SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JUNE 1, 2017**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3324 The People of the State of New York, Ind. 3744/11
Respondent,

-against-

Rafael Sanabria,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered November 1, 2013, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 10 years, affirmed.

In 2011, defendant followed the victim, who did not recognize defendant, into a building and demanded money. Defendant pulled out a kitchen knife about seven inches long, stated he would not hurt her, and told her to give him $12. The victim handed him a $20 bill, which prompted defendant to ask for

another, and she complied. Defendant ran out of the building and ended up at a Duane Reade store. The victim told a bystander what occurred, and several bystanders found defendant in the Duane Reade and waited for him to exit. As defendant exited and attempted to flee, several bystanders tackled him. Defendant was held down by two men, and one bystander saw a small kitchen steak knife on the ground. When two police officers arrived, they stood up defendant and transported him to the stationhouse. During processing, the officers recovered two packs of cigarettes from defendant, and he told an officer that he robbed a woman with a knife because he needed cigarettes.

During trial, defendant raised a defense of lack of criminal responsibility by mental disease or defect. Defendant's expert, Dr. Eric Goldsmith, reviewed documents, including the criminal complaint, indictment, voluntary disclosure form, and defendant's medical records. In addition, Dr. Goldsmith interviewed defendant several times and interviewed his family members. Dr. Goldsmith opined that defendant was experiencing schizophrenic conditions, including loud voices that told him he should do what he needed to get cigarettes, and that defendant believed something bad would happen if he did not follow the voice's command. Specifically, Dr. Goldsmith opined that defendant could not determine whether what he actually did was wrong or against

commonly held moral principles. Dr. Goldsmith's conclusions were largely based on self-reporting by defendant, such as defendant stating that he had used a butter knife during the robbery, he only asked for $20, and he walked away after taking the money. Dr. Goldsmith also concluded that a violent act was uncharacteristic of defendant because defendant had stated he had no history of violence.

The People's expert, Dr. Jason Hershberger, reviewed the complaint, the knife, defendant's medical records, and Dr. Goldsmith's report. He interviewed defendant and conducted a mental status exam, and concluded that at the time of the robbery, defendant did not suffer from any delusions and that his memory was fine. Dr. Hershberger noted that medical records from just after the arrest showed defendant was not suffering from delusions or hearing any voices, which was unusual because in his expert opinion, delusions do not come and go that fast. Dr. Hershberger stated that it strained medical believability that defendant would experience such intense and controlling delusions, but not suffer from any psychotic delusions 10 days before or 2 days after the robbery. Dr. Hershberger also stated that defendant's account attempted to minimize the crime and evade responsibility. Moreover, Dr. Hershberger contended that defendant knew his actions were wrong, because defendant "hid the

weapon under his clothes" as he was walking, revealing it only after he was alone with the victim, and that he ran away afterwards.

The court properly exercised its discretion in admitting evidence that defendant had been released from prison a few months before the robbery, and denying counsel's request to redact that information from defendant's medical records. In support of the defense of lack of criminal responsibility by reason of mental disease or defect, the defense psychiatric expert testified that defendant had been stable throughout his years in custody, when he received proper treatment for his schizophrenia. However, after he was released, he no longer received treatment, he became unstable, he began hearing voices, and he committed the robbery a few months later. Evidence of defendant's confinement in prison was "inextricably interwoven" with the expert's testimony and conclusion (*People v Ventimiglia*, 52 NY2d 350, 361 [1981]). The court minimized the possible prejudice by excluding evidence of defendant's underlying conviction and only admitted references to his imprisonment.

The court properly rejected defendant's suggested use of terms such as "institution" or "facility," rather than "prison," because such terms might have confused the jury, or led it to speculate on the circumstances surrounding his confinement.

Moreover, the court instructed the jury that the evidence was admitted solely for the purpose of evaluating the expert's opinion. Thus, the probative value of the evidence outweighed any prejudicial effect, which was avoided by the court's thorough limiting instructions (*see generally People v Bradley*, 20 NY3d 128, 133 [2012]).

The dissent claims that the trial court infringed on defendant's ability to present a defense when the court prevented defendant's expert from expanding on his answers provided during cross-examination about defendant's prior violent act. Defendant did not preserve his claim regarding the alleged limitations on his expert's testimony, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

At trial, the People asked Dr. Goldsmith if he was aware that defendant had committed a serious violent crime in his past. Dr. Goldsmith answered that he was aware defendant was "convicted of a serious violent act, which was later overturned on appeal, which he later then took a plea to, an *Alford* plea." The People asked to strike the answer, requesting Dr. Goldsmith answer with a yes or no to the question. After defense counsel's objection, the court stated the People's question stands, and that Dr. Goldsmith's previous answer would be stricken. Further, the

court informed the jury that the question was being asked not for the truth of the statement, but whether or not it would have influenced the doctor's conclusion if he knew of certain facts. In response to the question, Dr. Goldsmith stated, "I don't know." The People then asked that if he was aware that defendant had put a pillow over a woman's face and choked her, whether "that would be a violent act, right?" Dr. Goldsmith answered it "would be a violent act." Dr. Goldsmith then stated that he was aware there was an allegation that defendant had committed a violent crime in the past. The People asked, "[I]t's fair to say then that when the defendant tells you he has absolutely no violence in his past that's not a completely accurate statement, correct?," to which Dr. Goldsmith responded, "[I]ncorrect."[1] Dr. Goldsmith then answered that it was still his opinion that this robbery was out of character for defendant.

The dissent states that because the court struck Dr. Goldsmith's answer and instructed him to answer in a "yes or no or I don't know" capacity, the court infringed on counsel's ability to present a defense. The doctor's reference to an

[1] While the dissent states Dr. Goldsmith "was not allowed to explain his reasons for doubting that defendant had committed those acts" after answering "incorrect," the record shows that right afterwards, Dr. Goldsmith actually answered several questions uninterrupted.

*Alford* plea went beyond the People's question. Further, defense counsel failed to revisit this issue on redirect by exploring the basis of Dr. Goldsmith's response that his opinion was unchanged.[2] In any event, Dr. Goldsmith did not change his conclusion, and ultimately his answer was "I don't know," which required no further explanation.

Moreover, the court gave curative instructions as to why these questions were being asked, and repeatedly instructed the jury during this exchange that the questions were only to determine whether the doctor's conclusion would have been influenced based on these facts. Finally, during the jury charge, the court again explained that the information that defendant was in a institution or was in prison was not introduced to show the jury that he committed this particular crime or that he has a propensity to commit crimes, but was submitted only for the jury to assess the basis of the experts' opinions and the accuracy of information the experts relied upon. Even if the court had allowed Dr. Goldsmith to discuss the *Alford* plea in his answer, there is no reason to assume that would change the verdict.

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[2] We note there may have been a good reason why counsel did not pursue this on redirect, because it might have had involved the jury in the collateral issue of why someone takes an *Alford* plea.

Many of the facts that Dr. Goldsmith relied on were refuted by evidence in the record, which showed defendant was not being truthful. Thus, there was an ample basis in the record for the jury to reject Dr. Goldsmith's conclusion. For example, defendant reported to Dr. Goldsmith that he had walked away after the robbery, but witnesses saw defendant run away. Defendant also misinformed Dr. Goldsmith that he asked for $20, when in reality he had asked for exactly $12. Further, defendant told Dr. Goldsmith he had used a butter knife in the robbery, but Dr. Goldsmith discovered from other sources that defendant had used a serrated steak knife to threaten the victim.

Defendant has not made a CPL 440.10 motion, and his ineffectiveness claim cannot be resolved based on the current record on appeal (*see generally People v Rivera*, 71 NY2d 705, 709 [1988]). In the alternative, to the extent the record permits review, we conclude that defendant received effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome.

The only issue at trial was whether defendant proved his

affirmative defense under Penal Law § 40.15 by establishing that he did not appreciate the wrongfulness of the robbery he committed. Defendant has not shown that any of counsel's alleged errors and omissions had any effect on the jury's decision to credit the People's expert witness, who effectively rebutted the defense's expert's conclusions.

We reject the dissent's claim that counsel's question during voir dire about defendant having a criminal case involving a "sexual incident" could not have been a strategic decision. Raising the issue during voir dire may have had several possible strategic purposes, as explained by the court to the panel. Specifically, immediately after counsel's question, the court noted that counsel was "bringing it up, defense counsel, because it may come out. So he wants to make sure that - - he's not conceding that [defendant] did or didn't do anything, but his background, this defendant's whole life may come up again about things he did or didn't do in his life in your evaluation of the psychiatric evaluation." Without an expanded record, which requires a 440.10 motion, we cannot say there was no objective reasonable strategy in probing the jurors about their personal beliefs on this issue (*see generally Benevento* at 712).[3]

[3] In fact, later during voir dire, a juror did volunteer that he or she had "zero tolerance" as to sexual misconduct.

Counsel himself raised the strategic value earlier to the court. Specifically, after the court had explained that the defense expert could be questioned about a prior violent act without using the word "rape," counsel explained that he had a concern about the ruling. Counsel stated that voir dire would be critical here, and that during voir dire he wanted to find out how much it could affect the jurors to learn about the felony conviction for rape.

Defense counsel's reference to a sexual incident was only made during voir dire, and was not admitted into evidence at any point during trial. Moreover, immediately after counsel's use of the words "sexual incident," the court interjected and gave a curative instruction to the panel. The court explained that defendant may or may not have a prior record, that it would not be evidence of defendant's guilt here, and that the jurors may learn certain information about defendant's background being admissible only to the extent that it effects each psychiatrist's opinion. The court reminded the panel that an event from defendant's past was not evidence of the instant crime, was not admissible, and that the jurors "may consider that in evaluating the reliability of the expert's opinion" that defendant did not know the consequences of his actions. As the court immediately clarified counsel's statements and assured the prospective jurors

that this was only a hypothetical situation, any possible prejudice was cured.

