SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 31, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4851-		Ind. 4749/11
4852-		SCI 2059/12
4852A-		Ind. 164/15
4852B-		SCI 5327/15
4852C	The People of the State of New York, Respondent,	SCI 5328/15
	-against-	
	Juan Andino Perez, Defendant-Appellant.	

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eduardo Padro, J., James M. Burke, J. and Richard D. Carruthers, J. at pleas; James M. Burke, J. at sentencing), rendered February 24, 2016, unanimously affirmed.

Although we find that defendant did not make a valid waiver

of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4853 In re Juana R.,
Petitioner-Respondent,

-against-

Chelsea R.,
Respondent-Appellant.

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

Steven N. Feinman, White Plains, for respondent.

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Order, Family Court, New York County (Gail A. Adams, Referee), entered on or about March 18, 2016, which, after a hearing, granted the petition and issued a one year order of protection in favor of petitioner, unanimously reversed, on the law, without costs, and the petition denied.

Although the order of protection has expired, in light of the consequences that may flow from an adjudication that a party has committed a family offense, the appeal is not moot (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671-672 [2015]).

When granting the petition, Family Court found only that the parties were not "getting along." The court failed to find that a family offense had been committed, or that respondent had committed acts that constituted a particular family offense. The

lack of requisite factual findings precludes appellate review (*see Matter of Jose L.I.*, 46 NY2d 1024 [1979]), and it would be fruitless to remit for a new hearing and entry of factual findings, as the order of protection has expired by its terms.

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4854 Eyal Zabari, Index 653997/13
Plaintiff-Respondent,

-against-

Doron Zabari,
Defendant-Appellant.

_____

Warshaw Burstein, LLP, New York (Bruce H. Wiener of counsel), for appellant.

Callagy Law, PC, New York (Michael J. Smikun of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about July 22, 2016, which granted plaintiff's motion to confirm the report of a special referee, made after a traverse hearing, concluding that service was properly made, and denied defendant's cross motion to reject the report and dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, with costs.

The special referee's conclusion that plaintiff met his burden of proving proper service pursuant to CPLR 308(2) (*see Persaud v Teaneck Nursing Ctr.*, 290 AD2d 350, 351 [1st Dept 2002]) was "substantially supported by the record" (*Poster v Poster*, 4 AD3d 145, 145 [1st Dept 2004], *lv denied* 3 NY3d 605 [2004]). Plaintiff's proof consisted of the process server's affidavit and testimony, as well as videos of him making service

and testimony of the videographer. The referee found the witnesses' testimony to be credible, and defendant, who offered no evidence in opposition, shows no basis for rejecting the credibility determinations, made after the referee had "an opportunity to see and hear the witnesses and to observe their demeanor" (*id.*).

Contrary to defendant's contention, the evidence amply supported the referee's finding that the documents served were in fact the summons and complaint, and that the addresses to which delivery and mailing were directed were in fact defendant's residence and place of business. Further, the evidence supports the finding that delivery was properly made by placing the papers in the "general vicinity" of defendant's doorman after he denied the process server access (*see Bossuk v Steinberg*, 58 NY2d 916, 918 [1983]; *Charnin v Cogan*, 250 AD2d 513, 518 [1st Dept 1998]; *Duffy v St. Vincent's Hosp.*, 198 AD2d 31, 31 [1st Dept 1993]).

Because the documents were mailed to defendant's residence (in addition to his place of business), plaintiff was not required to send them by first class mail, and the use of certified mail was sufficient (*see* CPLR 308[2]; *Cohen v Shure*, 153 AD2d 35, 37-38 [2d Dept 1989]). The affidavit of service reflected that the mailing envelope sent to defendant's business address bore the requisite external markings (*see* CPLR 308[2];

Olsen v Haddad, 187 AD2d 375, 375-376 [1st Dept 1992], *lv denied* 81 NY2d 707 [1993]; *Broomes-Simon v Klebanow*, 160 AD2d 973, 973 [2d Dept 1990]), and no evidence was submitted to the contrary.

The fact that the process server was not licensed would not invalidate service, even if a license was required (*City of New York v VJHC Dev. Corp.*, 125 AD3d 425, 426 [1st Dept 2015]; *see also* Administrative Code of City of NY §§ 20-403, 20-404).

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

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4860 Stone Cast, Inc., Index 102748/07
Plaintiff-Respondent,

-against-

Federal Insurance Company,
Defendant-Appellant.
- - - - -
[And a Third-Party Action]

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Frenkel Lambert Weiss Weisman & Gordon, LLP, New York (Eric M. Eusanio of counsel), for appellant.

Couch Dale Marshall P.C., Latham (Mark W. Couch of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Lucy Billings, J.), entered November 25, 2016,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed for the reasons stated by Billings, J., without costs or disbursements.

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4861- Ind. 2068/13
4861A The People of the State of New York, 2373/14
Respondent,

-against-

Javann Garnes,
Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

Javann Garnes, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered March 6, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of five years' probation; and judgment, same court (Edward J. McLaughlin, J.), rendered October 15, 2015, convicting defendant, upon his plea of guilty, of conspiracy in the second degree, and sentencing him to a term of 5½ to 16½ years, and also convicting him of violation of probation, revoking the above-mentioned sentence of probation and resentencing him to a consecutive term of 2½ years, unanimously affirmed.

Although we do not find that defendant made a valid waiver

of the right to appeal, we perceive no basis for reducing the sentences or running them concurrently.

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. We have considered and rejected defendant's remaining pro se claims.

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4862 In re Kalah O.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about November 12, 2015, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the third degree and sexual abuse in the third degree, and placed him with the Office of Children and Family Services for a period of 18 months in a limited secure facility, with credit for time served, unanimously affirmed, without costs.

After weighing all the pertinent factors, we conclude that the court properly denied appellant's motion to dismiss the petition, made on the ground that he was denied his constitutional right to a speedy trial (*see Matter of Benjamin L.*, 92 NY2d 660 [1999]). The presentment agency provided a

sufficient explanation for its delay (of less than 10 months) in filing the petition, the delay did not undermine the rehabilitative goal of this proceeding, and appellant has not demonstrated any prejudice.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence supports the conclusion that the sexual activity at issue occurred after the victim had plainly revoked any consent she may have given.

Reliance on the rape shield law, as applicable to these proceedings, to limit inquiry into the victim's sexual history was a provident exercise of the court's discretion (*see* Family Court Act § 344.4; *Matter of Dakota EE.*, 209 AD2d 782 [3rd Dept 1994]). The additional evidentiary ruling challenged on appeal

was also a provident exercise of discretion. In any event, any error in either or both of these rulings would not warrant reversal.

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4864 John L. Loeb, Jr., Index 654495/15
Plaintiff-Respondent,

-against-

Architecture Work, P.C., et al.,
Defendants-Appellants.

_____

Melito & Adolfsen P.C., New York (Michael F. Panayotou of counsel), for appellants.

Wasserman Grubin & Rogers, LLP, New York (Richard Wasserman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about June 13, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the third cause of action alleging violation of General Business Law § 349, unanimously reversed, on the law, with costs, and the motion granted.

This is essentially a private contract dispute unique to the parties (*see e.g. New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]). Even if, arguendo, defendant Architecture Work, P.C. (Archwork) engaged in consumer-oriented conduct by placing statements on its website, those statements were not "likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]); instead, they were

mere puffery (*see e.g. MMCT, LLC v JTR Coll. Point, LLC,* 122 AD3d 497, 498 [1st Dept 2014]). Furthermore, even if the statements on Archwork's website were deceptive, they did not cause plaintiff's injury. Rather, plaintiff's alleged injury was a result of specific acts and omissions by the individual defendant, such as failing to provide constructible drawings, re-designing the apartment's windows and doors without authorization, and failing to coordinate the project.

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4865 Arthur Richardson, Index 23547/14E
Plaintiff-Respondent,

-against-

George Lopez, et al.,
Defendants-Appellants,

Nalini Sinha, et al.,
Defendants.

_____

Thomas Torto, New York, for appellants.

Law Offices of Vel Belushin, P.C., Brooklyn (Georgette Hamboussi of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about October 25, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for a default judgment against the Lopez defendants (defendants) and denied defendants' cross motion to dismiss the complaint for lack of personal jurisdiction or for a traverse hearing, unanimously reversed, on the law, without costs, and the matter remanded for the court to conduct a traverse hearing on the issue of service of process.

Plaintiff made a prima facie showing that his process server exercised due diligence in attempting to serve defendants personally with the summons and complaint before resorting to nail-and-mail service at defendants' dwelling place, as listed on

the police accident report (*see* CPLR 308[4]).

In opposition, defendants submitted the affidavit of defendant Maria Lopez, who denied ever hearing the doorbell ring or finding any documents affixed to the front door of defendants' residence. Her affidavit provided sufficient detail to raise issues of fact requiring a traverse hearing before either the motion or cross motion can be resolved (*see Sharbat v Law Offs. of Michael B. Wolk, P.C.*, 121 AD3d 426, 427 [1st Dept 2014]).

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4866- Ind. 2028/10
4866A The People of the State of New York,
Respondent.

-against-

Robert Boyer,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered November 20, 2012, convicting defendant, upon his plea of guilty, of sexual misconduct, and sentencing him to six years' probation, unanimously affirmed. Order, same court, Justice and date, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to level two. In this case, clear and convincing evidence established aggravating factors that were not adequately taken into account by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841 [2014]). The egregiousness of defendant's conduct towards a trusting friend, including grabbing

her by the neck and committing a forcible rape that required medical treatment, demonstrated defendant's inability to control his behavior (*see e.g. People v Ray*, 86 AD3d 435 [1st Dept 2011], *lv denied* 17 NY3d 716 [2011]). These aggravating factors outweighed the mitigating factors cited by defendant.

As to the judgment of conviction, application by defendant's counsel to withdraw 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 nonfrivolous points that could be raised on the appeal from the conviction.

Pursuant to CPL 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 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 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4867 In re Eileen Jordan, et al., Index 100993/14
Petitioners-Respondents-Appellants,

-against-

The New York City Housing Authority,
Respondent-Appellant-Respondent,

The Department of Citywide
Administrative Services,
Respondent.

