SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 5, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

12990 The People of the State of New York, Ind. 1984/12
Respondent,

-against-

Rodman Rivera,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 25, 2012, convicting defendant, upon his plea of guilty, of three counts of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 11 years, unanimously affirmed.

We previously held defendant's appeal in abeyance (127 AD3d 595 [1st Dept 2015]), and remanded the matter for a hearing, holding that it was error to deny defendant's motion to suppress

two pistols on the ground that he lacked standing. Initially, we note that on remand the motion court erred to the extent it stated at the conclusion of the hearing that defendant still lacked standing, as our earlier decision finding automatic standing based on the automobile presumption (Penal Law § 265.15 [3]), was dispositive, and nothing in our decision suggested that the People were entitled to a new opportunity before the trial court to show that automatic standing did not apply. We also note that our remand did not encompass the recovery of defendant's cell phone, because the remand was limited to matters about which the court had denied a hearing, i.e. the pistols.

The record supports the motion court's conclusion upon remand that the pistols should not be suppressed. Although the trial court could have made a more complete record at the suppression hearing as to why no information about the tip could be disclosed, or could have given defense counsel details that would not have revealed the confidential informant's identity, we find, based on our examination of the confidential materials, that overall the court properly employed the procedures discussed in *People v Castillo* (80 NY2d 578 [1992], *cert denied* 507 US 1033 [1993]) and *People v Darden* (34 NY2d 177 [1974]). We have reviewed the sealed transcript of the *Darden* hearing and the

court's summary report, and find that the confidential informant existed and provided reliable information to the police that established probable cause for defendant's arrest. Thus, the police lawfully searched the car for illegal weapons (*see People v Lowe*, 50 AD3d 516 [1st Dept 2008], *affd* 12 NY3d 768 [2009]; *People v Brown*, 93 AD3d 1231 [4th Dept 2012], *lv denied* 19 NY3d 958 [2012]; *see also People v Edwards*, 1 AD3d 277 [1st Dept 2003], *lv denied* 1 NY3d 627 [2004]). We have considered defendant's remaining arguments and find them unavailing.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

84 PK Restaurant, LLC, doing business as 212 Restaurant and Bar, Plaintiff-Appellant-Respondent, Index 654177/13

-against-

Ira Lifshutz, et al., Defendants-Respondents-Appellants,

133 East 65th Street Associates, LLC, et al., Defendants-Respondents,

133 East 65th Street Corporation et al., Defendants.

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JSBarkats PLLC, New York (Marc Jonas Block of counsel), for appellant-respondent.

Bashian & Papantoniou, P.C., Garden City (Erik M. Bashian of counsel), for respondents-appellants.

Steven Landy & Associates, PLLC, New York (David A. Wolf of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered June 20, 2014, which, to the extent appealed from as limited by the briefs, granted defendants 133 East 65th Street Associates, LLC (Associates) and Peter Steensen's (together, the Associates defendants) motion to dismiss the breach of contract, constructive eviction, piercing the corporate veil, and declaratory judgment causes of action as against them, granted

the part of defendants Ira Lifshutz and 115 East 37th Realty LLC's (Realty) (together, the Realty defendants) motion seeking to dismiss the breach of contract, constructive eviction, and unlawful detainer claims against them and the declaratory judgment claim as against Lifshutz, and denied the part of the motion seeking to dismiss the tortious interference with contractual relations and specific performance claims and the declaratory judgment claim as against Realty, and to cancel plaintiff's notice of pendency, award the costs of same, and sanction plaintiff, and denied plaintiff's cross motion for leave to amend its complaint, unanimously modified, on the law, to deny the part of the Realty defendants' motion seeking to dismiss the breach of contract cause of action as against Realty, and to grant the parts of their motion seeking to dismiss the tortious interference with contractual relations cause of action and to cancel the notice of pendency, and otherwise affirmed, without costs.

From 1987 until December 2012, Associates owned real property located at 133 East 65th Street. The building was ultimately leased to defendant 133 East 65th Street Corporation (Corporation). As of December 28, 1998, Corporation leased the cellar, basement, and first floor (the premises) to plaintiff's

predecessor through September 30, 2019. From June 1999 through February 8, 2010, plaintiff and its predecessor operated a successful restaurant. However, on the latter date, a fire devastated the premises, forcing plaintiff to vacate. Plaintiff alleges that Corporation failed either to restore the premises or to obtain a new certificate of occupancy so that plaintiff could reopen its restaurant. On or about January 31, 2011, Corporation informed plaintiff that it had ended its (Corporation's) tenancy with Associates, effective as of September 15, 2010. Thereafter, plaintiff tried unsuccessfully to have Associates restore the premises and obtain the certificate of occupancy.

After Associates locked plaintiff out of the premises and served a notice to cure, plaintiff commenced an action (the other action) against Associates and Corporation. The court in the other action restored plaintiff to the premises, conditioned upon its posting of an undertaking and payment of rent. Plaintiff failed to fulfill these conditions, and on July 5, 2012, it returned the keys to the premises to Associates and removed its furniture, fixtures, and equipment. Initially, Associates offered to let plaintiff take the keys back, but on July 18, 2012, it rescinded its offer, saying it would re-let the premises to a new tenant. Moreover, it had terminated the lease as of

July 11, 2012.

On September 13, 2012, Associates and Lifshutz entered into a contract whereby the former agreed to sell 133 East 65th Street to the latter or his assignee. Lifshutz assigned his rights to Realty, and Realty purchased the subject property on December 21, 2012. Some time between December 21, 2012 and December 4, 2013, Realty re-let the premises to a new tenant. On December 4, 2013, plaintiff commenced the instant action and, the next day, filed a notice of pendency against the property.

The court providently exercised its discretion in dismissing the first (breach of contract), second (constructive eviction), and seventh (declaratory judgment) causes of action[1] as against the Associates defendants pursuant to CPLR 3211(a)(4) (other action pending). While Steensen is not a party to the other action, there is still a substantial identity of parties; complete identity is not required (*Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013]). Similarly, both actions arose out of the "same subject matter or series of alleged wrongs" (*see id.* [internal quotation marks omitted]; *GSL Enters. v Citibank*, 155 AD2d 247 [1st Dept 1989]). As to the

[1] The third and fifth causes of action are asserted only against the Realty defendants, and the sixth is asserted only against Realty.

claims in the instant action that arose after plaintiff commenced the other action, plaintiff can seek leave to supplement its complaint in the other action (*see* CPLR 3025[b]).

The court correctly dismissed the fourth cause of action seeking to pierce Associates' corporate veil to impose personal liability on Steensen since piercing the corporate veil is not a cause of action independent of a cause of action against the corporation (*see Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 480 [1st Dept 2015]). In any event, plaintiff's allegations about Steensen's domination and control and abuse of the corporate form are entirely conclusory and, hence, insufficient (*see e.g. id.*).

The second cause of action (constructive eviction) is also time-barred, as is the fifth cause of action (unlawful detainer). Plaintiff alleges that it was constructively evicted on or about July 5, 2012. It commenced the instant action more than a year later (*see Kent v 534 E. 11th St.*, 80 AD3d 106, 111 [1st Dept 2010]). The unlawful detainer claim seeks treble damages pursuant to RPAPL 853. A claim under that statute is a wrongful eviction claim, also governed by a one-year Statute of Limitations, which begins to run when "it is reasonably certain that the tenant has been unequivocally removed with at least the

implicit denial of any right to return" (*Gold v Schuster*, 264 AD2d 547, 549 [1st Dept 1999]). This occurred at the latest on July 18, 2012, when Associates rescinded its offer to return the keys to plaintiff. Plaintiff commenced the instant action more than a year later.

The court correctly dismissed the first cause of action (breach of the sublease between plaintiff and Corporation and the master lease between Corporation and Associates) as against Lifshutz because Lifshutz is not a party to either of the above contracts. Although he was a party to the contract of sale with Associates, he assigned his rights thereunder to Realty, and Realty is the one that ultimately bought the subject property. For the same reason, the court correctly dismissed the seventh cause of action (declaratory judgment) as against Lifshutz.

However, the breach of the lease and sublease cause of action should not be dismissed as against Realty. The contract by which Associates sold 133 East 65th Street to Lifshutz or his assignee said, "Purchaser hereby agrees to assume at closing all liabilities with respect to all tenants of the Premises arising *prior to or* subsequent to the date of this Contract" (emphasis added). On the current record, it is difficult to discern Associates' and Lifshutz's intentions and, therefore, whether

plaintiff was an intended (as opposed to incidental) third-party beneficiary of the contract of sale (*see generally Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1st Dept 2006], *lv dismissed* 7 NY3d 864 [2006]). However, even if, arguendo, plaintiff were only an incidental beneficiary, it would have a remedy, independent of the contract of sale, under Real Property Law § 223, which provides, "A lessee of real property [i.e., plaintiff] . . . has the same remedy against the lessor [Associates], [or] *his grantee* [Realty] . . . for the breach of an agreement contained in the lease, that the lessee might have had against his immediate lessor [Corporation]" (emphasis added).

Realty contends that plaintiff has no contract claim against it because plaintiff surrendered the premises by operation of law on July 5, 2012. However, whether plaintiff surrendered the premises by operation of law must be determined on the facts (*see Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689, 692 [1986]).

Realty also relies on Associates' termination of the lease. However, plaintiff disputes whether that termination was proper.

The court providently exercised its discretion in denying plaintiff's cross motion for leave to amend, since plaintiff neither submitted a proposed amended complaint (*see* CPLR 3025[b]) nor indicated "the nature of, evidentiary basis for, or viability

of, the proposed amendment" (*Cracolici v Barkagan*, 127 AD3d 414, 415 [1st Dept 2015], *lv denied* 25 NY3d 913 [2015]).

The third cause of action (tortious interference with contractual relations against the Realty defendants) should be dismissed. Plaintiff does not allege that, but for the Realty defendants' conduct, Associates would have continued the sublease (*see Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006], *lv denied* 7 NY3d 704 [2006]). On the contrary, the record indicates that Associates wanted to terminate it even before the Realty defendants arrived on the scene. Furthermore, the complaint alleges only in conclusory fashion that the Realty defendants intended to induce Associates to breach the sublease (*see CDR Créances S.A. v Euro-American Lodging Corp.*, 40 AD3d 421 [1st Dept 2007]).

The Realty defendants contend that the sixth cause of action (specific performance against Realty) should be dismissed because, inter alia, plaintiff can be adequately compensated with money damages. However, resolution of the question whether money damages would adequately compensate plaintiff must await a fuller

record (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001]; *Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*, 112 AD3d 78, 87 [1st Dept 2013]). We have considered the Realty defendants' remaining arguments about specific performance in their main brief and find them unavailing. We decline to consider their contention, improperly raised for the first time in their reply brief, that plaintiff may not assert claims for both constructive eviction (which terminated the lease) and specific performance (of a terminated lease). Even if we were to consider this argument, we would find it unavailing, since causes of action may be stated alternatively (CPLR 3014). In any event, as indicated, the constructive eviction claim is time-barred.

