man argue with, chase, and attempt to hit defendant, the police learned that each man was claiming to have just been robbed by the other. The police reasonably credited the complainant's account, given its level of detail and its consistency with the circumstances that the officers observed (*see People v Lopez*, 258 AD2d 388 [1st Dept 1999], *lv denied* 93 NY2d 1022 [1999]). Accordingly, the police

lawfully arrested defendant and recovered a razor blade, money, and a wallet.

Defendant did not preserve his claim that the closed container search of his wallet, in which a second razor blade was found, was unlawful because it was not supported by exigent circumstances (*see People v Miranda*, 27 NY3d 931, 932-33 [2016]; *People v Frierson*, 137 AD3d 444, 445 [1st Dept 2016], *lv denied* 27 NY3d 1069 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find that to the extent the limited record permits review (*see People v Martin*, 50 NY2d 1029, 1031 [1980]), it establishes the requisite exigency (*see People v Jimenez*, 22 NY3d 717 [2014]). Notwithstanding that defendant had been handcuffed by the time the wallet was searched, the wallet was within his grabbable area and had not been reduced to the exclusive control of the police. Furthermore, the officers had reason to suspect that it might

contain a weapon, because defendant had been arrested for robbery, a violent crime, and the officers had already recovered one razor blade from defendant.

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4704 The People of the State of New York, Ind. 1086/15
Respondent,

-against-

Tomas Domena,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan P. Mansell of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Michael Gross, J.), rendered August 8, 2016,

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

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

ENTERED: OCTOBER 17, 2017

CLERK

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

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4705 Sira Kalajian, Index 155902/14
Plaintiff,

-against-

320 East 50th Street Realty Co.,
et al.,
Defendants-Appellants,

320-50 Realty Co., LLC,
Defendant,

Theresa M. Worner Herbst,
Defendant-Respondent.

_____

Mauro Lilling Naparty LLP, Woodbury (Kathryn M. Beer of counsel), for appellants.

Brownell Patners PLLC, New York (Shanna R. Torgerson of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered December 5, 2016, which, *inter alia,* granted the motion of defendant Theresa M. Worner Herbst for summary judgment dismissing the cross claims against her by defendants 320 East 50th Street Realty Co. and Daniel Rapaport, unanimously reversed, on the law, without costs, and the motion denied to that extent. Plaintiff's appeal from the order dismissed, without costs, as abandoned.

Plaintiff alleges that she tripped and fell over a misleveled sidewalk slab between properties owned by Herbst and

by appellants. Herbst moved for summary judgment dismissing the complaint and cross-claims as against her on the ground that she is exempt from personal liability for failure to maintain the sidewalk because her property is a "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (Administrative Code of the City of New York § 7-210[b]; *see Aracena v City of New York*, 136 AD3d 717, 717-19 [2d Dept 2016]). Administrative Code § 7-210(b) is to be strictly construed as a statute creating liability in derogation of the common law (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]).

The statute does not expressly contain a primary residence requirement as part of the owner-occupied exemption (*see Dimitratos v City of New York*, 25 Misc3d 1224, 2009 Slip Op 5229 [U] [Sup Ct., NY County]), but the term "owner occupied" generally is used to mean that the owner regularly occupies the property as a residence. Further, the legislative history shows that the exemption recognizes "the inappropriateness of exposing small-property owners *in residence*, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair" (*Coogan v City of New York*, 73 AD3d 613, 614 [1st Dept 2010] [emphasis added]).

Here, Herbst testified that the New York property is not her

primary residence, which is in Israel, and that she also has a property in New Hampshire, which is where her driver's license was issued and she receives most of her mail. Her testimony indicated that she spent about three months in the United States in the year the accident occurred, and divided that time between New Hampshire and New York. Accordingly, Herbst did not demonstrate prima facie that she regularly occupies the New York property as a residence, so as to be entitled to the benefit of the exemption provided by Administrative Code §7-210 as a matter of law (*see Howard v City of New York*, 95 AD3d 1276, 1277 [2d Dept 2012]; *Acevedo v Rodriguez*, 20 Misc.3d 1122 [A], 2008 NY Slip Op. 51518[U], 2008 WL 2805881 [Sup Ct., Richmond County]).

