SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 11, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4423 The People of the State of New York, Respondent, Ind. 639/13

-against-

Kevin Sutherland,
Defendant-Appellant.

_____

Kushner Law Group, PLLC, Brooklyn (Michael P. Kushner of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 19, 2014, convicting defendant, after a jury trial, of attempted grand larceny in the second degree, and sentencing him to a term of six months, concurrent with five years' probation, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. There was ample evidence that defendant made intentional false statements

concerning a material fact when he attempted to sell counterfeit artwork to an undercover police officer. In particular, defendant affirmatively misrepresented that he had no reason to doubt the authenticity of a painting, when in fact defendant had been informed by Sotheby's that the painting could not be accepted for consignment sale because experts had determined that it was not authentic.

The court's supplemental instructions, including its rereading of the relevant portion of the main charge, made it clear to the jury that in this case defendant could only be convicted on the basis of affirmatively false statements, rather than omissions, and defendant's argument to the contrary is unavailing.

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4425 In re Giovanni G.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

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

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about September 22, 2015, which denied appellant's application to vacate his prior adjudication as a juvenile delinquent and to seal the records of that adjudication, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's application to dismiss the petition and vacate his juvenile delinquency adjudication, given the seriousness of the underlying sexual offense and the need for protection of the community (Family Ct Act § 315.2). The court also properly exercised its discretion in denying appellant's application made pursuant to Family Court Act § 375.2 to seal the records of his juvenile delinquency adjudication. Given the serious nature of the underlying assault, the interest of justice would not be

served by sealing these records (*see Matter of Rosa R.*, 68 AD3d 407, 407 [1st Dept 2009). "Appellant's interests are adequately protected by the automatic confidentiality of Family Court records and the fact that juvenile delinquency adjudications do not entail civil disabilities (*see* Family Ct Act § 380.1). Sealing these records could potentially impede their use by law enforcement agencies for legitimate purposes in the event appellant engaged in further criminal activity" (*id.* at 407-408). Appellant has not substantiated his claim that this adjudication might subject him to sex offender registration if he relocates to another state.

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4426 Neighborhood Partnership Housing Development Fund Company, Inc., Plaintiff-Appellant, Index 157393/13

-against-

Everest National Insurance Company, Defendant-Respondent.

- - - - -

Everest National Insurance Company, Third-Party Plaintiff-Respondent,

-against-

Mt. Hawley Insurance Company, Third-Party Defendant-Appellant.

_____

Kenney Shelton Liptak Nowak LLP, Buffalo (Timothy E. Delahunt of counsel), for appellants.

Carroll McNulty & Kull, New York (Denise Marra DePekary of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered May 27, 2016, to the extent it granted defendant's motion for summary judgment declaring that it has no obligation to defend or indemnify plaintiff in the underlying personal injury action, and so declared, and denied plaintiff's and third-party defendant's cross motions for summary judgment, unanimously affirmed, with costs.

Notification to defendant of the underlying accident

approximately four months after plaintiff learned of the accident does not comply with the requirement of the insurance policy that defendant be notified of an occurrence "as soon as practicable"; it constitutes late notice as a matter of law (*see e.g. Peerless Ins. Co. v Nationwide Ins. Co.*, 12 AD2d 602 [1st Dept 1960]). Even if plaintiff and nonparty Enterprise Capital Partners were distinct entities, Enterprise's knowledge of the underlying accident, which occurred in August 2007, is imputed to plaintiff. Plaintiff had no employees of its own, but paid the salaries of Enterprise employees who worked on its behalf. One of these employees was present at the August 30, 2007 construction meeting at which the underlying injury was reported; another's written statement said that he was a principal of plaintiff. Yet, defendant did not receive notice of the occurrence and claim until December 28, 2007.

Defendant's disclaimer of coverage on the ground of late notice was reasonable and timely. It was issued to plaintiff on January 29, 2008, two weeks after defendant received the written statement in connection with its investigation (*see Ace Packing Co., Inc. v Campbell Solberg Assoc., Inc.*, 41 AD3d 12, 15 [1st Dept 2007]). The disclaimer also was sufficiently specific in its explanation, stating, "Coverage is denied based upon your violation of the notice provisions and conditions of the policy

since the loss was not reported to [defendant] as soon as practicable" (*see Paul M. Maintenance, Inc. v Transcontinental Ins. Co.*, 300 AD2d 209, 212 [1st Dept 2012]).

