SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 21, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

4987- Ind. 3090/12
4987A The People of the State of New York,
Respondent,

-against-

Jason Teneyck,
Defendant-Appellant.

_____

Richard M. Weinstein, New York, for appellant.

Jason Teneyck, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 30, 2013, as amended October 16, 2013, convicting defendant, after a jury trial, of conspiracy in the fourth degree, criminal sale of a firearm in the second degree, criminal sale of a firearm in the third degree (seven counts), criminal possession of a weapon in the second degree (seven counts), attempted criminal possession of a weapon in the second degree and attempted criminal sale of a firearm in the

third degree, and sentencing him to an aggregate term of 31⅓ years, and order, same court and Justice, entered on or about October 26, 2016, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The verdict, which rejected defendant's entrapment defense, was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. In any event, defendant's testimony, even if credited, did not establish that anyone acting in cooperation with a public servant induced defendant to engage in conduct he was not predisposed to commit, rather than merely taking an opportunity offered to him (*see People v Blunt*, 110 AD3d 635, 636 [1st Dept 2013], *lv denied* 22 NY3d 1087 [2014]).

Defendant's contention that the court improperly modified its *Sandoval* ruling shortly before defendant began to testify is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing (*see e.g. People v Ramos*, 255 AD2d 203 [1st Dept 1998], *lv denied* 93 NY2d 856 [1999]).

Any impropriety in the sole argument in the prosecutor's summation challenged on appeal was not so egregious or pervasive

as to warrant reversal (*see People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). In any event, any error concerning the modified *Sandoval* ruling or the prosecutor's summation was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court providently exercised its discretion in denying defendant's motion to vacate the judgment on the ground of newly discovered evidence. The court reasonably found that a codefendant's posttrial affidavit did not constitute newly discovered evidence within the meaning of CPL 440.10(1)(g), because the codefendant's account of his meetings and arrangements with defendant to sell firearms were already known to defendant (*see People v Taylor*, 246 AD2d 410 [1st Dept 1998], *lv denied* 91 NY2d 978 [1998]). It is of no moment that defendant was purportedly unaware of the codefendant's status as a confidential informant for the police at the time of the incidents, since the defense was aware of this fact throughout trial. Furthermore, the codefendant's allegation that he intended to instill fear in defendant by displaying a weapon had less probative value than defendant's testimony about his subjective reaction to seeing the weapon, and the affidavit was otherwise largely cumulative to defendant's testimony and other

trial evidence. Thus, the court properly found that there was no probability that the information in the affidavit would have caused the verdict to be more favorable to defendant, even assuming that the codefendant would have been called to testify about that information notwithstanding his assertion of the Fifth Amendment privilege against self-incrimination at trial (*see id.*).

We perceive no basis for reducing the sentence, which, we note, is capped at 20 years by operation of law.

We have considered and rejected defendant's pro se claims.

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

4988 Richard Kallop, et al., Index 26628/16
Plaintiffs-Respondents,

-against-

Board of Directors for Edgewater Park Owners' Cooperative Inc., et al.,
Defendants-Appellants,

PHH Mortgage, etc.,
Defendant.

_____

Brian R. Hoch, White Plains, for appellants.

Jacqueline M.H. Bukowski, New York, for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about January 12, 2017, which, after a hearing, granted plaintiffs' order to show cause, and compelled defendants to permit the sale of a cooperative apartment to plaintiffs, unanimously affirmed, without costs.

Plaintiffs' application to purchase a unit in defendants' cooperative residential complex was approved by defendant Board of Directors, and then rescinded two weeks later, based upon a Board member's erroneous report that plaintiff Richard Kallop told her he did not intend to reside in the complex, as required by the purchase contract. Plaintiffs filed a complaint seeking,

inter alia, to compel defendants to permit the sale to go forward. After defendants filed their answer, plaintiffs, by order to show cause, sought an order permitting the sale to close. An evidentiary hearing was held, at which the reporting Board member's testimony revealed that Richard Kallop had not, as she claimed, informed her he intended to reside outside the cooperative complex. For his part, Richard testified that it had always been his plan to reside in the cooperative unit with his elderly mother, co-plaintiff Joan Kallop.

Under these facts, we conclude that defendants' decision to rescind its approval of plaintiffs' purchase application, being without any basis in reason and without regard to the facts, was wholly arbitrary, and thus not entitled to the protections generally provided to cooperative boards by the business judgment rule (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 48 [1st Dept 2012]).

Having reviewed the record, we conclude that, in these unique circumstances, Supreme Court properly afforded relief sought in the complaint. Supreme Court conducted a full evidentiary hearing which revealed the absence of any disputed material facts, and which established that in the absence of relief, it was highly likely that plaintiffs would suffer irreparable harm (*cf. Olympic Tower Condominium v Cocoziello*, 306

AD2d 159, 160 [1st Dept 2003]). Having been approved by the Board to purchase the co-op unit, plaintiffs gave notice of an intention to vacate their rented home, which then went into contract with a third party. Having nowhere to go when the Board rescinded its approval, plaintiffs failed to vacate, and a holdover proceeding was commenced against them, the outcome of which was unclear at the time of the hearing. Moreover, plaintiff Joan Kallop is in poor health, and the uncertainty of her living situation had led to further illness, including severe depression.

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

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

4989 In re Malachi B.,

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

Windell B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Bruce A. Young, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondent.

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

_____

Order of fact-finding, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about December 23, 2016, which determined, after a hearing, that respondent father had neglected the subject child, unanimously affirmed, without costs.

Family Court erred in making a finding of neglect based on abandonment (*see* Family Ct Act § 1012[f][ii]), because the petition as filed did not allege abandonment and the petition was never properly amended to include that allegation (*see also Matter of Vallery P. [Jondalla P.]*, 106 AD3d 575, 575 [1st Dept 2013]). Sufficient proof, however, was presented to sustain the

original petition without considering the new allegations of abandonment (*see Matter of Aiden XX. [Jesse XX.]*, 104 AD3d 1094, 1096 [3d Dept 2013]; *see also Matter of Tia B.*, 257 AD2d 366 [1st Dept 1999]). The father repeatedly indicated a desire to have no contact with the child, failed to visit the child, and failed to plan for the child's care (*see Matter of Kimberly F. [Maria F.]*, 146 AD3d 562, 563 [1st Dept 2017], *lv denied* 29 NY3d 902 [2017]). The father also had no permanent home and failed to provide proof of any verifiable income. The father's abdication of his parental obligations, including his failure to plan for the child's needs, placed the child at imminent risk of harm, which is sufficient grounds for a finding of neglect (*see* Family Ct Act § 1012[f][I]; *Kimberly F.*, 146 AD3d at 563).

The father's failure to testify or offer evidence to contest the allegations of neglect permitted the drawing of the strongest inference against him that the opposing evidence in the record permitted (*see Matter of Rachel S.D. [Luis N.]*, 113 AD3d 450 [1st Dept 2014]).

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

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

4990 Alta Capital Partners International LLC, et al., Plaintiffs-Respondents, Index 656550/16

-against-

Parsons Capital LLC, et al., Defendants-Appellants.

_____

Robins Kaplan LLP, New York (Frederick A. Braunstein of counsel), for appellants.

Law Office of Edward J. Boyle, Manhasset (Edward J. Boyle of counsel), for respondents.

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Order, Supreme Court, New York County (David Benjamin Cohen, J.), entered June 9, 2017, which, to the extent appealed from, denied defendants' motion to dismiss plaintiffs' first cause of action for breach of contract, seeking a $200,000 "success fee," unanimously reversed, on the law, without costs, and the motion granted.

Because the language of the parties' engagement agreement did not grant, let alone unequivocally express an intent to grant, plaintiffs an exclusive right to purchase on defendants' behalf, plaintiffs were not entitled to a success fee. The engagement agreement, dated May 25, 2016, provided,

> "Parsons ... ("Buyer") ... engages [plaintiffs] (together, "Advisor") commencing as of the date hereof,

> to act as its exclusive financial advisor (other than for a NASDAQ-listed services company and an NYSE-listed basic materials company that Buyer is already pursuing) for investment banking services, including all types of mergers, acquisitions, ... and other business combinations."

In *Morpheus*, the Court of Appeals held that "a contract giving rise to an exclusive right of sale must clearly and expressly provide that a commission is due upon sale by the owner or exclude the owner from independently negotiating a sale." (*Morpheus Capital Advisors LLC v UBS AG*, 23 NY3d 528, 535 (2014)). This reasoning also applies in the investment banking context (*id.* at 536).

Nothing in the engagement agreement "clearly and expressly" precluded defendants from closing on a transaction they found on their own (*see id.*; *Miron Props., LLC v Eberli*, 126 AD3d 479, 479 [1st Dept 2015], *lv denied* 26 NY3d 911 [2015] [applying *Morpheus* to affirm the motion court's determination that a plaintiff who had been engaged by a purchaser was not entitled to a commission where the "brokerage agreement did not clearly provide plaintiff with the exclusive right to deal on defendant's behalf, and plaintiff did nothing to procure the transaction or even bring the property to the purchaser's attention"]). Accordingly, as it is undisputed that plaintiffs did not work on the Lightbridge

transaction, the motion court's order denying defendants' motion to dismiss plaintiffs' cause of action for breach of contract was in error.

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

4991-
4992 Ivan Ciment,
Plaintiff-Respondent,

-against-

Spantran, Inc., et al.,
Defendants-Appellants.

Index 655680/16

Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (Loretta Gastwirth of counsel), for appellants.

Zukerman Gore Brandeis & Crossman, LLP, New York (Ted Poretz of counsel) for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 10, 2017, and an order, same court and Justice, entered April 20, 2017, which, respectively, granted plaintiff's motion for a preliminary injunction and temporary restraining order preventing defendants from taking certain corporate governance actions pending a hearing, and denied defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

This action for declaratory judgment turns on the applicability of the shareholders agreement of nonparty Tekademic, Inc., now known as Morningside Translations, Inc., to the defendants. Plaintiff sufficiently alleged that defendants

are subject to the shareholders agreement, and the documentary evidence does not conclusively establish otherwise.

Moreover, plaintiff made a prima facie showing of a reasonable probability of success on the merits of his declaratory judgment claim. That the facts are in dispute is not conclusive (*Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016]). Plaintiff also established that he will suffer irreparable harm absent injunctive relief, and that the balance of the equities weigh in his favor (*id.* at 432). Defendants have not shown that they would be harmed by maintaining the status quo pending litigation of the merits of plaintiff's claim (*Dong-Pyo Yang v 75 Rockefeller Café Corp.*, 50 AD3d 320 [1st Dept 2008]).

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

4993 Apogee Handcraft, Inc., Index 156997/13
Plaintiff-Respondent-Appellant,

-against-

Verragio, Ltd.,
Defendant-Appellant-Respondent.

_____

Spektor & Tsirkin, P.C., New York (Vladimir Tsirkin and Gregory Spektor of counsel), for appellant-respondent.

Law Offices of Mitchell J. Devack, PLLC, East Meadow (Nicholas P. Otis of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered July 6, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment dismissing all counterclaims to the extent of dismissing the first, second, fourth, fifth, sixth, and seventh counterclaims, and denied the motion as to the third counterclaim, unanimously modified, on the law, to grant the motion as to the third counterclaim, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendant, a designer and seller of bridal jewelry, hired plaintiff to manufacture rings based on its designs. Defendant alleges that plaintiff failed to adequately safeguard the silver master models it provided, and the rubber molds created from

them, and that, as a result, unauthorized copies of the models were made and offered for sale on the black market.

Defendant's first counterclaim (for breach of contract) was properly dismissed because defendant cannot establish the elements of either breach or damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Defendant does not allege that the contract required plaintiff to employ any particular security measures. As such, all that plaintiff was required to do was exercise precautions consistent with industry standards (*cf. Aronette Mfg. Co. v Capitol Piece Dye Works*, 6 NY2d 465, 468 [1959]). Plaintiff submitted an affidavit from an experienced industry professional, who opined that the measures it took - i.e., keeping the molds in a locked storage room supervised by an onsite employee - were "standard in the industry." The affidavit submitted by defendant in opposition did not set forth any different standard, and therefore failed to raise an issue of fact.

As to damages, defendant's representative admitted that he was "not aware of any particular instances of sales of jewelry pieces manufactured from the counterfeit models." Defendant's theory of damages that the jewelry styles corresponding to the counterfeited models failed to meet projected sales is unduly

speculative (*see Lexington 360 Assoc. v First Union Natl. Bank of N. Carolina*, 234 AD2d 187, 190 [1st Dept 1996]).

The second counterclaim (for negligence) was properly dismissed as duplicative of the breach of contract counterclaim, as it "failed to allege a duty independent of the contract" (*see Von Sengbusch v Les Bateaux De N.Y., Inc.*, 128 AD3d 409, 410 [1st Dept 2015]).

The third counterclaim (for breach of the implied covenant of good faith and fair dealing) should similarly have been dismissed as redundant, as it was "intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Bostany v Trump Org. LLC*, 73 AD3d 479, 481 [1st Dept 2010]).

The fourth counterclaim (for breach of fiduciary duty) was properly dismissed because defendant cannot establish the existence of any relationship giving rise to a fiduciary duty (*see Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). "[A]n arms-length business relationship does not give rise to a fiduciary obligation" (*WIT Holding Corp. v Klein*, 282 AD2d 527, 529 [2d Dept 2001]; *V. Ponte & Sons v American Fibers Intl.*, 222 AD2d 271, 272 [1st Dept 1995]), and "[w]ithout an agreement providing for a relationship of trust, or special

circumstances indicating the same, none can be inferred" (*Mobil Oil Corp. v Joshi*, 202 AD2d 318, 318 [1st Dept 1994]).

The fifth counterclaim (for misappropriation of trade secrets) was properly dismissed because defendant failed to proffer sufficient evidence to show that the models were trade secrets (*see Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]). Defendant also failed to allege that plaintiff misappropriated the models (*see Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 [1st Dept 2015]), alleging instead that plaintiff failed to adequately safeguard them, as a result of which they were misappropriated by a third party.

The sixth counterclaim (for unfair competition and trademark dilution in violation of General Business Law [GBL] § 360-l) was properly dismissed because defendant cannot demonstrate a "[l]ikelihood of injury to business reputation or of dilution of the distinctive quality" of defendant's trademarks (GBL § 360-l; *Allied Maintenance Corp. v Allied Mech. Trades*, 42 NY2d 538, 545 [1977] [emphasis omitted]). Defendant also failed to allege the requisite "bad-faith misappropriation of a commercial advantage" to prevail on an unfair competition claim (*Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 [1st Dept 2012]).

The seventh counterclaim (for trademark infringement) was properly dismissed because defendant failed to allege that plaintiff made any "use" of its trademarks at all, let alone an infringing one (*see* GBL § 360-k[a]; *Allied Maintenance*, 42 NY2d at 542).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

4994-
4994A The People of the State of New York, Respondent,

Ind. 69/13
2293/13

-against-

Vladimir Vargas also known as
Bladimir Vargas,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (John S. Moore, J. at fourth-degree sale plea; Albert Lorenzo, J. at third-degree sale plea and sentencing), rendered May 12, 2014, convicting defendant of criminal sale of a controlled substance in the third and fourth degrees, and sentencing him to concurrent terms of 1½ years, unanimously affirmed.