_____

David Farber, New York City Housing Authority, New York (Jane E. Lippman of counsel), for appellant-respondent.

Cohen, Weiss and Simon LLP, New York (Thomas N. Ciantra of counsel), for respondents-appellants.

_____

Order and judgment (one paper), Supreme Court, New York County (Shlomo Hagler, J.), entered August 16, 2016, which, to the extent appealed from as limited by the briefs, granted the petition to direct respondent New York City Housing Authority (NYCHA) to conduct a medical examination of petitioner Eileen Jordan pursuant to Civil Service Law § 71, reinstate her to her former position, and award her back pay to the extent of remitting the proceeding to NYCHA for compliance with Civil Service Law § 71, dismissed the petition as against respondent Department of Citywide Administrative Services (DCAS), and denied NYCHA's cross motion to dismiss the petition as against it and request to answer the petition, unanimously affirmed, without

costs.

Respondent DCAS is not a necessary party (*see* CPLR 1001[a]). It had delegated its responsibility for determining the medical fitness of employees like petitioner Jordan well before Jordan applied for reinstatement, and was not involved in NYCHA's denial of the application; the court's determination completely resolves the controversy between the parties (*compare City of New York v Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [1979] ["to the extent that (the State Commissioner of Transportation) may choose to disregard a holding which is not binding on him, the judgment . . . may not produce a complete resolution of the controversy between the city and the limousine service"]).

NYCHA's argument that Civil Service Law § 71 does not apply to labor class employees is contradicted by the plain language of the statute, which, by its terms, applies broadly to "employee[s]," an undefined term. We "cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit because the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (*Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 62 [2013] [internal quotation marks omitted]). Indeed, elsewhere in article V of the

statute, the Legislature included terms that limited protections to certain classes of employee (*see* Civil Service Law §§ 75; 80; 80-a; 81; *Matter of Allen v Howe*, 84 NY2d 665 [1994]).

As the dispositive facts are undisputed and the parties fully presented their arguments before the court, it was not necessary to grant NYCHA an opportunity to answer the petition following the denial of its cross motion to dismiss (*Matter of Davila v New York City Hous. Auth.*, 190 AD2d 511, 512 [1st Dept 1993], *lv denied* 87 NY2d 801 [1995]).

Jordan is not entitled to back pay pursuant to Civil Service Law § 77, because she has not been reinstated to her former position "by order of the supreme court" (*id.*).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4868 Courtney Taylor, Index 305470/13
Plaintiff-Appellant,

-against-

Lorenzo Delgado, et al.,
Defendants-Respondents.

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Block O'Toole & Murphy, New York (David L. Scher of counsel), for appellant.

Saretsky Katz & Dranoff, L.L.P., New York (Allen L. Sheridan of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 5, 2016, which granted defendants' motion for summary judgment dismissing the complaint alleging serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to the claim of permanent consequential and significant limitations of use of the lumbar spine and the 90/180-day claim, and otherwise affirmed, without costs.

Defendants established that plaintiff did not suffer a serious injury to her lumbar spine or right knee as a result of the motor vehicle accident at issue by submitting the affirmed reports of a radiologist and orthopedist. The radiologist opined that the MRI of the lumbar spine showed a herniation associated with underlying degenerative disc disease and that the MRI of the

right knee revealed a tilted patella causing degeneration (*see Lindo v Brett*, 149 AD3d 459 [1st Dept 2017]). The orthopedist opined that plaintiff's lumbar spine surgery was due to her pre-existing spine condition, consistent with her age, weight and MRI findings, and was not caused by the subject accident, and that the knee condition also was unrelated to the accident (*see Nicholas v Cablevision Sys. Corp.*, 116 AD3d 567 [1st Dept 2014]). Defendants also submitted the MRI reports of plaintiff's own radiologist, who also found evidence of degenerative disc disease in the lumbar spine and a lateral tilting patella, thus shifting the burden to plaintiff to address and explain the medical evidence of preexisting conditions (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]).

In opposition, plaintiff raised an issue of fact as to a serious lumbar spine injury causally related to the accident through affirmed reports of an expert physiatrist, who measured severe, recent limitations in range of motion, and her orthopedic surgeon, who opined, based on his observations in surgery and review of plaintiff's medical history, that the disc herniation was caused by the accident (*see Aviles v Villapando*, 112 AD3d 534 [1st Dept 2013]). The surgeon specifically addressed the MRI films, which he reviewed, and opined that certain objective

evidence of degeneration was missing both from the MRI films and his observations during surgery. He also addressed the evidence that plaintiff had on one previous occasion sought treatment for back pain, which improved, opining that that was not evidence of a preexisting lumbar condition.

Plaintiff failed to present medical evidence sufficient to raise an issue of fact whether her right knee conditions are causally related to the accident. Thus, she cannot recover for any right knee injury, regardless of whether her lumbar spine injury is found to constitute a serious injury (*Hojun Hwang v Doe*, 144 AD3d 507 [1st Dept 2016], citing *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

In addition to submitting evidence that her lumbar injury was causally related to the accident, plaintiff submitted evidence of "a medically determined injury or impairment of a non-permanent nature," thereby raising an issue of fact whether she sustained an injury under the 90/180-day category. Plaintiff did not work for more than six months following the accident, and

an examining physician, who found a causal link between the surgery and the accident, noted that she was totally disabled, as evidenced by, among other things, a notice of disability (*see Coley v DeLarosa*, 105 AD3d 527, 528-529 [1st Dept 2013]).

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4869 Bari Yunis Schorr, Index 305587/11
Plaintiff-Respondent,

-against-

David Evan Schorr,
Defendant-Appellant.

_____

David E. Schorr, New York, appellant pro se.

Newman & Denney P.C., New York (Louis I. Newman of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about February 26, 2016, deemed appeal from judgment, same court (Michael L. Katz, J.), entered July 11, 2016, after a trial, inter alia, determining defendant husband's child support obligation, denying defendant's claims for separate property credits in distributing marital assets, directing the parties to repay a loan from plaintiff wife's father in the amount of $124,000, awarding plaintiff counsel fees, and directing defendant to post security, and, so considered, said judgment unanimously affirmed, with costs.

The appeal from the judgment being untimely, we deem the notice of appeal from the order a premature notice of appeal from the judgment and treat it as valid (*see* CPLR 5520[c]).

At the trial of the financial issues ancillary to the

divorce, both parties testified, and plaintiff's father, Joel Yunis, and the court-appointed forensic accountant, among others, testified on plaintiff's behalf. The court found defendant evasive and not credible, while finding plaintiff and, as relevant, the forensic accountant and Mr. Yunis credible, and its credibility determinations are entitled to deference (*Warshaw v Warshaw*, 169 AD2d 408 [1st Dept 1991]).

In calculating the child support award, the court properly imputed income to defendant by including significant funds he received from his parents to pay his expenses (*see* Domestic Relations Law § 240[1-b][b][5][iv][D]). Defendant is self-employed, and refuses to maintain a general ledger or financial records for his business. Trial evidence supports the court's finding that defendant inflated his expenses on his tax returns so as to deflate his reported net income, and otherwise manipulated his income. Further, defendant, who is the sole executor of his father's estate, admitted to using estate funds directly to pay some of his personal expenses. In view of its inability to quantify these alternate sources of revenue available to defendant, the court acted within its discretion in imputing income to him based on the discernible measure of parental contributions. Further, the court properly articulated its rationale for including combined parental income above the

statutory cap, i.e., to maintain the standard of living provided the child during his parents' marriage and taking into account his reasonable needs.

With respect to the outstanding loan from plaintiff's father (Mr. Yunis), the court providently exercised its discretion in directing the parties to repay the loan from the proceeds of the sale of the marital residence. We see no basis for disturbing the trial court's finding that Mr. Yunis testified credibly that $124,000 remained unpaid under two promissory notes for monies borrowed from him to purchase the marital residence. Defendant's contention that the court does not have the authority to enforce promissory notes to a third party is without merit (*see Epstein v Messner*, 73 AD3d 843, 845-846 [2d Dept 2010] [the court "is given broad discretion in allocating the assets and debts of the parties to a marriage"]).

The court properly found that defendant was not entitled to a separate property credit for funds he used toward the purchase of the marital residence. Defendant failed to prove that his premarital assets that were admittedly commingled with marital funds were not marital property (*see Todres v Freifeld*, 151 AD3d 569 [1st Dept 2017]). The trial evidence demonstrates that defendant's pre-marital funds were commingled with marital funds for approximately one year before the parties purchased the

marital residence. The account in which the funds were commingled was completely liquidated in 2009, two years before the commencement of this action. The forensic accountant testified that in "multiple instances" he could not trace deposits made by defendant into the account directly to defendant's separate property, but that, if the court chose to overlook the indisputable commingling of funds, he could calculate a separate property claim based on the separate property he had been able to trace.

The court properly awarded plaintiff counsel fees. The trial evidence supports the court's finding that, while the parties were on comparable financial footing, defendant has had the distinct economic advantage of being a lawyer representing himself pro se in this action, which has now lasted longer than the parties' marriage (*see Silverman v Silverman*, 304 AD2d 41, 48 [1st Dept 2003]). Moreover, the trial record is replete with instances of defendant's delaying the proceedings by arriving late, asking repetitive questions, and arguing with the court.

The court acted within its discretion in directing defendant to post security for payment of his obligations (*see* Domestic Relations Law § 243; *Adler v Adler*, 203 AD2d 81 [1st Dept 1994]).

We have considered defendant's remaining arguments, to the extent they are properly before the court, and find them unavailing.

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4870 The People of the State of New York, Ind. 4760/14
Respondent,

-against-

Brian Thomas,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard Carruthers, J.), rendered December 16, 2015, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4871 The People of the State of New York, Respondent, Ind. 30001/16

-against-

Carlton Jones, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Rachel L. Pecker of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about February 16, 2016, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to level two. Clear and convincing evidence established aggravating factors that were not adequately taken into account by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841 [2014]). In addition to the underlying sex

crime, defendant's record included a very serious attempted murder conviction and an earlier conviction involving sexual intercourse with a child. These aggravating factors outweighed the mitigating factors cited by defendant.

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

ENTERED: OCTOBER 31, 2017

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4872N Rafael Olivo, Index 300125/12
Plaintiff-Respondent,

-against-

Christine Nazario, et al.,
Defendants,

New York City Housing Authority,
Defendant-Appellant.