The Realty defendants contend that the seventh cause of action (declaratory judgment) should be dismissed as against Realty because plaintiff makes no allegations against it, and an innocent tenant would be adversely affected if plaintiff were restored to possession. Contrary to the first argument, plaintiff alleges that Realty and/or Lifshutz re-let the premises to the new tenant. As to the second argument, the record does not permit us at this pre-answer stage of the litigation to balance the hardship to the new tenant if it were dispossessed

against the hardship to plaintiff if it were not restored to possession (*see Fillman v Axel*, 63 AD2d 876 [1st Dept 1978]). We decline to consider the Realty defendants' argument, made for the first time in their reply brief, that plaintiff's failure to name the new tenant as a party is fatal to its claim for a declaratory judgment.

The Realty defendants' motion to cancel the notice of pendency is granted. "[A] lease for years is deemed personalty" (*Matter of Grumman Aircraft Eng'g Corp. v Board of Assessors of Town of Riverhead*, 2 NY2d 500, 507 [1957], *cert denied* 355 US 814 [1957]). Accordingly, we have held that "[e]ven in the context of a summary proceeding to recover possession under a lease, a notice of pendency is unavailable" (*Rose v Montt Assets*, 250 AD2d 451, 452 [1st Dept 1998]). This is consistent with the notion that courts should apply "a narrow interpretation in reviewing whether an action is one affecting 'the title to, or the possession, use or enjoyment of, real property'" (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 321 [1984], quoting CPLR 6501).

To the extent plaintiff relies on *Lawlor v 543 Second Ave. LLC* (49 AD3d 449 [1st Dept 2008]) in support of its position that the notice of pendency was properly filed, we note that that case

was decided on a unique set of facts. There, the out-of-possession tenant was asserting restoration, pursuant to Administrative Code of the City of NY § 26-408(d), to a building that had been demolished by the landlord. Nevertheless, given the suggestion in *Lawlor* and in *Casanas v Carlei Group, LLC* (105 AD3d 570 [1st Dept 2013]), which relied exclusively on *Lawlor*, that a notice of pendency filed by a possessory leaseholder could be viable, plaintiff had grounds to believe that it was justified in filing a notice of pendency. Therefore, it should not be forced to pay "costs and expenses occasioned by the filing and cancellation" (CPLR 6514[c]).

We have considered the Realty defendants' arguments as to why plaintiff should be sanctioned and find them unavailing.

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

165N U.S. Bank N.A. as Trustee on Behalf of Sasco Mortgage Loan Trust 2007-RNP1, Plaintiff-Appellant, Index 35082/13

-against-

Diana Askew, Defendant-Respondent,

City of New York Environmental Control Board, etc., et al., Defendants.

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Stim & Warmuth, P.C., Farmingville (Glenn P. Warmuth of counsel), for appellant.

Diana Askew, respondent pro se.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered November 6, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for the appointment of a referee to compute the amount due.

A plaintiff may establish standing in a foreclosure action either by showing assignment of the mortgage note or physical delivery of the note prior to the commencement of the foreclosure action (*Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d 695, 695-696 [1st Dept 2012]). Here, plaintiff attempted to show

assignment of the mortgage note through a series of allonges. However, the allonges do not all bear the same loan number as the original mortgage note. This creates a fact issue as to whether the allonges are proper (*see HSBC Bank USA, N.A. v Thomas*, 46 Misc 3d 429, 432-434 [Sup Ct, Kings County 2014]).

Nevertheless, plaintiff sufficiently demonstrated physical delivery of the note prior to commencement of the action (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 360-361 [2015]. Therefore, plaintiff was entitled to summary judgment. The reference to compute is made under CPLR article 40 and not RPAPL 1321.

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

ENTERED: APRIL 5, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

202 The People of the State of New York, Ind. 2686N/13
Respondent,

-against-

Rashsean Jackson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (James Burke, J. at diversion hearing; Melissa C. Jackson, J. at plea and sentencing), rendered April 21, 2014, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4½ years, unanimously affirmed.

Defendant made a valid waiver of the right to appeal that forecloses review of his judicial diversion and excessive sentence claims (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Jenkins*, __ AD3d __, 2016 NY Slip Op 01056 [1st Dept 2016]). The court elicited defendant's appeal waiver separately from its discussion of the trial rights that defendant automatically forfeited upon a guilty plea, and defendant also

signed a written waiver, which he acknowledged on the record that he understood and had discussed with counsel. The written waiver cured any ambiguity in the court's colloquy with defendant (*see People v Sanders*, 25 NY3d 337, 340-342 [2015]; *People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]).

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

305 In re David B.,
Petitioner-Respondent,

-against-

Katherine G.,
Respondent-Appellant.

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

Law Offices of Ilysa M. Magnus, P.C., New York (Ilysa M. Magnus of counsel), for respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the children.

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Order, Family Court, New York County (Fiordaliza A. Rodriguez, Referee), entered on or about January 23, 2015, which, after a hearing, among other things, granted petitioner father's petition to modify a prior consent order to the extent of designating the father's home in Manhattan as the children's primary residence with respondent mother having visitation time, and denied the mother's cross petition to modify the consent order to award her sole custody and permit her to relocate with the children to Katonah, New York, unanimously reversed, on the law, without costs, the petition denied, the cross petition granted, and the matter remitted to Family Court for

determination of an appropriate visitation schedule for the father.

Petitioner and respondent are the parents of two sons, Winter B. (born in 2002), and Orion B. (born in 2005). From 2002 to 2009 they lived in a duplex apartment on 32nd Street in a building then owned by the paternal grandfather. In June 2009 they moved to an apartment on East 68th Street, another building owned by the paternal grandfather.

In 2010, the parties separated, and the mother moved back into the 32nd Street apartment. On September 14, 2010, the parties entered into a so-ordered stipulation providing them with "joint legal custody of the children with the [m]other's home designated as the[] [c]hildren's primary residence." The parents agreed to "discuss diligently and agree upon all matters" affecting the children, "including, but not limited to, choice of schools."

One month later, in October 2010, the paternal grandfather commenced eviction proceedings against the mother. In February 2011, he sold the building, and in May 2011, the new owner evicted the mother.

In 2012, the mother petitioned the court to allow her to relocate to Colorado with the children. She alleged that there

had been a change in circumstances, i.e., the eviction, and that she was unable to afford similar accommodations in New York City. She wished to move to Colorado where she had family, a house, and an offer of employment.

While the petition was pending, the mother allegedly enrolled the children in school in Colorado for the 2012-13 year. However, she returned to New York promptly upon denial of her petition.

In September 2013, after staying at various friends' homes, the mother settled in Katonah, in Westchester County. She asserted that it would be in the children's best interests to attend school in Westchester, as she was the primary residential parent. On or about November 15, 2013, the father filed a petition to modify the consent order by granting him sole custody. The father alleged that there had been a change of circumstances in that the mother had relocated to Katonah from Manhattan and refused to comply with the terms of the consent order. The mother filed a cross petition, also seeking sole custody. She alleged a change of circumstances, i.e., that she had been evicted and forced to relocate, requiring the children to travel to Manhattan for school.

At the hearing, the mother testified that she had selected

Katonah for its superior school system and to permit the father to have relatively easy access to the children. She described the excellent quality of the Katonah public school system and its numerous extracurricular and athletic programs. When the children were with her they rode bikes, built forts, and played lacrosse, field hockey and basketball. They also enjoyed going to the town pool and library. The children's school in Manhattan, the Ella Baker School, lacked similar athletic or after-school programs.

The court-appointed psychiatrist opined that the mother had a stronger emotional connection with the children, both of whom had never wavered in their desire to live with her on a full-time basis. He described her as the more "emotionally attuned and available parent." The father lacked a similar strong emotional connection with the children or an awareness of their educational and emotional struggles. It troubled him that the father seemed to be unaware that Winter was at risk of not being promoted to the seventh grade, even after receipt of a promotion in doubt letter from the school.

The psychiatrist noted a "lack of any significant employment history," apart from working for his father, suggesting "a measure of professional underachievement." He also observed the

father to have difficulties managing stress. He found his living situation to be "fluid," given the presence of his live-in-fiancee and newborn. The psychiatrist opined that the father "appeared to be somewhat knowledgeable about his children and their functioning, but not necessarily insightful about their emotional needs."

While faulting the mother for being "somewhat self-centered," the psychiatrist acknowledged that the mother was the primary attachment figure for the children. She appeared "to respect her children's uniqueness, seems dedicated to their care and knows them well." Further, she appeared to "perceive her children realistically, with respect to strengths and weaknesses, and strives to better their academic and social lives," and also "to be emotionally attuned to their needs most of the time."

Both children expressed a desire to live with their mother in Katonah, and both reported the prolonged court proceedings to be stressful. The children felt that the mother was better able to understand them and took things "in stride," whereas the father yelled at them or got mad. The attorney for the children supported the mother's petition for relocation based on her investigation, and interviews with the children, and the forensic evaluations.

The Referee found that the father had met his burden of showing a change of circumstances. The Referee criticized the mother for relocating several times, finding that she had violated provision 4.1 of the stipulation, which required her "to provide a stable environment for the continuing parenting of the children." Focusing primarily on her relocation to Colorado, the court accused her of making "executive decisions" without the father's consent. The Referee disregarded the children's wishes to remain with their mother, citing the "strong possibility that the mother was exerting pressure on the children to declare their allegiance to her." While acknowledging that the mother had a stronger emotional connection to the children, the court nonetheless determined that the children's best interests would be better served if they were in the physical custody of the father during the week.

We now reverse. The father failed to show a change of circumstances warranting awarding him primary physical custody. The father failed to demonstrate that he had the same degree of attention to the children's emotional, academic and social needs as the mother. The father seemed unaware of the severity of the older son's academic problems, even after receipt of a promotion in doubt letter from the school. Only in his interview with the

forensic evaluator did he appear to acknowledge that the child's progression to the next grade was in question.

The evidence showed that the father, an Ivy League graduate, has never had a meaningful career independent of his father's real estate business. The father's personal life is also in flux, having recently married the mother of his child. Should the children remain in Manhattan, they will have to share a two-bedroom apartment with the father, his wife, and the new baby.[11]

The evidence at the hearing demonstrated that the mother was the more competent parent and that she, not the father, was the "primary attachment" figure. The forensic evaluator emphasized that the children had a stronger emotional attachment to the mother and that she was more attuned to their needs. Throughout the proceedings, the children, now entering high school and middle school, have unequivocally stated that they want to live with their mother in Katonah and attend school there.

When the parents separated, the father relied on his wealthy family, while the mother – evicted by the paternal grandfather – took constructive steps to become financially independent and to provide for the children. The father had the luxury of

[11] The court is apprised post-hearing that the father has separated from the wife and that she has returned to France with the baby, indicating further instability.

maintaining the status quo; the mother had to scramble to find affordable housing. After a fruitless search for affordable housing in New York City, she settled in Katonah. The mother throughout maintained her focus on the children; the father began a new relationship and had a new child, introducing more instability into his children's lives. That relationship has now unraveled, leaving the children with another broken home and a half-sister living in France.

The Referee inappropriately focused on the mother's "transience" while overlooking the father's real shortcomings, the wishes of the children, and the fact that the mother's circumstances were precipitated by eviction from the former family home.