Defendant's challenge to the court's recitation, at the time of his plea of guilty to fourth-degree sale, of his rights under *Boykin v Alabama* (395 US 238 [1969]) does not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]). Defendant was sentenced nearly a year later, after pleading guilty to the subsequent

third-degree sale charge (about which he raises no *Boykin* issue), and the record fails to support his claim that he lacked the practical ability to move to withdraw the first plea. We decline to review defendant's claim in the interest of justice. As an alternative holding, we find that the record establishes that the plea was knowing, intelligent and voluntary (*see People v Tyrell*, 22 NY3d 359, 365 [2013]; *People v Harris*, 61 NY2d 9, 16-19 [1983]), notwithstanding the claimed deficiencies in the *Boykin* warnings (*see e.g. People v Williams*, 137 AD3d 706 [1st Dept 2016], *lv denied* 27 NY3d 1141 [2016]).

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Singh, JJ.

4995-
4996 &
M-5523

Index 301568/14

Anthony Zappin,
Plaintiff-Appellant,

-against-

Claire Comfort,
Defendant-Respondent.

_____

Peter C. Lomtevas, Brooklyn, for appellant.

The Wallack Firm, P.C., New York (Robert M. Wallack of counsel), for respondent.

Cohen Rabin Stine Schumann LLP, New York (Harriet Newman Cohen of counsel), attorney for the child.

_____

Judgment of divorce, Supreme Court, New York County (Matthew F. Cooper, J.), entered August 16, 2016, inter alia, incorporating an order, same court and Justice, entered March 1, 2016, which awarded defendant sole physical and legal custody of the parties' child, granted plaintiff supervised visitation, and granted a five-year stay-away order of protection in defendant's favor, and awarding defendant basic child support beginning July 1, 2016, and child support arrears for the period from December 2013 through June 2016, unanimously affirmed, without costs.

Appeal from the March 1, 2016 custody and visitation order

unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court's determination that it was in the child's best interests to award sole custody to defendant has a sound and substantial evidentiary basis (*see Matter of Frank M. v Donna W.*, 44 AD3d 495 [1st Dept 2007]; *see also Eschbach v Eschbach*, 56 NY2d 167, 171-173 [1982]). It was based in part on the court's findings that plaintiff committed acts of domestic violence against defendant, both during her pregnancy with the child and after the child was born, rendering joint custody impossible.

The court saw both parties testify, and there is support in the record for its determination that defendant and the three witnesses she called were credible, whereas plaintiff's testimony regarding the domestic violence incidents was frequently not truthful. Photographs of defendant's injuries taken shortly after the incidents of abuse, as well as defendant's witnesses, corroborated defendant's account. Moreover, plaintiff's conduct and outbursts throughout the trial reinforced the court's conclusions that, unlike defendant, plaintiff was unable to control his emotions.

The evidence that plaintiff had physically and verbally harmed the child's mother, engaged in abusive litigation tactics,

and lacked the emotional restraint and personality to look after the child's best interests provides a sound and substantial basis for the court's finding that unsupervised visitation would have "a negative impact on the child's well-being" (*Matter of Arelis Carmen S. v Daniel H.*, 78 AD3d 504, 504 [1st Dept 2010], *lv denied* 16 NY3d 707 [2011]; *Ronald S. v Lucille Diamond S.*, 45 AD3d 295 [1st Dept 2007]). Plaintiff also made repeated false allegations of abuse to the Administration for Child Services and the police, which rendered supervised visitation appropriate (*Matter of James Joseph M. v Rosano R.*, 32 AD3d 725 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]).

The court detailed its reasons for issuing a five-year order of protection, and found that plaintiff committed numerous family offenses, including assault in the third degree (Penal Law § 120.00[1]) and harassment in the second degree (Penal Law § 240.26[1]). A fair preponderance of the evidence supports the determination (*see generally Okpe v Okpe*, 136 AD3d 511 [1st Dept 2016]). The court was not required to make a finding of "aggravating circumstances" before issuing the order of protection (*compare* Domestic Relations Law § 252 *with* Family Court Act § 842).

We have considered plaintiff's remaining challenges to the court's rulings in connection with the custody trial and find them unavailing. In any event, any claimed error would not warrant a different custody determination.

In determining the award of child support, the court properly imputed income to plaintiff based on his income in 2014. Although he presented no direct evidence of it, plaintiff claims that he was terminated from his position at his law firm because of the negative publicity he received after he had been sanctioned during these proceedings in 2015 (*Zappin v Comfort*, 49 Misc 3d 1201[A], 2015 NY Slip Op 51339[U] [Sup Ct, NY County 2015], *affd* 146 AD3d 575 [1st Dept 2017]). Even if he was terminated for that reason, the sanctions – and therefore his unemployment – resulted from his own misconduct at trial, not from the court's conduct in sanctioning him or publicly releasing the sanctions order (*see* Domestic Relations Law § 240[1-b][b][5][v]; *Johnson v Chapin*, 299 AD2d 294 [1st Dept 2002]). Moreover, plaintiff presented only vague, conclusory testimony regarding his purportedly unsuccessful attempts to find work since he lost that job.

The court properly declined to modify child support to account for plaintiff's cost in paying Comprehensive Family

Services to supervise his visits with the child. Plaintiff's need for supervision stemmed from his own previously described conduct, and there is no basis for a conclusion that such an expense is extraordinary in this context or that it renders his child support obligation unjust or inappropriate (*see* Domestic Relations Law § 240[1-b][f]).

In setting a child support income cap of $250,000, the court cited the parties' incomes in the mid- to high $200,000s and their upper-middle class lifestyle, and thus properly considered the parties' financial resources and the child's standard of living had the marriage not dissolved (Domestic Relations Law §240[1-b][f]; *Bast v Rossoff*, 91 NY2d 723, 726-727 [1998]).

The court properly awarded child support arrears retroactive to the date of defendant's application for child support in Washington, D.C., where the parties previously had resided, rather than when she later sought such relief before the New York Supreme Court (Domestic Relations Law § 236[B][7][a]), based on plaintiff's valid waiver of any objection to such an award. During proceedings before the Superior Court of the District of Columbia, when the court discussed the possibility of transferring the case to New York, as the more convenient forum, and the impact on any child support to which defendant was

entitled in Washington before the transfer, plaintiff personally agreed to waive "any objection if this case proceeds in New York to an award of child support beginning on the date that [defendant] made the request in D.C." Contrary to plaintiff's contention, the mere fact that proceedings in Washington, D.C., were stayed in the event that not all child support issues were resolved in the New York proceeding is not an indication that defendant disavowed the waiver.

The court should have at least directed the filing of a note of issue before proceeding to trial (*see* 22 NYCRR 202.21; *see also* CPLR 3402[a]; 22 NYCRR 202.16[i]). However, on these facts, a new trial on the issue of child support is not warranted (*see Hughes v Farrey*, 48 AD3d 385 [1st Dept 2008]). Plaintiff was not, as he claims, prejudiced by having to proceed to trial without further discovery. The parties had exchanged the financial documents relevant to the calculation of child support, the only issue at the financial trial. He had ample time to retain an expert on the issue of his earning potential if he wanted to do so.

We have considered plaintiff's remaining arguments regarding the award of child support and find them unavailing. In particular, we note that the court's rulings in this lengthy,

contentious proceeding were fair and impartial, and were based in part on credibility determinations that have support in the record.

M-5523 - *Zappan v Comfort*

Motion to transfer proceedings to another Appellate Division pursuant to CPLR 5711 denied.

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

4997 Robert Rosa, Index 151832/12
Plaintiff-Appellant,

-against-

Alianza, LLC,
Defendant-Respondent,

"John Doe" Construction, etc.,
Defendant.

_____

The Altman Law Firm, PLLC, New York (Michael Altman of counsel), for appellant.

Law Office of James J. Toomey, New York (Michael J. Kozoriz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered June 24, 2016, which, to the extent appealable, denied plaintiff's motion to renew his prior motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff failed to support his motion to renew with "new facts not offered on the prior motion" and "reasonable

justification" for his failure to present those facts on the prior motion (CPLR 2221[e]; *see American Audio Serv. Bur. Inc. v AT&T Corp.*, 33 AD3d 473, 476 [1st Dept 2006]).

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

4998-
4998A-
4998B The People of the State of New York,
Respondent,

-against-

Luis Vidro,
Defendant-Appellant.

Ind. 4593/09
1680/10
1671/11

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

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

Judgments, Supreme Court, Bronx County (Joseph J. Dawson, J.), rendered February 23, 2015, as amended March 5, 2015, convicting defendant, upon his pleas of guilty, of rape in the first degree, assault in the second degree and grand larceny in the fourth degree, and sentencing him to an aggregate term of 11 years, with an aggregate term of 20 years of postrelease supervision, unanimously affirmed.

The court lawfully imposed consecutive sentences. Although defendant is correct that his terms of postrelease supervision merge by operation of law, resulting in an actual aggregate term of 18½ years, and requiring the correctional authorities to compute his sentence accordingly (*see* Penal Law § 70.45[5][c]),

this does not render the sentence illegal (*People v Moore*, 61 NY2d 575, 578 [1984]), or require any action by this Court (*see e.g. People v Belle*, 277 AD2d 143 [1st Dept 2000], *lv denied* 96 NY2d 780 [2001]).

Defendant validly waived his right to appeal, foreclosing review of his claim that the sentence is excessive. The court's oral colloquy with defendant concerning the appeal waiver carefully separated the right to appeal from the rights normally forfeited by pleading guilty (*see People v Bryant*, 28 NY3d 1094 [2016]). Defendant also signed a written waiver, from which the court excised the language that has been held to be unenforceable (*see People v Powell*, 140 AD3d 401 [1st Dept 2016], *lv denied* 28 NY3d 1074 [2016]; *People v Santiago*, 119 AD3d 484 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]). In any event, regardless of whether defendant made 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: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

4999 In re Tiffany H.-C.,
Petitioner-Respondent,

-against-

Martin B.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Law Office of Israel Premier Inyama, New York (Israel P. Inyama of counsel), for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the children.

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Order, Family Court, Bronx County (Annette Louise Guarino, Referee), entered on or about August 25, 2016, which, insofar as appealed from as limited by the briefs, after a hearing, dismissed respondent father's petition to modify a custody order to change custody of the parties' minor children from petitioner mother to him, unanimously affirmed, without costs.

Family Court properly found that there was no change in circumstances to warrant a modification of the 2009 custody order, and that a change in custody would not be in the best interests of the children (*see Matter of Sergei P. v Sofia M.*, 44 AD3d 490 [1st Dept 2007]). The father's claims of educational neglect ring hollow, since, after moving to Georgia, he failed to

visit the children for some six years or to learn about their educational background and needs. The father, while claiming that the children were performing poorly in school, did not know the name of their school, and was not sure what grade each child was currently enrolled in.

Furthermore, the record showed that the mother took appropriate steps to address the children's challenges and learning disabilities by working with their school and obtaining necessary services for them (*see Matter of Liza R. v Lin F.*, 110 AD3d 513 [1st Dept 2013]). The mother, without the father's assistance, saw to the children's health and obtained physical therapy when needed. Moreover, relocating to Georgia would not be in the best interests of the subject children, who maintain positive relationships with their grandparents, older siblings and other relatives, all of whom live in New York City.

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

5000-
5000A The People of the State of New York,
Respondent,

Ind. 3747/13
2338/14

-against-

Rafael Cintron,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered January 21, 2015, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously reversed, on the law, the plea vacated and the matter remanded for further proceedings. Appeal from judgment, same court (Edward J. McLaughlin, J.), rendered May 5, 2015, convicting defendant, after a nonjury trial, of criminal facilitation in the fourth degree, and sentencing him to time served, held in abeyance, and the matter remanded for further proceedings on defendant's speedy trial motion.

Defendant is entitled to vacatur of his guilty plea because the court did not make any inquiry to ensure that the plea was knowing and voluntary, even though defendant had made statements casting significant doubt upon his guilt and calling into question his understanding of the nature of the charges against him (*see People v Lopez*, 71 NY2d 662, 665-666 [1988]; *People v Pariante*, 283 AD2d 345 [1st Dept 2001]). Among other things, immediately before the plea allocution, defendant said he "never possessed anything," and the court's subsequent questions did not clarify that defendant understood the charges and was retracting the claim of innocence he had just made. We find it unnecessary to reach defendant's other challenges to the plea.

With regard to the conviction after trial, defendant challenges the denial of his speedy trial motion. While we find that defendant's affidavit sufficiently satisfied his initial burden (*see People v Goode*, 87 NY2d 1045, 1047 [1996]), the record is unclear as to whether the People satisfied their burden in response, or merely raised issues of fact requiring a hearing (*see* CPL 210.45; *People v Santos*, 68 NY2d 859, 861 [1986]). Contrary to defendant's contention, the record indicates that the People responded to the motion. The court, without reviewing the People's submissions, denied the motion, improperly relying only

on its "notes" and "recollection" (*see* People v Berkowitz, 50 NY2d 333, 349 [1980]). Accordingly, we hold the appeal in abeyance and remand the matter for further proceedings on the motion. At this stage of the appeal, we do not address defendant's remaining challenges to the trial conviction.

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

5002 Helen Torres, Index 310684/10
Plaintiff-Respondent,

-against-

Nicola Diaz,
Defendant-Respondent,

Moustapha Diaby, et al.,
Defendants-Appellants.

_____

Picciano & Scahill, P.C., Bethpage (Keri A. Wehrheim of counsel), for appellants.

Cascione, Purcigliotti & Galluzzi, P.C., New York (Thomas G. Cascione of counsel), for Helen Torres, respondent.

Marjorie E. Bornes, Brooklyn, for Nicola Diaz, respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered on or about April 10, 2017, which, to the extent appealed from as limited by the briefs, denied defendant Moustache Dhaby's motion to set aside the directed verdict against him and reinstate the jury's verdict, unanimously reversed, on the law and the facts, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against defendant Moustapha Dhaby.

The jury's findings that defendant was not negligent, and that his actions were not a substantial factor in causing the

subject automobile accident, were not against the weight of the evidence. The jurors could have reasonably found that defendant had a green traffic light in his favor when he drove through the intersection of Manhattan Avenue and West 116th Street, and that codefendant Nicola Diaz failed to stop at the intersection's red traffic signal, causing the accident (*see Cooper v Apple Radio Car Serv.*, 261 AD2d 500 [2d Dept 1999]). As the verdict is supported by a fair interpretation of the evidence (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]), and there being no grounds to disturb the jury's credibility determinations (*see Phillips v Katzman*, 90 AD3d 436 [1st Dept 2011]), there was no basis for granting a directed verdict.

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

5004 Heriberto Mosqueda, Index 159551/13
Plaintiff-Respondent,

-against-

Ariston Development Group,
et al.,
Defendants-Appellants.

_____

Nicolini, Paradise, Ferretti & Sabella, PLLC, Mineola (Alyssa L. Garone of counsel), for Ariston Development Group, appellant.

Braff, Harris, Sukoneck & Maloof, New York (Brian C. Harris of counsel), for Kenneth Cole Productions, Inc., appellant.

