SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 30, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Acosta, Andrias, Saxe, Clark, JJ.

12543 Yousufu Sangaray, Index 104521/10
Plaintiff-Appellant,

-against-

West River Associates, LLC,
Defendant-Respondent,

Sandy Mercado, et al.,
Defendants.

[And a Third-Party Action]

_____

Kelner & Kelner, New York (Joshua D. Kelner of counsel), for appellant.

Michelle S. Russo, P.C., Port Washington (Michelle S. Russo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 23, 2013, which granted the motion of defendant West River Associates, LLC (West River) for summary judgment dismissing the complaint and all cross claims as against it, affirmed, without costs.

Dismissal of the complaint as against West River was proper, where the record, including an affidavit of a land surveyor, showed that West River did not own the property that abutted the sidewalk where plaintiff tripped and fell. West River was

therefore not responsible for maintaining the sidewalk in a reasonably safe condition (*see* Administrative Code of City of NY § 7-210; *Thompson v 793-97 Garden St. Hous. Dev. Fund Corp.*, 101 AD3d 642 [1st Dept 2012]; *Montalbano v 136 W. 80 St. CP*, 84 AD3d 600, 602 [1st Dept 2011]). Nor can West River be held liable under an exception to Administrative Code § 7-210, because the record does not show that it committed an affirmative act of negligence that caused the alleged defect or made special use of the accident location (*see O'Brien v Prestige Bay Plaza Dev. Corp.*, 103 AD3d 428, 429 [1st Dept 2013]).

All concur except Acosta and Saxe, JJ. who concur in a separate memorandum by Saxe, J. as follows:

SAXE, J. (concurring)

I reluctantly agree with my colleagues that the language of Administrative Code of the City of New York § 7-210 requires affirmance of the grant of summary judgment dismissing the complaint against defendant West River Associates, LLC. I write separately to emphasize how the Code provision fails to achieve at least one of its stated purposes in circumstances such as these.

Plaintiff Yousufu Sangaray tripped and fell due to a height differential between two adjacent flags of pavement on a public sidewalk; the point at which the two flags met was situated in front of 1785 Amsterdam Avenue in Manhattan. Defendants Sandy Mercado and Rhina Mercado own the property at 1785 Amsterdam Avenue; defendant West River Associates, LLC owns the neighboring premises located at 1787 Amsterdam Avenue.

The tripping hazard had developed because the lower of the two adjacent sidewalk flags, which according to plaintiff's surveyor was located approximately 92-94% on West River's property and 6-8% on the Mercado property, had been allowed to cave in and sink without repair. The point at which the two flags met, forming the height differential on which plaintiff tripped, was unquestionably on the Mercados' property. But, as the Mercados point out, they could not have corrected the defect

on their own, without the participation of West River. Had they attempted to raise the height of the portion of the sunken flag located at their property, they would only have served to move the location of the tripping hazard to the property line, several inches to the north, and even then, in doing so they could still have been liable for affirmatively creating the new tripping hazard.

Yet defendant West River Associates sought and obtained summary judgment dismissing the complaint as against it, on the ground that the undisputed evidence established that the spot at which plaintiff tripped was on the sidewalk abutting the Mercado property, and not the West River property. Based on my reading of Administrative Code § 7-210, I am constrained to join in the affirmance of that order.

Section 7-210(b) of the Administrative Code provides that "the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." It was enacted in 2003 to transfer tort liability from the City of New York to abutting owners for personal injuries that are proximately caused by defective sidewalks (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]). While the transfer of tort liability from the City

to the abutting property owners was primarily a cost-saving measure for the City (*id.*), according to a Report of the Committee on Transportation, another important purpose of enacting the provision was to encourage the maintenance of sidewalks in good repair, by ensuring that those who are in the best position to be aware of the need for repairs -- namely, the abutting property owners -- are motivated to make the necessary repairs in order to avoid liability (*see* Rep of Infrastructure Div, Comm on Transp at 9, Local Law Bill Jacket, Local Law No. 49 [2003] of City of NY).

Because this 2003 legislative enactment was "in derogation of common law," and "creat[ed] liability where none previously existed," we must construe it strictly (*Vucetovic*, 10 NY3d at 521, quoting *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 206 [2004], and citing McKinney's Cons Laws of NY, Book 1, Statutes § 301[c]). Consequently, the provision's imposition of liability on owners of the property abutting the defect that caused plaintiff's injury may not be broadly construed to apply to the owner of the property next to that abutting property, even if part of the defective condition extends to that neighboring property. When strictly construing the Code provision, it is irrelevant that the hazard here could only have been corrected by the two neighboring property owners

together; the condition on which plaintiff actually tripped, the height differential, was located on the portion of the sidewalk that abutted the Mercados' property, and therefore only the Mercados are liable under the provision.

This Court has previously addressed similar factual scenarios. In *Montalbano v 136 W. 80 St. CP* (84 AD3d 600 [1st Dept 2011]), the plaintiff similarly fell as he stepped from a raised sidewalk flag onto a lower one. The raised sidewalk flag spanned two properties, but the plaintiff was only permitted to proceed with the action against the owner of the property abutting the part of the sidewalk where the height differential was located (84 AD3d at 602). Among its grounds for dismissing the action as against the neighbor, this Court reasoned that because it was uncontroverted that regardless of its condition, the neighboring property did not abut the portion of the sidewalk where the plaintiff fell, there was no basis for holding that neighbor liable (*id.*). Similar facts and reasoning led to the same result from the Second Department in *Camacho v City of New York* (96 AD3d 795 [2d Dept 2012]).

The result we are constrained to reach fails to comport with the important purpose of the Code provision - encouraging the maintenance of sidewalks in good repair, by ensuring that those who are in the best position to be aware of the need for repairs

are motivated to make the necessary repairs in order to avoid liability (see Rep of Infrastructure Div, Comm on Transp at 9). West River is being allowed to avoid liability for the consequences of its failure to maintain its own sidewalk. Nevertheless, the law as it now stands permits the imposition of liability in these circumstances only on the Mercados.

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13149 Madison 96th Associates, LLC, Plaintiff-Respondent, Index 601386/03 108695/04 591088/05 591089/05 590585/07 590113/08

-against-

17 East 96th Owners Corp., sued herein as 17 East Owners Corp., Defendant.

- - - - -

17 East 96th Owners Corp. Plaintiff-Appellant,

-against-

Madison 96th Associates, LLC, et al., Defendants-Respondents.

[And Third-Party Actions]

_____

Charles E. Boulbol, P.C., New York (Charles E. Boulbol of counsel), for appellant.

Schoeman Updike Kaufman & Stern LLP, New York (Charles B. Updike of counsel), for Madison 96th Associates, LLC, respondent.

Gartner & Bloom P.C., New York (Arthur P. Xanthos of counsel), for 21 East 96th Street Condominium, respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 29, 2013, which, to the extent appealed from as limited by the briefs, granted Madison 96th Associates, LLC's motion for partial summary judgment dismissing 17 East 96th Owners Corp's (17 East Owners) trespass claims related to the underpinning (third, fourth, and fifth causes of action in Action No. 2), unanimously reversed, on the law,

without costs, and the motion denied.

17 East Owners is the fee owner of the building at 17 East 96th Street. Madison 96th Associates, LLC (Madison) owned a building formerly located on the adjacent lot, at 1380 Madison Avenue, which it demolished to make way for a new building. 21 East 96th Condominium (Condominium) is Madison's successor-in-interest as owner of the new building. The lots on which 17 East 96th Street and 1380 Madison Avenue sit share a 100-foot common boundary. It is alleged that in the process of constructing its new building, Madison excavated more than 10 feet below the curb level and installed underpinning on 17 East Owners' property, which constitutes a permanent encroachment. 17 East Owners seeks both injunctive and monetary relief for the claimed trespass.

There was extensive litigation during the demolition phase of this project. Action No. 1 includes claims by 17 East Owners that Madison failed to comply with applicable notice requirements before obtaining demolition and foundation permits from the New York City Buildings Department. 17 East Owners sought injunctive relief, and in resolution of that motion in Action No. 1, the parties stipulated (in July 2004) that Madison would not excavate further than ten feet below ground without first retaining a licensed engineer or a licensed architect who would not only supervise the work, but also confer with 17 East Owners'

professionals regarding any issues that might arise. The parties stipulated further that 17 East Owners would be afforded one week's advance notice of any excavation deeper than 10 feet and that excavation would not proceed without Madison's first retaining the aforesaid professional.

In September 2004, Madison requested permission "to enter and inspect" 17 East Owners' property "as it pertains to the pending adjacent excavations." It also requested that 17 East "accept this letter as formal notice to proceed with excavation and foundation work at [Madison's building]." In response, 17 East Owners granted Madison "a license in accordance with § 27-1026 of the New York City Building Code to enter and inspect 17 East 96th Street as it pertains to proposed excavations at 1380 Madison Avenue." 17 East Owners also reiterated in its response many of the terms of the July 2004 stipulation, stating that Madison could not excavate 10 feet below grade without its permission and without giving it advance notice so that its own professionals could review the plans and specification for the work.

Subsequently, in October 2004, Madison began and completed the underpinning of 17 East 96th. Although 17 East Owners brought a motion for injunctive relief to halt the construction, it was denied.

Madison and the Condominium separately moved for partial summary judgment dismissing certain causes of action. As is relevant to this appeal, the motion court granted Madison's motion as to all of 17 East Owners' trespass claims that were based upon the underpinning, and denied Condominium's motion as moot. The court found that 17 East Owners had either consented to the underpinning of its property by giving Madison permission to enter and inspect its property in September 2004, or, having had sufficient notice of the work being done next door and below its property, was barred, as a matter of law, from objecting to it for failure to act sooner.

