SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 5, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Andrias, Saxe, Richter, JJ.

10460 Pegasus Aviation I, Inc., et al., Index 603076/08
Plaintiffs-Respondents,

-against-

Varig Logistica S.A.,
Defendant,

MatlinPatterson Global
Advisers, LLC, et al.,
Defendants-Appellants.

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Simpson Thacher & Bartlett LLP, New York (Roy L. Reardon of counsel), for appellants.

Coblentz Patch Duffy & Bass LLP, San Francisco, CA (Richard R. Patch of the bar of the State of California, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 11, 2012, which, insofar as appealed from, granted plaintiffs' motion for a trial adverse inference instruction against defendants-appellants as a sanction for spoliation of electronic evidence, reversed, on the law and the facts, without costs, and the motion denied.

Plaintiffs are entities that leased aircraft to non-

appealing defendant Varig Logistica S.A. (VarigLog), a Brazilian cargo airline. In this action, plaintiffs are suing (1) VarigLog, for breach of the aircraft lease agreements and for conversion of the aircraft, and (2) defendants-appellants (collectively, the MP defendants), as owners of VarigLog (a direct subsidiary of one of the MP defendants), on an alter ego theory and also on the theory that the MP defendants' conduct constituted direct conversion of the aircraft. Plaintiffs originally sued VarigLog on these claims in a Florida action commenced in February 2008. In October 2008, plaintiffs voluntarily discontinued the Florida action (to which the MP defendants were not parties) and commenced this action against VarigLog and the MP defendants.

At issue on this appeal is whether the MP defendants exercised sufficient control over VarigLog during the period from April 1, 2008, until VarigLog's bankruptcy filing on March 3, 2009,[1] to render the MP defendants — who are not alleged to have failed to meet their obligations to preserve or produce their own documents relevant to this action — liable to sanctions for

[1]Notwithstanding VarigLog's bankruptcy filing in Brazil, this action has been permitted to proceed against it under Brazilian bankruptcy law. VarigLog and the MP defendants have been represented by separate counsel in this action.

spoliation based on VarigLog's loss of its relevant electronically stored information (ESI) during that period.[2] Although VarigLog did not implement a litigation "hold" to preserve its ESI, it did install new information technology systems in March 2008 (the month after plaintiffs commenced the Florida action) that provided for daily, weekly and monthly backing-up of its ESI. Plaintiffs adduce no evidence that anyone

[2]Plaintiffs do not claim that the MP defendants were in control of VarigLog before April 1, 2008. By way of background, the MP defendants (a group of commonly controlled private equity firms, based in New York, and entities under their control), together with a group of three Brazilian individuals, purchased VarigLog out of a previous Brazilian bankruptcy proceeding in early 2006. As required by Brazilian law, the MP defendants' Brazilian co-investors owned 80% of the voting stock of the entity that directly owned VarigLog; the remaining 20% was owned by the MP defendants. The Brazilian co-investors exercised their voting control to appoint themselves to three of the four seats on VarigLog's board of directors. In 2007, a dispute developed between the MP defendants and their Brazilian co-investors over VarigLog's obligation to repay loans from the MP defendants. Beginning in July 2007, the Brazilian co-investors completely froze the MP defendants out of VarigLog's offices, facilities and business. Shareholder litigation ensued in Brazil between the Brazilian co-investors and the MP defendants. On February 15, 2007, the Brazilian court issued an order finding the Brazilian co-investors guilty of mismanagement, removing them from VarigLog's management, and appointing a judicial administrator, who was subsequently replaced by a judicial oversight committee. On April 1, 2008, the Brazilian court removed the Brazilian co-investors as shareholders and appointed one of the MP defendants, as sole remaining shareholder, to manage VarigLog under the supervision of the judicial oversight committee. The judicial oversight committee remained in place until December 9, 2008.

took steps to defeat these back-up systems or otherwise deliberately destroyed ESI relevant to this litigation at any point after April 1, 2008. Unfortunately, however, as a result of computer system crashes that occurred in February and March of 2009, all of VarigLog's preexisting ESI was destroyed. As previously noted, plaintiffs do not claim that the MP defendants were to blame for these crashes.

After learning of the loss of VarigLog's ESI, plaintiffs moved for sanctions against both VarigLog and the MP defendants. The motion court granted the motion, striking VarigLog's answer and ruling that, at trial, the jury will be instructed that it may infer that the lost ESI would have supported the veil-piercing claim against the MP defendants. In summary, the court's reasoning in imposing the sanction against the MP defendants was as follows: (1) the MP defendants' control of VarigLog obligated them to see to it that VarigLog preserved evidence relevant to this litigation and, in particular, that VarigLog institute a litigation hold on its ESI; (2) the MP defendants' failure to ensure that VarigLog implemented a litigation hold constituted gross negligence per se, a ruling

that followed *Pension Comm. of Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC* (685 F Supp 2d 456, 465 [SD NY 2010] [Scheindlin, J.] ["the failure to issue a *written* litigation hold constitutes gross negligence"]); and (3) because VarigLog's culpability rose to the level of gross negligence, prejudice to plaintiffs could be presumed, consistent with *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012] ["The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence"]). Only the MP defendants have appealed.

Under this Court's jurisprudence:

> "A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and finally, (3) that the destroyed evidence was relevant to the [moving] party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*VOOM*, 93 AD3d at 45 [internal quotation marks omitted]).

Further, "[w]hile discovery determinations rest within the sound discretion of the trial court, the Appellate Division is vested with a corresponding power to substitute its own discretion for

that of the trial court, even in the absence of abuse" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]; *see also Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52-53 [1999] ["The Appellate Division, as a branch of Supreme Court, is vested with the same discretionary power and may exercise that power, even when there has been no abuse of discretion as a matter of law by the nisi prius court"]; 11 Carmody-Wait 2d § 72:142).

The first issue to be determined is whether, as of April 1, 2008, the MP defendants had sufficient control over VarigLog to trigger a duty on their part to see to it that VarigLog was preserving its ESI relevant to this litigation. We conclude that the record supports the motion court's determination that the MP defendants had a sufficient degree of control over VarigLog to trigger such a duty. This does not equate to a finding that VarigLog was an alter ego of the MP defendants (which will be the determinative issue on plaintiffs' claims against the MP defendants, since VarigLog itself has been held liable).[3]

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[3]There is no indication in the record that corporate formalities were not observed from April 1, 2008 through March 3, 2009. Moreover, the record establishes that, during that period: (1) the majority of VarigLog's five-member board was at all times independent of the MP defendants, with only one director having been an employee of the MP defendants and one having been a sister of a partner in one of the MP entities; (2) no employee of the MP defendants served as a VarigLog officer, although the

Nonetheless, it cannot be ignored that the MP defendants, as the sole shareholders of VarigLog at this time, selected VarigLog's directors, and the record establishes that, during the period in question, employees and consultants of the MP defendants were closely monitoring VarigLog's operations and were formulating its business strategy.[4] The MP defendants admit that they could obtain documents from VarigLog upon request. In essence, even if it is true that VarigLog was legally and organizationally distinct from the MP defendants, in view of the latter's status as sole shareholder, determination of the membership of VarigLog's board and intimate involvement in directing VarigLog's business, "there seems to be little doubt that [VarigLog] would have complied with a timely request by [the MP defendants] to

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aforementioned sister of a partner in one of the MP entities was chief executive officer for part of the relevant time; (3) VarigLog had its own staff, offices, operations, and computer systems; and (4) the law firms that have represented VarigLog in the litigation against plaintiffs, both in New York and Florida, have never represented the MP defendants in this matter.

[4]In arguing that they had no duty with respect to the preservation of VarigLog's ESI, the MP defendants stress that their control of VarigLog was subject to the supervision of the judicial oversight committee for most of the period in question. However, our attention has not been drawn to any evidence supporting an inference that the judicial oversight committee would have objected to VarigLog's implementation of standard ESI preservation measures.

preserve its [ESI]," from which we conclude that VarigLog's ESI was sufficiently under the MP defendants' "practical control" to trigger "a duty [on their part] to ensure that those materials were adequately preserved" (*GenOn Mid-Atlantic, LLC v Stone & Webster, Inc.*, 282 FRD 346, 355 [SD NY 2012], *affd* 2012 WL 1849101, 2012 US Dist LEXIS 70750 [SD NY 2012] [holding that the plaintiff was obligated to ensure that a third-party consultant, which had audited the defendant on the plaintiff's behalf, preserved information relating to the audit in the consultant's possession, where litigation relating to the subject matter of the audit was foreseeable]).[5]

While the motion court properly determined that the MP defendants, once they took control of VarigLog, had a duty with regard to the preservation of VarigLog's ESI, on this record it cannot be said that the MP defendants' failure to discharge this duty was so egregious as to rise to the level of gross negligence. The motion court's finding of gross negligence

[5]We note that the MP defendants have not denied that it was reasonably foreseeable as of April 1, 2008, that plaintiffs would ultimately sue them in connection with plaintiffs' disputes with VarigLog. In any event, even after plaintiffs commenced this action against the MP defendants in October 2008, no litigation hold was implemented at VarigLog.

apparently was based on a statement by a federal district court of the Southern District of New York that, when litigation is anticipated, "the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information" (*Pension Comm.*, 685 F Supp 2d at 465). To the extent the district court meant by this that failure to institute a litigation hold, in all cases and under all circumstances, constitutes gross negligence per se, the statement has been disapproved by the Second Circuit (*see Chin v Port Auth. of N.Y. & N.J.*, 685 F3d 135, 162 [2d Cir 2012], *cert denied* __ US __, 133 S Ct 1724 [2013] ["reject(ing) the notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*," and citing *Pension Comm.* as contrary authority]). The per se rule apparently articulated in *Pension Comm.*, and followed by the motion court, has never, to our knowledge, been adopted by a New York state appellate court.