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4427 Wilmington Trust Company, etc., Index 652686/13
Plaintiff-Appellant,

-against-

Morgan Stanley Mortgage Capital Holdings LLC, et al.,
Defendants-Respondents.

_____

Lowenstein Sandler LLP, New York (Michael J. Hampson of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Brian S. Weinstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 16, 2016, which, to the extent appealed from as limited by the briefs, upon defendants' motion to dismiss, granted dismissal of the third cause of action's indemnification claim as against defendant Morgan Stanley Credit Corporation (MSCC), and granted dismissal of the first cause of action's breach of contract claim based on the inclusion in the mortgage loan trust of interest-only and balloon loans, unanimously modified, on the law, to deny dismissal of the indemnification claim, and otherwise affirmed, without costs.

Plaintiff trustee sufficiently alleged a claim for indemnification under section 5(c) of the Third Amended and Restated Master Mortgage Loan Purchase Agreement (MSCC Purchase

Agreement). That section provides that MSCC, as Seller, "shall indemnify Purchaser and hold it harmless against any loss, damages, penalties, fines, forfeitures, legal fees and related costs, judgments, and other costs and expenses resulting from any claim, demand, defense or assertion based on or grounded upon, or resulting from, a breach of [MSCC's] representations and warranties contained in Sections 5(a) and 5(b) hereof." The foregoing indemnification provision reflects the unmistakable intent that plaintiff may recover its legal expenses incurred in enforcing the representations and warranties contained in the MSCC Purchase Agreement, especially considering the placement of the indemnification provision (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]; *see also U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 140 AD3d 518 [1st Dept 2016]).

The inclusion in the trust of interest-only loans and balloon loans does not violate the terms of section 3.01(u) of the Mortgage Loan Purchase Agreement (MLPA), which provides that mortgage loans must "amortize fully." Interest-only loans and balloon loans may be fully amortized over its life. As plaintiff concedes, there is no contractual obligation that the monthly payments be of equal amount. Moreover, the definition of amortization urged by plaintiff is not included in the MLPA and

will not be read into the agreement by this Court (*Beardslee v Inflection Energy, LLC*, 25 NY3d 150, 157 [2015]). Finally, the prospectus supplement made clear that interest-only and balloon loans were included in the trust.

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4428 The People of the State of New York, Respondent, Ind. 4892/14

-against-

Vincent Turturro, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ronald Zweibel, J.), rendered December 11, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4430 The People of the State of New York, Respondent,

-against-

Barry Charles, Defendant-Appellant.

Ind. 1004/15

_____

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

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 10, 2015, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established defendant's guilt of fourth-degree grand larceny under a theory of a taking from the person of another, (Penal Law § 155.30[5]). Defendant, while employing a ruse,

engaged in conversation with a man who was attempting to use a MetroCard vending machine and holding cash in his hand. While the victim was considering defendant's offer of assistance, defendant grabbed the money and departed. The evidence fails to support defendant's assertion that he was only guilty of tricking the victim into handing over his money.

Defendant did not preserve his challenge to the court's charge on grand larceny, and we decline to consider it in the interest of justice. As an alternative holding, we reject it on the merits. The trial court correctly explained the elements of the crime of from-the-person grand larceny, stressing that this was the only charge before them. At defense counsel's request, the trial court contrasted the grand larceny charge with the uncharged crimes of robbery and larceny by trick, and the court's instruction made clear to the jury that in this case, a finding that defendant engaged in conduct constituting either of the other two uncharged crimes would require a finding that he was not guilty of grand larceny. We do not find that the wording of the charge was confusing.

The court properly denied defendant's motion for substitution of counsel. The court, whose inquiry into defendant's complaints was sufficient under the circumstances and

accorded him ample opportunity to be heard, correctly found that there was no good cause for assignment of another attorney on the eve of trial (*see People v Linares*, 2 NY3d 507, 511 [2004]).

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4431-
4432-
4433 In re Markeith G., and Others,

Dependent Children Under Eighteen
Years of Age, etc.,

Deon W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), attorney for the children Markeith G. and Tiera G.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), attorney for the child Daveon W.