The Referee erred in not granting the mother's cross petition to relocate to Katonah. In determining a child's best interests, a court should give weight to all relevant factors, including each parent's reasons for seeking or opposing the move, the quality of the relationship between the child and the parents, the impact of the move on future contact with the noncustodial parent, and the degree to which the custodial parent's life may be enhanced economically, emotionally and

educationally by the move (*see Matter of Tropea v Tropea*, 87 NY2d 727 [1996]). These factors weight in favor of relocation. We note that the attorney for the children supported relocation based on her investigation and interviews with the children, and the forensic evaluation (*see Matter of Aruty v Mormando*, 70 AD3d 683 [2d Dept 2010]). The evidence showed the mother to be more attuned to the children's emotional and academic needs. The mother had sound reasons for relocating to Katonah and did so only after failing to find affordable housing in New York City. Katonah is 45 miles from the City and accessible via MetroNorth. The mother has exhibited a willingness to maintain a visitation schedule that preserves a positive and nurturing relationship between the children and their father. There is every reason to believe she will comply with liberal visits for the father, including increased summer and vacation time. Winter has just

finished middle school and Orion has just completed elementary school, enabling them to transition smoothly into the Katonah schools. We accordingly remand for determination of an appropriate visitation schedule.

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

700 The People of the State of New York, Ind. 4281/07
Respondent,

-against-

Amir Shabaan,
Defendant-Appellant.

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Labe M. Richman, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

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Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about May 1, 2015, which denied defendant's CPL 440.10 motion to vacate a 2008 judgment of conviction, unanimously affirmed.

Defendant argues that his counsel affirmatively misadvised him about the immigration consequences of his plea (*see People v McDonald*, 1 NY3d 109, 111 [2003]). However, neither counsel's statement that he would "do what he could to help" defendant with respect to defendant's stated desire to join the Army, nor counsel's request that the court issue a certificate of relief from disabilities to help defendant enlist despite his conviction, constituted an assurance or mistaken advice that defendant would not be deported as a consequence of his plea.

Defendant further argues that his attorney rendered ineffective assistance in the plea bargaining process, in that he failed to minimize the immigration consequences of the conviction by obtaining a plea to a drug felony based on the weight of the drugs rather than intent to sell. However, the submissions on the motion fail to establish any reasonable probability that the People would have made such an offer (*see Lafler v Cooper*, 566 US __, __, 132 S Ct 1376, 1384-1385 [2012]).

In any event, defendant has not established prejudice. There is no indication that but for his attorney's allegedly deficient performance, defendant would have proceeded to trial instead of pleading guilty (*see People v Hernandez*, 22 NY3d 972, 975-976 [2013]).

Defendant's claim that the court gave misleading advice concerning the immigration consequences of the plea (*see People v Peque*, 22 NY3d 168 [2013], *cert denied* 574 US __, 135 S Ct 90 [2014]) is not cognizable on a CPL article 440 motion (*see People v Llibre*, 125 AD3d 422, 423 [1st Dept 2015], *lv denied* 26 NY3d 969 [2015]). In any event, *Peque* is only retroactive to cases

pending on direct appeal, and not convictions that have become final (*id.* at 424).

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

702 In re Lawanna M., etc.,

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

William W.,
Respondent-Appellant,

The New York Foundling Hospital,
Petitioner-Respondent.

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

Daniel Gartenstein, Long Island City, for respondent.

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

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Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about September 10, 2014, which, upon a fact-finding determination that respondent permanently neglected his daughter, terminated his parental rights to the child and committed her care and custody to the New York City Children's Services and The New York Foundling Hospital for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence that the agency expended diligent efforts between May 2012 and February 14, 2014 to strengthen the parental

relationship by referring respondent to anger management and parenting skills programs and by sending him over 25 letters and/or emails asking him to engage in such services, while providing him with the assigned caseworker's contact information (*see Matter of Ebonee Annastasha F. [Crystal Arlene F.]*, 116 AD3d 576, 576-577 [1st Dept 2004], *lv denied* 23 NY3d 906 [2014]; Social Services Law § 384-b [7][a]).

The record also demonstrates that after the Family Court directed respondent to take additional anger management and parenting skills classes because it had witnessed him acting out in court, he refused to engage in those services during the relevant statutory period, even though the child was refusing to visit him because of his angry demeanor. The fact that respondent denied needing services rendered the agency's diligent efforts unavailing (*see Matter of Tiara J. [Anthony Lamont A.]*, 118 AD3d 545, 546 [1st Dept 2014]; *Matter of Kimberly C.*, 37 AD3d 192 [1st Dept 2007], *lv denied* 8 NY3d 813 [2007]).

In addition, clear and convincing evidence in the record demonstrates that respondent permanently neglected the child by failing to plan for her future, because during the relevant statutory period, he failed to take any steps toward correcting the conditions that prevented her from being placed in his care

or to advance a realistic, feasible plan for her future care (*see Matter of Jaileen X.M. [Annette M.]*, 111 AD3d 502, 503 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]; *Matter of Alpacheta C.*, 41 AD3d 285, 285 [1st Dept 2007], *lv denied* 9 NY3d 812 [2007]). Although respondent claims that the agency should have forced the child to engage in family therapy with him, he never addressed the fact that the child's therapist believed that such therapy would be harmful to her (*see Matter of Juanita H.*, 245 AD2d 89, 90 [1st Dept 1997], *lv denied* 91 NY2d 811 [1998]).

The Family Court properly declined to enter a suspended judgment because the child has lived in the foster home for most of her life, with her brother, who has already been adopted by the foster mother (*see Matter of Maryline A.*, 22 AD3d 227, 228 [1st Dept 2005]). The now sixteen-year-old child has also indicated that she felt unsafe around respondent and wants to be

adopted by the foster mother, who wants to adopt her (*see Matter of Nathaniel T.*, 67 NY2d 838, 841-842 [1986]).

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

703-
703A Index 307778/09

Abra Douayi,
Plaintiff-Respondent,

-against-

Charina A. Carissimi, C.N.M.,
Defendant-Appellant.

_____

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for appellant.

The Fitzgerald Law Firm, P.C., Yonkers (Mitchell Gittin of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered November 3, 2014, which, after a jury trial, awarded plaintiff Abra Douayi $200,000 for past emotional distress and $200,000 for future emotional distress, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about September 8, 2014, which denied the posttrial motion of defendant Charina A. Carissimi, C.N.M., to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

On June 23, 2008, plaintiff, who complained of decreased fetal movement at 38 weeks' gestation, was referred to defendant certified nurse midwife for a nonstress test to ascertain the

health of the fetus. After defendant performed the nonstress test, she found it to be "reactive," or normal, in that there were sufficient increases in the fetal heart rate (FHR) over a period of time. Three days later, on June 26, 2008, plaintiff delivered a stillborn infant with a "tightly wound" nuchal cord (the umbilical cord wrapped around the infant's neck).

At trial, plaintiff's expert opined that the nonstress test revealed that the FHR was not adequate, and that plaintiff should have been referred for, inter alia, additional monitoring. The expert asserted that had the mother been admitted to a hospital and undergone FHR monitoring, such testing would have detected signs of fetal distress, such as decreased fetal heartbeat and lack of variability, that could signal that a baby was deprived of oxygen, both of which were present on June 23, 2008. Further, had a physician been present, he or she could have performed an immediate cesarian section, and saved the baby.

No basis exists to disturb the verdict (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206-207 [1st Dept 2004]), "especially [as] resolution of the case turns on an evaluation of conflicting expert testimony" (*Leffler v Feld*, 79 AD3d 491, 491 [1st Dept 2010]).

The jury was entitled to resolve in plaintiff's favor the

conflict between the parties' experts' testimony with respect to what constituted a reactive nonstress test of the fetus (*see Rose v Conte*, 107 AD3d 481 [1st Dept 2013]). Thus, although defendant's expert reached a different conclusion concerning causation, the jury was free to accord more weight to the testimony of plaintiff's expert (*see Delgado v Murray*, 115 AD3d 417, 418 [1st Dept 2014]; *Torricelli v Pisacano*, 9 AD3d 291 [1st Dept 2004], *lv denied* 3 NY3d 612 [2004]).

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

704 The People of the State of New York, Ind. 1586/10
Respondent,

-against-

John Hook,
Defendant-Appellant.

_____

Leonard J. Levenson, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered September 26, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second drug felony offender, to a term of 5 years, unanimously affirmed.

The court properly found that defendant violated the no-arrest condition of his plea agreement, and thus forfeited the opportunity to have his conviction replaced by a misdemeanor conviction. There was a legitimate basis for the arrest (*see People v Outley*, 80 NY2d 702, 712-713 [1993]), notwithstanding that it resulted in an adjournment in contemplation of dismissal (*see People v Smith*, 248 AD2d 179 [1st Dept 1998], *lv denied* 91 NY2d 1013 [1998]). The prosecutor's statement indicated that

defendant was arrested for assaulting his wife with a hot iron in front of their young son. Defendant conceded his involvement in the incident, but claimed justification. The court had ample basis to reject that defense (*see e.g. People v Redwood*, 41 AD3d 275, 275 [1st Dept 2007], *lv denied* 9 NY3d 880 [2007]), and in any event defendant was not entitled to a minitrial on the issue of whether the evidence disproved justification (*see Outley*, 80 NY2d at 712-713). Under the circumstances, the court properly exercised its discretion in declining to conduct a more extensive hearing or to consider police and medical records, and any error in this regard was harmless.

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

705 LePatner & Associates, LLP, Index 650064/13
Plaintiff-Appellant,

-against-

Joseph Jaffe,
Defendant-Respondent.

_____

Tuttle Yick LLP, New York (Adam Zeidel of counsel), for appellant.

Levy, Tolman & Costello, LLP, New York (Robert J. Costello of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Nancy Bannon, J.), entered July 13, 2015, dismissing the complaint, awarding defendant judgment of his counterclaim, and, to the extent appealed from as limited by the briefs, bringing up for review so much of an order, same court and Justice, entered on or about May 27, 2015, which granted defendant's cross motion for summary judgment dismissing the complaint and for summary judgment on his counterclaim for unpaid compensation, and denied plaintiff's motion for leave to amend the complaint to add a claim for breach of fiduciary duty, unanimously reversed, on the law, without costs, defendant's motion for summary judgment dismissing plaintiff's claim for defendant's pro rata share of rent for office space and for summary judgment on his unpaid compensation

counterclaim denied, and, upon a search of the record, plaintiff is granted summary judgment dismissing that counterclaim.

The motion court erred in granting defendant summary judgment dismissing plaintiff's claim for defendant's share of rent. The agreement between the parties contained two contradictory statements, rendering it ambiguous. Even when considering extrinsic evidence, there is still an issue of fact as to what the parties intended when they entered into the agreement (*see GEM Holdco, LLC v Changing World Tech., L.P.*, 127 AD3d 598, 598-599 [1st Dept 2015]). Where, as here, plaintiff is a law firm and defendant is an experienced attorney, and the record demonstrates that both parties had a voice in the selection of the language in the agreement, the terms should not be construed against plaintiff, the drafter (*Citibank, N.A. v 666 Fifth Ave. Ltd. Partnership*, 2 AD3d 331, 331 [1st Dept 2003]).

Defendant waived enforcement of the salary provision of the parties' agreement by continuing to work for plaintiff for seven months after the reduction of his salary (*Taylor v Blaylock & Partners*, 240 AD2d 289, 290 [1st Dept 1997]).

