SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 14, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Webber, Kern, Moulton, JJ.

4844 HSBC Bank USA, etc., Index 850353/13
Plaintiff-Respondent,

-against-

Paula Rice,
Defendant-Appellant,

Board of Managers of the 374
Manhattan Condominium, et al.,
Defendants.

_____

Shaw & Binder, P.C., New York (Daniel S. LoPresti of counsel), for appellant.

Hogan Lovells US LLP, New York (Heather R. Gushue of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol Edmead, J.), entered September 30, 2015, which, among other things, granted plaintiff's motion for summary judgment on its foreclosure complaint and directed a referee to compute the amount due, unanimously reversed, on the law, without costs, plaintiff's motion for summary judgment denied, and, upon a search of the record, summary judgment granted to defendant Paula Rice dismissing the complaint as against her, without prejudice. The Clerk is directed to enter judgment accordingly.

RPAPL 1304 notice "shall be sent by [the] lender, assignee (including purchasing investor) or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage" (RPAPL 1304[2]). Proper service of a RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of a foreclosure action, and plaintiff has the burden of establishing its strict compliance with this condition (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 103 [2d Dept 2011]).

Plaintiff failed to establish that it strictly complied with RPAPL 1304. Plaintiff submitted an affidavit of its loan servicer, supported by copies of the 90-day notice it alleges was served and a copy of the unsigned, undated return receipt. These documents were insufficient to establish plaintiff's prima facie entitlement to summary judgment. In the affidavit, the loan servicer's vice president of loan documentation fails to demonstrate a familiarity with the servicer's mailing practices and procedures. Therefore, plaintiff did not establish proof of a standard office practice and procedure (*see Wells Fargo Bank, N.A. v Lewczuk*, 153 AD3d 890 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049 [2d Dept 2017]). Moreover, portions

of the receipt in the record are blank, and an undated and unsigned return receipt is not sufficient to establish proof of the actual mailing (*see Wells Fargo v Trupia* at 1051; *see also Investors Sav. Bank v Salas*, 152 AD3d 752 [2d Dept 2017]).

In light of the foregoing, we need not reach defendant's remaining contentions.

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

ENTERED: NOVEMBER 14, 2017

CLERK

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4914 The People of the State of New York, Respondent, Ind. 1769/14

-against-

Fernando Nunez,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (David S. Marcou of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert A. Sackett, J.), rendered April 8, 2015, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of seven years, unanimously affirmed.

Any error by the court in precluding the defense from cross-examining a police detective, who was part of the buy and bust team, regarding an unrelated federal civil complaint in which she was named as a defendant, was harmless because "there was no significant probability that the jury would have acquitted if defendant had been permitted to impeach" the officer at issue (*People v Smith*, 27 NY3d 652, 665 [2016]). There was overwhelming evidence that defendant possessed drugs with the intent to sell them, even without the limited circumstantial

evidence supplied by the detective at issue.

The court's discussion during voir dire regarding the applicable standard of proof in the grand jury, sparked by a prospective juror's statement that he had been a grand juror, should have been avoided (*see People v Melendez*, 140 AD3d 421, 423-424 [1st Dept 2016]). However, the brief comment, intended to emphasize the different and higher burden of proof at a trial, was harmless, and in any event it did not warrant the drastic remedy of a mistrial, which was the only remedy requested.

Defendant's general objection failed to preserve his present challenge to certain allegedly prejudicial background testimony about how buy and bust operations are conducted (*see People v Tevaha*, 84 NY2d 879, 881 [1994]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

The court did not err in permitting an undercover officer to testify anonymously, using his shield number rather than his name. Contrary to defendant's argument, the court did not simply grant the People's application on the ground that it was unlikely that any impeachment material would be found regarding the officer, who apparently regularly testified using his shield number. Instead, the court properly applied the analysis prescribed in *People v Stanard* (42 NY2d 74 [1977], *cert denied*

434 US 986 [1977]) and *People v Waver* (3 NY3d 748 [2004]). Nor did the court err in refusing defendant's request that the court use the officer's real name to conduct an in camera search for impeachment material in various databases, where the defense did not show that such records were reasonably likely to be found, especially considering the officer's long time undercover service (*see People v Gissendanner*, 48 NY2d 543 [1979]; *People v Valentine*, 160 AD2d 325 [1st Dept 1990], *lv denied* 76 NY2d 797 [1990]).

Finally, the court did not unduly curtail defense counsel's cross-examination of the undercover officer when he was recalled to the stand for a very limited purpose.