Since plaintiff abandoned her appeal by failing to perfect (22 NYCRR 600.11[a][3]), and defendants 320 East 50th Street Realty Co. and Daniel Rapaport have not argued that they are aggrieved by the dismissal of the complaint as against Herbst, we decline to reinstate the complaint as against Herbst (*Rodriguez v*

*Heritage Hills Society, Ltd.*, 141 AD3d 482 [1st Dept 2016]).

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4706 The People of the State of New York, Ind. 1245/96
Respondent,

-against-

Terry Pressley,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about February 23, 2015, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 15 points under the risk factor for alcohol abuse. Such an assessment may be based on alcohol abuse at the time of the underlying sex crime (*People v Palmer*, 20 NY3d 373, 378-379 [2013]). Here, the case summary and the victim's grand jury testimony provided clear and convincing evidence that defendant committed the second of two sex offenses while intoxicated. In particular, the victim's description of defendant's condition and behavior supported the inference that the sex crime was linked to his excessive consumption of alcohol

(*see People v Andrade*, 124 AD3d 533 [1st Dept 2015], *lv denied* 25 NY3d 903 [2015]).

Assuming, without deciding, that the state and federal standards for effective assistance at a criminal trial apply to a civil sex offender proceeding (*see People v Reid*, 59 AD3d 158 [1st Dept 2009], *lv denied* 12 NY3d 708 [2009]), we conclude that defendant received effective assistance at the classification hearing. Defendant has not shown that he was prejudiced by his attorney's failure to make additional arguments at the hearing. We also find no basis for a downward departure (*see generally People v Gillotti*, 23 NY3d 841 [2014]).

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4707 The People of the State of New York, Ind. 1188/15
Respondent,

-against-

Dwight McClain,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss 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, Bronx County (Nicholas Iacovetta, J.), rendered May 19, 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: OCTOBER 17, 2017

CLERK

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

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4708 The People of the State of New York, Ind. 504/09
Respondent,

-against-

Julio Perez,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

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Judgment of resentence, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered February 24, 2015, resentencing defendant to an aggregate term of 10 years, with an aggregate term of 5 years' postrelease supervision, unanimously affirmed.

On this Court's remand for resentencing (123 AD3d 592 [1st Dept 2014], *lv denied* 25 NY3d 1169 [2015]), the court properly exercised its discretion in denying defendant's request for youthful offender treatment. Without a showing of mitigating factors, defendant would be ineligible due to his convictions of armed felonies in this case (*see* CPL 720.10[2][a][ii],[3]). Defendant's principal claim of mitigation is essentially a justification defense, but on the prior appeal this Court has already found that a justification charge would not have been supported by any reasonable view of the evidence and that counsel

was not ineffective for failing to raise such a defense (123 AD3d at 593). The remaining mitigating factors cited by defendant, including his family support, employment history, deportation risk, and lack of a prior record, do not "bear directly upon the manner in which the crime was committed" (CPL 720.10[3][I]). "In any event, regardless of defendant's eligibility, youthful offender treatment was not warranted" (*People v Jordan*, 143 AD3d 524 [1st Dept 2016], *lv denied* 28 NY3d 1125 [2016]), in light of the heinousness of the crime, which involved shooting two people, causing extensive injuries to one of them.

We also perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4709 The People of the State of New York, SCID 30151/12
Respondent,

-against-

Antonio Lopez,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about July 27, 2016, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification, unanimously affirmed, without costs.

Defendant failed to establish by clear and convincing evidence a basis for modification of his risk level (*see People v Lashway*, 25 NY3d 478 [2015]). Defendant's expression of remorse is not new, and was considered by the SORA court at the original hearing. The remaining mitigating factors cited by defendant, including his failure to reoffend since his release from prison

on the underlying conviction, do not outweigh the seriousness of the sex crime, which was committed against a child over an extended period of time (*see People v Johnson*, 124 AD3d 495 [1st Dept 2015]; *People v Vega*, 115 AD3d 461, 461-62 [1st Dept 2014], *lv denied* 23 NY3d 905 [2014]).