The facts of this case do not support a finding of gross negligence against the MP defendants. First, the MP defendants did not take control of VarigLog until April 1, 2008, after plaintiffs had commenced suit against VarigLog in Florida the

previous February. VarigLog was already represented by counsel in the Florida action, and our attention has not been directed to any evidence tending to show that the MP defendants had reason to believe that VarigLog's counsel was not giving VarigLog adequate advice and direction concerning the preservation of information relevant to the litigation. Neither are we directed to any evidence suggesting that the MP defendants should have been aware of an inadequacy in this regard at any later time (*see GenOn*, 282 FRD at 357 [noting, as a factor weighing against a finding that a party (GenOn) was grossly negligent based on the loss of information in the possession of a third-party consultant (FTI), that "GenOn and its counsel may reasonably have expected that FTI . . . would be aware of the rules governing a party's discovery conduct"]). Moreover, the MP defendants are conceded to have discharged their responsibility to preserve and produce their own documents in this matter, which negates any inference that they deliberately sought to defeat plaintiffs' right to disclosure or were reckless as to that possibility (*see id.* [noting, as another factor weighing against a gross negligence finding against GenOn, that, "whatever GenOn's shortcomings with respect to FTI's

information may have been, there is no suggestion that GenOn failed to preserve and produce all of its own documents"]; *see also Hartford Ins. Co. v Holmes Protection Group*, 250 AD2d 526, 527 [1st Dept 1998] ["Gross negligence is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing"] [internal quotation marks omitted]). Finally, as previously discussed, although the MP defendants had "practical control" of VarigLog during the relevant period, the record establishes that VarigLog was an organization separate from the MP defendants, with its own offices, staff, operations, and computer systems. While employees of the MP defendants apparently were present at VarigLog's offices from time to time, these MP employees were present at VarigLog as representatives of the MP defendants and did not become VarigLog employees.[6]

Because the record supports, at most, a finding of simple negligence against the MP defendants, plaintiffs must prove that the lost ESI would have supported their claims (*see VOOM*, 93 AD3d

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[6]For example, members of the MP defendants' VarigLog "team," to which the dissent refers, continued to use accounts on the MP defendants' email system rather than switching to accounts on VarigLog's email system. Significantly, as the MP defendants note, in this litigation, plaintiffs have always dealt with VarigLog and its counsel directly in discovery matters, and have not directed demands for production of documents in VarigLog's possession to the MP defendants.

at 45). This they have failed to do.[7] The most important evidence bearing on plaintiffs' alter ego claims against the MP defendants would be communications between the MP defendants and VarigLog, but plaintiffs have abandoned any contention that the loss of VarigLog's ESI has deprived them of these communications — for the simple reason that the MP defendants have produced their own ESI embodying these communications. As to VarigLog's internal emails and email exchanges with the judicial oversight committee, plaintiffs only speculate that these would have provided support for their claim that VarigLog was an alter ego of the MP defendants. Plaintiffs also complain that they have not received a full set of VarigLog's banking records, but they claim that those they have received "demonstrate[] that VarigLog was, indeed (at [the MP defendants'] instruction), indirectly benefitting [the MP defendants] through payments to [their] affiliates." While proof of additional such payments would appear to be cumulative, information about payments to affiliates of the MP defendants presumably could be obtained through appropriate disclosure requests directed to the MP defendants

[7]Indeed, plaintiffs do not even claim to have made such a showing, and instead rely on the presumption arising from the gross negligence finding.

themselves or, perhaps, VarigLog's banks. Finally, even if VarigLog had instituted a litigation hold, plaintiffs have presented no evidence that such a "hold" would have saved the relevant ESI from destruction when VarigLog's entire computer system crashed (without any fault on the part of the MP defendants) in February and March of 2009.

We disagree with the full dissent's analysis in several respects. In concluding that the MP defendants were grossly negligent, the dissent disclaims reliance on any per se rule, instead asserting that the MP defendants "fail[ed] to take even the most rudimentary steps" to preserve evidence at VarigLog. This ignores the fact that VarigLog — which presumably could have anticipated being sued by plaintiffs before the Florida suit was commenced in February 2008, during the freeze-out of the MP defendants — had a duty to preserve evidence substantially before the MP defendants acquired control in April 2008 or were sued themselves the following October. Throughout the litigation against plaintiffs, VarigLog has been represented by its own U.S. counsel. The MP defendants evidently assumed that these attorneys, before and after the MP defendants took control, had been giving VarigLog employees adequate advice and direction

about evidence preservation, and that VarigLog employees had been following that advice. While it appears, on this record, that the MP defendants were negligent to operate under these (in hindsight, too optimistic) assumptions, the failure was not so egregiously irresponsible as to constitute gross negligence. Again, there is no dispute that the MP defendants preserved their own organization's ESI and other documents relevant to this dispute, which, in our view, largely negates any inference that their culpability rose to the level of gross negligence. The dissent also ignores the fact that, even after the MP defendants acquired control of VarigLog in April 2008, VarigLog remained organizationally distinct from the MP defendants, with its own offices, employees and computer system; there is no evidence that the VarigLog "team" established by the MP defendants, which monitored VarigLog and set its overall business strategy, displaced VarigLog's own employees. As to prejudice, the dissent simply speculates, without apparent basis in the record, that (1) VarigLog's documents lost in the crash (to the extent these were not available from other sources, such as the MP defendants) were "directly relevant to the critical [alter ego] issue," and (2)

the imposition of a litigation hold might have saved VarigLog's ESI from destruction in the crashes.

The partially dissenting justice, although he agrees with us that the record discloses only ordinary negligence by the MP defendants, would remit the matter for a hearing to determine the extent of the prejudice to plaintiffs from the loss of VarigLog's ESI. While we agree with the partial dissent that ordinary negligence may provide a basis for the imposition of spoliation sanctions, we are mindful that, where "the destruction of evidence is merely negligent, . . . relevance [of the lost material] must be proven by the party seeking spoliation sanctions" (*VOOM*, 93 AD3d at 45) to satisfy the third prong of the showing required on a motion for such relief.[8] The partial dissent does not dispute that the existing record does not support a finding that VarigLog's lost ESI would have supported plaintiff's claims against the MP defendants, which are the only claims that remain at issue. The present record is extensive; plaintiffs moved for sanctions in March 2012, more than two years

[8]*See VOOM*, 93 AD3d at 45 (the third element of the showing required on a motion for sanctions is "that the destroyed evidence was relevant to the [moving] party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense").

after they learned in January 2010 that VarigLog's ESI had been lost in computer crashes. Thus, plaintiffs, having had an ample opportunity to attempt to demonstrate the relevance of the lost material to their claims against the MP defendants, instead chose to rely on a presumption (which we have found inapplicable) to satisfy the relevance prong of the showing required on their motion.[9] The partial dissent, while agreeing with our rejection of plaintiffs' reliance on the presumption, would give plaintiffs another chance to establish relevance through an evidentiary showing, notwithstanding the extensive litigation that has already taken place on the spoliation issue. We decline to give plaintiffs what would amount to a second bite at the apple.

In sum, given the very weak showing, on this record, that plaintiffs have suffered any prejudice as a result of the MP

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[9]Again, plaintiffs' appellate brief does not argue, even in the alternative, that the record demonstrates the relevance of the lost ESI, should we determine that a presumption of relevance should not have been applied against the MP defendants. Contrary to plaintiffs' conclusory assertion that the motion court "found that the evidence established that the lost documents . . . were relevant," the motion court's decision makes clear that it was presuming relevance based on gross negligence. For example, in rejecting the MP defendants' argument that relevance had not been shown, the court stated: "But as I've said, the failure to issue [a] litigation hold constitutes gross negligence. And once there has been an inference of — a presumption of gross negligence, then there is an inference of relevance of the documents."

defendants' merely negligent failure to see to it that VarigLog instituted a litigation hold, the drastic sanction of an adverse inference instruction telling the jury that the MP defendants were directly responsible for preserving VarigLog's ESI — which, in a case based on an alter ego claim, is tantamount to granting plaintiffs summary judgment — is not warranted in this case.[10]

All concur except Andrias, J. who concurs in part and dissents in part in a memorandum, and Richter, J. who dissents in a memorandum, as follows:

[10]While the dissenting and partially dissenting justices are correct that the adverse inference instruction would be permissive, they overlook the severe prejudice that would accrue to the MP defendants, which are being sued on a theory that VarigLog was their alter ego, if the court were to tell the jury that the MP defendants were responsible for preserving documents in VarigLog's possession.

ANDRIAS, J. (concurring in part, and dissenting in part)

I agree with the majority and the dissent that defendant MatlinPatterson Global Advisors (MP) exercised a sufficient degree of control over its subsidiary Varig Logistica S.A. (VarigLog) to trigger a duty to preserve VarigLog's electronically stored information (ESI), and that MP's failure to impose a litigation hold was not, in and of itself, gross negligence per se.

I also agree with the majority that upon a contextual assessment of all pertinent facts (s*ee Chin v Port Auth. of N.Y. & N.J.*, 685 F3d 135, 162 [2d Cir 2012], *cert denied* _ US _, 133 S Ct 1724 [2013]), MP's failure to discharge its duty did not rise to the level of gross negligence. However, because a court may, in its discretion, impose a spoliation sanction for the negligent destruction of evidence, I disagree with the majority's conclusion that no sanction is warranted, and would remand for a determination as to the extent to which plaintiffs have been prejudiced by the loss of the evidence, and the sanction, if any, that should be imposed.

In *Zubulake v UBS Warburg* LLC (220 FRD 212 [SD NY 2003]), the federal district court held that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document

retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents" (220 FRD at 218). In *Voom HD Holdings LLC v Echostar Satellite LLC* (93 AD3d 33 [1st Dept 2012]), we adopted the *Zublake* standard for preservation and held that "[a] party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (93 AD3d at 40).

The requisite culpable state of mind can be demonstrated through intentional or willful conduct, gross negligence, or ordinary negligence (*id.*), and the court has "broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence ...[,] even if the destruction occurred through negligence rather than wilfulness ..." (*Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 714 [2d Dept 2013]).

In determining the appropriate sanction for spoliation, "the court must consider the degree to which the contumacious conduct

or destruction of evidence prejudiced the other party" (*Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 23-24 [1st Dept 2013]). As the Court of Appeals stated in *Ortega v City of New York* (9 NY3d 69 [2007]):

> "New York courts therefore possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action. Where appropriate, a court can impose the ultimate sanction of dismissing the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party" (9 NY3d at 76 [citations omitted]).

The majority believes that no sanction is warranted. However, the motion court stated that the lost documents, which included internal emails, communications with a Brazilian court, and bank records, "clearly would be very relevant and important for the plaintiff[s] to prove their case," i.e. that MP controlled and dominated VarigLog, that it used its domination to harm plaintiffs, and that MP's Brazilian court defense is not credible. Even if the destruction of the records was the result of ordinary negligence, a hearing should be held to assess the extent of the prejudice suffered by plaintiffs thereby, and for a

determination as to the sanction, if any, that would be appropriate. This includes an adverse inference charge (PJI 3d 1:77), which may be an appropriate sanction for the negligent spoliation of evidence (*see Marotta v Hoy*, 55 AD3d 1194 [3d Dept 2008), even if the evidence destroyed did "not constitute the sole source of the information and the sole means by which plaintiff c[ould] establish his case" (*Alleva v United Parcel Serv., Inc.*, 112 AD3d 543, 544 [1st Dept 2013]; *Melendez v City of New York*, 2 AD3d 170 [1st Dept 2003]).

In this regard, I disagree with the majority that an adverse instruction would be tantamount to the grant of summary judgment in favor of plaintiff on its alter ego and conversion claims. An adverse inference charge is permissive, allowing, but not requiring the jury to draw negative inferences from the missing evidence, and is not equivalent to a grant of summary judgment.

RICHTER, J. (dissenting)

I agree with the majority's finding that plaintiffs have demonstrated that defendant MatlinPatterson Global Advisers LLC and its affiliates (MP Global) exercised enough control over Varig Logistica S.A. (VarigLog) to trigger MP Global's obligation to see that VarigLog took reasonable steps to preserve potentially relevant documents. I part company with the majority's holding as to the extent of MP Global's negligence. I conclude that MP Global's failure to take any meaningful steps to preserve evidence constitutes gross negligence and therefore that the order imposing the sanction of an adverse inference should be affirmed.

The imposition of spoliation sanctions is within the discretion of the motion court and should not be disturbed on appeal absent evidence of an abuse of discretion (*see Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]; *Talansky v Schulman*, 2 AD3d 355, 361-362 [1st Dept 2003]). Courts "possess broad discretion to provide proportionate relief to the party deprived of the lost evidence" (*Ortega v City of New York*, 9 NY3d 69, 76 [2007]).[1] As observed by the majority, when

[1] Even if this Court were to use its own discretion, a standard relied on by the majority, I believe an adverse inference would

determining if a sanction is proper, the court must determine if the party seeking the sanction established: "(1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and finally, (3) that the destroyed evidence was relevant to the party's claim" (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012] [internal quotation marks omitted]). However, the party seeking the sanction need not establish relevance when the destruction of evidence arises from conduct above mere negligence (*see id.* at 45-46; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 482 [1st Dept 2010]). When the destruction is the result of gross negligence, relevance is presumed (*VOOM*, 93 AD3d at 45-46; *Ahroner*, 79 AD3d at 482).