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

ENTERED: NOVEMBER 14, 2017

CLERK

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4915 Luis Jose Martinez, Index 157941/12
Plaintiff-Appellant,

-against-

3801 Equity Company, LLC,
Defendant-Respondent,

BCS Construction Services Corp.,
et al.,
Defendants.

- - - - -

[And a Third-Party Action]

_____

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

Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, P.C., Syosset (Anton Piotroski of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about November 19, 2015, which granted the motion of defendant landlord 3801 Equity Company, LLC (defendant) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff alleges that he was injured when he stepped into a hole located in his employer's backyard while taking out the garbage for the night. The hole had been dug in connection with ongoing construction by plaintiff's employer, the Negro Claro Lounge, to convert its backyard into additional restaurant space. Negro Claro Lounge operated out of the premises through a verbal

agreement with the lessee, third-party defendant Morales.

The subject lease provided that defendant "shall maintain and repair the public portions of the building, both interior and exterior [and that]. . .[t]enant shall, throughout the term of this lease, take good care of the demised premises. . .and at its sole cost and expense, make all non-structural repairs. . .when needed to preserve them in good working order and condition." Here, testimony established that the accident did not occur in a public portion of the building, but rather in the backyard that was exclusively controlled by plaintiff's employer, thereby not implicating an area that defendant had retained the responsibility to maintain (*see Malloy v Friedland*, 77 AD3d 583, 584 [1st Dept 2010]). Similarly, the evidence demonstrated that, in actual practice, defendant did nothing to show that it had the authority to maintain or repair the accident premises (*cf. Rubinstein v 115 Spring St. Owners Corp.*, 146 AD3d 618, 618-619 [1st Dept 2017]).

Furthermore, although the lease states that defendant had the right to reenter the premises to make repairs, plaintiff has failed to show that defendant violated a specific statutory safety provision, or that the hole in which he stepped was a structural defect (*see Kittay v Moskowitz*, 95 AD3d 451, 451-452 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Malloy* at 584).

Plaintiff's reference to an OSHA provision that was allegedly violated by defendant is unavailing, because defendant was not plaintiff's employer (*see Khan v Bangla Motor & Body Shop, Inc.*, 27 AD3d 526, 529 [2d Dept 2006], *lv dismissed* 7 NY3d 864 [2006]).

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

ENTERED: NOVEMBER 14, 2017

CLERK

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4916-
4917 In re Izabela S.,

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

Angelica A.,
Respondent-Appellant,

Randy S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Karen D. Steinberg, New York, for Randy S., appellant.

Neal D. Futerfas, White Plains, for Angelica A., appellant.

Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow of counsel), for respondent.

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

_____

Order of fact-finding, Family Court, New York County (Jane Pearl, J.), entered on or about January 8, 2016, which, to the extent appealed from as limited by the briefs, after a hearing, found that respondents had neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that the respondent parents neglected the subject child (*see* Family Ct Act § 1046[b][i]), a child with severe physical and neurological

anomalies, by failing to provide her with adequate nutrition (*see Matter of Camara R.*, 263 AD2d 710, 712 [3d Dept 1999]), by missing crucial appointments with medical professionals and specialists (*see Matter of Briana S. [LaQueena S.]*, 91 AD3d 447, 448 [1st Dept 2012]) and by being lax in their day-to-day oversight of her care and safety (*see* Family Ct Act § 1012[f][i][A], [B]).

Contrary to the parents' unpreserved contention, Family Court properly conformed the pleadings to the proof adduced at the hearing (Family Ct Act § 1051[b]).

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

ENTERED: NOVEMBER 14, 2017

CLERK

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4918 Kimberly Caro, etc., et al., Index 308876/12
Plaintiffs-Appellants,

-against-

Edward Chesnick, et al.,
Defendants,

Ioannis Kentimenos, et al.,
Defendants-Respondents.

_____

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

Salmon, Ricchezza, Singer & Turchi LLP, New York (Jeffrey A. Segal of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered January 11, 2016, which granted the motion of defendants Ioannis Kentimenos and U.S. Xpress Enterprises, Inc. for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiffs' decedent was riding his motorcycle on the Cross Bronx Expressway, lane-splitting and weaving in and out of lanes at a rate of speed in excess of other vehicles on the road, in stop and go traffic, when he struck the rear of a motor vehicle in the center lane. Decedent was thrown from his motorcycle to the left lane, rolled under defendants' tractor-trailer, and was run over by the tractor-trailer's rear wheels.