The motion court correctly granted defendant's motion for summary judgment dismissing plaintiff's second cause of action, purportedly for breach of fiduciary duty, and properly denied

plaintiff leave to amend that claim. Aside from defendant's title and the fact that he apparently received a K-1, rather than a W-2, plaintiff was unable to provide any other evidence supporting its position that defendant was a partner in plaintiff law firm (*see Brodsky v Stadlen*, 138 AD2d 662, 663 [2d Dept 1988]). Accordingly, defendant did not owe plaintiff a fiduciary duty.

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

706-
707 The People of the State of New York,
Respondent,

-against-

Bobby Lango,
Defendant-Appellant.

Ind. 3447/00

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

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

Judgment of resentence, Supreme Court, New York County (Patricia Nunez, J.), rendered September 13, 2012, as amended September 14, 2012, resentencing defendant to concurrent terms of 25 years to life and 25 years, without any period of postrelease supervision, unanimously affirmed.

Defendant's current appeal "from a resentence following an order vacating the original sentence" (CPL 450.30[3]) does not bring up for review his present challenge to the voluntariness of his guilty plea (*see* CPL 450.30[1]; *People v Jordan*, 16 NY3d 845, 846 [2011]). In any event, that challenge is without merit, because at the time of his plea, defendant was clearly advised

that his aggregate sentence would be 25 years to life (*see People v Ferrell*, 76 AD3d 938 [1st Dept 2010], *lv denied* 15 NY3d 952 [2010]).

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

708 Curtis M. Stewart, Index 260685/13
Plaintiff-Appellant,

-against-

ARC Development LLC, et al.,
Defendants-Respondents.

_____

Curtis M. Stewart, appellant pro se.

Stecklow & Thompson, New York (David A. Thompson of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered August 22, 2014, which, in this action alleging race-based discrimination in housing, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff previously filed a complaint with the New York State Division of Human Rights (DHR), which was dismissed upon a finding of "no probable cause." Therefore, the subject complaint is barred by the election of remedies provision contained in Executive Law § 297(9) (*see Matter of East Riv. Hous. Corp. v New York State Div. of Human Rights*, 116 AD3d 562 [1st Dept 2014]; *Wrenn v Verizon*, 106 AD3d 995 [2d Dept 2013]).

Plaintiff argues that this action is not barred by the election of remedies provision, because it is actually a timely

appeal from the DHR determination. However, plaintiff did not file a notice of petition seeking reversal of the DHR determination within 60 days of the determination (*see* Executive Law § 298; *Matter of Jackson v N.Y.S. Div. of Human Rights*, 69 AD3d 501 [1st Dept 2010]). Moreover, to the extent he did file papers within the 60-day period, those papers failed to name DHR, which is a necessary party to such an appeal (*see* Executive Law § 298; 22 NYCRR 202.57[a]; *Matter of Jiggetts v MTA Metro-N. R.R.*, 121 AD3d 414, 415 [1st Dept 2014]), and there is no showing that those papers were ever served on any party. "A pro se litigant acquires no greater rights than those of any other litigant and cannot use such status to deprive defendant of the same rights as other defendants" (*Brooks v Inn at Saratoga Assn.*, 188 AD2d 921, 921 [3d Dept 1992]; *see Goldmark v Keystone & Grading Corp.*, 226 AD2d 143, 144 [1st Dept 1996]). Thus, the complaint and other

filed papers cannot be construed as a timely or effective appeal from the DHR determination.

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: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

711-
711A Index 20837/98

Anthony J. DeCintio, etc., et al.,
Plaintiffs-Appellants,

-against-

Lawrence Hospital, et al.,
Defendants,

Robert Roe, M.D., et al.,
Defendants-Respondents.

_____

Anthony J. DeCintio, Tuckahoe, appellant pro se and for Anthony Vincent DeCintio, appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Murphy of counsel), for Robert Roe, M.D., respondent.

Marulli, Lindenbaum & Tomaszewski, LLP, New York (Richard O. Mannarino of counsel), for Ronald Silverman, M.D., respondent.

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Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered June 5, 2014, dismissing the action against defendant Robert Roe, M.D., unanimously affirmed, without costs. Order, same court and Justice, entered May 16, 2014, which, upon reargument and renewal, granted defendants-respondents' separate motions for summary judgment dismissing the complaint against them, unanimously affirmed as to defendant Ronald Silverman, M.D., and the appeal from the order otherwise dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court properly granted renewal and reargument (*see* CPLR 2221[d], [e]), and, upon renewal and reargument, correctly granted defendants' motions for summary judgment. Defendants made a prima facie showing of their entitlement to judgment as a matter of law, by submitting expert affidavits stating that they appropriately diagnosed decedent based on her symptoms and that their treatment was not the proximate cause of her injuries (*Mignoli v Oyugi*, 82 AD3d 443, 444 [1st Dept 2011]). As this Court held with respect to nearly identical affidavits submitted by plaintiffs in opposition to the motions of the other defendants in this action, the expert affidavits that plaintiffs submitted in opposition to defendants' motions were conclusory and failed to raise a triable issue of fact (25 AD3d 320 [1st Dept 2006]; 33 AD3d 329 [1st Dept 2006]; 55 AD3d 407 [1st Dept 2008]).

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

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

713-
713A Index 652316/12

Arkin Kaplan Rice LLP, et al.,
Plaintiffs-Appellants,

-against-

Howard J. Kaplan, et al.,
Defendants-Respondents,

Arkin Kaplan Rice LLP, a dissolved firm,
Nominal Defendant.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Michael J. Bowe of counsel), for appellants.

Allegaert Berger & Vogel LLP, New York (Christopher Allegaert of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered January 29, 2015 and January 30, 2015, which, to the extent appealed from, denied plaintiffs' motion for partial summary judgment and granted summary judgment to defendants to the extent of determining that defendants Kaplan and Rice were equity partners in plaintiff Arkin Kaplan Rice LLP (AKR), a dissolved firm, and dismissing all causes of action except the cause of action for an accounting, unanimously affirmed, with costs.

In an earlier appeal in this case, we concluded that defendants Kaplan and Rice were partners of AKR pursuant to

section 71 of the Partnership Law, but that they were not liable for any post-dissolution liabilities, including as partners of AKR, under the specific language of the sublease at issue (*Arkin Kaplan Rice LLP v Kaplan*, 120 AD3d 422 [1st Dept 2014]). The IAS Court correctly determined that this decision, premised on the fundamental understanding that Kaplan and Rice were in fact equity partners of AKR, is law of the case, and is not subject to review (*Kenney v City of New York*, 74 AD3d 630 [1st Dept 2010]).

The IAS Court also properly dismissed the remainder of plaintiffs' claims based on the well-established principle that one partner may not sue another partner until a partnership accounting is concluded, except where "the alleged wrong involves a partnership transaction which can be determined without an examination of the partnership accounts" (*Travelers Ins. Co. v Meyer*, 267 AD2d 124, 125 [1st Dept 1999]). Plaintiffs have

failed to show that this exception applies.

We have considered plaintiffs' remaining arguments and defendants' request for sanctions, and find them unavailing.

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

ENTERED: APRIL 5, 2016

CLERK

CORRECTED ORDER - April 19, 2016

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

714-
714A-
714B-
714C-
714D-
714E

Index 104180/10
590892/10

Michael Gardner, et al.,
Plaintiffs-Respondents,

-against-

Tishman Construction Corporation, et al.,
Defendants-Respondents,

Rolyn Companies, Inc.,
Defendant-Respondent-Appellant,

Degmor, Inc.,
Defendant-Appellant.

- - - - -

Tishman Construction Corporation, et al.,
Third-Party Plaintiffs-Respondents,

-against-

E.J. Electric Installation Company, et al.,
Third-Party Defendants-Respondents-Appellants,

Degmor, Inc.,
Third-Party Defendant-Appellant.

- - - - -

[And a Second Third Party Action]

- - - - -

Rolyn Companies, Inc.,
Third Third-Party Plaintiff-Respondent-Appellant,

-against-

Prince Carpentry, Inc.,
Third Third-Party Defendant-Respondent.

- - - - -

Rolyn Companies, Inc.,
Fourth Third-Party Plaintiff-Respondent-Appellant,

-against-

Degmor, Inc.,
Fourth Third-Party Defendant-Appellant,

American International Specialty Lines Insurance Company,
Fourth Third-Party Defendant.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellant.

Lawrence, Worden, Rainis & Bard, P.C., Melville (Leslie McHugh of counsel), for Rolyn Companies, Inc., respondent-appellant.

Faust, Goetz, Schenker & Blee LLP, New York (Lisa DeLindsay of counsel), for E.J. Electric Installation Company, respondent-appellant.

Worby Groner Edelman, LLP, White Plains (Michael G. Del Vecchio of counsel), for Michael Gardner and Christine Gardner, respondents.

McGaw, Alventosa & Zajac, Jericho (Joseph Horowitz of counsel), for Tishman Construction Corporation, Tishman Construction Corporation of Manhattan, Tishman Construction Corporation of New York, 53rd Street and Madison Tower Development, LLC, and Prince Carpentry, Inc., respondents.

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Orders, Supreme Court, New York County (Anil C. Singh, J.), entered December 5, 2014, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Tishman Construction Corporation of New York (Tishman) and 53rd Street

and Madison Tower Development LLC (Madison) for summary judgment dismissing the complaint and all cross claims and counterclaims against them, granted them summary judgment against Degmor, Inc. (Degmor) on their claims of common law and contractual indemnity, and granted them summary judgment on their claim of contractual indemnity against third party defendant E.J. Electric Company (EJ); denied the motion of Degmor for summary judgment dismissing the complaint and all cross claims and third-party claims against it; granted summary judgment in favor of plaintiffs on their claims of common law negligence and Labor Law § 200 as against Degmor; granted the motion of third-party defendant Prince Carpentry (Prince) dismissing all claims against it; granted the motion of defendant Rolyn Companies, Inc. (Rolyn) for summary judgment on its claim of contractual indemnity against Degmor; and granted the motion of EJ on its claim for common law indemnification against Degmor, unanimously modified, on the law, to reinstate plaintiffs' claims of common law negligence and Labor Law § 200 and all cross claims and counterclaims against Tishman and Madison; deny plaintiffs' motion for summary judgment against Degmor premised upon Labor Law § 200; deny Tishman and Madison summary judgment on their claims of common law and contractual indemnity against Degmor; deny Rolyn's motion for

summary judgment on its claim for **contractual** indemnity against Degmor, and dismiss that claim; deny Tishman and Madison's motion for summary judgment on their contractual claims against EJ; and otherwise affirmed, without costs.

Questions of fact exist rendering summary resolution of plaintiffs' claims of common law negligence and Labor Law § 200 against Tishman and Madison inappropriate. Here, liability may be found against Tishman as the entity that coordinated, supervised and controlled the covering of holes created by subcontractors, since it was a failure of that activity that led to a hole being covered with plastic prior to being rendered safe with a plywood cover. Where a general contractor is responsible for coordination, and an accident occurs as a result of a lack of coordination, liability may be found (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352-353 [1998]). Tishman and Madison also failed to make out their prima facie burden with affirmative evidence that they were not on notice of the condition (*see Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 148-149 [1st Dept 2010]); *compare Canning v Barneys N.Y.*, 289 AD2d 32 [1st Dept 2001]).