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4710 The People of the State of New York, Ind. 5131/11
Respondent,

-against-

Richard Alcantara,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

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

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Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about December 10, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level (*see generally People v Gillotti*, 23 NY3d 841 [2014]). Defendant failed to meet his burden to show that his participation in sex offender treatment was so exceptional as to

warrant a downward departure. The remaining mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument, and were outweighed by the aggravating factors.

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

ENTERED: OCTOBER 17, 2017

CLERK

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4711-
4712N Efrain Matos,
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

Index 309441/09

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

Stecklow & Thompson, New York (David Thompson of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered June 9, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to vacate his note of issue, and order, same court and Justice, entered January 19, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to compel defendant to comply with outstanding discovery demands, unanimously affirmed, without costs.

The motion court providently exercised its discretion in vacating plaintiff's note of issue where plaintiff's former counsel made a material misstatement that discovery was complete. A note of issue should be vacated where "it is based upon a certificate of readiness that incorrectly states that all

discovery has been completed" (*Nielsen v New York State Dormitory Auth.*, 84 AD3d 519, 520 [1st Dept 2011]). Since discovery was not completed, the motion court correctly vacated the note of issue (*see Gomes v Valentine Realty LLC*, 32 AD3d 699, 700 [1st Dept 2006]; *Cromer v Yellen*, 268 AD2d 381 [1st Dept 2000]). Upon vacatur of the note of issue, the case was restored to its pre-note of issue status (*see Tejeda v Dyal*, 125 AD3d 578 [1st Dept 2015]). Accordingly, the court properly granted plaintiff's motion to compel defendant to comply with outstanding discovery demands.

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

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

ENTERED: OCTOBER 17, 2017

CLERK

**CORRECTED OPINION - OCTOBER 19, 2017**

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rosalyn H. Richter
Karla Moskowitz
Judith J. Gische
Barbara R. Kapnick, JJ.

4027
Docket 68001/13

_____x

The People of the State of New York,
Respondent,

-against-

**F. B.**,
Defendant-Appellant.

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Brooklyn Defender Services, Legal Action Center, The Community Service Society of New York, Neighborhood Defender Service of Harlem and Youth Represent,
Amici Curiae.

_____x

Defendant appeals from the order of the Supreme Court, Bronx County (Richard Lee Price, J.), entered August 30, 2016, which granted the People's CPL 160.55(1)(d)(ii) motion to unseal documents related to defendant's March 3, 2014 conviction of disorderly conduct.

Cleary Gottlieb Steen & Hamilton LLP, New York (Sharon L. Barbour, Jonathan S. Kolodner, Anjali V. Salvador and **Alexandra K. Theobald** of counsel), **and the Bronx Defenders, Bronx (Amreeta Mathai and Runa Rajagopal of counsel)**, for appellant.

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

Brooklyn Defender Services, Brooklyn (Lisa Schriebersdorf of counsel), for amici curiae.

KAPNICK, J.

On this appeal we are asked to determine an issue of first impression in this Court: Do the People constitute a "law enforcement agency" within the meaning of CPL 160.55(1)(d)(ii) when they act in their capacity as an agency authorized, pursuant to RPAPL 715(1), to demand that an eviction proceeding be commenced against a defendant so that the defendant's records can be unsealed and used by the landlord in the eviction proceeding? We conclude that they do not.

In November 2013, defendant was arrested and charged with two drug-related misdemeanors and an ammunition-related violation. The arrest, which was pursuant to the execution of a search warrant, took place at defendant's apartment, which he shared with his mother and other family members. The District Attorney's Office ultimately offered defendant a plea to disorderly conduct (Penal Law § 240.20), a noncriminal violation. Defendant accepted the plea in March 2014 and, as part of the plea, agreed to a one-year conditional discharge. Thus, one year later, in March 2015, and with no objection by the District Attorney's Office, the records related to the criminal action against defendant were sealed pursuant to CPL 160.55.

In the meantime, in December 2013, shortly after defendant's arrest, the Narcotics Eviction Unit of the Narcotics Bureau of

the Bronx District Attorney's Office had sent a demand letter to the landlord, instructing it to initiate an eviction proceeding against the tenants of defendant's apartment on the basis of defendant's arrest, pursuant to RPAPL 711 and 715. Enclosed with the demand letter were records related to defendant's arrest, including the criminal court complaint, a laboratory analysis, arrest report worksheets, and property vouchers.