Here, the motion court acted within its discretion in determining that MP Global's conduct constituted gross negligence. MP Global was in control of VarigLog when this action commenced in October 2008, triggering its obligation to preserve evidence (*see VOOM*, 93 AD3d at 45). Despite the fact

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be the correct sanction. I also note, as does the concurring judge, that an adverse inference is permissive and does not require that the jury draw a negative inference from the absence of evidence.

that it had control, MP Global took no action to ensure that VarigLog preserved potentially relevant evidence. I do not contend, as the majority suggests, that MP Global's failure to institute a litigation hold at VarigLog constitutes gross negligence per se. Rather, my conclusion is based on MP Global's failure to take even the most rudimentary steps to ensure that potentially relevant evidence was preserved, including, but not limited to, instructing that a litigation hold be put in place.

Although VarigLog experienced two separate computer crashes that affected its hardware and software in 2009, at the time the crashes occurred VarigLog had no policy in place for email retention. Furthermore, there is no evidence that any efforts were made to create copies of the information that now is at issue in case the primary backup data was destroyed. Indeed, the first crash caused the backup tape to become corrupted, and the tape could not be recovered. The second crash, which occurred about a month later, caused damage to VarigLog's backup server, which also could not be restored. Further, the disks and applications involved in the crashes were not retained. Perhaps most notable is the fact that after the first crash occurred, MP Global took no additional action to ensure the preservation of data going forward.

Testimony by employees of VarigLog and MP Global provides further evidence that MP Global did not take the necessary steps to preserve evidence. During her deposition, VarigLog's CEO, Chan Lup Wai Ohira, stated that as far as she knew or could remember, MP Global never made copies of any of VarigLog's computer hard drives. When she was asked if anyone told her at the time she became CEO in November 2008, a month after this action commenced, that she "needed to take special precautions to preserve or retain records," Ohira said no. Additionally, when Santiago Juan Born, a former employee of MP Global and manager of VarigLog, was asked if he ever saw an "instruction from anyone to [VarigLog] telling them to retain their records for the purposes of litigation," his answer also was no.

The majority's focus on the computer crashes does not take any of this into consideration. The crashes would have been irrelevant had MP Global taken any steps to ensure that the evidence was being preserved, such as printing hard copies of the material or taking images of the hard drive. However, MP Global took no such precautions. MP Global does not contend it was unaware of the role electronic evidence would play in litigation. Indeed, MP Global took action to ensure the preservation of its own documents, yet did absolutely nothing to ensure that the

VarigLog documents were preserved despite its control of the company. This further supports the conclusion that MP Global's failure to impose a litigation hold at VarigLog was not the result of mere negligence, but arose from a gross disregard of its obligations. Therefore, my finding of gross negligence is based, not only on MP Global's failure to initiate a litigation hold, but on a close review of the specific facts of this case (*see Chin v Port Auth. of N.Y. & N.J.*, 685 F3d 135, 162 [2d Cir 2012] [stating that "a case-by-case approach to the failure to produce relevant evidence, at the discretion of the district court, is appropriate"] [internal quotation marks omitted]).

My determination finds support in this Court's decision in *VOOM*. In that case, we found that several factors can "support a finding of gross negligence," such as "(1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail" (93 AD3d at 45). The record here indicates a pattern of inaction on the part of MP Global that supports a finding of gross negligence (*see id.*; *see also 915 Broadway Assoc. LLC v Paul, Hastings, Janofsky & Walker, LLP*, 34 Misc 3d 1229[A], 2012 NY Slip Op 50285[U], *9 [Sup Ct, NY County 2012]).

Contrary to MP Global's argument, this Court's affirmance of the motion court's decision will not result in parent corporations routinely being held responsible for the discovery lapses of related companies. My conclusion is based on the unique facts of this case and the significant control MP Global had over VarigLog at the time this action was commenced. Finally, other than disputing the degree of control, MP Global offers no excuse for its failure to ensure that the documents were preserved.

The fact that the companies may have had different computer systems does not undermine the conclusion that MP Global had an obligation to act. In April 2008, a Brazilian court placed MP Global in control of VarigLog's administration and management, and the record shows that MP Global put together the "team" that ran VarigLog, that the team included MP Global's own employees and consultants and, in one instance, a partner's sister, Ohira, who ultimately became VarigLog's CEO. MP Global could have, at a minimum, inquired about the existence of a litigation hold at VarigLog and directed preservation of the data.

As the loss of potential evidence was the result of MP Global's gross negligence, the relevance of the material is presumed and need not be proven by plaintiffs (*VOOM*, 93 D3d at

45-46; *Ahroner*, 79 AD3d at 482). I note that, although the majority finds that plaintiffs can only speculate as to the relevance of VarigLog's internal emails, "it is the peculiarity of many spoliation cases that the very destruction of the evidence diminishes the ability of the deprived party to prove relevance directly" (*Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 17 [1st Dept 2000], *lv dismissed* 96 NY2d 937 [2001]).[2]

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

ENTERED: JUNE 5, 2014

CLERK

[2] Although the majority engages in an extended discussion of the absence of prejudice, we do not know what the missing documents would show. However, it is important to note that the categories of destroyed materials are directly relevant to the critical issue in this litigation, which is whether MP Global was an alter ego of VarigLog.

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12160 & M-1818 Argent Acquisitions, LLC, Plaintiff-Appellant, Index 650455/13

-against-

First Church of Religious Science, Defendant-Respondent.

_____

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

Vernon & Ginsburg, LLP, New York (Darryl M. Vernon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 6, 2013, which, inter alia, granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Defendant is a church housed at 14 East 48th Street in Manhattan (the property). Plaintiff is a real estate investment and development firm. Plaintiff approached defendant about buying the property, and, by letter dated September 14, 2012, from plaintiff to Wade Adkisson, defendant's pastor (the September 14 letter), plaintiff purported to "set[] forth the updated indicative terms and conditions pursuant to which [plaintiff] or its designated affiliate . . . agrees to acquire the Property." Under the heading "Acquisition Terms," the

September 14 letter then summarized the terms of sale as follows:

"Acquisition Price	$15,000,000
Seller	First Church of Religious Science
Terms	Cash to Seller, conveyance of marketable title to Property at closing
Deposit	An initial, fully refundable deposit of $500,000 (the 'Deposit') shall be paid to an escrow agent upon execution by the parties of a reasonably acceptable escrow agreement.
Due Diligence Period	The Deposit shall become non-refundable following a 30 day due diligence period. This due diligence shall be satisfactory in all respects to the Buyer in its sole and absolute discretion, and upon mutual execution and delivery of Acquisition documentation satisfactory to Buyer in its sole and absolute discretion.
Delivery of Title	At closing, Seller shall convey to [plaintiff] fee simple marketable title to the Property. The Property shall be conveyed vacant and free and clear of all violations, liens and encumbrances.
Closing Date	A date mutually acceptable to the parties, allowing a reasonable period of time for Seller to deliver the Property to Purchaser vacant. [Plaintiff] wishes to accommodate the Seller's intentions to use the proceeds from the sale of the Property towards the acquisition of a different location for the Seller."

Reverend Adkisson signed the September 14 letter, under the words "Agreed and accepted on this 14th day of September, 2012." On October 24, 2012, counsel for plaintiff sent an email to counsel for defendant attaching a draft contract of sale which was, according to the email, "based upon the Letter of Intent." Plaintiff's counsel also forwarded a proposed escrow agreement. In the weeks that followed, plaintiff's counsel sent various emails to defendant's counsel expressing plaintiff's desire to formalize the arrangement. These emails discussed "finaliz[ing] the terms" of the transaction and the fact that "there ha[d] been whatever preliminary conversations there need to be."

According to plaintiff, before a contract of sale could be executed, defendant informed it that it was engaged in negotiations to sell the property to another buyer, and that it would only sell the property to plaintiff if it paid $17,500,000, renegotiated the due diligence term of the agreement, and increased the down payment to $1,750,000. Plaintiff then commenced this action for breach of contract and specific performance, and filed a notice of pendency against the property. Defendant moved to dismiss the complaint, arguing that the September 14 letter did not constitute an enforceable contract for the sale of real property. It asserted that the language of

the September 14 letter, as well as the negotiations which followed it, demonstrated that it was a mere summary of plaintiff's offer, and not a final agreement with all of the material and essential terms necessary to satisfy the statute of frauds. It also claimed the September 14 letter was not enforceable because it did not provide for approval by the court and the Attorney General, as required for religious institutions pursuant to the Not-For-Profit Corporation Law.

Plaintiff argued in opposition that the complaint properly alleged the existence of a binding agreement between the parties, since all of the essential terms were included in the September 14 letter. It asserted that the parties' intention to enter into a more formal agreement did not invalidate the already binding September 14 letter, which it claimed contained all necessary material terms. It also argued that the Not-For-Profit Corporation Law did not bar enforcement of the agreement.

Supreme Court granted defendant's motion to dismiss the complaint and vacated the lis pendens. It found that the September 14 letter was missing several material terms, including (1) the specific terms of the escrow agreement for a contract deposit; (2) the specific closing date; (3) financing terms; (4) the risk of loss during the sale period; (5) the time and terms

of payment of the purchase price; (6) a specific description of the subject property; (7) the identity of the parties who signed the term sheet or what relation the signers to the term sheet have to the buyer and seller; and (8) the correct name of the seller as First Church of Religious Science, New York, N.Y. The court placed particular significance on the fact that the September 14 letter left for future negotiation the obligation to make a down payment and when the down payment would actually be made. Additionally, the court found that the subsequent negotiations between the parties indicated that there was no agreement on essential terms.

"[I]t is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]). Plaintiff asserts that, in the context of agreements to sell real estate, which must satisfy the statute of frauds, the only terms that are material are price, the identities of the buyer and seller, and a description of the property to be sold. Since the September 14 letter contained all of those terms, it contends, it is enforceable regardless of whether the parties contemplated the negotiation of additional

terms at a later time. Defendant questions whether the September 14 letter is adequately definite on the identities of the parties and the property's description and that, in any event, there were additional terms, unique to the transaction, which were required to be embodied in any signed writing to satisfy the statute of frauds.

Defendant is correct that, while price, identity of the parties and the parcel of real estate to be sold are material in a real estate transaction, the list of essential terms is not a defined one. Indeed, those items which must be set forth in a writing are "those terms customarily encountered in" a particular transaction (*O'Brien v West*, 199 AD2d 369, 370 [2d Dept 1993]). Thus, courts have held that a writing to convey real estate must provide for a closing date, the quality of title to be conveyed, adjustments for taxes and risk of loss (*see id.*; *Nesbitt v Penalver*, 40 AD3d 596, 598 [2d Dept 2007]).

