SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 20, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4323 The People of the State of New York, Respondent, SCI 3229/15

-against-

Aneudy Rodriguez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Meaghan L. Powers of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Shari R. Michels, J. at plea; Ethan Greenberg, J. at sentencing), rendered March 3, 2016, convicting defendant of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3, unanimously affirmed.

Defendant's waiver of indictment and his prosecution by superior court information were valid under CPL 195.10(2)(b) because the proceedings took place in Supreme Court, not Criminal Court. Defendant waived indictment in a hybrid court, and the record establishes that the part was then operating in its

capacity as a Supreme Court part, so that the transfer from Criminal to Supreme Court had occurred (*see People v Graves*, 136 AD3d 520 [1st Dept 2016], *lv denied* 27 NY3d 997 [2016]).

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

ENTERED: JUNE 20, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4324 Monique Cartagena, et al., Index 22272/14E
Plaintiffs-Respondents,

-against-

Access Staffing, LLC.,
Defendant-Appellant.

_____

Barry McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for appellant.

Jaroslawicz & Jaros PLLC, New York (Norman Frowley and David Tolchin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered October 12, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff Monique Cartagena alleges that while in the course of her employment, she was walking in a hallway of the Christopher School, when she slipped and fell on water that was on the floor after it had been recently mopped by nonparty Winston Fofana, who was employed by defendant. Plaintiff's affidavit presents a triable issue of fact as to whether a special employee relationship existed between the school and Fofana. Plaintiff set forth that no one from the school supervised Fofana's work or directed his daily schedule, and that the school did not provide

him with equipment or a uniform (*see Holmes v Business Relocation Servs., Inc.*, 117 AD3d 468, 469 [1st Dept 2014], *affd* 25 NY3d 955 [2015]; *compare Berhe v Trustees of Columbia Univ. in the City of N.Y.*, 146 AD3d 697 [1st Dept 2017]).

The motion court properly considered plaintiff's affidavit, as it did not contradict her deposition testimony (*see e.g. Alvia v Mutual Redevelopment Houses, Inc.*, 56 AD3d 311 [1st Dept 2008]). Furthermore, plaintiff's deposition testimony and affidavit provide a nonspeculative basis for her account of the accident and sufficiently demonstrates a nexus between the hazardous condition and the circumstances of her fall, because she testified that immediately after she fell she noticed that the floor was wet and that there was a janitor's cart with wet floor signs attached to it near the accident location (*see Garcia v 1265 Morrison LLC*, 122 AD3d 512, 513 [1st Dept 2014]).

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

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

ENTERED: JUNE 20, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4327 Francisca Fernandez, Index 20608/13
Plaintiff-Appellant,

-against-

Emmanuel D. Hernandez, et al.,
Defendants-Respondents.

_____

Max D. Leifer, P.C., New York (Max D. Leifer of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Christine A. Hilcken of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered January 15, 2016, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not suffer significant or permanent limitations to her lumbar spine or knees as a result of the accident. Defendants submitted the affirmed report of an orthopedic surgeon who found normal ranges of motion, negative objective test results, and resolved sprains, strains, and contusions to those body parts (*see Reyes v Se Park*, 127 AD3d 459, 460 [1st Dept 2015]). Defendants also relied on plaintiff's own medical records showing that the claimed injuries were the result of preexisting degeneration (*see Alvarez v NYLL*

Mgt. Ltd., 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff offered no admissible medical evidence concerning her lumbar spine. Even if her unaffirmed medical records were considered, they acknowledged the existence of degeneration in her spine, but did not address the degeneration or explain why it was not the cause of any symptoms (*see Alvarez*, 120 AD3d at 1044). Further, the affirmed report of her orthopedist was insufficient to raise an issue of fact as to plaintiff's knees because the range of motion findings were not compared to any normal value (*see Rickert v Diaz*, 112 AD3d 451, 452 [1st Dept 2013]). The finding of "tears, standing alone, without any evidence of limitations, [was] insufficient to raise a triable issue of fact as to whether a serious injury exists" (*Acosta v Zulu Servs., Inc.*, 129 AD3d 640, 640 [1st Dept 2015]). In addition, the orthopedist did not address the findings of degeneration found in plaintiff's own medical records (*Alvarez*, 120 AD3d at 1044). Moreover, plaintiff failed to provide a reasonable explanation for her cessation of all medical treatment after a brief three-month course of physical therapy (*see Green v Domino's Pizza, LLC*, 140 AD3d 546, 547 [1st Dept 2016]).

Plaintiff did not plead a significant disfigurement claim

and, in any event, defendants' expert found no scarring upon examination and plaintiff's own medical records show no evidence of scarring to the left knee that was "unattractive . . . [or] objectionable," much less "the subject of pity or scorn," as required to establish significant disfigurement (*Sidibe v Cordero*, 79 AD3d 536, 536 [1st Dept 2010] [internal quotation marks omitted]; *Aguilar v Hicks*, 9 AD3d 318, 319 [1st Dept 2004]).

Lastly, defendants made a prima facie showing that plaintiff did not suffer a 90/180-day injury, given her admission in the bill of particulars that she was only confined to her bed or home for a period of five weeks (*see Komina v Gil*, 107 AD3d 596, 597 [1st Dept 2013]). In opposition, plaintiff failed to raise an issue of fact.

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

ENTERED: JUNE 20, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4328 The People of the State of New York, Ind. 3182/14
Respondent,

-against-

Michelle Johnson,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J. at plea; Roger Hayes, J. at sentencing), rendered July 9, 2015,

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 20, 2017

CLERK

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

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4329 All Children's Hospital, Inc., Index 162155/14
Plaintiff-Appellant,

-against-

Citigroup Global Markets, Inc.,
Defendant-Respondent.

_____

Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, Pensacola, FL (Peter J. Mougey of the bar of the State of Florida, admitted pro hac vice, of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Andrew J. Ehrlich of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about August 25, 2016, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the complaint as time-barred, unanimously affirmed, without costs.

The motion court was correct in utilizing New York's borrowing statute, CPLR 202, and applying Florida's shorter statute of limitations to plaintiff's claims, despite the contractual choice-of-law provision pointing to New York law (*see 2138747 Ontario, Inc. v Samsung C&T Corp.*, 144 AD3d 122, 126 [1st Dept 2016]).