The court erred in granting plaintiffs summary judgment against Degmor as to Labor Law § 200, since no such claim was

pled against Degmor. The court was correct, however, that summary judgment was appropriate as to plaintiffs' common law negligence claim against Degmor. While no one from Degmor admitted to sheeting and taping the hole in question before a plywood cover had been created, Degmor was the only contractor on site that performed such work, since it was necessary to its work (*see Caraballo v Paris Maintenance Co.*, 2 AD3d 275, 276 [1st Dept 2003]). And the court correctly dismissed plaintiffs' claims as against Prince, the carpentry contractor, since that entity had no affirmative duty to cover holes created by other subcontractors on site, and only did so at the direction of Tishman.

Since questions of fact exist regarding the negligence of Tishman, it is not entitled to summary judgment on its common law and contractual indemnity claims against Degmor, or its contractual indemnity claim against EJ. Tishman and Rolyn are incorrect in their contention that the contract between Rolyn and Degmor contains a "savings clause" that would permit partial indemnity in their favor (*see Dutton v Pankow Bldrs.*, 296 AD2d 321 [1st Dept 2002], *lv denied* 99 NY2d 511 (2003); *see also Hernandez v Argo Corp.*, 95 AD3d 782, 783-784 [1st Dept 2012]). And inasmuch as Rolyn was found negligent by the motion court, a

determination it does not appeal, it is not entitled to contractual indemnity against Degmor, and that claim must be dismissed.

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

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

715 & M-938 — Peter Davey, Plaintiff-Appellant, — Index 100500/13

-against-

Jones Hirsch Connors & Bull P.C., Defendant-Respondent.

_____

Peter Davey, appellant pro se.

Marshall Dennehey Warner Coleman & Goggin, New York (Richard C. Imbrogno of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered December 22, 2014, which effectively granted plaintiff's motion to reargue, and, upon reargument, adhered to the order, same court (Louis B. York, J.), entered March 7, 2014, which had granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Although the court on the reargument motion stated that reargument was denied, the court addressed the merits of the motion, and thus effectively granted reargument, rendering the order appealable (*see Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 484 [1st Dept 2015]). On reargument, the motion court properly adhered to the original determination, which had dismissed the complaint on res judicata and/or

collateral estoppel grounds, since plaintiff's claims against defendant had already been litigated and decided on the merits in federal court (*see e.g. Davey v Jones*, 2008 US Dist LEXIS 99828, 2008 WL 5061631 [SD NY, Dec. 1, 2008, 06-Civ-4206(DC)], *affd* 371 Fed Appx 146, 148-149 [2d Cir 2010]; *see Matter of Josey v Goord*, 9 NY3d 386, 389-390 [2007]; *see also Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]; *see also Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]).

M-938 - *Davey v Jones Hirsch Connors & Bull P.C.*

Motion to strike brief and for other relief denied.

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

716 The People of the State of New York, Ind. 5251/11
Respondent,

-against-

Gregory Velez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered September 30, 2014, convicting defendant, upon his plea of guilty, of murder in the first degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

Defendant's challenges to his plea are unpreserved, and they do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]). We decline to review these claims in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently and voluntarily made, notwithstanding any deficiencies in the plea colloquy, including the lack of reference to the right against

self-incrimination (*see People v Tyrell*, 22 NY3d 359, 365 [2013]; *People v Harris*, 61 NY2d 9, 16-19 [1983]). Furthermore, there was nothing in defendant's allocution itself that cast doubt on his guilt. Accordingly, the court was not required to inquire into statements defendant made on other occasions (*see e.g. People v Fiallo*, 6 AD3d 176, 177 [1st Dept 2004], *lv denied* 3 NY3d 640 [2004]).

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

717 Citimortgage, Inc., Index 382451/09
Plaintiff-Respondent,

-against-

George Dulgeroff, et al.,
Defendants,

Board of Managers of the Parkchester South Condominium,
Defendant Respondent,

Citibank (South Dakota) N.A., et al.,
Defendants,

West Fork Capital Equities, LLC,
Nonparty Appellant.

_____

Law Offices of Thomas J. Finn, Forest Hills (Thomas J. Finn of counsel), for appellant.

Akerman LLP, New York (Jordan M. Smith of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 13, 2014, which denied nonparty West Fork Capital Equities, LLC's motion to intervene and to vacate the default judgment of foreclosure, unanimously affirmed, without costs.

Contrary to the motion court's ruling, West Fork's failure to attach the judgment of foreclosure to its motion to intervene and to vacate the judgment is not a fatal defect. At most, the

court should have directed West Fork to supplement or resubmit its papers (*see Sea Trade Mar. Corp. v Coutsodontis*, 111 AD3d 483, 486 [1st Dept 2013]). However, contrary to West Fork's argument, the order on appeal need not be vacated for failure to recite the papers on which it is based (*see Singer v Board of Educ. of City of N.Y.*, 97 AD2d 507 [2d Dept 1983]).

On the merits, plaintiff is correct that the fact that West Fork obtained its interest in the property after plaintiff had filed notice of pendency bound West Fork to the outcome of the foreclosure action (*see* CPLR 6501; *2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158, 161 [1st Dept 2008], *lv denied* 11 NY3d 716 [2009]). However, that alone would not definitively bar West Fork from intervening (*see Westchester Fed. Sav. & Loan Assn. v H.E.W. Constr. Corp.*, 29 AD2d 670 [2d Dept 1968], *lv denied* 21 NY2d 646 [1968]). Nor is intervention barred by the fact that the motion was made post-judgment (*see Martinez v Estate of Carney*, 129 AD3d 607 [1st Dept 2015]).

Nevertheless, we affirm the denial of West Fork's motion, because there is nothing in the record that indicates that leaving the judgment standing would result in any injustice (*see Amalgamated Bank v Helmsley-Spear, Inc.*, 25 NY3d 1098 [2015]). There was no fraud or collusion among the parties. Indeed, West

Fork was on notice all along by virtue of the notice of pendency that its interest could be extinguished in the foreclosure action (*see 2386 Creston Ave. Realty*, 58 AD3d at 161). Its failure to intervene earlier, while on notice that its rights were at stake, undermines any claim of injustice.

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

ENTERED: APRIL 5, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

720 The People of the State of New York, Ind. 4296/08
Respondent,

-against-

Julius Brown,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered April 30, 2012,

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

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

ENTERED: APRIL 5, 2016

CLERK

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

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

721N James Caminero, Index 25495/14
Plaintiff-Appellant,

-against-

Go Airborne, LLC doing business as
Bounce Trampoline Sports,
Defendant-Respondent.

Alpert, Slobin & Rubenstein, LLP, Bronx (Morton Alpert of counsel), for appellant.

Hannum Feretic Prendergast & Merlino, LLC, New York (Christopher A. South of counsel), for respondent.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered June 24, 2015, which granted defendant's motion to change venue from Bronx County to Rockland County, unanimously reversed, on the law, without costs, the motion denied, and the action retained in Bronx County.

Plaintiff established, via his affidavit and supporting documentation, that he resided in Bronx County at the time that the action was commenced in November 2014, thereby making venue properly placed there (*see* CPLR 503[a]; *Leetom v Bell*, 68 AD3d 532 [1st Dept 2009]). The only evidence of plaintiff's residency elsewhere is a hospital record from October 2013, at a time when he attended a residential school in Rockland County. However,

plaintiff graduated from that school in June 2014.

Plaintiff's failure to respond to defendant's written demand for a change of venue, pursuant to CPLR 511(b), did not preclude him from contesting the merits of defendant's motion (*see e.g. McDermott v McDermott*, 267 Appellant Div 171, 172-173 [1st Dept 1943]).

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

722 The People of the State of New York, Ind. 4238/10
Respondent,

-against-

Devin T. Burley,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel) and Debevoise & Plimpton LLP, New York (Jarrod L. Schaeffer of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), rendered February 11, 2014, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fourth degree, and sentencing him to a term of five years' probation, unanimously reversed, on the law, and the matter remanded for a new trial.

Reversal is unavoidable, because the file contains a jury note, making a substantive legal inquiry, that was marked as an exhibit but not referred to on the record in any manner. There is no evidence that it was revealed to counsel, or that the court gave the jury any response (*see People v Silva*, 24 NY3d 294, 300 [2015]). Accordingly, the record does not show that the court

fulfilled its "core responsibility" of giving counsel "meaningful notice" of the contents of the note, and of providing a "meaningful response" to the jury (*People v Kisoon*, 8 NY3d 129, 134 [2007]).

Since a new trial is required, we find it unnecessary to reach any other issues (*see People v Evans*, 94 NY2d 499, 504-505 [2000]).

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

724 In re Kadiza D.,

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

Saaniel T.,
Respondent-Appellant,

-against-

Abbott House,
Petitioner-Respondent.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

John R. Eyerman, New York, for respondent.

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

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Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about March 6, 2015, which, to the extent appealed from as limited by the briefs, found that respondent mother had permanently neglected the subject child, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). The record shows that petitioner agency exercised diligent efforts to encourage and strengthen the parental relationship by, among

other things, encouraging visitation with the subject child and referring the mother for parenting skills and mental health services (*see* § 384-b[7][f]; *Matter of O. Children*, 128 AD2d 460, 463-464 [1st Dept 1987]). The mother's failure to cooperate is not the fault of the agency, as it is not a guarantor of the mother's success (*see Matter of Imani Elizabeth W.*, 56 AD3d 318,319 [1st Dept 2008]).

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

726-
727 Index 161695/13

Joseph Collins,
Plaintiff-Appellant,

-against-

Martin P. Unger, Esq., et al.,
Defendants-Respondents,

Certilman Balin Adler & Hyman, LLP,
et al.,
Defendants.

_____

Bailey & Sherman, P.C., Douglaston (Edward G. Bailey of counsel), for appellant.

Blank Rome LLP, New York (Richard V. Singleton of counsel), for Blank Rome LLP, respondent.

Martin P. Unger, Garden City, respondent pro se.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about October 8, 2014, which, insofar as appealed from as limited by the briefs, granted defendants Martin P. Unger's and Blank Rome, LLP's motions to dismiss the complaint as against them pursuant to CPLR 3211, and order, same court and Justice, entered on or about December 22, 2014, which granted Blank Rome's motion to dismiss the complaint as against it, unanimously affirmed, without costs.

The legal claims are time-barred (*see e.g. Chelsea Piers*

L.P. v Hudson Riv. Park Trust, 106 AD3d 410, 412 [1st Dept 2013] ["a breach of contract cause of action accrues at the time of the breach, even if no damage occurs until later" (internal quotation marks omitted)]; *Sanchez de Hernandez v Bank of Nova Scotia*, 76 AD3d 929, 930 [1st Dept 2010] [there was no "affirmative breach that occurred within the limitations period"], *lv denied* 16 NY3d 705 [2011]), and the equitable claim for an accounting is barred by laches (*see Matter of Linker*, 23 AD3d 186 [1st Dept 2005]).

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

728 The People of the State of New York, Ind. 2906/08
Respondent,

-against-

Anibal Joaquin,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (James M. Kindler, J.), rendered May 23, 2011, convicting defendant, after a jury trial, of attempted murder in the second degree and robbery in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court properly exercised its discretion when it declined to conduct an inquiry into whether jurors had engaged in premature deliberations, and we note that the court repeatedly reminded the jury that such deliberations are not permitted (*see People v Mejias*, 21 NY3d 73, 79 [2013]). The application for an inquiry was based on two jurors' alleged body language, which was observed by defense counsel but not the court, and from which the inference of premature deliberations was speculative in any

event.