We agree with plaintiff that the September 14 letter was sufficiently definite with respect to price, identification of the buyer and seller and a description of the property. The price of $15,000,000 was expressly stated, and defendant has failed to adequately explain why the use in the September 14 letter of the term "First Church of Religious Science" to

identify it as the seller was inadequate, when the name is nearly identical to its official name, which is "First Church of Religious Science, New York, NY." Further, defendant has not demonstrated that the street address for the church does not fully describe the property it owns.

Nevertheless, we agree with defendant that the September 14 letter did not contain all of the material terms which one would reasonably have expected to be included under the circumstances, rendering the September 14 letter unenforceable. For example, while the September 14 letter contemplated that the down payment would be held in escrow, it failed to identify who the escrow agent would be and left to future negotiations "a reasonably acceptable escrow agreement." Since "[n]o contract for the sale of real property can be created when a material element of the contemplated bargain has been left for further negotiations," (*Generas v Hotel des Artistes*, 117 AD2d 563, 566 [1st Dept 1986] *lv denied* 68 NY2d 606 [1986]), and the details of an escrow arrangement are certainly material, this alone warranted the motion court's conclusion that the letter was not a contract.

Further, the contemplated transaction was unique, insofar as it was contingent on approval by the court and the Attorney General. While we do not question that defendant was entitled to

agree to a sale of the property prior to seeking such approval (*see Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn*, 76 AD2d 712, 716 [2d Dept 1980] *affd* 54 NY2d 742 [1981]), one would expect that an agreement would have contained such material terms as defendant's duty to seek approval in a diligent manner, and the consequences of a failure to secure such approval. Indeed, it has been held that the contingency created by a condominium association's right of first refusal is material to an agreement to sell an individual condominium apartment (*see Simmonds v Marshall*, 292 AD2d 592, 593 [2d Dept 2002]).

Plaintiff argues that it is of no moment that the September 14 letter omitted terms such as the closing date and allocation of risk of loss, since those can be supplied by common-law precepts in the absence of specific contractual agreement. However, the issue is not whether the law can operate to flesh out the agreement, rather, it is whether there was a meeting of the minds in the first place. Thus, there is a direct correlation between the number of terms omitted from a writing and the likelihood that the parties agreed to be bound by it (*see O'Brien,* 199 AD2d at 371). Here, there are sufficient material terms absent from the September 14 letter such that it does not

constitute an enforceable agreement. Further, we find that by merely indicating that he "[a]greed and accepted" the September 14 letter, Reverend Adkisson did not transform an otherwise incomplete agreement to agree into a fully enforceable contract to sell the church property.

Finally, the documentary evidence created after the execution of the September 14 letter establishes that it was not meant to constitute a final agreement. Most significant to us is plaintiff's counsel's statement, four months after execution of the September 14 letter, that all negotiations until that time had been "preliminary conversations," and that the principals still needed to "have a face to face to finish up and look to sign whatever is to be signed." This evidence "flatly contradict[s]" plaintiff's claim that the September 14 letter was independently enforceable, and permits the pre-answer dismissal of the complaint (*Rivietz v Wolohojian*, 38 AD3d 301, 301 [1st Dept 2007] [internal quotation marks omitted]).

In light of our finding that the September 14 letter was missing numerous material terms, we reject plaintiff's contention that, at the very least, it created an obligation on defendant's

part to continue to negotiate in good faith (*see Mode Contempo, Inc. v Raymours Furniture Co., Inc.*, 80 AD3d 464, 465 [1st Dept 2011]). Further, because we have determined that the September 14 letter proposal was not enforceable, we need not reach the issue of whether it expired before plaintiff attempted to enforce it.

M-1818 - *Argent Acquisitions v First Church of Religious Science*

Motion seeking renewal of denial of reinstatement of notice of pendency denied as academic.

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

ENTERED: JUNE 5, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12212 PAF-PAR LLC, Index 652243/12
Plaintiff-Appellant,

-against-

Michael Silberberg, et al.,
Defendants-Respondents.

_____

Pryor Cashman LLP, New York (William L. Charron of counsel), for appellant.

Stahl & Zelmanovitz, New York (Joseph Zelmanovitz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 26, 2013, which denied plaintiff's motion for summary judgment in lieu of complaint (CPLR 3213), and granted defendants' cross motion to dismiss the complaint, unanimously affirmed, with costs.

It is well settled that since a guaranty "is a contract of secondary liability . . . a guarantor will be required to make payment only when the primary obligor has first defaulted." *Weissman v Sinorm Deli,* 88 NY2d 437, 446 (1996). Here, there is no dispute that defendants guaranteed the payment of the borrower's obligations under a promissory note, and that the borrower satisfied its obligations under the note, as modified by the Loan Modification and Extension Agreement signed by

plaintiff. Nevertheless, plaintiff argues that despite the borrower's full payment of the modified loan amount, the guaranty for the original loan amount is still enforceable because Article II of the guaranty states that it cannot be " . . . diminished, impaired, reduced or adversely affected by . . .[,]" *inter alia*, modifications. However, as the Court below held, this language cannot operate to make the guarantor liable for more than what the primary obligor was obligated to pay and did pay.

Hence, plaintiff did not make out a prima facie case, since it did not show that the guarantors failed to make a payment called for by the terms of their guaranty (*see Banner Indus. v Key B.H. Assoc.*, 170 AD2d 246 [1st Dept 1991]; *see also SCP [Bermuda] v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]).

While, as plaintiff points out, the guaranty waives many defenses, plaintiff's failure to establish its prima facie case obviates the need for defendants to raise a triable issue of fact as to defenses (*see SCP*, 224 AD2d at 216; *see also Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59, 69 [2006]).

An additional reason for denying plaintiff's summary judgment motion is that plaintiff failed to establish standing – it merely submitted an affidavit saying that the original lender

had assigned it the note, mortgage, and guaranty (*see 627 Acquisition Co., LLC v 627 Greenwich, LLC*, 85 AD3d 645, 647 [1st Dept 2011], and its assertions were contradicted by documentary evidence submitted by defendants.

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12617 The People of the State of New York, Ind. 2053/10
Respondent,

-against-

Kirk Malcolm,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William L. McGuire, J.), rendered February 4, 2011, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of one year, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing.

The record establishes that the court did not actually consider youthful offender treatment, but ruled it out on the ground that it had been waived as part of defendant's negotiated plea. The subsequent determination by the Court of Appeals in *People v Rudolph* (21 NY3d 497 [2013]) that CPL 720.20(1) requires "that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails

to request it, or agrees to forgo it as part of a plea bargain" requires a new sentencing proceeding. Although defendant pleaded guilty to an armed felony, he was potentially eligible under CPL 720.10(3), and he was thus entitled to a determination (*People v Flores*, __ AD3d __, 2014 NY Slip Op 02884 [1st Dept 2014]). This issue survives defendant's waiver of his right to appeal (*see People v Pacheco*, 110 AD3d 927 [2d Dept 2013]).

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

ENTERED: JUNE 5, 2014

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, JJ.

12625 Robert K. Holdman, Claim 121182
Claimant-Appellant,

-against-

Office of Court Administration, et al.,
Defendants-Respondents.

_____

Gage Spencer & Fleming LLP, New York (William B. Fleming of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Brian A. Sutherland of counsel), for respondents.

_____

Order of the Court of Claims of the State of New York (Alan C. Marin, J.), entered January 31, 2013, which granted defendants' motion to dismiss claimant's complaint, unanimously affirmed, without costs.

Claimant alleges that he resigned from his former positions as a Court of Claims Judge and acting Supreme Court Justice, relying on the erroneous advice of employees of defendant Office of Court Administration (OCA) that he was vested in his New York State Health Insurance Program (NYSHIP). He also asserts that he would not have resigned when he did if not for this advice. He seeks to be reinstated to the NYSHIP, or to recover money damages.

Although the giving of advice by the OCA employees was

ministerial in nature, which might subject the governmental body to liability (*see Valdez v City of New York*, 18 NY3d 69, 76-77 [2011]; *see also Lauer v City of New York*, 95 NY2d 95, 99 [2000]), claimant has not alleged a sufficient special duty owed to him, as opposed to any other employee seeking advice from OCA (*see Valdez*, 18 NY3d at 76-77; *McLean v City of New York*, 12 NY3d 194, 202 [2009]; *Lauer*, 95 NY2d at 99-100). In any event, it is uncontested that claimant is, in his present status, not eligible for NYSHIP benefits under the law, and defendants may not be estopped from applying the law to claimant based on the erroneous information given to him (*see Matter of Galanthay v New York State Teachers' Retirement Sys.*, 50 NY2d 984, 986 [1980]; *Goldstein v Teachers' Retirement Sys. of the City of N.Y.*, 89 AD3d 501, 502 [1st Dept 2011]; *Matter of Grella v Hevesi*, 38 AD3d 113, 117 [3d Dept 2007]). The narrow exception to the rule that

estoppel may not be invoked to prevent a governmental agency from performing its duty is not applicable here (*Matter of Grella*, 38 AD3d at 117-118).

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12652- Ind. 6358/08
12653 The People of the State of New York,
Respondent,

-against-

Rashid Bilal,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered December 15, 2010, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of five years, unanimously affirmed. Order, same court and Justice, entered on or about August 9, 2013, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant was not deprived of effective assistance of counsel. Although counsel's failure to move to suppress the weapon had no strategic justification but was based on a misunderstanding of the law, that error did not cause defendant

any prejudice under the state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

The CPL 440.10 motion court (41 Misc 3d 1203[A], 2013 NY Slip Op 51568[U][Sup Ct, New York County 2013]) correctly determined, based on undisputed material facts, that defendant would not have prevailed on a suppression motion. Unlike the situation in *People v Clermont* (22 NY3d 931 [2013]), this was not a "close" suppression issue (*id.* at 934) where a properly litigated motion might have been successful, or where a suppression hearing is now warranted in the interest of fairness. Instead, the undisputed facts establish that, when added to the information already known to the police, defendant's flight created reasonable suspicion warranting pursuit (*see People v Moore*, 6 NY3d 496, 500-501 [2006]; *see also People v Collado*, 72 AD3d 614 [1st Dept 2010], *lv denied* 15 NY3d 850 [2010]), and that the seizure was lawful, in any event, under the doctrine of

abandonment (*see People v Boodle*, 47 NY2d 398, 402 [1979], *cert denied* 444 US 969 [1979]).

Turning to defendant's direct appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12655 In re Marisela N.,
Petitioner-Respondent,

-against-

Lacy M.S.,
Respondent-Appellant.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Susan Cordaro of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (David B. Cohen, J.), entered on or about November 9, 2012, which, inter alia, denied appellant paternal grandmother's motion to vacate a two-year order of protection for the benefit of the subject children and petitioner-respondent mother, dated January 19, 2012, issued after a hearing, unanimously affirmed, without costs.

Although the order of protection has expired, the appeal is not moot because the grandmother continues to suffer a permanent and enduring stigma from the order and the underlying findings against her (*see Matter of Diallo v Diallo*, 68 AD3d 411 [1st Dept 2009], *lv denied* 14 NY3d 854 [2010]). Nor does collateral estoppel bar her from raising her appellate claim since the consequences of the order of protection were not a significant

part of her argument before this Court on her direct appeal from the order of protection (*see* 101 AD3d 425 [1st Dept 2012]; *Ventur Group, LLC v Finnerty*, 80 AD3d 474, 475 [1st Dept 2011]).