Defendant sustained its initial burden of demonstrating prima facie that there was sufficient material available in the

public record, including numerous newspaper articles and well-publicized regulatory actions, to inform plaintiff of the possibility of defendant's alleged fraud by 2008, at the latest, thus making plaintiff's claims time-barred under Florida's applicable four-year statute of limitations (*see* Fla Stat §§ 95.11[3][j], [p]; 95.031[1], [2][a]). The affidavit of plaintiff's chief financial officer was insufficient to raise a triable issue of fact because it was vague and failed to address why the extensive press coverage of the manipulation of the ARS market did not come to plaintiff's attention by 2008. Under Florida law, issues concerning when fraud was reasonably discoverable with due diligence may be determined as a matter of law because the standard is objective (*see First Fed. Sav. & Loan Assn. of Wis. v Dade Fed. Sav. & Loan Assn.*, 403 So 2d 1097, 1100 [Fla Dist Ct App 1981]).

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 20, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4330 The People of the State of New York, Respondent, Ind. 1023/15

-against-

Kegan Richards, Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

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

_____

Judgment, Supreme Court, New York County (Ann M. Donnelly, J.), rendered August 12, 2015, convicting defendant, upon his plea of guilty, of attempted burglary in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant's challenges to his plea do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that the plea was knowingly, intelligently and voluntarily made. The sequence in which the

court conducted the allocution was permissible (*see People Gillegbower*, 143 AD3d 479 [1st Dept 2016], *lv denied* 28 NY3d 1145 [2017]). Defendant's other challenges to the plea are without merit.

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

ENTERED: JUNE 20, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4331-
4332 Index 157104/15

Billy Green, Jr.,
Plaintiff-Respondent,

-against-

Simon Property Group, Inc. et al.
Defendants-Appellants,

Loews Roosevelt Field Cinemas, Inc., et al.,
Defendants.

- - - - -

E.W. Howell Co., LLC,
Third-Party Plaintiff-Respondent,

-against-

Metropolitan Construction Systems, Inc.,
Third Party Defendant-Appellant.

- - - - -

[And Other Third-Party Actions]

_____

Appeals having been taken to this Court by the above-named appellant from orders of the Supreme Court, New York County (Joan M. Kenney, J.), entered on or about January 5, 2017, and on or about January 24, 2017,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 9, 2017,

It is unanimously ordered that said appeals be and the

same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: JUNE 20, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4334- Ind. 1012/11
4335 The People of the State of New York, 2804/13
Respondent,

-against-

Kirk Skilling,
Defendant-Appellant.

_____

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

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

_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County, rendered October 24, 2012 (Richard Carruthers, J.), and May 27, 2014 (Charles Solomon, J.),

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: JUNE 20, 2017

CLERK

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

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4336 Index 155565/14
595297/14

Benedict D' Amico,
Plaintiff-Appellant,

-against-

56 Leonard LLC, et al.,
Defendant-Respondents.

- - - - -

56 Leonard LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Livingston Electrical Associates, Inc.,
Third-Party Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered on December 9, 2016,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 1, 2017,

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

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

ENTERED: JUNE 20, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4337-
4338 The People of the State of New York,
Respondent,

-against-

Karen Rochez,
Defendant-Appellant.

Ind. 60389C/10

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

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J., at plea, William McGuire, J., at sentencing and resentencing), rendered August 4, 2014, as amended August 5, 2014, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: JUNE 20, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4339 Stillwater Liquidating LLC, Index 652451/15
Plaintiff-Respondent-Appellant,

-against-

Partner Reinsurance Company, Ltd., et al.,
Defendants-Appellants-Respondents.

_____

Mayer Brown LLP, Washington, DC (Michael B. Kimberly of the bar of the State of Maryland and District of Columbia, admitted pro hac vice, of counsel), for appellants-respondents.

Wallison & Wallison LLP, New York (Jeremy L. Wallison of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about January 23, 2017, which to the extent appealed from as limited by the briefs, upon defendants' CPLR 3211(a) motion to dismiss the amended complaint, denied dismissal of the first and second causes of action except for the portion of the first cause of action alleging that the initial loan and pledge transaction between defendant Partner Reinsurance Company, Ltd. (Partner Re) and nonparty debtor Stillwater Funding LLC (the Partner Re loan) was a fraudulent conveyance, unanimously affirmed, without costs.

The motion court correctly determined that the Partner Re loan was not a fraudulent conveyance, since a loan advance, regardless of the size of the collateral pledged, is "fair

consideration" for the pledge (Debtor and Creditor Law §§ 274, 275; *see Chemtex, LLC v St. Anthony Enterprises, Inc.*, 490 F Supp 2d 536 [SD NY 2007]). However, the allegations that Stillwater Funding transferred its interests in the collateral, allegedly worth over $200 million, to defendants to satisfy a debt worth less than $40 million, thereby leaving Stillwater Funding unable to pay other creditors, states a cause of action for fraudulent conveyance (*see* Debtor and Creditor Law §§ 274, 275, 278; *In re Norstan Apparel Shops, Inc.*, 367 BR 68, 80 [Bankr ED NY 2007]).

The motion court correctly found that discovery was warranted as to whether the foreclosure and sale agreement between Stillwater Funding, defendants, and others constituted a valid strict foreclosure under the New York Uniform Commercial Code (*see* NY UCC 9-620), and whether the agreement was made in "good faith" (Comment 11 to NY UCC 9-620).

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

ENTERED: JUNE 20, 2017

CLERK

Acosta, P.J., Richter, Feinman, Webber, Kahn, JJ.

4340 The People of the State of New York, Respondent, Ind. 1138/15

-against-

Helen Barbato, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered May 28, 2015, unanimously affirmed.

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

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

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

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

ENTERED: JUNE 20, 2017

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Gesmer, JJ.

3740 Rolando Cordero, Index 113450/11
Plaintiff-Respondent,

-against-

Koval Retjig & Dean PLLC, et al.,
Defendants-Appellants.

_____

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

Law Office of Steven C. Pepperman, New York (Steven C. Pepperman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered March 21, 2016, which denied defendants' motion for summary judgment dismissing the complaint alleging legal malpractice, unanimously affirmed, without costs.