The particular portion of the prosecutor's summation to which defendant objected on the ground of "denigrating the defense" was generally responsive to defendant's summation, and does not warrant reversal. Defendant's remaining challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we similarly find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Any improprieties were harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

729 Metropolitan Bridge & Scaffolds Corp., Index 653507/13
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

David I. Farber, New York (Lauren L. Esposito of counsel), for appellant.

Eric W. Gentino, Saratoga Springs, for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 28, 2014, which, to the extent appealed from, denied defendant's motion to dismiss the second and fourth causes of action insofar as they sought payment for extra maintenance work and in quantum meruit, unanimously reversed, on the law, without costs, and the motion granted.

The contractual notice of claim requirement in section 23 of the contract's General Conditions is an express condition precedent to recovery and provides that claims are waived by the

contractor's failure to submit a sufficient notice (*see Hi-Tech Constr. & Mgt. Servs. Inc. v Housing Auth. of the City of N.Y.*, 125 AD3d 542 [1st Dept 2015], *lv denied* 26 NY3d 908 [2015]; *Promo-Pro Ltd. v Lehrer McGovern Bovis, Inc.*, 306 AD2d 221, 222 [1st Dept 2003], *lv denied* 100 NY2d 628 [2003]). Plaintiff's notices of claim seeking payment for "maintenance costs (Done under protest)" were insufficient as notices that the basis of plaintiff's claim was to recover for the removal of garbage thrown by the tenants onto plaintiff's sheds. Furthermore, to allow the same claim to be pleaded in quantum meruit would undermine the notice of claim requirement.

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

730 In re Patricia Gill, Index 400856/14
Petitioner-Appellant,

-against-

Mercy College, et al.,
Respondents-Respondents.

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Patricia Gill, appellant pro se.

Locke Lord LLP, New York (Kara M. Cormier of counsel), for Mercy College, Evan Imber-Black, Michael Sperling, Lois Wims, Kimberly Cline, Shelly Akin and Deirdre Whitmab, respondents.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for the City of New York Commission on Human Rights, respondent.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered February 24, 2015, denying the petition to reverse a determination of respondent City of New York Commission on Human Rights (NYCHR), dated March 27, 2014, which dismissed petitioner's complaint against respondent Mercy College and several of its administrators and employees, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

As the article 78 court found, petitioner failed to exhaust her administrative remedies (*see* CPLR 7801[1]; *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). NYCHR's

Determination and Order after Investigation is a non-final order; petitioner's failure to apply to the Chairperson for review of the dismissal of her complaint within 30 days of service of notice thereof (Administrative Code of City of NY § 8-113[f]) bars her from litigating the dismissal in a court of law (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d at 57; *Koch v New York State Div. of Human Rights*, 84 AD2d 520 [1st Dept 1981], *affd* 55 NY2d 864 [1982]). Moreover, judicial review would in any event be time-barred, because this proceeding was brought more than 30 days after service of the determination (*see* Administrative Code § 8-123[h]). Petitioner's ignorance of the statute of limitations does not excuse her untimeliness (*see generally Harris v City of New York*, 297 AD2d 473 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]; *see Matter of Okoumou v Community Agency for Senior Citizens, Inc.*, 17 Misc 3d 827, 833 [Sup Ct, Richmond County 2007]).

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: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

731 JPMorgan Chase Funding Inc., Index 151693/13
Plaintiff-Appellant-Respondent,

-against-

William D. Cohan,
Defendant-Respondent-Appellant.

_____

Levi Lubarsky Feigenbaum & Weiss LLP, New York (Howard B. Levi of counsel), for appellant-respondent.

Liddle & Robinson, L.L.P., New York (Blaine H. Bortnick of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 31, 2015, which denied plaintiff's motion for summary judgment on the second, third, fourth and fifth causes of action and dismissing defendant's amended counterclaim, and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant defendant's motion as to the first and fifth causes of action, and otherwise affirmed, without costs.

The evidence presented by plaintiff on its second motion for summary judgment was not new, and plaintiff demonstrated no other sufficient cause for making the second motion (*see Brown Harris Stevens Westhampton LLC v Gerber*, 107 AD3d 526 [1st Dept 2013]).

Since plaintiff failed to establish that there was an

express contract, or to raise an issue of fact as to the existence of an express contract, the first cause of action, alleging breach of contract, must be dismissed. The fifth cause of action, for account stated, should also be dismissed, as time-barred.

Issues of fact preclude summary judgment in either party's favor on the second, third and fourth causes of action, alleging implied-in-fact contract, money lent, and unjust enrichment, and on defendant's amended counterclaim for an accounting.

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

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

732 Retail Advisors Inc., Index 650779/13
Plaintiff-Appellant,

-against-

SLG 625 Lessee LLC, et al.,
Defendants-Respondents.

_____

Law Office of Lionel A. Barasch, New York (Lionel A. Barasch of counsel), for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered February 24, 2015, which granted defendants SLG 625 Lessee LLC and Fratelli Rossetti New York Ltd.'s motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Despite the contention of plaintiff, Retail Advisors Inc. (RAI), that it represented defendant Rossetti exclusively with respect to a lease renewal transaction, there was no agreement in place between these parties. Without such a contract, RAI's second cause of action, for breach of contract against Rossetti, fails, as does RAI's third cause of action, against SLG for tortiously inducing Rossetti to commit such a breach (*see NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]).

RAI's fourth cause of action, for tortious interference with prospective business relations, also fails because RAI cannot establish that Rossetti would have negotiated its 2012 lease renewal using RAI's services "but for [SLG's] wrongful conduct" (*Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002]), based on Rossetti's frustration with how RAI had handled the failed 2010 through 2011 negotiations, and RAI's admitted mistakes in dealing with SLG.

RAI is not entitled to recover a co-brokerage commission under a theory of unjust enrichment (fifth cause of action), since its efforts were not successful at the time negotiations ceased, and SLG and Rossetti did not begin to speak again until one year after those negotiations reached an impasse (*see Rosenhaus Real Estate, LLC v S.A.C. Capital Mgt., Inc.*, 121 AD3d 409, 410 [1st Dept 2014]; *Helmsley-Spear, Inc. v 150 Broadway N.Y. Assoc.*, 251 AD2d 185, 186 [1st Dept 1998]).

RAI's argument that it was entitled to a commission based on a "special" contract or agreement (first cause of action) in which SLG supposedly agreed to pay RAI a commission regardless of the April 2011 impasse in negotiations also fails, as plaintiff failed to present any evidence that the parties intended a brokerage agreement to be a "special agreement" which would

entitle plaintiff to a commission even if it were not the procuring cause of the tenancy (*Kenneth D. Laub & Co. v 101 Park Ave. Assoc.*, 162 AD2d 294, 295 [1st Dept 1990] [citation omitted]). Although the unsigned brokerage agreement referenced the pending negotiations, which, like the negotiations in *SPRE Realty, Ltd. v Dienst* (119 AD3d 93, 96 [1st Dept 2014]) ultimately failed, here, plaintiff also rejected the unsigned agreement on the basis of its reduced commission. Accordingly, there was no agreement in place when defendants negotiated their lease renewal without any brokers over one year later.

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

733 In re Celene M.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Damion K. L. Stodola of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about December 17, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of assault in the third degree and menacing in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility. There was ample evidence to establish the element of physical injury (*see e.g. People v Mullings*, 105 AD3d 407 [1st Dept 2013] *lv denied* 21 NY3d 945 [2105]). We have

considered and rejected appellant's arguments concerning the menacing charge, including her challenge to the sufficiency of that count of the petition (*see Matter of Orenzo H.*, 33 AD3d 492, 493 [1st Dept 2006]).

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

734 The People of the State of New York, Ind. 4517/08
Respondent,

-against-

Hector Matos,
Defendant-Appellant.

_____

Cardozo Criminal Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Hector Matos, appellant pro se.

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

_____

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered February 25, 2013, convicting defendant, after a jury trial, of manslaughter in the first degree and criminal possession of a weapon in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 22 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY2d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence disproved defendant's justification defense beyond a reasonable doubt.

Defendant was not entitled to an adverse inference charge

with respect to surveillance video footage of the moments after the shooting, which the police did not copy from the recording system of the building where the crime occurred. "The People have no constitutional or statutory duty to acquire, or prevent the destruction of, evidence generated and possessed by private parties" (*People v Banks*, 2 AD3d 226, 226 [1st Dept 2003], *lv denied* 2 NY3d 737 [2004]), and "[t]he fact that a police officer viewed the [video recording] did not place it within the People's constructive possession or control" (*People v Turner*, 118 AD3d 463, 463 [1st Dept 2014], *lv denied* 23 NY3d 1068 [2014]). In any event, without resort to speculation, "there is no indication that there was anything exculpatory on the tape" (*Banks*, 2 AD3d at 226).

Defendant has not established that a "significant" portion of the trial minutes have been lost (*see People v Parris*, 4 NY3d 41, 44 [2004]). Although the minutes for one day of jury selection are missing, the record indicates that those minutes only involve sworn and prospective jurors who were excused by the court when it granted defendant's application to start jury selection over again. Accordingly, there is no need for a reconstruction hearing.

Defendant's pro se ineffective assistance of counsel claims

may not be addressed on direct appeal because they involve matters outside the record (*see People v Love*, 57 NY2d 998 [1982]).

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

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

735 Roberta Voss, Index 300883/11
Plaintiff-Appellant,

-against-

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

_____

Frank J. Laine, P.C., Plainview (Frank Braunstein of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about August 18, 2014, which, to the extent appealed from as limited by the briefs, granted defendant City's motion for summary judgment dismissing as against it the causes of action for common-law negligence and violations of the Labor Law and the Penal Law, unanimously affirmed, without costs.

Plaintiff's common-law negligence claim is barred by the so-called "Firefighter Rule," because she was injured by a fellow officer during the performance of police duties (*see* General Obligations Law § 11-106). Plaintiff had not yet completed her tour of duty, and was waiting in the precinct muster room to return her radio, when the other officer grabbed her from behind

and allegedly demonstrated a take-down maneuver (*see Ferriolo v City of New York*, 72 AD3d 490 [1st Dept 2010], *lv denied* 15 NY3d 702 [2010]).

Because it is asserted against her employer (and her fellow officer), plaintiff's common-law negligence claim can only be based on the statutory right of action in General Municipal Law § 205-e (*Williams v City of New York*, 2 NY3d 352, 363 [2004]). Although a § 205-e claim may be predicated upon a violation of Labor Law § 27-a (*Gammons v City of New York*, 24 NY3d 562 [2014]), we conclude that plaintiff's injury is not the type of workplace injury contemplated by Labor Law § 27-a (*see id.* at 573; *Williams*, 2 NY3d at 368). With respect to the alleged Penal Law violations, there is no evidence that any criminal charges were brought against the fellow officer, and plaintiff offered no evidence that the officer's conduct was intentional, criminally reckless, or criminally negligent, so as to rebut the presumption

that the Penal Law was not violated (*see Williams*, 23 NY3d at 366-367).

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: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

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

-against-

Nicholas Vincenty, Defendant-Appellant.