We hold that the motion court improperly resolved issues of fact in granting Madison's motion for summary judgment on the third, fourth and fifth causes of action, i.e. those related to Madison's underpinning of 17 East Owners' property. Although the record shows that 17 East Owners granted Madison's request under former § 27-1026[1] of the New York City Building Code (Administrative Code of the City of New York), for permission to enter and inspect its property, that license was for the purpose of a post-demolition, pre-excavation inspection of 17 East 96th, effectuating what had been stipulated in court. It does not

[1]The Building Code was revised in 2008, effective July 1, 2008.

provide the basis for finding that 17 East Owners consented to the erection of any permanent structure on its property, including the underpinning.

Madison contends that it satisfied all the notice requirements for proceeding with the excavation and underpinning, including the requirement of 72 hours advance notice of excavation under former § 27-195 of the Building Code. 17 East Owners denies that Madison complied with those requirements and contends that, in any event, Madison violated the July 2004 stipulation, which limited and restricted when and how Madison could proceed with its intended excavation. In addition, the parties dispute the nature and extent to which 17 East Owners' engineer was given access to information and access to the property to inspect the work as it progressed. These disputed facts preclude a finding, as a matter of law, that 17 East Owners had sufficient notice of the work being done to bar it from objecting.

Former Administrative Code of the City of New York § 27-1031(b)(1)[2] provides that

> "[w]hen an excavation is carried to a depth more than ten feet below the legally

[2]The equivalent provision is now contained in the New York City Construction Code (Administrative Code, tit. 28, ch. 33, § 3309.4).

> established curb level the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures, the safety of which may be affected by such part of the excavation as exceeds ten feet below the legally established curb level provided such person is afforded a license to enter and inspect the adjoining buildings and property."

The imposition of absolute liability on parties whose excavation work damages an adjoining property places the burden of protecting adjoining property onto those undertaking the excavation work, and the risks thereof, rather than those whose interest in adjoining property is harmed by the work (*Yenem Corp v 281 Broadway Holding*, 18 NY3d 481, 489 [2012]). It should not be inferred, however, that the transfer of risk to the owner/excavator carries with it a corresponding unfettered right to excavate more than 10 feet below curb level, or that the adjoining property owner must allow underpinning of its property simply because the neighboring property owner undertaking such excavation bears absolute liability for any damage it may cause to the adjoining property (*see id.*).

The safeguard requirements of former Administrative Code § 27-1031(b)(1) do not abrogate the well established principle of law that a property owner's placement of a permanent structure upon an adjacent owner's property, without the adjacent owner's

consent or permission, is a trespass (*see e.g. Shaw v Bronfman*, 284 AD2d 267 [1st Dept 2001], *lv dismissed* 97 NY2d 725 [2002]). While compliance with § 27-1031(b)(1) and the absence of structural damage to the building (i.e. leaks, cracking, etc.) may bear upon the issue of damages, they do not constitute a complete defense to a claim of trespass where, as here, the underpinning is a permanent encroachment (*see e.g. Matter of Broadway Enters., Inc. v Lum*, 16 AD3d 413 [2d Dept 2005]). Madison did not have the right, in the absence of an agreement with 17 East Owners, to erect permanent structures extending beyond the property line, either above or below the surface, and thus encroaching on 17 East Owners' property.

17 East Owners did not expressly consent to any excavation work deeper than 10 feet below curb level. The parties also dispute whether 17 East Owners, through its engineer, conceded that underpinning was unavoidable, or the only way to shore up and protect its property. While underpinning is one way to protect an adjoining property owner's building, former New York City Administrative Code § 27-1031(b)(1) does not describe the manner in which the adjoining property must be "preserve[d] and protect[ed] from injury," and 17 East Owners has raised further issues of fact whether Madison failed to consider other, non-encroaching, alternatives.

The court did not limit or decide the measure of damages on the trespass claims related to the underpinning. Accordingly, we decline 17 East Owners' request that we instruct the court as to the proper measure of damages.

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

ENTERED: OCTOBER 30, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13336-
13336A-
13336B

Index 150609/11

Leonard Gartner,
Plaintiff-Appellant,

-against-

Cardio Ventures, LLC, et al.,
Defendants,

Adrienne Edelstein,
Defendant-Respondent.

_____

Smith Valliere PLLC, New York (Gregory Zimmer of counsel), for appellant.

Beckman, Lieberman & Barandes LLP, New York (Robert A. Buckley of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Lawrence K. Marks, J.), entered October 30, 2013, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment seeking a declaration that a transfer of membership interests in defendant Cardio Ventures, LLC (Cardio) was null and void, declared that the transfer is valid, and granted that portion of defendants Cardio Ventures, LLC, James S. Cardone and Alan M. Swiedler's (the Cardio defendants) motion for partial summary judgment of dismissing the causes of action for negligent misrepresentation and access to Cardio's books and records, unanimously modified, on the law, to deny the Cardio defendants'

motion for summary judgment dismissing the cause of action for access to Cardio's books and records, and grant plaintiff, upon a search of the record, summary judgment on that cause of action, and otherwise affirmed, without costs.

Under the terms of the operating agreement, the transfer to defendant Edelstein, which was approved in writing by a majority of the members, is expressly authorized. Even assuming that the operating agreement is invalid, the majority's written consent to transfer the interest would govern *(see Spires v Casterline*, 4 Misc 3d 428, 433 [Sup Ct 2004]).

Further, the subscription agreement governs the transfer, it does not bar it. Indeed, the subscription agreement does not enumerate any restrictions on transfer, other than compliance with the law. As such, were the subscription agreement to control, the issue of transfer would be governed by the Limited Liability Company Law pursuant to which the transfer was valid based on the written consent of the majority of the members (*see* Limited Liability Company Law §§ 603 and 604).

Because plaintiff's negligent misrepresentation claim is predicated on a finding that the interest was not transferable, it was properly dismissed.

However, the motion court erred in dismissing plaintiff's demand to inspect the books and records of Cardio. Plaintiff, as a member of the LLC, has an independent statutory right to conduct an inspection (Limited Liability Company Law § 1102).

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13344 The People of the State of New York, Respondent, Ind. 3572/08

-against-

Bello Shehu, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (George Villegas, J.), rendered March 22, 2011, convicting defendant, upon his plea of guilty, of grand larceny in the third degree, and sentencing him to a term of one to three years, with restitution in the amount of $26,000, unanimously affirmed.

Defendant's claim that his counsel rendered ineffective assistance by failing to seek a sentence that allegedly might have avoided defendant's deportation is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we

find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). The record establishes that both the court and counsel advised defendant of the deportation consequences of the plea, and defendant's assertion that counsel could have obtained a disposition that might have avoided those consequences is unsupported.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13345 In re Maria Lopez, Index 401491/12
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

The Bronx Defenders, Bronx (Runa Rajagopal of counsel), for appellant.

David I. Farber, New York (Kimberly W. Wong of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Louis B. York, J.), entered May 24, 2013, denying the petition to annul respondent's determination, dated June 13, 2012, which adopted the decision of the Hearing Officer to terminate petitioner's tenancy, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Transfer of the subject proceeding pursuant to CPLR 7804(g) was not required since the issues raised in the petition concerned the penalty imposed rather than issues of substantial evidence (*see e.g. Matter of Kerney v Hernandez*, 60 AD3d 544 [1st Dept 2009]; *Matter of Charles v Commissioner, N.Y. State Dept. of Social Servs.*, 240 AD2d 490 [2d Dept 1997]).

Having reviewed the record, we agree with Supreme Court that the decision to terminate petitioner's tenancy was not arbitrary

and capricious. Respondent had previously afforded petitioner a mitigated penalty by agreeing to a permanent exclusion of her son from the apartment, rather than pursuing termination of her tenancy due to her son's serious criminal activity. Petitioner, however, admittedly violated the stipulation of settlement when her son, newly released from a lengthy prison sentence, was discovered in the apartment.

Under the circumstances presented the penalty of termination does not shock our sense of fairness, notwithstanding petitioner's longstanding tenancy (*see e.g. Matter of Cruz v New York City Hous. Auth.*, 106 AD3d 631 [1st Dept 2013]; *Matter of Gibbs v New York City Hous. Auth.*, 82 AD3d 412 [1st Dept 2011]; *Matter of Wooten v Finkle*, 285 AD2d 407, 408-409 [1st Dept 2001]).

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

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13346 In re Skylar F., also known as
Skylar Me'Shelle P.,

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

David Judah P.,
Respondent-Appellant,

Children's Aid Society,
Petitioner-Respondent,

Christina F., etc.,
Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for Children's Aid Society, respondent.

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

_____

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about July 23, 2013, which, upon a finding of mental illness, terminated respondent father's parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence, including the uncontroverted expert testimony of the court-appointed psychologist who

testified that respondent suffers from schizophrenia, supports the determination that respondent is presently and for the foreseeable future unable to provide proper and adequate care for the child (Social Services Law § 384-b[4][c]; *Matter of Justin Javonte R. [Leticia W.]*, 103 AD3d 524 [1st Dept 2013]).

Contrary to respondent's contention, his medical records containing diagnoses are admissible under the business record exception to the hearsay rule, as germane to his treatment (*see Matter of Anthony H. [Karpati]*, 82 AD3d 1240, 1241 [2d Dept 2011], *lv denied* 17 NY3d 708 [2011]).

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

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13347 The People of the State of New York, Ind. 3399/12
Respondent,

-against-

Vasaun Jones,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Arlene Goldberg, J.), rendered on or about June 13, 2013,

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

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

ENTERED: OCTOBER 30, 2014

CLERK

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

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13351 The People of the State of New York, Respondent, Ind. 150/10

-against-

Eric Davidson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. and Charles H. Solomon, J. at hearing; Michael J. Obus, J. at jury trial and sentencing), rendered August 1, 2012, convicting defendant of two counts of burglary in the second degree and two counts of criminal possession of stolen property in the fifth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 16 years to life, unanimously affirmed.

Defendant's motion to suppress identification testimony was properly denied. The record supports the hearing court's finding that the photo array and lineup identification procedures were fair and nonsuggestive. The photographs were sufficiently similar to avoid any substantial likelihood that defendant would

be singled out for identification (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]).