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

Ginsberg & Bianco, LLP, Smithtown (Beth S. Gereg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered January 26, 2017, which denied the motion of defendant New York City Housing Authority (NYCHA) to strike plaintiff's supplemental bill of particulars and preclude his expert, unanimously modified, on the law and the facts, to permit limited discovery on newly specified claims of future surgery, and otherwise affirmed, without costs.

Plaintiff's supplemental bill of particulars did not claim new injuries, but sequelae of the original injuries pleaded (*see Spiegel v Gingrich*, 74 AD3d 425, 427 [1st Dept 2010]; *Maisonet v New York City Hous. Auth.*, 276 AD2d 260 [1st Dept [2000]; *Villalona v Bronx-Lebanon Hosp. Ctr.*, 261 AD2d 185, 185

[1st Dept 1999]). However, given that a need for future surgeries had only previously been pleaded in the most vague and boilerplate terms, and his medical records showed no indication that future surgery would be necessary, discovery limited to those newly specified injuries is warranted (*see Hartnett v City of New York*, 139 AD3d 506 [1st Dept 2016]; *Villalona, supra*).

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4630 Yizheng Zhao, Index 151573/16
Plaintiff-Appellant,

-against-

Engi Wassef Evans, et al.,
Defendants-Respondents.

_____

Davidoff Hutcher & Citron LLP, New York (Joshua Krakowsky of counsel), for appellant.

Woods Lonergan & Read PLLC, New York (Annie E. Causey of counsel), for respondents.

_____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered June 2, 2017, which denied plaintiff's motion for summary judgment on the breach of contract cause of action, unanimously affirmed, without costs.

Plaintiff alleges that on or about August 31, 2014, the parties entered into a two-year lease for Penthouse Apartment B located at 1280 Fifth Avenue and that defendants vacated the unit after residing there for only approximately 13 months, leaving a balance of 11 months' rent remaining due and owing under the lease. By letter dated December 16, 2015, plaintiff advised defendants that they were in default under the lease for nonpayment of rent as of September 2015, and indicated that the lease ran from September 1, 2014 through August 31, 2016. Defendants contend that the lease term was intended to be one

year with the possibility of extending upon mutual assent, and that they tendered rent to plaintiff from September 2014 through September 2015, in addition to paying a deposit of two months' rent upon entering the premises, so that when they vacated in November 2015 they did not owe plaintiff any additional rent.

Plaintiff moved for summary judgment on his breach of contract claim. He submitted the default letter and three pages of an executed lease (although the lease actually had four pages), which was almost entirely illegible. The only legible part of the lease is the very top where the address is handwritten, and the end date for the term of the lease, "Aug 31, 2016," is handwritten in dark bold ink, apparently over another date, which cannot be deciphered, and is initialed only by plaintiff. Plaintiff also submitted a more legible blank boilerplate lease with spaces for the lease term upon which he alleges the subject lease was based.

After receiving defendants' opposition, plaintiff submitted in reply three additional versions of the lease. The first was from the property manager and reflected a lease term of "2 YEARS" beginning on "SEPT. 1, 2014" and ending on "August 31, 2016." However, the end date is not written in dark ink as in the lease initially submitted by plaintiff, nor does it appear to have been written over another date. Moreover, the end date is not

initialed by plaintiff, and all four pages of the lease are included.

The next version of the lease was submitted by the broker, and appears to be nearly identical to the one submitted by the property manager, although the copy in the record is only partially legible. The third version of the lease, also submitted by the broker, reflects an end date of "Sept. 30, 2016," which appears to be written over another date, and again does not contain plaintiff's initials next to the end date.

The motion court correctly determined that plaintiff failed to establish prima facie his entitlement to summary judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Although the various versions of the lease seem to reflect a lease term of "2 YEARS," the actual date range for that term is not consistent, and there is an issue of fact as to whether the term of the lease was altered after defendants signed the lease, without their consent, since the alleged end date on the original lease submitted was initialed by plaintiff, but not by defendants.

Additionally, we note that in his reply papers, plaintiff submitted affidavits by the broker and the property manager, both of whom stated that the lease indicates that the term was for two years, ending on August 31, 2016. The broker also annexed a copy

of the lease application in support of her position. However, if the terms of the lease are not clear from the four corners of the document, and extrinsic evidence is needed to interpret those terms, then this further raises an issue of fact (*see Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017], quoting *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 171-172 [1973] [stating that when interpreting the terms of an ambiguous contract, if the "'determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, then such determination is to be made by the jury'"]).

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4633 The People of the State of New York, Respondent, SCI 4117/93

-against-

Alejandro Garcia,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Martin Marcus, J.), rendered October 14, 2015, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered June 30, 1993, unanimously affirmed.

Defendant alleged in support of his CPL 440.10 motion that counsel affirmatively misled him about the deportation consequences of his guilty plea, by misadvising him that he would not be deportable if he pleaded guilty, and that the plea would not "pose any immigration problems." However, since defendant pleaded guilty to an aggravated felony under federal law, deportation was actually mandatory (*see People v Corporan*, 135 AD3d 485 [1st Dept 2016]). Defendant also alleged that, had he known that deportation was mandatory, he would have proceeded to trial or sought a more favorable plea, in light of his strong

ties to the United States.

Supreme Court's denial of defendant's CPL 440.10 motion was a provident exercise of discretion (*People v Hicks*, 114 AD3d 599, 601-602 [1st Dept 2014]). When asserting a claim of ineffective assistance of counsel, the defendant bears the burden to show that the alleged facts entitle him or her to relief *(People v Satterfield*, 66 NY2d 796, 799 [1985]), and the court then decides whether the showing is sufficient to require a hearing. Although defendant's claim was not refuted by "unquestionable documentary proof" (CPL 440.30[4][c]), the bare-boned claims were "made solely by the defendant and [were] unsupported by any other affidavit or evidence" (CPL 440.30[4][d]). The court properly determined, without a hearing and based upon the totality of the circumstances, including consideration of the strength of the People's case, the favorable plea, the likelihood of a plea offer with non-mandatory immigration consequences and defendant's

substantial criminal record by 1993, including a 1987 conviction that also carried mandatory immigration consequences, that there is no reasonable possibility that defendant's claims were true.

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

ENTERED: OCTOBER 31, 2017

CLERK

Friedman, J.P., Richter, Andrias, Gische, Moulton, JJ.

4763 The People of the State of New York, Respondent, Ind. 1224/13

-against-

Walter Watson, Defendant-Appellant.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Melissa C. Jackson, J.), rendered April 29, 2015, convicting defendant of violation of probation, revoking a prior sentence of three years' probation imposed on February 4, 2014, and resentencing defendant to a jail term of one year, unanimously reversed, on the law, and the matter remanded for a new hearing on the violation of probation.

Defendant was found to be in violation of probation based upon his failure to satisfy a condition requiring him to complete anger management treatment. However, defendant was not given an opportunity to be heard prior to the court's initial determination (CPL 410.70). While the court subsequently allowed defendant to speak, it did not conduct a sufficient inquiry into whether defendant sought in good faith to comply with programming

directives, but was prevented, as he contends, from doing so primarily by circumstances outside his control (*see People v Bowman*, 73 AD2d 921 [2d Dept 1980]).

In light of these procedural errors, the matter is remanded for a new hearing on the violation of probation.

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

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4829 In re Felicia S. A.,
Petitioner-Appellant,

-against-

Gary C.,
Respondent-Respondent.

- - - - -

In re Gary C.,
Petitioner-Respondent,

-against-

Felicia S. A.,
Respondent-Appellant.

_____

Law Office of Dewette C. Aughtry, Brooklyn, for appellant.

Law Office of Ursula A. Gangemi, P.C., Brooklyn (Ursula A. Gangemi of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for children.

_____

Order, Family Court, New York County (Christopher W. Coffey, Referee), entered on or about June 6, 2016, which granted the petitions in part, and awarded joint legal and physical custody of the children to the parties, unanimously affirmed, without costs.

The record does not support the mother's contention that there was a prior custody arrangement in place, and thus the court's paramount consideration is the "ultimate best interest" of the children as opposed to whether there has been a change in

circumstances (*Friederwitzer v Friederwitzer*, 55 NY2d 89, 94 [1982]). The Family Court's finding that it was in the children's best interest to award joint legal and physical custody to the parties was amply supported.

The parties appear equally well-suited to provide for the children's needs, have conducted themselves civilly and have generally set aside their personal feelings for the sake of the children (*Matter of Victoria H. [Tetsuhito A.]*, 110 AD3d 636, 636-637 [1st Dept 2013]). The parties have been able to resolve their custody and visitation disputes despite their failure to communicate directly (*Matter of Johanys M. v Eddy A.*, 115 AD3d 460, 461 [1st Dept 2014]).

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4830 Keri O'Connell, Index 153272/14
Plaintiff-Appellant,

-against-

Macy's Corporate Services, Inc., etc., et al.,
Defendants-Respondents.

_____

Robert Giusti & Associates, PLLC, Bayside (Robert Giusti of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered September 14, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie that they cannot be held liable for the injuries that plaintiff allegedly sustained while participating as a volunteer in the Macy's Thanksgiving Day parade, by submitting a copy of a portion of plaintiff's electronic application to be a participant that contained a release from liability showing her name typed at the bottom and a check mark in the box indicating her agreement to the terms of the release.

Plaintiff's affidavit in opposition, at most, created only a

feigned issue of fact since it contained a version of the facts that conflicted with her earlier deposition testimony (*see e.g. Estate of Mirjani v DeVito*, 135 AD3d 616 [1st Dept 2016]). Plaintiff unpersuasively argues that the release does not apply because defendant Stanton, whose vehicle struck plaintiff, was not an employee of Macy's. As a volunteer in the parade, Stanton was an agent of Macy's and covered by the release (*see e.g.*, 5015 *Art Fin. Ptnrs, LLC v Christine's* Inc., 58 A.D.3d 469, 471 [1st Dept 2009] [a principal-agent relationship may be established by evidence of the consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act" even where the agent is acting as a volunteer] [internal quotations and citations omitted]).