Ind. 3031/11

Richard M. Greenberg, Office of the Appellate Defender, New York and Petrillo Klein & Boxer LLP, New York (Mirah E. Curzer of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at hearing; Juan Merchan, J. at jury trial and sentencing), rendered May 30, 2012, convicting defendant of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 11 years, unanimously affirmed.

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]). Defendant asserts that his counsel's admission of ethnic bias in attempting to exercise a peremptory strike resulted in the seating of a potentially unfavorable juror and the subsequent grant of the

People's reverse-*Batson* application allowing for the seating of a second potentially unfavorable juror. Initially, we note that in the absence of a showing of ineffective assistance, a defendant is not aggrieved by his or her own attorney's discriminatory use of peremptory challenges (*People v Garcia*, 298 AD2d 107 [1st Dept 2002], *lv denied* 99 NY2d 558 [2002]). Although counsel should have avoided ethnic bias, defendant has not shown that counsel's actions resulted in the seating of any unfair or otherwise unqualified jurors (*see Morales v Greiner*, 273 F Supp 2d 236, 253 [ED NY 2003]). Defendant's claim that a different course of action in jury selection might have resulted in a jury more favorable to the defense is speculative, and would in any event not be sufficient to satisfy the prejudice requirement under the state and federal standards.

Defendant did not preserve his challenge to the procedures by which the court handled the reverse-*Batson* application (*see e.g. People v Meyes*, 112 AD3d 516, 516-517 [1st Dept 2013], *lv denied* 23 NY3d 965 [2014]), and we decline to review it in the interest of justice. As an alternative holding, we find that the court fairly evaluated the People's claim that defense counsel had again exercised a peremptory challenge for the same ethnically-biased reason as in the first instance. The court's

finding of pretext, which is supported by the record and based primarily on its assessment of counsel's credibility, is entitled to great deference (*see id.*).

The motion court properly denied defendant's motion to suppress showup identifications. The prompt showup, conducted near the scene of the crime and as part of an unbroken chain of fast-paced events, was not unduly suggestive, and the manner in which the showup was conducted was justified by the exigencies of the case (*see People v Williams*, 87 AD3d 938 [1st Dept 2011], *lv denied* 18 NY3d 863 [2011]). While the better practice, when feasible, is not to conduct a showup before multiple witnesses (*see People v Love*, 57 NY2d 1023, 1024 [1982]), here the officer transporting two witnesses unexpectedly came upon a scene where private security guards were holding defendant, and there was no real opportunity for the officer to arrange for each witness to individually view defendant. In any event, nothing in the record suggests that the witnesses influenced each other's identifications (*see People v Wilburn*, 40 AD3d 508 [1st Dept 2007], *lv denied* 9 NY3d 883 [2007]).

Defendant's remaining suppression arguments, and his claims relating to events that occurred during jury deliberations, are

unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

738 In re Matthew Maleski, Index 651928/13
Petitioner,

-against-

New York City Department of Education,
Respondent.

_____

Gregory Antollino, New York, for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Amanda Sue Nichols of counsel), for respondent.

_____

Determination of respondent New York City Department of Education dated April 29, 2013, which terminated petitioner's employment as a probationary special education teacher, unanimously confirmed, the claim brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Manuel J. Mendez, J.], entered June 12, 2014), dismissed, without costs, and the matter remanded for further proceedings on petitioner's plenary claim alleging discrimination under the New York City Human Rights Law.

A probationary employee may be terminated without a hearing, for any reason or no reason at all, as long as the dismissal is

not unlawful or in bad faith (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320 [1st Dept 2006]). Here, based on the limited record before us, we find no basis to conclude that petitioner's termination was in bad faith. Petitioner's plenary claim alleging discrimination under the New York City Human Rights Law is not properly before us. The motion court transferred only the Article 78 claim and stayed the plenary claim.

We decline to consider petitioner's arguments that his termination violated the First Amendment and Labor Law § 201-d(2)(c) because he failed to raise these issues in either his original or amended pleadings (*see Matter of Cherry v Horn*, 66 AD3d 556, 557 [1st Dept 2009]).

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

739-
740 Index 309228/10

Amy Wilensky,
Plaintiff-Appellant/Respondent,

-against-

Ben Hon,
Defendant-Respondent/Appellant.

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Schlam Stone & Dolan LLP, New York (Elizabeth Wolstein of counsel), for appellant/respondent.

Lawrence B. Goodman, New York, for respondent/appellant.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered November 28, 2012, which, inter alia, awarded plaintiff mother primary physical and legal custody of the parties' children, and order, same court (Matthew Cooper, J.), entered April 4, 2014, which scheduled a hearing on defendant father's motion to modify custody, adhered to the schedule increasing defendant's parenting time in an order entered on or about March 19, 2014, and denied plaintiff's cross motion to vacate the March 19, 2014 order and to strike an expert report, unanimously affirmed to the extent a hearing was scheduled and the appeal otherwise dismissed, without costs, as academic.

The motion court correctly scheduled a hearing on the father's motion to modify custody based upon an initial showing

of a change in circumstances (*Matter of Patricia C. v Bruce L.*, 46 AD3d 399 [1st Dept 2007]. The remainder of these appeals have otherwise been rendered academic by an order of the same court (Matthew F. Cooper, J.), entered on or about December 22, 2014, which, after a hearing, awarded defendant permanent legal and physical custody of the children (*see e.g. Matter of Brenda J. v Nicole M.*, 59 AD3d 299, 300 [1st Dept 2009]; *Haggerty v Haggerty*, 78 AD3d 998 [2d Dept 2010]; *see also Matter of Victoria W.*, 305 AD2d 126 [1st Dept 2003]).

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

741 The People of the State of New York, Ind. 4358/13
Respondent,

-against-

Jose Cruz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J.), rendered May 1, 2014,

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: APRIL 5, 2016

CLERK

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

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

742 The People of the State of New York, Ind. 4974/10
Respondent,

-against-

Melvin Pinkston,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at plea; Cassandra M. Mullen, J. at sentencing), rendered December 10, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third and fourth degrees, and sentencing him, as a second violent felony offender, to an aggregate term of nine years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Sanders*, 25 NY3d 337, 341 [2015]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]). Regardless of the validity of defendant's waiver of the right to appeal, we perceive no basis for reducing the sentence. In addition, defendant's contention that his

sentence was based on an presentence report that lacked statutorily required information about him is unpreserved (*see People v Smallwood*, 212 AD2d 449 [1st Dept 1995], *lv denied* 86 NY2d 741 [1995]), and we decline to review it in the interest of justice. Although defendant asserts that this defect rendered his sentence illegal, he does not claim that he received a substantively unauthorized sentence. Instead, his arguments "do not involve sentencing power but relate to presentence procedures," and are thus subject to preservation requirements (*People v Samms*, 95 NY2d 52, 58 [2000]). As an alternative holding, we find no basis upon which to remand for resentencing. Defendant received the sentence he had been promised, and had he wished to be interviewed by the Probation Department, he could have called the court's attention to the fact that he had not been produced for such an interview.

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

743 In re Celia Seligson, Index 108426/11
Petitioner-Appellant, 104195/12

-against-

Board of Managers of the 25 Charles Street Condominium, et al.,
Respondents-Respondents.

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Michael T. Sucher, Brooklyn, for appellant.

Ganfer & Shore, LLP, New York (Ira Brad Matetsky of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 24, 2014, which denied the two consolidated CPLR article 78 petitions challenging certain budgetary determinations made by respondent Board of Managers of the 25 Charles Street Condominium (the board) for its fiscal years 2011 and 2012, unanimously affirmed, without costs.

The rulings issued in the prior plenary action, both at the trial and appellate level, do not preclude petitioner, under either the doctrine of res judicata or collateral estoppel, from advancing her present claims. The propriety of the individual expenditures for the 2011 and 2012 budgets, which is the subject of this proceeding, was not decided, nor even at issue, in the

prior action, nor could it have been raised there (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]; *see also Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]).

Petitioner has failed, however, to point to any evidence in the existing record to show that the board's actions were "outside the scope of its authority," "did not legitimately further the corporate purpose," or were made "in bad faith," as required to overcome the protection of the business judgment rule (*40 W. 67th St. v Pullman*, 100 NY2d 147, 155 [2003]; *see South Tower Residential Bd. of Mgrs. of Time Warner Ctr. Condominium v Ann Holdings, LLC*, 127 AD3d 485, 486 [1st Dept 2015], *lv dismissed* 25 NY3d 1196 [2015]). Nor does it avail petitioner to assert, conclusorily, that the board's actions were "arbitrary and capricious," since "board action that comes within the business judgment rule cannot be characterized as arbitrary and capricious, or an abuse of discretion" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 541 n [1990]). Nor does she demonstrate that the challenged expenses were not necessary to comply with "a governmental statute, law or regulation," as provided in the bylaws.

Summary disposition was not premature, since petitioner failed to specify how discovery was incomplete, or explain what

essential facts further discovery might uncover (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]; *see also* CPLR 409[b]).

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

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

744N Tak Chio Cheong, Index 305549/08
Plaintiff-Appellant,

-against-

Jinghong Zhu,
Defendant-Respondent.

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Law Offices of Jim Li, Flushing (Aaron Lebenger of counsel), for appellant.

The Law Offices of Perry Ian Tischler P.C., Bayside (Perry Tischler of counsel), for respondent.

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Order, Supreme Court, New York County (Joseph P. Burke, Special Referee), entered December 12, 2014, which, after a hearing, among other things, granted defendant wife's motion for 50% of the proceeds of the sale of the parties' house, unanimously affirmed, without costs.

The unambiguous language of the parties' stipulation of settlement, which was incorporated but not merged into the judgment of divorce, provided that if they are unable to agree on the sale price of the house, they "shall seek an appraisal from Silver Bay [appraisal company] at equal cost, and the appraised value shall be the price at which the [h]ouse is to be sold." Plaintiff's failure to obtain an appraisal from Silver Bay, as required by the stipulation, bars his claim that defendant

breached the stipulation by failing to cooperate in connection with the sale of the house (*see generally Matter of Gravlin v Ruppert*, 98 NY2d 1, 5 [2002]). The doctrine of "substantial performance" may not be used to excuse plaintiff's failure to perform an express condition precedent in the stipulation (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 693 [1995]). Nor is plaintiff's impossibility argument availing, since the parties could have guarded against the foreseeable possibility that Silver Bay would no longer be performing appraisals (*see 143-145 Madison Ave. LLC v Tranel, Inc.*, 74 AD3d 473, 474 [1st Dept 2010]). In any event, plaintiff's noncooperation claim is belied by the record, which shows that defendant, among other things, agreed to plaintiff's offer to buy-out her interest and never objected to the showing of the property. Defendant's disagreement as to the sale price of the house was contemplated by the stipulation, and should not be regarded as noncooperation.

Plaintiff's claim for unjust enrichment is barred, given the

parties' stipulation of settlement (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

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

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

ENTERED: APRIL 5, 2016

CLERK

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

745 [M-691] In re Christopher Lynn on Behalf of Dramanne Douombia, Petitioner, -against- Justice Steven Barrett, Respondent. Index 51/16

Christopher Lynn, Long Island City, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Lisa E. Fleischmann 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.