Defendant's arguments concerning the sufficiency and weight of the evidence supporting one of the burglary convictions are unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supporting this conviction included the inference to be drawn from recent, exclusive, unexplained possession of the fruits of a crime (*see People v Galbo*, 218 NY 283, 290 [1916]), and damaging admissions contained in recordings of phone calls made by defendant while incarcerated. The evidence did not support any inference that defendant could have obtained the first victim's property other than by burglarizing his apartment.

The trial court, which accorded defendant a full opportunity to present a third-party-culpability defense, properly exercised its discretion in precluding defendant from introducing portions of a videotape that plainly constituted hearsay. Defendant did not make an adequate showing that the hearsay evidence was reliable, or that it was critically exculpatory (*see Chambers v Mississippi*, 410 US 284 [1973]; *People v Robinson*, 89 NY2d 648, 654 [1997]; *People v Burns*, 18 AD3d 397 [2005], *affd* 6 NY3d 793 [2006]). We note that the court permitted defendant to use the nonhearsay aspects of the videotape to support his defense.

We have considered and rejected defendant's ineffective assistance of counsel claims (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13352 Tribeca Lending Corporation, Index 105275/07
Plaintiff-Respondent,

-against-

Gregory M. Bartlett formerly known as Gregory Hill,
Defendant-Appellant,

NYS Department of Taxation & Finance, et al.,
Defendants.

_____

David Stein, Brooklyn, for appellant.

Jill C. Lesser, New York, for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered December 4, 2013, which denied defendant-appellant's (defendant) motion to vacate a judgment of foreclosure and sale pursuant to CPLR 5015(a)(2) and (4), or, alternatively, to renew a prior motion to vacate the judgment pursuant to CPLR 2221(e), unanimously affirmed, without costs.

The alleged defects raised by defendant do not involve jurisdictional defects within the meaning of CPLR 5015(a)(4), and thus do not provide a basis for vacatur under that provision (*Wells Fargo, N.A. v Levin*, 101 AD3d 1519, 1521 [3d Dept 2012], *lv dismissed* 21 NY3d 887 [2013] [lack of standing is not a jurisdictional defect]; *see Matapos Tech. Ltd. v Compania Andina*

de Comercio Ltda, 68 AD3d 672, 673 [1st Dept 2009] [lack of a certificate of conformity is "not a fatal defect"]; *see also Varon v Ciervo*, 170 AD2d 446, 447 [2d Dept 1991] [untimely filing of proof of service is not a basis to vacate a notice of pendency]).

Nor is defendant entitled to vacatur on the ground of newly-discovered evidence (CPLR 5015[a][2]). The alleged transfer of the subject mortgage, which purportedly occurred after the entry of the judgment of foreclosure and sale, is not "newly-discovered evidence" within the meaning of CPLR 5015(a)(2) (*see Chase Home Fin., LLC v Quinn*, 101 AD3d 793 [2d Dept 2012]).

The court properly denied defendant's motion to renew, as he failed to offer a reasonable justification for not presenting the alleged new facts on his prior motions (*see* CPLR 2221[e][3]; *Henry v Peguero*, 72 AD3d 600, 602-603 [1st Dept 2010], *appeal dismissed* 15 NY3d 820 [2010]; *see also* 84 AD3d 496 [1st Dept 2011] *and* 103 AD3d 516 [1st Dept 2013]).

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13353-
13354 Lloyd Gibbs,
Plaintiff-Respondent,

-against

Albee Tomato Co., Inc., et al.,
Defendants-Appellants.

Index 307776/09

Law Offices of Tobias & Kuhn, New York (Benjamin A. Jacobson of counsel), for Albee Tomato Co., Inc., appellant.

Camacho Mauro Mulholland, LLP, New York (Wendy Jennings of counsel), for Hunts Point Terminal Produce Cooperative Association, Inc., appellant.

Pollack Pollack Isaac & De Cicco, LLP, New York (Jillian Rosen of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered July 1, 2013, which, inter alia, denied the motions of defendants Albee Tomato Co., Inc. (Albee) and Hunts Point Terminal Produce Cooperative Association, Inc. (Hunts Point) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants did not establish their entitlement to judgment as a matter of law in this action where plaintiff was allegedly injured when he slipped on ice and water that had leaked from a delivery of produce, and fell off the rear of a loading dock; Hunts Point managed the market and leased it from the City of New

York and Albee subleased its unit from Hunts Point. Defendants failed to show that they neither created nor had actual or constructive notice of the wet and slippery condition of the subject loading platform. No evidence was presented by either movant concerning their cleaning schedule or when the area was last inspected prior to the accident *(see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420-421 [1st Dept 2011]; *compare Raghu v New York City Hous. Auth.*, 72 AD3d 480, 482 [1st Dept 2010]). It is also unclear from the record as to which defendant was responsible for maintaining the location of the fall.

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13355 The People of the State of New York, Ind. 2188/11
Respondent,

-against-

Christopher Robinson,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about February 6, 2013,

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

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

ENTERED: OCTOBER 30, 2014

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

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13356 The People of the State of New York, Respondent, Ind. 6095/06

-against-

Steven Finkelstein, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (James Yates, J. at pretrial proceedings; Lewis Bart Stone, J. at jury trial and sentencing), rendered August 22, 2008, convicting defendant of two counts of coercion in the first degree, and sentencing him, as a second felony offender, to consecutive terms of 3½ to 7 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The victim's testimony clearly established the elements of first-degree coercion. We reject defendant's argument to the contrary, which rests on minor portions of the victim's testimony taken out of context.

The court that presided over certain pretrial appearances properly exercised its discretion in revoking defendant's pro se

status during portions of the proceedings on the ground that he had forfeited his right of self-representation by his conduct (*see People v McIntyre*, 36 NY2d 10, 18 [1974]). We further note that the colloquies at which defendant was denied pro se status did not involve any hearings, that defendant was permitted to represent himself throughout the trial, and that defendant has not established that he is entitled to the remedy of a new trial (*cf. People v Wardlaw*, 6 NY3d 556, 559-561 [2006]).

The trial court properly exercised its discretion in receiving evidence that established the victim's knowledge of defendant's coercion of a former girlfriend. This evidence was directly relevant as proof of coercion in the present case. Moreover, it was "inextricably interwoven" (*People v Vails*, 43 NY2d 364, 368 [1977]) with the coercive conduct in this case because, as part of his campaign of intimidation, defendant explicitly informed the victim about the details of the prior case and urged her to obtain more information about it. We do not find that the scope of the challenged evidence was unduly prejudicial.

Given the unusual overlapping relationship between coercion in the first and second degrees (*see People v Discala,* 45 NY2d 38 [1978]; *People v Eboli*, 34 NY2d 281 [1974]; *People v Adams*, 50 AD3d 433 [1st Dept 2008], *lv denied* 10 NY3d 955 [2008]), and the

facts presented, we find that defendant's claims that the indictment was duplicitous, that he was deprived of his constitutional right to a jury determination of all essential facts, and that the court should have submitted second-degree coercion to the jury are all unavailing.

The trial court properly exercised its discretion in precluding evidence offered by defendant that was irrelevant, collateral or cumulative, and the evidentiary rulings at issue did not deprive defendant of a fair trial or the right to present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

Consecutive sentences were lawfully imposed, because the two convictions were sufficiently separate and distinct (*see* Penal Law § 70.25[2]), and we perceive no basis for reducing the sentences.

Defendant's remaining contentions, including his challenges to allegedly disparaging comments by the trial court, are

unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13359 The People of the State of New York, Respondent, Ind. 3767/12

-against-

Delanta Spires, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about November 19, 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: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13360 Jean Carlo Romero, Index 305375/09
Plaintiff-Appellant,

-against-

Bronx-Lebanon Hospital Center,
Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Stanley Green, J.), entered on or about September 26, 2013,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated October 8, 2014,

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

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13361 The People of the State of New York, Ind. 3798/10
Respondent,

-against-

John Stone,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered May 9, 2012, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 22 years, unanimously affirmed.

The court providently exercised its discretion in denying, without a hearing, defendant's CPL 330.30(2) motion to set aside the verdict on the ground of jury misconduct. Defendant's motion contained an affidavit from a person who witnessed a postverdict interaction between the victim and several jurors. The events described in the affidavit, standing alone, did not constitute any basis for setting aside the verdict. The affidavit related an ambiguous remark by the victim that allegedly suggested the possibility of an undisclosed prior relationship between the victim and one of the jurors. However, the People supplied an

affidavit from the victim denying any relationship, and explaining that he was simply thanking the jurors for reaching what he believed to be a just verdict. "A motion is no substitute for an investigation to be made by counsel...and a defendant is not entitled to a hearing based on expressions of hope that a hearing might reveal the essential facts (*People v Brunson*, 66 AD3d 594, 596 [1st Dept 2009], *lv denied* 13 NY3d 937 [2010] [internal quotation marks and citations omitted]).

The court properly exercised its discretion in denying defendant's mistrial motion, made after a detective gave testimony that may have implied that a nontestifying declarant had implicated defendant. The court prevented any prejudice by striking the testimony and instructing the jury to disregard it, an instruction that the jury is presumed to have followed (*see People v Baker*, 14 NY3d 266, 274 [2010]).

We perceive no basis for disturbing the sentence.

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13362 Marcela Hoffer-Adou, Index 312824/12
Plaintiff-Respondent,

-against-

Azouhouni Adou,
Defendant-Appellant.

_____

Azouhouni Adou, appellant pro se.

Rapaport Law Firm, PLLC, New York (Marc A. Rapaport of counsel), for respondent.

_____

Judgment of divorce, Supreme Court, New York County (Deborah A. Kaplan, J.), entered May 23, 2013, awarding plaintiff sole right, title and possession of the marital residence, which brings up for review an order, same court and Justice, entered February 14, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff wife's summary judgment motion for a judgment of divorce, found the parties' separation agreement to be valid and enforceable, and granted plaintiff wife exclusive occupancy of the marital residence, unanimously affirmed, without costs.