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 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4831 In re Anita Ryan, Index 101515/13
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

_____

Ungaro & Cifuni, LLP, New York (Nicholas Cifuni of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered January 6, 2016, denying the petition to annul a determination of respondent Board of Trustees of the Police Pension Fund, Article II, dated August 17, 2013, which denied petitioner's application for accidental disability retirement, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to submit evidence showing that her disabling condition of systemic sclerosis, which is not recognized as a qualifying physical condition under the World Trade Center (WTC) law, was a "new onset disease" (*see* Retirement and Social Security Law § 2[36][c][v]). Accordingly, petitioner has failed to show entitlement to the statutory presumption that her condition was caused by her exposure to toxins during her

rescue and recovery work at the World Trade Center site (*see Matter of Stavropoulos v Bratton*, 148 AD3d 449, 450-451, 454 [1st Dept 2017]).

Credible record evidence supported the Board of Trustees' determination, by a tied vote, that petitioner's condition was not caused by her work at the WTC site (*see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 144-145 [1997]). Indeed, petitioner's physicians all acknowledged that, while a link to environmental risk factors such as silica dust is suspected, the etiology of her condition remains unknown.

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4833 Adolfo Meregildo, et al., Index 151905/13
Plaintiffs-Appellants,

-against-

Angela Diaz,
Defendant-Respondent.

_____

Gleason & Koatz, LLP, New York (John P. Gleason of counsel), for appellants.

Conover Law Offices, New York (Branford D. Conover of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered March 21, 2016, which granted defendant's motion for summary judgment dismissing the complaint and for partial summary judgment on liability on her counterclaims, and denied plaintiffs' cross motion for summary judgment dismissing the counterclaims, unanimously affirmed, without costs.

Plaintiffs failed to demonstrate that defendant was a "bona fide executive" exempt from coverage under the federal and state overtime compensation laws (*see* 29 CFR 541.100[a]; 12 NYCRR 142-2.14[c][4][i][a]-[e]; *Clougher v Home Depot U.S.A., Inc.*, 696 F Supp 2d 285, 289 n 4 [ED NY 2010]). In fact, the evidence supports defendant's position that she was a covered employee and not an executive, as her duties were not "primarily" managerial. Contrary to plaintiffs' contention, defendant's allegations do

not merely track the overtime compensation statutes (29 USC § 207; Labor Law § 663), and her testimony and that of others sufficiently demonstrates that she worked in excess of forty hours per week during specific months of the year, including often working until 9 or 10 p.m. and on Saturdays (*see Dejesus v HF Mgt. Services, LLC*, 726 F3d 85, 88 [2d Cir 2013], *cert denied* __ US __, 134 S Ct 918 [2014]).

Plaintiffs' breach of contract claim is undermined by the individual plaintiff's denial in his deposition testimony that there was any contract with defendant to allocate the fees earned from certain travel services. Moreover, plaintiffs failed to set forth the terms of the alleged agreement, and therefore cannot demonstrate that defendant had breached any contractual term (*see Paz v Singer Co.*, 151 AD2d 234, 235 [1st Dept 1989]).

Plaintiffs' breach of good faith claim is not viable in the absence of a valid contract (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]) and is duplicative (*see Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 AD3d 548, 549 [1st Dept 2015]). To the extent that the portion of this cause of action suggests a breach of fiduciary duty owed by an employee to an employer, it is based on the same factual allegations as the breach of contract claim, and is duplicative (*see Stefatos v Frezza*, 95 AD3d 787, 787 [1st Dept 2012]). The unjust enrichment

claim is similarly duplicative (*see Wald v Graev*, 137 AD3d 573, 574 [1st Dept 2016]) and is also deficient because plaintiffs are unable to demonstrate that defendant had retained benefits to which she was not in good conscience entitled (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

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

We decline defendant's request to impose sanctions on plaintiffs, as plaintiffs' appeal is not frivolous (*see* 22 NYCRR 130-2.1).

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4834-
4835 Index 650097/09

UBS Securities LLC, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Highland Capital Management, L.P., et al.,
Defendants-Appellants-Respondents,

Highland Security Opportunities
Holding Company, et al.,
Defendants-Appellants.

_____

Lackey Hershman, L.L.P., New York (Kieran M. Corcoran of counsel), for appellants and appellants-respondents.

Kirkland & Ellis LLP, New York (Andrew B. Clubok of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about March 27, 2017, which granted the motions for summary judgment of defendants Highland CDO Opportunity Master Fund, L.P., Highland Special Opportunities Holding Company, Highland Capital Management, L.P., Highland Financial Partners, L.P., Highland Credit Opportunities CDO, L.P., and Strand Advisors, Inc. to the extent of dismissing the claim for breach of implied covenant against defendant Highland Capital, and otherwise denied the motions, unanimously modified, on the law, to dismiss the causes of action for fraudulent conveyances, and otherwise affirmed, without costs.

In a prior order in this case, we found that,

> "to the extent the claims against Highland in the new complaint implicate events alleged to have taken place before the filing of the original complaint, res judicata applies. That is because UBS's claims against Highland in the original action and in this action all arise out of the restructured warehousing transaction. While the claim against Highland in the original action was based on Highland's alleged obligation to indemnify UBS for actions taken by the affiliated funds, and the claims against Highland in the second action arose out of Highland's alleged manipulation of those funds, they form a single factual grouping. Both are related to the same business deal and to the diminution in the value of the securities placed with UBS as a result of that deal. Thus, the claims form a convenient trial unit" (86 AD3d 469, 474-475 [1st Dept 2011]).

While, in that order, we dismissed those portions of the causes of action for fraudulent conveyances that "rely on conduct" predating the commencement of this action on February 24, 2009, and further held that to the extent those causes of action "rely on conduct alleged to have occurred after" that date, "such claims should be allowed" (*id.* at 476), we now find that the alleged fraudulent conveyances that occurred in March 2009 not only "implicate events alleged to have taken place before the filing of the original complaint" (*id.* at 474), but are integrally intertwined with and rooted in conduct that predated

the commencement of this action such that the entirety of the fraudulent conveyance claims, as pled, which concern Highland's alleged manipulation of its affiliated funds for the purpose of frustrating UBS's potential recovery, are barred under the doctrine of res judicata. On the other hand, neither our prior decisions nor the doctrine of res judicata supports dismissal of the cause of action relating to alter ego liability because the allegations supporting alter ego liability are based on defendants' conduct prior to February 24, 2009.

The court correctly rejected defendants' arguments in support of dismissal of the remaining claims at issue. Issues of fact exist with respect to whether UBS suffered any recoverable contract damages, and as to whether it can establish justifiable reliance to support its claims that defendants committed fraud by misrepresenting their creditworthiness or the assets they owned prior to entering the transaction.

We take judicial notice of the decision of the trial court, dated September 19, 2017, which granted plaintiffs leave to reargue the dismissal of the claim for breach of implied covenant against defendant Highland Capital, and upon reargument, held that the claim should be reinstated. To the extent this decision has rendered moot plaintiffs' cross appeal of that part of the order on appeal, we exercise our broad discretionary authority to

reach beyond the scope of defendants' notices of appeal to review the merits of that order, as the same issues have been briefed on the cross appeal, and we find that the trial court properly reinstated this claim.

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4836-
4837 File 1568/12A

In re Turnover Proceeding,
Estate of Fay Solomon, Deceased.

- - - - -

Bruce Solomon, et al.,
Petitioners-Respondents,

-against-

Mae Marlow,
Respondent-Appellant.

- - - - -

In re Probate Proceeding, Will of
Leon Hernesh, Deceased.

- - - - -

Mae Marlow,
Petitioner-Appellant,

-against-

Bruce Solomon, et al.,
Respondents-Respondents,

Office of the Attorney General,
Respondent.

_____

McCarthy Fingar LLP, White Plains (Robert H. Rosh of counsel), for appellant.

Law Offices of Joanne Fanizza, P.A., Bay Shore (Joanne Fanizza of counsel), for Bruce Solomon and Joanne Fanizza, respondents.

Radin and Kleinman, West Nyack (Abraham N. Kleinman of counsel), for Diskin Orphan Home of Israel, respondent.

_____

Order, Surrogate's Court, Bronx County (Nelida Malave-Gonzalez, S.), entered on or about August 11, 2016, which, inter alia, denied petitioner Mae Marlow's motion to vacate a May 7,

2016 written stipulation and an October 13, 2015 so-ordered stipulation, and granted respondent Bruce Solomon's cross motion to enforce said stipulations, unanimously affirmed. Order, same court and Justice, entered on or about September 13, 2016, which denied respondent Marlow's motion for the aforementioned requested relief, and granted petitioner Solomon's cross motion for the aforementioned requested relief, unanimously affirmed, without costs .

It is undisputed that the stipulations were in writing, signed by Marlow's counsel, entered into in open court, and that the later stipulation was so-ordered. Thus, they are enforceable pursuant to CPLR 2104 (*see Hallock v State of New York,* 64 NY2d 224, 230 [1984]). Moreover, Marlow cloaked her attorney with apparent authority to negotiate and enter into the settlements in that the firm represented her in the litigation over many years, and she confirmed to the court attorney in telephone conversations, while negotiations were ongoing, that counsel was authorized to settle on the terms discussed (*see Daniels v Concourse Animal Hosp.,* 41 AD3d 284 [1st Dept 2007]).

The stipulations were sufficiently definite and were more than agreements to agree in that what was promised was easily ascertainable and the later stipulation expressly stated that no further documents were necessary to effectuate the settlement

(*see Yan's Video v Hong Kong TV Video Programs*, 133 AD2d 575, 578 [1st Dept 1987]).

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

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4838 In re Martici Taylor, Index 100823/16
Petitioner,

-against-

Shola Olatoye, etc., et al.,
Respondents.

_____

Brooklyn Defender Services, Brooklyn (Lauren F.D. Price of counsel), for petitioner.

David I Farber, New York (Hanh H. Le of counsel), for respondents.

_____

Determination of respondents, dated March 30, 2016, which, after a hearing, denied petitioner's remaining family member claim for succession rights to a public housing apartment, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Arthur F. Engoron, J.], entered October 20, 2016), unanimously dismissed, without costs.