_____

Order of disposition, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about March 15, 2016, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about March 15, 2016, which found that respondent-appellant sexually abused one of the subject children and derivatively abused the two others, unanimously affirmed, and the appeal from the order of disposition otherwise dismissed, without costs, as taken from a nonappealable order. Appeal from

fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition. Appeal from order of protection, same court and Judge, entered on or about March 15, 2016, unanimously dismissed, without costs, as taken from a nonappealable order.

The Family Court's determination that respondent sexually abused the female child is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]; *Matter of Shirley C.-M.*, 59 AD3d 360, 360 [1st Dept 2009]). That child's in-court testimony regarding the sexual abuse respondent inflicted upon her was sufficient to support the abuse finding (*see Matter of Fendi B. [Jason B.]*, 142 AD3d 878 [1st Dept 2016]). There is no basis for disturbing the court's credibility determinations, including its evaluation of the alleged inconsistencies in the child's testimony (*see id.*). Respondent's intent to gain sexual gratification from the acts described by the child was properly inferred from the acts themselves, especially given the lack of any other explanation (*see Matter of Dorlis B. [Dorge B.]*, 132 AD3d 578, 579 [1st Dept 2015]).

The Family Court properly drew a negative inference from respondent's failure to testify at the fact-finding hearing (*see Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659, 660 [1st Dept 2013]). The criminal case pending against him at the time of the hearing did not deprive the court of the right to draw on adverse inference from his failure to testify (*see Matter of Rachel S.D. [Luis N.]*, 113 AD3d 450 [1st Dept 2014]; *Matter of Jonathan Kevin M. [Anthony K.]*, 110 AD3d 606, 607 [1st Dept 2013]).

A preponderance of the evidence supports the Family Court's determination that respondent derivatively abused the two male children. The female child's testimony that the male children were sleeping in the same bedroom as she when respondent sexually abused her establishes that respondent's parental judgment and impulse control were so defective as to create a substantial risk of harm to any child in his care (*see Matter of Marino S.*, 100 NY2d 361, 373-375 [2003], *cert denied sub nom. Marino S. v Angel Guardian Children & Family Services, Inc.*, 540 US 1059 [2003]; *Matter of Brandon M. [Luis M.]*, 94 AD3d 520, 520-521 [1st Dept 2012]).

The order of disposition and the order of protection are not appealable, because they were entered on consent (*see Matter of Ian C.*, 254 AD2d 132 [1st Dept 1998]).

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4434 Board of Managers of the Reade Chambers Condominium,
Plaintiff-Respondent,

-against-

71 RC Property, LLC, et al.,
Defendants-Appellants,

Goldstein Hill & West Architects, LLP, et al.,
Defendants.

Index 651236/16

Wasserman Grubin & Rogers, LLP, New York (Michael T. Rogers of counsel), for appellants.

Law Office of Michael Fuller Sirignano, Cross River (Michael Fuller Sirignano of counsel), for respondent.

Order, Supreme Court, New York County (Eileen M. Coin, J.), entered May 5, 2016, which denied defendants-appellants' (the sponsor defendants) motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the causes of action for breach of contract and a declaration of easement, and denied their application to cancel a notice of pendency, unanimously affirmed, without costs.

Plaintiff alleges, inter alia, that the sponsor defendants breached their contractual obligations under the offering plan by failing to correct, repair or replace the defective conditions in the condominium building's garage, which caused unit owners who purchased parking spaces in the garage to have to drive over the

last unsold parking space to enter and exit the garage and their own spaces safely and reasonably. These allegations state causes of action for breach of contract and for a declaration that plaintiff has an implied easement of necessity over the unsold parking space (*see Simone v Heidelberg*, 9 NY3d 177 [2007]). The sponsor defendants' documentary evidence does not conclusively provide a defense to these claims.

The motion court properly left the notice of pendency undisturbed (CPLR 6501; *see Piccirillo v Ravenal*, 161 AD2d 253 [1st Dept 1990], *lv dismissed* 76 NY2d 935 [1990]).