The claim for malpractice accrued when defendants failed to timely file a notice of claim (*see* General Municipal Law § 50-e) upon the City of New York and the New York City Department of Transportation after plaintiff was allegedly injured in a fall from his motorcycle because he struck a defectively-placed construction plate in the road (*see generally Glamm v Allen*, 57 NY2d 87, 93 [1982]). However, the evidence raised triable issues whether the malpractice statute of limitations (CPLR 214[6]) was tolled under the continuous representation doctrine. Mark Koval, an attorney formerly employed by defendant law firm, joined

another law firm at or about the time plaintiff's personal injury case was transferred to such new law firm. Defendants admit that plaintiff's case was transferred to the new firm, and Koval does not deny having worked on the case at either the old or new firm (*see generally Antoniu v Ahearn*, 134 AD2d 151 [1st Dept 1987]; *HNH Intl., Ltd. v Pryor Cashman Sherman & Flynn LLP*, 63 AD3d 534, 535 [1st Dept 2009]). Although Koval claims he subsequently left the new firm and did not take plaintiff's case with him, there is no evidence that plaintiff was ever informed of, or had objective notice of, Koval's departure such as to end the continuous representation circumstance and the tolling of the statute of limitations (*see Shumsky v Eisenstein*, 96 NY2d 164, 167-169, 170 [2001]).

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

ENTERED: JUNE 20, 2017

CLERK

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

3909-
3910 Index 654035/12

Deutsche Zentral-Genossenschaftsbank AG, et al.,
Plaintiffs-Respondents,

-against-

Morgan Stanley, et al.,
Defendants-Appellants.

_____

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for Morgan Stanley, Morgan Stanley & Co., LLC, Morgan Stanley Mortgage Capital Holdings LLC, Morgan Stanley Capital I Inc., Morgan Stanley ABS Capital I Inc., Saxon Funding Management LLC, Saxon Mortgage Inc., and Saxon Asset Securities Company, appellants.

Davis & Gilbert LLP, New York (H. Seiji Newman of counsel), for Natixis Real Estate Holdings LLC, appellant.

Labaton Sucharow LLP, New York (Mark S. Arisohn of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 13, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motions to dismiss with regard to certain fraud claims, unanimously affirmed, without costs.

In connection with their purchase of about $694 million in residential mortgage-backed certificates, plaintiffs allege that defendants provided them offering materials containing false and misleading statements regarding the underlying mortgage loans. Specifically, plaintiffs claim that the offering materials

understated the loan-to-value ratios and overstated owner-occupancy rates, and misrepresented that exceptions to the originators' underwriting guidelines would be permitted only on a case-by-case basis, when, in fact, there were widespread deviations from the guidelines. Plaintiffs allege that defendants' misrepresentations caused them to make a far riskier investment than they intended, and that they suffered considerable investment losses as a direct result.

The motion court properly declined to dismiss the fraud claims as barred by the German statute of limitations, given the incomplete record as to the applicable German legal standards (*see HSH Nordbank AG v Barclays Bank PLC*, 42 Misc 3d 1231[A], 2014 NY Slip Op 50290[U], *9 [Sup Ct, NY County 2015]; *see generally Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]).

Plaintiffs have sufficiently alleged each element of fraud (*IKB Intl. S.A. v Morgan Stanley* , 142 AD3d 447 [1st Dept 2016];

Basis Yield Alpha Fund Master v Morgan Stanley, 136 AD3d 136 [1st Dept 2015]).

We considered defendants' remaining contentions and find them unavailing.

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

ENTERED: JUNE 20, 2017

CLERK

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4041 The People of the State of New York, Respondent, Ind. 2112/12

-against-

Lataya Davis,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Meaghan L. Powers of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered September 13, 2012, convicting defendant, upon her plea of guilty, of criminal possession of a weapon in the third degree, and sentencing her, as a second felony offender, to a term of three to six years, unanimously affirmed.

Defendant did not make a valid waiver of her right to appeal (*see People v Powell*, 140 AD3d 401 [1st Dept 2016], *lv denied* 28 NY3d 1074 [2016]; *People v Santiago*, 119 AD3d 484 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]). However, we find that the court properly denied defendant's suppression motion. There is no basis for disturbing the hearing court's credibility determinations. The police encounter with defendant, which led to probable cause for her arrest, was not a seizure requiring reasonable suspicion, notwithstanding that it involved a

direction to stop (*see People v Reyes*, 83 NY2d 945 [1994], *cert denied* 513 US 991 [1994]; *People v Bora*, 83 NY2d 531, 535-536 [1994]), and some incidental physical contact (*see People v Francois*, 61 AD3d 524 [1st Dept 2009], *affd* 14 NY3d 732 [2010]). Defendant did not preserve her claim that the police unlawfully searched her bag after her arrest, and we decline to review it in the interest of justice.

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

ENTERED: JUNE 20, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4085N Seymour Camins, Index 260148/16
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered September 22, 2016, which granted plaintiff's application for leave to file a late notice of claim, unanimously affirmed, without costs.

This appeal involves a claim of negligence against defendant for injuries plaintiff allegedly sustained on November 23, 2015, at approximately 2:45 p.m. On that date, plaintiff allegedly tripped and fell on a defect in a concrete sidewalk in front of 3033 Middletown Road, a housing project owned and maintained by defendant.

A court, after considering all the relevant facts and circumstances, has the discretion to extend the time to serve a notice of claim (*see* General Municipal Law § 50-e[5]). Here, we find that the motion court did not improvidently exercise its

discretion in granting the application to file a late notice of claim 22 days after the statutory deadline had passed, as the 22-day period was still well within the one year and 90 days within which to commence an action against defendant under CPLR 217-a. In so finding, we note that plaintiff was in the hospital from his alleged accident on November 23, 2015 until November 30, 2015, and on the latter date was transferred to a nursing home, where he remained until December 23, 2015. Thus, plaintiff was physically incapacitated for 30 days after his alleged accident (*see* General Municipal Law § 50-e[5]).

Plaintiff sustained his initial burden of showing that the late notice of claim will not substantially prejudice defendant, as the record demonstrates that defendant fixed the allegedly defective condition on its premises the day after plaintiff's fall (*see Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 467 [2016]).

By contrast, defendant did not rebut plaintiff's showing of lack of substantial prejudice, and therefore cannot convincingly argue that it was prejudiced by any delay in serving the notice of claim. On the contrary, even had plaintiff timely served his notice, the allegedly defective condition would no longer have existed by the time of service, as that condition had already been repaired by the day after the incident. Defendant therefore

cannot now be heard to say that the late notice of claim prejudiced its ability to conduct an investigation of the premises (*see e.g. Matter of Beary v City of Rye*, 44 NY2d 398, 412 [1978]).