Pursuant to the court's ruling, defense counsel redacted references to defendant's prior sexual assault conviction from his medical records. Although, counsel attempted to redact these references, he did not completely obscure or darken the underlying text in all the exhibits. His failure to foresee that the underlying text could be read in certain light angles does not provide a basis to reverse on ineffective assistance grounds. Only some of the exhibits containing these redactions were requested and published to the jury. Of the exhibits published to the jury, it is speculative to conclude that the jury read the redacted information, and the obscured text did not contain the underlying details of defendant's prior violent act. In light of the above, counsel's failure to completely obscure the text did not change the jury's verdict nor deprive defendant of meaningful representation (*see Benevento* at 714 ["whether defendant would have been acquitted of the charges but for counsel's errors is relevant, but not dispositive . . ."]).

With regard to defendant's remaining ineffectiveness claims, we likewise find that the present, unexpanded record fails to show defendant received ineffective assistance of counsel under either the state or federal standards.

The court properly exercised its discretion in refusing to conduct any inquiry into whether a highly publicized mass murder committed by a mentally ill man during defendant's trial affected the jurors' ability to continue serving. Other than the fact that both crimes involved a mentally ill man, there was no resemblance between the two cases, and no reason to make an inquiry (*see People v Moore*, 42 NY2d 421, 433-434 [1977], *cert denied* 434 US 987 [1977]; *People v Figueroa*, 4 AD3d 118, 119 [1st Dept 2004], *lv denied* 2 NY3d 799 [2004]; *see also People v Shulman*, 6 NY3d 1, 32 [2005], *cert denied* 547 US 1043 [2006]).

All concur except Acosta, P.J. and Manzanet-Daniels, J. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting)

The trial court infringed on defendant's ability to present a defense when it allowed the prosecutor to question defendant's psychiatric expert about the graphic particulars of defendant's prior rape conviction (which was subsequently vacated on appeal), yet prevented him from explaining why he had doubts that defendant had committed that crime. Moreover, defendant was deprived of the effective assistance of counsel by defense counsel's references to the conviction during voir dire and the submission of inadequately redacted exhibits that served as a reminder of the lurid details of the prior crime, despite the trial court's pretrial ruling precluding that evidence. I would accordingly reverse defendant's conviction for robbery in the first degree, and remand for a new trial.

Defendant suffers from schizophrenia. He has auditory and visual hallucinations as well as paranoid delusions. Over the 30 years since his diagnosis, defendant has been in various psychiatric hospitals and other institutionalized settings and on and off medication.

In 2011, defendant was charged with robbery in the first degree for forcibly stealing property with a dangerous instrument. Prior to trial, defense counsel moved to exclude evidence of defendant's 2005 conviction for rape in the first

degree. The conviction was reversed by this Court upon a finding that the trial court had erred in precluding the defense from investigating the complainant's prior claims of molestation by her doctors, which, if proven to be false, could have been used to undermine her veracity and account of what had transpired (72 AD3d 552 [1st Dept 2010], *lv denied* 15 NY3d 756 [2010]). After the reversal, defendant entered an *Alford* plea in exchange for a sentence resulting in his near immediate release.

The prosecution argued that it ought to be allowed to question the defense's psychiatric expert about the prior conviction because Dr. Goldsmith based his opinion, in part, on the aberrational nature of defendant's threat of violence during the robbery. Defense counsel noted that the conviction had been reversed, and that defendant had subsequently entered an *Alford* plea.

The trial court agreed that the evidence of the prior rape would be unduly prejudicial. Nonetheless, the trial court ruled that the prosecution could ask Dr. Goldsmith whether the fact that defendant had committed a prior violent act would affect his opinion concerning defendant's criminal responsibility. While prohibiting any evidence that the crime involved rape or sexual assault, the court permitted the prosecution to elicit the underlying facts of the crime, namely, that defendant had

allegedly put a pillow over a woman's face and strangled her.

When defense counsel tried to object, the trial court silenced him, stating, "Excuse me. They were proven beyond a reasonable doubt and the verdict is overturned only because of something Justice Goodman did. He chose to plead guilty in an *Alford* plea." Defense counsel registered an objection.

The court found that questioning about the rape would be unduly prejudicial, but stated that the defense expert could be cross-examined concerning the basis of his opinion that defendant was nonviolent. The court suggested that the prosecutor "come up with some language about a violent act without mentioning rape," while acknowledging, "I don't know how you could do that."

At trial, the defense called Dr. Goldsmith as a witness. Dr. Goldsmith testified that defendant was a paranoid schizophrenic who suffered from both auditory and visual hallucinations. Defendant was diagnosed at the age of 25 and had been hospitalized multiple times beginning in the 1980s. Dr. Goldsmith opined that defendant had been fairly stable while receiving treatment, but noted that when he relocated back to New York City, he was unable to re-enroll at St. Luke's/Roosevelt, and wasn't receiving therapy. He began drinking again, worsening his delusional state. It was in this paranoid and hallucinatory state of mind that defendant committed the robbery.

During cross, the prosecutor asked Dr. Goldsmith, "[B]y now you're aware the defendant had committed a serious violent crime in the past, correct?" Defense counsel's objection to the question was overruled. Dr. Goldsmith answered that he was aware defendant had been "convicted of a serious violent act," but noted that the conviction had been overturned on appeal and that defendant had subsequently entered an *Alford* plea. The prosecution posed the question again, and defense counsel again objected, following which a sidebar was held.

When proceedings resumed, the trial court instructed the jury that the question stood but that Dr. Goldsmith's answer was stricken and that the jury was to disregard it.

The prosecution posed the question again to the defense expert. Before Dr. Goldsmith could answer, the court intructed the witness, "[T]hat's a 'yes' or 'no.'" Upon defense counsel's objection, the court clarified that Dr. Goldsmith could respond "yes," "no," or "I don't know." Dr. Goldsmith replied, "I don't know," whereupon the prosecution demanded, "And if you were aware that the defendant put a pillow over a woman's face and choked her that would be a violent act, right?" Defense counsel's objection was overruled, and Dr. Goldsmith answered, "[T]hat would be a violent act." The prosecution asked whether Dr. Goldsmith was aware that there was an allegation that defendant

had committed a violent crime in the past, to which the expert replied, "Correct." The prosecution then asked, "And it's fair to say that when the defendant tells you he has absolutely no violence in his past that's not a completely accurate statement, correct?" Dr. Goldsmith replied, "[I]ncorrect," but was not allowed to explain his reasons for doubting that defendant had committed those acts.

I would reverse the conviction and remand for a new trial. The court infringed on counsel's ability to present a defense by allowing the prosecution to question defendant's expert about certain aspects of defendant's prior rape conviction, yet preventing Dr. Goldsmith from explaining why he had doubts defendant had committed the crime.

Dr. Goldsmith testified that defendant's prior conviction did not alter his opinion concerning defendant's state of mind at the time of the crime. The prosecution aggressively cross-examined Dr. Goldsmith concerning this point, asking, "And it's fair to say then that when the defendant tells you he has absolutely no violence in his past that's not a completely accurate statement, correct?" Any attempt to explain that defendant had entered an *Alford* plea and had not in fact admitted the elements of the prior crime was rebuffed by the trial court. Indeed, the trial court struck Dr. Goldsmith's explanation

concerning why the prior conviction had not altered his opinion and instructed the jury to disregard his response. Later, in summation, the prosecution argued that the jury should not believe Dr. Goldsmith because he refused to acknowledge defendant's prior rape conviction. The prosecutor asserted that "[e]verything he premised his opinion on . . . crumbles when scrutinized even slightly," noting that none of his expertise could explain "how he completely sticks to that conclusion in the face of the facts being markedly different from what he believes them to be when he initially made that conclusion."

Defendant's expert was precluded from explaining why he doubted that defendant had committed the prior rape. The rape conviction was not overturned simply "because of something Judge Goodman did," as the trial court asserted. The complainant in the rape case, a patient at a mental health treatment center, had made claims of sexual abuse against several of her doctors. The trial court precluded the defense from investigating the details of those prior claims, despite the fact that they were relevant to her credibility. After the conviction was overturned, defendant was offered a plea that would result in his immediate release from prison. Ultimately, he entered an *Alford* plea in exchange for a sentence of time served.

By failing to allow Dr. Goldsmith to explain the

circumstances surrounding the prior conviction, the trial court gave the jury a "distorted impression" of the facts (*People v Carroll*, 95 NY2d 375, 386 [2000]), namely, that Dr. Goldsmith had simply ignored the conviction in arriving at his opinions. It prevented defendant from rebutting the prosecutions's claim that Dr. Goldsmith lacked credibility or that defendant had lied to his expert, depriving defendant of his due process right to present a defense (*see People v Hudy*, 73 NY2d 40, 56-58 [1988] [defendant denied due process where the trial court prevented him from presenting evidence challenging the credibility of the complainant], *abrogated on other grounds by Carmell v Texas*, 529 US 513 [2000]).

The majority attempts to minimize the impact of the trial court's ruling restricting Dr. Goldsmith's testimony, asserting that Dr. Goldsmith's references to an *Alford* plea "went beyond the People's question." It cannot seriously be denied that by disallowing a reference to the plea, and limiting the expert to "yes," "no," or an "I don't know" answer, the trial court effectively deprived the doctor of any effective means of rebutting the prosecutor's assertion that defendant had a serious violent history, as well as thoroughly undermined the expert's credibility.