Defendants made a prima facie showing that decedent's negligent operation of the motorcycle caused the accident (*see Chowdhury v Matos*, 118 AD3d 488, 488 [1st Dept 2014]; *Dattilo v Best Transp. Inc.*, 79 AD3d 432 [1st Dept 2010]). Further, although defendants acknowledge that the tractor-trailer was unlawfully in the left lane at the time of the accident (*see* Vehicle and Traffic Law § 1110[a]), there is no evidence in the record that would support a finding that the statutory violation was a proximate cause of the accident. The presence of the tractor-trailer in the left lane merely furnished the condition that led to decedent's death, and was not a proximate cause of the accident (*see Sheehan v City of New York*, 40 NY2d 496, 503 [1976]; *Roman v Cabrera*, 113 AD3d 541, 542 [1st Dept 2014], *lv dismissed in part and denied in part* 24 NY3d 949 [2014]). Nor is there any nonspeculative basis for finding that defendant driver could have avoided the accident.

Plaintiffs failed to present evidence raising a triable issue of fact as to whether any negligence on the part of defendants was a substantial factor in causing the accident.

Although plaintiffs did not have an opportunity to depose defendant driver, they failed to demonstrate the existence of any testimony by defendant driver relevant to defendant's summary judgment motion.

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

ENTERED: NOVEMBER 14, 2017

CLERK

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4919-
4919A-
4919B-
4919C

Index 305441/10

Donald Reid,
Plaintiff-Appellant,

-against-

Dr. Rubinstein, et al.,
Defendants-Respondents,

Jose, Dr. Jerry Lynn, D.D.S., et al.,
Defendants.

_____

Joel M. Kotick, New York, for appellant.

Mauro Lilling Naparty, Woodbury (Gregory A. Cascino of counsel), for Dr. Rubinstein, respondent.

Marulli, Lindenbaum & Tomaszewski, LLP, New York (Aleksandr Gelerman of counsel), for Dr. Robert Winegarten, respondent.

Gordon & Silber, P.C., New York (Michael A. Bayron of counsel), for Sol Stolzenberg, respondent.

_____

Appeal from order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered November 30, 2016, deemed appeal from judgments, same court and Justice, entered February 15, 2017, February 27, 2017, and May 26, 2017, dismissing the complaint as against defendants Sol Stolzenberg, D.M.D., d/b/a Toothsavers, Harrison Rubinstein, D.D.S., s/h/a Dr. Rubinstein, and Robert Winegarden, D.M.D, s/h/a Dr. Robert Winegarten, respectively, and, so considered, said judgments unanimously affirmed, without

costs.

The trial court correctly granted defendants' motion for judgment as a matter of law at the close of plaintiff's dental malpractice case (*see* CPLR 4401; *Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Plaintiff claims that defendants should have treated him with implants, rather than a bridge. However, his expert testified that, although he favored implants, both implants and a bridge were appropriate treatment options (*see Durney v Terk*, 42 AD3d 335 [1st Dept 2007], *lv denied* 9 NY3d 813 [2007]).

The trial evidence demonstrates that, contrary to his contention, plaintiff's consent to the insertion of a bridge was informed (*see Orphan v Pilnik*, 15 NY3d 907 [2010]).

Nothing in the trial record shows judicial bias warranting a mistrial (*see Noboa-Jaquez v Town Sports Intl., LLC*, 138 AD3d 493 [1st Dept 2016]).

The court properly precluded plaintiff's expert from testifying as to bone grafting since no theory of liability

involving bone grafting was included in plaintiff's expert disclosure (*see* CPLR 3101[d]), or his bill of particulars.

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

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

ENTERED: NOVEMBER 14, 2017

CLERK

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4920 The People of the State of New York, Ind. 2923/04
Respondent,

-against-

Devon Brown,
Defendant-Appellant.

_____

Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of resentencing of the Supreme Court, Bronx County (Margaret Clancy, J.), rendered July 15, 2009,

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.

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

ENTERED: NOVEMBER 14, 2017

CLERK

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

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4921-
4922 Index 651693/16

MIMS Master Fund, L.P.,
Plaintiff-Appellant-Respondent,

-against-

Joseph A. Cambi,
Defendant-Respondent-Appellant.

_____

Sidley Austin LLP, New York (John G. Hutchinson of counsel), for appellant-respondent.