Similarly, although defendant notes that its security recordings were erased from the database in the normal course of business, it notably fails to mention how often those recordings were actually erased. If recordings were erased, for example, every 30 days, even timely service could have prejudiced defendant, as the recordings would already have been erased even had a notice of claim been timely served 45 days (or even fewer) after the incident.

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

ENTERED: JUNE 20, 2017

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kahn, JJ.

4086N Demetrius Flowers, Index 25252/14
Plaintiff-Respondent,

-against-

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

Police Officer John Doe, et al.,
Defendants.

_____

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered March 16, 2016, which, to the extent appealed from as limited by the briefs, denied the motion of defendants the City of New York, New York City Police Department, Police Officer Carlos Cruz, and Police Officer Jessica Alvarado (collectively, the City), seeking an order pursuant to CPLR 3126 to compel discovery, unanimously reversed, on the law and the facts, without costs, and the motion granted to the extent stated herein.

In this action alleging, inter alia, wrongful arrest and prosecution, plaintiff denied at his deposition ever using any aliases or nicknames, including "Moe." The search warrant leading to plaintiff's prosecution was based upon controlled drug

buys between a confidential informant and an individual named "Moe." In support of its motions seeking social media information, the City proffered public portions of Facebook pages under the monikers "Moejobrim Moejo," "Moejoe Brim," "Moejoebrim Moejo," "Demetrius Flowers," and "Moejobrims Brim" that have photographs posted that depict plaintiff as the account holder, a fact plaintiff did not deny in opposition to the City's motion. In addition, one of the account holders alleged to be plaintiff posted a photograph identified as the account holder's nephew. Plaintiff's nephew was at the premises, where plaintiff denied having been that day, when the search warrant was executed.

By submitting the above evidence, the City made a threshold showing that examination of the above Facebook accounts will result in the disclosure of relevant evidence bearing on the claim (*see Forman v Henkin*, 134 AD3d 529 [1st Dept 2015]; *Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620 [1st Dept 2013]; *Richards v Hertz Corp.*, 100 AD3d 728 [2d Dept 2012]). As such, plaintiff is directed to review and provide or permit access to those Facebook and associated Messenger accounts, including their messenger components, and any deleted materials which contain any information connecting plaintiff to the accounts in question, connecting him to any variation of the nickname "Moe," or relevant to his claims that he has had no connection to the

apartment searched or the contraband located thereat. Plaintiff shall also provide an authorization permitting Facebook to release the photograph purported to be of plaintiff's nephew, including any metadata associated with the photograph. Production shall be made within 30 days of this order and it is without prejudice to plaintiff seeking, prior to the expiration of the 30-day period, a protective order for expressly identified materials on these Facebook accounts seeking protection from discovery for reasons other than relevancy.

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

ENTERED: JUNE 20, 2017

CLERK

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

4307- Ind. 3627/12
4308 The People of the State of New York,
Respondent,

-against-

Cecily McMillan,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Tomoeh Murakami Tse of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered May 19, 2014, convicting defendant, after a jury trial, of assault in the second degree, and sentencing her to a term of three months, concurrent with five years' probation, unanimously affirmed.

The court properly mitigated any error in denying defendant's request for a missing witness charge as to an unidentified police officer with whom defendant interacted immediately before the incident by allowing defense counsel to raise the argument extensively in summation.

When defendant sought to question the injured police officer about alleged prior acts of misconduct, the court, which had legitimate concerns about whether the allegations were raised in good faith, providently exercised its discretion when it ordered

a preliminary inquiry outside the presence of the jury concerning these allegations. Defendant effectively abandoned the request (*see People v Graves*, 85 NY2d 1024, 1027 [1995]) by declining to take this opportunity, which, based on information elicited in such an inquiry, could have resulted in a more favorable ruling regarding the prospective scope of cross-examination. The record does not support defendant's assertion that the court made a final ruling precluding inquiry into these matters.

We have considered defendant's other challenges to the court's evidentiary rulings and find them unavailing.

By failing to object, or by making general objections, defendant failed to preserve any of her challenges to the People's summation, and we decline to review them in the interest of justice. "The word 'objection' alone [is] insufficient to preserve [an] issue" for review as a question of law (*People v Tevaha*, 84 NY2d 879, 881 [1994]). As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). Any improprieties in the challenged remarks were not so egregious as to deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Moreover, any errors involving the summation, or any of the

other issues on appeal, were harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]), including a videotape of the incident, which supported the victim's rather than defendant's account.

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

ENTERED: JUNE 20, 2017

CLERK

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

4309-
4309A-
4309B

Index 150684/12

John Quealy Irrevocable Life Insurance Trust,
Plaintiff-Appellant,

-against-

AXA Equitable Life Insurance Company,
Defendant-Respondent.

_____

Friedman Kaplan Seiler & Adelman LLP, New York (Robert S. Smith of counsel), for appellant.

Gordon & Rees LLP, New York (Mark A. Beckman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about April 14, 2016, which, to the extent appealable, denied plaintiff's motion to vacate an order entered, upon default, granting defendant's motion to vacate the note of issue and dismiss the complaint for failure to provide discovery, unanimously reversed, on the facts, and as a matter of discretion in the interest of justice, with costs, the motion granted, and the matter remanded for a determination on the merits of defendant's motion to strike the complaint. Appeal from so much of the April 2016 order as granted defendant's motion for sanctions against plaintiff, deemed an appeal from judgment, entered August 11, 2016, awarding defendant sanctions, and, so considered, said judgment unanimously reversed, on the facts,

without costs, and the judgment vacated. Order, same court and Justice, entered on or about November 9, 2015, declaring plaintiff's motion for summary judgment moot, unanimously reversed, on the facts, without costs, and the declaration vacated.

