SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 8, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7063 Normandy Real Estate Partners LLC, Index 650984/15
Plaintiff-Appellant,

-against-

24 East 12th Street Associates LLC,
et al.,
Defendants-Respondents.

_____

Meister Seelig & Fein LLP, New York (Stephen B. Meister and Thomas L. Friedman of counsel), for appellant.

Max Markus Katz, P.C., New York (Max Markus Katz of counsel), for 24 East 12th Street Associates LLC, respondent.

Ellenoff Grossman & Schole LLP, New York (John B. Horgan and Fawn Lee of counsel), for Elie Tahari, Ltd., respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 6, 2016, which granted defendants' motion to dismiss the amended complaint, unanimously modified, on the law, to deny the motion as to the breach of contract and tortious interference with contract claims, and otherwise affirmed, without costs.

Defendant 24 East 12th Street Associates LLC (Associates) leased property with an option to purchase if certain conditions occurred. After the owner notified Associates that it would sell

the property, Associates entered into a letter agreement with plaintiff whereby the parties agreed that they would negotiate plaintiff's purchase of Associates' lease and the option to purchase. The letter agreement included the purchase price and some relevant terms, provided for plaintiff to provide a deposit, and contemplated a further purchase and sale agreement. It included a confidentiality provision, and provided for an "Exclusivity Period" of 14 days, during which Associates could "continue discussions" with defendant Elie Tahari, Ltd. (Tahari) regarding the sale of the lease and the purchase option.

Plaintiff alleges that, within one day of entering into the letter agreement, Associates disclosed the letter agreement to Tahari in violation of the confidentiality provision and agreed to accept an offer from Tahari in violation of the exclusivity provision.

The complaint states a cause of action for breach of the letter agreement's exclusivity provision. The letter agreement provided only that Associates could "continue discussions" with Tahari, and did not provide that it could accept an offer, within the 14-day period, and therefore does not utterly refute the complaint's factual allegations or conclusively establish a defense for Associates as a matter of law (*see Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

The complaint states a cause of action for breach of the confidentiality provision by alleging the existence of the letter agreement, plaintiff's performance thereunder, Associates' breach of the letter agreement's confidentiality provision by disclosing the letter agreement to Tahari, and resulting damages (*see Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]). Although the "lost profits" damages allegation is boilerplate and does not allege facts showing that the damages are attributable to Associates' conduct (*see Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]), the complaint sufficiently alleges other damages, such as incurring expenses in performing due diligence and negotiating and drafting the letter agreement and an ultimately worthless escrow agreement.

The complaint fails to state a cause of action for breach of the duty to negotiate in good faith, which was expressly included in a non-binding section of the letter agreement. Even considered a claim for breach of the implied duty of good faith and fair dealing, the claim was correctly dismissed, because it is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (*see MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 420 [1st Dept 2011] [internal quotation marks omitted]).

The complaint states a cause of action for tortious

interference with contract by alleging that plaintiff entered into a valid contract (the letter agreement) with Associates, that Tahari had knowledge of the letter agreement, that Tahari intentionally and improperly induced Associates to breach the enforceable provisions of the letter agreement by entering into an agreement with it to purchase the lease and purchase option during the exclusivity period, and that as a result plaintiff suffered damages (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). The allegations show that Tahari's inducement of Associates to breach the enforceable provisions of the letter agreement "exceeded a minimum level of ethical behavior in the marketplace" (*id.* at 427 [internal quotation marks omitted]).

Tahari failed to establish the economic interest defense to tortious interference with contract at this time. The complaint alleges that Tahari was effectively plaintiff's competitor, that it did not appear to have a prior contractual or economic relationship with Associates, and that it had merely a generalized economic interest in soliciting Associates to sell the lease and the purchase option for profit (*see id.* at 426; *LNYC Loft, LLC v Loo*, 148 AD3d 552 [1st Dept 2017]; *Wells Fargo Bank, N.A. v ADF Operating Corp.*, 50 AD3d 280 [1st Dept 2008]).

Since plaintiff can be adequately compensated for breach of

contract and tortious interference by monetary damages, the cause of action for an equitable lien was correctly dismissed as not warranted (*see Meehan v Meehan*, 227 AD2d 268, 269-270 [1st Dept 1996]; *see also Wolf v National Council of Young Israel*, 264 AD2d 416, 418 [2d Dept 1999]).

The Decision and Order of this Court entered herein on July 5, 2018 (163 AD3d 424 [1st Dept 2018]) is hereby recalled and vacated (*see* M-3892 decided simultaneously herewith).

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

ENTERED: JANUARY 8, 2019

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7957N William Celestino, et al., Index 157748/12
Plaintiffs-Respondents,

-against-

Fountainhead Corp. Continental Hosts, Ltd., et al.,
Defendants-Respondents.

- - - - -

City of Yonkers,
Proposed Plaintiff-Intervenor-Appellant.

- - - - -

Fountainhead Corp., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Cherie C. Garcia,
Third-Party Defendant.

- - - - -

City of Yonkers,
Proposed-Intervenor-Plaintiff-Appellant.

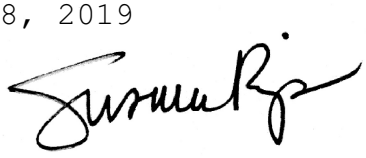
_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Adam Silvera, J.), entered on or about February 7, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 5, 2018,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JANUARY 8, 2019



CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7718 & M-5250 — Index 652305/14

U.S. Specialty Insurance Company,
Plaintiff-Appellant,

-against-

SMI Construction Management, Inc.,
Defendant-Respondent.

_____

DLA Piper LLP (US), New York (Aidan M. McCormack of counsel), for appellant.

Rosenberg & Pittinsky, LLP, New York (Laurence D. Pittinsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered July 19, 2016, which denied plaintiff's motion for summary judgment declaring that it has no obligation to defend or indemnify defendant in the underlying personal injury action and awarding it reimbursement for defense costs, unanimously affirmed.

Issues of fact exist and discovery is warranted as to whether defendant performed as the construction manager on the project and therefore is subject to the insurance policy's exclusion for "Construction Management for a Fee." "The label of construction manager versus general contractor is not necessarily determinative," and this determination depends on the duties defendant was assigned and performed (*Rodriguez v Dormitory Auth.*

of the State of N.Y., 104 AD3d 529, 530 [1st Dept 2013], quoting *Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *see also Carollo v Tishman Constr. & Research Co.*, 109 Misc 2d 506, 508–509 [Sup Ct, NY County 1981]). The relevant contract describes defendant's duties in relation to the project owner as, inter alia, supplying an adequate supply of workers and materials and performing the work. Defendant's owner characterized defendant as both a construction manager and a general contractor, and described its work on the project as "the total supervision of ... the construction," the provision of some laborers, and supervision of maintenance and carpentry. Moreover, the contract is divided into two phases - preconstruction and construction - and defendant performed services at the inception of the project, such as working with the owner, architect, and engineer, and when the work was ready to proceed, obtained permits, hired and paid the subcontractors, and allegedly acted as a general contractor.

In addition, although defendant performed for a fee, the budget attached to the contract suggests that the fee was based in part on profit. Specifically, the fee in the contract refers to the budget attached as Exhibit A to the contract. The budget, in turn, includes an amount of $1,042,918 payable to defendant for "profit and overhead." This evidence raises issues of fact

as to whether defendant performed as the functional equivalent of a general contractor and whether it was being compensated on a cost-of-work-plus-profit-basis. We note that these facts distinguish this case from *Houston Cas. Co. v Cavan Corp. of NY, Inc.* (158 AD3d 536 [1st Dept 2018]), in which the third-party plaintiff was compensated by a flat fee plus reimbursement for overhead and staffing expenses.

Plaintiff failed to detail how it was prejudiced by defendant's alleged 51-day delay in providing notice of the underlying accident (*see* Insurance Law § 3420[a][5]). Its claim that, had it known that defendant was a construction manager, it would not have issued the policy, and thus coverage would be barred as a matter of law, was raised for the first time on appeal and is an unreviewable factual argument. A determination as to primacy of coverage is premature absent a liability determination, and in any event plaintiff may still be obligated to defend under its policy.

M-5250 - ***U.S. Specialty Insurance Company v SMI Construction Management, Inc.***

Motion to file surreply
denied as moot.

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8026 The People of the State of New York, Respondent, Ind. 1148/14

-against-

Jack Ward,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered November 24, 2015, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second felony offender, to a term of 4 years, unanimously affirmed.

Defendant's challenge to his plea is unpreserved because he failed to move to withdraw the plea or move to vacate the judgment, and this case does not fall under the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]). We decline to review this claim in the interest of justice. As an alternative holding, we find under the circumstances, that the court was not required to conduct a sua sponte inquiry into defendant's mental condition. Defendant had been found competent following proceedings under CPL article 730

a few months before the plea, and his responses to the court's questions in the plea colloquy established that his plea was knowing, intelligent, and voluntary (*see People v Osman*, 151 AD3d 494 [1st Dept 2017], *lv denied* 30 NY3d 982 [2017]*; People v Ragin,* 136 AD3d 426 [1st Dept 2016], *lv denied* 27 NY3d 1074 [2016]).