The court providently exercised its discretion in denying appellant's motion to vacate its prior order and for a new hearing based on the alleged ineffective assistance of counsel, who, she alleged, declined to present certain evidence at the original hearing. As the court noted, the attorney actively advocated for his client at the hearing, presented testimony, cross-examined witnesses, and disagreements between the attorney and his client were not evident. After reviewing the evidence the attorney declined to offer at the hearing, the court properly found that it would not have changed the result, and, in fact, was mostly unfavorable to appellant.

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12656 Jeffrey Markowitz, Index 651957/11
Petitioner-Respondent,

-against-

Richard Friedman,
Respondent-Appellant,

RFJM Partners, LLC,
Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about January 29, 2013,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated April 24, 2014,

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12657 In re Aretha Gabriel, Index 102539/10
Petitioner-Appellant,

-against-

New York City Department
of Education,
Respondent-Respondent.

_____

Joy Hochstadt, P.C., New York (Joy Hochstadt of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Nicholas J. Murgolo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered November 14, 2012, which denied petitioner's motion to renew respondent's motion to dismiss the petition, unanimously affirmed, without costs.

Much of the evidence that petitioner submitted on her motion to renew had been submitted by her in support of the petition and therefore was not "new" (CPLR 2221[e][2]; *see Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 23 [1st Dept 2013]). Insofar as any of the evidence was new but could have been presented in opposition to respondent's motion to dismiss, petitioner offered no justification for the failure to present the evidence on the prior motion (CPLR 2221[e][3]). Insofar as any of the evidence

was new and previously unavailable, the evidence would not have changed the prior determination (CPLR 2221[e][2]), which denied the petition and dismissed the proceeding as barred by petitioner's conceded failure to file a timely notice of claim (Education Law § 3813[1]) and by the statute of limitations (CPLR 217[1]).

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12659 The People of the State of New York, Ind. 4171/11
Respondent,

-against-

Ronnie Killens,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Cyrus R. Vance, District Attorney, New York (Allen J. Vickey 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 (Richard D. Carruthers, J. at plea; Ronald A. Zweibel, J. at sentencing), rendered on or about March 16, 2012,

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

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

ENTERED: JUNE 5, 2014

CLERK

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

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12661 Patricia D. Lakins, Index 301868/09
Plaintiff-Appellant,

-against-

171 E. 205th Street Corp.,
Defendant-Respondent.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (John O. Fronce of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered April 18, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendant established its entitlement to judgment as a matter of law by showing that it did not have notice of the allegedly icy condition upon which plaintiff fell. Defendant submitted evidence including plaintiff's deposition testimony that she never observed ice on the ground, and the affidavit of its principal that prior to plaintiff's fall, he never received any complaints of a snow or ice condition in the parking lot where the fall occurred (*see Herrera v E. 103rd St. & Lexington Ave. Realty Corp.*, 95 AD3d 463 [1st Dept 2012]).

In opposition, plaintiff raised a triable issue of fact by submitting climatological data revealing precipitation in the days preceding the accident that left an inch of "snow/ice" on the ground on the day of plaintiff's accident (*see e.g. Massey v Newburgh Realty, Inc.*, 84 AD3d 564, 567 [1st Dept 2011]; *Rivas v New York City Hous. Auth.*, 261 AD2d 148 [1st Dept 1999]). Contrary to defendant's contention that it was entitled to summary judgment because plaintiff could not identify the cause of her fall, she testified that she knew she slipped on ice because "[w]hen I was laying on the ground it was cold and wet that night." Such testimony may be fairly interpreted that plaintiff felt the ice on the ground after she fell, as she consistently stated in her affidavit submitted in opposition to the motion.

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12662- Ind. 4288/09
12662A The People of the State of New York, 5994/09
Respondent,

-against-

Louis Rodriguez,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Richard D. Carruthers, J.), rendered July 14, 2011, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree and two counts each of assault in the first degree, criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third and fourth degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 80 years to life, unanimously modified, on the law, to the extent of directing that the sentence for defendant's conviction of criminal possession of a weapon under the sixth count of the indictment run concurrently with the sentences on the murder, attempted murder and assault

convictions, and otherwise affirmed.

The court conducted a thorough colloquy with a juror who expressed a concern for his safety as a result of his erroneous belief that defendant's wife had tried to contact him, and, following this inquiry, the court properly concluded that the juror was not grossly unqualified to continue serving. After the juror learned that the call he received (apparently the result of a stranger dialing a wrong number) could not have been from defendant's wife, he assured the court that this incident would not affect his ability to remain fair and impartial (*see* CPL 270.35 [1]; *People v Buford*, 69 NY2d 290 [1987]).

The sentence for defendant's conviction under Penal Law § 265.03(1)(b), for possessing a loaded firearm with intent to use it unlawfully against another, must run concurrently with the sentences on the other charges relating to the shootings. The People neither alleged nor proved any unlawful intent that was separate from his intent to shoot the victims (*see People v Wright*, 19 NY3d 359 [2012]). However, the court lawfully imposed a consecutive sentence for the conviction under Penal Law §

265.03(3), because there was a completed possession, within the meaning of that statute, before the shooting took place (*see People v Brown*, 21 NY3d 739 [2013]).

We perceive no other basis for reducing the sentences.

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12663- Index 650205/11
12663A Rosemarie A. Herman, etc., et al.,
Plaintiffs-Appellants,

-against-

Julian Maurice Herman, et al.,
Defendants-Respondents,

J. Maurice Herman, etc., et al.,
Defendants.

_____

Law Offices of Craig Avedisian, P.C., New York (Craig Avedisian of counsel), and Jaspan Schlesinger LLP, Garden City (Steven R. Schlesinger of counsel), for appellants.

Akerman LLP, New York (M. Darren Traub of counsel), for respondents.

_____

Appeals from orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 15, 2012, which granted in part and denied in part defendants J. Maurice Herman, Windsor Plaza LLC (the New York corporation), Windsor Plaza LLC (the Delaware corporation), and Mayfair York LLC's and defendant Michael Offit's motions to dismiss the complaint as against them, unanimously dismissed, without costs, as moot.

The orders entered June 15, 2012 have been superseded by an order of the same court and Justice, entered on or about February 8, 2013, which granted plaintiffs' motion to renew and, upon

renewal, as plaintiffs acknowledge, reinstated virtually all of the claims previously dismissed as time-barred, including certain conspiracy claims that were previously dismissed, and granted in part plaintiffs' motion to reargue, and, upon reargument, reinstated in part the derivative causes of action (__ Misc 3d __, 2013 NY Slip Op 30366[U] [Sup Ct, NY County 2013]).

Plaintiffs' main argument on appeal is that the court erred in refusing to take allegations in the complaint as true and in deeming plaintiffs' evidentiary submissions insufficient to rebut defendants' prima facie showing that the claims arising from a 1998 transaction in which defendant Julian Maurice Herman (Maurice) is alleged to have secretly purchased plaintiff Rosemarie Herman's 50% interest in real estate at far less than fair market value, were barred by the applicable statutes of limitations. Plaintiffs are correct that the court should have credited the allegations in the complaint on this motion to dismiss pursuant to CPLR 3211(a)(5) (*see e.g. Benn v Benn*, 82 AD3d 548 [1st Dept 2011]; *New York Tel. Co. v Mobil Oil Corp.*, 99 AD2d 185, 192 [1st Dept 1984]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). However, virtually all of plaintiffs' arguments have been addressed and mooted. In its subsequent order, the court, upon renewal, credited plaintiffs'

new affidavit and evidence in concluding that it should have denied defendants' motions to dismiss on statute of limitations grounds, and it reinstated the claims relating to the 1998 transaction that had previously been dismissed as time-barred. The court also cited the 1998 Confidentiality Agreement signed by Maurice and the trustee of Rosemarie's Trusts, defendant Michael Offit, as evidence of their efforts to conceal the transaction from Rosemarie, and thus concluded that there were factual issues whether defendants were estopped to raise the statute of limitations as a defense. Thus, plaintiffs' arguments that the unavailability of the Confidentiality Agreement warranted denial of the motions pursuant to CPLR 3211(d) have also been mooted.

To the extent the superseding order denied plaintiffs relief on narrow grounds, including the denial of reargument as to whether the infancy toll applies (*see* CPLR 208) and the dismissal

of certain claims on grounds not addressed in the order on appeal, plaintiffs have noted their pending appeal from that order, and the parties will have a full opportunity to be heard on those issues on that appeal.

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12664 In re Dorothy Burch, Index 103480/12
Petitioner-Appellant,

-against-

New York City Health and
Hospitals Corporation,
Respondent-Respondent.

Law Offices of Lloyd Somer, New York (Lloyd Somer of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered March 19, 2013, which granted respondent's cross motion to dismiss, as time-barred, the petition in this article 78 proceeding seeking annulment of its determination, dated December 5, 2011, terminating petitioner's employment, unanimously reversed, on the law, without costs, the cross motion denied, and the matter remanded for further proceedings.

Ordinarily, where the employment of an at-will employee, like petitioner, is terminated, the four-month statute of limitations applicable in article 78 proceedings (CPLR 217) begins to run from the date of the termination, notwithstanding the availability of optional administrative review proceedings

(*see Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763 [1988]). However, where an administrative agency "create[s] [] ambiguity and [the] impression of nonfinality," that ambiguity regarding finality is to be resolved against the agency (*Mundy v Nassau County Civ. Serv. Commn.*, 44 NY2d 352, 358 [1978]).

In the instant case, in informing petitioner by letter dated December 5, 2011, that she was terminated and advising her of the possibility of review under Operating Procedure 20-39, respondent employed precisely the same language as that used in the article 78 statute of limitations (CPLR 217) to inform petitioner that the result of that *review* would be "final and binding." The language of the termination letter tracked that of paragraph V (G) of Operating Procedure 20-39, which provides that "[t]he reviewer's decision is final and binding, and is not subject to further administrative review."

We find that, notwithstanding the fact that the letter otherwise conveyed the concrete impact ordinarily associated with

finality for statute of limitations purposes (*see Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]), respondent created sufficient ambiguity as to finality such that the language must be construed against it and the petition must be deemed timely.

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12666 The People of the State of New York, Ind. 2922/11
Respondent,

-against-

Walter Stephens, Jr.,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Patrick J. Somers of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered September 27, 2012, convicting defendant, after a jury trial, of grand larceny in the first degree and criminal possession of stolen property in the first and third degrees, and sentencing him to an aggregate term of 3 to 9 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The jury could have reasonably inferred defendant's accessorial liability for the theft of over $1 million and his knowing possession of the stolen funds with the intent to benefit himself. It is a reasonable

inference, from the totality of circumstances, that defendant knew the large sums of money coming into an account under his control could not have had any legitimate origin (*see generally People v Reisman*, 29 NY2d 278, 285-286 [1971], *cert denied* 405 US 1041 [1972]). Furthermore, defendant's overall course of conduct, including his use of the funds, had no reasonable innocent explanation.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12667 Juanita Quintana, Index 308442/09
Plaintiff-Respondent,

-against-

TCR, Tennis Club of Riverdale, Inc.,
Defendant-Appellant.

_____

Kaufman Dolowich Voluck, LLP, New York (Kevin J. O'Donnell of counsel), for appellant.