The motion court improvidently exercised its discretion in sua sponte granting, on default, defendant's motion to strike the complaint. Plaintiff's papers filed in motion sequence #1 were also "in opposition to defendant's ... motion seeking the striking of the note of issue" (motion sequence #2), and did address defendant's argument concerning its failure to respond to discovery requests by arguing that no discovery was required under the circumstances. Considered on the merits, the motion should have been granted only to the extent of compelling plaintiff to respond to defendant's discovery requests. To the extent plaintiff may be deemed to have defaulted by failing to file opposition papers in motion sequence #2 or to address more extensively the substance of the motion to strike, its default was reasonably excusable, given the two motion sequences addressing similar issues, and it has shown a meritorious defense against the drastic sanction of striking the complaint, namely, that it did not fail to comply with any discovery orders, because defendant never made any motion to compel discovery (*see Siegman*

v Rosen, 270 AD2d 14, 15 [1st Dept 2000]). Under these circumstances, the court improvidently failed to vacate the default judgment (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

As plaintiff's motion to vacate was not frivolous, we reverse the order awarding monetary sanctions based on its making the motion.

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

ENTERED: JUNE 20, 2017

CLERK

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

4310 In re Lela G.,
Petitioner-Respondent,

-against-

Shoshanah B.,
Respondent-Appellant.

_____

Greenspoon Marder, P.A.P.C., New York (Scott G. Drucker of counsel), for appellant.

Dobrish Michaels Gross LLP, New York (Nina S. Gross of counsel), for respondent.

Karen Freedman, Lawyers for Children Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about July 13, 2016, which modified the parties' January 26, 2012 so-ordered custody agreement, without a hearing, by, inter alia, modifying respondent Shoshanah B.'s weekly, holiday and summer parenting time, and restricting her access to information regarding the child's education, health care, school events, and medical treatments, unanimously reversed, on the law, without costs, and the matter remanded for a hearing.

Modification of custody or visitation, even on a temporary basis, requires a hearing, absent a showing of an emergency (*see Shoshanah B. v Lela G.*, 140 AD3d 603, 606 [1st Dept 2016]; *Matter of Martin R.G. v Ofelia G.O.*, 24 AD3d 305, 305-306 [1st Dept

2005]; *Matter of Rodger W. v Samantha S.*, 95 AD3d 743, 743 [1st Dept 2012]). Here, a hearing was not conducted prior to the court's modification of the custody agreement with respect to visitation. The court also effectively barred respondent from access to the child's school officials and events, as well as medical visits and treatment, without petitioner's consent, over the attorney for the child's objection, based on an incident where respondent objected to how the child's name was registered and petitioner's failure to identify respondent as a parent. On this record, the modifications lacked an evidentiary basis.

Nor was the determination rendered on an emergency basis. At the time the Family Court issued the order appealed from, petitioner's July 2, 2015 application had been pending for approximately one year. In view of the parties' conflicting factual accounts in their papers and the absence of any showing of an emergency requiring an immediate modification of the custody agreement, the court should not have modified the agreement without a hearing at which respondent and the child's attorney had an opportunity to present testimony and evidence (*see Shoshanah B.*, 140 AD3d at 607).

Additionally, in light of this Court's decision on a prior appeal, which vacated that portion of the Family Court's November 2014 order that suspended respondent's Wednesday overnight visits without a hearing (*id.* at 603), the court erred in failing to

reinstate such visitation, since the court had not received competent evidence that it would not be in the child's best interest to do so (*id.*). We note, as indicated by the attorney for the child, that this issue requires further exploration at a hearing.

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

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

ENTERED: JUNE 20, 2017

CLERK

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

4311 Ariel Cabrera, Jr., Index 302984/13
Plaintiff-Appellant,

-against-

Apple Provisions, Inc., et al.,
Defendants-Respondents.

_____

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

Picciano & Scahill, P.C., Bethpage (Andrea E. Ferrucci of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered July 7, 2016, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff alleges that he suffered serious injuries to his spine and left knee as a result of a motor vehicle accident that occurred in January 2013. Defendants submitted an expert report of an orthopedist, who found full range of motion in those body parts and opined that the alleged injuries had resolved (*see Clementson v Price*, 107 AD3d 533 [1st Dept 2013]). The expert also opined that plaintiff's MRI reports of the spine were unremarkable and that the MRI report of the

knee showed injuries that were not causally related to the accident.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff submitted no evidence of any medical examination after March 2013, and therefore did not demonstrate any permanent consequential limitation of use of any body part (*see Kang v Almanzar*, 116 AD3d 540 [1st Dept 2014]; *see also Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012]).

As to the cervical spine claim, plaintiff's treating physician found normal range of motion in February 2013, but some limitations a month later. The physician's failure to explain the inconsistencies between her findings of deficits before and after the findings of full range of motion, renders her opinion speculative (*see Santos v Perez*, 107 AD3d 572, 574 [1st Dept 2013]; *Colon v Torres*, 106 AD3d 458 [1st Dept 2013]). As to the lumbar spine, plaintiff's treatment records showed that he had normal or near-normal lumbar spine range of motion within two months after the accident, which is insufficient to support a serious injury claim (*see Gaddy v Eyler*, 79 NY2d 955, 957 [1992]; *Eisenberg v Guzman*, 101 AD3d 505, 506 [1st Dept 2012]).

Regarding the left knee, plaintiff presented medical evidence of a lateral meniscal tear, which his physician stated was causally related to the subject accident. However, his

physician failed to make any measurements of his knee, relying on unaffirmed records of his surgeon, which was impermissible (*see Malupa v Oppong*, 106 AD3d 538, 539 [1st Dept 2013]). In any event, the last measurement found in the surgeon's records showed only a five-degree deficit in range of motion, which, again, was too minor in extent, degree and duration to support a serious left knee injury claim involving significant limitation of use (*see Gaddy v Eyler*, 79 NY2d at 957; *Vasquez v Almanzar*, 107 AD3d 538, 539-540 [1st Dept 2013]).

As for the 90/180-day claim, defendants met their prima facie burden of refuting plaintiff's allegations in his bill of particulars that he was confined to bed for two months and home for six months after the accident, by submitting his deposition testimony that he stayed home for just two days after the accident and returned to work by May 2013. They also submitted the opinion of their expert, who opined that plaintiff's medical records did not demonstrate a knee injury caused by the accident or a spinal injury that would result in deficits. In opposition, plaintiff submitted no evidence to demonstrate he sustained a "medically determined" injury (Insurance Law 5102[d]). Instead,

his medical records show he was able to work shortly after the accident and that his left knee injury resolved within about two months after the accident (*see Figueroa v Ortiz*, 125 AD3d 491, 492 [1st Dept 2015]).