The court's restriction on Dr. Goldsmith's testimony

prevented defendant from being able to rebut the prosecution's attack on the credibility of the expert upon whom defendant's entire defense rested and skewed the trial in the People's favor.

I would also find that defendant was deprived of the effective assistance of counsel when his attorney during voir dire told the jury that defendant had been convicted of a sexual assault and submitted inadequately redacted exhibits containing references to the details of the rape and defendant's conviction. The claim is properly raised on direct appeal, since defendant has met his burden of establishing the absence of a legitimate explanation or discernible strategy for counsel's actions (*see People v Jarvis*, 25 NY3d 968 [2015]; *People v Cleophus*, 81 AD3d 844 [2d Dept 2011]).[1]

To demonstrate ineffective assistance of counsel under the federal standard, a defendant must show that but for counsel's error, "there is a reasonable possibility that . . . the result of the proceeding would have been different" (*Strickland v Washington*, 466 US 668, 694 [1984]). The prejudice component under the state standard of meaningful representation "focuses on the fairness of the process as a whole," requiring reversal

[1]It should be noted that co-counsel made a motion for a mistrial on these grounds, affording defense counsel the opportunity to explain his strategy.

"whenever a defendant is deprived of a fair trial" (*People v Caban*, 5 NY3d 143, 156 [2005]).

Almost immediately after beginning voir dire, counsel told the panel of jurors that they would hear that defendant had a prior criminal case for a "sexual incident." The jury learned the details of the prior conviction for sexual assault when defense counsel failed to properly redact the exhibits.

Defense counsel introduced highly prejudicial evidence without any strategic or legitimate explanation for doing so (*see e.g. People v Stefanovich*, 136 AD3d 1375, 1378 [4th Dept 2016] [reversing conviction where defense counsel referred to prior sexual offense during voir dire, perceiving no "discernible benefit" to defense counsel's strategy, concluding he took "an inexplicably prejudicial course of action by allowing the jury to know the defendant [wa]s a registered sex offender"], *lv denied* 27 NY3d 1139 [2016]; *People v Jarvis*, 113 AD3d 1058, 1059-1060 [4th Dept 2014] [no strategic explanation for defense attorney's failure to object to the introduction of prejudicial and previously excluded evidence that the defendant had threatened a prosecution witness], *affd* 25 NY3d 968 [2015]; *People v Cleophus*, 81 AD3d at 846 ["no valid tactical reason" for defense counsel's failure to object to the admission of the minutes of defendant's prior guilty plea when such evidence was statutorily

excludable]). The evidence of the prior rape conviction had already been excluded by the trial court so there was no danger of the prosecutor introducing or relying on the rape conviction. Indeed, had the prosecution done so, defendant would have had grounds for a mistrial. An argument that the door would have inevitably opened by virtue of other trial evidence is speculative at best.

The evidence of defendant's prior rape conviction was highly prejudicial given the nature and severity of the crime. The jury learned not only that defendant had a rape conviction, but that he had been sentenced to 21 years on account of the violent crime. The inadequate redactions provided graphic reminders of defendant's criminal past, including references to "serving a twenty-one year sentence for violent sexual crimes," and "forc[ing] the [victim] to have sexual intercourse with him." That this evidence was highly prejudicial is patent from the fact that the court determined initially to exclude it.

Defendant has shown that "counsel's representation fell below an objective standard of reasonableness" and that as a

result thereof he was deprived of a fair trial (*see People v Caban*, 5 NY3d at 155-156; *People v Garcia*, 19 AD3d 17, 20 [2005]). I would accordingly reverse the conviction and remand for a new trial.

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

ENTERED: JUNE 1, 2017

CLERK

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

3817 Michael P. Thomas, Index 100956/15
Plaintiff-Appellant,

-against-

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

Communications Workers of America District One,
Defendant.

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Michael P. Thomas, appellant pro se.

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

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 15, 2016, which granted defendants-respondents' motion to dismiss the amended complaint as against them, unanimously affirmed, without costs.

In this taxpayer action, plaintiff Michael P. Thomas, alleges, among other things, that defendant Department of Education (DOE) and defendant Chancellor Farina engaged in fraudulent and/or wasteful acts in connection with defendant Communications Workers of America District One's (CWA) use of public school property to host a meeting with Mayor Bill de Blasio, and that the Office of the Special Commissioner of Investigation for the New York City School District (SCI)

fraudulently concealed such conduct.

Plaintiff does not deny that CWA was charged, and paid, the customary fees set by the DOE for use of public school premises, including custodial and security costs. Accordingly, the grant of use of the school premises to CWA does not constitute a gift of money in violation of the New York State Constitution (*see* NY Const, art VIII, § 1). Moreover, because no expenditure was accompanied by fraud or for an entirely illegal purpose, no cause of action lies under General Municipal Law § 51 (*see Godfrey v Spano*, 13 NY3d 358, 373 [2009]). In addition, plaintiff may not use a taxpayer action to correct technical or procedural irregularities by the DOE or to review determinations allegedly made in violation of law (*see Beresford Apts. v City of New York*, 238 AD2d 218, 219 [1st Dept 1997], *lv denied* 89 NY2d 815 [1997]).

Plaintiff, who failed to allege an intent to deceive, has not pleaded a cause of action for fraudulent misrepresentation or bad faith against SCI (*see Guberman v Rudder*, 85 AD3d 683, 684 [1st Dept 2011]; *see also Lama Holding Co. v Smith Barney*, 88

NY2d 413, 421 [1996]), and his conclusory allegations lack the requisite specificity (*see* CPLR 3016[b]).

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: JUNE 1, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3917 Leggiadro, Ltd., Index 154749/12
Plaintiff-Respondent-Appellant,

Brooks Ross, et al.,
Plaintiffs,

-against-

Winston & Strawn, LLP,
Defendant-Appellant-Respondent.

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Arthur M. Handler Law Offices LLC, New York (Arthur M. Handler of counsel), for appellant-respondent.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Lawrence S. Hirsh of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 15, 2016, which granted in part and denied in part the motion of defendant Winston & Strawn, LLP (W&S) for summary judgment dismissing the remaining legal malpractice claim in the complaint, unanimously modified, on the law, to deny W&S's motion for summary judgment in its entirety, and otherwise affirmed, without costs.

The court properly declined to dismiss the corporate plaintiff's claim that it would not have accepted the landlord's buyout offer of the remaining six years on its commercial lease if it had been properly advised by W&S of a $400,000 New York City corporate tax obligation it would have to pay on the buyout

figure. Deposition testimony and affidavits offered from the corporate plaintiff's principal assert that it was W&S's responsibility to ensure that the negotiated buyout covered all of plaintiff's anticipated relocation expenses and attendant tax obligations such that plaintiff would not be out of pocket financially when relocating to allow the nonparty landlord to undertake a major renovation of its building. Under the circumstances presented, triable issues exist as to whether, but for W&S's failure to inform plaintiff of the corporate tax obligation, plaintiff would have declined the buyout offer, remained in its existing leasehold and avoided any damages associated with having to pay, out of pocket, a corporate tax on the buyout sum (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007]; *Miuccio v Straci*, 129 AD3d 515 [1st Dept 2015]).

Another branch of the malpractice claim alleged that but for counsel's negligence in failing to raise the tax issue, the landlord would have offered a higher buyout figure to cover the New York City corporate tax obligation. This branch of the claim is also viable. Although the claim is founded upon a discretionary decision residing in another over whom the corporate plaintiff had no control, the circumstances support plaintiff's contention that the landlord would have agreed to

satisfy the tax liability. As we opined in sustaining the malpractice cause of action in the complaint on defendant's motion to dismiss, plaintiff had a strong bargaining position because the amount of time left on the lease, as well as the importance of the leased space to the landlord's conversion plans, would have pressured the landlord to acquiesce to plaintiff's relatively minor request (*see Leggiadro, Ltd. v Winston & Strawn, LLP*, 119 AD3d 442, 442-443 [1st Dept 2014]; *see also Campbell v Rogers & Wells*, 218 AD2d 576, 580 [1st Dept 1995]; *Khadem v Fischer & Kagan*, 215 AD2d 441, 443 [2d Dept 1995]). W&S has not proffered any new probative evidence to counter this aspect of plaintiff's legal malpractice claim.

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

ENTERED: JUNE 1, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3923-
3923A Index 23492/91

Othilda Wynter, etc., et al.,
Plaintiffs-Appellants,

-against-

Our Lady of Mercy Medical Center, et al.,
Defendants-Respondents,

Evelyn Campbell, R.N., et al.,
Defendants.

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Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for appellants.

Turken & Heath, LLP, Armonk (Jason D. Turken of counsel), for Our Lady of Mercy Medical Center, Patricia Scanlon, M.D. and Jerry Balentine, M.D., respondents.

Zachary W. Carter, Corporation Counsel, New York (Qian Julie Wang of counsel), for New York City Health and Hospitals Corporation, respondent.

Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Christopher Simone of counsel), for Stephen Weitz, M.D., respondent.

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Judgments, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered September 15, 2015 and September 24, 2015, dismissing the complaint as against defendants New York City Health and Hospitals Corporation, Stephen Weitz, M.D., Our Lady of Mercy Medical Center, Patricia Scanlon, M.D., and Jerry Balentine, M.D., unanimously affirmed, without costs.