Krantz & Berman LLP, New York (Larry H. Krantz of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 11, 2017, which denied plaintiff's motion for summary judgment on defendant's liability under the guaranty agreement, denied plaintiff's motion to dismiss defendant's counterclaim for fraud and denied defendant's cross motion for summary judgment dismissing plaintiff's complaint, unanimously modified, on the law, plaintiff's motion for summary judgment and its motion to dismiss the fraud counterclaim granted, and the matter remanded for further proceedings, without costs.

The motion court should have granted plaintiff's motion for summary judgment on the issue of defendant's liability under the guaranty. Plaintiff established that defendant executed an absolute and unconditional personal guaranty to plaintiff that

the entities under defendant's control would perform all of their obligations under or in connection with a partnership agreement with plaintiff. Defendant's conclusory allegation that he was unaware that it was a personal guaranty does not raise an issue of fact as to whether he was fraudulently induced into signing the documents (*see Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446-447 [1st Dept 2012]). We reject defendant's arguments that the guaranty is not enforceable because it did not run to the beneficence of the obligations guaranteed. His remaining allegations of fraudulent inducement, largely negated by the express terms of the written guaranty, do not create triable issues of fact with respect to a bona fide defense (*see e.g. Banner Indus. v Key B.H. Assoc.*, 170 AD2d 246 [1st Dept 1991]).

Plaintiff also demonstrated that defendant failed to perform under the guaranty when he did not fulfill the entities' obligations in connection with the partnership agreement (*see*

generally Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro, 25 NY3d 485, 492 [2015]). Defendant's attacks on the validity and scope of the unambiguous personal guaranty are unavailing.

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

ENTERED: NOVEMBER 14, 2017

CLERK

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4923 The People of the State of New York, Ind. 5573/14
Respondent,

-against-

Octavia Tarver,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota 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 (Melissa Jackson, J.), rendered May 14, 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.

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

ENTERED: NOVEMBER 14, 2017

CLERK

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

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4924- Index 105122/09
4925- 160946/14
4926 In re New York Diet Drug Litigation 653434/14

- - - - -

Clara Appel-Hole, et al.,
Plaintiffs,

-against-

Wyeth-Ayerst Laboratories, et al.,
Defendants.

- - - - -

Ella Abramova, et al.,
Intervenor Plaintiffs,

-against-

Paul J. Napoli, et al.,
Intervenor Defendants.

- - - - -

Paul J. Napoli, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Parker Waichman, et al.,
Third-Party Defendants-Appellants.

- - - - -

In re: New York Diet Drug Litigation

- - - - -

Clara Appel-Hole, et al.,
Plaintiffs,

-against-

Wyeth-Ayerst Laboratories, et al.,
Defendants.

- - - - -

Sherrie Antrum-Perry, et al.,
Intervenor Plaintiffs,

-against-

Paul J. Napoli, et al.,
Intervenor Defendants.

- - - - -

Paul J. Napoli, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Parker Waichman, et al.,
Third-Party Defendants-Appellants.

- - - - -

In re: New York Diet Drug Litigation

- - - - -

Clara Appel-Hole, et al.,
Plaintiffs,

-against-

Wyeth-Ayerst Laboratories, et al.,
Defendants.

- - - - -

John M. McDonnell as Chapter 7 Trustee
for the Bankruptcy Estate of Cynthia
Altini and John Altini,
Intervenor Plaintiff,

-against-

Paul J. Napoli, et al.,
Intervenor Defendants.

- - - - -

Paul J. Napoli, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Parker Waichman, et al.,
Third-Party Defendants-Appellants.

_____

Rivkin Radler LLP, Uniondale (Merril S. Biscone of counsel), for appellants.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Eric Alan Stone of counsel), for Paul J. Napoli, Napoli Kaiser & Associates, LLP, Napoli Kaiser Bern, LLP, Napoli Kaiser Bern & Associates LLP and Napoli Kaiser & Bern, P.C., respondents.

Ropers Majeski Kohn & Bentley PC, New York (Christopher B. Hitchcock of counsel), for Marc J. Bern and Law Offices of Marc Jay Bern, P.C., respondents.

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered February 16, 2016 and February 19, 2016, which, to the extent appealed from, denied third-party defendants' motions to dismiss the third-party claims for contribution based on liability for common-law fraud, unanimously reversed, on the law, with costs, and the motions granted.