Thomas Torto, New York, for respondent.

_____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered July 13, 2016, which, in this action for personal injuries sustained when plaintiff fell from a ladder, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Defendants' contention that a description of the accident in plaintiff's medical records inconsistent with his deposition testimony presents an issue of fact regarding his credibility, is unavailing. As Supreme Court found, statements in medical records, including "acts or occurrences leading to the patient's

hospitalization – such as a narration of the accident causing the injury - not germane to diagnosis or treatment" constitute inadmissible hearsay (*Williams v Alexander*, 309 NY 283, 287 [1955]). Whether the subject ladder was wooden or metal or whether plaintiff fell because it slipped or because the rung cracked is not germane to diagnosis or treatment of injuries resulting from the fall (*see Quispe v Lemle & Wolff, Inc.*, 266 AD2d 95, 96 [1st Dept 1999]; *compare Eitner v 119 W. 71st St. Owners Corp.*, 253 AD2d 641 [1st Dept 1998]). Although the height from which plaintiff fell may be germane to diagnosis or treatment, the statute was violated under either version of the accident (*DeFreitas v Penta Painting & Decorating Corp.*, 146 AD3d 573 [1st Dept 2017]; *Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592 [1st Dept 2010]).

Moreover, the party admission exception to the hearsay rule does not apply. Any statement in the medical records allegedly attributable to plaintiff "does not qualify as an admission unless the [individual] who recorded it were to testify that it was the [plaintiff]'s statement" (*Mikel v Flatbush Gen. Hosp.*, 49 AD2d 581, 582 [2d Dept 1975]; *see Quispe* at 96; *Gunn v City of New York*, 104 AD2d 848, 849-850 [2d Dept 1984]). Here, defendants offered no evidence connecting plaintiff to the

statements in the medical records allegedly attributable to him and upon which they rely. Furthermore, while hearsay may be used to defeat summary judgment so long as it is not the only evidence relied on, the medical records are insufficient to defeat summary judgment here since they are the only evidence relied on by defendants on the issue (*see Ying Choy Chong v 457 W. 22nd St. Tenants Corp.*, 144 AD3d 591, 592 [1st Dept 2016]).

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

5005 Highbridge House Ogden LLC, Index 650793/14
Plaintiff-Respondent,

-against-

Highbridge Entities LLC,
Defendant-Appellant.

_____

Morrison Cohen LLP, New York (Mary E. Flynn of counsel), for appellant.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 13, 2017, which granted plaintiff's motion to strike defendant's jury demand, unanimously affirmed, without costs.

The plain terms of the Purchase Agreement and the Escrow Agreement clearly evince the parties' intent to waive their rights to a trial by jury. The right to a jury trial may be waived "in an instrument other than that representing the agreement upon which the action is founded" (*Barclays Bank of N.Y. v Heady Elec. Co.*, 174 AD2d 963, 964 [3d Dept 1991], *appeal dismissed* 78 NY2d 1072 [1991]; *Franklin Natl. Bank of Long Is. v Capobianco*, 25 AD2d 445 [2d Dept 1966]).

The Escrow Agreement had a broad, clear and complete waiver with respect to "ANY ACTION OR PROCEEDING ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT," and the express terms of both agreements memorialize the parties' intent that the two documents be read in tandem. The Purchase Agreement provides that the Escrow Agreement, which was attached as an exhibit, was "hereby made part hereof." It also provided that all exhibits, including the Escrow Agreement, were to be "incorporated into this [Purchase] Agreement as if fully set forth herein." The Escrow Agreement provided that it and the Purchase Agreement "contain[ed] the entire agreement and understanding between the parties." Regardless, even if the parties had not intended for the Purchase Agreement and the Escrow Agreement to be read together, this dispute, concerning return of the escrow funds, "arises out of" and is "in connection with" the Escrow Agreement. The broad jury waiver provision in the Escrow Agreement clearly applies.

We have considered the parties' remaining contentions, and find them unavailing.

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

5006 The People of the State of New York, Ind. 1033/15
Respondent,

-against-

Jeffrey Yebaoh,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered November 12, 2015,

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

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

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

5007-		Ind. 1572/10
5007A-		3986/10
5007B-		1441/11
5007C	The People of the State of New York, Respondent,	1380/13

-against-

Reginald Goldman,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Judgments of resentence, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered March 28, 2016, resentencing defendant to an aggregate term of six years, unanimously affirmed.

In this resentencing pursuant to *People v Rudolph* (21 NY3d 497 [2013]), the court providently exercised its discretion in denying youthful offender treatment. The seriousness of defendant's multiple violent crimes, including, among other

things, shooting two victims in the back, outweighed the allegedly mitigating factors asserted by defendant.

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

ENTERED: NOVEMBER 21, 2017

CLERK

Tom, J.P., Mazzarelli, Andrias, Oing, Singh, JJ.

4532-
4533 The People of the State of New York,
Respondent,

-against-

Santos Santiago,
Defendant-Appellant.

Ind. 3464/09

_____

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Eugene Oliver, J.), rendered August 11, 2014, as amended May 11, 2016 and April 28, 2017, convicting defendant, after a jury trial, of manslaughter in the first degree and criminal possession of a weapon in the fourth degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

As in cases such as *People v Velez* (131 AD3d 129 [1st Dept 2015]), the court's charge failed to convey that an acquittal on the top count of second-degree murder based on a finding of justification would preclude consideration of the remaining charges. We find that this error was not harmless and warrants

reversal in the interest of justice (*see e.g. People v Kareem*, 148 AD3d 550 [1st Dept 2017], *lv dismissed* 29 NY3d 1033 [2017]). We have considered and rejected the People's various arguments for affirmance.

Since we are ordering a new trial, we find it unnecessary to reach defendant's remaining contentions.

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

4616 The People of the State of New York, Ind. 954/12
Respondent,

-against-

Octavio Gonzalez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia B. Heeger of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at initial motion to exclude DNA evidence; Edward J. McLaughlin, J. at subsequent motion, jury trial and sentencing), rendered January 14, 2014, convicting defendant of assault in the second degree, and sentencing him to a term of four years, unanimously affirmed.

The court properly declined to submit third-degree assault as a lesser included offense. There was no reasonable view of the evidence, viewed most favorably to defendant, under which defendant hit and kicked the victim, but neither cut the victim's throat personally, nor acted in concert (*see* Penal Law § 20.00) with another person who did so (*see People v Montanez*, 147 AD3d 444, 445 [1st Dept 2017]).

The court providently exercised its discretion in denying defendant's mistrial motion, the only remedy requested, when it came to light that a juror had prematurely informed the other jurors that he was already convinced of defendant's guilt. The court provided a sufficient remedy by simply discharging this juror, because the information before the court indicated that all the other jurors had rejected any notion of premature deliberations and cautioned the offending juror not to make such a statement. Even if further inquiries of the remaining jurors would have been appropriate, defense counsel expressly declined that remedy (*see People v Ayers*, 214 AD2d 459 [1st Dept 1995], *lv denied* 86 NY2d 732 [1995]).

The motion court's pretrial ruling, issued on July 23, 2013, denying defendant's motion to exclude, or alternatively to conduct a *Frye* (*Frye v United States*, 293 F 1013 [DC Cir 1923]) hearing on, expert testimony relating to high sensitivity, or low copy number (LCN) DNA testing, was a provident exercise of discretion. At the time that the motion court's ruling was made, a court of coordinate jurisdiction, following an eight-month *Frye* hearing, had issued a decision holding that LCN DNA testing was "generally accepted as reliable in the forensic scientific community" and "*not a novel* scientific procedure" *People v*

Megnath, 27 Misc 3d 405, 413 [Sup Ct Queens County 2010] [emphasis in original]). "A court need not hold a *Frye* hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony" (*People v LeGrand*, 8 NY3d 449, 457-458 [2007]; *see People v Garcia*, 39 Misc 3d 482, 486-487, 490 [following *LeGrand* and relying on *Megnath* in holding that both LCN and forensic statistical tool [FST] DNA testing evidence was admissible without the need for a *Frye* hearing]). Here, as both *Garcia* and *Megnath* had been decided prior to the motion court's ruling in this case, it was not an abuse of discretion for the motion court, in keeping with *LeGrand*, to rely on them in denying defendant's motion to exclude the LCN DNA testing evidence or to conduct a *Frye* hearing in this case.

Likewise, the trial court's denial of defendant's renewed motion for a *Frye* hearing in December 2013, which motion was recast to include evidence relating to both LCN DNA testing and a then-recently issued FST DNA testing report, was a provident exercise of discretion. The trial court's ruling was consistent with prior determinations of courts of coordinate jurisdiction that these procedures were not novel scientific techniques and were generally accepted by the relevant scientific community (*see*

Garcia, 39 Misc 3d at 490 [denying *Frye* hearing as to both LCN and FST testing]; *Megnath*, 27 Misc 3d at 413 [finding, after holding *Frye* hearing, that LCN testing is not novel and is generally accepted as reliable in the forensic scientific community]; *People v William Rodriguez*, [Sup Ct, NY County, Oct. 24, 2013, Carruthers, J.], at 7-8, *affd* 153 AD3d 235 [1st Dept 2017] [finding, after holding *Frye* hearing, that the FST is not novel and is generally accepted as reliable in the forensic scientific community]). Thus, the trial court's ruling was also in keeping with *LeGrand*, and did not constitute an abuse of discretion. In any event, any error was harmless because the DNA evidence contributed little to the otherwise overwhelming evidence that it was defendant who wielded a knife during the assault.

Defendant's arguments relating to the trial court's instructions on accessorial liability are unpreserved because the court corrected, to defense counsel's satisfaction, each deficiency in the charge to which counsel had objected and no further instructions were requested (*see People v Heide*, 84 NY2d 943, 944 [1994]; *People v Whalen*, 59 NY2d 273, 280 [1983]). We decline to consider defendant's claims in the interest of justice. As an alternative holding, we find that the court's

instructions, viewed as a whole and as corrected, generally conveyed the proper standards, and that reversal is not required.

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

ENTERED: NOVEMBER 21, 2017

CLERK

Tom, J.P., Renwick, Mazzarelli, Oing, Singh, JJ.

4873-
4874 The People of the State of New York,
Respondent,

-against-

Boris Brown,
Defendant-Appellant.

Ind. 4977/10

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered July 25, 2012, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree (two counts), and sentencing him, as a second felony offender, to an aggregate term of 32 years to life, and order, same court and Justice, entered on or about April 14, 2016, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The order stating that the court denied defendant's motion to vacate the judgment for the reasons set forth in the People's response "was insufficient to satisfy the requirements of CPL 440.30(7)," but "the record is sufficient to enable us to intelligently review the order denying defendant's motion"

(*People v Mingo*, 141 AD3d 423 [1st Sept 2016], *lv denied* 28 NY3d 1029 [2016] [internal quotation marks and citation omitted]). We do not interpret the order (*see People v Nicholson*, 26 NY3d 813, 825 [2016]) as limiting the determination to any one or more of the many grounds asserted in the People's response to defendant's claim of denial of the right to conflict-free representation, and we reject defendant's argument that a remand is necessary.

We find that the record supports the conclusion that defendant validly waived his counsel's potential conflict of interest, which was one of the grounds asserted in the People's response. Defendant, who was represented by independent counsel for purposes of the conflict waiver, indicated his "awareness of the potential risks involved in that course" and that he had "knowingly chosen it" (*People v Gomberg*, 38 NY2d 307, 313-314 [1975]), even in the absence of a more detailed explanation of how the potential conflict might affect the defense strategy (*see People v Lloyd*, 51 NY2d 107, 111 [1980]). We have considered and rejected defendant's argument that the conflict was not waivable.

Defendant's suppression motion was properly denied. There is no basis for disturbing the court's credibility determinations. After the principal eyewitness had identified defendant by his nickname, but before the police had connected

that nickname with any particular person, two detectives were sitting across a table from the eyewitness, conferring with each other and examining photos of persons considered to be possible witnesses. Although the detectives had no intention of showing him any of the photos, the eyewitness noticed a photo of defendant and spontaneously revealed that this was the man whose nickname he had supplied. "The accidental viewing was not a police-arranged procedure," and it was not constitutionally deficient (*People v Leibert*, 71 AD3d 513, 513 [1st Dept 2010], *lv denied* 15 NY3d 752 [2010]). The police obtained defendant's mother's express consent to enter her apartment, leading to defendant's arrest (*see e.g. People v Bruno*, 294 AD2d 179 [1st Dept 2002], *lv denied* 99 NY2d 533 [2002]), and defendant's assertion to the contrary is belied by the hearing testimony.

Defendant's legal insufficiency claim related to his murder conviction is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Defendant's act of repeatedly "firing into a crowd" -- a "[q]uintessential example[]" of depraved indifference (*People v Suarez*, 6 NY3d 202, 214 [2005]) -- while running away, without

looking at where he was shooting, abundantly demonstrated a depraved indifference to human life (*see People v Russell*, 91 NY2d 280, 289 [1998]).

The court lawfully ran the sentence imposed on the murder count consecutively with the sentence imposed on the count of simple weapon possession (Penal Law § 265.03[3]), since defendant completed the act of possession within the meaning of that statute before the shooting occurred (*see People v Brown*, 21 NY3d 739, 750-51 [2013). The court also lawfully ran the murder sentence consecutively with the sentence imposed on the count of possession with intent to use unlawfully against another (Penal Law § 265.03[1][b]), because the evidence that defendant obtained the weapon from another location, while seeking revenge for a recent robbery, established that he formed a "separate and distinct" intent (*People v Wright*, 19 NY3d 359, 367 [2012]) before intending to shoot at the crowd, such that the crime of

possession with unlawful intent was likewise completed before the homicide.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 21, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4934 The People of the State of New York, Ind. 1665/14
Respondent,

-against-

Roberto Sanchez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered November 24, 2015, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously reversed, on the law, the plea vacated, and the matter remanded for further proceedings.

A defendant forfeits his right to appellate review of a CPL 30.30 motion upon a guilty plea (*see People v O'Brien*, 56 NY2d 1009 [1982], citing *People v Suarez*, 55 NY2d 940 [1982]). However, here, the record is clear that the court misadvised defendant that he could pursue his 30.30 claim on appeal of a guilty plea (*see People v Williams*, 123 AD3d 1376, 1377 [3d Dept 2014]; *People v Dalton*, 69 AD3d 1235, 1235-1236 [3d Dept 2010]). Neither the defense counsel nor the prosecutor corrected the

court's misadvice. Moreover, defendant accepted a lengthier sentence, and declined to replead to a different offense with a shorter prison sentence, based on this misstatement that his 30.30 claim could be raised on appeal. Under the totality of these circumstances, defendant's plea is vacated and the matter remanded (*see Williams* at 1377-1378; *see generally People v Gray*, 62 AD3d 1256 [4th Dept 2009]). As defendant had no practical ability to object to the error because he was sentenced on the date the misstatement occurred, (*see Williams* at 1377, quoting *People v Peque*, 22 NY3d 168, 182 [2013], *cert denied*, *sub nom. Thomas v New York*, 574 US –, 135 S Ct 90 [2014]), he was not required to preserve his argument.