The eviction proceeding was repeatedly adjourned, and trial did not commence until June 2015, after the records relating to the criminal action had been sealed. During the trial, the landlord introduced into evidence the documents it had received related to the criminal action against defendant, and counsel for the tenants moved to strike the documents on the ground that they had been sealed pursuant to CPL 160.55. Housing Court granted the motion to strike the sealed records, holding that "[t]o allow the records to be admitted, even though previously disseminated prior to sealing, would be in contravention of the sealing statutes and a violation of [defendant's] due process." The landlord moved to reargue the motion to strike the sealed records, with the support of the District Attorney's Office as amicus curiae. However, Housing Court denied that motion as well, and restored the matter to the calendar.

The People then filed a motion in Supreme Court, Criminal

Term, to unseal defendant's records, pursuant to CPL 160.55(1)(d)(ii), for use by the landlord in the civil eviction proceeding. Supreme Court granted the motion, finding that RPAPL 715(1), also known as the Bawdy House Laws, "allows any law enforcement agency, such as the District Attorney's Office to compel the landlord to bring eviction proceedings 'when premises are used for any illegal trade, business or manufacture.'" The court further determined that

> "[i]t is in the interest of justice to give landlords the tools necessary to evict persons who use or allow the use of residential premises for the manufacturing and distribution of narcotics or other illegal enterprises . . . It is the responsibility of this Court . . . to see the housing court has all relevant information before making such a determination.
>
> "It is the opinion of this Court that as **[defendant]** did enter a plea of guilty to a violation of the penal law, it is the prerogative of the housing court to be aware of the circumstances of that arrest and conviction for purposes of enforcing the Real Property Actions and Proceedings Law."

The court did not determine or even discuss whether the People constitute a "law enforcement agency" under CPL 160.55(1)(d)(ii), which is a prerequisite to determining whether the records should be unsealed in the interest of justice. Because we find that the People do not constitute a law enforcement agency under the statute, we now reverse Supreme Court's order unsealing defendant's records.

CPL 160.50 and 160.55, known as the sealing statutes, apply

when a criminal proceeding terminates in favor of the accused, i.e., acquittal (160.50), or terminates by conviction for a noncriminal offense, i.e., a guilty plea to a violation (160.55). Both statutes dictate when sealing is appropriate, the steps required to seal records, and, as is the focus of this appeal, when sealed records may be unsealed. Under CPL 160.55, when a criminal action or proceeding against an individual is terminated by conviction of, or guilty plea to, a traffic infraction or a violation, "all official records and papers relating to the arrest or prosecution . . . on file with the division of criminal justice services, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency" (CPL 160.55[1][c]). Addressing the sister statute, CPL 160.50, the Court of Appeals found that that statute "was designed to lessen the adverse consequences of unsuccessful criminal prosecutions by limiting access to official records and papers in criminal proceedings which terminate in favor of the accused" (*Matter of Katherine B. v Cataldo*, 5 NY3d 196, 202 [2005], quoting *Matter of Harper v Angiolillo*, 89 NY2d 761, 766 [1997]). "That detriment to one's reputation and employment prospects often flows from merely having been subjected to criminal process has long been recognized as a serious and unfortunate by-product of even unsuccessful criminal

prosecutions. The statute's design is to lessen such consequences" (*id.*, quoting *Matter of Hynes v Karassik*, 47 NY2d 659, 662 [1979]).

Although the Court of Appeals in *Matter of Katherine B.* dealt with CPL 160.50, it noted that "CPL 160.55(1)(d)(ii) . . . is identical to CPL 160.50 (1)(d)(ii)" (5 NY3d at 201 n 3). Thus, we find that the purpose ascribed to CPL 160.50 and the analysis applied to CPL 160.50 by the Court in *Matter of Katherine B.* should be applied here, notwithstanding that we are addressing CPL 160.55, the sister statute.