Supreme Court improperly ruled on objections that did not terminate this article 78 proceeding before transferring it to this Court (*see* CPLR 7804[g]). Accordingly, we decide all issues herein de novo (*see Matter of Roberts v Rhea*, 114 AD3d 504 [1st Dept 2014]).

Respondents' denial of petitioner's claim to remaining family member status is supported by substantial evidence (*see*

300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176 [1978]). Petitioner never obtained respondents' written permission to join his mother's household, and he was not listed on an affidavit of income for the year preceding her death (*see e.g. Matter of Clark v New York City Hous. Auth.*, 147 AD3d 568, 569 [1st Dept 2017]). The hearing officer accorded the documentary evidence more weight than the testimony of petitioner's witnesses, and there is no basis for disturbing her credibility determinations (*see Matter of Rodriguez v Olatoye*, 150 AD3d 476 [1st Dept 2017]). The documentary evidence supports the conclusion that petitioner did not live in his mother's apartment at the time that he and his mother submitted the request to respondents to add him to the household, approximately one month before his mother's death.

The record affords no basis for relieving petitioner of the written consent and income affidavit requirements (*see e.g. Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289 [1st Dept 2004]; *cf. Matter of Gutierrez v Rhea*, 105 AD3d 481 [1st Dept 2013] [denial of remaining family member claim annulled and proceeding remanded where respondents failed to notify tenant of

family member's ineligibility due to a criminal conviction, depriving her of opportunity to present evidence of his rehabilitation], *lv denied* 21 NY3d 861 [2013]).

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

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4839- Ind. 878/12
4840 The People of the State of New York, 1597/15
Respondent,

-against-

Kaseem Moye,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Antigone Curis of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Miriam R. Best, J.), rendered April 29, 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 31, 2017

CLERK

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

Richter, J.P., Webber, Kern, Moulton, JJ.

4841 The People of the State of New York Ind. 5707/13
Respondent,

-against-

Freeman Lovely,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered January 6, 2015, as amended February 17, 2015, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 4½ years, unanimously affirmed.

Regardless of whether defendant made a valid waiver of his right to appeal, we find that the court properly denied defendant's suppression motion. The stop of defendant's van was lawful even though one of the two bases for the stop mentioned in the officers' hearing testimony constituted an objectively reasonable mistake of law (*see People v Guthrie*, 25 NY3d 130, 138 [2015]), and defendant's remaining suppression arguments are unavailing.

Regardless of the effect of defendant's waiver of the right to appeal, defendant failed to preserve his claim that his out-of-state conviction was not the equivalent of a New York felony, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Santiago*, 143 AD3d 545 [1st Dept 2016], *lv denied* 28 NY3d 1127 [2016]; *People v West*, 58 AD3d 483 [1st Dept 2009], *lv denied* 12 NY3d 822 [2009]).

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4842 In re Elijah T., and Others,

Children Under Eighteen Years
of Age, etc.,

Melvin G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about August 30, 2016, which, after a hearing, found that respondent neglected the subject children, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence including that respondent engaged in acts of domestic violence against the children's mother while the children were in the home and that they were being affected by what they were witnessing (*see Matter of Madison M. [Nathan M.]*, 123 AD3d 616 [1st Dept 2014]; *Matter of Kelly A. [Ghyslaine G.]*, 95 AD3d 784 [1st Dept 2012]).

There exists no basis to disturb the Family Court's credibility determinations (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4845 The People of the State of New York, Respondent,

Ind. 4649/11

-against-

Kahn Hightower,
Defendant-Appellant.

_____

Resko Law Office, P.C., Mount Kisco (Michael Resko of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered July 10, 2012, convicting defendant, after a jury trial, of assault in the third degree, and sentencing him to a term of six months, unanimously affirmed.

The court properly denied defendant's motion to suppress a statement he made to the police before the administration of *Miranda* warnings. The record amply supports the court's finding that defendant was not in custody at the time of the statement (*see People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). Defendant voluntarily accompanied the police to the precinct, he was not handcuffed or in any way restrained at the time he made the challenged statement, and he had been explicitly told that he was not under arrest (*see e.g. People v Andrango*, 106 AD3d 461 [1st Dept 2013], *lv denied* 21 NY3d 1040 [2013];

People v Colon, 54 AD3d 621, 622 [1st Dept 2008], *lv denied* 11 NY3d 923 [2009]). In any event, the record also supports the court's finding that the challenged statement was a spontaneous, freely volunteered utterance that was unprompted by any police interrogation or the functional equivalent thereof (*see People v Rivers*, 56 NY2d 476 [1982]).

Defendant's challenges to the prosecutor's opening statement and summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4846-
4846A-
4846B

Index 150350/12

Duane Reaves,
Plaintiff-Respondent,

-against-

Lakota Construction Group, Inc.,
Defendant-Respondent-Appellant,

J.B.H., L.L.C., et al.,
Defendants,

214-217 Northern Boulevard, LLC, et al.,
Defendants-Appellants.

_____

O'Connor O'Connor Hintz & Deveney, LLP, Melville (Eileen M. Baumgartner of counsel), for 214-27 Northern Boulevard, LLC, appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Bergon Construction Corp., appellant.

Mauro Lilling Naparty, LLP, Woodbury (Gregory S. Cascino of counsel), for Lakota Construction Group Inc., respondent-appellant.

Michelle S. Russo PC, Port Washington (Michelle S. Russo of counsel), for Duane Reade, respondent.

_____

Orders, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 15, 2016, which denied defendants 214-27 Northern Boulevard, LLC, Bergon Construction Corp., and Lakota Construction Group, Inc.'s respective motions for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

Plaintiff commenced this action to recover for personal injuries he allegedly sustained when he tripped over construction materials at his place of employment as it was undergoing renovations. Supreme Court properly concluded that defendant 214-27 Northern Boulevard, LLC, the lessee of the premises failed to demonstrate as a matter of law that it was an alter ego of plaintiff's employer and therefore shielded from tort liability by the exclusive remedy of Workers' Compensation Law §§ 11 and 29(6). While there was overlap in the ownership and management of 214-27 Northern Boulevard and plaintiff's employer, 214-27 Northern Boulevard was separately incorporated for the purpose of leasing the premises, maintained a separate corporate address, and maintained a separate bank account from which it paid for the renovations to the premises. An understanding of the financial relationship between the two is not clear from the record (*see Henderson v Gyrodyne Co. of Am., Inc.*, 123 AD3d 1091, 1092 [2d Dept 2013]; *Ocana v Quasar Realty Partners L.P.*, 137 AD3d 566 [2016], *lv dismissed* 27 NY3d 1078 [2016]; *Amill v Lawrence Ruben Co., Inc.*, 100 AD3d 458, 459 [1st Dept 2012]).

Issues of fact exist regarding whether defendant Lakota Construction Group, Inc., the carpentry contractor, created or contributed to the dangerous condition that caused plaintiff's accident by failing to tape down the Masonite on which he

tripped, cordon off the construction area, or ensure that the construction area near where employees passed remained properly illuminated (*Mizell v Bright Servs., Inc.*, 38 AD3d 267 [1st Dept 2007]). With regard to construction manager Bergon Construction Corp., because there was no written agreement regarding the work, the scope of its involvement was unclear, and thus issues of fact exist regarding whether it created or contributed to the dangerous condition that caused the accident. In particular, it was uncontested that Bergon directed Lakota where to store the panels that plaintiff apparently tripped over.

Moreover, Lakota and Bergon failed to establish that plaintiff was the sole proximate cause of his accident as a matter of law. It was not unforeseeable that with his exit out the rear door blocked, he would attempt to traverse the construction area to the side door, and his decision to do so in the dark presents an issue of comparative negligence (*see Mizell*,

38 AD3d 267 [even where garbage bags blocking exit were readily visible, plaintiff's effort to step over them to reach only exit raises issue of comparative negligence]).

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4848 The People of the State of New York, Respondent, Ind. 2669/11

-against-

Elvio Feola, Defendant-Appellant.

_____

David K. Bertan, Bronx, for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered November 22, 2013, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 18 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence, and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. There was ample evidence to support the inference that defendant shot the victim, and was not merely present. The evidence showed that defendant punched the victim, who was fighting with an acquaintance of defendant, that the victim was then shot on his

right side, consistent with where defendant would have been standing if he fired the shot, that the victim's then-girlfriend shouted that defendant had shot the victim, that defendant then handed a revolver to a friend at the scene, and that his DNA was found on the weapon, whereas the DNA of other bystanders, including the man initially charged with the shooting, was not.

The testimony and descriptions in the relevant documents regarding the three DNA swabs, based on the area of the revolver swabbed, the voucher number, and the Evidence Unit number, sufficed to establish a chain of custody, and provided reasonable assurances as to the identity and unchanged condition of that evidence, notwithstanding the unavoidable destruction of the packaging for the swabs by the time of trial (*see People v Julian*, 41 NY2d 340, 342-343 [1977]; *see also People v Hawkins*, 11 NY3d 484, 494 [2008]).

The portions of the prosecutor's summation that defendant challenges as alluding to facts not proven at trial were fair comments on the evidence and reasonable inferences to be drawn therefrom, and they did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Defendant's remaining challenges to the summation are unpreserved, and we

decline to review those claims in the interest of justice. As an alternative holding, we likewise find no basis for reversal. To the extent that there were any improprieties, they did not deprive defendant of a fair trial.

Defendant waived his claim that the court should have conducted individual inquiries of the jurors regarding the possible effect of news accounts of an assault that, like the case on trial, involved motorcyclists, but was otherwise unrelated. Defense counsel declined the court's offer to conduct individual inquiries, and instead approved of the court's jury instruction on this subject, which was sufficient to avoid any prejudice.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 31, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4849 The People of the State of New York, Respondent, Ind. 3292/10

-against-

Oscar Perez, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered December 16, 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 31, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Moulton, JJ.

5009 Howard Wexler, Index 151058/14
Plaintiff-Respondent,

-against-

Ogden Cap Properties, LLC,
et al.,
Defendants-Appellants.

_____

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellants.

Morelli Law Firm PLLC, New York (Adam Deutsch of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered January 13, 2017, which denied defendants' 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.