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8027 Robert Little, Index 22388/15
Plaintiff-Respondent,

-against-

Jorge J. Morillo, et al.,
Defendants-Respondents,

Vanessa Garcia,
Defendant-Appellant.

_____

Law Offices of William S. Boorstein, New York (Debora L. Jacques of counsel), for appellant.

Rosenbaum & Rosenbaum, P.C., New York (Jonathan Davis of counsel), for Robert Little, respondent.

The Law Offices of Richard J. DaVolio, P.C., Sayville (Richard J. DaVolio of counsel), for Jorge J. Morillo and Rolling Frito Lay Sales, LP, respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered March 19, 2018, which, in this action for personal injuries sustained in a multi-vehicle accident, denied the motion of defendant Vanessa Garcia for summary judgment dismissing the complaint and all cross claims as against her, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant Morillo failed to offer a nonnegligent explanation for the accident, in which he struck Garcia's vehicle in the rear, which then struck plaintiff's vehicle (*see Morgan v Browner*, 138 AD3d 560 [1st Dept 2016]). Hence, Morillo's claim that Garcia stopped short is insufficient, as Morillo failed to

explain why he did not maintain a safe distance from Garcia, or why, with the light having just turned green, he was unable to stop in time (*see e.g. Santana v Tic-Tak Limo Corp.*, 106 AD3d 572, 573-574 [1st Dept 2013]; *Profita v Diaz*, 100 AD3d 481 [1st Dept 2012]). In any event, inasmuch as Morillo also testified that plaintiff, whose vehicle was the first vehicle in this three vehicle accident, also stopped before the accident, Garcia would have had no choice but to stop as well.

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8028-
8028A In re Olivia J.R.,

A Child Under Eighteen Years
of Age, etc.,

Marianette R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Anne Reiniger, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Lorenzo Di Silvio of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about November 6, 2017, to the extent it brings up for review a fact-finding order of the same court and Judge entered on or about September 25, 2017, which found that respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding that the child was educationally neglected by respondent is supported by a preponderance of the evidence (Family Court Act § 1012[f][i][A]). During the 2015-2016 school

year, the child was absent from school 64 times and late 40 times. The child also demonstrated developmental and academic delays, performing below average in all areas, due at least in part to her poor attendance record (*see Matter of Ashley S. [Rebecca S.-C.]*, 157 AD3d 536, 537 [1st Dept 2018]; *Matter of Kyeley V. [Antoinette V.]*, 160 AD3d 468 [1st Dept 2018]; *Matter of Jonathan M. [Gilda L.]*, 139 AD3d 438 [1st Dept 2016]). The child's excessive absences from school also prevented her from receiving the services prescribed to her under her Individual Education Plan.

Respondent's argument that the child was not required to attend school until the age of six is without merit (*see* Education Law § 3205[2][c]; New York City Dept. of Educ., Regulation of the Chancellor A-210, Standards for Attendance Programs, Abstract at 1 [Sept. 28, 2017] ["Each minor from 5 to 17 years of age in New York City is required to attend school on a full-time basis"]).

Respondent also neglected the child by leaving her with her paternal grandmother with only the clothing she was wearing, some of which was dirty, and without provisions for food or medical care (*see* Family Court Act § 1012[f][i][A]). Further, respondent failed to inform the grandmother, who agreed to care for the child for one day, that she planned to leave the child in the

grandmother's care until the end of the school year (*Matter of Nassair S.[Chareshma T.]*, 144 AD3d 604, 604-605 [1st Dept 2016]; *Matter of Charisma D. [Sandra R.]*, 115 AD3d 441, 442 [1st Dept 2014]). While respondent did return on one date to drop off medical documents and clothes for the child, it appears she only did so after being contacted by petitioner agency.

Family Court providently found that respondent was unable to provide a stable home for the child, and we find no basis to disturb its determination.

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8030 Jennifer McMurray, Index 650002/17
Plaintiff-Appellant,

-against-

Hye Won Jun, also know as Helen Jun,
Defendant-Respondent.

_____

Law Office of Terry D. Horner, Poughkeepsie (Terry D. Horner of counsel), for appellant.

Mintz & Gold LLP, New York (Timothy H. Wolf of counsel), for respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered September 12, 2017, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss plaintiff's unjust enrichment claim, unanimously affirmed, without costs.

To successfully plead unjust enrichment "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks omitted]). "Although privity is not required for an unjust enrichment claim" (*id.*), "a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement

on the plaintiff's part" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]).

Plaintiff failed to state a cause of action for unjust enrichment against defendant. Although defendant was enriched by plaintiff's ex-husband, as the court noted, the funds belonged to him and plaintiff jointly. Plaintiff concedes that her ex-husband voluntarily gave defendant property and assets for his own benefit. Defendant was under no obligation to return property or assets voluntarily given to her by plaintiff's ex-husband. As noted by the court, plaintiff's claim against her former husband for dissipation of marital assets was released in the divorce proceeding.

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

ENTERED: JANUARY 8, 2019

CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, JJ.

8032 Charles Rochester, Index 250288/14
Plaintiff-Appellant,

-against-

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

_____

Charles Rochester, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about October 18, 2017, which, inter alia, denied plaintiff's motion for leave to file a late notice of claim, and granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to deny defendants' motion as to the claim for malicious prosecution, and otherwise affirmed, without costs.

Supreme Court properly denied plaintiff's motion to deem his July 1, 2013 notice of claim timely filed for his claims accruing as of his June 27, 2012 arrest (*Pierson v City of New York*, 56 NY2d 950, 954-956 [1982]). However, on appeal, defendants acknowledge that the notice of claim was timely as to plaintiff's malicious prosecution claim, which did not accrue until the April 1, 2013 dismissal of the charges against him (*Nunez v City of New York*, 307 AD2d 218, 219 [1st Dept 2003]).

While plaintiff's claim alleging violation of 42 USC § 1983 was not subject to the notice of claim requirement (*Liu v New York City Police Dept.*, 216 AD2d 67, 68 [1st Dept 1995], *lv denied* 87 NY2d 802 [1995], *cert denied* 517 US 1167 [1996]), the failure to plead that the alleged constitutional violations were the result of an official policy except in bare conclusory terms is fatal to this cause of action (*id.*; *Connick v Thompson*, 563 US 51, 60-62 [2011]).

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8033 R&R Capital LLC, et al., Index 604080/05
Plaintiffs-Appellants,

-against-

Linda Merritt, also known as Lyn Merritt,
Defendant-Respondent.

_____

Certilman Balin Adler & Hyman LLP, East Meadow (Paul B. Sweeney of counsel), for appellants.

Joseph T. Adragna, Huntington, for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 12, 2017, which denied plaintiffs' motion to dismiss defendant's counterclaims pursuant to CPLR 3211(a)(7), and/or for summary judgment pursuant to CPLR 3212, unanimously reversed, on the law, with costs, and the motion to dismiss the counterclaims granted. The Clerk is directed to enter judgment accordingly.

A prior ruling by Justice Ramos correctly found that the operating agreements of the LLCs did not require either party to fund the LLCs, and they clearly state what remedy the party who does fund the LLCs has in the event the other party does not fund its 50%. That is, the funding party could pay into the LLCs the other party's share of the funding, and treat it as a loan to the LLCs, with an interest rate of 12%. Because defendant's lender

liability and tortious interference counterclaims rest on the erroneous assertion that plaintiffs were required to fund the LLCs, they should have been dismissed. Moreover, prior Pennsylvania and Delaware litigation has conclusively established that plaintiffs were the only parties to have funded the LLCs, and that Merritt, in fact, defrauded the LLCs and plaintiffs, further supporting dismissal of these counterclaims.

The scope and import of this Court's decision in *R&R Capital LLC v Merritt* (78 AD3d 533 [1st Dept 2010], *lv dismissed* 17 NY3d 769 [2011]) was to reassign trial of the counterclaims to another Justice. This Court did so to address plaintiffs' concerns about the previous Justice's impartiality, but such concerns did not arise from his rulings as to the nature of members' obligation to fund the LLCs. His rulings during proceedings on December 11, 2007 were not only supported by the language of the LLC agreement, but also consistent with his previous day's reciprocal rulings as to plaintiffs' claims against Merritt – rulings that no one claims were within the scope of our November 2010 order. Supreme Court accordingly went too far in deeming the entirety of the December 11, 2007 proceedings irrelevant to what it was permitted to consider.

The counterclaims should also have been dismissed in light of intervening events in the Delaware litigation. Given the

language of the LLC operating agreements, the only claims Merritt could potentially assert were for tortious interference. However, all such claims had been placed under the exclusive jurisdiction of the Delaware court which, in turn, unequivocally barred Merritt from receiving any LLC distributions or assets ever again, and indeed instructed her to withdraw any claims in New York that sought to establish entitlement to LLC assets.