Specifically, there are six narrow and precisely drawn exceptions to the rule against unsealing records. At issue in the case before us is CPL 160.55(1)(d)(ii), which provides that the records shall be made available to "a law enforcement agency upon ex parte motion in any superior court, or in any district court, city court or the criminal court of the city of New York provided that such court sealed the record, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it." Here, the People argue that they are, under these circumstances, acting as a "law enforcement agency" within the meaning of CPL 160.55(1)(d)(ii) because the District Attorney's Office operates in a unique law enforcement capacity in its nonprosecutorial role

of assisting landlords to evict tenants that use the premises for "any illegal trade, business or manufacture" (RPAPL 715[1]).[1] Thus, in keeping with their obligation to enforce RPAPL 715, the People moved for an unsealing order.

The Court of Appeals in *Matter of Katherine B.* held that the narrow statutory exceptions to the sealing requirement of CPL 160.50 should be strictly construed. In that case, the Court had to determine whether the "'law enforcement agency' exception in CPL 160.50(1)(d)(ii) [was] broad enough to encompass an ex parte request by a prosecutor to unseal records for purposes of making sentencing recommendations" (5 NY3d at 203). Ultimately, the Court concluded that the statute's "primary focus is the unsealing of records for investigatory purposes," and that unsealing records for the purpose of making sentencing recommendations in a separate criminal proceeding went beyond such purposes (*id.* at 205). The Court determined that the legislative history as well as the statutory language dictated

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[1] Specifically, RPAPL 715(1) provides that if certain premises are used "in whole or in part . . . for any illegal trade, business or manufacture," then "any duly authorized enforcement agency of the state or of a subdivision thereof, under a duty to enforce the provisions of the penal law or of any state or local law, ordinance, code, rule or regulation relating to buildings, may serve personally upon the owner or landlord of the premises so used or occupied . . . a written notice requiring the owner or landlord to make an application for the removal of the person so using or occupying" the premises.

this result. Specifically, the Court noted that the exception in CPL 160.50(1)(d)(i) authorizes disclosure, and thus the unsealing of records, to a "prosecutor" in a "proceeding,"[2] whereas CPL 160.50(1)(d)(ii) authorizes disclosure to a "law enforcement agency" and does not include the word "proceeding" (*id.* at 205). Therefore, the Court determined that unsealing records pursuant to 160.50(1)(d)(ii) was limited to instances in which the People were acting in an investigatory capacity, and, even then, was only available before the commencement of a criminal proceeding.[3]

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[2] Both CPL 160.50(1)(d)(i) and CPL 160.55(1)(d)(i) provide that sealed records shall be made available to "a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter." CPL 170.56 and 210.46 both address instances in which an adjournment in contemplation of dismissal (ACD) in marijuana cases may be available to an accused, and, moreover, both statutes dictate that a court cannot order an ACD if the defendant has previously been granted one or has been convicted of offenses involving controlled substances, among other specifically delineated exceptions. Thus, it makes sense that a prosecutor have access to an accused's criminal record in that situation, even if sealed, in order to be sure to comply with CPL 170.56 and 210.46.

[3] The Court determined that the term "law enforcement agency" includes "law enforcement entities in addition to police departments and the Division of Criminal Justice Services" (5 NY3d at 204). The Court based this determination on its observation that, within section 160.50, the term "law enforcement agency" is undefined, yet, when it does appear in the statute, it is always in conjunction with the terms "division of criminal justice services," and/or "police department" (*id.*). Moreover, the phrase "police department or law enforcement agency" is used throughout the statute. We further note that the terms "district attorney," "prosecutor's office," and

Here, the People attempt to distinguish *Matter of Katherine B.*, arguing that the District Attorney's Office in that case "sought unsealing for a non-investigatory purpose, and ... the unsealing related to their ongoing prosecution," including sentencing recommendations. However, in this case, according to the People, the District Attorney's Office acted in an investigatory capacity in furtherance of the landlord's litigation. The People contend that their authority pursuant to RPAPL 715 is wholly separate and distinct from the District Attorney's general prosecution of the underlying offenses. Specifically, under RPAPL 715, the People do not directly commence an action, but rather, demand that a third party do so.