In light of the foregoing, we need not reach defendant's remaining arguments.

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

5010-
5011 In re Derick B.,
Petitioner-Respondent,

-against-

Catherine L.,
Respondent-Appellant.

- - - - -

In re Catherine L.,
Petitioner-Appellant,

-against-

Derick B.,
Respondent-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for respondent.

Law office of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), attorney for the child.

_____

Appeal from order, Family Court, Bronx County (Karen Lupuloff, J.), entered on or about September 10, 2014, upon the appellant mother's default, which imposed a two-year final order of protection on behalf of the father Derick B. and the subject child, unanimously dismissed, without costs. Order, same court (Tracey Bing, J.), entered on or about June 29, 2016, which dismissed the mother's petition for modification of a custody order, unanimously affirmed, without costs.

The mother's appeal from the September 10, 2014 order of protection is dismissed, as no appeal lies from an order issued upon default (*see Matter of Pedro A. v Susan M.*, 95 AD3d 458 [1st Dept 2012]).

The mother failed to show a change in circumstances to warrant modification of the custody order (*see Matter of Adragna v Fuori*, 129 AD3d 950 [2d Dept 2015]); *Matter of Lowe v Bonelli*, 129 AD3d 1135, 1137 [3d Dept 2015]). The mother's argument that the custodial father failed to foster a bond between her and the child is unavailing. Under the circumstances here, the father was under no obligation to take affirmative steps to have the child interact with the mother, as during the relevant time period, the stay-away order of protection prohibited her from having any contact with the child unless ordered by the court.

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

5012 Thomas A. Leahy, Index 100818/14
Plaintiff-Appellant,

-against-

U.S. National Bank Association,
Defendant-Respondent.

_____

Hegge & Confusione, LLC, New York (Michael J. Confusione of counsel), for appellant.

The Ginzburg Law Firm, P.C., Fresh Meadows (Daniel Ginzburg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered February 15, 2017, which granted defendant's motion to dismiss the fourth amended complaint, unanimously affirmed, without costs.

The complaint fails to state causes of action for negligence and negligent misrepresentation, given the absence of allegations that would establish a duty owed to plaintiff by defendant or a special relationship of trust or confidence between the parties

(*see Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]; *Ravenna v Christie's Inc.*, 289 AD2d 15 [1st Dept 2001]).

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

5013 Plaza Collectibles Corp., Index 156627/14
Plaintiff-Appellant,

Lee Rosenbloom,
Plaintiff,

-against-

Directors Guild of America, Inc.,
Defendant-Respondent.

_____

Law Offices of Solomon J. Jaskiel, Brooklyn (Solomon J. Jaskiel of counsel), for appellant.

Newman Ferrara LLP, New York (Jarred I. Kassenoff of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan M. Kenney, J.), entered November 1, 2016, which denied plaintiffs' motion for a *Yellowstone* injunction, granted defendant's motion to vacate a temporary restraining order, and denied plaintiffs' request for a declaration that the parties' lease had been renewed, unanimously modified, on the law, solely to declare that the lease was not renewed, and otherwise affirmed, without costs.

The court properly denied plaintiffs' motion for a *Yellowstone* injunction and granted defendant's motion to vacate the temporary restraining order because plaintiffs no longer held a lease to the premises (*see Graubard Mollen Horowitz Pomeranz &*

Shapiro v 600 Third Ave. Assoc., 93 NY2d 508, 514 [1999]). Alternatively, plaintiffs failed to demonstrate their readiness to cure any claimed default.

The court erred in finding that plaintiffs did not validly exercise the option to renew the lease on the ground that the letter declaring their intent to do so was not sent more than 180 days before the lease's expiration. As the parties admit, the lease was set to expire on December 31, 2014, not September 19, 2014. Thus, plaintiffs' April 12, 2014 letter was timely. Nevertheless, plaintiffs did not validly exercise the renewal option, because the letter did not strictly comply with the written notice requirements of the lease (*see American Realty Co. v 64 B Venture*, 176 AD2d 226, 227 [1st Dept 1991], *lv denied* 79 NY2d 756 [1992]). In any event, defendant was permitted to cancel the renewal option, because, at the time they sought to

exercise it, plaintiffs were in incurable breach of the lease (*see Nobu Next Door v Fine Arts Hous.*, 3 AD3d 335, 336 [1st Dept 2004], *affd* 4 NY3d 839 [2005]).

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

5014 The People of the State of New York, Ind. 260/15
Respondent,

-against-

Shomari Moore,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Corey Forster of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Jeanette Rodriguez-Morick, J.), rendered February 22, 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: NOVEMBER 21, 2017

CLERK

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

5015 The People of the State of New York, Ind. 4278/12
Respondent,

-against-

Glen Johnson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J. at plea and sentencing; Marcy L. Kahn, J. at resentencing), rendered May 7, 2013, as amended September 23, 2014, convicting defendant, upon his plea of guilty, of stalking in the first degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

Defendant did not preserve his claim that his guilty plea was involuntary and unknowing because the promised sentence was unlawful (*see People v Williams*, 27 NY3d 212 [2016]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. Defendant successfully moved under CPL 440.20 to have his unlawful sentence of three years replaced by a lawful sentence of two to four years. Even assuming, without deciding, that defendant would have been entitled to withdraw his plea (the remedy he

requests on appeal), he expressly declined that remedy at resentencing.

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

5016 Anonymous, Index 650152/11
Plaintiff-Appellant,

-against-

Gerald R.,
Defendant,

Michael Z.,
Defendant-Respondent.

_____

Law Office of James M. Haddad, New York (James M. Haddad of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Cristina R. Yannucci of counsel), for respondent.

_____

Appeal from so-ordered transcript, Supreme Court, New York County (Anil C. Singh, J.), entered November 27, 2013, which granted defendant Michael Z.'s motion to dismiss the claims against him without prejudice, unanimously dismissed, without costs.

Plaintiff should have appealed from the short-form order served with notice of entry on October 24, 2013 (*see Corteguera v City of New York*, 179 AD2d 362, 363 [1st Dept 1992]), instead of

from the so-ordered transcript served with notice of entry on April 26, 2016.

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

5017 Vicki Morwitz, et al., Index 600007/10
Plaintiffs-Appellants,

-against-

Mobili De Angelis, et al.,
Defendants,

Central Plumbing Specialties Co., Inc.,
Defendant-Respondent.

_____

Law Office of Joseph H. Green, PLLC, Tarrytown (Joseph H. Green of counsel), for appellants.

The Salvo Law Firm PC, Tarrytown (Cindy D. Salvo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered September 28, 2015, which, to the extent appealed from as limited by the briefs, after a nonjury trial, dismissed the breach of contract and General Business Law §§ 349 and 350 causes of action against defendant Central Plumbing Specialties Co., Inc. (Central), unanimously affirmed, without costs.

Since a fair interpretation of the evidence supports the determination of the fact finding court, based largely on its assessment of the credibility of the witnesses, that plaintiffs' claims under General Business Law §§ 349 and 350 are without merit, we are obliged to defer to it (*see Thoreson v Penthouse*

Intl., 80 NY2d 490, 495 [1992]). The claims for breach of contract, based on the allegation that defendants promised to deliver an "Italian" cabinet, was correctly dismissed as barred by the parol evidence rule, inasmuch as the parties' integrated and detailed written agreement did not specify that the cabinet was required to be "Italian" (*see Matter of Primex IntI. Corp. v Wal-Mart Stores*, 89 NY2d 594, 600 [1997]; *Braten v Bankers Trust Co.*, 60 NY2d 155, 162 [1993]).

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

5018 The People of the State of New York, Ind. 550/12
Respondent,

-against-

Reginald Smith,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered April 4, 2016,

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

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

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

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

5019 In re Wendy P., and Another,

Children Under Eighteen Years
of Age, etc.,

Edwin S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

Professors of Psychology and Psychiatry,
Amicus Curiae.

_____

Davis Polk & Wardwell LLP, New York (Matthew R. Brock of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the children.

Christine Gottlieb, New York, and Proskauer Rose LLP, New York (Russell L. Hirschhorn of counsel), for amicus curiae.

_____

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about May 19, 2016, which, to the extent appealable and insofar as appealed from as limited by the briefs, found that respondent Edwin S. had sexually abused his stepdaughter Wendy P., unanimously affirmed, without costs.

Respondent's attempt to seek review of the Family Court's earlier ruling under *Frye v United States* (293 F 1013 [DC Cir

1923]), is not reviewable on this appeal. Family Court denied respondent's *Frye* application in January of 2015 (47 Misc 3d 1202[A], 2015 NY Slip Op 50365[U] [Family Ct, Bronx County 2015]). There, Family Court found that Dr. Treacy's validation testimony did not present a novel scientific issue requiring a *Frye* hearing, and that any purported deviation from the appropriate professional practices was a matter of evidentiary weight rather than of admissibility (*id.*). Respondent did not appeal from this order, and we are thus without jurisdiction to review it on this appeal from a nonfinal fact-finding order (Family Court Act § 1112[a]; CPLR 5501[a][1]).

Respondent's argument that Dr. Treacy's testimony lacked the proper foundation also fails. Dr. Treacy provided detailed information about the guidelines she used to interview the child as well as her analysis of the interview utilizing Sgroi's Sexual Abuse Dynamics framework (*Matter of Nicole V.*, 71 NY2d 112, 120-121 [1987]). Contrary to respondent's argument, a proper foundation does not require general acceptance in the scientific community, but may be properly laid by the expert based on her "personal knowledge acquired through professional experience" (*Mitrovic v Silverman*, 104 AD3d 430, 431 [1st Dept 2013]). This was clearly established here. Any alleged deviations from the

established protocols went to the weight of Dr. Treacy's testimony, and did not form a basis for excluding the evidence entirely (*see e.g. Matter of Nikita W. [Michael W.]*, 77 AD3d 1209, 1211 [3d Dept 2010]). Regardless, the record supports that Dr. Treacy did adhere closely to the aspirational protocols in question, in that she refrained from using leading or suggestive questions, considered alternative hypotheses and endeavored to promote an objective, neutral stance in conducting the evaluations.

To the extent the appeal raises any issue about evidentiary weight, the court did not abuse the discretion in relying on Dr. Treacy's testimony as providing sufficient validation and corroboration for the child's out of court statements. Given the admissibility and reliability of Dr. Treacy's testimony, Family Court's finding of sexual abuse was supported by a preponderance of the evidence (Family Ct Act § 1046[b][i]). In addition to Dr. Treacy's validation testimony, the child's spontaneous, repeated, unrecanted descriptions of the abuse and the lack of any motive for her to fabricate the allegations against respondent support this finding. There was, in any event, additional corroborating evidence (Family Ct Act § 1046[a][vi]), including the observations made of the child at the hospital. Moreover,

respondent did not testify (*see e.g. Matter of Jacklyn P.*, 86 NY2d 875 [1995]; *Matter of Tashia QQ.*, 28 AD3d 816, 817 [3d Dept 2006]) or present evidence tending to show that he had not committed the abuse, and he admitted to an agency caseworker to having pornography on his electronic device. Respondent's case rested on the testimony of his expert, but she did interview the child and could not provide an opinion as to whether or not the child had been abused.

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

5020-
5021-
5022 Index 652292/13

Orient Overseas Associates,
Plaintiff-Appellant,

-against-

XL Insurance America, Inc., et al.,
Defendants-Respondents,

Cushman & Wakefield, Inc.,
Defendant.

_____

Nicoletti Horing & Sweeney, New York (John A.V. Nicoletti of counsel), for appellant.

Zelle LLP, Minneapolis, MN (Dan Millea of the bar of the State of Iowa, admitted pro hac vice, of counsel), for XL Insurance America, Inc., Ace American Insurance Company and Arch Insurance Company, respondents.

Robins Kaplan LLP, New York (Sherli M. Furst of counsel), and Robins Kaplan LLP, Boston, MA (William N. Erickson of the bar of the State of Massachusetts, admitted pro hac vice, of counsel), for Westport insurance Corporation, respondent.

_____

Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 16, 2016, and from orders of the same court and Justice, entered July 13, 2016,

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

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed for the reasons stated by Kornreich, J. The appeals from the orders are dismissed, without costs, as subsumed in the appeal from the judgment.

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

5023 Arina Aristova, Index 311931/10
Plaintiff-Respondent,

-against-

Michael Derkach,
Defendant-Appellant.

_____

Ingrid Gherman, P.C., New York (Ingrid Gherman of counsel), for appellant.

Katsandonis, P.C., New York (John Katsandonis of counsel), for respondent.

_____

Judgment of divorce, Supreme Court, New York County (Matthew F. Cooper, J.), entered April 22, 2015, to the extent appealed from as limited by the briefs, adjudging valid and enforceable the parties' postnuptial agreement terminating a prior separation agreement, directing plaintiff to pay durational spousal maintenance prospectively only, directing defendant to pay 28% of the children's add-on expenses, and awarding defendant $50,000 in counsel fees, and bringing up for review an order, same court and Justice, entered on or about May 12, 2012, which denied as untimely defendant's motion for summary judgment invalidating the termination agreement, unanimously affirmed, with costs.

On December 27, 2004, the parties signed an agreement, effective as of August 1, 2004 (the Termination Agreement),

pursuant to which they terminated a preexisting separation agreement but agreed, among other things, that property each had acquired before August 1, 2004 would be separate property.

The court correctly denied defendant's motion for summary judgment invalidating the Termination Agreement as untimely, since it was made after the deadline set in a so-ordered stipulation and on the eve of trial (CPLR 3212[a]). Contrary to defendant's argument that he could not make the motion until plaintiff served a reply to his counterclaims, issue was joined on the question of the validity of the Termination Agreement and other postnuptial agreements when defendant served his answer. In any event, defendant was able to fully litigate the issues on the merits at trial.

The court correctly determined equitable distribution in accordance with the terms of the Termination Agreement (*see Tirrito v Tirrito*, 191 AD2d 686 [2d Dept 1993]), upon its finding after trial that defendant failed to prove that the Termination Agreement, which was written, signed, and properly acknowledged, was invalid. While he was not represented by counsel, defendant, an engineer with an MBA, was sufficiently sophisticated to be aware that he might need counsel, particularly given plaintiff's forthright explanation that her purpose in entering into the

agreement was to protect her rights to an apartment she had purchased before August 1, 2004, and the fact that she had given him a week to review the agreement before signing it. Moreover, plaintiff, although an attorney, was not a matrimonial lawyer, and needed the help of online forms in drafting the agreement. We note that the court found that, of the parties, plaintiff was the more credible witness, and this determination is entitled to deference (*see Petracca v Petracca*, 101 AD3d 695, 699 [2d Dept 2012]).

Under the circumstances of this case, the court properly awarded prospective maintenance only (*see e.g. Hendry v Pierik*, 78 AD3d 784 [2d Dept 2010]; *Grumet v Grumet*, 37 AD3d 534 [2d Dept 2007], 9 NY3d 818 [2008]; *see also Grunfeld v Grunfeld*, 255 AD2d 12, 22 [1st Dept 1999], *mod on other grounds* 94 NY2d 696 [2000]). During the first two years following commencement of the action, the parties lived together in the marital residence with their children. The trial evidence showed that, during that period, plaintiff voluntarily bore the majority of the family's expenses, including costs associated with the parties' cooperative apartment, and the family's medical and dental insurance costs, as well as groceries and other family expenses. Indeed,

defendant did not move for pendente lite relief until two months before the scheduled trial date.