Notwithstanding the strong public policy of this State to

decide cases on the merits and our previous recognition of the potential merit of plaintiffs's claims (*see Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376 [1st Dept 2004]), the motion court providently exercised its discretion in denying vacatur of plaintiffs' default at the May 20, 2013 and July 24, 2013 court conferences. Bearing in mind the principle that "ultimately it was plaintiff's duty to prosecute its case" (*Lance Intl., Inc. v First Natl. City Bank*, 86 AD3d 479, 481 [1st Dept 2011], *lv dismissed* 17 NY3d 922 [2011]], *lv dismissed* 19 NY3d 898 [2012]), we find plaintiffs failed to provide a reasonable excuse for their various failures to prosecute their claims after this case was restored by this Court in 2004, including the failure to appear at the 2013 conferences at issue on this appeal that resulted in the dismissal of this action pursuant to the Uniform Rules for Trial Courts (22 NYCRR) § 202.27(b).

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

ENTERED: JUNE 1, 2017

CLERK

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

4052 & M-1974 Prince Oparaji, et al., Plaintiffs-Appellants, Index 102264/15

-against-

Lawrence T. Yablon, et al., Defendants-Respondents.

_____

Prince Oparaji, appellant pro se.

Maurice Oparaji, appellant pro se.

Rivkin Radler LLP, New York (Jonathan B. Bruno of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered July 12, 2016, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7), and denied plaintiffs' motion for a default judgment, or in the alternative, for summary judgment, unanimously affirmed, with costs.

In this pro se action alleging fraud, conspiracy, conversion and defamation by defendants in connection with their legal representation of plaintiff Prince Oparaji in an underlying motor vehicle accident, defendants, by their service of a motion to dismiss the action, made within the time extension granted by the court, did not default, contrary to plaintiffs' contentions (*see generally* CPLR 320[a]; 2211; 3211[a]; *see also Urena v NYNEX,*

*Inc.*, 223 AD2d 442 [1st Dept 1996]; *Colbert v International Sec. Bur.*, 79 AD2d 448 [2d Dept 1981], *lv denied* 53 NY2d 608 [1981]). Plaintiffs' further argument that defendants defaulted in answering their motion seeking a default judgment is refuted by the record.

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

**M-1974 - *Prince Oparaji v Lawrence T. Yablon***

Motion to strike portions of appendix denied.

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

ENTERED: JUNE 1, 2017

CLERK

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

4146 The People of the State of New York, Respondent, Ind. 9335/91

-against-

Hollis Hosear, 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 (Sabrina Margret Bierer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Abraham L. Clott, J.), entered on or about October 30, 2015, which denied defendant's petition to modify his sex offender classification, unanimously affirmed, without costs.

Defendant failed to meet his burden under Correction Law § 168-o of presenting clear and convincing evidence that a downward modification of his risk level is warranted (*see People v Torres*, 120 AD3d 1126 [1st Dept 2014], *lv denied* 24 NY3d 911 [2014]). Defendant did not establish a prolonged abstinence from substance abuse, because all but a relatively short portion of the period he cites occurred while he was incarcerated (*see People v Birch*, 99 AD3d 422 [1st Dept 2012], *lv denied* 20 NY3d 854 [2012]. Defendant likewise failed to establish that his medical problems

render him unlikely to commit any kind of sex offenses (*see e.g. People v Wragg*, 41 AD3d 1273, 1274 [4th Dept 2007], *lv denied* 9 NY3d 809 [2007]). Among other things, even during hospital treatment defendant has recently engaged in lewd acts toward nurses.

The court providently exercised its discretion in declining to adjourn the proceeding, and the lack of an adjournment had no effect on the court's determination.

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

ENTERED: JUNE 1, 2017

CLERK

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

4147 Mephisto Management, LLC, Index 653456/13
Plaintiff-Appellant-Respondent,

-against-

Moon 170 Mercer, Inc., et al.,
Defendants-Respondents-Appellants.

_____

Windels Marx Lane & Mittendorf, LLP, New York (Don Abraham of counsel), for appellant-respondent.

Cordova & Schwartzman, LLP, Garden City (Jonathan B. Schwartzman of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about July 11, 2014, which, insofar as appealed from, granted so much of defendants' motion as sought to dismiss the wrongful eviction claim, and denied so much of the motion as sought to dismiss the fraud claim, unanimously reversed, on the law, with costs and the motion denied as to the wrongful eviction claim and granted as to the fraud claim.

The complaint states a cause of action for wrongful eviction based on an invalid warrant (RPAPL 853; *see e.g. Rodriguez v 1414-1422 Ogden Ave. Realty Corp.*, 304 AD2d 400 [1st Dept 2003]; *Mayes v UVI Holdings*, 280 AD2d 153 [1st Dept 2001]). Defendant Moon 170 Mercer, Inc.'s service of a 10-day notice to cure a default, commencement of a new holdover proceeding, and filing of a petition alleging that the tenancy had recently been terminated

arguably reflect an intent to revive the lease after the issuance of a warrant of eviction in an earlier proceeding (*see DiGiglio v Tepedino*, 173 AD2d 763 [2d Dept 1991], *lv dismissed* 78 NY2d 1007 [1991]).

The general allegations in the complaint that defendant Michael Shah lacked an intent to perform a contract when he entered into it are insufficient to support a cause of action sounding in fraud (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Arnon Ltd [IOM] v Beierwaltes*, 125 AD3d 453 [1st Dept 2015]; *compare Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 [1995] [allegation that defendant made false statement of intention is sufficient to support fraud claim]).

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

ENTERED: JUNE 1, 2017

CLERK

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

4148-
4149 In re Toussaint E.,

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

Angeline M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondent.

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

_____

Order of fact-finding, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 16, 2016, which, to the extent appealed from, determined that respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding decision, same court and Judge, entered on or about March 14, 2016, unanimously dismissed, without costs, as taken from a nonappealable paper.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The record shows that the child was subject to actual or imminent

danger of injury or impairment to his emotional and mental condition from exposure to repeated incidents of domestic violence between his parents, occurring in close proximity to the child (*Matter of Naveah P. [Saquan P.]*, 135 AD3d 581 [1st Dept 2016]). The mother's contention that she should not be penalized as a victim of domestic violence is unfounded, since she refused referrals for assistance, denied that any domestic violence occurred, and permitted the father to care for the child while she went to work, after knowing that the father had left the child alone in their apartment (*see Nicholson v Scoppetta*, 3 NY3d 357, 371-372 [2004]; *Matter of Serenity H. [Tasha S.]*, 132 AD3d 508, 509 [1st Dept 2015]). Moreover, the mother knew or should have known of the father's mental illness and failed to protect the child from the risks presented (*see Matter of Christy C. [Roberto C.]*, 77 AD3d 563 [1st Dept 2010]; *see also Matter of Joseph Benjamin P. [Allen P.]*, 81 AD3d 415, 416 [1st Dept 2011], *lv denied* 16 NY3d 710 [2011]).

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

ENTERED: JUNE 1, 2017

CLERK

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

4150 David A. Dobbs, Index 652175/14
Plaintiff-Appellant,

-against-

Colin Smith,
Defendant-Respondent.

_____

Leavitt & Kerson, Forest Hills (Paul E. Kerson of counsel), for appellant.

McBreen & Kopko, Jericho (Richard A. Auerbach of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered August 8, 2016, which granted the motion by defendant Colin M. Smith residing in Astoria, New York (movant), for summary judgment dismissing the complaint, and marked the case as "disposed," unanimously modified, on the law and the facts and in the exercise of discretion, to clarify that the complaint is dismissed as against movant only, and that the disposition is non-final, and otherwise affirmed, without costs.

Movant's motion for summary judgment dismissing the breach of contract claims against him was correctly granted upon movant's unrebutted showing that he was not the "Colin M. Smith" with whom plaintiff had contracted. However, since movant sought dismissal only as against himself, plaintiff's request that the

action be allowed to continue against the individual who, it appears, assumed movant's identity, i.e., the "Colin M. Smith" who represented himself to be an attorney with law offices at 721 Fifth Avenue, New York, NY 10022, and purported to enter into the subject contract, should have been granted (*see* CPLR 5019[a]; *see e.g. Ansonia Assoc. v Ansonia Tenants Coalition*, 171 AD2d 411 [1st Dept 1991]; *Follender v Maxim*, 44 AD3d 1227 [3d Dept 2007).

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

ENTERED: JUNE 1, 2017

CLERK

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

4151 Cleo Realty Associates, L.P., Index 651106/16
Plaintiff-Appellant,

-against-

Mike Papagiannakis,
Defendant-Respondent.

_____

The Abramson Law Group, PLLC, New York (Jeffrey A. Bodoff of counsel), for appellant.

Kordas & Marinis, LLP, Long Island City (Ross Kordas of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered November 22, 2016, which denied plaintiff's motion for summary judgment in lieu of complaint, unanimously affirmed, with costs.

Defendant's guaranty of a lease is not an instrument for the payment of money only, because it was necessary to consult other documents to determine whether the guaranty continued to be enforceable (*see PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494 [1st Dept 2017]). The guaranty did not apply to obligations incurred after the tenant surrendered possession pursuant to the procedures set forth in paragraph 6 of the guaranty. While Manoli Papagiannakis's July 31, 2015 email did not constitute the prior written notice of surrender required by paragraph 6 of the guaranty, it was nevertheless another document to which reference

was required along with the guaranty and proof of nonpayment.