Moreover, Merritt's tortious interference counterclaim fails to meet the requisite elements to support such a claim (*see Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980]) because she does not allege valid agreements between herself and a third party. Her allegations regarding relationships with unnamed lenders are conclusory and vague, and she does not allege plaintiffs interacted with these third parties, or even knew about her relationships with them. To the extent her claim seeks to hold plaintiffs liable for her own debts, such claims are outside the scope of plaintiffs' responsibilities under the LLC agreements, and she alleges no other ground for their alleged duty to her. The "lender liability" counterclaim fails because Merritt does not and cannot allege a lender-borrower relationship between her and plaintiffs. To the extent the slander counterclaim was not previously dropped, it should have been dismissed due to Merritt's failure

to allege the actual words used and/or that the counterclaim is not based on non-actionable rhetorical hyperbole (*see* CPLR 3016[a]; *see also 600 W. 115th St. v Von Gutfeld*, 80 NY2d 130 [1992], *cert denied* 508 US 910 [1993]).

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

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8034-
8035 The People of the State of New York,
Respondent,

-against-

Alexis Matos, Jr.,
Defendant-Appellant.

Ind. 5147/10

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Thomas Farber, J.), entered on or about December 17, 2015, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

To the extent defendant is arguing that the court erred in assessing 15 points under the risk factor for refusing or being expelled from treatment, that claim is academic because, even if those points were subtracted, defendant would remain a level three offender (*see People v Corn*, 128 AD3d 436, 437 [1st Dept 2015]). In any event, the assessment was supported by clear and convincing evidence, because the record shows that defendant was expelled from treatment as a result of his own conduct.

Furthermore, regardless of whether defendant's correct point score is 140 or 125, we find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The underlying crime was committed against a 13-year-old victim at a time when defendant was 23 years old (*see People v Mendoza*, 123 AD3d 417 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]), and defendant's sexual misconduct while incarcerated demonstrated a risk of sexual recidivism.

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8036 In re Xavier C.,
Petitioner-Respondent,

-against-

Armetha K.,
Respondent-Appellant.

_____

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

The Law Office of Steven P. Forbes, Jamaica (Steven P. Forbes of counsel), for respondent.

Janet Neustaetter, The Children's Law Center, Brooklyn (Eva D. Stain of counsel), attorney for the child.

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Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about February 1, 2018, which, after a hearing, inter alia, granted the father's petition for modification of custody and awarded him physical custody of the subject child and final decision-making authority, unanimously affirmed, without costs.

The Referee's determination that it was in the best interest of the child to modify the custody arrangement and grant physical custody to the father has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]). The Referee found that the father credibly testified that he had a place for the child in his home, and had a plan for addressing

his medical, psychological, dental, and educational needs. The record also showed that by awarding physical custody to the father, the subject child would be living with his biological brother (*see id.* at 173; *Matter of Michael B. [Lillian B.]*, 145 AD3d 425, 430 [1st Dept 2016]).

Moreover, the record showed that a transfer of physical custody was warranted because the mother discouraged the relationship between the father and the child by misleading the child as to the identity of his biological father and by failing to produce the child for at least three visits (*see Sendor v Sendor*, 93 AD3d 586, 587 [1st Dept 2012]; *Matter of Matthew W. v Meagan R.*, 68 AD3d 468, 468 [1st Dept 2009]). The mother also refused to comply with a prior court order granting the father joint legal custody by refusing to provide him with information about the child's education, medical issues and appointments absent further explicit court directive to do so, and by refusing to involve the father in joint decision making with respect to the child (*see Moore v Gonzalez*, 134 AD3d 718, 719-720 [2d Dept 2015]; *Arieda v Arieda-Walek*, 74 AD3d 1432, 1433 [3d Dept 2010]). In addition, the child had numerous absences and was late to school on many occasions, and was not promoted to first grade, while in the mother's care (*see Rubin v Della Salla*, 107 AD3d 60, 64 [1st Dept 2013]; *Matter of Farran v Fenner*, 94 AD3d 1116, 1117

[2d Dept 2012]). Further, the mother failed to explain why she did not address the child's dental health until it became an emergency and he needed to have four teeth extracted (*see Rubin*, 107 AD3d at 64-65; *Hurlburt v Behr*, 70 AD3d 1266, 1268 [3d Dept 2010], *lv dismissed* 15 NY3d 943 [2010]).

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8038 The People of the State of New York, Respondent, Ind. 1538/16

-against-

Martin Washington, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 9, 2016, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 12 years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony, without granting a hearing pursuant to *People v Rodriguez* (79 NY2d 445 [1992]). Defendant's motion sought such a hearing to test the People's assertion in their voluntary disclosure form that a witness who had a prior relationship with defendant had made a confirmatory identification. However, after the People's opposing papers set forth detailed factual assertions regarding the relationship between defendant and the identifying witness, including the

witness's frequent interactions with defendant over a period of years and knowledge of defendant by his nickname, defendant failed to submit a reply or otherwise controvert those allegations (*see e.g. People v Marte*, 103 AD3d 470 [1st Dept 2013], *lv denied* 22 NY3d 1140 [2014]). Accordingly, there was no factual issue requiring a hearing.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8039 The People of the State of New York, Ind. 982/16
Respondent,

-against-

Rafael Lora,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered May 25, 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: JANUARY 8, 2019

CLERK

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

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8040 In re Stephen & Mark 53 Associates LLC, Petitioner-Appellant, Index 151696/17

-against-

New York City Department of Environmental Protection, et al., Respondents-Respondents.

Granger & Associates LLC, New York (Howard Zakai of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for City respondent.

Barbara D. Underwood, Attorney General, New York (Blair J. Greenwald of counsel), for State respondent.

Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered April 4, 2018, dismissing the proceeding brought pursuant to CPLR article 78 to annul respondents' determination, dated October 20, 2016, which denied petitioner's request to order removal of the backflow prevention devices installed in its commercial condominium unit, unanimously affirmed, without costs.

This Court affirms the dismissal of the proceeding on an alternative basis argued to but not reached by the motion court (*see Chanin v Machcinski*, 139 AD3d 490 [1st Dept 2016]). Petitioner's failure to join as a party the condominium board, which installed the backflow prevention device in dispute,

constitutes a failure to join a necessary party (*see Matter of Ferrando v New York City Bd. of Stds. & Appeals*, 12 AD3d 287, 288 [1st Dept 2004]). Since the applicable statutory period has expired and the condominium board can no longer be joined, and proceeding in its absence would potentially be highly prejudicial to it, the proper remedy is dismissal of the proceeding rather than joinder of the condominium board (*id.*; *see also* CPLR 1001 and 1003).

The proceeding was also properly dismissed against respondent Department of Health for the independent reason that it did not make any final determination within the meaning of article 78 (*see* CPLR 7801[1], 7803[3]; *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]).

In view of the foregoing, we need not reach the issue of whether the proceeding was timely commenced because a filing made at midnight should be considered as having been made on the day leading up to the midnight. We note, however, that there is

conflicting authority regarding whether a day ends at midnight, begins at midnight, or both ends and begins at midnight, and the parties have not cited to any cases involving the precise situation at issue here.

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8041 Kuliarchar Sea Foods (Cox's Bazar) Ltd., Plaintiff-Respondent, Index 654930/17

-against-

Soleil Chartered Bank, et al., Defendants-Appellants.

_____

Peyrot & Associates, P.C., New York (David C. Van Leeuwen of counsel), for appellants.

Freiberger Haber LLP, Melville (Jeffrey M. Haber of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered April 6, 2018, which, to the extent appealed from as limited by the briefs, denied those branches of defendants' motion to dismiss the complaint for lack of personal jurisdiction, and as against defendants Soleil Capitale Corporation (Soleil Capitale) and Govind Srivastava, on the grounds of a defense founded upon documentary evidence and failure to state a cause of action, unanimously affirmed, with costs.

Supreme Court properly held that, at this stage of the litigation, plaintiff's complaint sufficiently alleges facts which state a claim against Soleil Capitale and Srivastava so as to pierce defendant Soleil Chartered Bank (SCB)'s corporate veil

and hold Soleil Capitale and Srivastava liable as alter egos of SCB, and that defendants' documentary evidence fails to conclusively refute these allegations (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]; *Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005]). That branch of the motion which was to dismiss for lack of personal jurisdiction was also properly denied (*see generally Daimler AG v Bauman*, 571 US 117 [2014]).

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8042 The People of the State of New York, Respondent, Ind. 2606/16

-against-

Shardell Hall, Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ellen N. Biben, J.), rendered May 2, 2017, convicting defendant, upon his plea of guilty, of conspiracy in the second degree and criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

Defendant's challenges to the validity of his plea do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently and voluntarily made. The circumstances of the plea were not coercive (*see People v Luckey*, 149 AD3d 414 [1st Dept 2017], *lv*

denied 29 NY3d 1082 [2017]).