Defendant's contention that he was entitled to a credit against the retroactive child support award was unsupported by a showing of any payments he made for child-related expenses. To the extent he relies on his payments towards the mortgage and maintenance on the marital residence, we find that these payments were made in satisfaction of defendant's own contractual obligations and do not constitute the voluntary payments contemplated under Domestic Relations Law § 236(B)(7)(A) (*see Krantz v Krantz*, 175 AD2d 865 [2d Dept 1991], *accord Sergeon v Sergeon*, 216 AD2d 122 [1st Dept 1995]). Nor did defendant show that the court erred in directing him, based on the parties' combined income, to pay 28% of child care costs (*see* Domestic Relations Law § 240[1-b][c][4]) and 28% of the children's extracurricular expenses, which plaintiff demonstrated were incurred as a means of child care to enable her to work (*see Micciche v Micciche*, 62 AD3d 673 [2d Dept 2009]).

The court providently exercised its discretion in reducing the special referee's recommended award of counsel fees by $10,000, taking into account the parties' disparate financial circumstances and the relative merits of the parties' positions.

The court also properly denied defendant's application for an additional $10,000 in fees incurred in opposing plaintiff's motion to modify the special referee's report, since the motion was not frivolous and indeed was successful on several fronts.

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: NOVEMBER 21, 2017

CLERK

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

5024 The People of the State of New York, Ind. 1278/14
Respondent,

-against-

Alfredo Lopez-Suozo, true name
Alfredo Lopez-Suazo,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered August 5, 2014, 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: NOVEMBER 21, 2017

CLERK

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

5027 The People of the State of New York, Ind. 18/10
Respondent,

-against-

Angel Concepcion,
Defendant-Appellant.

_____

Freshfields Bruckhaus Deringer US LLP, New York (Megha Hoon of counsel), and Rosemary Herbert, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered August 10, 2015, resentencing defendant to a term of 22 years, unanimously affirmed.

On remand from this Court (128 AD3d 612, 614 [1st Dept 2015], *lv denied* 26 NY3d 927 [2015]), the resentencing court providently exercised its discretion in denying youthful offender

treatment (*see People v Drayton*, 39 NY2d 580 [1976]) in light of the heinous circumstances of the homicide.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

5028 Mauricio Fernholz, et al., Index 106980/11
Plaintiffs-Respondents,

-against-

Craig Hart, et al.,
Defendants-Respondents,

The Board of Managers of the Washington Irving Condominium,
Defendant-Appellant.

_____

Winget, Spadafora & Schwartzberg, LLP, New York (Dianna D. McCarthy of counsel), for appellant.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered July 25, 2014, which, to the extent appealed from, denied defendant Board of Managers of the Washington Irving Condominium's motion for summary judgment dismissing the nuisance and nuisance per se causes of action and the cross claims based on negligence and breach of contract against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint and cross claims against the Board.

Plaintiffs and defendants Craig Hart and Rebecca Barber, the owners of the apartment directly above plaintiffs' apartment, challenge the Board's 2004 decision not to require the former owner of the Hart and Barber apartments to rebuild an interior

wall she had demolished without authorization. They contend that the absence of the wall created a condition that amplified noises from the Hart and Barber apartment.

The Board established prima facie its entitlement to summary dismissal of the complaint and cross claims on the ground that its decision was protected by the business judgment rule (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]). The record shows that the Board engaged an independent expert who opined that the removal of the wall did not affect the structural integrity of the building and did not cause the noise.

In opposition, plaintiffs and Hart and Barber failed to raise a triable issue of fact whether the Board's decision not to require rebuilding of the wall and its handling of plaintiffs' noise complaint were in breach of its fiduciary duty to the condominium (*see id.* at 538). They submitted no evidence that the Board's actions were not taken in furtherance of a corporate purpose or that the Board acted in bad faith, arbitrarily, or out

of favoritism, discrimination or malice (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 156, 157 [2003]).

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

ENTERED: NOVEMBER 21, 2017

CLERK

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

5029-
5030N In re Andres Rodriguez, et al.,
Petitioners-Appellants,

-against-

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

Index 162629/15

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

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered August 11, 2016, which denied the petition for leave to serve late notices of claim, and order, same court and Justice, entered November 25, 2016, which, in effect, granted petitioners' motion for reargument and adhered to the original determination, unanimously affirmed, without costs.

The notice of claim requirement does not apply to respondent Metropolitan Transportation Authority's (the MTA) subsidiaries, which include respondents MTA Capital Construction Company (MTA Capital) and Long Island Rail Road (*see* Public Authorities Law §§ 1265-b[1][a]; 1276[6]; *Stampf v Metropolitan Transp. Auth.*, 57 AD3d 222 [1st Dept 2008]). A suit against these entities must be

preceded by a demand for payment of damages and a period of at least 30 days without adjustment or payment (*see* Public Authorities Law § 1276[1], [6]; *Andersen v Long Is. R.R.*, 59 NY2d 657 [1983]).

On appeal, petitioners argue that MTA Capital's possession of an incident report prepared by the injured petitioner's employer - the general contractor on the MTA's construction project - establishes that it had actual knowledge of the essential facts constituting the claims within 90 days after they arose or a reasonable time thereafter (*see* General Municipal Law § 50-e[5]; *Johnson v New York City Tr. Auth.*, 278 AD2d 83 [1st Dept 2000]. However, it is not clear from the record when MTA Capital came into possession of this report (*see Velazquez v City of N.Y. Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 69 AD3d 441 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]).

In any event, MTA Capital's knowledge of the incident would not be imputed to respondents the MTA, New York City Transit Authority, or the City of New York. Although MTA Capital is a subsidiary of the MTA, it is a distinct legal entity for purposes of suit, and its employees "shall not be deemed employees of [the MTA]" (*see* Public Authorities Law §§ 1266[5]; 1265-b[1][a]; *see also Stampf*, 57 AD3d at 223; *Noonan v Long Is. R.R.*, 158 AD2d 392

[1st Dept 1990]). Petitioners have not demonstrated that the MTA exercises the level of control over MTA Capital necessary to create an agency relationship (*see Quik Park W. 57 LLC v Bridgewater Operating Corp.*, 148 AD3d 444 [1st Dept 2017]).

MTA Capital's connection to respondent New York City Transit Authority is even more remote (*see* Public Authorities Law §§ 1201; 1263; 1265-b[1][a]; *Konner v New York City Tr. Auth.*, 143 AD3d 774, 776 [2d Dept 2016]), and its connection to the City is remoter still.

The fact that respondents share the same attorney does not alter this analysis. In the cases cited by petitioners, the shared attorneys were aware of the facts constituting the claims from the outset because they were already actively representing a related entity in connection with virtually identical claims (*see Matter of Fox v New York City Dept. of Educ.*, 124 AD3d 887 [2d Dept 2015]; *Matter of Billman v Town of Deerpark*, 73 AD3d 1039 [2d Dept 2010]). In this case, the suit was commenced against all respondents at the same time.

In view of the foregoing, petitioners failed to demonstrate that respondents were not substantially prejudiced by the delay

(*see Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016]).

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

ENTERED: NOVEMBER 21, 2017

CLERK

Acosta, P.J., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3935 Peter Weiss, Index 810090/10
Plaintiff-Respondent,

-against-

Edward Phillips,
Defendant-Appellant,

Austin Smith, et al.,
Defendants.

_____

Shaw & Binder, P.C., New York (Stuart F. Shaw of counsel), for appellant.

Dorf & Nelson LLP, Rye (Jonathan B. Nelson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered November 4, 2016, affirmed, without costs.

Opinion by Renwick, 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.
Dianne T. Renwick
Angela M. Mazzarelli
Judith J. Gische
Ellen Gesmer, JJ.

3935
Index 810090/10

_____x

Peter Weiss,
Plaintiff-Respondent,

-against-

Edward Phillips,
Defendant-Appellant,

Austin Smith, et al.,
Defendants.
_____x

Defendant Edward Phillips appeals from the order of the Supreme Court, New York County (Gerald Lebovits, J.), entered November 4, 2016, which, among other things, granted plaintiff's motion for summary judgment on the first cause of action, to foreclose on an unsatisfied mortgage, and denied Phillips's cross motion for summary judgment dismissing the action.

Shaw & Binder, P.C., New York (Stuart F. Shaw and Daniel S. LoPresti of counsel), for appellant.

Dorf & Nelson LLP, Rye (Jonathan B. Nelson, Laura-Michelle Horgan and Jami L. Mevorah of counsel), and Cox Padmore Skolnik & Shakarchy LLP, New York (Solomon J. Borg of counsel), for respondent.

RENWICK, J.

In this case, plaintiff Peter Weiss seeks, among other things, a foreclosure and sale based on a Mortgage and Note Extension and Modification Agreement (CEMA)[1] executed by defendant Edward Phillips. Plaintiff lent $500,000 to borrowers who purported to own the real estate property they sought to mortgage.[2] The borrowers signed a note, in which they promised to pay the loan, and a mortgage, in which they gave the plaintiff/lender a security interest in the property they purported to own. The borrowers, however, acquired the property by fraudulent means. After the rightful owner, Phillips, reacquired the property, he executed the CEMA with the individual lender, Weiss. Pursuant to the CEMA, Phillips acknowledged Weiss's rights under the note and mortgage; and, Weiss agreed to forbear from foreclosing on the subject property for a year, presumably to permit Phillips to obtain refinancing.

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[1] The "CEMA" is titled the "Mortgage and Note Extension and Modification Agreement" but the parties and the court referred to it as the "Consolidated Extension Mortgage Agreement Note (CEMA)."

[2] Austin Smith and Jeanetta Welch-Ford are fraudulent owners/borrowers who are also defendants in this action. They, however, are not involved in this appeal. This appeal concerns only Supreme Court's order granting Weiss's motion for summary judgment against defendant and denying Phillips's summary judgment motion dismissing Weiss's claims asserted against him.

We find that the motion court properly granted Weiss summary judgment. Unlike the dissent, under the circumstances of this case, we find that Weiss's interest in the property as a mortgagee was not rendered null and void because his borrowers, the mortgagors, had acquired the property by fraudulent means. In addition, we find that Weiss met his burden for summary judgment, on his claim for foreclosure and sale, by submitting the Mortgage and CEMA, along with undisputed evidence establishing both the existence of the note, which obviated the need to submit the note as proof that Weiss had the right to foreclose, and the nonpayment.

Procedural and Factual History

In the 1990's, Phillips bought two distressed properties in Harlem (8 West 130th Street and 10 West 130th Street). On September 15, 1999, Phillips deeded 10 West 130th Street to a relative, Arque McCarthy, for no consideration. Phillips transferred the property to McCarthy so that McCarthy could obtain a mortgage for him to make repairs and pay accumulated debt. McCarthy held legal title with the understanding that Phillips would pay the loan and McCarthy would transfer the deed back to Phillips at a later date.

Four and one-half years later, in April 2004, Phillips's lawyer told him that he was sending his paralegal, Austin Smith,

to obtain McCarthy's signature on a deed to transfer the property back to Phillips. Smith provided McCarthy with a blank deed. Rather than filling in Phillips's name on the deed as the transferee, Smith inserted his mother's name (Jeanetta Welch-Ford) as the grantee for no consideration. Then, on December 8, 2005, 18 months after the fraudulent transfer, Welch-Ford unlawfully deeded the property to herself and Smith.

Also on or about December 8, 2005, Weiss lent $500,000 to Welch-Ford and Smith pursuant to their signing a note and mortgage in favor of Weiss, encumbering the property for the subject loan amount.[3] Welch-Ford and Smith breached the terms and conditions of the note by failing to make the required payments due on the note. Subsequently, when Phillips learned of the fraudulent transfer, he sued McCarthy to recover his property. Phillips later abandoned his lawsuit against McCarthy when she agreed to sue Welch-Ford and Smith to recover the property from them. Eventually, the lawsuit settled when

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[3] The dissent claims that it is disputed whether Weiss loaned $500,000 to anyone. However, in his deposition, Phillips does not allege that Welch-Ford and Smith never executed a mortgage and note for $500,000, in favor of Weiss. To the contrary, Phillips simply alleged that it was "unconscionable" and "unfair" for Weiss to demand the $500,000. "Peter Weiss didn't give me $500,000. He gave it to Austin Smith and Jeanettea [sic] Welch-Ford." In addition, in his amended answer, which he verified, Phillips explicitly acknowledges that Welch-Ford and Smith had defaulted by failing to make payments on the note.

Welch-Ford and Smith agreed to transfer title to the property back to Phillips. This deed transfer took place on February 23, 2009. At the time, the original McCarthy loan (made by McCarthy on behalf of and at the request of Phillips) reportedly remained unpaid; the principal and accumulated interest totaled $450,000.

Once Phillips learned of Weiss's intention to foreclose on Phillips's reclaimed property, Phillips executed the CEMA with Weiss, on April 8, 2009, extending and modifying the terms of Weiss's mortgage.[4] The CEMA stated that Smith and Welch-Ford were conveying the property to Phillips, and that Weiss agreed to extend and modify the terms of the note and mortgage that were executed by Smith and Welch-Ford. Paragraph 2(a) of the CEMA

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[4] The dissent claims that "nothing in the record leads to the conclusion that Phillips knew Weiss intended to foreclose when he executed the [CEMA], or that this was Phillips's motivation for signing [it]." Phillips, however, testified that after the deed was signed over to him, Weiss both called him and visited his office to inform him that he (Weiss) had lent $500,000 to Welch-Ford and Smith. Phillips also testified that his lawyer informed him that the loan was secured by a mortgage. Under the circumstances, it is very clear what motivated the parties into executing the CEMA. Given this testimony, there is no reasonable basis for the dissent to question Weiss's intent, particularly as both parties were represented by counsel when they executed the CEMA. Indeed, what the dissent finds troublesome, besides Phillips's lack of "formal education after the age of 14," is Phillips's alleged failure to "understand the [CEMA]" and that Phillips "signed it because his attorney ... 'told [him] to sign it and [he] signed it'." Whether Phillips has a viable legal malpractice claim against his lawyer has no bearing on the issues in this case.

stated that Phillips consented to the conveyance of the property and understood that he was not personally assuming payment of the note executed by Smith and Welch-Ford. Paragraph 4 stated that Phillips warranted that the principal outstanding balance under the note was $500,000; that Smith and Welch-Ford had no deductions, counterclaims, defenses, or offsets to the note or mortgage; and that the note and mortgage remained in full force and effect and were fully enforceable in accord with their terms and the modification in the CEMA.

In paragraph 5, Phillips "ratifie[d] and reaffirm[ed]" that the terms and revisions of the note and mortgage remained in effect, and were true and correct, without modification, "except as necessary to implement" the CEMA. Paragraph 6 provided that Phillips warranted that the CEMA was a "valid, enforceable and binding obligation of [his]." In paragraph 7, Phillips "represent[ed] and warrant[ed] that there [we]re no deductions, counterclaims, defenses, or offsets of any nature whatsoever to any of [his] obligations under the Note or Mortgage, as ... modified [by the CEMA]."