The mutual waiver of maintenance provision in the parties' separation agreement was not unfair and unreasonable when made, and is not now unconscionable. Although the husband's stated income at the time the parties signed the separation agreement

was $10,000 and the wife's was $60,000, the husband acknowledged that consideration for his waiver of maintenance included a reduced child support monthly payment of $50 and a payment of $60,000 for the transfer of title to the marital residence. Under these circumstances, we cannot find that the inequality was "so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense" (*McCaughey v McCaughey*, 205 AD2d 330, 331 [1st Dept 1994] [internal quotation marks omitted]).

We find no merit to the husband's claim, which was not asserted in either his answer or opposing papers, that the waiver of maintenance provision in the separation agreement rendered him at risk of becoming a public charge (*see* General Obligations Law § 5-311). The husband acknowledged in the separation agreement that he was self-supporting, and there was no evidence that he would not be able to support himself, since the record indicates that he was capable of earning in excess of $50,000, as evident by his previous employment as a musical director. Supreme Court had ample basis to reject his affidavit as an insufficient effort to avoid the consequences of his prior testimony before the Family Court that he was a self-supporting musician, with an annual income of $40,000 (*see Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270 [1st Dept 2009]).

The husband is estopped from challenging the validity of the separation agreement, since he had accepted substantial benefits due under the agreement for a period of almost three years before challenging it as unconscionable (*see Mahon v Moorman*, 234 AD2d 1, 2 [1st Dept 1996]*; Groper v Groper*, 132 AD2d 492, 496-497 [1st Dept 1987]).

The wife was entitled to ownership of the marital residence, since the separation agreement provided that the wife was entitled "to the exclusive ownership, possession and occupancy" thereof. The husband's claim that $60,000 was not a "fair consideration" for his share in the marital residence, which was purchased for $145,000, but was encumbered by total debt of $175,000 at the time of their separation agreement, is unpersuasive.

Contrary to the husband's contention, the wife was entitled to a judgment of divorce under the no-fault provision of DRL § 170(7), since her statement under oath that the marriage was irretrievably broken for a period of six months was sufficient to establish her cause of action for divorce as a matter of law (*see Townes v Coker*, 35 Misc 3d 543, 547 [Sup Ct, Nassau County 2012]).

Supreme Court's granting of the divorce did not contradict DRL § 170(7)'s requirement that

> "[n]o judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce."

The parties' separation agreement resolved the issues of child custody and support. Their subsequent commencement in the Family Court of proceedings concerning these issues did not render the court without authority to grant the divorce, since "[n]on-compliance with/or enforcement of, the [s]eparation [a]greement is not an element of [Domestic Relations Law] § 170 (7)" (*Burger v Burger,* 36 Misc 3d 752, 755 [Sup Ct, Nassau County 2012]).

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

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13363-
13363A The People of the State of New York, Respondent,

Ind. 262N/07
5385N/09

-against-

Jean Cherry,
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 (Yuval Simchi-Levi of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Ellen Coin, J.), rendered on December 14, 2011, convicting defendant, upon his pleas of guilty, of criminal sale of a controlled substance in the fourth degree and bail jumping in the second degree, and sentencing him to consecutive terms of one year and one to three years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (see *People v Lopez*, 6 NY3d 248 [2006]). In explaining the waiver, the court separated the right to appeal from the rights automatically forfeited as the result of a guilty plea, and expressly stated that a defendant does not ordinarily give up the right to appeal by pleading guilty. It then explained that, in exchange for the negotiated plea and sentence, defendant was

additionally agreeing to waive his right to appeal. Defendant acknowledged that he understood and also executed a written waiver. This waiver forecloses defendant's claims that the court failed to exercise its sentencing discretion, and that the sentence was excessive.

Regardless of whether defendant made a valid waiver of his right to appeal, we perceive no basis for remanding for resentencing (*see e.g. People v Diaz*, 304 AD2d 468 [1st Dept 2003], *lv denied* 100 NY2d 561 [2003]) or reducing the sentence.

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13364N- Index 604381/98
13365N-
13366N-
13367N-
13368N-
13368NA Ames Ray,
Plaintiff-Appellant,

-against-

Christina Ray,
Defendant-Respondent.

_____

Law Offices of Clifford James, New York (Clifford James of counsel), for appellant.

Law Offices of Donald E. Watnick, New York (Donald E. Watnick of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered July 18, 2013 and July 22, 2013, which granted defendant's motion for sanctions based on the spoilation of evidence, unanimously reversed, on the law and the facts, without costs, and the motion denied. Orders, same court and Justice, entered July 19, 2013 and July 22, 2013, which denied plaintiff's motion to bar defendant from calling plaintiff's trial counsel as a witness, unanimously reversed, on the law and the facts, with costs, and the motion granted. Appeals from orders, same court and Justice, entered July 19, 2013 and July 22, 2013, which denied plaintiff's motion to exclude an expert report,

unanimously dismissed, without costs.

Defendant's motion for sanctions for spoliation of evidence was made more than five years after the close of discovery, and thus after she requested such documents, through prior counsel, and raised no objections when they were not produced. Moreover, any allegedly spoliated files are of limited relevance to her defense, and there is other relevant documentary and testimonial evidence available to her (*see e.g. Gitlitz v Latham Process Corp.*, 258 AD2d 391, 391 [1st Dept 1999]; *Ortiz v Board of Educ. of City of N.Y.*, 26 AD3d 158 [1st Dept 2006]).

Plaintiff's trial counsel's testimony is not necessary to plaintiff's case. Counsel represented both parties in a prior lawsuit against a contractor for work on a house jointly owned by them, and plaintiff now alleges breach of contract based in part on defendant's failure to pay him for his half interest in that home pursuant to various agreements. The prior lawsuit is of limited, if any, relevance to the breach of contract claim. To the extent defendant seeks to demonstrate that plaintiff took contradictory positions regarding his interest in the home, she has already cited documents in support of her claim.

To the extent defendant argues that counsel was somehow a witness to, or an instrument of, plaintiff's infliction of duress on her, resulting in her execution of the agreements that form

the basis of plaintiff's breach of contract claim, there is no evidence to support her claim. Moreover, given the late stage at which she seeks his testimony, and given the trial court's reversal of its earlier ruling that plaintiff's counsel could not testify, a ruling permitting him to testify would be highly prejudicial to plaintiff, who would likely be required to seek new counsel at this late stage in this 16-year litigation (*see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]; *see also Murray v Metropolitan Life Ins. Co.*, 583 F3d 173, 178 [2d Cir 2009]).

We note that the court's denial of plaintiff's motion to bar defendant from calling his counsel as a witness is reviewable, because the ruling affects a substantial right (*see* CPLR 5701[a][2][v]; *Cooke v Laidlaw Adams & Peck*, 126 AD2d 453, 457 [1st Dept 1987]; *Kudelko v Dalessio*, 21 Misc3d 135[A], 2008 NY Slip Op 52214[U] [App Term, 2d Dept 2008]). In contrast, the court's pretrial denial of plaintiff's motion to exclude an "expert report" on the issue of duress is not reviewable at this stage, because that ruling does not implicate any substantial rights or involve the merits of the controversy (*see Piorkowski v*

Hospital for Special Surgery, 116 AD3d 560 [1st Dept 2014]; *Seward Park Hous. Corp. v Greater N.Y. Mut. Ins. Co.*, 70 AD3d 468 [1st Dept 2010]; see CPLR 5701[a][2][iv], [v]).

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

ENTERED: OCTOBER 30, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13369 [M-4271] In re Reginald Herbin, also known as Reign Al Dey,
Petitioner,

-against-

Hon. Michael R. Sonberg, etc., sued herein as Micheal R. Sonberg, etc.,
Respondent.

Ind. 2500N/13

_____

Reginald Herbin, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13370-
13371 The People of the State of New York,
Respondent,

-against-

Anthony Ortega,
Defendant-Appellant.

Ind. 1565/04

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Eduardo Padro, J.) rendered April 5, 2013, as amended April 10, 2013, resentencing defendant to an aggregate term of 12 years, unanimously affirmed. Appeal from judgment of resentence, same court and Justice, rendered July 13, 2012, unanimously dismissed as subsumed in the appeal from the April 10, 2013 amended judgment of resentencing.

The resentencing was properly limited to correcting the error in defendant's original sentence, where the sentencing court failed to place on the record that defendant's sentences would all run concurrently with a separate, already-imposed misdemeanor sentence. This procedural correction did not authorize the court to revisit the appropriateness of defendant's

original sentence (*see People v Lingle*, 16 NY3d 621, 634-635 [2011]; *see also* CPL 430.10).

In any event, we find no basis for reducing the sentence. We note that on defendant's direct appeal (70 AD3d 416, 418 [1st Dept 2010], *lv denied* 15 NY3d 808 [2010]), this Court upheld the same sentence, both on the ground of defendant's valid waiver of his right to appeal, and alternatively on the merits.

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13372 Wendy Pagan, Index 307891/11
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Subin Associates LLP, New York (Brian J. Isaac of counsel), for appellant.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Christine Gasser of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 10, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff alleges that at approximately 7 a.m, she slipped and fell on liquid as she descended the stairs in defendant's building. Defendant submitted evidence showing that it neither created nor had actual or constructive notice of the allegedly hazardous condition. Regarding the absence of actual notice, defendant submitted the testimony of the supervisor of housing caretakers for the building, who testified that he did not receive any complaints

about liquid on any stairwells prior to the accident and there had been no prior accidents in that area (*see Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470 [1st Dept 2012]).