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters outside the record concerning counsel's advice to defendant. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant made a valid waiver of his right to appeal, which forecloses review of his excessive sentence claim (*see People v Bryant*, 28 NY3d 1094 [2016]). The court did not conflate the right to appeal with the rights automatically forfeited by pleading guilty. Furthermore, the oral colloquy was supplemented by a detailed written waiver.

Regardless of whether defendant made a valid waiver of his 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: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8043 Beverly Kessler, et al., Index 153085/16
Plaintiffs-Appellants,

-against-

HFZ 90 Lexington Avenue Owners LLC, et al.,
Defendants-Respondents,

Carnegie Park Associates, L.P., et al.,
Defendants.

_____

Goldsmith & Fass, New York (Robert N. Fass of counsel), for appellants.

Rosenberg & Estis, P.C., New York (Deborah Riegel of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.,) entered July 10, 2017, which, inter alia, granted the HFZ defendants' motion to dismiss the complaint as against them, unanimously affirmed, without costs.

In this putative class action against the owners and sponsors of residential buildings that were converted to cooperatives or condominiums, plaintiffs contend that they have the right to seek non-purchaser tenant status based on their status as eligible senior citizens or eligible disabled persons, although the offering plans at issue were undisputedly non-eviction plans under General Business Law § 352-eeee(2)(c). We

reject plaintiffs' textual arguments in light of the structure of section 352-eeee. Special rights for eligible senior citizens and disabled persons are identified only in section 352-eeee(2)(d), which governs eviction plans. Thus, it would be contrary to rules of interpretation to apply them to non-eviction plans (*see* Statutes § 240; *People v Spadafora*, 131 AD2d 40, 47 [1st Dept 1987]). As we have previously determined, "General Business Law § 352-eeee(2)(d), by its terms, applies only to eviction plans" (*Walsh v Wusinich*, 32 AD3d 743, 744 [1st Dept 2006]).

Nor do the emergency regulations issued by the New York State Department of Law in November 2015 avail plaintiffs. The regulations support plaintiffs' position, but in 2016 they were expressly stated to be applicable prospectively only. As the offering plans at issue were accepted for filing before the original emergency regulations were issued, the regulations are not considered to be part of the plans.

This action is also barred by plaintiffs' lack of standing (*see Murray v Empire Ins. Co.*, 175 AD2d 693 [1st Dept 1991]). It

is undisputed that none of the named plaintiffs ever resided in any of defendants' buildings or had any dealings with defendants with regard to any coop or condo conversion.

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

ENTERED: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8044-
8045 Index 114525/03

Paul Schwenger,
Plaintiff-Appellant,

-against-

New York University, et al.,
Defendants-Respondents.

_____

Stewart Lee Karlin Law Group, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Marshall Dennehey Warner Coleman & Goggin, P.C., Melville (Michael P. Kelly of counsel), for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered May 8, 2017, which, to the extent appealed from, as limited by the briefs, denied plaintiff's motion for leave to amend the complaint to assert causes of action under Labor Law §§ 740 and 741, the New York State Human Rights Law, and the New York City Human Rights Law; and order, same court and Justice, entered April 10, 2018, which, to the extent appealed from, granted leave to reargue the denial of plaintiff's motion to amend and, upon reargument, adhered to its prior determination, unanimously affirmed, without costs.

Plaintiff sought leave to amend the complaint on August 22, 2016, more than 13 years after he commenced this action. Plaintiff was put on notice that his causes of action hinged on

whether an employer-employee relationship existed between him and defendants, at the latest, when defendants answered his amended complaint in December 2003 asserting Workers' Compensation Law as an affirmative defense and admitting that plaintiff was an employee. Discovery proceeded in this action for over 2½ years, until August 2003, when the case was stayed pending the Workers' Compensation Board's (WCB) determination. On the motion for leave to amend, plaintiff provided no explanation as to why he did not move to amend before the case was stayed to assert his proposed causes of action as alternative legal theories. In reply on his motion for leave to renew and reargue, plaintiff broadly argued, for the first time, that "many of the facts which underlie the employment based claims ... did not become apparent to Plaintiff until *after* the hearings before the [WCB]" (emphasis in original]). But plaintiff has not identified which specific facts were unknown to him prior to the WCB hearings. Accordingly, the motion court properly denied plaintiff's motion for leave to amend on the ground that plaintiff failed to articulate a reasonable excuse for his delay and, upon

reargument, properly adhered to that determination (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003]).

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: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8046 The People of the State of New York, Ind. 5559/12
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Maxwell Wiley, J.), rendered December 17, 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: JANUARY 8, 2019

CLERK

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

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8047-
8048 The People of the State of New York,
Respondent,

-against-

Fabricio Dos Santos,
Defendant-Appellant.

Ind. 1746/14

Christina A. Swarns, Office of the Appellate Defender, New York (Amanda Rolat of counsel), for appellant.

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered February 3, 2016, 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: JANUARY 8, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Mazzarelli, Webber, JJ.

8049N Ahmed Drir, Index 156070/15
Plaintiff-Respondent,

- against -

U-9 Restaurant Associates, Inc.,
doing business as Knickerbocker
Bar & Grill, et al.,
Defendants-Appellants.

- - - - -

[And Third-Party Actions]

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Joseph A.H. McGovern of counsel), for appellants.

Gropper Law Group PLLC, New York (David de Andrade of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered February 14, 2018, which granted plaintiff's motion to sever the third-party actions, unanimously affirmed, without costs.

The motion court providently exercised its discretion in severing the third-party actions, based on the record before it, which reflected that discovery in the main action was complete and discovery in the second third-party action had barely commenced, and that plaintiff would be prejudiced by a delay in further discovery due to a 180-day stay of a liquidation and/or reorganization proceeding involving the insurer for the second third-party defendants (*see Golden v Moscowitz*, 194 AD2d 385 [1st

Dept 1993]; *Weber v Baccarat, Inc.*, 70 AD3d 487 [1st Dept 2010]). Defendants/second third-party plaintiffs retain their right of contribution, which they can exercise, if necessary, upon resolution of the liquidation/reorganization proceeding (*see Kharmah v Metropolitan Chiropractic Ctr.*, 288 AD2d 94 [1st Dept 2001]; *Moy v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 92 AD3d 651 [2d Dept 2012]).

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

ENTERED: JANUARY 8, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Peter Tom
Angela M. Mazzarelli
Ellen Gesmer
Peter H. Moulton, JJ.

6956
Index 380685

_____x

Wells Fargo Bank N.A.,
Plaintiff-Respondent,

-against-

Lawson Ho-Shing also known as Lawson H. Ho-Shing,
Defendant-Appellant,

Audrey Ho-Shing, et al.,
Defendants.
_____x

Defendant Lawson Ho-Shing appeals from the judgment of foreclosure of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about May 18, 2017, bringing up for review an order of the same court and Justice, entered on or about April 6, 2017, which denied his CPLR 5015(a)(3) motion to vacate an order of the same court (Betty Owen Stinson, J.), entered January 28, 2016, which granted plaintiff's motion for summary judgment and/or default judgment on its complaint, and denied defendant's CPLR 3024(b) motion to strike an affidavit of merit.

Lawson Ho-Shing, appellant pro se.

Hogan Lovell, US LLP, New York (Leah Edmunds, David Dunn and Cava Brandriss of counsel), for respondent.

TOM, J.

In this mortgage foreclosure action, Supreme Court granted plaintiff Wells Fargo Bank, N.A.'s unopposed motion for summary judgment and referred the matter to a referee to determine the amount owed under the consolidated mortgage and note. We find that Supreme Court properly denied the motion of pro se defendant Lawson Ho-Shing to vacate the summary judgment order, as both his claim of fraud and his standing defense lack merit (*see Aurora Loan Servs., LLC v Taylor* (25 NY3d 355, 361 [2015]). We also find that the court properly denied defendant's motion to strike an affidavit pursuant to CPLR 3024(b).

The pertinent facts are undisputed. On November 12, 2005, defendant Lawson Ho-Shing and codefendant Audrey Ho-Shing (defendants) obtained a mortgage loan from nonparty Fremont Investment & Loan in the principal amount of $432,000. Defendant and Audrey executed a promissory note and mortgage (both also dated November 12, 2005) on their property located at 1312 Needham Avenue in the Bronx; Mortgage Electronic Registration Systems, Inc. (MERS), was the mortgage nominee.

On February 20, 2008, defendants obtained a second loan secured by the property in the amount of $43,338, from plaintiff Wells Fargo. Defendants executed a promissory note and mortgage in connection with the second secured loan, also dated February

20, 2008.

Then, defendants executed a Consolidation, Extension and Modification Agreement (CEMA) on February 20, 2008, under which the 2005 and 2008 mortgage loans were consolidated into a single loan in the principal amount of $471,415, which was secured by the property and payable to Wells Fargo. Under the CEMA, they agreed to keep all promises in the notes and mortgage as consolidated and modified. The CEMA explained that the two notes, identified in Exhibit A to the agreement, were combined and that the parties' rights and obligations were combined into one mortgage and one "loan obligation."