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4435 The People of the State of New York, Ind. 77/07
Respondent,

-against-

Raul DeJesus,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 22, 2008,

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: JULY 11, 2017

CLERK

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

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4436 In re DC, Index 402790/10
Petitioner-Appellant,

-against-

Selfhelp Community Services, Inc.,
Respondent.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane G. Temkin of counsel), for appellant.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered on or about March 3, 2016, which, to the extent appealed from as limited by the briefs, restored the guardianship proceeding to the calendar, reappointed the same court evaluator, and ordered an initial guardianship hearing on the petition, unanimously reversed, on the law, without costs, and the order vacated.

There was no basis to restore the proceeding, to reappoint the court evaluator or to schedule a hearing, because there was

no request for this relief. Indeed, HRA has determined that DC is no longer eligible for adult protective services because she has "sufficient mental and physical capacity."

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4437 Marisa S.-H., Index 102061/12
Plaintiff-Respondent,

-against-

Christopher H.,
Defendant-Appellant,

Michael P., et al.,
Defendants.

_____

Christopher H., appellant pro se.

Marisa S.-H., respondent pro se.

_____

Order, Supreme Court, New York County (Tandra L. Dawson, J.), entered May 20, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff wife's motion to confirm a report and recommendation of a special referee, and denied defendant husband's motion to reject it, unanimously affirmed, without costs.

The Special Referee's report was amply supported by the record (*Nager v Panadis*, 238 AD2d 135, 135-136 [1st Dept 1997]). The "badges of fraud" supporting the Special Referee's finding of a fraudulent conveyance are compelling, and not contested by the husband (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). As the Special Referee found, the husband admitted that he sold the marital residence to a person he trusted and in fact

considers to be his mother, and he does not deny selling the apartment below market value (*id.*). The husband also does not deny selling the property in secret or that it was done in an effort to delay and defraud the wife from her equitable share of property. Nor is there a basis to challenge the Special Referee's determination that the relatively modest amount of the wife's attorney's fees was "reasonable" and recoverable under Debtor and Creditor Law § 276-a.

We have considered the husband's remaining contentions, which are largely irrelevant, and find them unavailing.

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4438 The People of the State of New York Ind. 2923/10
Respondent,

-against-

Maurice Eaddy,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Marcy L. Kahn, J.), entered July 16, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]), and we find no basis to substitute our own discretion in this regard. The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or were outweighed by the seriousness of the underlying crime, which consisted of repeated sexual abuse of a 10-year-old child over an extended period of time.

The court properly designated defendant a sexually violent

offender because he was convicted of an enumerated offense, and the court lacked discretion to do otherwise (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). We have considered and rejected defendant's constitutional arguments.

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4440 Donough Lawlor, Index 3130/06
Plaintiff-Respondent,

-against-

Kathleen McAuliffe,
Defendant-Appellant.

_____

Law Office of Niall MacGiollabhui, New York (Niall MacGiollabhui of counsel), for appellant.

Robert J. Del Col, Bay Shore, for respondent.

_____

Order, Supreme Court, Bronx County (La Tia W. Martin, J.), entered April 15, 2015, which, to the extent appealed from as limited by the briefs, denied defendant's application for a downward modification of child support and for sanctions, unanimously affirmed, without costs.

During hearings on financial issues in the course of these prolonged post-divorce child custody and visitation proceedings, the court properly issued an interim child support order, in March 2015, increasing defendant's child support obligation based on her testimony and 2014 W2 income statement showing a substantial increase in income since the issuance of the preceding interim support order providing for nominal support based on defendant's representation that she was unemployed (*see* Domestic Relations Law §§ 240; 236[B][a][9][2][i]; Family Court

Act § 451[3][a]; *Matter of James B. v Regina D.S.*, 132 AD3d 505 [1st Dept 2015]). In support of the instant motion for a downward modification of the March 2015 order, defendant failed to submit a net worth statement, as required by the matrimonial rules (22 NYCRR 202.16[k][2]; *see also Belmore-Gaillard v Gaillard*, 51 AD3d 603 [1st Dept 2008]). Moreover, defendant failed to provide the court with any other evidence demonstrating that the amount of support ordered was inappropriate in light of her earning ability, even considering that she was temporarily disabled from working, or that a reduction to the prior nominal level of child support was warranted or in the child's best interests.

The court properly determined that plaintiff's testimony and evidence submitted in connection with his application for counsel fees did not constitute misrepresentations subject to sanctions (22 NYCRR 130-1.1).