Defendant appears to argue that a surrender by operation of law occurred in February 2016. However, paragraph 6 of the guaranty says, "Upon surrender of possession *as aforesaid* [i.e., pursuant to the procedures set forth in paragraph 6], this Guaranty shall be deemed revoked" (emphasis added). The tenant did not give plaintiff 30 days' written notice that it was going to surrender possession on February 17, 2016; on the contrary, its lawyer wrote on February 7, 2016 that it intended to vacate and surrender at the end of the lease, i.e., June 30, 2016.

Even if, arguendo, defendant's guaranty were an instrument for the payment of money only, plaintiff failed to establish as a matter of law that it was entitled to the amount it seeks. Most of this amount consists of late fees, which the rent history that plaintiff submitted with its opening papers shows were 4% per month, i.e., 48% per year. In view of the public policy underlying Penal Law § 190.40, which makes an interest charge of more than 25% per year a criminal offense, these late fees are unenforceable (*see Sandra's Jewel Box v 401 Hotel*, 273 AD2d 1, 3 [1st Dept 2000]; *see also Clean Air Options, LLC v Humanscale Corp.*, 142 AD3d 923 [1st Dept 2016]).

Even if the late fees were enforceable, there is a triable issue of fact as to whether plaintiff ever billed the tenant for

those fees (*see Rehbock v Levine*, 111 AD2d 16 [1st Dept 1985]). In opposition to plaintiff's motion, both defendant and Manoli Papagiannakis submitted affidavits saying that plaintiff had never billed the tenant for late fees. In reply, plaintiff submitted bills that an accounting manager claimed had been mailed on various dates between March 2010 and February 2016. However, each bill said, "Includes Payments Received As Of: *06/21/16*" (emphasis added).

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

ENTERED: JUNE 1, 2017

CLERK

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

4152 Chatham Towers, Inc., Index 651561/13
Plaintiff, 595441/15

-against-

Castle Restoration & Construction, Inc., et al.,
Defendants.

- - - - -

Castle Restoration & Construction, Inc.,
Third-Party Plaintiff-Appellant,

-against-

JPI Construction & Management Services, Inc., et al.,
Third-Party Defendants,

Howard L. Zimmerman Architect P.C.,
Third-Party Defendant-Respondent.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Brian L. Battisti respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 10, 2016, which, insofar as appealed from as limited by the briefs, granted third-party defendant Howard L. Zimmerman Architect P.C.'s (Zimmerman) motion to dismiss defendant-third-party plaintiff Castle Restoration & Construction, Inc.'s (Castle) common-law claims against it for contribution and indemnification, unanimously affirmed, without

costs.

The court properly dismissed Castle's common-law contribution claim against Zimmerman. Although Castle attempted to cast plaintiff Chatham Towers, Inc.'s (Chatham) claims, as set forth in the underlying complaint, as sounding in tort, the claims were actually all based on alleged breaches of a contract between Chatham and Castle. Thus, because Chatham sought only to enforce the benefit of its bargain with Castle, its damages were for purely economic loss, and does not constitute an injury to property under CPLR 1401, which governs claims for contribution (*see Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]; *Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911 [1st Dept 2011]; *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [1st Dept 2009]).

In addition, the court also properly dismissed Castle's common-law indemnification claim. Common-law indemnification may be pursued by parties who have been held vicariously liable for the party that actually caused the negligence that injured the plaintiff (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Here, however, there is no common-law indemnification claim because Chatham sought recovery from Castle

because of the latter's alleged wrongdoing — breach of contract — and not vicariously because of any negligence on the part of Zimmerman (*see Structure Tone, Inc.*, 87 AD3d at 911-912; *Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]; *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]).

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

ENTERED: JUNE 1, 2017

CLERK

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

4153 The People of the State of New York, Respondent, Ind. 3782/07

-against-

Douglas Latta, Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Arza Feldman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered August 8, 2013, convicting defendant, after a jury trial, of conspiracy in the fifth degree, scheme to defraud in the first degree (two counts), grand larceny in the second degree, grand larceny in the third degree (four counts), attempted grand larceny in the third degree, criminal possession of a forged instrument in the second degree (two counts), criminal possession of stolen property in the second degree, and criminal possession of stolen property in the fourth degree (eight counts), and sentencing him, as a second felony offender, to an aggregate term of 22 to 44 years, unanimously affirmed.

At the end of a long trial with no alternate jurors remaining, the court providently exercised its discretion when it declined to excuse a juror who had initially expressed concern

that lengthy deliberations might interfere with his travel plans, but who then gave an unequivocal assurance that his ability to deliberate fairly would not be affected. There is no indication that defendant was deprived of a fair trial, and his arguments to the contrary are speculative (*see e.g. People v Marchena*, 303 AD2d 295 [1st Dept 2003], *lv denied* 100 NY2d 584 [2003]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 1, 2017

CLERK

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

4154 In re Alexander Z., and Another,
Appellants,

Dependent Children Under Eighteen Years
of Age, etc.,

Anne Z.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Adam R. Mandelsberg of counsel), for Alexander Z. and Christina Z., appellants.

Anne Z., appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for respondent.

_____

Appeals from order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about October 7, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about August 10, 2015, which found, upon respondent mother's default, that she neglected theappellant children by excessively consuming alcohol; and appeal from fact-finding order, unanimously dismissed, without costs.

The children's appeal is dismissed because they are not aggrieved by the finding of neglect against their mother (*see*

*Matter of Geovany S. [Martin R.]*, 143 AD3d 578 [1st Dept 2016]; *see also* CPLR 5511). Although the children may have been aggrieved by the order of disposition, which placed the children into their father's custody with supervision by petitioner agency for 12 months, the terms of the order have expired, and thus any appeal from the order is moot (*see Geovany S.*, 143 AD3d at 578).

The mother's appeal is dismissed because the fact-finding order was entered upon her default, rendering it nonappealable (*see* CPLR 5511; *Matter of Darren Desmond W. [Nirandah W.]*, 121 AD3d 573, 573 [1st Dept 2014]).

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

ENTERED: JUNE 1, 2017

CLERK

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

4159- Index 311503/07
4160 Ira Schacter,
Plaintiff-Appellant-Respondent,

-against-

Janice Schachter,
Defendant-Respondent-Appellant.

_____

Ira J. Schacter, New York, appellant-respondent pro se.

Thomas D. Shanahan, P.C., New York (Thomas D. Shanahan of counsel), for respondent-appellant.

_____

Judgment of divorce, Supreme Court, New York County (Laura E. Drager, J.), entered October 22, 2014, to the extent appealed from as limited by the briefs, awarding defendant 17% of the value of plaintiff's partnership interest in his law firm as of the date of commencement of the action, awarding defendant maintenance through August 1, 2019, distributing certain tangible property, and placing 100% responsibility for unpaid pre-commencement tax liability on plaintiff, unanimously modified, on the law and the facts, to vacate the award of plaintiff's partnership interest and the maintenance award, and the matter remanded for further proceedings on those issues, and to reimburse plaintiff for his payments to Dawn Cardi, Esq.,and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about October 22, 2014, which, inter

alia, denied plaintiff's requests to reallocate certain taxes, costs, and fees, and for a distributive award and other payments, and denied defendant lifetime maintenance and child support for the parties' son, unanimously dismissed, without costs, as subsumed in the appeal from the judgment of divorce.

In valuing plaintiff's partnership interest as of the date of commencement of the divorce action, the trial court failed to factor sufficiently the roles that the 2007-2008 financial crisis and defendant's conduct in generating negative publicity about plaintiff played in the decline in value of plaintiff's partnership interest by the time of trial (*see Naimollah v De Ugarte*, 18 AD3d 268, 270-271 [1st Dept 2005]; *Grunfeld v Grunfeld*, 255 AD2d 12, 17 [1st Dept 1999], *mod on other grounds* 94 NY2d 696 [2000]; *see* Domestic Relations Law [DRL] § 236[B][4][a]). The court concluded that market forces and defendant's conduct contributed to the decline in the value of plaintiff's partnership interest between October 2007, when the action commenced and that interest was valued at $5,032,000, and September 2012, when the trial commenced and that interest was valued at $1,660,000. Nevertheless, the court chose the October 2007 figure, and allocated 17% ($855,440) to defendant. Accordingly, this part of the distributive award should be vacated and the matter remanded for a determination of

defendant's distributive share of plaintiff's partnership interest based on the September 2012 valuation.

Plaintiff is entitled to reimbursement for payments made to Dawn Cardi, Esq., who was retained to facilitate communications between plaintiff and the parties' daughter, from the sale of the marital assets at the time of equitable distribution. The court so ruled in a 2011 order, and, absent any explanation for its deviation from that ruling, we find that the court erred in reaching the contrary conclusion in its order entered on or about October 22, 2014.

Plaintiff's brief testimony that a piano was gifted to him during the marriage did not suffice to overcome the marital property presumption; thus, the court properly deemed the piano marital property to be sold and the net proceeds divided equally between the parties (*see* DRL § 236[B][1][c]; *Bernard v Bernard*, 126 AD3d 658, 659 [2d Dept 2015]). Similarly, the court's allocation of cars to the parties, and its decision not to grant plaintiff a credit for the car loan he paid, or to factor in the respective values of the cars, was a provident exercise of discretion, since plaintiff received his preferred car.

The court providently exercised its discretion in allocating costs and fees, including counsel fees, upon its finding that both parties contributed to the "intensity" of the litigation and

its consideration of the parties' financial circumstances, as well as the costs plaintiff incurred in defending a criminal case and other investigations (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]; *see* DRL § 237).