Law Offices of Henry W. Davoli, Jr., PLLC, Rockville Centre (Zory Shteyman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 20, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant's sole argument on this appeal is that it is entitled to summary judgment because plaintiff failed or is unable to identify the precise cause of her slip and fall on a step in the women's locker room at defendant's facility. Viewing the record in the light most favorable to plaintiff, defendant failed to satisfy its initial burden to establish entitlement to summary judgment on that ground. In any event, plaintiff raised triable issues of fact as to whether slipping on water caused her fall. Among other record evidence, when pressed by defendant's

counsel at her deposition, plaintiff expressly testified that she "slipped in water" on the step and saw water in the vicinity of the step after her fall, and in an affidavit stated that she had mentioned to defendant's employees on several occasions prior to her accident that the locker room floor was slippery when wet.

Our decision in *Zanki v Cahill* (2 AD3d 197 [1st Dept 2003], *affd* 2 NY3d 783 [2004]), relied upon by defendant, is distinguishable. In *Zanki*, the plaintiff testified that she never observed "'anything on the stairs' either before *or after* her accident . . . . The sole basis [she] offer[ed] for the inference that a dangerous [wet] condition existed on the stairwell . . . [was] her testimony that her sleeve (not any part of the stairwell itself) was wet . . . at the end of her fall. . . . [She] offer[ed] nothing more than 'speculation or guesswork' to support her contention that the alleged recurring condition existed on the stairwell at the time of her accident, and also caused her accident" (*Zanki*, 2 AD3d at 198-199 [internal citations omitted]).

Moreover, defendant failed to establish a lack of constructive notice of the condition. The moving papers contain no indication of when the area was last inspected prior

to the accident (*see Lorenzo v. Plitt Theatres*, 267 AD2d 54, 56 [1st Dept 1999]; *Yioves v. T.J. Mazz, Inc.*, 29 AD3d 572 [2d Dept 2006]; *compare Green v. Gracie Muse Rest. Corp.*, 105 AD3d 578 [1st Dept 2013]).

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

ENTERED: JUNE 5, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12669 The People of the State of New York, Ind. 2657/12
Respondent,

-against-

Benny Davis,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about October 25, 2012, unanimously affirmed.

Application by appellant'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 appellant'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: JUNE 5, 2014

CLERK

CORRECTED ORDER - July 28, 2014

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12671N Jason Loeb, Index 113049/09
Plaintiff-Respondent,

-against-

Assara New York I L.P., et al.,
Defendants-Appellants.

Jerome Shuman, New York, for appellants.

Held & Hines, LLP, Brooklyn (Joanna J. Lambridis of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 20, 2013, which, inter alia, granted plaintiff's motion pursuant to CPLR 3126 to strike defendants' answer based on their failure to comply with discovery orders, unanimously affirmed, with costs.

The court did not abuse its discretion in striking defendants' answer, given defendants' unexcused failure to comply with at least three courts orders requiring them to provide supplemental responses to plaintiff's discovery demands and produce a witness with knowledge for deposition by specific dates (CPLR 3126[3]; *see also Williams v Shiva Ambulette Serv. Inc.*, 102 AD3d 598, 599 [1st Dept 2013]). Each of the subject orders expressly warned defendants that all dates set forth therein were "final" and the failure to comply, absent a showing of good cause, would result in the striking of the answer or preclusion

of evidence at trial, upon written notice of motion of such noncompliance (*see Oasis Sportswear, Inc. v Rego*, 95 AD3d 592, 592 [1st Dept 2012]). Also, the court granted plaintiff's first motion to strike the answer, and although it subsequently vacated that order, defendants' failure to avail themselves of the opportunity to produce a witness within the newly extended deadline conclusively demonstrates that their noncompliance was "willful, contumacious or due to bad faith" (*Henderson-Jones v City of N.Y.*, 87 AD3d 498, 504 [1st Dept 2011], quoting *McGilvery v New York City Tr. Auth.*, 213 AD2d 322, 324 [1st Dept 1995]). Defendants' repeated failure to produce a witness has prejudiced plaintiff's ability to obtain material and necessary information that is solely within defendants' possession, thus warranting striking their answer (*see Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004]). Defendants also waived their right to conduct a physical examination of plaintiff.

Although the "affirmation of good faith" submitted by counsel in support of plaintiff's motion, standing alone, contained insufficient details of his efforts to resolve this discovery matter without court intervention, when viewed in conjunction with the other affirmation counsel submitted in support of the motion, the requirements of 22 NYCRR 202.7(c) were sufficiently satisfied. Even if plaintiff's motion papers were technically noncompliant with 22 NYCRR 202.7(c), we find that the

record establishes that plaintiff's counsel attempted on numerous occasions, both in and out of court, to resolve the outstanding discovery issues with defendants before filing the motion to strike the **answer**. As such, in the unique circumstances of this case, "any further attempt to resolve the dispute non-judicially would have been futile" (*Northern Leasing Sys., Inc. v Estate of Turner*, 82 AD3d 490, 490 [1st Dept 2011]).

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

ENTERED: JUNE 5, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12672 The People of the State of New York, Ind. 1394/06
Respondent,

-against-

Ivan Maestre,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc I. Eida of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about March 14, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three sexually violent offender adjudication.

The court properly exercised its discretion in declining to grant a downward departure (*see People v Cintron*, 12 NY3d 60, 70, *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant did not

demonstrate any mitigating factors, not already taken into account in the risk assessment instrument, that would warrant a downward departure, given the seriousness of the underlying conduct committed against a child. While conceding that the court properly assessed points for unsatisfactory conduct while confined (*see People v Perez*, 104 AD3d 403 [1st Dept 2013], *lv denied* 21 NY3d 858 [2013]; *People v Salley*, 67 AD3d 525 [1st Dept 2009], *lv denied* 14 NY3d 703 [2010]), defendant argues that the court should have exercised its discretion to assess fewer than 20 points. However, defendant would have remained a level three offender even if the court had not assessed any points under that factor. In any event, the assessment of 20 points was appropriate.

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

ENTERED: JUNE 5, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12674 In re Aimee E.-H.,
Petitioner-Respondent,

-against-

Alexander H.,
Respondent-Appellant.

_____

Larry S. Bachner, Jamaica, for appellant.

Preston Stutman & Partners, P.C., New York (Robert Preston of counsel), for respondent.

_____

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about April 4, 2013, which denied respondent-appellant's objections to a support magistrate's order finding that respondent willfully violated a child support order, awarding petitioner a money judgment for child support arrears, and directing a good-faith payment of $20,000, unanimously affirmed, without costs.

Respondent's admission that he failed to pay court-ordered child support constitutes prima facie evidence of a willful violation of the support order (*see Matter of Powers v Powers*, 86 NY2d 63, 69 [1995]). Respondent failed to rebut this prima facie evidence with competent, credible evidence of his inability to make the required payments (*see id.* at 69-70). Although

respondent asserted that his business had failed due to the economic downturn, he failed to provide evidence of his diminished income or show that he thereafter made reasonable efforts "to obtain employment commensurate with his qualifications and experience" (*Matter of Heyward v Goldman*, 23 AD3d 468, 469 [2d Dept 2005] [internal quotation marks omitted]; *see Matter of Maria T. v Kwame A.*, 35 AD3d 239, 240 [1st Dept 2006]). There is no basis to disturb the credibility findings of the magistrate (*In re Bristene B.* 102 AD3d 562 [1st Dept 2013]).

The Support Magistrate providently exercised its discretion in directing a good-faith payment of $20,000 (*see e.g. Matter of Gorsky v Kessler*, 79 AD3d 746, 747 [2d Dept 2010]), and in awarding post-petition arrears (*see* Family Ct Act § 459).

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

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

ENTERED: JUNE 5, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12675 Peter Fama, Index 103419/11
Plaintiff-Appellant,

-against-

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Jenna Lynn Krueger of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered April 10, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges he was injured when he slipped and fell on a puddle of grease on the floor of the sanitation garage where he worked. Defendants failed to meet their prima facie burden of establishing that they neither created nor had notice of the dangerous condition (*see Arnold v New York City Hous. Auth.*, 296 AD2d 355 [1st Dept 2002]). The testimony of the supervisor on duty was insufficient to establish when the floor was last

inspected before plaintiff's accident (*see Guerrero v Duane Reade, Inc.*, 112 AD3d 496 [1st Dept 2013]; *Cater v Doubledown Realty Corp.*, 101 AD3d 506 [1st Dept 2012]). Further, plaintiff's evidence was sufficient to raise an issue of fact as to whether the condition was created by defendants' workers on the prior shift (*see Fragale v City of New York*, 88 AD3d 488, 489 [1st Dept 2011]).

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

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

ENTERED: JUNE 5, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12676 Brian Cohen, Index 159052/12
Plaintiff-Respondent,

-against-

Michail Z. Hack, et al.,
Defendants-Appellants.

_____

Traub Lieberman Straus & Shrewsberry, LLP, Hawthorne (Lisa L. Shrewsberry of counsel), for appellants.

Law Office of Steven Cohn, Carle Place (Mitchell R. Goldklang of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered January 28, 2014, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss the legal malpractice claim and to compel arbitration of the breach of contract claim, unanimously modified, on the law, the motion granted to the extent of dismissing the legal malpractice claim, and otherwise affirmed, without costs.

Plaintiff does not assert that defendants' conduct caused the result of his dispute with his disability insurer to be worse than it would have been. Rather, he argues that defendants, in bad faith and without full disclosure, pressured him into changing from an hourly retainer to a contingency retainer. The

only loss he alleges is the additional fees owed to counsel as a result of changing the retainer. This is fatal to his claim for malpractice (*see Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 106 AD3d 536 [1st Dept 2013], *lv dismissed* 21 NY3d 1059 [2013]; *see also Sumo Container Sta. v Evans, Orr, Pacelli, Norton & Laffan*, 278 AD2d 169, 170-171 [1st Dept 2000]).

The court correctly held that, despite the submission to arbitration in the retainer agreement, arbitration of the contract claim was inappropriate under the circumstances. The retainer agreement provided for arbitration under part 137 of the Rules of the Chief Administrator of the Courts. However, the gravamen of the contract claim is that it is invalid because of defendants' misconduct in inducing plaintiff to sign it, or because it created a windfall for defendants. By the express terms of the rules the parties chose to govern their arbitration, claims such as this are not arbitrable since 22 NYCRR 137.1(b)(3)

provides that part 137 does not apply to "claims involving substantial legal questions, including professional malpractice or misconduct" (*see Mahler v Campagna*, 60 AD3d 1009, 1012 [2d Dept 2009]).

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

ENTERED: JUNE 5, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12678 The People of the State of New York, Ind. 136/12
Respondent,

-against-

Javier Tirado,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda 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 (Daniel McCullough, J.), rendered on or about October 11, 2012,

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

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

ENTERED: JUNE 5, 2014

CLERK

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

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12679 2110-2118 ACBP, LLC, Index 810001/10
Plaintiff-Respondent,

-against-

Lucy Holland-Harden,
Defendant-Appellant,

Joseph Holland, et al.,
Defendants.

_____

Clair & Gjertsen, Scarsdale (Nicole M. Black of counsel), for appellant.

Charles I. Epstein, Flushing, for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 15, 2013, which, following a traverse hearing, denied defendant-appellant's motion to dismiss the complaint and vacate the judgment issued against her, and reinstated a previously vacated Judgment of Foreclosure and Sale, dated August 14, 2012, unanimously affirmed, without costs.