Defendants also executed a consolidated note and a consolidated mortgage that identified Wells Fargo as the payee and mortgagee, respectively. The consolidated note was attached to the CEMA, which provided that it "[would] supersede all terms, covenants, and provisions of the [original] Notes." Similarly, the consolidated mortgage constituted a "single lien" on the property and "[would] supersede all terms, covenants, and provisions of the [original] Mortgages." On October 18, 2010, MERS executed a written assignment of the first mortgage to Wells Fargo.

After May 1, 2010, defendants defaulted on their payment obligations under the consolidated mortgage. Wells Fargo states

that it mailed defendants a notice of default and a 90-day pre-foreclosure notice, as required by Real Property Actions and Proceedings Law § 1304, and defendants failed to cure. Although the 90-day notice is not included in the appellate record, the record contains an affidavit of merit and amounts due and owing, signed by Sarah Lee Stonehocker, Wells Fargo's Vice President, Loan Documentation, who averred that she had reviewed the 90-day pre-foreclosure notice sent to defendant by certified and first class mail, confirmed that the notice was filed with the New York State Banking Department, as required, and that a confirmation number was issued.

On or about June 20, 2013, Wells Fargo commenced this foreclosure action by filing a summons, complaint, and notice of pendency. At that time, it was unrefuted that Wells Fargo had physical possession of the consolidated note. Defendants answered, asserting Wells Fargo's lack of standing as an affirmative defense.

In August 2015, Wells Fargo filed a motion for summary judgment, asking that the proceeding be referred to a referee to determine the amount owed under the consolidated mortgage and loan. Wells Fargo states that its motion was supported by copies of the RPAPL 1304 90-day notice mailed to defendant and proof of its filing with the New York State Banking Department pursuant to

RPAPL 1306, and an affidavit by Amanda J. Weatherly, setting forth Wells Fargo's standard business practice concerning the mailing of 90-day notices, and stating that it complied with those practices here. Defendant did not oppose the motion.

By order entered January 28, 2016, Supreme Court granted the motion and struck defendants' answer with prejudice, finding that it was "nothing more than a general denial which is insufficient to create an issue of fact" as to default under the consolidated loan. By separate order entered January 28, 2016, the court referred the matter to a referee.

On or about September 1, 2016, Wells Fargo served - but did not file - a motion for judgment of foreclosure and sale supported by the Stonehocker affidavit.

In September 2016 and January 2017, defendant filed a motion to strike the Stonehocker affidavit under CPLR 3024(b), arguing that it was "impertinent, immaterial, scandalous, and a deliberate fraud," and separately moved to vacate the summary judgment order and order of reference under CPLR 5015(a)(3), arguing that Wells Fargo lacked standing to foreclose because the first mortgage assignment was invalid. Defendant contended that Wells Fargo "inten[ded] to deceive the Court" by "manufactur[ing] [documents] for the purposes of litigation, in order to get standing." He also argued that MERS had no authority to assign

the first mortgage and note to Wells Fargo and that the entity that issued the original loan, Fremont Investment & Loan, had gone into bankruptcy before the assignment.

Supreme Court denied both motions. The court found that defendant failed to establish that Wells Fargo engaged in fraud that would warrant vacatur under CPLR 5015(a)(3), and declined to strike the Stonehocker affidavit under CPLR 3024, since it was never filed and was not a pleading, and, in any event, was neither scandalous nor prejudicial.

First, with regard to vacatur, even accepting, as the dissent lays out, that defendant established an excusable default because his attorney, who had been served with the summary judgment motion, filed for bankruptcy and failed to respond, he did not demonstrate a meritorious defense.

Initially, defendant's vacatur motion was primarily predicated on his claim that Wells Fargo had engaged in fraud and misrepresented facts, a point that the dissent overlooks. In any event, defendant argues on appeal that Wells Fargo failed to prove that it gave 90 days' notice of foreclosure, as required by RPAPL 1304 and 1306.

Defendant's belated notice argument is improperly raised for the first time on appeal (*see Lutin v SAP V/A Atlas 845 WEA Assoc. NF LLC*, 157 AD3d 466, 467 [1st Dept 2018]). Moreover, the

argument is unavailing. Indeed, Stonehocker averred that she had reviewed the RPAPL 1304 90-day pre-foreclosure notice sent to defendant by certified and first class mail and could confirm that the RPAPL 1306 notice was filed with the New York State Banking Department, as required, and that a confirmation number was issued.

Wells Fargo also argues that before the motion court, as further proof, it submitted the Weatherly affidavit, in which Weatherly averred that 90-day pre-foreclosure notice was sent to defendant at the subject property, and documentation of the mailing was filed with the New York State Banking Department. However, that assertion cannot be confirmed or rejected, because the Weatherly affidavit is omitted from the record, and cannot be accessed otherwise.

Further, there is no record evidence to support defendant's claim that Wells Fargo manufactured documents to "get standing." This is a bare accusation with no evidentiary proof. Nor is defendant aided by reference to an unrelated bankruptcy case in which he claims that Wells Fargo had relied upon a blank endorsement that the court found had been forged.

Turning to standing, it is not disputed that Wells Fargo had possession of the consolidated note and the consolidated mortgage at the time this action was commenced. A plaintiff in these

cases establishes standing by showing that it is the holder or assignee of the subject note at the time the action is commenced (*see Aurora Loan Servs.*, 25 NY3d at 361). As the dissent recognizes, in *Aurora* (25 NY3d at 361) the Court of Appeals made clear that "[i]t is the note, and not the mortgage, that is the dispositive instrument that conveys standing to foreclose." Accordingly, Wells Fargo established standing by showing that it held the consolidated note at the time it commenced this action, as Stonehocker, who had personal knowledge of the facts, averred (*see OneWest Bank FSB v Carey*, 104 AD3d 444, 445 [1st Dept 2013]).[1]

To the extent defendant could challenge standing based on any claims related to the consolidated note, his failure to include the complaint or the underlying summary judgment motion together with the supporting papers is fatal to this potential line of attack.

Moreover, defendant does not contest that Wells Fargo brought suit to enforce the consolidated note and mortgage, not the originals given by Fremont, and it is not contested that

---

[1]The dissent's efforts to distinguish *Aurora* are misplaced. There is no "unexplained gap" in the note's chain of ownership in this case. The 2005 note was consolidated and superseded by the consolidated note, and this is all fully explained by the CEMA. Nor is it consequential that *Aurora* did not involve a consolidated loan.

Wells Fargo was holder of the consolidated note and mortgage before commencing suit.

Critically, the CEMA makes clear that the consolidated note superseded the original notes and is the operative document in this case. As did the plaintiff in *Weiss v Phillips* (157 AD3d 1 [1st Dept 2017]), Wells Fargo seeks foreclosure based on the CEMA and consolidated note. As we held the plaintiff did in *Weiss*, Wells Fargo established its entitlement to relief by submitting the CEMA, consolidated note, unchallenged evidence that it is the holder of the consolidated note, and nonpayment of the loan by the borrowers. As we also held in *Weiss*, "In this case, because of the CEMA, standing is not an issue" and any absence of the underlying notes in this action is likewise accounted for by the CEMA (157 AD3d at 5-6). In other words, "there is no legitimate question that [Wells Fargo] is the party entitled to enforce under the [consolidated] note, as evinced by . . . the CEMA" (*id.* at 6).

Defendant failed to raise a triable issue of fact regarding standing, and we disagree with the dissent's limited reading of *Weiss*. While the facts of *Weiss* may be unique, the dissent provides no compelling reason that its holding should not be applied here. There is no legitimate question that Wells Fargo is the holder of the consolidated note and can enforce its rights

under it.

The dissent seeks to entirely avoid our holding in *Weiss*, and instead prefers to create an additional and inappropriate burden for Wells Fargo, namely the production of the 2005 note and information about how it was endorsed, assigned or transferred. However, as we have held, the CEMA established that Wells Fargo was the holder of the consolidated note that superseded the 2005 note and that therefore made the 2005 note irrelevant to actions based on the consolidated note. Contrary to reason, the dissent would find that even in the face of the CEMA and the undisputed fact that Wells Fargo is the holder of the consolidated note, a borrower in default could somehow raise an issue of fact by attacking a note that is no longer in existence and that the parties agreed had been transferred to Wells Fargo for purposes of consolidation.

Significantly, the consolidated note and consolidated mortgage, which identified Wells Fargo as the new payee and mortgagee, were executed by defendant and Audrey as borrower. Mortgage payments were then made by the borrower to Wells Fargo without any objection from Fremont or MERS, a clear acknowledgment of the CEMA. This acknowledgment was subsequently memorialized by MERS's written assignment of the Fremont mortgage to Wells Fargo in October 2010.