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

In light of our ruling vacating the award to defendant based on plaintiff's partnership interest, the maintenance award, which was based in part on that distributive award, also must be vacated and the matter remanded for a determination of whether the maintenance award should be modified. We note, however, that, contrary to defendant's arguments, the court properly denied defendant lifetime maintenance, upon consideration of the relevant statutory factors, including the size of the distributive award, the parties' age and health, and defendant's ability to earn an income and become self-supporting (DRL § 236[B][6][a]; *see Allen v Allen*, 275 AD2d 225 [1st Dept 2000], *lv denied* 96 NY2d 708 [2001]).

The court properly declined to award defendant child support

for the parties' son, for whom plaintiff pays all educational and healthcare costs and fees, and who lives with plaintiff when he is not away at school.

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

ENTERED: JUNE 1, 2017

CLERK

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

4161 In re Donn Gerelli Associates Insurance Agency, Inc., et al., Petitioners-Appellants, Index 101106/15

-against-

Benjamin M. Lawsky, etc., Respondent-Respondent.

_____

Michelle M. Bonsignore, Scarsdale, for appellants.

Eric T. Schneiderman, Attorney General, New York (Andrew R. Davies of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered July 7, 2016, insofar as appealed from as limited by the briefs, denying the petition to annul a determination of the Superintendent of Financial Services of the New York State Department of Financial Services, dated June 1, 2015, which found that petitioners violated Insurance Law §§ 2119 and 2110(a)(4), and ordered petitioners' licenses revoked unless they paid restitution in the aggregate amount of $6,434.25 and a civil penalty of $69,600, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The Superintendent's initial warning letter to petitioners, addressing their admitted statutory violations but declining enforcement at that time, which stated that the letter did not

"constitute a formal administrative action," did not preclude respondent from subsequently charging petitioners with those violations and others following further investigation. The doctrines of res judicata and collateral estoppel are inapplicable to this proceeding, and petitioners' other theories in this regard are likewise unavailing (*see Matter of Venes v Community School Bd. of Dist.* 26, 43 NY2d 520, 525 [1978]). It is "the settled policy of the courts not to review the exercise of discretion by public officials in the enforcement of State statutes, in the absence of a clear violation of some constitutional mandate" (*Matter of Rivergate Co. v Board of Stds. & Appeals of City of N.Y.*, 144 AD2d 266, 266 [1st Dept 1988], *lv denied* 74 NY2d 605 [1989] [internal quotation marks omitted]). Petitioners' contentions that the determination was barred under 19 NYCRR 400.13(a) and the doctrine of laches are without merit. The timeliness requirements of 19 NYCRR 400.13(a) are applicable only to proceedings "under the jurisdiction of the Secretary of State." "[T]he equitable doctrine of laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a

public interest" (*Matter of Cortlandt Nursing Home v Axelrod*, 66 NY2d 169, 177 n 2 [1985], *cert denied* 476 US 1115 [1986]).

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

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

ENTERED: JUNE 1, 2017

CLERK

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

4162 The People of the State of New York, Ind. 513/09
Respondent,

-against-

Robert Pastore,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered February 6, 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: JUNE 1, 2017

CLERK

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

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

4163 Andres Rivera, Index 301377/09
Plaintiff-Respondent, 83980/09
84144/12

-against-

Columbia Hicks Associates, LLC,
et al.,
Defendants.

- - - - -

Columbia Hicks Associates LLC,
Third-Party Plaintiff,

-against-

SDS Columbia LLC, et al.,
Third-Party Defendants.

- - - - -

Columbia Hicks Associates LLC,
Second Third-Party Plaintiff-Respondent,

-against-

Knockdown Contracting, Inc.,
Second Third-Party Defendant-Appellant.

_____

Clausen Miller P.C., New York (Don R. Sampen of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellant.

Mallilo & Grossman, Flushing (F. Jason Kajoshaj of counsel), for Andres Rivera, respondent.

Baker Greenspan & Bernstein, Bellmore (Robert L. Bernstein, Jr. of counsel), for Columbia Hicks Associates LLC, respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered April 6, 2016, which denied second third-party defendant Knockdown Contracting Inc.'s motion for summary judgment

dismissing second third-party plaintiff Columbia Hicks Associates LLC's third-party claims against it, unanimously affirmed, without costs.

The motion court properly denied Knockdown's motion as untimely, because Knockdown failed to show "good cause" for moving for summary judgment more than 120 days after the filing of the note of issue (CPLR 3212[a]; *see e.g. Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]).

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

ENTERED: JUNE 1, 2017

CLERK

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

4164 The People of the State of New York, Ind. 4382/14
Respondent,

-against-

Rashad Jeffries,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 25, 2015, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of two years, unanimously modified, as a matter of discretion in the interest

of justice, to the extent of reducing the term of postrelease supervision from 2½ years to 1½ years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 1, 2017

CLERK

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

4166-
4166A The People of the State of New York, Respondent,

Ind. 1947/14
2452/14

-against-

Frank L.,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered June 15, 2015, convicting defendant, upon his pleas of guilty, of robbery in the second degree and criminal possession of a weapon in the second degree, adjudicating him a youthful offender on the robbery conviction and sentencing him to a term of one year, and sentencing him to a term of 3½ years on the weapon possession conviction, unanimously affirmed.

As to the weapon possession conviction, the court properly exercised its discretion in declining to adjudicate defendant a youthful offender. Defendant fired pistol shots in the direction of other people, and the presentence report indicated that he had the capacity for violence and that his criminal actions were

escalating.

As to the robbery conviction, application by defendant's counsel to withdraw 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 nonfrivolous points that could be raised on this appeal as to that conviction.

Pursuant to CPL 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 30 days after service of a copy of this order.

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

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

ENTERED: JUNE 1, 2017

CLERK

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

4167N Vincent Vitkowsky, Index 303301/09
Plaintiff-Appellant,

-against-

Pandora Strasler,
Defendant-Respondent.

_____

McLaughlin & Stern, LLP, New York (Linda A. Rosenthal of counsel), for appellant.

Pandora Strasler, New York, respondent pro se.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered February 24, 2016, which, following a hearing, granted defendant mother's motion to enforce plaintiff father's child support obligations pursuant to the parties' stipulation and divorce judgment, denied the father's cross motion for suspension or downward modification of child support, and awarded attorney's fees to the mother in the amount of $15,000, unanimously affirmed, without costs.

In this postjudgment divorce proceeding, the father's reduced income was not an "unanticipated" change of circumstances that warranted a modification of the parties' settlement agreement (*Matter of Boden v Boden*, 42 NY2d 210, 212-213 [1977]). The father submitted an affidavit to the IAS court in June 2011 indicating that his partnership position was at risk.

Nevertheless, he committed himself to paying more than $10,000 in monthly child support (inclusive of add-ons) when he signed the stipulation settling the divorce action approximately four months later. The father's contention that he unwittingly depleted all of his assets two years after his formal termination in 2012 such that he was unable to meet his expenses or to contribute anything at all to paying his child support obligations is questionable, particularly given his payment of other large expenses for which he had no legal obligation.

The IAS court providently exercised its discretion in awarding the mother $15,000 in attorney's fees, after taking into account the parties' stipulation, which provides for legal fees resulting from a party's default, and the parties' financial circumstances.

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

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

ENTERED: JUNE 1, 2017

CLERK

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

4168N Roza Aleksandrova, Index 21677/11E
Plaintiff-Appellant,

-against-

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered February 5, 2016, which denied plaintiff's motion to amend the notice of claim and the complaint, unanimously affirmed, without costs.

Plaintiff alleged in her notice of claim and complaint that she tripped over a protruding manhole cover near the entrance to a park, and that defendants were negligent in "failing to timely and/or properly repair [the] sidewalk," or to warn of the dangerous condition. After the applicable one-year-and-90-day limitations period elapsed (General Municipal Law § 50-i[1]), plaintiff moved to amend the notice of claim and complaint in order to plead, as an exception to the prior written notice rule (*see* Administrative Code of City of NY § 7-201[c]), that defendants had caused and created the condition or made "special

use" of the sidewalk.

The allegations of negligent maintenance in the notice of claim did not provide notice of plaintiff's new theory of affirmative negligence (*see Cambio v City of New York*, 118 AD3d 577 [1st Dept 2014]; *compare Cooke v City of New York*, 95 AD3d 537 [1st Dept 2012] [notice of claim alleging that the defendant "created" defective condition through negligent repair provided adequate notice of the plaintiff's cause-and-create claim]). Thus, General Municipal Law § 50-e(6), which "authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability" (*Scott v City of New York*, 40 AD3d 408, 410 [1st Dept 2007]), does not apply. Further, General Municipal Law § 50-e(5) does not authorize amendment of the notice of claim to assert a new theory of liability where, as here, the limitations period has expired (*see Frankel v New York City Tr. Auth.*, 134 AD3d 440, 441 [1st Dept 2015]; General Municipal Law § 50-i[1]).

Even assuming that the "special use" theory is not a new theory of liability, leave to amend to add it would be futile,

since the City's ownership of the manhole cover does not constitute a "special use" of the sidewalk (*see Chambers v City of New York*, 147 AD3d 471, 472 [1st Dept 2017]).

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

ENTERED: JUNE 1, 2017

CLERK

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

4169 In re Jordano Fernandez, Ind. 4782/15
[M-2049] Petitioner, 4272/16
OP 101/17

-against-

Hon. Kevin McGrath, etc.,
Respondent.

_____

Michele Hauser, New York, and New York County Defender Services, New York (Stanford Hickman of counsel), for petitioner.

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

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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: JUNE 1, 2017

CLERK

Andrias, J.P., Feinman, Gische, Gesmer, JJ.