This argument is at odds with the Court's conclusion in *Matter of Katherine B.* that the narrow statutory exceptions to the sealing requirement must be strictly construed. Moreover, in *Matter of Katherine B.*, the Court determined that a court's authority to make sealed records available to a prosecutor depended on whether or not a *criminal proceeding* had commenced. Thus, in order to qualify as a "law enforcement agency," as used in CPL 160.50(1)(d)(ii), not only must the District Attorney's Office be acting in its investigatory capacity, but, also, it

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"prosecutor" are used as well, but never in conjunction with the term "law enforcement agency."

must be doing so before the commencement of a *criminal* proceeding. Here, the District Attorney's Office sought to unseal defendant's records so that a third party could use them in a *civil* proceeding against defendant and his fellow tenants. This runs counter to the Legislature's intent in drafting the sealing statutes and their narrow exceptions.

Additionally, other courts have rejected this very argument and, although their rulings are not binding upon us, we find their reasoning to be compelling (*see People v Canales*, 174 Misc 2d 387 [Sup Ct, Bronx County 1997, Richter, J.]; *People v Diaz*, 15 Misc 3d 410 [Sup Ct, NY County 2007]). In both instances, the issue before the court was the unsealing of records pursuant to CPL 160.50(1)(d)(ii), based upon the People's law enforcement authority provided under RPAPL 715. In *People v Canales*, the court observed that the "statute's language permitting an ex parte application strongly suggests that the Legislature was concerned about protecting the confidentiality of criminal investigations. The need for an ex parte motion is not the same when the records are being used in a civil proceeding" (174 Misc 2d at 390) (finding that the District Attorney was not acting in a law enforcement capacity under CPL 160.50[1][d][ii] even though she was authorized under RPAPL 715 to assist landlords in seeking to evict tenants who were engaged in any illegal trade or

business). In *People v Diaz*, which was decided after *Matter of Katherine B.*, the court noted that even though there is a similarity in language between CPL 160.50(1)(d)(ii) and RPAPL 715 regarding enforcement agencies, the "law enforcement agency must still be serving a criminal investigation purpose. In seeking to provide evidence for a civil eviction proceeding, it is not serving such a purpose" (15 Misc 3d at 413).

Finally, in 2011, several years after *Matter of Katherine B.* was decided, an amendment was proposed in the Legislature to address the difference between CPL 160.50(1)(d)(i) and (ii) and 160.55(1)(d)(i) and (ii), as highlighted in *Katherine B.*, by adding a seventh exception that would allow "a party in a criminal proceeding" to unseal records if "the moving party demonstrates to the satisfaction of the court that justice requires that the records be made available to such party in connection with the criminal proceeding" (Sponsor's Mem, 2011 AB 7389). The Sponsor's Memorandum in support of the legislation argued that the Court of Appeals in *Matter of Katherine B.* had "inappropriately narrowed the situations where the Court may unseal records," including limiting the prosecutor's ability to unseal records pursuant to CPL 160.50 (1)(d)(ii) and CPL 106.55 (1)(d)(ii) to situations in which the records are sought for an investigatory purpose, and then, only before the commencement of

a criminal proceeding. The memorandum went on to argue that the Court "limited prosecutorial access to sealed records after commencement [of a criminal proceeding] to the 'singular circumstance' where a defendant requests an ACD in low level marijuana cases" (*id.*).

Despite these arguments, the Legislature rejected the proposed amendment. Consistent with the Legislature's commitment to limit the instances in which records may be unsealed pursuant to CPL 160.55, we too decline to expand the District Attorney's ability to do so. Thus, we conclude that the People do not constitute a "law enforcement agency" within the meaning of CPL 160.55(1)(d)(ii) when they are acting in their capacity as an agency authorized, pursuant to RPAPL 715(1), to demand the commencement of an eviction proceeding by a landlord.

Accordingly, the order of the Supreme Court, Bronx County (Richard Lee Price, J.), entered August 30, 2016, which granted

the People's CPL 160.55(1)(d)(ii) motion to unseal documents related to defendant's March 3, 2014 conviction of disorderly conduct, should be reversed, on the law, and the motion denied.

All concur.

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

ENTERED: October 17, 2017

CLERK