Defendants established their prima facie entitlement to judgment as a matter of law by submitting climatological records and a meteorologist's affidavit showing that there was a winter storm in progress at the time that plaintiff slipped and fell on ice on the sidewalk in front of defendants' building (*see Levene v No. 2 W. 67th St., Inc.*, 126 AD3d 541, 542 [1st Dept 2015]).

In opposition, plaintiff failed to raise a triable issue of fact. Although plaintiff testified that there was no

precipitation at the time of his fall, even if there was a lull in the storm around the time of plaintiff's fall, this does not establish that defendants had a reasonable time to correct the ice-related conditions (*see Krutz v Betz Funeral Home*, 236 AD2d 704, 705 [3d Dept 1997], *lv denied* 90 NY2d 803 [1997]). Plaintiff's testimony that he did not notice anything on the sidewalk, that he did not know how long the ice had been on the sidewalk, and that he saw the ice for the first time when he fell was insufficient to raise an issue of fact (*see Santiago v New York City Hous. Auth.*, 150 AD3d 545, 546 [1st Dept 2017]).

The facts in this case are distinguishable from those in *Pipero v NY City Tr. Auth.* (69 AD3d 493 [1st Dept 2010]), upon which the trial court relied. Here, defendants' expert's very detailed testimony demonstrated that there was no significant lull in the freezing rain falling that morning during the relevant half hour period. Moreover, there was no showing that

the staff of plaintiff's building negligently performed snow and ice removal.

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

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

ENTERED: OCTOBER 31, 2017

CLERK

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

3610-
3611-
3612 380976/07

Bank of America, National Association,
Plaintiff-Appellant,

-against-

Sarah Brannon,
Defendant-Respondent.

- - - - -

[And Other Actions]

_____

Fein, Such & Crane, LLP, Syracuse (John A. Cirando of counsel), for appellant.

Sarah Brannon, respondent pro se.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered March 17, 2015, reversed, on the law, without costs, plaintiff's motion for summary judgment and an order of reference granted, and the matter remanded for appointment of a referee, to compute and ascertain the amount due plaintiff on the subject mortgage. Appeals from orders, same court and Justice, entered September 18, 2014 and December 24, 2014, dismissed, without costs, as academic.

Opinion by Andrias, J. All concur except Gesmer, J. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Rosalyn H. Richter
Richard T. Andrias
Marcy L. Kahn
Ellen Gesmer, JJ.

3610-3611-3612N
Index 380976/07

_____x

Bank of America, National Association,
Plaintiff-Appellant,

-against-

Sarah Brannon,
Defendant-Respondent.
- - - - -
[And Other Actions]

_____x

Plaintiff appeals from the order of the Supreme Court, Bronx County (Mark Friedlander, J.), entered March 17, 2015, which, to the extent appealed from as limited by the briefs, denied its motion for summary judgment and an order of reference, and from the orders of the same court and Justice, entered September 18, 2014 and December 24, 2014, which denied its motions for summary judgment and related relief.

Fein, Such & Crane, LLP, Syracuse (John A. Cirando, D.J. Cirando, Bradley E. Keem and Elizabeth deV. Moeller of counsel), for appellant.

Sarah Brannon, respondent pro se.

ANDRIAS, J.

On January 18, 2007, defendant Sarah Brannon obtained a $360,000 loan from GE Money Bank (GE), secured by a mortgage on her home in the Bronx. GE indorsed the mortgage note in blank, making it a bearer instrument.

On September 17, 2007, plaintiff's agent, Litton Loan Servicing, LP, sent defendant a "Notice of Default and Intent to Accelerate" stating that defendant was in default for failing to pay amounts due and that the total amount needed to bring the loan current was $5,482.40 as of that date. On November 14, 2007, plaintiff commenced this foreclosure action alleging that defendant defaulted by failing to make the payment due on August 1, 2007. The mortgage was assigned to plaintiff by assignment dated November 29, 2007. In her answer, defendant, pro se, admitted that as of the date of the complaint she owed plaintiff $359,809.63 with interest from July 1, 2007 and did not raise any affirmative defenses.

In March 2008, plaintiff moved for summary judgment, supported, inter alia, by an affidavit of Denise Bailey, Assistant Secretary of Litton, and an Affidavit of Merit and Amount due of Diane Dixon, Assistant Vice President of Litton. In opposition, defendant asserted that she had been in contact

with Litton regarding a loan modification and was awaiting a complete review. She did not dispute her default.

By order dated April 24, 2008, plaintiff was granted summary judgment and a referee was appointed to compute the amount due. On November 2, 2009, plaintiff assigned the mortgage to IFS Properties, LLC. On February 16, 2011, a settlement conference was held and the matter was released to the Foreclosure Part.

In April 2014, plaintiff, by new counsel, moved to vacate the April 24, 2008 order because the Bailey and Dixon affidavits may not have been correctly notarized under New York law, and counsel could not comply with the requirements of Administrative Orders 548/10 and 431/11 of the Chief Administrative Judge of the Courts. Plaintiff also moved for summary judgment anew, based upon an affidavit, sworn to April 18, 2014, of Matthew Mattera, a managing member of IFS, and an affirmation of counsel certifying the accuracy of Mattera's affidavit. In opposition, defendant asserted that Mattera could not affirm the relevant facts because he was an employee of IFS, not plaintiff, and his affidavit did not describe the records upon which he relied. Defendant also asserted that she had no notice of the assignment to IFS.

By order dated September 15, 2014, the court granted plaintiff's motion to vacate the April 29, 2008 order. However,

the court denied summary judgment on the ground that the defects in the affidavits in support of the original summary judgment motion were not mistakes, omissions or mere irregularities that could be cured by a new affidavit.

In November 2014, plaintiff again moved for summary judgment based on an affidavit of Mattera dated November 3, 2014. In opposition, defendant questioned the validity of the assignment of the loan by plaintiff to IFS and complained that IFS had not given her the opportunity to get a loan modification. Defendant no longer alleged that Mattera failed to establish that he could affirm the facts necessary to establish her default. By order dated December 22, 2014, the court denied plaintiff's motion for the reasons stated in its September 15, 2014 order.

In February 2015, plaintiff moved for summary judgment for a third time. In support, plaintiff submitted the indorsed in blank note, the mortgage, and the default notice. Plaintiff also submitted an affidavit of Mattera dated January 31, 2015 and an affirmation of counsel asserting that plaintiff had demonstrated a prima facie case for foreclosure and that defendant had failed to plead any affirmative defenses.

In opposition, defendant alleged that she was not properly notified that the note had been transferred to IFS and that she

was improperly served with the motion. Defendant did not challenge the sufficiency of Mattera's affidavit or refute his allegations concerning her default. Plaintiff's counsel replied that the mortgage did not require notice of a sale or transfer be given to defendant; that defendant had waived the defense of standing when she failed to raise it in her answer; that, in any case, plaintiff had standing because it was the holder of the indorsed-in-blank note when the action was commenced; and that defendant was properly served.

By order dated March 10, 2015, the court denied the motion, stating that it did not believe that plaintiff understood that an action initiated on the basis of a false affidavit suffers from a fatal defect, which cannot be overcome with a subsequent affidavit. The court also stated that even if the error could be corrected in a new affidavit, the January 31, 2015 affidavit of Mattera was defective because it failed to indicate the state or county where the notarization took place.

We now reverse to grant plaintiff's third motion for summary judgment. The failings in the supporting affidavits to the original motion for summary judgment only affected the ability of the court to grant that motion, not the viability of the action as a whole. The substitution, nunc pro tunc, of newly-signed

affidavits of merit in a mortgage foreclosure action, provided in an effort to bring a plaintiff in compliance with Administrative Order 431/11, is permitted (*see U.S. Bank N.A. v Eaddy*, 109 AD3d 908 [2d Dept 2013]).

Furthermore, under the circumstances before us, the flaws in the notarization of Mattera's affidavit are not fatal to plaintiff's summary judgment motion (*see Matter of Cubisino v Cohen*, 47 NYS2d 952, 953-954 [Sup Ct, NY County 1944], *affd* 267 App Div 891 [1st Dept 1944]; *Fisher v Bloomberg*, 74 App Div 368, 369 [1st Dept 1902]; *see also Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 434 [1st Dept 2010]; *Todd v Green*, 122 AD3d 831, 832 [2d Dept 2014]). Pursuant to CPLR 2101(f) the court can disregard a defect in the Uniform Certificate of Acknowledgment unless a defendant has demonstrated that a substantial right of hers has been prejudiced. As no prejudice has been shown by defendant, the alleged defect should have been disregarded (*see Bank of N.Y. Mellon v Vytalingam*, 144 AD3d 1070 [2d Dept 2016]; *see also* Executive Law § 142-a[2][f] [official certificate of notary public shall not be deemed invalid due to "the fact that the action was taken outside the jurisdiction where the notary public or commissioner of deeds was authorized to act"]).

Plaintiff established standing by virtue of its possession

of the indorsed-in-blank note at the commencement of this action (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). It demonstrated its prima facie entitlement to judgment as a matter of law by providing evidence of the note and mortgage, and proof of defendant's default (*see Horizons Invs. Corp. v Brecevich*, 104 AD3d 475 [1st Dept 2013]). This included Mattera's affidavit of facts and defendant's answer in which she admitted that as of the date of the complaint she owed plaintiff $359,809.63 with interest from July 1, 2007, and denied knowledge or information sufficient to form a belief as to plaintiff's allegations that she "has/have failed to comply with the conditions of the mortgage and note by failing to pay principal and interest and/or taxes, assessments, water rates, insurance premiums, escrow and/or other charges that came due and payable on the 1st day of August 2007 . . . ."

In opposition, defendant failed to provide evidence sufficient to raise an issue of fact as to an available defense. "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]). Defendant did not deny receiving the notice of default or that she had defaulted in her obligations under the note and mortgage. Defendant also

waived any standing defense, or defense based on plaintiff's alleged failure to comply with a condition precedent, since she did not raise those defenses in her answer, and did not bring a motion to dismiss the complaint on those grounds (see *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 280-281 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007]; *1199 Hous. Corp. v International Fid. Ins. Co.*, 14 AD3d 383, 384 [1st Dept 2005]). Defendant's mere denial of receipt of service of the motion is insufficient to rebut the presumption of service (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]).