Stated differently, defendant did not raise an issue of fact by making unsubstantiated allegations. To raise an issue of fact, he would have had to provide evidence that the 2005 note was not transferred to Wells Fargo. He failed to do so. Nor is there any basis in the record to question the legitimacy of the CEMA, the consolidated note, or Wells Fargo's right to foreclose. Defendant's unsubstantiated allegations appear to be nothing more than a tactic to delay foreclosure. It should be noted that defendant has defaulted in mortgage payments since May 2010 and continues to remain in possession and have full beneficial use of the property.

Notably, there is no evidence in the record or offered by defendant of any complaints by Fremont or MERS, its nominee, that its 2005 note was misappropriated or not actually transferred to Wells Fargo. To the contrary, the 2010 assignment of the Fremont mortgage validates the entire transaction and demonstrates that Fremont in fact had previously transferred the note to Wells Fargo and authorized its mortgage nominee - MERS - to assign the mortgage to Wells Fargo. Contrary to the dissent's claim, while the 2010 assignment of mortgage was not necessary to establish standing, the fact that it was transferred actually serves to validate the entire transaction and show that there were no concerns or issues with the consolidation.

Further, it is undisputed that Wells Fargo took physical possession of the consolidated note pursuant to the February 20, 2008 CEMA. Once Wells Fargo was the holder of the consolidated note, it became the assignee or transferee of the mortgage. As stated by the Court of Appeals in *Aurora* (25 NY3d at 361-362):

> "Once a note is transferred, however, the mortgage passes as an incident to the note' (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 280 [2d Dept 2011]).
>
> "'[A]ny disparity between the holder of the note and the mortgagee of record does not stand as a bar to a foreclosure action because the mortgage is not the dispositive document of title as to the mortgage loan; the holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose' (14A Carmody-Wait 2d § 92:79 [2012] [citation omitted])."

MERS subsequently assigned the Fremont mortgage to Wells Fargo on October 18, 2010. Defendant's bare assertion that MERS had no authority to assign the first mortgage and note to Wells Fargo is without merit. MERS was the designated mortgage nominee for Fremont and thus had authority to act on behalf of Fremont with respect to the subject mortgage.

Moreover, the dissent's fear that "a borrower and subsequent lender could agree to appropriate an original lender's investment merely by executing a CEMA" is not supported by the evidence in this case. However, the dissent's holding would mean that despite a party's being the undisputed holder of a note, and a

CEMA evidencing that prior notes were superseded and no longer in effect, as well as an undisputed default by the borrower, the borrower could impede a clear right to foreclose by raising speculative questions without proof about inconsequential notes.

The dissent's reliance on *US Bank N.A. v Richards* (155 AD3d 522 [1st Dept 2017]), a case decided after *Weiss*, is misplaced. *Richards* involved a consolidated note, and we found that the plaintiff failed to show that it was assigned one of the original notes. However, *Richards* did not involve a CEMA that clearly set forth the plaintiff's entitlement to enforce the consolidated note, as is the case here. Rather, *Richards* involved the issue of the sufficiency of a lost note affidavit, an issue not raised in this case. Further, in *Richards* there was no proof that the original note was assigned to the plaintiff. In contrast, here there is clear record evidence of the assignment of the underlying notes and mortgages.

Defendant seeks to raise questions about the original loan from Fremont. In particular, he contends that Wells Fargo lacks standing to foreclose on the consolidated mortgage and loan because the original loan originator, Fremont Investment & Loan, filed for Chapter 11 bankruptcy on June 18, 2008, at which point Fremont's interest in the original loan became part of its bankruptcy estate. Defendant also focuses on the fact that MERS

assigned the original mortgage to Wells Fargo on October 18, 2010, following execution of the consolidated loan papers on February 20, 2008. Defendant claims that it is undisputed that MERS's assignment was not approved by the bankruptcy court, and hence the assignment was invalid, depriving Wells Fargo of standing.

As to the original loan from Fremont, that note was consolidated with and superseded by the consolidated note under the CEMA in February 2008, which identified Wells Fargo as the payee and mortgagee and therefore is irrelevant to defendant's standing analysis. Thus, any issues concerning Fremont's bankruptcy reorganization in January 2009, which occurred after consolidation of the notes and mortgage, are of no moment. The 2005 Fremont note was superseded and no longer in existence at the time of the Fremont bankruptcy. As the dissent recognizes, Wells Fargo is not seeking to foreclose on the 2005 note and thus is not required to demonstrate anything with regard to that note.

Defendant's claims regarding the assignment of the mortgage in 2010 are also unavailing, as only the consolidated note, and not the mortgage, is relevant to the standing analysis (*see Aurora*, 25 NY3d at 361). Further, the assignment of the Fremont mortgage in 2010 was clearly a ministerial act and had no bearing on the earlier valid transfer of the note.

We also find that Supreme Court properly denied defendant's motion to strike the Stonehocker affidavit. Simply, the Stonehocker affidavit is not a pleading, and hence is not subject to being struck under CPLR 3024(b), and (as Supreme Court found) defendant failed to comply with 3024(c), which requires service of notice of a motion to strike within 20 days of service of a challenged pleading. In any event, the Stonehocker affidavit states only that defendant defaulted on his loan obligations and was sent 90-day pre-foreclosure notice, and is not scandalous or prejudicial, as defendant claimed.

Accordingly, the judgment of foreclosure, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about May 18, 2017, bringing up for review an order, same court and Justice, entered on or about April 6, 2017, which denied defendant Lawson Ho-Shing's CPLR 5015(a)(3) motion to vacate an order (same court, Betty Owen Stinson, J.), entered January 28, 2016, which granted plaintiff Wells Fargo Bank's motion for summary judgment and/or default judgment on its complaint, and denied defendant's CPLR 3024(b) motion to strike an affidavit of merit, should be affirmed, without costs.

All concur except Gesmer and Moulton, JJ. who dissent in an Opinion by Moulton, J.

MOULTON, J. (dissenting)

I respectfully dissent.

In this action to foreclose a consolidated mortgage loan, the borrower, Lawson Ho-Shing (Ho-Shing), appeals pro se from Supreme Court's denial of two motions seeking to vacate Supreme Court's order entered January 28, 2016. The 2016 order granted plaintiff Wells Fargo Bank, N.A.'s unopposed motion for summary judgment and an order of reference. In my view, Supreme Court abused its discretion in denying Ho-Shing's motions, which established both an excusable default (the bankruptcy of his counsel) and a potentially meritorious standing defense.[1]

On November 12, 2005, Ho-Shing and co-borrower Audrey Ho-Shing (the borrowers) obtained a mortgage loan from Fremont Investment & Loan (Fremont) in the principal amount of $432,000. The borrowers signed a promissory note for $432,000, dated November 12, 2005, secured by a mortgage on their Bronx property.

On February 20, 2008, Wells Fargo loaned $43,338.22 to the borrowers. In exchange, the borrowers executed a promissory note for $43,338.22, secured by a mortgage on the property (the New Money Note). In order to create a single loan in the principal

[1]I agree with the majority that Ho-Shing's notice arguments under Real Property Actions and Proceedings Law §§ 1304 and 1306 are not preserved.

amount of $471,415, the borrowers executed a consolidated note, a consolidated mortgage and a Consolidation, Extension and Modification Agreement (the CEMA). The CEMA provides that the consolidated note superseded all terms, covenants, and provisions of the notes identified on Exhibit A. Exhibit A includes a brief description of the New Money Note and the 2005 note, but neither note is attached as an exhibit to the CEMA. The CEMA references the consolidated note as Exhibit C. Wells Fargo points to the consolidated note that is attached as an exhibit to the complaint in Bronx County Supreme Court On-Line Records Library (SCROLL). Wells Fargo does not similarly assert that the 2005 note can be found on SCROLL. Indeed, the 2005 note does not appear in SCROLL or the appellate record. As discussed *infra*, the 2005 note's absence fatally undermines Wells Fargo's argument.

On June 18, 2008, Fremont General Corporation (and its subsidiaries) filed for bankruptcy.[2] According to New York Secretary of State records, Fremont became Fremont Reorganizing Corporation on January 5, 2009, and thereafter became an inactive corporation. On October 18, 2010, Mortgage Electronic Registration Systems, Inc. (MERS), "as nominee for Fremont Investment & Loan," assigned the 2005 Fremont mortgage to Wells

[2]Wells Fargo does not dispute that Fremont was part of the bankruptcy.

Fargo.

Wells Fargo commenced this action on June 20, 2013, to foreclose the consolidated loan in the principal amount of $471,415 based on the borrowers' May 1, 2010 default in payment. The borrowers, through their attorneys the Litvin Law Firm, P.C. (Litvin), answered the complaint in August 2013. The borrowers' answer included an affirmative defense of lack of standing.

In early October 2015, Wells Fargo moved for summary judgment and served its motion papers on Litvin. Supreme Court granted the motion without opposition, by order entered January 28, 2016. Wells Fargo also served Litvin with a notice of entry dated February 1, 2016. It is undisputed that Litvin was in bankruptcy at the time that Wells Fargo served it with the motion and the notice of entry.