Intervenor plaintiffs in each of these three actions were the plaintiffs in the New York Diet Drug Litigation. They were represented in the litigation by intervenor defendants/third-party plaintiffs, who negotiated settlements (settling counsel). They had been referred to settling counsel by third-party defendants (referring counsel). Intervenor plaintiffs allege that settling counsel engaged in common-law fraud in allocating costs and settlement amounts as between their direct and referred clients. Settling counsel asserted third-party claims for contribution, alleging that referring counsel failed to object to

any of the settlements despite scrutinizing each one closely to determine whether it was fair and reasonable.

To succeed on their fraud claims, intervenor plaintiffs must demonstrate that they were justified in relying on settling counsel's alleged misrepresentations (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83 [1st Dept 2017]). If referring counsel, intervenor plaintiffs' agents, received notice requiring them to take steps to stop the settlements, the notice would be imputed to intervenor plaintiffs, who consequently would be unable to demonstrate justifiable reliance; the defeat of the fraud claim would obviate the claim for contribution based on liability for fraud (*see New York Islanders Hockey Club, LLP v Comerica Bank-Texas*, 115 F Supp 2d 348, 351-352 [ED NY 2000] [dismissing third-party claim for contribution "where the claim essentially duplicate(d) an element of the plaintiff's own cause of action"]). Contrary to settling counsel's contention, the third-party complaints do not allege facts from which it could be

inferred that referring counsel were acting outside the scope of their representation or had totally abandoned intervenor plaintiffs' interests with regard to the settlements (*see Kirschner v KPMG LLP*, 15 NY3d 446, 466-467 [2010]).

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

ENTERED: NOVEMBER 14, 2017

CLERK

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4927- Ind. 4575/13
4927A The People of the State of New York, 957/15
Respondent,

-against-

Latik Nelson,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Ronald Zweibel, J.), rendered May 31, 2016,

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 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: NOVEMBER 14, 2017

CLERK

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

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4928 The People of the State of New York, Respondent, Ind. 5092/14

-against-

Joshua Rodriguez, 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 (Gregory Carro, J.), rendered May 6, 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: NOVEMBER 14, 2017

CLERK

Kapnick, J.P., Webber, Gesmer, Oing, JJ.

4929 Willy Rodriguez, et al., Index 160931/15
Plaintiffs-Appellants,

-against-

KGA Inc., et al.,
Defendants-Respondents.

_____

Eisner & Dictor, P.C., New York (Thomas J. Lamadrid of counsel), for appellants.

Joseph & Kirschenbaum LLP, New York (Lucas C. Buzzard of counsel), for respondents.

_____

Order, Supreme Court, New York County (Kathryn Freed, J.), entered July 8, 2016, which to the extent appealed from, granted defendants KGA Inc. ("KGA") and Simon Werner's ("Werner") motion to dismiss the complaint for failure to state a claim, unanimously affirmed, without costs.

Under New York Law, it is a "settled rule of statutory interpretation, that unless expressly stated otherwise, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state enacting it" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 286 AD2d 229, 230 [1st Dept 2001], *affd* 98 NY2d 314 [2002]), [citations omitted]; *see also* McKinney's Statutes § 149 ["The laws of one state can have no force and effect in the territorial limits of another jurisdiction, in the absence of the consent of the latter"]).

Article 6 of the New York Labor Law, which contains the unlawful deductions, notice, and record keeping provisions which plaintiffs claim were violated, contains no indication that the provisions were intended to apply when the work in question is performed outside the state. Article 19 of the New York Labor Law, which contains the minimum wage, overtime, and spread of hours provisions identified in the complaint, includes a "Statement of Public Policy" which states, in relevant part: "There are persons employed in some occupations in the state of New York at wages insufficient to provide adequate maintenance for themselves and their families.... Employment of persons at these insufficient rates of pay threatens the health and well-being of the people of this state and injures the overall economy" (Labor Law § 650).

Since these statutes do not expressly apply on an extraterritorial basis, plaintiffs' claims under these provisions, based on labor performed exclusively outside New York, do not state a cause of action under Article 6 or Article 19 of the New York Labor Law (*see O'Neill v Mermaid Touring Inc.*, 968 F Supp 2d 572, 578-579 [SDNY 2013]).

Plaintiffs' claims for breach of contract and for application of the minimum wage laws of another jurisdiction are asserted for the first time on appeal, and on this record, are unavailing.

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

ENTERED: NOVEMBER 14, 2017

CLERK

Friedman, J.P., Kapnick, Webber, Gesmer, JJ.

4930 Marjatta Freeman, Index 152087/15
Plaintiff-Appellant,

-against-

Dan Brecher, Esq., et al.,
Defendants-Respondents,

John Does 1 through 5,
Defendants.