Defendant also demonstrated that it lacked constructive notice of the liquid on the staircase through the affidavit of the caretaker assigned to the building on the day before the accident, who averred that she would have followed the weekend janitorial schedule, which required inspecting the building by 11:00 a.m. on the day before the accident and removal of anything found on the staircase, and that, pursuant to the schedule, she would inspect the staircase at around 8:00 a.m. the next morning (*see Rodriguez v New York City Hous. Auth.*, 102 AD3d 407 [1st Dept 2013]; *Raposo v New York City Hous. Auth.*, 94 AD3d 533 [1st Dept 2012]). Her statement concerning the janitorial schedule was corroborated by her supervisor's testimony. Plaintiff testified that the wet condition was not present on the stairs the prior evening, when she returned home at 9 p.m. Such evidence established that the wet liquid was deposited on the stairs only after the caretaker left work and that the accident occurred before the caretaker came to work the next morning. This time frame, occurring out of regular work hours, would not have provided the caretaker with a sufficient period of time to

discover and remedy the problem (*see Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 [2005]). Defendant is not required to patrol the staircases 24 hours a day (*see Love v New York City Hous. Auth.*, 82 AD3d 588 [1st Dept 2011]).

Plaintiff's opposition failed to raise a triable issue of fact. There is no evidence that a recurring dangerous condition of wetness on the stairs was left unaddressed, since the caretaker and supervisor testified that these areas were cleaned daily, and plaintiff testified that complaints to the porters concerning the stairs were addressed (*see Pfeuffer* at 471-472). There is also no evidence that rainwater entering the building through its elevator had anything to do with plaintiff's fall. Furthermore, plaintiff's assertion that defendant did not address the allegation in her bill of particulars that the stairway was not properly illuminated is insufficient to deny the motion. Indeed, plaintiff testified that the lights were on when she fell

and there is no indication that she had difficulty seeing the steps prior to her fall (*see Jenkins v New York City Hous. Auth.*, 11 AD3d 358, 359 [1st Dept 2004]).

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13373 In re Elvin M.,

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

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kristin M. Helmers of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about November 21, 2013, which denied appellant's application to seal the record of his prior adjudication as a juvenile delinquent, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's Family Court Act § 375.2 sealing application. Given the seriousness of the underlying crimes, and appellant's participation in a gang assault while on probation, the interest of justice would not be served by sealing these records (*see Matter of Rosa R.*, 68 AD3d 407 [1st Dept 2009]; *Matter of Carlton B.*, 268 AD2d 368 [1st Dept 2000]). Appellant's interests are adequately protected by the automatic general confidentiality of

Family Court proceedings (*see* Family Ct Act §§ 166; 380.1), and the additional remedy of sealing these records could potentially impede their use by law enforcement agencies for legitimate purposes in the event appellant engages in further criminal activity.

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13374 The People of the State of New York, Ind. 3587/10
Respondent,

-against-

Israel Martinez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow 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 (Charles H. Solomon, J. at plea and sentencing), rendered on or about November 1, 2011,

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

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

ENTERED: OCTOBER 30, 2014

CLERK

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

Tom, J.P., Sweeny,, Andrias, Moskowitz, Gische, JJ.

13375 Nicholas Brunero, Index 107565/10
Plaintiff-Appellant,

-against-

City of New York Department
of Parks and Recreation,
Defendant-Respondent.

_____

Mazzeo Song & Bradham LLP, New York (John M. Bradham of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about August 12, 2013, which, upon granting plaintiff's motion to reargue, adhered to a prior determination denying plaintiff's motion for leave to add nonparty Central Park Conservancy as a party defendant and to serve a supplemental summons and amended complaint asserting claims for negligence and gross negligence against the Conservancy, unanimously modified, on the law, to the extent of granting plaintiff leave to add the Conservancy as a defendant and to serve a supplemental summons and amended complaint asserting a claim for negligence against the Conservancy, and otherwise affirmed, without costs.

Plaintiff commenced this action against defendant City of New York Department of Parks and Recreation, alleging that he was

injured when he was struck by a park maintenance vehicle operated by a City employee, Nicholas Marotta, while riding his bicycle through Central Park, and that the vehicle was owned and provided by the City, which was vicariously liable for its employee's negligent acts. In its answer, defendant City denied the allegations that Marotta was a City employee and that the vehicle was owned and provided by the City. However, the City failed to comply with a series of discovery orders requiring it to respond to plaintiff's discovery requests concerning Marotta's employment and the vehicle. Shortly after the three-year statute of limitations for negligence elapsed, the City disclosed that Marotta in fact was employed by nonparty Conservancy, which also owned the vehicle.

Plaintiff then moved for leave to amend the complaint to add the Conservancy as a defendant, arguing that it was united in interest with the City. Since the statute of limitations had run as to the Conservancy, plaintiff argued that the relation back doctrine applied (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]; *Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615 [1st Dept 2014]).

In opposing plaintiff's motion, the City disputed only the second requirement of the relation back doctrine, that the Conservancy is united in interest with it. The "classic test" for determining unity of interest is "that if the interest of the

parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other," then they are united in interest (*Vanderburg v Brodman*, 231 AD2d 146, 147-148 [1st Dept 1997] [internal quotation marks omitted]). A unity of interest "will be found where there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other" (*id.*; *Cuello v Patel*, 257 AD2d 499, 500 [1st Dept 1999]).

In support of its motion, plaintiff relied on the 2006 Central Park Agreement, a contract between the City and the Conservancy, a nonprofit organization, in which they acknowledged that they had formed an effective "public/private partnership." Under the Agreement, the Conservancy is required to provide specified maintenance services in Central Park to the "reasonable satisfaction" of the City, and the City is broadly required to indemnify the Conservancy "from and against any and all liabilities . . . arising from all services performed and activities conducted by [the Conservancy] pursuant to this agreement in Central Park." The City's indemnification obligation, among other things, expressly excludes claims arising from gross negligence or intentional acts of the Conservancy or its agents or volunteers. As a result of the Agreement, the Conservancy acts, in effect, as an independent contractor

fulfilling the City's nondelegable obligation to maintain the City parks in reasonably safe condition (*compare Haxhaj v City of New York*, 68 AD3d 612 [1st Dept 2009] [interpreting a prior 1998 agreement between the City and Conservancy], *lv denied* 14 NY3d 714 [2010]).

The City is vicariously liable for the Conservancy's negligence in the course of providing maintenance in Central Park by virtue of the contractual indemnification provision, and the parties are thus united in interest (*see Quiroz v Beitia*, 68 AD3d 957, 959-960 [2d Dept 2009]; *Austin v Interfaith Med. Ctr.*, 264 AD2d 702, 704 [2d Dept 1999]). Further, since the City has a nondelegable duty to maintain Central Park, it is vicariously liable for negligence committed by the contractor in the course of fulfilling that duty (*see Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 258 [2008]; *see also Vanderburg*, 231 AD2d at 147-148. However, the City is correct that its interests are not united with those of the Conservancy with respect to the proposed gross negligence claim, and leave to assert that claim against the Conservancy is therefore denied.

Plaintiff's additional arguments concerning equitable estoppel, raised for the first time in reply, are not properly before the Court.

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13376 The People of the State of New York, Ind. 4359/10
Respondent,

-against-

Eugene Baugh,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about May 29, 2013, 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: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13377 Frebar Development Corporation, Index 103525/10
Plaintiff,

Dr. Fred L. Pasternack,
Plaintiff-Appellant,

-against-

Elana Waksal Posner,
Defendant-Respondent.

_____

Dr. Fred L. Pasternack, appellant pro se.

Meister Seelig & Fein LLP, New York (Howard S. Koh of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered August 7, 2013, which granted defendant's motion to confirm the special referee's report and recommendation, and denied plaintiff landlord's motion to reject the report, unanimously affirmed, without costs.

The special referee did not exceed her authority in holding a second hearing since the issue of what rent was due, including late fees, was not previously determined. Accordingly, it was proper for the special referee to hold a second hearing to determine actual damages in accordance with the court's decision (*see Steingart v Hoffman*, 80 AD3d 444, 445 [1st Dept 2011]).

Plaintiff landlord's claim for nonpayment of rent from defendant tenant who never took possession of the apartment was

properly dismissed since plaintiff failed to establish that the multiple dwelling at issue was registered with the New York City Department of Housing Preservation and Development (*see* Multiple Dwelling Law § 325[2]; Administrative Code of City of NY § 27-2097[b]; *Matter of Blackgold Realty Corp. v Milne*, 69 NY2d 719 [1987]; *151 Daniel Low, LLC v Gassab*, 43 Misc 3d 134[A] [App Term, 2d Dept 2014]). The dismissal was appropriately made without prejudice (*see 9 Montague Terrace Assoc. v Feuerer*, 191 Misc 2d 18 [App Term, 2d Dept 2001]).

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

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13378 In re Betty Jean Mitchell, Petitioner, Index 400443/13

-against-

New York City Housing Authority, etc., Respondent.

_____

Betty Jean Mitchell, petitioner pro se.

Kelly D. MacNeal, New York (Hanh H. Le of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated December 19, 2012, which denied petitioner's grievance seeking succession rights as a remaining family member to the tenancy of her late mother, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Tanya R. Kennedy, J.], entered on October 29, 2013), dismissed, without costs.

Respondent's determination that petitioner is not entitled to succession rights as a remaining family member is supported by substantial evidence (*see generally 300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]). The record shows that petitioner's February 2011 request for consent to rejoin her mother's household was granted by respondent on

April 7, 2011 and that petitioner's mother died eight months later, on December 7, 2011. Thus, petitioner did not meet the requirement that she continuously reside in the apartment with respondent's written consent for at least one year prior to the death of her mother, who was the tenant of record (*see Matter of Saad v New York City Hous. Auth.*, 105 AD3d 672 [1st Dept 2013]; *Matter of Ponton v Rhea*, 104 AD3d 476, 477 [1st Dept 2013]). Petitioner's mitigating circumstances, including her sacrifice of another residency and opportunity for employment in order to care for her ailing mother, do not provide a basis for annulling respondent's determination (*see Matter of Firpi v New York City Hous. Auth.*, 107 AD3d 523, 524 [1st Dept 2013]; *Matter of Guzman v New York City Hous. Auth.*, 85 AD3d 514 [1st Dept 2011]).