In September 2016, Ho-Shing moved pro se to vacate Supreme Court's order by filing papers that he denominated as a CPLR 3024(b) motion to strike the affidavit of Wells Fargo's Vice President, Loan Documentation (the Stonehocker affidavit). In January 2017, Ho-Shing filed papers that he denominated as a motion to vacate Supreme Court's order pursuant to CPLR 5015(a)(3), based on Wells Fargo's "fraud, misrepresentation and misconduct." Supreme Court consolidated the motions for disposition.

In his motions, Ho-Shing asserted that Litvin failed to adequately represent him because the firm failed to respond to plaintiff's motion for summary judgment or to move to vacate the resulting order. As noted above, plaintiff's papers were served on Litvin after the firm filed for bankruptcy.

With respect to the merits, Ho-Shing pointed to irregularities that occurred in connection with the consolidated loan.[3] Ho-Shing cited to evidence of Fremont's parent company's June 18, 2008 bankruptcy. He also cited to New York Secretary of State records indicating that Fremont became Fremont Reorganizing Corporation on January 5, 2009, and thereafter became an inactive corporation. Ho-Shing argued that the assignment of a mortgage without the assignment of the underlying note would not convey any interest to Wells Fargo. He maintained that Wells Fargo had no legal authority to offer the loan modification "of a loan it did not own" because Wells Fargo had "no interest in the chain of title." Only the trustee in bankruptcy, Ho-Shing argued, could assign or deliver the 2005 note to Wells Fargo. In addition, despite Fremont's parent company's 2008 bankruptcy, Ho-Shing observed that over two years later, in 2010, Herman Kennerty, as

[3]Ho-Shing appears to have cited to CPLR 5015(a)(3) because he believed that Wells Fargo fabricated documents in order to manufacture standing.

Assistant Secretary of MERS, executed a written assignment of the Fremont mortgage to Wells Fargo.[4] Pointing to Kennerty's May 20, 2010 Washington State deposition, Ho-Shing questioned the validity of the assignment because Kennerty admitted that he was employed by Wells Fargo.

In opposition, Wells Fargo contended that it was entitled to summary judgment as the "original lender" of the consolidated loan, skirting the issues raised by Ho-Shing. Wells Fargo also maintained that the Stonehocker affidavit could not be struck under CPLR 3024(b) because it was never filed and was not scandalous or prejudicial.[5] In addition, Wells Fargo argued that Ho-Shing failed to demonstrate that it made false statements in connection with the loan or that there was a standing issue that warranted vacatur of Supreme Court's order under CPLR 5015(a)(3).

Supreme Court denied Ho-Shing's motions, agreeing with Wells Fargo's view that his pro se motions required a circumscribed analysis under CPLR 3024(b) and CPLR 5015(a)(3). Supreme Court ignored the fact that Ho-Shing's motion papers established his

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[4]Ho-Shing asserted that Fremont's parent company's assets were sold sometime in 2010 to Signature Group Holdings, Inc.

[5]On appeal, Wells Fargo explains that the Stonehocker affidavit was served but never filed with Supreme Court, as the result of an internal litigation hold.

excusable default and a meritorious standing defense sufficient for vacatur under CPLR 5015(a)(1). After mechanically analyzing Ho-Shing's arguments under CPLR 3024(b) and CPLR 5015(a)(3), Supreme Court concluded that Ho-Shing failed to establish that Wells Fargo committed "fraud, misrepresentation, or other misconduct of an adverse party" under CPLR 5015(a)(3). Supreme Court further found that Ho-Shing failed to establish that the Stonehocker affidavit was a scandalous or prejudicial pleading under CPLR 3024(b). Supreme Court additionally rejected Ho-Shing's standing argument on the basis that standing was not a "jurisdictional defect," citing two cases decided under CPLR 5015(a)(4).[6]

We should not disregard Ho-Shing's articulation of an excusable default (*see e.g. Apple Bank for Sav. v Fort Tryon Apts. Corp.*, 44 AD3d 497 [1st Dept 2007]) and a meritorious defense (discussed *infra*) merely because he mislabeled his

[6] On appeal, Wells Fargo explains that Supreme Court appeared to have been confused when it rejected Ho-Shing's standing argument on the basis that it was not a jurisdictional defect. Supreme Court cited two cases holding that standing can be waived if the defense is not asserted in an answer or pre-answer motion (*see e.g. Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 244 [2d Dept 2007] [standing is "not a jurisdictional defect that was so fundamental to the power of adjudication of a court, that it could not be waived"] [internal quotation marks and citation omitted]). Waiver is not an issue in this action because the borrowers asserted a standing defense in their answer.

motions. It is evident from Ho-Shing's papers that he lacks legal training. Pro se defendants are entitled to "[s]ome leniency" (*Du-Art Film Labs. v Wharton Intl. Films*, 91 AD2d 572, 573 [1st Dept 1982]), and the papers that pro se litigants submit are given "liberal and broad interpretation" (*Matter of Stephen W. v Christina X.*, 80 AD3d 1083, 1084 [3d Dept 2011], *lv denied* 16 NY3d 712 [2011]). While Ho-Shing did not specifically cite to CPLR 5015(a)(1), the fact remains that he has made the requisite showing thereunder.

In this appeal, Wells Fargo takes the position that it has unassailable standing as the "original lender" and the "holder" of the consolidated note as the term "holder" is defined in NY UCC 1-201(b)(21). However, it makes no effort to demonstrate that it received assignment or physical custody of the 2005 note from Fremont, the original lender. Nor does Wells Fargo explain how its employee, Kennerty, had the authority to execute the mortgage assignment at a time when Fremont no longer existed.[7]

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[7]The 2008 CEMA contains inconsistent language regarding when the 2005 Fremont mortgage was assigned to Wells Fargo. The preprinted language at the bottom of Exhibit A (entitled "List of Mortgages, Notes and Agreements") reads, "This mortgage *was assigned* to [plaintiff]" (emphasis added). By contrast, the preprinted language continues, "by Assignment of Mortgage dated," and immediately thereafter the language, "*to be recorded*," is inserted (emphasis added). Wells Fargo does not maintain that the mortgage assignment signed by MERS on October 18, 2010 was actually made two years earlier in connection with the

Instead, Wells Fargo argues that the mortgage assignment is "irrelevant" because the consolidated note is the operative instrument.

A plaintiff proves that it has standing to commence a mortgage foreclosure action by showing that it was the holder or assignee of both the mortgage and the note at the time the action was commenced (*see OneWest Bank FSB v Carey*, 104 AD3d 444 [1st Dept 2013]). It is the note, and not the mortgage, that is the dispositive instrument that conveys standing to foreclose (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). The mortgage passes as an incident to the note; however, the transfer of the mortgage without the debt is a nullity, and no interest can be acquired by that transfer (*see Merritt v Bartholick*, 36 NY 44, 45 [1867]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 280 [2d Dept 2011]). The rule that mortgage obligations are owed to the persons entitled to enforce the note is "designed to protect the mortgagor against having to pay twice or defend against multiple claims on the note" (*Weiss v Phillips*, 157 AD3d 1,8 [1st Dept 2017]).

Wells Fargo fits within the definition of the "holder" of the consolidated note because it is "the person in possession of

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consolidated loan.

a negotiable instrument that is payable . . . to an identified person that is the person in possession" (NY UCC 1-201[b][21]). However, in the context of a consolidated mortgage loan, the issue of standing is not so simple.

As we have previously noted, "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" from the original lender (*Weiss*, 157 AD3d at 8 n 6). Here, Wells Fargo describes itself as the "original lender" of the consolidated loan.[8] However, it only advanced $43,338.22 to the borrowers; Fremont was the "original lender" that advanced $432,000 to the borrowers. The consolidated note is premised on Wells Fargo's receipt of the assignment or physical delivery of the 2005 note from the original lender. There is no proof of such assignment or delivery in the record. While the 2005 note was purportedly consolidated with, and superseded by, the consolidated note, we cannot dispense with the requisite proof (*see e.g. Bank of N.Y. v Silverberg*, 86 AD3d at 281 [complaint

[8]Wells Fargo cites *Emigrant Mtge. Co., Inc. v Persad* (117 AD3d 676 [2d Dept 2014]) to bolster its argument that it is the "original lender." However, *Emigrant Mtge. Co., Inc.* did not involve a consolidated loan. Rather, the original lender assigned a note and a mortgage in connection with a single loan transaction to another entity two months after the original lender commenced a foreclosure action.

dismissed for lack of standing where "the consolidation agreement purported to merge the two prior notes and mortgages into one loan obligation" but the plaintiff proffered no evidence that MERS or the original lender assigned or physically transferred the notes described in the CEMA to the plaintiff]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 99 [2d Dept 2011] [complaint dismissed for lack of standing because the plaintiff failed to produce evidence that MERS possessed the authority to assign to plaintiff a first and second note and mortgage, or the CEMA and the consolidated note]).