Plaintiff satisfied its burden of establishing personal jurisdiction over defendant-appellant (defendant), pursuant to CPLR 308(2). At the traverse hearing, the process server testified that, after attempting to personally serve defendant and her husband at their apartment building, he delivered the pleadings to the building's doorman, a "person of suitable age

and discretion" (CPLR 308[2]; *F.I. duPont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 797 [1977]). The process server also testified that, consistent with his affidavit of service, he then mailed the pleadings to defendant's residence. Although the mailings were mistakenly addressed, under the circumstances of this case, the mailing requirement of CPLR 308(2) was satisfied.

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

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

ENTERED: JUNE 5, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12687 Rosa Donoso, Index 150138/09
Plaintiff-Respondent,

-against-

Motor Vehicle Accident
Indemnification Corporation,
Defendant-Appellant.

_____

Kornfeld, Rew, Newman & Simeone, Suffern (William S. Badura of counsel), for appellant.

Law Offices of Michael M. Goldberg, P.C., New York (David H. Green of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered April 2, 2013, upon a jury verdict, in plaintiff's favor, unanimously reversed, on the law, without costs, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff claims that she suffered permanent consequential and significant limitations of use of her lumbar spine as a result of an accident involving a motor vehicle (*see* Insurance Law § 5102[d]). At trial, she testified that she was knocked over by a car and thereafter suffered back pain and injuries for which she received physical therapy and epidural injections, and that she underwent surgery four years later. Ambulance and

emergency room records admitted into evidence show that the then 65-year-old plaintiff complained of back pain following the accident, and medical records of the treatment about which plaintiff testified show, inter alia, that the surgical procedure was a laminectomy to address spinal stenosis. Plaintiff did not call any treating physician or medical expert to testify.

Defendant moved for a directed verdict at the close of plaintiff's evidence, arguing that plaintiff could not prove causation without a doctor's testimony (*see* CPLR 4401). Contrary to plaintiff's contention, since defendant's argument constituted a challenge to the sufficiency of the evidence, and indeed plaintiff opposed defendant's motion on the ground that her medical records were sufficient, the issue whether plaintiff established prima facie that she suffered a serious injury causally related to the motor vehicle accident is preserved for review (*see Geraci v Probst*, 15 NY3d 336, 342 [2010]).

Plaintiff presented no evidence of a causal connection between the motor vehicle accident and her lumbar condition. The medical records do not contain an opinion given by a physician that there was a causal connection between the accident and plaintiff's disc herniation or the spinal stenosis for which she underwent surgery four years later. Indeed, the impression of

one of plaintiff's treating physicians, according to his medical records, was "[d]egenerative disc disease of the lumbar spine." However, if the records had contained an opinion, the trial court could not have considered them, because the opining physician was not available for cross-examination (*see Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]; *Daniels v Simon*, 99 AD3d 658, 660 [2d Dept 2012]). Thus, defendant was correct that plaintiff could not prove causation without a doctor's testimony, and its motion should have been granted because "there [was] no rational process by which the fact trier could base a finding in favor of [plaintiff]" (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *see e.g. Ciocca v Park*, 21 AD3d 671 [3d Dept 2005], *affd* 5 NY3d 835 [2005]).

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

ENTERED: JUNE 5, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12688 The People of the State of New York, Ind. 5446/10
Respondent,

-against-

Michael Turner,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered August 20, 2012, convicting defendant, after a jury trial, of robbery in the first degree (two counts), robbery in the second degree (two counts), burglary in the second degree (three counts) and grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 12 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence

supported the inference that defendant was an intentional participant in a forcible taking, and was not merely a knowing facilitator.

The court properly denied defendant's request for an adverse inference charge regarding a segment of security videotape that was created and later erased by the management of the building where the robbery took place, as it was never in the possession of the police or prosecution (*see People v Banks*, 2 AD3d 226 [1st Dept 2003], *lv denied* 2 NY3d 737 [2004]). The fact that a police officer viewed the tape did not place it within the People's constructive possession or control (*see People v Walloe*, 88 AD3d 544 [1st Dept 2011], *lv denied* 18 NY3d 963 [2012]; *see also People v Hayes*, 17 NY3d 46 [2011], *cert denied* 565 US , 132 S Ct 844 [2011]). In any event, the portion of the tape that was introduced at trial was clearly incriminating, and there is no reason to believe that the erased portion was exculpatory.

The court's *Sandoval* ruling balanced the appropriate

factors and was a proper exercise of discretion (*see People v Williams*, 12 NY3d 726 [2009]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). In a compromise ruling, the court only permitted defendant's convictions to be identified as unspecified felonies.

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

ENTERED: JUNE 5, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12693 The People of the State of New York, Ind. 66193C/10
Respondent,

-against-

Willarid Santana,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael McLaughlin of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered on or about August 14, 2012, unanimously affirmed.

Application by appellant'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 appellant'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: JUNE 5, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12694N Andrzej Buszko, Index 307205/09
Plaintiff,

-against-

The City of New York, et al.,
Defendants.
- - - - -
Slawek W. Platta, PLLC,
Nonparty Appellant,

-against-

Lipsig, Shapey, Manus and Moverman, P.C.,
Nonparty Respondent.

_____

The Platta Law Firm, PLLC, New York (Brian J. Vannella of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about February 21, 2013, which apportioned attorneys' fees 97.5% to plaintiff's incoming attorneys (nonparty respondent) and 2.5% to his outgoing attorneys (nonparty appellant), unanimously modified, on the facts, to increase appellant's portion to 5% and reduce respondent's portion to 95%, and as so modified, affirmed, without costs.

During the four months it represented plaintiff, appellant prepared and filed a bill of particulars, prepared and filed

discovery demands and responses to defendants' discovery demands, obtained plaintiff's medical records, and retained two experts. Respondent, which represented plaintiff in two stints over the course of several years, performed the lion's share of the work, including representing plaintiff in a General Municipal Law § 50-h hearing, commencing the action by filing and serving a summons and complaint, preparing a summary judgment motion, continuing discovery, and successfully mediating a $3 million settlement in this personal injury action. Under the circumstances, we find that appellant's relative contributions are comparable to the work performed by outgoing counsel in recent matters where an award of 5% or nearly 5% was found appropriate (*see Han Soo Lee v Riverhead Bay Motors*, 110 AD3d 436, 436 [1st Dept 2013]; *Rosado v Alhati*, 109 AD3d 753 [1st Dept 2013], *lv denied* __ NY3d __, 2014 NY Slip Op 68077 [2014]; *Shabazz v City of New York*, 94 AD3d 569 [1st Dept 2012]).

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

ENTERED: JUNE 5, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12695N The Estate of Anthony Lazzarino, etc., Plaintiff-Appellant, Index 602029/05

-against-

Warner Bros. Entertainment Inc., et al., Defendants-Respondents,

Henry Morrison, Defendant.

_____

Law Office of Aaron Siri, New York (Aaron Siri of counsel), for appellant.

McGuireWoods LLP, New York (Marshall Beil of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 6, 2013, which, to the extent appealed from, denied plaintiff's motion to amend the complaint, unanimously affirmed, without costs.

The court properly determined that the proposed breach of contract claim against The Warner Brothers defendants, asserting breach of an agreement to pay proceeds of a film made by a third party, is devoid of merit (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). The agreement does not

contemplate such a payment. Further, to the extent plaintiff asserted that Warner Brothers violated plaintiff's predecessor-in-interest's "right to match," the claim is barred by the statute of limitations (*Lazzarino v Warner Bros. Entertainment, Inc., et al.*, Sup Ct, NY County, September 15, 2008, Fried, J., index No. 602029/05).

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

ENTERED: JUNE 5, 2014

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11367 The People of the State of New York, Ind. 3610/10
Respondent,

-against-

Marlon Cole,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered February 29, 2012, reversed, on the law, and the matter remanded for a new trial.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
Dianne T. Renwick
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

11367
Ind. 3610/10

_____x

The People of the State of New York,
Respondent,

-against-

Marlon Cole,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered February 29, 2012, convicting him, after a jury trial, of burglary in the second degree, and imposing sentence.

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen and Susan Axelrod of counsel), for respondent.

ACOSTA, J.

At issue in this burglary case is whether the trial court conducted the "searching inquiry" required by the Court of Appeals in *People v Crampe* (17 NY3d 469 [2011]) before allowing defendant to proceed pro se. We find that it did not and therefore reverse and remand for a new trial.

Defendant first requested to proceed pro se during the suppression hearing. Noting that they were "in the middle of a hearing," the court advised defendant that he could confer with counsel about anything he thought counsel "should be doing" when the questioning of the witness was completed. At the conclusion of the evidence, counsel read a statement prepared by defendant, in which defendant sought suppression of a statement. A few days later, the court denied suppression and adjourned the case for trial. Defendant again asked to proceed pro se. The court said that that was a possibility and that it would be discussed on the next court date, and urged defendant to think about it. When defendant said that he "just need[ed] a legal adviser," the court answered that defendant might get a legal adviser, but urged defendant to discuss it with counsel and "think about it."

Several weeks later, counsel told the court that he and defendant had discussed the matter and that defendant still wanted to proceed pro se. Defendant responded, "Okay," when the

court asked how he was feeling, and, in response to the court's inquiry about the level of his education, stated that he had "a full high school education" and "a diploma."

The court instructed defendant:

> "It is in your interest to continue to have [your attorney] represent you. You have a right to represent yourself. That doesn't mean it is a good idea. In fact, it is probably a bad idea. Generally, it is a very bad idea. Mr. San Pedro is a trained attorney so I would urge you avail yourself of his services so that he can represent you in this case. I have every confidence that he will do a very good job.
>
> "Can we proceed with him as your lawyer?"

Defendant responded, "I understand what you are saying but I have been studying and doing legal work. He will be [my] legal . . . advisor." The court told defendant that San Pedro could be his lawyer or his legal advisor, and defendant confirmed that he preferred to use counsel as a legal advisor. The court reminded defendant that he could change his mind at any time and have the attorney take over as counsel and that defendant should alert the court if he had "any legal questions" or needed to consult with counsel.

The court added,

> "Understand that there are all kinds of dangers in doing this, not the least of which is if you find yourself in a position, for example, giving an opening statement in this case, the jury will actually hear you talk to them, which is something that will not happen if you chose not to testify in this case."

Defendant said that he understood. The court added that this was a course "fraught with problems" and that defendant should "think about it carefully and talk to Mr. San Pedro about it over lunch." The court permitted defendant to represent himself and granted defendant's request that San Pedro act as his legal advisor.

Before allowing a defendant to proceed pro se, the court must determine that the defendant's waiver of the right to counsel is made knowingly, voluntarily, and intelligently (*People v Crampe*, 17 NY3d 469, 481 [2011], *cert denied* ___ US ___, 132 S Ct 1746 [2012]). A waiver cannot be deemed knowing, voluntary and intelligent unless, after a "searching inquiry," the court is satisfied that defendant is "aware of the dangers and disadvantages of proceeding without counsel" (*id.* [internal quotation marks omitted]). The court must adequately inform the accused of the "risks inherent in proceeding pro se" and apprise the defendant of "the singular importance of the lawyer in the adversarial system of adjudication" (*id.* at 482 [internal quotation marks omitted]).