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13380 The People of the State of New York, Respondent, Ind. 1289/09 1385/10

-against-

Lorenzo Padin, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered October 5, 2010, convicting defendant, after a jury trial, of criminal contempt in the first degree, tampering with a witness in the fourth degree and assault in the third degree, and sentencing him to an aggregate term of two to four years, unanimously affirmed.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting the contempt conviction (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The record supports reasonable inferences that defendant intended to harass, annoy, threaten, or alarm the victim when he made hundreds of calls to her in violation of an order of protection, and that he lacked any legitimate purpose for doing so (*see* Penal Law § 215.51[b][iv]).

To the extent that a portion of the prosecutor's summation could be viewed as containing a misstatement of law, it did not deprive defendant of a fair trial, and any prejudice was avoided by the court's instructions, which the jury is presumed to have followed (*see People v Moreno*, 100 AD3d 435, 437 [1st Dept 2012], *lv denied* 20 NY3d 987 [2012]).

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Moskowitz, Gische, JJ.

13381 Maria Armendariz, et al., Index 154625/14
Plaintiffs-Appellants-Respondents,

-against-

Enriqueta Luna, et al.,
Defendants-Respondents-Appellants.

_____

Steven B. Sarshik, New York, for appellants-respondents.

Cuti Hecker Wang LLP, New York (Eric Hecker of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered June 19, 2014, which, in this action alleging breach of a stipulation of settlement (settlement agreement) entered into in an underlying federal action, denied plaintiffs' motion for a preliminary injunction seeking to enjoin defendants from obtaining further payments under the settlement agreement and from filing an affidavit and confession of judgment signed by one of the plaintiffs, granted defendants' cross motion seeking to dismiss the complaint pursuant to CPLR 3211(a) as against defendant MFY Legal Services, Inc. (MFY) only, unanimously modified, on the law, to grant defendants' cross motion in its entirety, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

The motion court properly concluded that plaintiffs failed to establish a likelihood of success on their breach of contract claim. To the extent plaintiffs allege that defendants Enriqueta Luna and Inelia Gabriela Ortega breached the settlement agreement by failing to cause independent news organizations to remove their online articles discussing the allegations of racial discrimination and sexual harassment made against plaintiffs in the underlying federal action, such interpretation of the agreement leads to an absurd result and is contrary to the reasonable expectations of the parties (*see Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170 [1st Dept 2003]).

With respect to MFY, a non-profit legal services organization that represented the individual defendants in the federal action, the language of the agreement requires it "to remove all references to any named defendant [plaintiffs herein] on its website, and to ... explore in good faith whether/how it might redact any and all defendants' names from such Complaint." We agree with the motion court that this unambiguous language does not require MFY to remove the names from the complaint but only to explore in good faith "whether" to do so. The record establishes that in compliance with the agreement, MFY deleted from its website references to plaintiffs' names as well as a previously issued press release about the federal action but

retained a link to the complaint. It further establishes that MFY's executive and deputy directors, as well as the attorneys working on the federal action, met to discuss the issue of whether to redact the names from the complaint but determined that doing so would conflict with MFY's policy. Accordingly, MFY demonstrated that it explored this issue in good faith. Plaintiffs fail to allege any facts showing that MFY's exercise of discretion in determining not to redact the complaint was done arbitrarily or irrationally (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). Thus, the court properly dismissed the action against MFY.

Plaintiffs also fail to allege any facts demonstrating that Luna or Ortega posted disparaging statements about plaintiffs or failed to remove such postings, in breach of the agreement. Thus, the action against them must also be dismissed. The allegations against defendant Cuti Hecker Wang LLP, a law firm that also represented defendants in the federal action, are based on the breach of contract cause of action, and therefore the action against it must be dismissed.

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

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13382 Wieslaw Kowalczyk, Index 100176/05
Plaintiff-Respondent,

-against-

Time Warner Entertainment Company, L.P., et al.,
Defendants-Appellants,

The City of New York,
Defendant.

_____

Newman Myers Kreines Gross Harris, P.C., New York (Charles W. Kreines, Richard Schmedake and Adrienne Yaron of counsel), for appellants.

William Schwitzer & Associates, PC, New York (Linda Simmons of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 21, 2013, which denied the Time Warner defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The Time Warner defendants failed to demonstrate their lack of constructive notice. Pursuant to 34 RCNY §2-07, Time Warner is required to monitor, maintain and repair any defects to the cable box it owns and over which plaintiff fell. In order to establish lack of constructive notice, Time Warner was required to show that the condition was neither visible nor apparent or that it did not exist for a sufficient period of time for

defendant to discover and correct it (see *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011]). Defendant provides no evidence that it inspected the cable box at any time prior to the accident and found it to be in good condition (*Ross*, 86 AD3d at 421). Nor does the plaintiff's bare-boned deposition testimony that he never saw the cable box any time before the accident satisfy defendant's burden. Upon our review of the record, we note that in any event an issue of fact was raised by the testimony of a Time Warner employee that his supervisor knew of an accident that may have damaged the cable box cover and that may well have occurred before plaintiff's accident. The Time Warner defendants' contention that the defect was latent and not discoverable upon reasonable inspection is improperly raised for the first time on appeal and is, in any event, factually inaccurate (*see Titova v D'Nodal*, 117 AD3d 431 [1st Dept 2014]).

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13383 The People of the State of New York, Ind. 5570/00
Respondent, 6358/00

-against-

Elvis Castillo,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Elon Harpaz of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Thomas Farber, J.), rendered June 26, 2012, resentencing defendant, as a second felony offender, to an aggregate term of 30 years, with five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13384 Jane Doe, Index 101639/07
Plaintiff-Respondent-Appellant,

-against-

Madison Third Building Companies, LLC, et al.,
Defendants-Appellants-Respondents,

American Commercial Security Services of New York, Inc., et al.,
Defendants-Respondents,

Dwayne Afflick,
Defendant.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants-respondents.

Conover Law Offices, New York (Bradford D. Conover of counsel), for respondent-appellant.

Jeffrey Samel & Partners, New York (David M. Samel of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered January 8, 2014, which, to the extent appealed from as limited by the briefs, denied the motion of Madison Third Building Companies, LLC and Cohen Brothers Realty Corporation (Madison) for summary judgment dismissing the complaint and all cross claims asserted against them or, alternatively, for summary judgment on their cross claims against the remaining defendants, granted the motion of defendants American Commercial Security

Services of New York, Inc. and ABM Security Services (ACSS) for summary judgment dismissing the complaint and all cross claims asserted against them insofar as it related to their employee Joseph Rogers, and denied plaintiff's cross motion to amend her complaint, unanimously affirmed, without costs.

It is uncontroverted that Madison's motion was not filed within 60 days after the note of issue was filed, as required by the court's part rules. Thus, it was untimely (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). Moreover, the court providently exercised its discretion in determining that Madison did not show good cause for the delay (*see Fine v One Bryant Park, LLC*, 84 AD3d 436 [1st Dept 2011]).

The court also properly granted the motion for summary judgment of ACSS, the employers of defendant Afflick, the security guard who committed the alleged assault on plaintiff, and of another security guard, Rogers, present on the date of the assault, and denied plaintiff's motion to amend the complaint as to Rogers. Contrary to her argument on appeal, plaintiff has no viable claim against ACSS based on the actions of Rogers, who had no notice that Afflick would commit the assault (*see generally Maheshwari v City of New York*, 2 NY3d 288 [2004]). ACSS can not be liable for the negligent hiring or retention of Rogers since

his conduct in this case did not cause plaintiff's injury (*see White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243, 244 [1st Dept 2006]). Further, even if he violated ACSS's internal post orders by, inter alia, leaving his post during the time of the assault, and ACSS should have known that he had done that in the past, ACSS's internal rules are not admissible (*see Gilson v Metropolitan Opera*, 5 NY3d 574, 577 [2005]).

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13386 George DeHoyos, Index 109491/11
Plaintiff-Appellant,

-against-

The City of New York, et al.,
Defendants,

MTA Capital Construction Company,
Defendant-Respondent.

_____

Franzblau Dratch, P.C., New York (Brian M. Dratch of counsel), for appellant.

Amabile & Erman, P.C., Staten Island (Nicholas J. Loiacono of counsel), for respondent.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered May 7, 2013, which, to the extent appealed from, granted defendant MTA Capital Construction Company's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff testified that as he was cycling south on Second Avenue in Manhattan a passenger in a double-parked livery cab opened the cab door directly into his path, whereupon he veered into the adjacent traffic lane and was hit by another vehicle. Plaintiff's contention that MTA's construction activities along Second Avenue obstructed his view of the cab until he was about 15 feet from it, and that if he had seen the cab from a greater

distance the accident could have been avoided, is belied by his testimony that the cab door opened just as he was about to pass the cab. The opening of the cab door interrupted the nexus between any possible negligence on MTA's part and plaintiff's injuries and relieves MTA of any liability (*see Kush v City of Buffalo*, 59 NY2d 26 [1983]; *Hoenig v Park Royal Owners*, 249 AD2d 57 [1st Dept 1998], *lv denied* 92 NY2d 811 [1998]).

Plaintiff's speculative request for additional discovery to determine if there were other possible causes of the accident is insufficient to defeat the motion (*Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]).

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13387 The People of the State of New York, Ind. 8989/98
Respondent,

-against-

Gil Lewis,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Gregory Carro, J.), rendered May 16, 2012, as amended May 31 and June 14, 2012, resentencing defendant, as a second felony offender, to an aggregate term of 23 years to life, and imposing an aggregate term of 5 years' postrelease supervision as to certain convictions, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13388N CMS Life Insurance Opportunity Fund, L.P., et al., Plaintiffs-Appellants, Index 653646/11

Genesis Merchant Partners, LP, et al., Plaintiffs-Respondents,

-against-

Progressive Capital Solutions, LLC, et al., Defendants.

- - - - -

Ironshore Specialty Insurance Company, Intervenor Defendant-Respondent.

_____

Blank Rome LLP, New York (Michael P. Smith of counsel), for appellants.

Law Office of Wallace Neel, P.C., New York (Wallace Neel of counsel), for Genesis Merchant Partners, LP and Genesis Merchant Partners II, LP, respondents.