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

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4441N Franklin Credit Management Corporation, Plaintiff, -against- Theresa Striano Revocable Trust, Defendant-Respondent. - - - - - 5 Boro Enterprises Group, LLC, Nonparty Appellant. Index 380345/12

Law Office of Daniel H. Richland, PLLC, Lindenhurst (Daniel H. Richland of counsel), for appellant.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered August 3, 2015, which denied 5 Boro Group Enterprises, LLC's (5 Boro's) motions to, among other things, permanently enjoin the Receiver, his agents and employees from entering the subject premises, collecting rents or interfering with the possessory rights of 5 Boro (as successor in interest to plaintiff), without prejudice to seeking the same relief in a consolidated mortgage foreclosure action, unanimously reversed, on the law, without costs, and the motions granted.

By judgment of Supreme Court, Bronx County (Mark Friedlander, J.), entered March 8, 2013 in the underlying strict foreclosure action commenced by plaintiff, defendant's rights and interests were extinguished by its failure to file a notice of

its intention to redeem the mortgage on the property sold to plaintiff, and plaintiff was deemed to hold the property free and clear from any and all such liens, encumbrances or interest (*see* RPAPL 1352; *Bass v D. Ragno Realty Corp.*, 111 AD3d 863, 864-865 [2d Dept 2013]). Given that the Receiver at issue was appointed in the consolidated mortgage foreclosure action, that defendant's rights in that action are now extinguished by the judgment entered March 8, 2013, and that the Receiver is subject to the control of the court (*see Matter of Kane [Freedman--Tenenbaum]*, 75 NY2d 511, 515 [1990]), the motion court should have granted 5 Boro's motions.

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

ENTERED: JULY 11, 2017

CLERK

Friedman, J.P., Renwick, Andrias, Moskowitz, Gesmer, JJ.

4442N- Index 653850/14
4442NA Reliable Abstract Co., LLC,
Plaintiff-Respondent,

-against-

45 John Lofts, LLC, et al.,
Defendants,

Chaim Miller, also known as Harry Miller,
Defendant-Appellant.

_____

Davidoff Hutcher & Citron LLP, New York (Jonathan W. Rich of counsel), for appellant.

Carter Ledyard & Milburn LLP, New York (Jacob H. Nemon of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Barry R. Ostrager, J.), entered June 3, 2016 and June 10, 2016, which denied defendant Chaim Miller's motion to vacate pursuant to CPLR 5015 or CPLR 317 an order granting plaintiff a default judgment on liability against him and to dismiss the complaint as against him for lack of personal jurisdiction, unanimously affirmed, with costs.

Defendant failed to establish a lack of personal jurisdiction. He did not flatly deny that any person matching the description in the process server's affidavit of service was in his apartment on the day in question, and therefore he failed to overcome the presumption of proper service created by the

affidavit (*see NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]). The absence of the precise apartment number in the address was not material, since the address as it appeared in the affidavit was one that defendant routinely used as his address in agreements and other documents, and it was sufficient to be relied on for proper delivery of a document mailed to it (*see e.g. Commercial Bank, N.A. v Logan*, 2008 NY Slip Op 33343[U], *4 [Sup Ct, NY County 2008]).

Defendant failed to establish that his default should be vacated pursuant to CPLR 5015, because he demonstrated no excuse for failing to appear (*see Matter of Lukes Jacob R. [Cynthia R.]*, 148 AD3d 420 [1st Dept 2017]). There is no record support for his argument that he believed this action to be part of "global settlement" talks with various parties. Indeed, the argument is belied by the fact that, during these purported talks, plaintiff continued with the action against him, and he had repeated notice of the proceedings.

Nor did defendant establish that his default should be vacated pursuant to CPLR 317. He failed to rebut plaintiff's showing that he had actual knowledge of this action (*see Lopez v 592-600 Union Ave. Corp.*, 292 AD2d 262, 263 [1st Dept 2002]).

Plaintiff submitted proof of some half-dozen mailings of papers in the action to defendant at his proper address. Defendant did not deny that he received those mailings. He merely asserted conclusorily that he was not properly served.

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

ENTERED: JULY 11, 2017

CLERK