3245-
3246 Index 653307/14

MBI International Holdings Inc., et al.,
Plaintiffs-Appellants,

-against-

Barclays Bank PLC,
Defendant-Respondent.

_____

Kirkland & Ellis LLP, Washington, DC (Paul D. Clement of the bar of the District of Columbia, the State of Virginia and the State of Wisconsin, admitted pro hac vice, of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Craig A. Newman of counsel), for appellants.

Wilkie Farr & Gallagher LLP, New York (Todd G. Cosenza of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.) entered February 17, 2016, affirmed, without costs. Appeal from order, same court and Justice, entered January 29, 2016, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Feinman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Paul G. Feinman
Judith J. Gische
Ellen Gesmer, JJ.

3245-3246
Index 653307/14

_____x

MBI International Holdings Inc., et al.,
Plaintiffs-Appellants,

-against-

Barclays Bank PLC,
Defendant-Respondent.

_____x

Plaintiffs appeal from the judgment of the Supreme Court, New York County (Charles E. Ramos, J.) entered February 17, 2016, dismissing the complaint in its entirety with prejudice, and from the order of the same court and Justice, entered January 29, 2016, which dismissed plaintiffs' claims.

Kirkland & Ellis LLP, Washington, DC (Paul D. Clement of the bar of the District of Columbia, the State of Virginia and the State of Wisconsin, admitted pro hac vice, of counsel, and Jeffrey M. Harris of the bar of the District of Columbia and the State of California, admitted pro hac vice, of counsel), Kirkland & Ellis LLP, New York (Stephen V. Potenza of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Craig A. Newman and Muhammad U. Faridi of counsel), for appellants.

Wilkie Farr & Gallagher LLP, New York (Todd G. Cosenza, William A. O'Brien and Frank Scaduto of counsel), for respondent.

FEINMAN, J.

This appeal arises out of an alleged scheme to defraud a Saudi Arabian residential real estate developer out of hundreds of millions of dollars owed to it by the Saudi government. Its resolution requires us to construe New York's date of discovery rule for purposes of ascertaining when the statute of limitations was triggered with respect to plaintiffs' fraud-based claims. Ultimately, the result we reach today embraces the well-settled rule established in New York long ago: "[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he [or she] has been defrauded, a duty of inquiry arises, and if he [or she] . . . shuts his [or her] eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him [or her]" (*Higgins v Crouse*, 147 NY 411, 416 [Nov. 26, 1895, Finch, J.]). Thus, we affirm the motion court's holding to the extent it dismissed plaintiffs' action as time-barred.

In the early 1990s, plaintiff Jadawel International Company (Jadawel), a Saudi Arabian real estate development company, constructed two luxury residential compounds in Saudi Arabia. Jadawel is a subsidiary of plaintiff MBI International Holdings Inc. (MBI), a British Virgin Islands holding company founded by prominent Saudi Arabian billionaire Sheikh Mohamed Bin Issa Al

Jaber. The compounds, containing 1,000 luxury villas, housed senior employees of two U.S. government contractors, who passed on the costs of rental payments to the Saudi government through the U.S. Department of Defense's Foreign Military Sales program. In March 1999, at the Saudi government's request, Jadawel and the Saudi government entered into direct lease agreements for the Compounds (the Lease Agreements). Pursuant to the Lease Agreements, Jadawel was entitled to annual lease payments from the Saudi government for an 18-year term through 2017, totaling in excess of $2 billion.

In September 2000, MBI sought to monetize the first ten years of lease payments in order to refinance a loan it took to finance construction of the compounds and to finance real estate opportunities. In order to do so, MBI created nonparty Compound Lending Company (CLC) as a special financing vehicle, which plaintiffs allege became Jadawel's designated agent to collect annual payments due from the Saudi government during the first ten years of the Lease Agreements between 2001 and 2011.[1] These

[1] Plaintiffs allege that while forming CLC, two Saudi legal instruments, known as "hawalas," were created. A hawala enables Party A to transfer to Party B its obligation to pay a debt owed to Party C. Plaintiffs claim that because no debt was owed by Jadawel to CLC, under Saudi law, instead of functioning as an assignment, the arrangement was automatically deemed a "wakala," a legal relationship which resembles agency.

eleven annual payments under the leases were to be paid by the Saudi government directly into two New York collection accounts maintained by CLC at the Bank of New York.

In connection with the refinancing, on June 14, 2001, CLC secured the extension of a $450 million bridge loan from defendant Barclays Bank PLC (Barclays). On December 27, 2001, Barclays led a bank syndicate in providing a $900 million term loan to CLC (the Term Facility Agreement).[2] Of this $900 million, CLC used $450 million to repay the bridge loan, and the remaining $450 million was made immediately available for plaintiffs to finance new real estate investments. Under the Term Facility Agreement, the bank syndicate was to be repaid the $900 million term loan, plus interest, out of the $1.4 billion in expected lease payments from the Saudi government. The surplus, totaling over $200 million, or the residual payments made after the term loan plus interest was repaid in full, was to go to CLC for the benefit of plaintiffs.

Under the Term Facility Agreement, as collateral for the $900 million term loan, CLC pledged a security interest in: (1)

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[2] The other lenders of the syndicate, none of which are parties in the instant action, were The Industrial Bank of Japan, Ltd., Dresdner Bank Luxembourg S.A., and Saudi American Bank. Each of the lenders, including Barclays, lent $225 million to CLC under the Term Facility Agreement.

CLC's right to collect lease payments from the Saudi government; (2) all of CLC's shares; and (3) CLC's depositary accounts with the Bank of New York. Thus, in an event of default, the bank syndicate's Security Trustee had the right to assume control of CLC and its bank accounts, and had the right to enforce the Saudi government's payment obligations under the Lease Agreements. As further provided, in an event of default, the Security Trustee was entitled to collect such sums and distribute them in the following order of priority; first, to the bank syndicate in their relevant proportions; and then any additional amount recovered would go to CLC for plaintiffs' benefit.

On April 1, 2002, the Saudi government failed to make its first lease payment to CLC after the Term Facility Agreement became effective. As a result, CLC failed to make its first payment to the syndicate, triggering an event of default, which entitled the Security Trustee to assume control of CLC and become responsible for collecting the lease payments from the Saudi government. The Security Trustee informed the Saudi government that it assumed control of CLC's right to enforce the lease payments. After the Saudi government failed to remedy its default, the Security Trustee, on behalf of Barclays and the rest of the bank syndicate, brought suit in 2002 against the Saudi government in the United States District Court for the Southern

District of New York for breach of contract and a declaration that the Saudi government was obligated to continue payments under the Lease Agreements.

However, on April 1, 2003, the Security Trustee voluntarily withdrew its complaint, without prejudice, allegedly to facilitate possible settlement negotiations (*see Notice of Voluntary Dismissal*, *Dresdner Bank, et al v The Ministry of Fin., et al*, US Dist Ct, SD NY, 1:02 Civ 09618, Martin, J., 2003). In or around July 2006, the bank syndicate entered into a settlement agreement with the Saudi government, the terms of which are confidential (the 2006 settlement). In connection with the 2006 settlement, CLC did not receive any amount of the hundreds of millions of dollars in residual payments it was entitled to under the Term Facility Agreement.

In 2007, after CLC's claims against the Saudi government were released through the 2006 settlement, the Saudi government informed Jadawel of its intent to abandon its performance under the Lease Agreements for the years of 2011 through 2017. Thereafter, Jadawel brought suit against the Saudi government in Saudi Arabia to enforce the Lease Agreements. In 2008, a Saudi court ruled that because the bank syndicate had settled CLC's claims, Jadawel no longer had any right to recover against the Saudi government. As a result of this ruling, Jadawel maintained

ownership of the compounds, but with a tenant who was no longer paying hundreds of millions of dollars in rent. Jadawel was therefore forced to sell the compounds at a substantial loss.

At no point after the 2006 settlement did plaintiffs bring suit against the bank syndicate for failing to recover the residual payments it was owed under the Term Facility Agreement. Years later, however, on May 10, 2013, the *Financial Times* published two articles concerning an alleged investigation by the U.S. Department of Justice into whether Barclays had made illegal payments to a Saudi prince in exchange for securing a banking license in Saudi Arabia and repayment of the $900 million term loan related to this case. According to the *Financial Times*, the Saudi government announced in 2003 that it was accepting applications for banking licenses from non-Arab lenders for the first time since the 1970s. Allegedly after that announcement, Barclays sought help from Saudi Prince Turki bin Abdullah bin Abdel Aziz to resolve the litigation that was pending in this case at that time against the Saudi government in the Southern District of New York. The articles concluded that the lawsuit was settled and Barclays was ultimately granted a banking license from the Saudi government in 2009.

Plaintiffs claim that the *Financial Times* articles prompted them to commence pre-action discovery in the motion court

pursuant to CPLR 3102(c). That limited disclosure allegedly revealed that Barclays had settled the bank syndicate and CLC's claims against the Saudi government for $925 million, meaning the bank syndicate was repaid in full with no residual amount left over for CLC or plaintiffs' benefit. Therefore, plaintiffs commenced this action against Barclays on October 28, 2014, asserting causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, tortious interference with prospective economic advantage, tortious interference with contract, "alter ego," and fraud and fraudulent concealment.

Barclays moved the motion court pursuant to CPLR 3211(a)(1), (5), (7) and CPLR 3016(e) to dismiss the complaint, arguing, inter alia, that plaintiffs' claims were time-barred. The motion court, agreeing with defendant, granted defendant's motion to dismiss the complaint with prejudice and judgment was entered accordingly. Plaintiffs appealed.