Butzel Long, New York (Edward Copeland of counsel), for Ironshore Specialty Insurance Company, respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered March 11, 2014,

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

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed for the reasons stated by Friedman, J., with costs.

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13389 In re Anthony Blue, Ind. 1401/13
[M-4376] Petitioner,

-against-

Hon. Gregory Carro, etc., et al.,
Respondents.

_____

Anthony Blue, petitioner pro se.

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

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13390 In re Anthony Blue, Ind. 1401/13
[M-4377] Petitioner,

-against-

Hon. Bruce Allen, etc., et al.,
Respondents.

_____

Anthony Blue, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Anthony J. Tomari of counsel), for Hon. Bruce Allen, respondent.

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

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: OCTOBER 30, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12645 The People of the State of New York, Ind. 784N/10
Respondent,

-against-

Christian Williams,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Anita Aboagye-Agyeman 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 (Edward J. McLaughlin, J.), rendered January 24, 2012, as amended on February 1, 2012 and February 28, 2012, reversed, on the law, the plea vacated, and the matter remanded for further proceedings.

Opinion by Renwick, J. All concur except Tom, J.P. and Andrias, J. who dissent in an Opinion by Tom, J.P.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Richard T. Andrias
Helen E. Freedman
Darcel D. Clark, JJ.

12645
Ind. 784N/10

_____x

The People of the State of New York,
Respondent,

-against-

Christian Williams,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 24, 2012, as amended on February 1, 2012 and February 28, 2012, convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and imposing sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Anita Aboagye-Agyeman and Alexandra Keeling of counsel), for appellant.

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

RENWICK, J.

The principal question presented here is whether a judgment of conviction, entered upon a guilty plea to a particular crime, may stand when the record discloses that neither the court nor the parties realized that the agreed upon sentence, to be imposed if defendant complied with the conditions of the plea, was illegal. Although defendant violated the conditions of his plea, and the enhanced sentence was legal, defendant is entitled to a plea vacatur for two fundamental reasons. First, defendant's constitutional claim that his plea violated due process because it was induced by an illegal promise need not be preserved. Second, to accept a guilty plea induced by an illegal promise affects the fairness, integrity and public reputation of judicial proceedings as the defendant could not have had a full understanding of what the plea connotes and its consequences (*People v Harris*, 61 NY2d 9, 19 [1983]; *Boykin v Alabama*, 395 US 238, 244 [1969]) or "exercised a voluntary and intelligent choice among the alternative courses of action open to the defendant" (*North Carolina v Alford, 400 US 25, 31, citing Boykin v Alabama, 395 US 238, 244 [1969]).*

The genesis of this case is defendant's arrest on January 7, 2010, for allegedly selling drugs to an undercover police officer. On November 1, 2011, defendant entered into a plea

agreement that required him to plead guilty to the top count of the indictment, criminal sale of a controlled substance in the third degree, a class B felony. In exchange, the trial court promised to sentence defendant to a definite term of imprisonment of three years and two years of postrelease supervision (PRS). In addition, as part of the plea agreement, the trial court permitted defendant to remain at liberty pending sentence. This was done with the understanding that defendant's sentence could be enhanced to a maximum prison term of 12 years, at the discretion of the sentencing court, if he failed to return to court for sentencing, failed to cooperate with the Department of Probation, or committed a crime.

As indicated, neither the trial court nor the parties realized that the agreed upon sentence, to be imposed if defendant complied with the conditions of the plea, was illegal. Specifically, defendant had previously been convicted of attempted criminal possession of a weapon in the first degree and adjudicated a predicate violent felony offender (*see* Penal Law §§ 110/265.03[3]; 70.02[1][c]). Under the circumstances, the correct incarceratory sentence range, for the crime to which defendant pled guilty, was from a minimum of 6 years to a maximum of 15 years (*see* Penal Law §70.70[4][b][i]).

After his plea, but prior to his sentence in this case,

defendant was arrested in an unrelated matter. Soon thereafter, on November 17, 2011, the trial court held an *Outley*[1] hearing to determine whether defendant had violated the plea conditions. At the hearing, a police officer testified that he arrested defendant after observing him smoking marihuana with two other men while inside a public housing building. The District Attorney's Office, however, declined to prosecute defendant because he was not found in possession of any marihuana. Nevertheless, finding the police officer's testimony credible, the trial court found that defendant had committed the crime of misdemeanor criminal possession of marihuana.[2] Accordingly, the trial court found defendant in violation of the plea agreement and sentenced him to six years in prison, as well as two years of PRS, which the court considered "an appropriate enhancement in

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[1]*People v Outley* (80 NY2d 702, 713 [1993]) held that in order for a court to impose an enhanced sentence, "the mere fact of the arrest, without more, is not enough." Therefore, "[w]hen an issue is raised concerning the validity of the post- plea charge or there is a denial of any involvement in the underlying crime, the court must conduct an inquiry at which the defendant has an opportunity to show that the arrest is without foundation" (*id.*).

[2]It appears that the court was relying on Penal Law § 221.10(1), which provides, in relevant part:

> "A person is guilty of criminal possession of marihuana in the fifth degree when he knowingly and unlawfully possesses: 1. marihuana in a public place ... and such marihuana is ... open to public view ...."

view of all the things that went on related to this case."

On appeal, defendant seeks to vacate his plea on two grounds. First, defendant argues that the court's confusing plea conditions were not properly explained to him. Like the dissent, we find this contention devoid of merit because the record establishes that defendant was explicitly told that he must comply with certain conditions, including "not committing a crime." Second, defendant contends, and we agree, that his plea violated due process because it was secured by way of an illegal promise. It is, thus, on this issue that we depart from the dissent's position.

As the Court of Appeals recently held in *People v Johnson* (23 NY3d 973, 976 [2014]), a plea can never be knowing and voluntary when it is based "on complete confusion by all concerned." In *Johnson*, defendant pleaded guilty to rape in the second degree, which, as defined in Penal Law § 130.30(2), is committed when a person "engages in sexual intercourse with another person who is incapable of consent by reason of being ... mentally incapacitated." "'Mentally incapacitated' means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent"

(Penal Law § 130.00(6); *Johnson* at 974-975).

In *Johnson*, however, there was "no indication in the record that this victim was incapacitated by anything other than voluntary intoxication" (*id.* at 975). Yet, both "the court and counsel believed, mistakenly, that it was necessary to put on the record facts showing that the victim was mentally incapacitated" (*id.* at 976). Morever, both the court and counsel "believed, equally mistakenly, that they had done so" (*id.*) Under these circumstances, the Court of Appeals held, it cannot be said that the plea was knowing and voluntary because "[i]t is impossible to have confidence, on a record like this, that defendant had a clear understanding of what he was doing when he entered his plea" (*id.*). Similarly here, it is difficult to understand the dissent's position that defendant's plea was knowing and voluntary when the court itself did not understand that the agreed upon sentence, to be imposed if plaintiff complied with the conditions of the plea, was illegal.

The dissent also erroneously concludes that defendant failed to preserve any objection to the plea agreement by failing to protest or move to vacate it. While such a challenge must ordinarily be preserved by a motion to withdraw the plea under CPL 220.60(3), this does not apply where the trial court failed to fulfill its obligations to ensure that a plea conformed with

due process (*People v Louree*, 8 NY3d 541, 545-546 [2007]). As has been well established in our law, when a criminal defendant waives the fundamental right to trial by jury and pleads guilty, due process requires that the waiver be knowing, voluntary and intelligent (see NY Const, art I, § 6; People v Harris, 61 NY2d at 19; Boykin v Alabama, 395 US at 244; *see also McCarthy v United States*, 394 US 459, 466 [1969] ["if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void"]).

Prior to accepting a guilty plea, therefore, a defendant must be informed of the direct consequences of the plea *(People v Ford*, 86 NY2d at 403). When a court fails to so advise the defendant, the plea cannot be deemed knowing, voluntary and intelligent, and defendant may withdraw the plea and be returned to his or her uncertain status before the negotiated bargain (*see People v Harris*, 61 NY2d 9, 17 [1983]; *People v Aleman*, 43 AD3d 756, 757 [1st Dept. 2007]).

The dissent unpersuasively argues that preservation was required because the court fulfilled its duty to advise defendant of the direct consequences of his plea. The cases cited by the dissent to support its position that the court fulfilled its duty are inapposite as the dissent cannot seriously dispute that defendant’s originally promised illegal sentence is a direct

consequence of his plea. The dissent's attempt to blame defense counsel for the constitutional infirmity is misguided and equally unavailing. The dissent fails to explain how, by making a promise of an illegal sentence – a promise the court could not fulfill - the court fulfilled its duty to inform defendant of the direct consequences of his plea. The dissent simply ignores the fact that, when defendant entered into the plea agreement that included an illegal sentence, a material element, it was simply not possible for defendant to possess the full understanding necessary to make an informed plea. Because the improper promise was an integral part and material aspect of the agreement, the resulting plea is invalid.

The dissent finds no constitutional infirmity in a plea procured by an illegal promise because defendant's "enhanced sentence was lawful." This ignores the fact that, in its inception, the voluntary nature of the plea agreement is undermined when an agreement includes a provision for an illegal sentence. Additionally, there can be no breach of a plea agreement where the agreement itself is constitutionally defective and therefore cannot be recognized because it contains, as an integral component, an illegal promise that materially induced the defendant to plead guilty.

Indeed, the Court of Appeals has consistently held that,

when a defendant enters into an involuntary guilty plea, the constitutional defect lies in the plea itself, and not in the resulting sentence (see *People v Van Deusen*, 7 NY3d 744 [2006]; *People v Catu*, 4 NY3d 242 [2005]). In other words, the prejudice resulting from a defendant entering into an involuntary guilty plea is that the "court violated the defendant's due process rights - not the defendant's sentencing expectations" (*People v Hill*, 9 NY3d 189, 193 [2007], *cert denied* 553 US 1048 [2008]). In such a scenario, vacatur of the plea is the only remedy since it returns the defendant to his status before the constitutional infirmity took place (*id.*).