It is improper to dispense with the requisite proof merely because Wells Fargo and Ho-Shing executed the CEMA. The majority asserts that there is record evidence of the assignment of the underlying notes and mortgages, which is presumably a reference to the CEMA. However, the CEMA is not evidence that the 2005 note was endorsed, assigned, or transferred from the original lender Fremont to Wells Fargo, because Fremont was not a party to the CEMA. The majority incorrectly argues that Fremont's parent company's bankruptcy is of no moment because the 2005 note was already superseded and no longer in existence at the time of the bankruptcy filing. But the bankruptcy would only be of no moment if Fremont had endorsed, assigned, or transferred the 2005 note to Wells Fargo in the first place, and an issue of fact exists as

to whether this ever occurred.

I disagree with the majority's conclusion that Ho-Shing has not raised a potentially meritorious standing defense because he did not provide evidence that the 2005 note was either misappropriated or was not transferred to Wells Fargo - evidence to which Ho-Shing would be not be privy. Ho-Shing's burden was to demonstrate a *potentially* meritorious standing defense (*see e.g. Romero v Alezeb Deli Grocery Inc.*, 115 AD3d 496, 496 [1st Dept 2014] [potentially meritorious defense raised even though there was "no conclusive evidence" regarding the defendant's notice defense]; *Rosenblatt v New York City Tr. Auth.*, 122 AD3d 410, 411 [1st Dept 2014] [the plaintiff's testimony supported the possibility that the defendant "may" have a potentially meritorious defense based on a condition that "could have" caused or contributed to the accident]). He has made the requisite showing here.

To address the absence of evidence that Fremont transferred the 2005 note to Wells Fargo, the majority points to the lack of complaints by Fremont and MERS. However, the record is devoid of evidence that Fremont had notice of the consolidated loan. Nor can the 2010 mortgage assignment validate the entire transaction or demonstrate that Fremont had in fact transferred the 2005 note to Wells Fargo, as the majority asserts. In discounting Ho-

Shing's arguments and characterizing the mortgage assignment as a ministerial act that had "no bearing on the earlier valid transfer of the note," the majority undermines its own position. If the 2010 mortgage assignment had no bearing on the transfer of the 2005 note, then the assignment cannot serve to validate the entire transaction.

Aurora Loan Servs., LLC. v Taylor (25 NY3d 355 [2015], *supra*) undermines, rather than supports, the majority's position. Unlike in this appeal, the plaintiff loan servicer in that case submitted an affidavit indicating that the affiant had "examined the original note herself," and the moving papers "clearly show the note's chain of ownership through Deutsche" (*id.* at 362). The Court of Appeals pointed three times to the fact that the loan servicer demonstrated that no gap existed in the note's chain of ownership as evidenced by an allonge that was affixed to the note (*id.* at 359-360). By contrast, here there is an unexplained gap in the chain of ownership caused by the absence of evidence that Fremont assigned the 2005 note to Wells Fargo (*compare Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 727 [2d Dept 2014] [summary judgment should have been granted to the plaintiff because "the documentary evidence established that there was no gap in the chain of ownership of one of the notes and mortgages, which was the subject of a consolidation, extension, and

modification agreement"]).

Moreover, *Aurora Loan Servs*. did not involve a consolidated loan. While the Court of Appeals concluded that standing was demonstrated by proof of possession of the note, Aurora involved a single loan and a single note for $600,000, which was later made part of a residential mortgage-backed securitization trust (*id*. at 358-359). This appeal involves three separate notes (the 2005 note, the New Money Note and the consolidated note) and Wells Fargo's chain of ownership is in question.[9]

If, for example, Wells Fargo had not bundled the consolidated loan but had sought to foreclose on the 2005 note, it would be required to demonstrate that it had physical possession of the 2005 note or that the 2005 note had been assigned to it (*see e.g. One Westbank FSB v Rodriguez*, 161 AD3d 715 [1st Dept 2018] [Supreme Court properly denied summary judgment because a standing issue existed regarding the assignment of the note through a blank indorsement written on separate paper that did not reference the note]). There is no justification for dispensing with such proof merely because the

[9]Similarly, O*neWest Bank FSB* (104 AD3d 444), cited by the majority and Wells Fargo, does not support the proposition for which it is cited. Like *Aurora Loan Servs*., *OneWest Bank FSB* did not involve a consolidated loan, and, therefore, it did not address the issue before us.

2005 note was purportedly consolidated with, and superseded by, the consolidated note. As noted by Ho-Shing in his motions, if the 2005 note was assigned or transferred to an entity other than Wells Fargo, the 2010 assignment of the Fremont mortgage would not have transferred any interest to Wells Fargo (*see Merritt*, 36 NY at 45; *Bank of N.Y. v Silverberg*, 86 AD3d at 280).[10]

Reversal of Supreme Court's order is compelled by our decision *in US Bank N.A. v Richards* (155 AD3d 522 [1st Dept 2017]). In that case, we reversed Supreme Court's denial of a borrower's motion to vacate his default under CPLR 5015(a)(1) (*id.*). We found that the borrower demonstrated an excusable default and a meritorious standing defense in light of the gaps in the plaintiff's proof (*id.* at 524). We noted that although the plaintiff sought to foreclose on a loan modification agreement in the amount of $327,828.34, it failed to demonstrate that it was assigned the first note of $289,000, which was made in favor of the first lender (*id.* at 523-524).

In *US Bank N.A. v Richards,* we also held that the borrower demonstrated a standing defense because there was a question

[10]While it is the note, and not the mortgage, that is the operative document, the execution of a mortgage assignment at a time when Fremont no longer existed also raises concerns regarding the legitimacy of the consolidated loan transaction.

regarding the sufficiency of the lost note affidavit required under UCC 3-804 (155 AD3d at 524). NY UCC 3-804 provides a method of recovery for a plaintiff who claims to be the owner of an instrument but does not have possession of the lost paper and therefore "does not have the holder's prima facie right to recover" (NY UCC 3-804, Official Comment). In this appeal, unlike the plaintiff in *US Bank, N.A. v Richards*, Wells Fargo does not argue that it lost the note that was consolidated with, and superseded by, the consolidated note. Yet it has not produced a copy of the 2005 note.[11] Wells Fargo ignores any issue regarding the assignment or delivery of the 2005 note by incorrectly positing that the inquiry begins and ends with its status as the undisputed holder of the consolidated note.

I also disagree with the majority's position that *Weiss* (157 AD3d 1) supports dispensing with the requisite proof that Fremont transferred the 2005 note to Wells Fargo. *Weiss* involved a loan made to borrowers who gave the lender a mortgage on property that they had acquired by fraudulent means (*id*. at 3). After

[11]To the extent Wells Fargo lost the 2005 note, it cannot circumvent the requirements of NY UCC 3-804 by relying on its status as the undisputed holder of the consolidated note. This status does not negate the possibility that Ho-Shing could be subject to double liability if the 2005 note later appeared in the possession of some entity other than Wells Fargo.

reacquiring the property, the rightful owner entered into a CEMA with the lender that extended the due date of the note, capped interest, and scheduled interest payments, giving the owner time to obtain financing to avoid foreclosure (*id.* at 3, 6). This Court found it significant that the owner signed the CEMA while represented by counsel - a factor not present here (*id.* at 13). Notably, "we [did] not view [the] action as a typical mortgage foreclosure action" (*id.* at 7). Our holding was limited to the "unique facts of this case" (*id.* at 6).[12] We dispensed with the requirement that the lender produce the note that was executed by the borrowers who had acquired the property through fraudulent means (*id.* at 7). We did so because there was "no legitimate question that [the lender was] the party entitled to enforce under the note" (*id.* at 8-9). The uncontested evidence included "unchallenged deposition testimony of the existence of the note" (*id.* at 7). Here, there is more than a legitimate question regarding Fremont's assignment or delivery of the 2005 note to Wells Fargo.[13] Unlike the lender in *Weiss*, who was the original

[12]Indeed we stressed that our holding was cabined by virtue of the action's unique facts by noting that point six times in our decision (*id.* at 3, 5 n 4, 6, 7, 10 and 13).

[13]Notably, in *Weiss*, the rightful owner bore no personal liability for the loan obtained through the borrowers' fraud, and, therefore, no risk existed that the owner would be subject to double liability (*id.* at 9). Ho-Shing, however, as an obligor

lender of the undisputed note in question, Wells Fargo was not the original lender of the 2005 note. The CEMA cannot fill the void. To hold otherwise would mean that a borrower and subsequent lender could agree to appropriate an original lender's investment merely by executing a CEMA to which the original lender is not a party.

Therefore, in my view, Ho-Shing demonstrated an excusable default and a meritorious standing defense. I would reverse Supreme Court's decision granting plaintiff summary judgment and remand this matter to Supreme Court for further proceedings.

Judgment of foreclosure, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about May 18, 2017, affirmed, without costs.

Opinion by Tom, J. All concur except Gesmer and Moulton, JJ. who dissent in an Opinion by Moulton, J.

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

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

ENTERED: JANUARY 8, 2019

CLERK

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of the 2005 note, could be subject to double liability if the 2005 note was transferred or delivered to an entity other than Wells Fargo.