The dissent agrees that the motion court should have granted plaintiff summary judgment on its foreclosure claim based on defendant's answer, in which she admitted the amount she owed plaintiff and waived any challenge to plaintiff's standing. However, the dissent would hold, sua sponte, that plaintiff is not entitled to an order of reference because its counsel could not affirm the facts necessary to satisfy his obligations under Administrative Order 431/11.

Administrative Order 431/11, which amends Administrative Order 548/10, requires the plaintiff's counsel in a residential mortgage foreclosure action to file an affirmation confirming that he or she communicated with a representative of the

plaintiff who confirmed the factual accuracy of the plaintiff's pleadings, supporting documentation and submissions to the court (*see Wells Fargo Bank, N.A. v. Pabon*, 138 AD3d 1217, 1217-1218 [3d Dept 2016]). "The order incorporated two forms for this purpose—an affirmation to be filed by the plaintiff's counsel ('shall file'), and an affidavit to be filed by the plaintiff's representative ('may file')" (*Bank of N.Y. Mellon v Izmirligil*, 144 AD3d 1063, 1065 [2d Dept 2016]).

To fulfill his obligations under Administrative Order 431/11, plaintiff's counsel submitted an affidavit that comported with the form provided in Administrative Order 431/11. Counsel stated that on April 21, 2014 he had communicated with Mattera,

> "who informed me that he/she/they (a) personally reviewed Plaintiff's documents and records relating to this case for factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the Complaint and any supporting affidavits or affirmations filed with the Court, as well as the accuracy of the notarization contained in the supporting documents filed therewith."

Counsel further stated:

> "Based upon my communication with Matthew Mattera as well as upon my own inspection and other reasonable inquiry under the circumstances, I affirm that, to the best of my knowledge, information, and belief, the Summons, Complaint, and other papers filed or submitted to this Court in this matter contain no false statements of fact or law. I understand my continuing obligation to amend this [a]ffirmation in light of

newly discovered material facts following its filing."

The dissent finds this affidavit deficient, stating that "because Mattera's affidavits do not establish a complete review of, or the indicia of reliability necessary to lay a business records foundation for, the records pre-dating IFS's acquisition of defendant's mortgage, counsel may not rely upon alleged communications with Mattera to comply with the requirements of the Administrative Order." However, defendant, who has continued to reside on the premises for the last 10 years without paying her mortgage, did not dispute her default or challenge the accuracy or sufficiency of Mattera's affidavit on the third summary judgment motion.

Furthermore, CLPR 4518(a) does not require a person to have personal knowledge of each of the facts asserted in the affidavit of merit put before the court as evidence of a defendant's default in payment (*see Citigroup v Kopelowitz,* 147 AD3d 1014, 1015 [2d Dept 2017] ["There is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon"]; *Citibank, NA v Abrams*, 144 AD3d 1212 [3d Dept

2016]). Thus, in seeking to enforce a loan, an assignee of an original lender or intermediary predecessor may use an original loan file prepared by its assignor, when it relies upon those records in the regular course of its business (*see Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418 [1st Dept 2012]; *see also State of New York v 158th St. & Riverside Dr. Hous. Co., Inc.*, 100 AD3d 1293, 1296 [3d Dept 2012], *lv denied* 20 NY3d 858 [2013] [records admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business"]).

Here, Mattera, a representative of IFS, which has held the note and mortgage since November 2009, satisfied these standards, stating that

> "I make this affidavit with personal knowledge of the facts and circumstances herein which are derived from personal knowledge and/or an independent examination of the financial books and business records made in the ordinary course of business maintained by or on behalf of Plaintiff to be an accurate and fair representation of the occurrences with which the record purports to represent as well as business records relative to the within litigation. I am familiar with the record keeping systems that Plaintiff and/or its loan servicer uses to

record and create information related to the residential mortgage loans that it services, including the processes by which Plaintiff and/or its loan servicer obtains the loan information in those systems. While many of those processes are automated, where the employees of the Plaintiff and/or its servicer manually enter data relating to loans on those systems, they have personal knowledge of that information and enter it into the system at or near the time they acquired that knowledge. The records relied upon are made in the regular course of business made at or about the time the event is being recorded, systematically made for the conduct of business and are relied upon as the accurate routine reflections of the day-to-day regularly conducted business activity and so they may be relied upon as being truthful and accurate. In connection with making this affidavit, I have personally examined these business records reflecting data and information as of January 31, 2015. . . .

* * *

"I have also reviewed Plaintiffs books and records, and the payments of principal and interest made by Defendant(s) to Plaintiff. Any allegation of either full or timely payment after default is simply not substantiated by these records. All notices of default as required in the Note have been sent as prescribed in the Mortgage . . . . All time frames set forth in the notice and /or notices, as required by the Mortgage have elapsed and the Defendant(s) have not taken the necessary action to correct the default and or defaults as specified herein and in the Complaint. . . .

* * *

> "The simple uncontroverted fact is that Defendant, SARAH BRANNON, was loaned and did receive $360,000.00, as is confirmed by the Mortgage and Note. Defendant did not uphold this obligation, to the detriment of Plaintiff. Defendant breached his/her obligations under the Mortgage by failing to successfully tender funds for the August 1, 2007 payment and all successive payments thereafter."

These allegations sufficed to establish plaintiff's default and the basis of Mattera's knowledge. Mattera indicated that he was personally familiar with the recordkeeping systems of IFS and plaintiff and the loan servicer it used, that the records he relied on were made in the regular course of business and that he personally reviewed them on January 31, 2015 (*see JP Morgan Chase Bank, N.A. v Shapiro*, 104 AD3d 411, 412 [1st Dept 2013] ["Plaintiff submitted the affidavit of an employee who identified herself as having personal knowledge of, inter alia, plaintiff's status as successor-in-interest to WAMU and defendant Saadia Shapiro's default. . . . based upon her review of plaintiff's books and records and its account records regarding Shapiro's delinquent account"]; *Deutsche Bank Natl Trust Co. v Naughton*, 137 AD3d 1199, 1200 [2d Dept 2016]). While the dissent finds the affidavit deficient

because Mattera did not state that he was familiar with the records of GE, the Default Notice was sent by Litton, plaintiff's agent, and Mattera stated that he was familiar with the recordkeeping systems that plaintiff and/or its loan servicer used. He also stated that he personally reviewed plaintiff's books and records, and the payments made by defendant.[1]

Accordingly, the order of the Supreme Court, Bronx County (Mark Friedlander, J.), entered March 17, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment and an order of reference, should be reversed, on the law, without costs,

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[1]In any event, where an action was pending on the effective date of Administrative Order 431/11, and no judgment of foreclosure has been entered, the order provides that the affirmation must be filed "at the time of filing either the proposed order of reference or the proposed judgment of foreclosure" (*U.S. Bank N.A. v Polanco*, 126 AD3d 883, 884-885 [2d Dept 2015][internal quotation marks omitted]). Accordingly, even if Mattera's affidavit did not sufficiently set forth the basis for his knowledge, under the circumstances of this case, where defendant's default is not disputed and plaintiff has established its entitlement to summary judgment, the appropriate remedy would be to direct counsel to file a revised affirmation and affidavit pursuant to Administrative Order 431/11 with the proposed order of reference (*see Wilmington Trust Co. v Walker*, 149 AD3d 409 [1st Dept 2017]). This would address the dissent's concerns that the referee have all necessary information relevant to the computations that he or she will have to undertake.

plaintiff's motion granted, and the matter remanded for appointment of a referee, to compute ans ascertain the amount due plaintiff on the subject mortgage. The appeals from the orders of the same court and Justice, entered September 18, 2014 and December 24, 2014, which denied plaintiff's motions for summary judgment and related relief, should be dismissed, without costs, as academic.

All concur except Gesmer, J. who dissents in part in an Opinion.

GESMER, J. (dissenting in part)

I respectfully dissent in part.

In my view, the affidavit that BOA submitted in support of its motion was deficient and failed to comply with Administrative Order 431/11 of the Chief Administrative Judge of the Court. Nonetheless, I agree with the majority that the motion court should have granted BOA summary judgment on its foreclosure claim, since this is the rare case where a foreclosure plaintiff was able to establish its prima facie case without reference to its own affidavit. Instead, BOA could rely solely on defendant's answer, in which she admitted the amount she owed to BOA and waived any challenge to BOA's standing (*see Bank of N. Y. Mellon v Arthur*, 125 AD3d 492, 493 [1st Dept 2015]; *Security Pac. Nat. Bank v Evans*, 31 AD3d 278, 281 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007]).

However, since the deficiencies in the affidavit submitted by BOA are substantial, I believe that we should follow the approach taken by our colleagues in the Second Department and hold that BOA was not entitled to an order of reference because the affidavit it submitted failed to establish that the affiant could affirm the facts necessary

to satisfy BOA's and its counsel's obligations under Administrative Order 431/11 (*Bank of N.Y. Mellon v Izmirligil*, 144 AD3d 1063, 1065 [2d Dept 2016]). This result is necessary to accomplish the purposes which that Administrative Order was intended to achieve.

In October 2010, Chief Judge Jonathan Lippman instituted a rule requiring plaintiffs in foreclosure actions to certify the accuracy of the documents they present to the court. This requirement, embodied in Administrative Order 548/10, later amended by Administrative Order 431/11, was intended to prevent the practice of "robo-signing"(2014 Report of the Chief Administrator of the Courts, available at https://www.nycourts.gov/publications/pdfs/2014-Foreclosure-Report-ofthe-CAJ.pdf, at 5-6 [accessed September 14, 2017]). "Robo-signing" refers to "the robotic affixation of signatures on key papers in the case by those with no first-hand knowledge of the information contained in the papers they're signing" (252 Siegel's Practice Review 2 [Dec. 2012]).