Finally, contrary to the People's assertion, neither *People v Williams (*87 NY2d 1014 [1996]) nor *People v DeValle* (94 NY2d 870 [2000]) mandates a different result. In *People v Williams*, the Court held that "the trial court had the inherent power to correct an illegal sentence" over the defendant's objection where the corrected sentence fell within the range initially stated by the court (87 NY2d at 1015). There, the defendant pleaded guilty to burglary in the second degree and, at the time of the plea, "the court state[d] . . . that the defendant could receive up to 15 years in prison" (*id.*). He was originally sentenced as if he were a predicate felon to 3½ to 7 years imprisonment, a sentence that was illegal due to his actual status as a first felony

offender. On its own motion, the court corrected its error and resentenced the defendant to 3½ to 10½ years in prison, a sentence well within the defendant's bargained-for expectation "of up to 15 years," from an understood minimum of 3 ½ years. Thus, *People v Williams* is not controlling here. It cannot be disputed that this case does not involve a "corrected sentence [that] fell within the range initially stated by the court" because here the initial range contained an illegal minimum sentence of 3 years, a bargained-for expectation that was no longer available.

In *DeValle*, the defendant pleaded guilty to robbery in the third degree, and on November 17, 1995, based upon his plea, the trial court sentenced the defendant to two to four years in prison, to run concurrently with an undischarged portion of an earlier sentence. By letter dated January 5, 1996, however, the Department of Correctional Services notified the trial court that Penal Law § 70.25(2-a) required that the defendant's sentence run consecutively with his prior sentence, and the court, on its own motion, calendared the case for resentencing (*id*).

In *DeValle*, there was a factor not present in *Williams*, namely that in order to correct the sentence to comply with the requirements of Penal Law § 70.25[2-a], the court would have to impose a more severe sentence than the sentence originally

promised. As such, the Court of Appeals found that the *DeValle* resentence was controlled by *People v Selikoff* (35 NY2d 227, 239) [1974], *cert denied* 419 US 1122 [1975]) where the Court held that "if a court made a sentencing promise to a defendant and was unable to fulfill it, the defendant had a right to withdraw the guilty plea and to be restored to pre-plea status" (*DeValle*, 94 NY2d at 872). "[A]t resentencing, [however,] defense counsel stated that the defendant wanted neither to withdraw his plea nor to be resentenced" (*id*). Over the defendant's objection, the trial court resentenced the defendant to a consecutive term. *DeValle* upheld such resentence because the defendant "did not demonstrate on the record before [the court] that he detrimentally relied on the illegal sentence in a way that could not be rectified by restoring him to his pre-plea status if he so desired" *(id.*) Thus, *DeValle* is not controlling here, where "defendant detrimentally relied on the illegal sentence in a way that [could] be rectified by restoring him to his pre-plea status if he so desired" (*id.*).

In sum, in view of the evident misunderstanding by the trial court and by the parties in this matter, resulting in defendant's incomplete understanding of the implications of entering a guilty plea, the appropriate course is to permit defendant to withdraw his plea and restore the parties to their status before the plea

agreement was reached.

Accordingly, the judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 24, 2012, as amended on February 1, 2012 and February 28, 2012, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, should be reversed, on the law, the plea vacated, and the matter remanded for further proceedings.

All concur except Tom, J.P. and Andrias, J. who dissent in an Opinion by Tom, J.P.

TOM, J.P. (dissenting)

In exchange for his guilty plea, defendant was promised a three-year determinate sentence followed by a two-year period of postrelease supervision with the proviso that he not commit another crime before sentence was pronounced, among other conditions. The court explicitly advised defendant that if he violated the condition, "I don't have to give you the three years with the two years. I might, but I don't have to, and I could theoretically sentence you up to 12 years." Defendant committed a subsequent crime, and the court imposed a six-year term of imprisonment. Because defendant's criminal history includes a previous violent felony conviction, the minimum sentence that could be imposed is 6 years, and he was subject to a maximum period of imprisonment of 15 years. Thus, the court's three-year promised sentence was an unlawful sentence.

Defendant did not move to withdraw his plea or otherwise preserve his present challenges to its voluntariness (*see People v Lopez*, 71 NY2d 662, 665 [1988]). He now contends that he was induced to plead guilty by the promise of an unlawful sentence in violation of his due process rights (citing *People v Selikoff*, 35 NY2d 227, 238 [1974], *cert denied* 419 US 1122 [1975]; *People v Bullard*, 84 AD2d 845 [2d Dept 1981]) and that preservation is unnecessary because the promise of a sentence the court could not

lawfully impose rendered his guilty plea less than knowing, voluntary and intelligent (citing *People v Hill*, 9 NY3d 189, 191 [2007], *cert denied* 553 US 1048 [2008]). Defendant's objections, which are unpreserved, should not be considered in the interest of justice. As an alternative holding, his argument is without merit and affords no basis for reversal.

A defendant generally has the right to withdraw a plea if a court makes a sentencing promise it cannot fulfill or fails to inform a defendant of a direct consequence of his plea (*see People v DeValle*, 94 NY2d 870, 872 [2000]; *People v Williams*, 87 NY2d 1014, 1015 [1996]). Counsel did not move to withdraw defendant's plea or argue, even when the final six-year sentence was imposed, that the plea had been induced by the promise of an unlawful sentence. Further, defendant does not challenge the effectiveness of counsel in failing to seek to withdraw the guilty plea (*see DeValle*, 94 NY2d at 872).

Where a defendant does not move to withdraw his plea, a sentencing court nevertheless has the inherent power to correct an illegal sentence (*DeValle*, 94 NY2d at 871-872; *Williams*, 87 NY2d at 1015; *People v Donaldson*, 117 AD3d 1467, 1468 [4th Dept 2014], *lv denied* 23 NY3d 1036 [2014]). Thus, the illegality of the promised sentence does not, in itself, render a defendant's guilty plea unknowing and involuntary. However, since the

enhanced sentence was lawful, defendant's plea did not violate his due process rights. In *Williams*, the Supreme Court, sua sponte, resentenced defendant to 3½ to 10½ years pursuant to a guilty plea to burglary in the second degree because the sentence of 3½ to 7 years originally imposed was unlawful. The Court of Appeals, in rejecting the defendant's double jeopardy argument stated, "That claim would be colorable only if the defendant's sentence had been increased beyond his legitimate expectations of what the final sentence should be" (*Williams*, 87 NY2d at 1015; see also *People v Collier*, 22 NY3d 429, 433-434 [2013], *cert denied* __ US __, 134 S Ct 2730 [2014]). More specifically, in *Collier* the Court of Appeals held that "if the originally promised sentence cannot be imposed in strict compliance with the plea agreement, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations. Again, 'the reasonable understanding and expectations of the parties, rather than technical distinctions in semantics, control the question of whether a particular sentence imposed violates a plea agreement'" (*id.* at 434, quoting *Gammareno v United States*, 732 F2d 273, 276 [2d Cir 1988]).

Here, defendant was told that he could receive up to 12 years' imprisonment if he failed to comply with the conditions set by the court. Thus, contrary to the majority's flawed

reasoning, the six-year statutory minimum sentence finally imposed after defendant violated the conditions of the plea was clearly within the legitimate expected sentencing range of up to 12 years (*Collier*, 22 NY3d at 434; *see also Del Valle*, 94 NY2d at 871-872). The majority focuses exclusively on the promised sentence of three years, ignoring the conditional part of the plea agreement and the fact that defendant never moved to withdraw his plea. Since defendant violated the conditions of the plea agreement and did not move to withdraw his plea, he was no longer entitled to the three year sentence and cannot argue that the period of imprisonment finally imposed was not within the expected sentencing range of up to 12 years. Because the final sentence was lawful and within the expectations of the parties, defendant's plea did not violate his due process rights.

Defendant did not preserve his present claim by interjecting a timely protest so as to afford the trial court an opportunity to address the asserted error at a time when corrective action could be taken (CPL 220.60 [3]; *Lopez*, 71 NY2d at 666). It is the obligation of counsel to carefully review the terms of the plea and determine whether the proposed sentence legally conforms with defendant's guilty plea and predicate felony offender status to be able to adequately advise the client to accept or reject the proffered plea. Nor does this matter represent the "rare

case" where preservation is not required, either because the sentencing court's attention should be immediately drawn to a discrepancy in a defendant's allocution that negates an essential element of the crime or because the court failed in its duty to advise the defendant of a direct consequence of entering a guilty plea (*People v Louree*, 8 NY3d 541, 545 [2007]). Significantly, the cases relied upon by defendant and cited by the majority involve the court's dereliction of this duty (*see Hill*, 9 NY3d at 191 [failure to advise defendant of period of postrelease supervision]; *People v Van Deusen*, 7 NY3d 744 [2006] [same]; *People v Catu*, 4 NY3d 242 [2005] [same]; *People v Gina M. M.*, 40 NY2d 595, 597 [incorrect advice regarding consequences of plea on defendant's criminal record]).

Moreover, no unlawful sentence was imposed that requires correction, because defendant failed to comply with the condition imposed by the court and the contemplated sentence was never available to him. Even if defendant had fulfilled the condition to be entitled to receive the promised sentence, it is settled that a "[d]efendant cannot rely on a promise by the court to impose a sentence which it could not lawfully impose" (*Bullard*, 84 AD2d at 845), and "the courts have inherent power to remedy an illegal sentence by permitting modification to bring the sentence within the sentencing range that the defendant understood would

be available upon conviction" (*People v Richardson*, 100 NY2d 847, 851 [2003]).

People v Johnson (23 NY3d 973 [2014]), cited by the majority, is clearly distinguishable. First, the defendant preserved his objection by making a timely motion to withdraw his plea. In addition, it was not confusion over the sentence that rendered the plea less than knowing, intelligent and voluntary but confusion over the crime to which the plea was entered.

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

ENTERED: OCTOBER 30, 2014

CLERK