An action in New York based upon fraud must be commenced within the greater of six years from the date of the fraud or within two years from the time plaintiffs discovered, or with reasonable diligence, could have discovered the fraud (CPLR 213[8]). Here, the parties do not dispute that the alleged fraud occurred in or around July 2006, the date of the 2006 Settlement, more than six years prior to the commencement of plaintiffs'

action. Therefore, the question we face is whether plaintiffs commenced their action within two years from the time they discovered, or could have discovered the alleged fraud with reasonable diligence. Under this inquiry, "when the plaintiff[s] ha[ve] knowledge of facts from which the fraud could be reasonably inferred," they will be held to have discovered the fraud (*Cusimano v Schnurr*, 137 AD3d 527, 531 [1st Dept 2016]).

Plaintiffs allege that they first discovered the facts underlying their fraud-based claims after the *Financial Times* articles were published in May 2013; they argue they could not have reasonably discovered these facts until then. However, as persuasively argued by defendant, plaintiffs' own complaint establishes that they were on inquiry notice by at least 2008. The following facts are of particular importance to reaching this conclusion: first, by 2003, plaintiffs knew that Barclays voluntarily withdrew from a lawsuit against the Saudi government in the Southern District of New York, a lawsuit in which their complaint contends they "should have prevailed on a claim worth more than $1.25 billion, resulting in the return of a surplus worth hundreds of millions to Plaintiffs."[3] Around the same

[3] In fact, plaintiffs' counsel at oral argument before the motion court characterized the withdrawal of the lawsuit as "highly unusual."

time, according to plaintiffs' complaint, it was public knowledge that the Saudi government was "contemplating the grant of a license to a Western financial institution to conduct banking activity within Saudi Arabia for the first time in decades." By as early as 2007, plaintiffs learned that Barclays had entered into an undisclosed settlement with the Saudi government around July 2006, which entirely extinguished plaintiffs' right to any surplus amount under the Term Facility Agreement.

Notably, while plaintiffs allege in their complaint that Barclays became their fiduciary after taking over CLC, they admit that Barclays entered the 2006 settlement agreement without ever consulting with them, that Barclays then later "actively concealed" the settlement, and "rebuff[ed] all inquiries for further information" between 2006 and 2008. With the realization that plaintiffs were out hundreds of millions of dollars, in 2007, plaintiffs sued the Saudi government in Saudi Arabia seeking to compel its performance under the Lease Agreements. However, again as set forth by plaintiffs' complaint, the Saudi court ruled in 2008 that because Barclays had settled plaintiffs' claims, they "no longer had any right to recovery from Saudi Arabia." Thus, by at least 2008, plaintiffs were fully aware that Barclays and the Saudi government had settled CLC's claims, and that they would receive no money. By 2009, it became public

knowledge that Barclays obtained a Saudi banking license. Yet, the last inquiry plaintiffs alleged to have made to Barclays was in 2008, and plaintiffs fail to allege any investigation they undertook in the years leading up to this action. Plaintiffs' own allegations, which we must accept as true on a motion to dismiss, establish that plaintiffs were apprised of facts from which fraud could have been reasonably inferred by at least 2008.

Accordingly, by at least 2008, New York law imposed on plaintiffs a duty to inquire, and plaintiffs' subsequent failure to pursue a reasonable investigation triggered the running of the statute of limitations at that time (*see Koch v Christie's Intl. PLC*, 699 F3d 141, 155 [2d Cir 2012] ["New York law recognizes . . . that a plaintiff may be put on inquiry notice, which can trigger the running of the statute of limitations if the plaintiff does not pursue a reasonable investigation."]; *see also, e.g., Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d 685, 689 [1st Dept 2016] ["'Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.'"] [citations omitted]).

Plaintiffs attempt to avoid dismissal by relying on *Erbe v Lincoln Rochester Trust Co.* (3 NY2d 321 [1957]), which states that whether plaintiffs are "possessed of knowledge of facts from which [fraud] could be reasonably inferred . . . presents a mixed question of law and fact" and therefore, "where it does not conclusively appear that the plaintiffs had knowledge of facts of that nature, a complaint should not be dismissed on motion" (*id.* at 326). Initially, it is worth noting that *Erbe* was decided before the New York legislature amended CPLR 213(8) to explicitly codify the duty of inquiry requirement. Yet, in any event, we find that it conclusively appears in this case that the plaintiffs had undisputed knowledge of facts by at least 2008 from which fraud could reasonably be inferred (*Koch*, 699 F3d at 155–156 ["[I]t is proper under New York law to dismiss a fraud claim on a motion to dismiss pursuant to the two-year discovery rule when the alleged facts do establish that a duty of inquiry existed and that an inquiry was not pursued."] [citations omitted]). Because the statute was triggered by at least 2008, and plaintiffs failed to pursue any investigation until 2013, five years later, plaintiffs are barred from asserting a claim for fraud.

Similarly, plaintiffs' claims for breach of fiduciary duty are time-barred. The parties dispute whether a three-year or

six-year limitations period applies. Regardless, even under the longer time period, plaintiffs' claims for breach of fiduciary duty are untimely for the same reasons their claim for fraud is untimely (*see Gonik v Israel Disc. Bank of N.Y.*, 80 AD3d 437, 438 [1st Dept 2011]).

Even if plaintiffs' breach of fiduciary duty claims were timely, the motion court properly dismissed them pursuant to CPLR 3211(a)(7) and CPLR 3016(e), for plaintiffs have failed to allege with particularity the applicable Saudi law and only generally discuss the Saudi concepts of "hawalas" and "wakalas" without citation to any law (*see* CPLR 3016[e]). Under New York law, the law of the forum (*Bank of N.Y. v Norilsk Nickel*, 14 AD3d 140, 149 [1st Dept 2004], *lv dismissed* 4 NY3d 846 [2005], *appeal dismissed* 4 NY3d 843 [2005]; *Minovici v Belkin BV*, 109 AD3d 520, 525 [2d Dept 2013]), the complaint does not sufficiently allege a fiduciary relationship, and merely contains allegations that these sophisticated parties were dealing at arm's length (*see L. Magarian & Co. v Timberland Co.*, 245 AD2d 69, 70 [1st Dept 1997]).

Plaintiffs' remaining claims for tortious interference, sounding in economic injury, are also time-barred. These claims, which are subject to a three-year statute of limitations, accrued in July 2006, when the 2006 Settlement was entered (see *Amaranth*

*LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 48 [1st Dept 2009], *lv dismissed, denied* 14 NY3d 736 [2010]). Because the complaint was not filed until nearly eight years later, plaintiffs' claims for tortious interference were properly dismissed as barred by the statute of limitations.

Finally, plaintiffs cannot rely on principles of equitable estoppel to save their complaint. Courts in New York have the power to apply the "extraordinary remedy" of equitable estoppel only where it would be unjust to permit a defendant to assert a statute of limitations defense (*see Zumpano v Quinn*, 6 NY3d 666, 673 [2006]; *Pahlad v Brustman*, 33 AD3d 518, 519 [1st Dept 2006], *affd*, 8 NY3d 901 [2007]). In order for equitable estoppel to apply, plaintiffs bear the burden in showing: (1) plaintiffs were "induced by fraud, misrepresentations or deception to refrain from filing a timely action"; and (2) plaintiffs reasonably relied on defendant's misrepresentations (*Zumpano*, 6 NY3d at 674, quoting *Simcuski v Saeli*, 44 NY2d 442, 449 [1978]). Furthermore, plaintiffs must demonstrate their due diligence in ascertaining the facts and in commencing the action in order to seek shelter under this doctrine (*see Brustman*, 33 AD3d at 520).

Plaintiffs have failed to satisfy their burden to show that equitable estoppel applies in this case. Plaintiffs point to only one alleged misrepresentation by Barclays in their

complaint: In May 2002, an executive at Barclays, Elie Khouri, told a representative of plaintiffs in a telephone call that Barclays was "in the process of negotiating a resolution to the dispute [with the Saudi government] and that it would get the best deal possible for Plaintiffs." Further, Mr. Khouri allegedly advised plaintiffs that they should not get involved or bring legal claims. However, plaintiffs have failed to show how this statement amounts to a misrepresentation, because, as defendant points out, this statement was allegedly made before defendant instituted litigation against the Saudi government in December 2002; before the Saudi government announced in 2003 that it was accepting bids for banking licenses from Western banks; and four years before defendant's alleged fraud actually occurred in July 2006 (*see Zumpano*, 6 NY3d at 674 ["It is therefore fundamental to the application of equitable estoppel for plaintiffs to establish that *subsequent and specific actions* by defendants somehow kept them from timely bringing suit."] [emphasis added]).

Moreover, plaintiffs have failed to demonstrate their due diligence, for they were on inquiry notice by at least 2008 and failed to make a reasonable investigation (*see Rite Aid Corp. v Grass*, 48 AD3d 363, 364-365 [1st Dept 2008] ["(E)quitable estoppel . . . will not toll a limitations statute where

plaintiffs possessed timely knowledge sufficient to have placed them under a duty to make inquiry."]). Therefore, we reject plaintiffs' claim of equitable estoppel.

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

Accordingly, the judgment of the Supreme Court, New York County (Charles E. Ramos, J.) entered February 17, 2016, dismissing the complaint in its entirety with prejudice, and bringing up for review an order, same court and Justice, entered January 29, 2016, dismissing plaintiffs' claims, should be affirmed, without costs. The appeal from the above order should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: JUNE 1, 2017

CLERK