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

ENTERED: JUNE 20, 2017

CLERK

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

4312 The Bank of New York Mellon formerly known as The Bank of New York, etc., Plaintiff-Respondent, Index 850098/15

-against-

Harold D. Knowles, Defendant-Appellant,

Wilbert H. Knowles also known as Wilbert Knowles, et al., Defendants.

_____

David A. Bythewood, Mineola, for appellant.

Davidson Fink LLP, Rochester (Larry T. Powell of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 8, 2016, which granted plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff established prima facie that it was entitled to foreclose on the mortgage by attaching the indorsed note, mortgage, assignment of mortgage and proof of the default through the affidavit of a mortgage loan servicer employee with personal knowledge (*HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 773, 774 [2d Dept 2015]; *see also Wilmington Trust Co. v Walker*, __ AD3d __, 2017 NY Slip Op 02597 [1st Dept Apr. 4, 2017]).

"A plaintiff may establish standing in a foreclosure action either by showing assignment of the mortgage note or physical delivery of the note prior to the commencement of the foreclosure action" (*B & H Fla. Notes LLC v Ashkenazi*, __ AD3d __, 2017 NY Slip Op 02591 [1st Dept Apr. 4, 2017] [emphasis omitted]; *U.S. Bank N.A. v Askew*, 138 AD3d 402, 402 [1st Dept 2016]). "However, a plaintiff may not do so by means of 'conclusory, boiler plate statements'" (*B & H Fla. Notes LLC*, __ AD3d __, 2017 NY Slip Op 02591). Nevertheless, if the note is affixed to the summons and complaint at the time the action is commenced, it is unnecessary to give factual details of the delivery to establish that possession was obtained prior to a particular date (*Deutsche Bank Natl. Trust Co. v Logan*, 146 AD3d 861, 863 [2d Dept 2017] [citing *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]]; *see also Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151, 1152 [2d Dept 2015]).

Plaintiff established standing by showing that it had attached the indorsed note to the summons and complaint, which were served and filed on the same day to commence this action. Even though it was not required, plaintiff also provided affidavits from two employees of its mortgage loan servicer, which provided further evidence that plaintiff received the note prior to commencement of the action.

Defendant's arguments are unavailing. It is clear from the second mortgage loan servicer employee affidavit that the indorsement was "firmly affixed" to the back side of the note and therefore satisfied the requirement of NY UCC 3-202. In addition, while it appears that plaintiff may have violated 15 USC § 1641[g], it is not clear that such violation prevents plaintiff from having standing in this action and defendant cites no legal precedent in support of this argument.

Further, defendant's argument that Supreme Court acted in a biased manner by ordering supplemental affidavits to clarify the location of the indorsement, i.e., whether it was located on the back of the note or on a separate page, is unavailing. Supreme Court properly exercised its discretion to order supplemental affidavits to clarify this issue prior to rendering a decision (*Ostrov v Rozbruch*, 91 AD3d 147, 155 [1st Dept 2012]; *Orsini v Postel*, 267 AD2d 18, 18 [1st Dept 1999]).

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

ENTERED: JUNE 20, 2017

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Gesmer, JJ.

4313 Veleron Holding, B.V., on behalf of itself and as assignee of OJSC Russian Machines,
Plaintiff-Appellant,

-against-

Morgan Stanley, et al.,
Defendants-Respondents.

Index 652944/14

Kasowitz, Benson, Torres & Friedman LLP, New York (Ronald R. Rossi of counsel), for appellant.

Weil, Gotshal & Manges LLP, New York (Jonathan D. Polkes of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 4, 2016, which granted defendants' motion for summary judgment dismissing the complaint as barred by the doctrine of res judicata, unanimously affirmed, with costs.

The transactions upon which plaintiff's claim of fraud are premised were the subject of prior claims adjudicated in federal court, and thus this action is barred by the doctrine of res judicata (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357-358 [1981]; *Elias v Rothschild*, 29 AD3d 448 [1st Dept 2006]). Indeed, defendants sought removal of this action to join the federal claim, an action that plaintiff opposed, and the federal court, in remanding this matter back to state court, even warned that the action might be subsequently barred by claim preclusion.

Plaintiff's claim that it did not have sufficient knowledge to raise the cause of action when filing the federal complaint is not persuasive in light of that complaint referencing the very allegations that form the basis of this action. The fact that subsequent discovery revealed emails supporting this claim is irrelevant, since the proper inquiry for res judicata purposes is not whether Veleron had enough evidence to prove its claim, but when it had sufficient knowledge to raise the cause of action (*see UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 476 [1st Dept 2011]).

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

ENTERED: JUNE 20, 2017

CLERK

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

4314 The People of the State of New York, Ind. 3583/14
Respondent,

-against-

Brian Arias,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered May 11, 2015,

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 20, 2017

CLERK

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

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

4315 In re 135 West. 13 LLC, Index 77055/10
Petitioner-Respondent, 570847/14

-against-

Judith Stollerman, et al.,
Respondents-Appellants.

_____

Cardozo Bet Tzedek Legal Services, New York (Leslie Salzman of counsel), for appellants.

Cyruli Shanks Hart & Zizmor, LLP, New York (James E. Schwartz of counsel), for respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered on or about May 3, 2016, which reversed a judgment of the Civil Court, New York County (Sheldon J. Halprin, J.), entered on or about December 10, 2012, after a nonjury trial, dismissing the holdover petition, and awarded possession of the subject rent-stabilized apartment to petitioner landlord, unanimously reversed, on the law, with costs, the petition denied, and the proceeding dismissed. The Clerk is directed to enter judgment accordingly.

Respondents, who are in their 80s, have been joint lessees of a studio apartment and a one-bedroom apartment, Apartments 3 and 4, respectively, the only apartments on the second floor of the subject premises, for more than 40 years, under a succession of landlords. Petitioner, the current landlord, established

prima facie that Apartment 4 was not respondents' primary residence by presenting surveillance video and Con Edison's records of electrical usage (*see* Rent Stabilization Code [9 NYCRR] § 2524.4[c]; *Glenbriar Co. v Lipsman*, 5 NY3d 388, 392 [2005]). However, respondents rebutted petitioner's case and demonstrated that the two apartments were treated as a combined primary residence (*see Glenbriar Co. v Lipsman*, 5 NY3d at 393; *Sharp v Melendez*, 139 AD2d 262 [1st Dept 1988], *lv denied* 73 NY2d 707 [1989]), and there is no evidence that respondents' living arrangement was entered into as a means of avoiding rent stabilization laws (*see Riverside Syndicate, Inc. v Munroe*, 10 NY3d 18 [2008]).