Paragraph 15 stated that the note and mortgage as modified by the CEMA remained in full force and effect. Paragraph 16 provided that "[n]o extension, change, modification or amendment of any kind" of the CEMA, note, or mortgage would be effective

unless it was in writing and signed by Weiss and Phillips. Paragraph 19 provided that all prior agreements between the parties with respect to the subject matter of the CEMA were merged into the CEMA.

Finally, Weiss agreed to forbear from foreclosing on the property for a year to permit Phillips to obtain refinancing. Specifically, paragraph 3 of the CEMA extended the due date for a year until April 1, 2010; it also capped the interest due at 9.6%, and required Phillips to make interest payments accruing each month in the amount of $4,000. Phillips paid $4,000 of accrued interest toward Weiss's mortgage on the first of each month for four consecutive months following the CEMA's execution, but he ceased doing so in September 2009.

Upon the expiration of the CEMA's extension period in April 2010, Weiss commenced this action against Phillips, Welch-Ford, and Smith. Subsequently, Weiss moved for summary judgment on the first cause of action of the complaint against Phillips. Along with his motions papers, Weiss provided a copy of the CEMA and the mortgage contract, but he did not provide a copy of the promissory note. Phillips both opposed the motion and cross-moved for summary judgment dismissing the complaint, arguing that the mortgage was unenforceable as it was based on a void deed. The motion court granted Weiss's motion for summary judgment on

the first cause of action of the complaint for foreclosure on the mortgage and denied Phillips's cross motion for summary judgment dismissing the complaint. The motion court found that Weiss satisfied his prima facie burden of demonstrating his entitlement to judgment as a matter of law, and that Phillips offered insufficient evidence to raise a triable issue of fact.

Discussion

As a threshold consideration, given Phillips's execution of the CEMA and other unique facts of this case, we reject the dissent's argument that the failure to produce the note prevents plaintiff from establishing a prima facie case for foreclosure.

The basis of a foreclosure is that an actionable breach of the mortgage has occurred entitling the plaintiff/mortgagee to sell the property to satisfy the debt the mortgage secured (*see e.g. Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], lv dismissed 10 NY3d 741 [2008]). The complaint must allege statements that will ultimately establish a judgment of foreclosure and sale (*id.*). Accordingly, a motion for summary judgment requires the plaintiff to prove the allegations of the complaint which, absent a viable defense or efficacious counterclaim, would entitle a plaintiff to the relief requested (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New*

York Univ. Med. Ctr., 64 NY2d 851 [1985]).

In this case, the complaint seeks a foreclosure and sale based on the CEMA and the mortgage encumbering the subject property. As indicated, under the CEMA, as the "new owner," Phillips ratified and affirmed all the terms of the note and mortgage and warranted that there were no deductions, counterclaims, defenses, and/or setoffs to any obligations under the note. When the CEMA's extension period expired, without complete payment, Weiss commenced this action. Under these circumstances, Weiss established the allegations of the complaint by submitting the CEMA and the mortgage contract, along with unchallenged deposition testimony of the existence of the note and nonpayment.

Unlike the dissent, we do not view this action as a typical mortgage foreclosure action. In a typical mortgage foreclosure transaction, a prima facie case is based on production of the unpaid note and mortgage, which establishes that the plaintiff is entitled to foreclose on the unpaid note. A prima facie case is established here, however, by plaintiff's submission of the mortgage and the CEMA, in which Phillips acknowledges the existence and validity of the unpaid note and mortgage, as well as the deposition testimony in which the existence of the note is unchallenged (*see Seaway Capital Corp. v 500 Sterling Realty*

Corp., 94 AD3d 856 [2d Dept 2012]).

We are not persuaded by the dissent's argument that UCC 3-804 mandates a different result. As fully explained below, the dissent takes UCC 3-804 out of context. UCC 3-804 allows one to maintain an action as a "holder" on a promissory note even though the instrument has been lost or destroyed. The section does not apply here where it is established that plaintiff has the right to sue on the note as the undisputed "holder" of the note.[5]

UCC article 3 defines "a holder in due course" as one who lawfully possesses a negotiable instrument (UCC 3-302). A holder in due course has the presumption that it is the proper party to enforce or negotiate the instrument (*see* UCC §3-301, 3-302). Consistent with article 3, mortgage obligations are owed to the "[p]erson entitled to enforce the note" (*see* UCC §3-301*; see also Aurora Loan Servs., LLC* v *Taylor*, 25 NY3d 355, 361-362 [2015]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d 2011]). The concept of entitlement to enforce the note is designed to protect the mortgagor against having to pay twice or defend against multiple claims on the note. If the mortgagor pays in full the person entitled to enforce the note, the note is discharged and

[5] Here Weiss is both the owner of the note, as he executed the note and leant the money, as well as the "holder" of the note, as demonstrated by the CEMA, which Phillips executed, acknowledging Weiss' right under the note and mortgage.

the mortgage that secures it is extinguished (*see FGB Realty Advisors, Inc.* v *Parisi*, 265 AD2d 297 [2d Dept 1995]).

UCC 3-804 comes into play because article 3 of the UCC does not necessarily equate the person entitled to enforce the note with the person who owns the negotiable instrument (see UCC 3-3a). UCC 3-804 is intended to provide a method of recovery on instruments that are lost, destroyed or stolen. The plaintiff who claims to be the owner of such an instrument is not a holder as that term is defined under article 3, if the plaintiff is not in possession of the paper, and the plaintiff does not have the holder's prima facie right to recover under the section (*see generally*, 3 Anderson, Uniform Commercial Code, § 3-804 [3d ed. 1998]). Thus, under UCC 3-804, the plaintiff must establish the terms of the instrument and his ownership, and must account for its absence.

In this case, because of the CEMA, standing is not an issue.[6] The note's absence is accounted for by the CEMA and

[6] Weiss is the original lender. Standing usually becomes an issue when the plaintiff is not the original lender, but obtained its rights to the mortgage and note by, for example, an assignment. This complicates the issue of standing because it is very common in the mortgage industry for the original lender to sell or assign its mortgage rights to a third party, by the time a defendant defaults upon his/her payment obligations *(see e.g. Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 205-206 [2d Dept 2009]).

there is no legitimate question that Weiss is the party entitled to enforce under the note, as evinced by the mortgage contract and the CEMA, in which Phillips acknowledges Weiss's right under the note and mortgage, and the deposition testimony indicating the existence of the note. When he entered into the CEMA, Phillips was represented by counsel and he knew that Weiss remained the lawful holder of the note and mortgage. Indeed, Phillips waived lack of standing as a defense by failing to raise it in the answer, or by a pre-answer motion (CPLR 3211[e]; 3211[a][3]; *see also Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279-281 [1st Dept 2006], *appeal dismissed* 8 NY3d 837, 862 [2007]).

Our holding here is consistent with a prior holding from the Second Department in *Seaway Capital Corp. v 500 Sterling Realty Corp*. (94 AD3d 856). In *Seaway*, the foreclosure action contained the added element of a forbearance agreement (*id. at 856*). The Second Department found that the plaintiff established a prima facie case for foreclosure "by submitting proof of the existence of the mortgage and note made by and executed on behalf of [the defendant], certain forbearance agreements and [the defendant's] default." In such a situation, the submission of the forbearance agreement, like the CEMA here, served to establish the plaintiff's entitlement to foreclosure, along with proof of the

note and mortgage, thus the failure to submit the note was not a fatal defect.

The dissent expresses unfounded concerns that our holding is inconsistent with the purpose of article 3 of the UCC, which, as indicated, dictates that only a holder in due course can sue on a note so that an obligor is not subject to double liability if the note later turns up in the possession of another claiming to be a holder in due course. Such a risk does not exist in this case where Phillips has assumed no personal liability for the note and the mortgage would be extinguished upon foreclosure.

The dissent seems to be operating under the misconception that Weiss can only enforce his rights under the subject note and mortgage if Phillips had assumed the mortgagors' (borrowers) personal obligations under the note. To be sure, a mortgage instrument is not independently enforceable as a debt *(see FGB Realty Advisors v Parisi*, 265 AD2d 297, 298 [2d Dept 1999] ["A mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation"]). This simply means that a mortgage may be enforced only by the person who is entitled to enforce the note's obligations that the mortgage secures (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]).

Since Weiss's failure to submit the note, under the

circumstances of this case, does not negate his entitlement to summary judgment of foreclosure, the burden shifted to Phillips to produce admissible proof sufficient to raise a triable issue of fact. In this case, as noted, the CEMA contains a provision whereby Phillips waived interposition of defenses or counterclaims in any foreclosure action. Courts have held that the waiver of the right to assert defenses, counterclaims or set offs is enforceable and thus not violative as against public policy (*see e.g. Parasram v DeCambre*, 247 AD2d 283 [1st Dept 1998]; *KeyBank N.A. v Chapman Steamer Collective, LLC*, 117 AD3d 991 [2d Dept 2014]). Similarly, where the agreement of the parties, like the CEMA here, clearly recites that the indebtedness must be paid without set offs, deduction, defense or counterclaim, such claims are barred (*see Federal Land Bank of Springfield v Saunders*, 108 AD2d 838, 839 [2d Dept 1985], *lv denied* 64 NY2d 611 [1985]). Accordingly, waived defenses "may not be maintained" (*Bank of New York v Cariello*, 69 AD2d 805, 805 [2d Dept 1979]).

Phillips, however, argues that the mortgage is not enforceable because it was based on a "fraudulent/forged deed." We reject this argument. Essentially, Phillips asserts that because McCarthy and Smith never had title in the first place, they never had anything to mortgage. Thus, the mortgage was

invalid. Phillips's argument, however, conflates the distinction between a void deed and a voidable deed.

To be clear, a deed may be cancelled because it is void or because it is voidable. The difference, however, between a void deed and a voidable deed is important under the law because it affects a party's ability to defend against a future purchaser or encumbrancer for value. A void real estate transaction is one where the law deems that no transfer actually occurred (*Faison v Lewis*, 25 NY3d 220, 225 [2015]). Accordingly, if the deed is void, it does not pass title and cannot be enforced even if title is later acquired by a bona fide purchaser (*id.*; *ABN AMRO Mtge. Group, Inc. v Stephens*, 91 AD3d 801, 803 [2d Dept 2012]). Similarly, a lender who takes a mortgage to a property subject to a void deed does not have anything to mortgage, so the lender's mortgage is invalid as well (*Cruz v Cruz*, 37 AD3d 754 [2d Dept 2007]; *Yin Wu v Wu*, 288 AD2d 104, 105 [1st Dept 2001]). In contrast, a voidable real estate transaction is one where a transfer is deemed to have occurred, but can be revoked. In that situation the deed is only voidable (*Faison v Lewis*, 25 NY3d at 225).

The question becomes whether the deed by which Welch-Ford and Smith acquired the subject real estate was a void deed or a voidable deed. Forged deeds and/or encumbrances are those

executed under false pretenses, and are void ab initio (*see Marden v Dorthy*, 160 NY 39 [1899]; *GMAC Mtge. Corp. v Chan*, 56 AD3d 521, 522 [2d Dept 2008]; *Cruz v Cruz*, 37 AD3d 754). The interests of subsequent bona fide purchasers or encumbrancers for value are thus not protected under Real Property Law § 266[7] when their title is derived from a forged deed or one that is the product of false pretenses (*see Ameriquest Mtge. Co. v Gaffney*, 41 AD3d 750 [2d Dept 2007]; *LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 599-600 [2d Dept 2007]). In contrast, a fraudulently induced deed is merely voidable, not void (*see Marden v Dorthy*, 160 NY at 150; *Dalessio v Kressler*, 6 AD3d 57, 61 [2d Dept 2004]; *Yin Wu v Wu*, 288 AD2d at 105).

In this case, Phillips improperly labels the instrument by which the improper transfer took place as both a "fraudulent/forged deed." The undisputed facts establish, however, that the deed was the result of fraudulent inducement, rather than the result of a forged deed or one executed under false pretenses. As fully explained above, the tortfeasor (at the time, a paralegal assigned to procure the deed transfer) obtained the owner's signature on the deed purportedly to

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[7] Real Property Law § 266 protects the title of a bona fide purchaser or encumbrancer unless he or she had previous notice of "the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

transfer the property back to its original owner, Phillips. The paralegal presented the owner with a blank deed, which she signed. The subsequent deed transfer was the result of a classic fraudulent inducement, because the owner believed that she was signing the deed in order to transfer the property back to its original owner, Phillips. Instead, the deed transferred the property to the paralegal's mother and then himself, before they obtained a loan and mortgage from Weiss. Thus, the deed here was voidable, not void ab initio.

Phillips, however, argues that Weiss was not a bona fide encumbrancer entitled to protection under Real Property Law § 266. While the evidence in this case presents an issue of fact as to whether Phillips was in actual possession of the property when Weiss acquired his mortgage interest, which was sufficient to require an inquiry by Weiss into "the existence of any right which [the owner may be] able to establish" (*Phelan v Brady*, 119 NY 587, 592 [1890]), Phillips's attack on the mortgage faces an insurmountable obstacle, the CEMA. The CEMA makes clear that Phillips acknowledged Weiss's rights under the note and mortgage and waived any claims or defenses as to the same.

We reject Phillips's contention - adopted by the dissent

here - that the CEMA is ambiguous as to its intended purpose.[8] Phillips argues that ambiguity is created by the language in the CEMA stating that Phillips "is not personally assuming payment of the Note." However, this simply means that if Weiss proceeded to an eventual foreclosure and sale of the property and the proceeds of the sale were less than the amount due and owing to Weiss under the note and mortgage, Phillips would not be personally liable to pay the deficient amount. Contrary to the dissent's position, this language is not inconsistent with the remaining terms of the CEMA which, in effect, indicated to Phillips that his property was subject to Weiss's lien up to the amount of the unpaid note.

Ultimately, Phillips may not avoid a mortgage obligation on his property on the ground of fraud where, after acquiring knowledge of the fraud, he affirmed in the CEMA that his property

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[8] The dissent mistakenly asserts that it is "the law of this case that the [CEMA] is ambiguous." The doctrine of law of the case provides that once an issue is judicially determined, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]; *Kenney v City of New York*, 74 AD3d 630 [1st Dept 2010]; *New York State Thruway Author. v KTA-Tator Eng. Servs, P.C.*, 78 AD3d 1566, 1567(4th Dept 2010); *Gould v International Paper Co.*, 223 AD2d 964, 965 [3d Dept 1996], lv denied 88 NY2d 808 [1996]). Thus, the trial court's finding of ambiguity on a prior motion does not constitute law of the case with respect to this Court and is not binding on the Appellate Division.

was subject to Weiss's lien up to the amount of the unpaid note. A party can ratify a contract by failing to timely disaffirm it or by acts, like here, that are consistent with a showing of an intent to be bound by the contract, even if the contract was otherwise voidable (*see Stauss v Title & Guar. Trust Co.*, 284 NY 41, 45 [1940]; *Cooper v Greenberg*, 151 AD2d 423, 424 [1st Dept 1989]).