_____

Aitken Berlin LLP, White Plains (Bernard V. Kleinman of counsel), for appellant.

Rivkin Radler LLP, Uniondale (David Wilck of counsel), for Dan Brecher, Esq. and Scrinci Hollenbeck, L.L.C., respondents.

Matalon Shweky Elman PLLC, New York (Jeremy C. Bates of counsel), for Pullman & Comley, LLC, respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered January 13, 2016, which granted defendants-respondents' motions to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's claim for legal malpractice in connection with an underlying settlement fails to state a cause of action in the absence of allegations that the "settlement . . . was effectively compelled by the mistakes of [defendant] counsel" (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]) or the result of fraud or coercion (*see Beattie v Brown & Wood*, 243 AD2d 395 [1st Dept 1997]). Plaintiff's equivocal denial of knowledge of

the terms of the settlement is flatly contradicted by the clear terms of the settlement agreement (*see Bishop v Maurer*, 33 AD3d 497, 499 [1st Dept 2006], *affd* 9 NY3d 910 [2007]). Additionally, plaintiff's speculative and conclusory allegations of proximately caused damages cannot serve as a basis for a legal malpractice claim (*see Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002], *lv denied* 98 NY2d 606 [2002]). Plaintiff's cause of action for breach of fiduciary duty arising from the same conduct was correctly dismissed as duplicative of the legal malpractice claim (*see Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435, 436 [1st Dept 2011]; *InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003]). Plaintiff has abandoned her breach of fiduciary duty claim based on a referral scheme, and, in any event, has failed to properly plead such a scheme.

The speculative nature of plaintiff's claim of damages arising from defendant Dan Brecher's alleged conflict of interest in assuming a board position in a company in which plaintiff invested while simultaneously serving as plaintiff's counsel cannot support a legal malpractice claim (*see Dweck Law Firm v Mann*, 283 AD2d 292, 294 [1st Dept 2001]).

The Judiciary Law § 487 claims were correctly dismissed, as the conduct alleged does not evince a chronic and/or extreme pattern of legal delinquency (*see Chowaiki & Co. Fine Art Ltd. v*

Lacher, 115 AD3d 600, 601 [1st Dept 2014]). Additionally, plaintiff has not alleged any proximately caused damages or identified any damages sustained as a result of Brecher's alleged conflict of interest, which did not arise in the course of a judicial proceeding and thus is not actionable under the statute (*see Meimeteas v Carter Ledyard & Milburn LLP*, 105 AD3d 643 [1st Dept 2013]).

Plaintiff's unsubstantiated hope that discovery and time will help salvage her claims is insufficient to defeat the motions (*see* CPLR 3211[d]; *Leonard v Gateway II, LLC*, 68 AD3d 408, 410 [1st Dept 2009]).

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: NOVEMBER 14, 2017

CLERK

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4931 Kisha Chantell Davis, Index 311094/11
Plaintiff-Appellant,

-against-

1715 Walton Avenue Properties, L.L.C., et al.,
Defendants-Respondents.

_____

Dubow, Smith & Marothy, Bronx (Steven J. Mines of counsel), for appellant.

Varvaro, Cotter & Bender, White Plains (Heath A. Bender of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered March 16, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendants failed to establish prima facie that they did not have actual notice of the hazardous condition of the bathroom floor in plaintiff's apartment (*see Negroni v Langsam Prop. Servs. Corp.*, 124 AD3d 565 [1st Dept 2015]).

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

ENTERED: NOVEMBER 14, 2017

CLERK

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4932 The People of the State of New York, Ind. 2104/14
Respondent,

-against-

Roberto Aquero,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen 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 (William Mogulescu, J.), rendered December 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.

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

ENTERED: NOVEMBER 14, 2017

CLERK

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

Friedman, J.P., Kapnick, Webber, Gesmer, Oing, JJ.

4933N Pauline Moodie, Index 25853/16E
Plaintiff-Appellant,

-against-

Maureen Kehoe,
Defendant-Respondent.

_____

Law Office of Nicole R. Kilburg, New York (Nicole R. Kilburg of counsel), for appellant.

Law Office of Gialleonardo, Gizzo & Rayhill, Elmsford (Brian J. Rayhill of counsel), for respondent.

_____

Order, Supreme Court, Supreme Court, Bronx County (Fernando Tapia, J.), entered January 12, 2017, which granted defendant's motion to change venue, unanimously reversed, on the law, without costs, and the motion denied.