The trial court's findings were reached under a fair interpretation of the evidence, and are thus entitled to deference (*see 409-411 Sixth St., LLC v Mogi*, 22 NY3d 875 [2013]; *542 E. 14th St. LLC v Lee*, 66 AD3d 18, 22 [1st Dept 2009]). The court credited respondents' testimony as to respondent Sandow's decision to sleep in Apartment 3 temporarily, due to the situation created by the upstairs neighbor and a perceived threat posed by the scaffold and shed located outside the window(s) of that apartment (*see 542 E. 14th St.*, 66 AD3d at 19; *Ascot Realty LLC v Richstone*, 10 AD3d 513 [1st Dept 2004], *lv dismissed* 4 NY3d 842 [2005]).

The evidence of limited electrical consumption in Apartment 4 does not compel a finding of nonprimary residence, given respondent Sandow's explanation for it, which includes her inability to use the kitchen and shower there.

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

ENTERED: JUNE 20, 2017

CLERK

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

4316 The People of the State of New York, Respondent, Ind. 1105/13

-against-

Eliexer Reyes, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J. at plea; Robert Stolz, J. at re-plea and sentencing), rendered December 18, 2014, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 20, 2017

CLERK

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

4317 In re Kevin McK.,
Petitioner-Appellant,

-against-

Elizabeth A.E.,
Respondent-Respondent.

Kevin McK., appellant pro se.

Elizabeth A. E., respondent pro se.

Andrew J. Baer, New York, attorney for the child.

Order, Family Court, New York County (Jane Pearl, J.), entered on or about April 16, 2015, which, among other things, dismissed without prejudice petitioner father's petitions seeking to modify a custody order and to enforce a visitation order, unanimously affirmed, without costs.

Family Court properly declined to exercise its continuing jurisdiction under Domestic Relations Law § 76-a(1)(a), as the record supports its determination that neither the child nor the mother had a "significant connection" to New York and that "substantial evidence" was no longer available in New York, concerning the child's care, protection, training and personal relationships (Domestic Relations Law § 76-a[1][a]). The record shows that the child had been living continuously with his mother and maternal grandparents in Mississippi since October 2013, and

had no continued significant connection to New York, aside from his father living here. Although the father testified that he had lived at the same address in New York for eight months, the record shows that his visits with the child after the child's relocation to Mississippi generally involved trips outside of New York State. In addition, the court properly determined that evidence related to the allegations in the father's petitions concerning the mother's conduct and the child's welfare would be located in Mississippi (*see id.*; *see also Clark v Clark*, 21 AD3d 1326 [4th Dept 2005]).

Even if Family Court had continuing jurisdiction, it providently exercised its discretion in determining that Mississippi was the more convenient forum (*see* Domestic Relations Law § 76-f). The court applied the statute's relevant factors, including that the Mississippi court was well equipped to decide the litigation expeditiously, as it was familiar with the parties' case and expressed its own belief that the case should be heard in Mississippi (*see* § 76-f[2]; *see also Matter of Luis F.F. v Jessica G.*, 127 AD3d 496, 497 [1st Dept 2015]).

Family Court properly found that the father had waived any right to counsel, given that he voluntarily proceeded pro se throughout these ongoing custody/visitation proceedings (*see generally Matter of Joshua UU. v Martha VV.*, 118 AD3d 1051, 1053

[3d Dept 2014]).

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 20, 2017

CLERK

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

4318 The People of the State of New York, Respondent, Ind. 1489/12

-against-

William Faulkner, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about September 25, 2015, which adjudicated defendant a level three sexually violent predicate offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 20 points under risk factor 13 for unsatisfactory conduct while confined, based on an incident where he sexually harassed a nurse (*see People v Birch*, 99 AD3d 422 [1st Dept 2012], *lv denied* 20 NY3d 854 [2012]). In any event, without those points, defendant would remain a level three offender because of both his point score and the presumptive override for a prior felony sex crime conviction, and there is no basis for a downward departure. The mitigating factors cited by defendant are outweighed by the seriousness of the underlying

offense (*see People v Gillotti*, 23 NY3d 841 [2014]).

The court properly designated defendant a sexually violent offender because he was convicted of an enumerated offense, and it lacked discretion to do otherwise (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]).

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

ENTERED: JUNE 20, 2017

CLERK

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

4319 The People of the State of New York, Respondent, Ind. 4269/09

-against-

Joel Herrera, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow and Ussula Bentele of counsel), and Kirkland & Ellis LLP, New York (Madelyn Morris of counsel), for appellant.

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

_____

Judgment, New York County (Carol Berkman, J. at suppression hearing; A. Kirke Bartley, Jr., J. at first part of trial; Jill Konviser, J. at second part of trial and sentencing), rendered June 26, 2012, convicting defendant of manslaughter in the first degree and gang assault in the first degree, and sentencing him to concurrent terms of 20 years, unanimously affirmed.

The court properly denied defendant's motion to suppress statements and physical evidence. The totality of the chain of information known to the police (*see generally People v Shulman*, 6 NY3d 1, 26 [2005]), notably including defendant's false explanation for, and attempt to conceal, his bloody condition, provided probable cause for his arrest, notwithstanding the inability of two witnesses to identify him at the scene. Defendant's statements were voluntary under all the

circumstances, and the police did not use any tactics designed to overbear defendant's will (*see Arizona v Fulminante*, 499 US 279, 288 [1991]; *People v Anderson*, 42 NY2d 35, 41 [1977]).

Defendant did not preserve his claim that he invoked his right of silence, and we decline to review it in the interest of justice. As an alternative holding, we find that when viewed in context, the comments cited by defendant did not constitute unequivocal invocations of the right to remain silent or requests that the interview be terminated (*see People v Cole*, 59 AD3d 302 [1st Dept 2009], *lv denied* 12 NY3d 924 [2009]).