ENTERED: APRIL 5, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

201 The People of the State of New York, Ind. 3172/13
Respondent,

-against-

Waun Smith,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered January 28, 2014, as amended February 26, 2014, reversed, on the law, and the case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein.

Opinion by Sweeny, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Dianne T. Renwick
Sallie Manzanet-Daniels
Barbara R. Kapnick, JJ.

201
Ind. 3172/13

_____x

The People of the State of New York,
Respondent,

-against-

Waun Smith,
Defendant-Appellant.
_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Renee A. White, J.), rendered January 28, 2014, as amended February 26, 2014, convicting him, upon his plea of guilty, of forgery in the second degree, and imposing sentence.

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

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

SWEENY, J.

The issue before us on this appeal is whether a defendant is eligible for judicial diversion when charged with both statutorily qualifying offenses as well as other offenses, including misdemeanors, which are neither defined as qualifying or disqualifying offenses. We hold that a defendant so charged is not automatically disqualified from applying for judicial diversion.

Defendant was charged in a nine-count indictment with identity theft in the first degree (Penal Law § 190.80[3]), forgery in the second degree (Penal Law § 170.10[1]), four counts of grand larceny in the fourth degree (Penal Law § 155.30[4]), criminal possession of stolen property in the fourth degree (Penal Law § 165.45[2]), identity theft in the third degree (Penal Law § 190.78[1]), and criminal trespass in the third degree (Penal Law § 140.10[a]). Shortly after his arraignment, he filed a motion pursuant to CPL 216.05(1) requesting that he be considered for judicial diversion. The People opposed, contending that judicial diversion was only available to defendants whose indictments consisted entirely of qualifying offenses as specified in CPL 216.00. Since defendant was charged with three crimes that are neither specifically listed as qualifying or disqualifying offenses (first-degree identity theft

[a class D felony], third-degree identity theft [a class A misdemeanor] and third-degree criminal trespass [a class B misdemeanor]), the People argued that therefore defendant was not eligible. The motion court agreed, concluding that it could not "expand the list of eligible defendants, even if it believed the list [was] too restrictive." Thereafter, defendant entered a plea of guilty to forgery in the second degree in full satisfaction of the indictment and was sentenced, as a predicate felony offender, to a term of imprisonment of 2½ to 5 years. We now reverse and remand for further proceedings.

The Drug Law Reform Act (DLRA) of 2004 is a remedial statute, allowing low-level, nonviolent drug offenders who meet various basic eligibility requirements and who were originally sentenced under legislation that often mandated "'inordinately harsh punishment'" to apply for resentencing (*see People v Paulin*, 17 NY3d 238, 244 [2011], quoting Assembly Sponsor's Mem, Bill Jacket, L 2004, ch 738 at 6). The Legislature amended the DLRA in 2009, enacting CPL 216.00 and 216.05 to create a mechanism for judicial diversion. Under this program, eligible felony offenders whose drug or alcohol abuse contributed to their criminal conduct, may, at the discretion of the court, be afforded the opportunity to avoid a felony conviction and a prison sentence by successfully participating in a judicially

supervised substance abuse program. Unlike prior drug offense programs, judicial diversion does not require the prosecutor's consent (*see People v DeYoung*, 95 AD3d 71, 73 [2d Dept 2010]; L 2009 ch 56, part AAA, § 4).

This legislative scheme envisions a two-step process. As a threshold matter, the court must determine whether the defendant is an "eligible defendant." Once a defendant is determined to be such, he or she must undergo a substance abuse evaluation as more fully discussed below.

Eligibility for diversion is not automatic. CPL 216.00(1) defines an "'[e]ligible defendant' [as one charged with a class B, C, D or E felony (drug) offense] . . . or any other specified offense as defined in subdivision four of section 410.91[1] of this chapter." Those offenses are: burglary in the third degree; second and third-degree criminal mischief; third and fourth-degree grand larceny; second-degree unauthorized use of a vehicle; third and fourth-degree criminal possession of stolen property; second degree forgery; second-degree criminal possession of a forged instrument; first-degree unlawfully using slugs; first-degree criminal diversion of medical marijuana; and

[1]There is a typographical error in the statute as passed since CPL 410.91(5) sets forth the "specified offenses" for which a defendant is eligible for consideration for judicial diversion. CPL 410.91(4)was repealed by this legislation.

any attempt to commit those crimes, as well as certain other crimes. These are the statutorily specified qualifying offenses.

Despite being charged with any of these qualifying crimes, a defendant may be automatically disqualified for eligibility for judicial diversion if, within the last ten years, excluding time during which he was incarcerated, defendant was convicted of: (i) a violent felony offense under Penal Law 70.02; (ii) any other offense that precludes merit time under Correction Law 803[1][d][ii];[2] or (iii) a class A felony drug offense under Article 220 (CPL 216.00[1][a]). Also excluded from eligibility is a defendant who has previously been adjudicated a second violent felony offender under Penal Law 70.04 or a persistent violent felony offender under Penal Law 70.08 (CPL 216.00[1][b]). These are the statutorily specified disqualifying offenses. Yet even a defendant who is initially ineligible for diversion under these sections may become eligible "upon the prosecutor's consent" (CPL 216.00[1][b]).

As noted, once a defendant is found eligible, he or she must undergo a substance abuse evaluation, after which either party may request a hearing. The court is then required to make

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[2]Such offenses include non-drug A-I felonies, second-degree manslaughter, first and second-degree vehicular manslaughter, criminally negligent homicide, and certain sex offenses (*see* Correction Law §803[1][d][ii]).

findings as to the appropriateness of judicial diversion, taking into account defendant's history of substance abuse that contributed to his or her criminal behavior, whether judicial diversion could effectively address the substance abuse issues, and whether incarceration is necessary to protect the public (CPL 216.05[3][b]). Only after these findings are made may a court exercise its discretion and either permit a defendant to enter diversion or deny his or her application (CPL 216.06[4], [10]).

The statute is silent as to whether the inclusion in an indictment of nonviolent, nonspecified crimes along with specified qualifying crimes precludes eligibility. We must, therefore, determine the legislative intent of the statute to resolve this issue.

"[T]he governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used" (*People v Williams*, 19 NY3d 100, 103 [2012], quoting *People v Finnegan*, 85 NY2d 53, 58 [1995]). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent.*

School Dist., 91 NY2d 577, 583 [1998]). "If the wording of the statute has caused an unintended consequence, it is up to the legislature to correct it" (*People v Golo*, 26 NY3d 358, 362 [2015]). However, "remedial statutes such as the DLRA should be interpreted broadly to accomplish their goals - in this case the reform of unduly harsh sentencing imposed under pre-2005 law" (*People v Brown*, 25 NY3d 247, 251 [2015]; *see* McKinney's Cons Law of NY, Book 1, Statutes § 321).

Although the Court of Appeals has not addressed this specific issue, it has taken an expansive approach in interpreting the DLRA. In *People v Sosa* (81 AD3d 436, 464 [1st Dept 2011], *affd* 18 NY3d 436 [2012]), we were called upon to determine when the 10-year look back provision of CPL 216.00(1)(a) begins to run. We held that the look-back period runs from the date of the application for resentence, "since no other time period is set forth" in the statute. We found that "where the Legislature has intended for a period to run from the date of commission of an offense back to the date of sentence of an earlier crime, it has expressly said so, or incorporated such look-back provisions by reference" (81 AD3d at 437). We applied the statutory interpretation maxim "espressio unius est exclusio alterius" ("expression of the one is exclusion of the other") in arriving at our determination (*id.*). In affirming, the Court of

Appeals approved this reasoning and found it to be "plainly consistent with the legislation's necessarily broad remedial objectives in addressing the sequelae of the prior sentencing regimen and should not be effectively nullified as a matter of statutory interpretation" (18 NY3d at 442-443; *see also People v Brown*, 25 NY3d at 251).

The plain language of the statute itself undermines the People's position. It sets forth a list of disqualifying offenses/conditions that prevent a defendant from qualifying for judicial diversion, although as noted, even some of those offenses may not prevent disqualification with the People's consent. In applying the principle "espressio unius est exclusio alterius," "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (*People v Jackson*, 87 NY2d 782, 788 [1996]). The inescapable conclusion is that the Legislature's decision not to list certain offenses as disqualifying means their mere inclusion in an indictment will not prevent an otherwise eligible defendant from making an application for judicial diversion.

Our decision comports with the legislative intent of the statute. By removing prosecutorial consent to admission to a drug treatment program, the judicial diversion program's intent is to return the decision-making authority as to whether a

defendant is eligible for diversion to the judiciary. Indeed, "the uniqueness of the program is illustrated by the fact that a special provision was added to the Judiciary Law to encourage assignment of cases eligible for this procedure to particular parts of the court staffed by jurists who by virtue of caseload and training are in the best position to provide effective supervision of offenders who qualify for diversion from the normal conviction and sentencing of criminal offenders (*see* Judiciary Law § 212[2(r)])" (Peter Preiser, 2009 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 11A3 CPL 216.00, 2016 Supp Pamph at 93). While there is no question that prosecutors have "broad discretion to decide what crimes to charge" (*People v Urbaez*, 10 NY3d 773, 775 [2008]), "[t]o read the statute to exclude individuals on the basis that they are also charged with nonqualifying offenses would allow the People to undermine the purpose of the statute by including a nonqualifying offense in the indictment, and thereby rendering the defendant ineligible" (*People v Jordan*, 29 Misc 3d 619, 622 [Westchester County Ct 2010]), in effect, taking that decision away from the judiciary in contravention of the statute's clearly stated intent.

That is not to say that prosecutors have no input into the ultimate decision-making process. It must be remembered that "a

finding of eligibility is simply the first step in the resentencing process - the ultimate decision lies in the exercise of discretion of the reviewing judge" (*People v Brown*, 25 NY3d at 251). As noted, after a defendant is evaluated *either* the People or defendant may request a hearing and present any evidence either in favor or, or against, diversion. But, as the legislature intended, the ultimate decision to either grant or deny an application for diversion is made by the justice presiding over that particular case.

The trial courts that have considered this issue have reached conflicting conclusions[3]. Our decision today should provide some clarity.

Accordingly, the judgment of the Supreme Court, New York County (Renee A. White, J.), rendered January 28, 2014, as amended February 26, 2014, convicting defendant, upon his plea of guilty, of forgery in the second degree, and sentencing him, as a

[3]The vast majority of those cases have found these offenses to be not disqualifying for purposes of determining a defendant's eligibility for diversion (*see e.g. People v Dawson*, 47 Misc 3d 425, 427 [Sup Ct, Kings County 2015]; *People v Walker*, 42 Misc 3d 1230[A] [Sup Ct, Kings County 2014]; *People v Weissman*, 38 Misc 3d 1230[A] [Sup Ct, NY Co 2013]; *People v Jordan*, 29 Misc 3d 619 [Westchester County Ct. 2010]. Other courts have found otherwise (*see e.g. People v Iverson*, 32 Misc 3d 1246[A] [Sup Ct, Kings County 2011]; *People v Jaen*, [Sup Ct, NY Co, Mar 19, 2010], Cain, J., indictment No. 5704/08).

second felony offender, to a term of 2½ to 5 years, should be reversed, on the law, and the case remitted to Supreme Court, New York County for further proceedings in accordance with the opinion herein.

All concur.

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

ENTERED: APRIL 5, 2016

CLERK