In this case, not only did Phillips sign the CEMA, by which he acknowledged Weiss's rights under the Note and Mortgage, but he also paid $4,000 of accrued interest toward Weiss's mortgage on the first of each month, for four consecutive months, pursuant to the CEMA's extension agreement. Accordingly, because of the unequivocal language of the CEMA, and in light of Phillips's conduct following its execution, Phillips expressly and impliedly ratified Weiss's mortgage on the property (*see Votta v Votta Enter.*, 249 AD2d 536, 537 [2d Dept 1998] [mortgage debt deemed ratified where borrowers made payments for 18 months after discovering the alleged fraud]).

Significantly, Phillips signed the CEMA while represented by counsel. It is of no moment that Phillips now claims to have misunderstood the legal implications and ramifications of the terms of the CEMA. The fact that no one allegedly explained the agreement to the signer does not make the agreement unenforceable

unless it rises to the level of fraud, overreaching or unconscionability (*Matter of Gould v Board of Educ. Of Sewankaha Cent. High School Dist.*, 81 NY2d 446, 453 [1993]). The concept of unconscionability permits a court to declare a part or all of a contract inoperative if it would result in "unfair surprise" or if it would be "oppressive" to the signer (*id.; see also Broadway-111th St. Assoc. v Morris*, 160 AD2d 182 [1st Dept 1990]).

There is no showing of unconscionability in the formation of the CEMA, the subject contract (*see Morris v Snappy Car Rental*, 84 NY2d 21, 30 [1994]). Phillips's allegation that his lawyer improperly induced him to sign the CEMA is refuted by his counsel's detailed explanation for entering into the CEMA. In his deposition, counsel for Phillips explained that $450,000 of the $500,000 proceeds of Weiss's loan went to satisfy the first mortgage, which McCarthy had obtained on Phillips's behalf. The mortgage, for which McCarthy was liable, was in default even though Phillips had agreed to make payments on the loan. The $500,000 second mortgage loan covered the debt of the first mortgage loan taken out by McCarthy on behalf of Phillips. Under the circumstances, counsel for Phillips reasonably concluded that Weiss, as a mortgagee, had a valid equitable subrogation claim for $450,000 (*see King v Pelkofski*, 20 NY2d 326 [1967] [A party

who provides the money used to discharge a prior mortgage is entitled to be subrogated to the rights of the prior lienor where the party's lien, through some disability, becomes invalid]). Finally, counsel for Phillips explained that, prior to entering into the CEMA, Phillips had already agreed to waive seeking the remaining $50,000 from the parties who defrauded him, in exchange for regaining title to the property.

Phillips alternatively claims that the CEMA is unenforceable because there was no consideration. This ignores the fact that by entering into the CEMA, Weiss agreed to forbear from foreclosing on the property for a year to permit Phillips to obtain refinancing. Finally, we have considered Phillips's remaining contentions, including that Weiss violated the rule against successive summary judgment motions, and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Gerald Lebovits, J.), entered November 4, 2016, which, among other things, granted Weiss's motion for summary judgment on the first cause of action, to foreclose on an

unsatisfied mortgage, and denied Phillips's cross motion for summary judgment dismissing the action, should be affirmed, without costs.

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

GESMER, J. (dissenting in part)

I respectfully dissent as to the portion of the majority decision that affirms the grant of summary judgment to plaintiff Peter Weiss. The majority's position is premised on the accuracy of two statements in the first paragraph of its writing, both of which are unsupported by any evidence. First, my colleagues state that plaintiff loaned $500,000 to the borrowers. However, plaintiff does not swear in any of his affidavits that he loaned $500,000 to anyone, and the record before the court does not include any documents showing that he did so.

Second, the majority states that the alleged borrowers signed a note. However, the record before the court does not include any note, or any affidavit by anyone who claims to have drafted or signed the alleged note, or even by anyone who claims to have seen or ever possessed the alleged note. In fact, plaintiff's failure to produce the note on which he sues deprives him of a fundamental element of his prima facie case for foreclosure (*Bank of Smithtown v 264 West 124 LLC*, 105 AD3d 468, 469 [1st Dept 2013]). Plaintiff can only cure this deficiency by explaining the absence of the note and proving its terms, which he has failed to do (UCC 3-804; *see also Shanmugam v SCI Eng'g, P.C.*, 122 AD3d 437, 438 [1st Dept 2014]; Clovine *Assoc. Ltd. Partnership v Kindlund*, 211 AD2d 572, 573 [1st Dept 1995]). The

record does not include any explanation for the absence of the note. One possible conclusion is that the note does not exist. This undercuts the majority's conclusion that plaintiff is the "undisputed 'holder' of the note." Thus, in the absence of an explanation for its absence, production of the note, and proof that plaintiff holds it, is essential to plaintiff's case. The majority makes the unprecedented holding today that plaintiff may make out a prima facie case for foreclosure without either producing the note or explaining its absence and proving its terms.

The majority writing is also premised on a significant error of law. A foreclosure proceeding is premised on the breach of a note, not, as the majority states, a breach of a mortgage, since "a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (*FGB Realty Advisors v Parisi*, 265 AD2d 297, 298 [2d Dept 1999], citing *Copp v Sands Point Mar.*, 17 NY2d 291, 293 [1966]).

Defendant Edward Phillips has raised triable issues of fact as to plaintiff's entitlement to a judgment of foreclosure, including whether Phillips had any obligation to pay plaintiff on which he could have defaulted, and whether plaintiff is the holder of a bona fide obligation. Therefore, I would reverse the grant of summary judgment to plaintiff, and affirm the denial of

summary judgment to Phillips.

Facts

Plaintiff, a college graduate, is in the business of lending money secured by mortgages. He works both in his own name and through his business, Confidential Lending LLC. Phillips had no formal education after the age of 14, when he quit school to work on his family's farm in Tobago. He now supports himself doing plumbing repairs on a freelance basis for a management company.

On May 15, 1996, Phillips purchased a three family dwelling at 10 West 130th Street in Manhattan (the Property). In 1999, on the advice of his lawyer Edwin Drakes, he made an oral agreement with his relative Arque McCarthy that he would deed the Property to her, for no consideration, and that she would, upon his request, deed the Property back to him, at a future date. Accordingly, on September 15, 1999, he executed a deed transferring ownership of the Property to McCarthy.[1]

In or about April 2004, Drakes told Phillips that it was

[1]Phillips testified that he did so because he needed funds to renovate a property he owned at 8 West 130th Street, but he was unable to qualify for a mortgage. Once the Property had been transferred to McCarthy's name, she took out a loan for $208,000 secured by a mortgage on the Property (the 1999 Mortgage). Phillips used those funds to make repairs on 8 West 130th. He then intended to take out a mortgage on 8 West 130th and use the proceeds to pay off the 1999 Mortgage, at which time he would ask McCarthy to transfer the Property back to him.

time to have McCarthy deed the Property back to him. Drakes said that he would take care of the transfer, by sending his employee Austin Smith to obtain McCarthy's signature on a deed that would transfer the Property back to Phillips.[2] Phillips told McCarthy that she should meet with Smith to sign the deed. According to McCarthy's undisputed affidavit, on or about April 28, 2004, Smith presented her with a blank deed, which she signed; no notary was present when she did so. She believed that she was signing the deed in order to transfer the Property back to Phillips.

On August 2, 2004, a deed dated April 28, 2004 transferring the Property from McCarthy to Smith's mother, Jeanetta Welch-Ford, was recorded.[3] An acknowledgment of McCarthy's signature by notary Lewis Phillip appears on the deed. McCarthy did not authorize the transfer of the Property to Welch-Ford, and did not see the completed deed until years later. The accompanying Real

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[2]At that time, Phillips continued to believe that Drakes was his attorney. However, Drakes had been suspended from the practice of law for a period of two years commencing April 1, 2004 (*Matter of Drakes*, 60 AD3d 153, 155 [2d Dept 2009]). In 2009, Drakes was disbarred for, inter alia, conversion of client funds, appearing for Phillips at the mortgage closing, and depositing the proceeds into his attorney escrow account during the period of his suspension (*Matter of Drakes*, 60 AD3d 153).

[3]The order appealed from states incorrectly that this deed transferred the Property to Welch-Ford and Smith.

Property Transfer Report submitted to the City Register provides that this was a "Sale Between Relatives or Former Relatives." There is no claim that Welch-Ford and McCarthy are relatives or former relatives. The accompanying smoke detector affidavit submitted to the City Register confirms that the Property is residential.

On November 12, 2004, Phillips commenced an action against McCarthy under New York County index number 116025/04 in which he filed a lis pendens against the Property and claimed that McCarthy was going to transfer or had transferred the Property to a third party in violation of their agreement. He sought an order directing her to transfer title of the Property back to him. By order dated August 26, 2005, the court denied a motion to vacate the lis pendens. According to the Unified Court System website, the matter was dismissed on August 30, 2005.[4]

On or about December 8, 2005, Welch-Ford executed a deed transferring the Property from herself to herself and Smith.

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[4]Phillips testified that he "dropped" this action after speaking with McCarthy and becoming convinced that she had not been part of a scheme to deprive him of his rights to the Property, as he had believed when he commenced the action. There is no evidence in the record before us that Phillips abandoned this action because McCarthy "agreed to sue Welch-Ford and Smith to recover the property from them," as the majority writing states. Indeed, McCarthy's suit against Smith and Welch-Ford was not commenced until nearly two years after dismissal of Phillips's suit against McCarthy.

Simultaneously, Smith and Welch-Ford entered into a Mortgage, Security Agreement and Assignment of Leases and Rents (the Mortgage) with plaintiff, ostensibly to secure a loan from plaintiff of $500,000. Plaintiff had done three or four mortgage transactions with Smith before that.

The Mortgage refers to a note dated December 8, 2005 (the Note) but the Note is not in the record on appeal and there is no indication that it was provided to the motion court.[5] Plaintiff has failed to meet his burden to provide an explanation as to why the Note was not produced. Therefore, the court cannot consider testimony as to its contents (Jerome Prince, Richardson on Evidence § 10-201 [Farrell 11th ed 1995]; Martin, Capra and Rossi, New York Evidence Handbook § 10.3 [3d ed 2017]; 57 NY Jur 2d, Evidence and Witnesses § 253). Indeed the record is also devoid of evidence that Weiss paid $500,000 to Smith and Welch-Ford at that time, either by direct payment or by making a payment on their behalf. Weiss does not make any affirmative statement that he made such a payment, nor is there any documentary evidence that he made such a payment.

[5]The order appealed from states that "plaintiff provides a copy of the mortgage and note," but the Note is not in the record. From context, it appears that the motion court was referring not to the Note but to the 2009 Mortgage and Note Extension and Modification Agreement (EMA), discussed infra.

The recording and endorsement cover page for the Mortgage states that the Property is a "DWELLING ONLY - 3 FAMILY."[6] However, the Mortgage provides, at Paragraph 45, titled "Non-Residential Property," that it "does not cover real property principally improved by one or more structures containing in the aggregate six (6) or less residential dwelling units having their own separate cooking facilities." At the end of the mortgage document, there are three boxes in which the borrower is to indicate whether the property securing the loan is residential, and has one or two units, or more; no box is checked.

A December 2005 title report, prepared in connection with the Mortgage, lists Phillips's lis pendens, as well as a lis pendens filed against McCarthy in connection with foreclosure actions against her by Nationscredit Financial Services. Phillips first saw this title report when it was produced in discovery in this action. Plaintiff testified that, although he received the title report prior to the closing, he did not examine the schedules attached to it. Plaintiff further testified that, before making the loan, he never spoke to Welch-

[6]This is consistent with Phillips's testimony at his deposition that one unit was occupied by a long-time tenant and her husband, the other units were occupied by Phillips's cousin and Phillips's stepdaughter, and that Phillips stayed at the Property on weekends and stored his work tools there.

Ford, did not request that Smith and Welch-Ford complete a loan application, did not conduct a credit check on them, did not run an internet search on the Property, and did not have the Property appraised prior to closing. He testified that he only looked at the Property from the outside.

On January 31, 2006, the deed transferring the Property from Welch-Ford to Welch-Ford and Smith was recorded, along with the Mortgage.

On January 5, 2007, McCarthy, represented by attorney David K. Fiveson,[7] commenced an action against Smith and Welch-Ford under New York County index number 100179/07 (the McCarthy action)[8] seeking to set aside the deeds transferring the Property from McCarthy to Welch-Ford and from Welch-Ford to herself and Smith, and seeking damages of $500,000, "minus any sums used from these proceeds to discharge valid liens of plaintiff against [the Property]." According to the Unified Court System website, the McCarthy action was marked "settled during trial" on February 4,

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[7]Fiveson had represented Phillips in a 2007 action against Drakes in which he obtained a judgment that was later vacated. In addition, since 1990, Fiveson had represented the company that insured title in connection with the Mortgage.

[8] The description of the relief sought is taken from the complaint in the McCarthy action, which is not in the record before us, but was available on the court website. The order appealed from incorrectly states that the index number was 10017/07 and that Phillips was a party to the McCarthy action.

2009. The record does not contain either a written settlement agreement or a transcript of an agreement entered into in open court, and no one has explained its absence. Therefore, the terms of the alleged agreement have not been established, except that, on or about February 23, 2009, Smith and Welch-Ford executed a "correction deed," transferring the Property to Phillips, which states that it "is intended to correct the name of the grantee's in the deed recorded 1/31/2006 under CRFN 2006000059194 from Jeanettea [sic] Welch Ford and Austin Smith - to- edward [sic] Phillips pursuant to a settlement of New York County Supreme Court action/index no. 10017/2007 [sic]." The correction deed was recorded on May 29, 2009.

In April 2009, Phillips and plaintiff executed a document titled "Mortgage and Note Extension and Modification Agreement" (EMA).[9] The EMA denominates Smith and Welch-Ford as "Original Borrower," Phillips as "New Owner," and plaintiff as "Lender." The EMA provides that plaintiff consents to the conveyance of the

[9]The majority states that Phillips did so when he "learned of Weiss's intention to foreclose on Phillips's reclaimed property." However, nothing in the record leads to the conclusion that Phillips knew Weiss intended to foreclose when he executed the EMA, or that this was Phillips's motivation for signing. Indeed, Phillips testified that, even at the time of his deposition in this case, he did not understand the EMA, and that he signed it because his attorney, whom Phillips believed had prepared the EMA, "told me to sign it and I signed it."

Property from Smith and Welch-Ford to Phillips, and provides, at paragraph 2(a), that "[i]t is understood and acknowledged that New Owner is not personally assuming payment of the Note." It extends the maturity date of the Note to April 1, 2010. However, the EMA does not set forth the terms of the Note.

Moreover, contrary to the majority's statement that the EMA obligates Phillips to make interest payments to plaintiff, the EMA is explicit that Phillips is *not* assuming payments due under the alleged Note. The EMA is, at best, ambiguous as to who is obligated to make interest payments, as the motion court previously found in its October 10, 2012 order denying plaintiff's first motion for summary judgment. This ambiguity had not been resolved, and remained the law of this case at the time the motion court granted plaintiff's second motion for summary judgment, which is the subject of this appeal. The second paragraph 3 of the EMA, at the bottom of page 1, provides that

> "[i]nterest shall continue to accrue on the outstanding principal balance due under the Note from March 1, 2009 until the Maturity Date at the rate of 9.6% per annum. Interest only shall be payable in the amount of $4,000 on April 1, 2009 and like amount on the first day of each month thereafter. All accrued interest shall be due and payable on the Maturity Date or such earlier date as the principal sum due under the Note shall become due and payable. Borrower may prepay the principal balance and all accrued interest at any time without premium or penalty."