It is not enough to tell the defendant that it is against his interests to represent himself, even when coupled with advise about the consequences of conviction (*see e.g. People v Kaltenbach*, 60 NY2d 797, 799 [1983] [court's declarations that

defendant was entitled to be represented by a lawyer, that he was facing a serious charge, and that, if convicted, he could receive a year's imprisonment failed to adequately warn]; *People v Sawyer*, 57 NY2d 12, 21 [1982], *cert denied* 459 US 1178 [1983] [court's declaration that defendant was "facing a very serious charge" and that his "own best interests are probably served by having a lawyer represent you" were "woefully inadequate"]). It is not enough to warn the defendant in general terms that going pro se would be "extraordinarily dangerous" and "that most defendants who represent themselves are not successful," even when coupled with a discussion of the potential sentences (*People v Rafikian*, 98 AD3d 1139, 1140 [2nd Dept 2012], *leave denied* 20 NY3d 988 [2012]).

In addition to insuring that the defendant is aware of the dangers and disadvantages of proceeding pro se, a searching inquiry "encompasses consideration of a defendant's pedigree since such factors as age, level of education, occupation and previous exposure to the legal system and may bear on a waiver's validity (*Crampe*, 17 NY3d at 482). The colloquy should also include the nature of the charges and the range of allowable punishments (*see United States v Fore*, 169 F3d 104, 108 [2d Cir 1999], *cert denied* 527 US 1028 [1999]).

A comparison of the warnings given in *People v Crampe* (17 NY3d at 473-474) and by the hearing court in *People v Wingate* (17 NY3d 469, 475-480 [decided with *Crampe*]), which were found inadequate by the Court of Appeals, with inquiry conducted by the trial court in *Wingate* (17 NY3d at 476-480), which was found adequate, illustrates the extent of the inquiry that must be conducted.[1]

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[1] The trial court in *Crampe* merely gave the defendant a form advising of his rights, and said "be here with a lawyer or without a lawyer, as you choose. I advise you to get a lawyer" (*Crampe*, 17 NY3d at 773-474).

The form stated:

> "The defendant has the absolute right to have counsel at all times during this proceeding. The defendant has a further constitutional right to represent himself in a criminal proceeding.
>
> "The defendant acknowledges and understands the risk of representing himself and the failure to cooperate with counsel. Among those risks is the risk that he could be convicted of a crime, and he may be sentenced to jail if found guilty.
>
> "The defendant acknowledges that a criminal trial and proceedings associated with a trial are difficult to understand and complex in nature.
>
> "If you elect to represent yourself by failure to cooperate with the Legal Aid Society and retain counsel, you acknowledge that you are under no distress, no threats or promises have been made to you, and you are not suffering from any mental defect, and your election to represent yourself is not affected by drugs or alcohol.
>
> "You are further advised that you have a constitutional right to be present at a trial of these charges before this Court. This right may be waived by your conduct. Such

We quote extensively from the *Wingate* trial court's

> conduct must be a knowing, voluntary, intelligent waiver of this right. Acknowledgment of this right is by your signature hereon this date.
>
> "Further, your signature is taken as evidence that you are not under any distress or compulsion, and you are ready for trial on August 21, 2008 at 9:30 [a.m.], or any adjourn date thereafter without justifiable excuse, shall be deemed a waiver of your right to be present at the trial of these char ges, and we will proceed in your absence at that time" (*id.* at 473-474).

The hearing court's inquiry in *Wingate* consisted of the following:

> "[T]he court: You understand that you're facing felony charges, sir?
>
> "[T]he defendant: Yes.
>
> "[T]he court: You understand that you face jail time if convicted of the top charge in this indictment?
>
> "[T]he defendant: Yes.
>
> "[T]he court: Do you understand that the right to represent yourself is not an absolute right? If you can't conduct yourself in a proper manner in the courtroom, you would forfeit the right to pro se representation. Do you understand that?
>
> "[T]he defendant: Yes.
>
> "[T]he court: Sir, notwithstanding any of the risks that you face representing yourself, do you still wish to go forward and defend yourself in this case? That's your constitutional right. Do you understand that?
>
> "[T]he defendant: Yes.
>
> "[T]he court: Okay. I will allow you to represent yourself."

"extensive colloquy with defendant, drawing his attention to the many challenges that he would face if he proceeded pro se rather than avail himself of legal representation" (*id.* at 483), to stress the extent of the searching inquiry mandated by the Court. The trial court reviewed the favorable plea offer that defendant had turned down, warned him that as a discretionary persistent felon he faced a life sentence, "and stressed that, 'based on [its] many years of experience,' it was [the court's] 'good faith belief that it is a mistake to represent yourself'" (*id.* at 476)

The court next informed the defendant that the law could be complicated and that even lawyers should not engage in self-representation, especially given the exposure that the defendant was facing in the event of a conviction, and the defendant responded that he understood (*id.*).

> "After reiterating that defendant 'could be facing a long time in jail, up to life,' the trial judge cautioned that it was 'a big mistake to go it alone.' The judge then asked defendant if he had any legal training, and defendant replied that he had been studying law for the last 10 or 12 years 'in the street and different libraries' and was 'not a paralegal [but] just received legal research certificates.' When the judge inquired if he was a college graduate, defendant responded that he held a two-year associate's degree in labor studies from Empire State College, and was 'a law librarian, library clerk in the facility' where he worked" (*id.*).

The court again urged defendant to get a lawyer, and "[b]efore sending the case to the trial-ready part for disposition of defendant's pro se speedy trial motion, the judge

reiterated that defendant should think twice before representing himself" (*id.* at 477). After the defendant's speedy trial motion was denied and his case was recalled for trial, the trial judge reiterated that the defendant should seriously consider getting a lawyer; defendant responded that he had asked for an attorney to assist him, but that he did not want an attorney to take control of his case (*id.*).

The trial judge then had an extensive dialogue with defendant, filling 20 pages of transcript. The court delved into the defendant's age, competency in English, whether he was taking or had ever taken medications that might compromise his understanding, and confirmed that defendant did not suffer from any mental or physical condition that might impair his ability to follow what was happening in court. The judge also asked the defendant whether he had sufficient time to reflect on his decision to go pro se, and whether doing so was still his desire, to which the defendant said yes (*id.* at 477). Later in the inquiry, the court asked defendant whether had been coerced or threatened or in any way influenced to request to represent himself (*id.* at 478).

The trial judge also reviewed defendant's education and employment history, and knowledge of the criminal justice system. In response, the defendant stated that he had a an "A" average in

college and had worked as a legal clerk. He also had experience with the criminal justice system, and had "some success representing himself in this case in the past," although he never represented himself at a trial. Further inquiry convinced the court that the defendant had no knowledge of the rules of evidence (*id.* at 478).

The trial judge also probed the defendant's understanding of the charges he was facing and the plea offer that had been made, and the length of the possible sentence he might receive if convicted. The defendant said that he understood his lawyers' explanations of court procedures and legal issues related to the charges. He nonetheless preferred self-representation. "[O]therwise, he would not know about 'things . . . going on between [his attorney] and the DA" (*id.*).

The trial judge questioned the defendant about his knowledge of the distinct functions of the judge the jury. The defendant "answered that the 'jury would be the triers of the facts' and would decide the case 'based on the facts . . . presented . . . and the instructions'" (*id.*). The defendant described the prosecutor's role as "to seek justice not just convictions. Her duty is to present her case . . . and to do it fairly. My job is to protect, preserve the rights of myself . . . , and to present the same information or evidence that I have to contradict what

is being stated by the witnesses . . . that [the] prosecution presents (*id.*)"

The trial judge then addressed some of the dangers of proceeding pro se :

> "[T]he law recognizes the right of a person to defend himself or herself. However, the law also recognizes such a choice may not be a wise one. Let me alert you now to some of the [dangers] of self-representation so that you will be aware of them before you finally decide whether you wish to give up your right to be represented by a lawyer. Please listen to me carefully. Even the most intelligent and educated layman has small and sometimes no skills in the field of law. Left without the assistance of counsel, he or she may be put on trial without a proper charge and convicted upon incomplete[ ], irrelevant, or inadmissible evidence. Often the layman lacks the skill [or] knowledge to adequately prepare his or her defense, even though he may have a good one. Without counsel, though an accused may not be guilty, he faces the danger of conviction because he does not know how to adequately protect his legal rights. Lawyers are both generally college and law school trained before they are permitted to take the bar examination. Only those who pass the bar are licensed to practice law. The number who become trial lawyers [is] small. In order to adequately represent a client, a trial lawyer needs a comprehensive knowledge of the rules of evidence, which I believe you do not possess, as well as an understanding of the art of jury selection and the art of cross-examination . . . [M]ost non-lawyers do not have such education and training. Did you understand what I just said? (*id.* at 479)"

The defendant answered "Yes" (*id.*).

> "The trial judge then asked defendant if he understood that almost all pro se representations are unsuccessful; that by choosing to represent himself he was not entitled to a lawyer, although the judge would appoint a lawyer to 'sit next to [him] and give [him] legal advice'; that he would be held to the same legal standards as an attorney; that he would 'receive no advantage or assistance from [the] court'

> because '[e]ven in those cases where [he] show[ed] a lack of complete knowledge of how to represent [himself], [the court couldn't] jump in the middle' and help him out; that when defendant did 'something wrong,' the judge was going to 'call [him] on it' and he had to 'live with that'; that he risked not being able to understand legal terms of art used in court proceedings, the 'case names used and what they stand for' and potentially applicable rules or theories of criminal law; that he would be subject to the same rules of evidence as an attorney and chanced not being able to introduce evidence because of his ignorance of these rules; that his examination of witnesses would be held to the same standards as those expected of an attorney; that he would have to make his own opening and closing statements to the jury; that the assistant district attorney presenting the case against him was trained in the law and was familiar with criminal law principles, and would not 'go 'easy' on' him because he was representing himself; that by waiving his right to counsel he was giving up the 'benefit of [an] attorney's ability, training, and past experiences in speaking to a jury'; and that he would be expected to "conduct [himself] appropriately in the courtroom.' Defendant indicated that he understood all of these things, and '[w]ithout a doubt" still wished to represent himself'" (*id.* at 479-480).

Last, the court admonished the defendant that "'self-representation [was] not a license to abuse' the courtroom's 'dignity and decorum,' cautioning him that if he did not conduct himself properly he might lose his right to be present at trial" (*id.* at 480).

Here, we find that the trial court's inquiry failed to satisfy *Crampe's* "searching inquiry" standard. The court gave nothing more than generalized warnings, and completely failed to advise defendant of the benefits of being represented by counsel.

The court's statements to defendant that it was in his "interest" to continue with counsel; that "[g]enerally, [self-representation] is a very bad idea"; and that there were "all kinds of dangers in doing this," its sole example being that defendant would have to give the opening statement himself, failed to insure that the dangers and disadvantages of giving up the fundamental right to counsel [had] been impressed on . . . defendant" (*Crampe*, 17 NY3d at 481). The court also failed to advise defendant about the "importance of the lawyer in the adversarial system of adjudication" (*see Crampe*, 17 NY3d at 482 [internal quotation marks omitted]). Because we find that the court did not make the requisite searching inquiry, we reverse the judgment convicting defendant and remand for a new trial.

Since we are ordering a new trial, we not address defendant's other arguments..

Accordingly, the judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered February 29, 2012, convicting defendant, after a jury trial, of burglary in the

second degree, and sentencing him, as a second felony offender, to a term of eight years, should be reversed, on the law, and the matter remanded for a new trial.

All concur.

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

ENTERED: JUNE 5, 2014

CLERK