The motion for a change of venue should have been denied because defendant did not meet her initial burden "of disproving plaintiff's Bronx County residence" (*Fiallos v New York University Hosp.*, 85 AD3d 678 [1st Dept 2011]). In her personally verified complaint, plaintiff alleges that she is a resident of Bronx County, and the summons specifies her address on Baychester Avenue in Bronx County. In support of her motion to change venue, defendant submitted only a copy of the Police Accident Report, which contained no information inconsistent with plaintiff's allegation that she resides in Bronx County. Because

defendant did not meet her initial burden of coming forward with evidence that plaintiff resided outside of Bronx County, the burden never shifted to plaintiff to produce evidence demonstrating her residence in that jurisdiction. In view of defendant's failure to meet her initial burden, it is unnecessary to consider the sufficiency of plaintiff's opposition to the motion (*see Mejia v J. Crew Operating Corp.*, 140 AD3d 505 [1st Dept 2016]).

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

ENTERED: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4936-
4937-
4938 In re Angelicah U., and Others,

Children Under the Age of Eighteen, etc.,

Reggie U.,
Respondent-Appellant,

Children's Aid Society
Petitioner-Respondent,

Aiesha A.,
Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Law Office of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Tennille M. Tatum-Evans, New York, attorney for the children

_____

Orders, Family Court, New York County (Emily M. Olshansky, J.), entered on or about October 21, 2016, which to the extent appealed from, following a hearing, made a finding of abandonment as to Baby Girl A. (Baby Girl) and permanent neglect as to all three of the children, unanimously affirmed, without costs.

Family Court's determination that the father permanently neglected the subject children is supported by clear and convincing evidence (Social Services Law 384-b[7][a]). Petitioner agency engaged in diligent efforts to encourage and

strengthen the father's relationship with the children by developing individualized plans tailored to fit his situation and needs that included parenting skills classes, domestic violence services, mental health services, attendance in case planning meetings, and family visitation so that he could be reunited with the children (*Matter of Adam Mike M. [Jeffrey M.]*, 104 AD3d 572, 573 [1st Dept 2013]). Despite these efforts, the father refused to speak to the agency, and when its representatives went to his apartment he would not answer the door. He would not return messages from the agency and did not respond to the agency's letters. Some of the letters set forth his service plan and others actually made referrals for services, but he never engaged in any services and did not follow up on a single referral. The agency set up regular visitation with the children that the father did not take advantage of. An agency that has embarked on a diligent course but faces an uncooperative parent is deemed to have fulfilled its duty (*Matter of Sheila G.*, 61 NY2d 368, 384 [1984]).

We also reject the father's contention that his mental illness precluded a finding of permanent neglect because it prevented him from planning for the children's future. The agency made multiple referrals and appointments for the father to receive mental health services, but he did not take advantage of

any of them. The father failed to plan by failing to utilize the medical, psychiatric, psychological and other social and rehabilitative services and the material resources that were made available to him, and cannot blame the agency for his failure to do so (Social Services Law § 384-b(7)[c]; see *Matter of Vincent Anthony C.*, 235 AD2d 283, 283 [1st Dept 1997]).

There was also clear and convincing evidence of the father's abandonment of Baby Girl, whom he did not even name (Social Services Law § 384-b(5)(a); *Matter of Annette B.*, 4 NY3d 509 [2005]; *Matter of Tamar T.W. [Temorerie T.W.]*, 149 AD3d 852 [2d Dept 2017]). During the abandonment period from March 14, 2015 through September 14, 2015, the unrefuted testimony and progress notes establish that the father did not visit Baby Girl at all and did not communicate with her in any way. The single contact the father had with the agency at a service and permanency plan conference for Baby Girl was not sufficient to overcome his abandonment of her (*Matter of Crawford*, 153 AD2d 108, 111 [1st Dept 1990]; *Matter of Stephen Sidney W.*, 283 AD2d 153, 154 [1st Dept 2001]).

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

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

ENTERED: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4939 Smith, Gambrell & Russell, LLP, Index 653476/16
Plaintiff-Respondent,

-against-

Telecommunications Systems, Inc.,
Defendant-Appellant.

_____

Lupkin & Associates PLLC, New York (Jonathan D. Lupkin of counsel), for appellant.

Smith, Gambrell & Russell, LLP, New York (Donald Rosenthal of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 8, 2017, which granted plaintiff's motion to dismiss the counterclaim, unanimously affirmed, without costs.