Specifically, the Administrative Order requires counsel for a foreclosure plaintiff to file an affirmation

confirming that he or she communicated with a representative of the plaintiff who personally reviewed the plaintiff's books and records, personally reviewed the summons, complaint and other submissions in the case, and confirmed the factual accuracy of the plaintiff's submissions as well as the accuracy of the notarization of those submissions (Administrative Order of the Chief Administrative Judge of the Courts, available at https://www.nycourts.gov/attorneys/pdfs/AdminOrder_2010_10_20.pdfat Exhibit A [accessed August 28, 2017] [Administrative Order]; *see also Izmirligil*, 144 AD3d at 1065; *Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 521 n 1 [1st Dept 2016]). The Administrative Order prescribes the required form of the attorney affirmation and a sample affidavit of merit that may be used by the representative of the plaintiff (Administrative Order, Forms A and B). For cases pending at the time of the order's effective date, where no judgment of foreclosure has been entered, this affirmation must be filed "at the time of filing either the proposed order of reference or the proposed judgment of foreclosure" (*Izmirligil*, 144 AD3d at 1065 [internal quotation marks

omitted]).[1]

Our colleagues in the Second Department have refused to issue an order of reference and judgment of foreclosure and sale, when the plaintiff failed to submit the required affirmation (*see Bank of N.Y. Mellon v Izmirligil*, 144 AD3d 1067, 1070 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Hudson*, 98 AD3d 576, 577-578 [2d Dept 2012]), or submitted an affirmation which was not "in compliance" with the Administrative Order (*see Downey Sav. Loan Assn., F.A. v Trujillo,* 142 AD3d 1040, 1042 [2d Dept 2016]), even where the application was otherwise sufficient.

I submit that this is an appropriate case to follow the Second Department. In this case, counsel relies on the affidavit of Matthew Mattera, a "Member" of BOA's successor-in-interest, IFS. Mattera alleges, in each of his affidavits, as follows:

"I make this affidavit with personal

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[1] On August 30, 2013, CPLR 3012-b, which requires that a certificate of merit be filed with the complaint in a mortgage foreclosure action, became effective. On that date, the Chief Administrative Judge of the Court issued Administrative Order 208/13, which directs, as relevant here, that counsel representing a plaintiff in a mortgage foreclosure action commenced prior to August 30, 2013 may comply with either Administrative Order 431/11 or CPLR 3012-b.

> knowledge of the facts and circumstances herein which are derived from personal knowledge and/or an independent examination of the financial books and business records made in the ordinary course of business maintained by or on behalf of Plaintiff to be an accurate and fair representation of the occurrences with which the record purports to represent as well as business records relative to the within litigation. I am familiar with the record keeping systems that Plaintiff and/or its loan servicer uses to record and create information related to the residential mortgage loans that it services, including the processes by which Plaintiff and/or its loan servicer obtains the loan information in those systems. While many of those processes are automated, where the employees of the Plaintiff and/or its servicer manually enter data relating to loans on those systems, they have personal knowledge of that information and enter it into the system at or near the time they acquired that knowledge. The records relied upon are made in the regular course of business made at or about the time the event is being recorded, systematically made for the conduct of business and are relied upon as the accurate routine reflections of the day-to-day regularly conducted business activity and so they may be relied upon as being truthful and accurate. In connection with making this affidavit, I have personally examined these business records . . . .”

Mattera also alleges that he reviewed “[p]laintiff’s books and records” and that “[a]ny allegation of either full or

timely payment after default is simply not substantiated . . . ." In addition, Mattera alleges that defendant breached "his/her obligations" to tender the August 1, 2007 payment and all successive payments. These statements do not comply with the Administrative Order (*see Wells Fargo, N.A. v Jones*, 139 AD3d at 521 n 1).[2]

In fact, Mr. Mattera's affidavit differs in two critical respects from the proposed principal's affidavit in the Administrative Order. First, that affidavit is written as if the affiant were a representative of the plaintiff. However, Mr. Mattera does not claim to have any relationship to plaintiff, BOA; rather, he claims to be a managing member of IFS, plaintiff's assignee.

Second, the proposed affidavit in the Administrative

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[2] The majority notes that defendant did not challenge the sufficiency of Mattera's affidavit in opposition to BOA's third summary judgment motion. However, defendant did raise such a challenge in opposition to BOA's first summary judgment motion. Defendant was a pro se litigant who could not be expected to know that she should have repeated her argument in opposition to each of BOA's successive summary judgment motions. Furthermore, "multiple summary judgment motions in the same action should be discouraged in the absence of newly discovered evidence or sufficient cause" (*Public Serv. Mut. Ins. Co. v Windsor Place Corp.*, 238 AD2d 142, 143 [1st Dept 1997]). Since BOA submitted what was substantively the same summary judgment motion three times over, defendant raised her argument in opposition to the only one of BOA's motions that was properly submitted.

Order assumes that the mortgage has not been transferred, as demonstrated by this alternative language: "Inasmuch as the underlying mortgage loan has been transferred prior to commencement or during the pendency of this action, I am unable to confirm or deny that the underlying documents filed with the Court have been properly reviewed or notarized by the prior servicer" (Administrative Order 431/11 Form B). In contrast, although Mr. Mattera acknowledges that the mortgage has been transferred, he does not explain his source of knowledge about the records maintained by plaintiff and its predecessor, GE Money Bank (GE), which was the original lender and mortgagee, and remained the mortgagee until after the date of defendant's default. Mr. Mattera does not claim to have reviewed the records of GE or to be familiar with GE's record-keeping practices. Instead, Mr. Mattera's affidavits only refer to his alleged review of the records of "plaintiff," i.e., BOA. Indeed, while the majority highlights that "in seeking to enforce a loan, an assignee of an original lender or intermediary predecessor may use an original loan file prepared by its assignor," there is no indication in the record that Mr. Mattera reviewed GE's original loan file

(*see Jones* 139 AD3d at 521-522).

Mattera has also failed to allege facts sufficient to establish a business records foundation under CPLR 4518(a) for the records of BOA, and its loan servicer, Litton, which he claims to have reviewed. Mattera is a member of IFS, which was assigned the mortgage on November 2, 2009. Mattera has not explained how he acquired personal knowledge of the record-keeping practices of BOA, or its loan servicer (*see Jones* at 521-522). Furthermore, Mattera does not provide the court with any assurances that the unidentified employees to whom he refers actually followed the practices he describes. Accordingly, Mattera's affidavits are bereft of the "'indicia of reliability'" necessary for a representative of one entity to lay a business records foundation for the records of another entity (*see Jones*, 139 AD3d at 521, quoting *One Step Up, Ltd., v Webster Bus. Credit Corp.*, 87 AD3d 1, 11 [1st Dept 2011]; *see also People v Cratsley*, 86 NY2d 81, 90 [1995]).[3] Since Mattera cannot

[3] Mattera also cannot rely on the Bailey and Dixon affidavits for any of this information, both because BOA has conceded their impropriety, and because documents prepared in connection with litigation do not qualify for the business records exception to the rule against hearsay (*Jones*, 139 AD3d at 522).

lay a business records foundation for the records of BOA or Litton that he claims to have reviewed, this Court "cannot rely on any statements in the [Mattera affidavits] concerning events before the date of [IFS's] acquisition of the mortgage" (*Jones*, 139 AD3d at 522).

Indeed, Mr. Mattera's lack of knowledge of events before 2009 is underscored by the discrepancy between his statement in the first of his three affidavits that BSI Financial was the loan servicer from the inception of the loan, and the 2007 notice of default in which Litton Loan Servicing claims to be the loan servicer.

The majority cites a number of cases in an effort to suggest that Mattera can lay a business records foundation for the records pre-dating IFS's acquisition of the mortgage. However, in the majority's cases, the witness was able to provide the court with the necessary "indicia of reliability" that Mattera's affidavits lack (*id.* at 521 [internal quotation marks omitted]).

In each of *Citibank, NA v Abrams* (144 AD3d 1212, 1216 [3d Dept 2016]) and *Deutsche Bank Natl. Trust Co. v Naughton* (137 AD3d 1199, 1200 [2d Dept 2016]), the foreclosure plaintiff's agent was found to have sufficient knowledge of

the plaintiff's record-keeping procedure to provide the "indicia of reliability" necessary to lay a proper business records foundation. Here, Mattera is a member of IFS which is merely BOA's successor-in-interest; he has not claimed that IFS has any agency relationship with GE, BOA, or BOA's agent, Litton.

In *State of New York v 158th St. & Riverside Dr. Hous. Co., Inc.* (100 AD3d 1293, 1296 [3d Dept 2012], *lv denied* 20 NY3d 858 [2013]), a representative of the Department of Environmental Conservation (DEC) laid a proper business records foundation for the records of an outside contractor when, inter alia, the records were generated at the DEC's direction and the DEC was the records' primary custodian. Mattera's affidavits lack any comparable factual details or indicia of reliability.

In *Landmark Capital Invs., Inc. v Li-Shan Wang* (94 AD3d 418, 419 [1st Dept 2012]), the foreclosure plaintiff relied upon an original loan file prepared by its assignor, a record that the plaintiff "[r]elied on . . . in its regular course of business." In this case, Mattera does not allege that IFS has incorporated BOA's records into its own records, or that IFS relies upon the records of BOA in the

regular course of its own business or that he relied on or reviewed GE's records.[4]

Accordingly, because Mattera's affidavits do not establish a complete review of, or the indicia of reliability necessary to lay a business records foundation for, the records predating IFS's acquisition of defendant's mortgage, counsel may not rely upon alleged communications with Mattera to comply with the requirements of the Administrative Order.

Moreover, the accuracy of BOA's records remains relevant to the computations that a referee will have to undertake in this case. Denying an order of reference at this juncture, in order to ensure the accuracy of the records upon which those computations will be based, is our obligation under the Administrative Order.

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[4] *JP Morgan Chase Bank, N.A. v Shapiro* (104 AD3d 411 [1st Dept 2013]), also cited by the majority, does not address the issue of whether Mattera can lay a business records foundation for the records of BOA, because that case involved an affidavit by an employee of a foreclosure plaintiff, which stated that she reviewed the foreclosure plaintiff's books and records. The majority's reliance on *Citigroup v Kopelowitz* (147 AD3d 1014 [2d Dept 2017]) is similarly misplaced, since that case involved an affidavit from an employee of the plaintiff's loan servicer, who attested to reviewing records kept in the regular course of the loan servicer's business.

For all these reasons, I would follow the procedure prescribed by our colleagues in the Second Department and deny BOA's application for an order of reference (*Izmirligil*, 144 AD3d at 1070; *Trujillo*, 142 AD3d at 1042; *Hudson*, 98 AD3d at 577-578).

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

ENTERED: OCTOBER 31, 2017

CLERK