The EMA further states that accrued interest under the Note totaled $81,666.66 as of February 28, 2009; that the outstanding principal balance was $500,000; and that "Borrower has no deduction, counterclaim, defense and/or offset relating to the Note or Mortgage, which Note and Mortgage are acknowledged to be and remain in full force and effect and fully enforceable in accordance with their respective terms . . . . " It further provides that "New Owner represents and warrants that there are no deductions, counterclaims, defenses, or offsets of any nature whatsoever to any of its obligations under the Note or Mortgage . . . . " However, it does not state that New Owner has any obligations under the Note, Mortgage, or EMA, and it does not define the term "Borrower."

Phillips testified throughout his deposition that he had difficulty understanding written documents, legal concepts, or words such as "indemnify," "convey," or "legitimate."[10] He testified that he understood the EMA to obligate "the person who took . . . the [M]ortgage to pay" it. In his affidavit submitted to the motion court, he also stated that he understood the EMA to be a forbearance agreement that did not give plaintiff the right

[10]Fiveson also testified that Phillips "is not a man that understands legal terms."

to foreclose against him.

Plaintiff testified that he understood the second paragraph three in the EMA to obligate Phillips to make interest payments of $4,000 per month, although that paragraph does not impose any obligation on Phillips either by name or as "New Owner." Although the EMA defines Smith and Welch-Ford as "Original Borrower," the term "Borrower" is not defined. Plaintiff testified that he understood the term "Borrower" to refer to Phillips, although he acknowledged that plaintiff never received any funds from the Mortgage proceeds. Although plaintiff has a college education and is an experienced businessman whose business is making loans secured by mortgages, he claimed not to understand the language in paragraph 2(a) of the EMA providing that Phillips is not personally liable on the Mortgage.

Plaintiff commenced this foreclosure action on November 19, 2010. Smith and Welch-Ford did not appear or submit an answer.

In the amended complaint dated March 4, 2011,[11] plaintiff alleges in his first cause of action that Smith and Welch-Ford failed to make payments due under the Mortgage and Note on February 1, 2008 and thereafter; that Phillips was obligated to

[11]Although plaintiff's counsel refers to the "amended verified complaint," the amended complaint contained in the record is not verified.

pay $4,000 per month commencing April 1, 2009 pursuant to the EMA; and that he failed to do so on and after September 1, 2009. Plaintiff seeks a judgment of foreclosure.

The amended complaint further alleges, in the second cause of action, that plaintiff is entitled to a judgment against "Defendant" for the costs of collection because Smith and Welch-Ford agreed to pay collection costs and counsel fees. In addition, in the third cause of action, plaintiff alleges that Smith and Welch-Ford are liable for sums due under the Mortgage and Note pursuant to a written guaranty, and plaintiff seeks a judgment against them for any deficiency remaining after sale of the Property. The fourth cause of action alleges that McCarthy took out a mortgage on the Property in 1999 for $208,000, that McCarthy and Phillips failed to make payments on that mortgage, and that $350,000 of the proceeds of the Mortgage were used to pay off the 1999 mortgage. Plaintiff seeks, in the alternative to a judgment on his first three causes of action, a declaratory judgment that he has a valid first lien on the Property, to the extent that $350,000 of the proceeds from the Mortgage were used to pay off the earlier mortgage on the Property or were "paid to or for the benefit of" Phillips.[12]

[12]The majority states that accrued principal and interest on the 1999 mortgage taken out in McCarthy's name totaled $450,000

Phillips filed a verified amended answer on April 7, 2011. Phillips's affirmative defenses include that the Mortgage is unenforceable because it is based on a deed obtained through false pretenses; that plaintiff is not a bona fide encumbrancer for value because he should have known that the deed was questionable, and failed to make reasonable inquiry; that the EMA is unenforceable because it is based on a deed obtained through false pretenses, and lacks consideration; and that the EMA does not obligate Phillips to pay any sums.

By order dated October 10, 2012, Judge Wooten denied both plaintiff's first motion for summary judgment, which sought dismissal of Phillips's defenses to his obligations under the Mortgage, and Phillips's cross motion for summary judgment, in which he sought dismissal on the grounds that plaintiff had failed to attach a copy of the Mortgage and Note. In addition, Judge Wooten held that the EMA was ambiguous, and that plaintiff's and Phillips's materially divergent claims about their intent in entering into the EMA precluded summary judgment

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at the time McCarthy's suit against Smith and Welch-Ford was settled. However, there is no evidence in the record of this, other than Fiveson's deposition testimony from his memory, which he himself acknowledged was not reliable, stating, "if my memory serves me correctly . . . ." Even plaintiff alleges that the accrued balance on the 1999 mortgage totaled not more than $350,000.

as a matter of law.

After further discovery, including party depositions, plaintiff moved for summary judgment on his first cause of action for a judgment of foreclosure, and Phillips cross-moved for summary judgment dismissing the complaint as against him. By order dated July 22, 2016, which is the subject of this appeal, Judge Lebovits granted plaintiff's motion for summary judgment on his first cause of action, denied Phillips's cross-motion for summary judgment, and directed plaintiff to settle an order on notice referring the matter to a Special Referee.

Analysis

I would vote to reverse the award of summary judgment to plaintiff for three reasons.

First, plaintiff has failed to make out a prima facie case entitling him to a judgment of foreclosure, since he has failed to produce the Note (*Bank of Am., N.A. v Thomas*, 138 AD3d 523 [1st Dept 2016]; *see also Bank of Smithtown*, 105 AD3d at 469; *Bank of N.Y. Trust Co., N.A. v Chiejina*, 142 AD3d 570 [2d Dept 2016][all holding that plaintiff establishes a prima facie right to foreclosure by producing the mortgage, note and undisputed evidence of nonpayment]).[13] Indeed, neither plaintiff's

[13] *Seaway Capital Corp. v 500 Sterling Realty Corp.* (94 AD3d 856 [2d Dept 2012]) does not support the position for which the

affidavit in support of the motion for summary judgment, nor his attorney's accompanying affirmation, even refer to the Note, even though plaintiff's failure to present it to the motion court was a major factor in the denial of plaintiff's first summary judgment motion.

The majority's statement that plaintiff satisfied his obligation by producing unspecified "evidence . . . of the note" is not consistent with the case law. A party may only prevail in a foreclosure action without producing the underlying note where he meets his "burden of explaining the note's loss, ownership and terms as required by UCC 3-804" (*Clovine Assoc. Ltd. Partnership v Kindlund*, 211 AD2d at 573; *see also Shanmugam v SCI Eng'g, P.C.*, 122 AD3d 437, 438 [1st Dept 2014]; *Marrazzo v Piccolo*, 163 AD2d 369 [2d Dept 1990]). Absent evidence of the complete terms of the Note, plaintiff has failed to establish his prima facie

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majority cites it. That decision merely recites that the plaintiff established its right to summary judgment "by submitting proof of the existence of the mortgage and note . . . certain forbearance agreements, and the default of [defendant]" (*id.* at 856). The Second Department does not specify what proof of the note was offered in *Seaway*, and it is possible the proof was the note itself. That case certainly does not hold that a forbearance agreement signed by a person who was not a party to the note and has never seen it, standing alone and in the absence of the note, is sufficient proof of the note's existence and terms. Nor does *Seaway* hold that the absence of deposition testimony challenging the note constitutes proof of its existence and terms.

case (*76-82 St. Marks, LLC v Gluck*, 147 AD3d 1011 [2d Dept 2017]; *Wong v Wong*, 86 AD3d 439 [1st Dept 2011]; *Cole v Canno*, 168 App Div 178, 183 [3d Dept 1915]["It would certainly be establishing a dangerous precedent to permit a writing vital to the maintenance of a cause of action to be established by parol until some satisfactory proof of its loss or of inability to produce it had been made, or at least some effort to ascertain whether the writing were still in existence"]).

This is consistent with the purpose of UCC 3-804, which protects the obligor by requiring the plaintiff to prove it is a holder in due course of the note sued upon, so that the obligor is not subject to double liability if the note later turns up in the possession of another claiming to be the holder in due course (*see* Official Commentary, McKinney's Cons Laws of NY, Book 62½, UCC 3-804).[14] Here, plaintiff has offered no explanation whatsoever for the Note's absence, and no proof of its contents. Furthermore, the majority may not rely on the EMA to take the place of the missing Note, because that document does not set

[14] My colleagues in the majority are correct that this particular risk is not present for Phillips, since he is not liable on the Note. However, he is certainly at risk of losing his property based on the alleged breach of a note that may never have been executed, the terms of which remain unknown, which purports to arise from a loan nobody claims to have made, and which may not exist at all.

forth the terms of the alleged Note.

Moreover, plaintiff has also failed to present "undisputed evidence" that Phillips has defaulted since, as discussed further below, the EMA is ambiguous as to whether it obligates Phillips to make any payments on the Note (*Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]). The majority appears to view Phillips's execution of the EMA as a ratification of the Mortgage and alleged Note. However, the EMA merely states at paragraph 7 that Phillips acknowledges that there are no defenses or counterclaims to *his* obligations under the Note or Mortgage. Since there is no claim that he had obligations under either, this statement does not impose any obligation on him, or constitute a ratification of either document. Nor has plaintiff presented evidence that the original borrowers defaulted, since he has not proven what obligations, if any, the Note imposed on them.

Second, defendant has raised material questions of fact as to the EMA's enforceability. At the time that Weiss made his second motion for summary judgment resulting in the order now appealed from, it remained the law of this case that the EMA is ambiguous, and neither party has produced evidence in admissible form sufficient to resolve the ambiguity.

The motion court seemed to hold that the ambiguity of the

EMA was resolved by the settlement agreement in the McCarthy action against Smith and Welch-Ford, which plaintiff claims was binding on Phillips and required him to indemnify Smith and Welch-Ford against any deficiency judgment in connection with the Mortgage.

However, no one has produced that settlement agreement. To succeed on a summary judgment motion, the movant must establish his cause of action by presentation of proof in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 [1st Dept 2007]). The best evidence of the terms of the alleged settlement agreement would be a certified copy of the complete transcript of the proceedings, or a signed writing; neither party presented any such evidence to the motion court (*see Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 644 [1994]). Instead, plaintiff presented an unsigned transcript of Phillips's deposition testimony, which included purported quotes of portions of the transcript of the alleged settlement agreement. This is clearly inadequate under the best evidence rule to establish the contents of the settlement agreement.

In addition, since Phillips was not a party to the McCarthy action, it is unlikely that any settlement of that action would bind him. CPLR 2104, which deals with agreements "between

parties or their attorneys relating to any matter in an action," requires that such agreements be reduced to a writing, unless they are made "between counsel in open court" (CPLR 2104). Since Phillips was not a party to the McCarthy action, the exception created by CPLR 2104 does not apply here. Furthermore, since the agreement is alleged to have addressed interests in real property and an obligation to pay for the debt of another, an oral agreement would also violate the statute of frauds (General Obligations Law § 5-701[a][2], [10]; *see also Matter of Dolgin Eldert Corp.*, 31 NY2d 1, 11 [1972]).

Moreover, as Judge Wooten previously found, the plain language of the EMA does not obligate Phillips or "New Owner" to do anything, and expressly provides that he is not personally liable on the Note. The deposition testimony attached to the motion does not resolve the ambiguity; indeed, it demonstrates that Phillips and Weiss had directly contrary purposes and understandings in entering into the EMA. Phillips testified that he believed, when he signed the EMA, that Fiveson, whom Phillips perceived to be representing him at the time, had prepared it and that it was "a part of the deed" transferring the Property back to him. He further testified that Fiveson did not fully explain it to him, and, contrary to the majority's statement, it is not clear on the record before us that Fiveson, or any other

attorney, represented Phillips when he executed the EMA.[15] Fiveson and Borg testified that Borg prepared it. Fiveson testified that he understood the EMA to be a forbearance agreement, not a loan to Phillips secured by the Property.

Finally, contrary to the majority's statement, Phillips has also raised questions of fact as to whether plaintiff is a bona fide encumbrancer entitled to protection under Real Property Law § 266. I agree with the majority that a deed that is the result of fraudulent inducement is voidable (*Faison v Lewis*, 25 NY3d 220, 225 [2015]). However, the majority fails to address the relevance to this case of the doctrine that, where a mortgagee had previous notice of fraud affecting the grantor's title, it may not be a bona fide encumbrancer, and may not be protected (RPL § 266; *see also Yin Wu v Wu*, 288 AD2d 104, 105 [1st Dept 2001]). "A mortgagee will be charged with constructive notice if it is 'aware of facts that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue.' If a 'reasonable inquiry' would reveal some evidence

[15]Fiveson testified that he had no specific recollection of what he said to Phillips about the EMA, but acknowledged that Phillips must have signed it in his office because his signature was notarized by Fiveson's employee. However, Fiveson also testified that the settlement "went beyond the scope of my Retainer Agreement with" Phillips, so it is not clear what Fiveson's role was with regard to the EMA.

of fraud, then failure to 'make some investigation' will divest the mortgagee of bona fide encumbrancer status" (*Miller-Francis v Smith-Jackson*, 113 AD3d 28, 34 [1st Dept 2013] [internal citations omitted]).

Here, Phillips has raised questions of fact requiring a trial as to whether plaintiff is a bona fide encumbrancer entitled to protection.[16] First, the Mortgage itself raises an issue as to whether plaintiff conducted a reasonable inquiry, since the cover pages state that the Property is residential, and the Mortgage itself states that it is not; moreover, public records and a cursory perusal of the outside of the Property would have revealed that it is a residential building. Second, plaintiff admitted that he received a title report in connection with the Mortgage prior to the closing, but did not read it completely. That title report showed that Phillips had obtained a lis pendens on the property in his 2004 action against McCarthy. Similarly, plaintiff knew that, at the time of the closing on the Mortgage, another mortgage existed in McCarthy's name, even though Smith and Welch-Ford claimed to own the

[16]Contrary to the majority's characterization of my position, I do not find that plaintiff is not a bona fide encumbrancer; rather, it is my view that Phillips has raised material questions of fact about whether plaintiff is a bona fide encumbrancer, thus precluding summary judgment in his favor.

Property. Finally, plaintiff admitted at his deposition that he conducted virtually no investigation into Smith's and Welch-Ford's creditworthiness and bona fides and into the Property and its history and value, other than viewing the outside of the building and walking around the neighborhood; and Phillips testified that plaintiff later admitted to him that he had not even done that.

Since plaintiff has failed to make out a prima facie case entitling him to a judgment of foreclosure, and Phillips has raised issues of fact requiring a trial, I would vote to reverse the motion court's award of summary judgment to plaintiff on his first cause of action, and I would affirm the motion court's denial of Phillip's motion for summary judgment.

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

ENTERED: NOVEMBER 21, 2017

CLERK