The court presiding over the latter portions of the trial (when the first justice became unavailable) providently exercised its discretion in denying defendant's mistrial motion made after the prosecutor asked about defendant's gang nickname. Defendant never answered the question, which was immediately stricken from the record, and the court's instructions were sufficient to avoid any prejudice (*see People v McCaa*, 16 AD3d 139 [1st Dept 2005], *lv denied* 5 NY3d 765 [2005]). The record does not establish that the prosecutor's question was a deliberate violation of a *Sandoval* ruling. Defendant's other argument about the prosecutor's cross-examination is unavailing.

Defendant's general objections failed to preserve his challenges to portions of an expert's testimony and to a related

portion of the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find that defendant opened the door to the challenged matters.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 20, 2017

CLERK

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

4320 The People of the State of New York, Respondent, Ind. 2970N/13

-against-

Ramon Medina-Feliz, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered November 14, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree and attempted criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of three years, unanimously reversed, on the law, the pleas as to both counts vacated, and the matter remanded for further proceedings.

This is a "rare case" where the preservation requirement for challenges to guilty pleas does not apply because "defendant's factual recitation negate[d] an essential element of the crime pleaded to" and the court "accept[ed] the plea without making further inquiry to ensure that defendant underst[ood] the nature of the charge and that the plea [was] intelligently entered"

(*People v Lopez*, 71 NY2d 662, 666 [1988]). The crime of attempted possession of a weapon in the second degree requires that a defendant intend to use the weapon unlawfully against another. However, during the plea colloquy, defendant explicitly, repeatedly and consistently denied any intent to use the weapon against anyone, lawfully or otherwise, at the time the police recovered it or at any other time. The court asked followup questions, but they were ineffectual because defendant's responses only reconfirmed that he expressly denied having the requisite intent. Although an express admission of unlawful intent may not have been necessary in the first place, particularly because such intent is presumed (*see* Penal Law § 265.15[4]), defendant expressly negated that intent.

Because the promise of concurrent sentences can no longer be fulfilled, defendant is also entitled to vacatur of his plea to possession of a controlled substance (*see People v Rowland*, 8 NY3d 342 [2007]; *People v Pichardo*, 1 NY3d 126 [2003]).

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

ENTERED: JUNE 20, 2017

CLERK

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

4322N Denise A. Rubin, Index 154060/15
Plaintiff-Respondent,

-against-

Napoli Bern Ripka Shkolnik, LLP, et al.,
Defendants,

Paul J. Napoli,
Defendant-Appellant.

_____

Clausen Miller P.C., New York (Kimbley A. Kearney of counsel), for appellant.

LeClairRyan, A Professional Corporation, New York (Joseph M. Cerra of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 30, 2016, which, to the extent appealed from, denied the individual defendant's motion to amend his answer insofar as he sought to assert counterclaims for defamation and defamation per se, unanimously affirmed, with costs.

Because the notice of appeal was limited to "the defamation and defamation per se causes of action," we cannot consider defendant's arguments relating to the motion court's denial of leave to amend his answer to assert counterclaims for intentional and negligent infliction of emotional distress (*see D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 453 [1st Dept 2013]).

As to the proposed defamation counterclaims, defendant

initially sought to assert them as standalone counterclaims within the one-year limitations period. However, the counterclaims were dismissed as procedurally improper, since they were not appended to an answer (*see* CPLR 3011; *Newman v Newman*, 245 AD2d 353, 354 [2d Dept 1997]). Because the motion for leave to amend was made less than six months later, the proposed counterclaims could be saved by CPLR 205(a)'s six-month grace period (*see George v Mt. Sinai Hosp.*, 47 NY2d 170, 177-179 [1979]; *Weksler v Weksler*, 140 AD3d 491, 493 [1st Dept 2016]).

Nevertheless, in the record before us, defendant fails to state with particularity the allegedly defamatory statements, and therefore his fourth and fifth counterclaims are defective as a matter of law (CPLR 3016[a]["the particular words complained of shall be set forth in the complaint"]; *Dillon v City of New York*, 261 AD2d 34, 40 [1999]).[1] To the extent that defendant's counterclaim sets forth some of the words complained of, they consist largely of verbatim quotations from the complaint, and thus are "absolutely privileged and cannot form the basis of a

[1]Defendant's counterclaim refers to exhibits that are not in the record before us. It is not clear whether they were attached to the papers before the motion court.

defamation action" (*Flomenhaft v Finkelstein*, 127 AD3d 634, 637 [1st Dept 2015]; *see Tacopina v O'Keeffe*, 645 Fed Appx 7, 8 [2d Cir 2016]).

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

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

ENTERED: JUNE 20, 2017

CLERK

Richter, J.P., Feinman, Webber, Kahn, JJ.

4333 Art Capital Group, LLC, Index 160445/15
Plaintiff-Appellant,

-against-

Carlyle Investment Management LLC,
Defendant-Respondent.

_____

The Marjorie Firm, Ltd., New York (Francis B. Majorie of counsel), for appellant.

Debevoise & Plimpton LLP, New York (Jyotin Hamid of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about April 25, 2016, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff does not adequately plead a claim for breach of a confidentiality agreement. Plaintiff makes vague and conclusory statements that defendant must have used the confidential information it provided regarding the secured art loan business because defendant's principal did not know much about the business prior to speaking with plaintiff and, within the two-year period, defendant set up a competitor. Such allegations are insufficient because plaintiff does not identify what confidential information was allegedly misused by defendant during the two year confidentiality period (*see Parker Waichman*

LLP v Squier, Knapp & Dunn Communications, Inc., 138 AD3d 570 [1st Dept 2016]). Moreover, the confidentiality agreement expressly provided that defendant could do business with a competitor "now (i.e. at the time of the entry of the confidentiality agreement) or in the future," and acknowledged that execution of the confidentiality agreement and receipt of the confidential information would not restrict or preclude such activities (*see Automobile Coverage, Inc. v American Intl. Group, Inc.*, 42 AD3d 405, 407 [1st Dept 2007]).

Plaintiff also failed to adequately allege that there was any violation of the non-solicitation provision of the confidentiality agreement. Plaintiff did not identify any party that it introduced to defendant who then was solicited by defendant following termination of the transaction causing damages to plaintiff.

The court also properly dismissed the implied covenant of good faith and fair dealing claim as duplicative. The allegations in the complaint were premised on the same conduct as the breach of contract claim and were "intrinsically tied to the

damages allegedly resulting from a breach of the contract" (*Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]; *see MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 420 [1st Dept 2011]).

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

ENTERED: JUNE 20, 2017

CLERK