Defendant alleges that plaintiff committed legal malpractice by failing to file a timely motion for attorneys' fees in a federal patent proceeding in which it represented defendant. Defendant relies on Federal Rules of Civil Procedure rule 54(d)(2)(B), which sets the deadline at 14 days after entry of a judgment in the proceeding. It alleges that 16 months after the deadline, and following extensive posttrial proceedings, plaintiff moved for attorneys' fees as a sanction. As the motion court found, federal case law holds that a motion for attorneys' fees is timely under rule 54(d)(2)(B) when filed 14 days after the entry of judgment or within 14 days of the resolution of

postjudgment motions (*see e.g. Sorenson v Wolfson*, 170 F Supp 3d 622, 628 [SD NY 2016], *affd* 683 Fed Appx 33 [2d Cir 2017]). Thus, the court correctly dismissed the counterclaim for failure to state a cause of action for legal malpractice predicated on the missed deadline.

On appeal, defendant argues that plaintiff's filing of a sanctions motion, instead of a motion for attorneys' fees as the prevailing party pursuant to 35 USC § 285, constitutes malpractice. We may entertain this new legal argument because it appears on the face of the record, involves no new facts, and is determinative (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]). However, the argument does not avail defendant.

The record shows that plaintiff had contemplated filing a motion pursuant to 35 USC § 285 and decided against it. The statute provides that the court may award attorneys' fees to the prevailing party "in exceptional cases" (*see Octane Fitness, LLC v Icon Health & Fitness, Inc.*, __ US __, __, 134 S Ct 1749, 1756 [2014]). Plaintiff advised defendant that it would be a "stretch" to argue prevailing party under § 285. Thus, defendant's theory that plaintiff breached a duty of care to it by choosing to apply for attorneys' fees via a sanctions motion instead of a motion under § 285 amounts to no more than an

allegation that plaintiff made an error in judgment, which does not state a cause of action for malpractice (*see Rosner v Paley*, 65 NY2d 736, 738 [1985]; *Sitomer v Goldweber Epstein, LLP*, 139 AD3d 642 [1st Dept 2016], *lv denied* 28 NY3d 906 [2016]).

Moreover, defendant failed to allege that the choice of a sanctions motion rather than a motion under § 285 was a proximate cause of its claimed injury, since there are no allegations in the counterclaim that would establish that the patent proceeding was an exceptional case warranting attorneys' fees (*see Octane Fitness*, 134 S Ct at 1756).

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: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4940 P.R., an Infant by His Mother and Natural Guardian, Shameka W., et al.,
Plaintiffs-Appellants,

-against-

New York City Housing Authority,
Defendant-Respondent.

Index 150649/12

_____

Jacoby & Meyers LLP, Newburgh (Andrew L. Spitz of counsel), for appellants.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered August 8, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was warranted in this action for personal injuries sustained when infant plaintiff slipped off the bed and fell against hot pipes that conveyed steam to the radiators in the apartment. The court properly concluded that defendant did not violate its common-law duty to plaintiffs in failing to insulate the hot pipes (*see White v New York City Hous. Auth.*, 139 AD3d 579, 580 [1st Dept 2016]; *see also Rivera v Nelson Realty, LLC*, 7 NY3d 530, 535 [2006]). Plaintiffs argue that because the pipes were not the primary source of heat to the

apartment, insulation would not have interfered with the functionality of the heating system, unlike in *White*. However, even plaintiffs' expert acknowledged that the pipes were part of the heating system and supplied some heat to the room.

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

ENTERED: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4941-
4941A-
4941B

Ind. 1215/11
3165/12
1642/14

The People of the State of New York,
Respondent,

-against-

Anthony Cintron, etc.,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

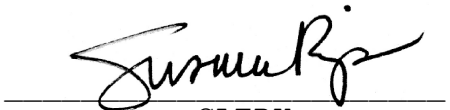
_____

Judgments, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered February 11, 2015, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 14, 2017



CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4942-
4943 Illinois Union Insurance Co., et al.,
Plaintiffs-Appellants-Respondents,

-against-

Grandview Palace Condominiums Association, etc.,
Defendant-Respondent-Appellant.

- - - - -

[And Other Actions]

Index 155113/12
273/13
2253/13
650748/14

Foran Glennon Palandech Ponzi & Rudloff, New York (Matthew Ponzi of counsel), for Illinois Union Insurance Co., appellant-respondent.

Mound Cotton Wollan & Greengrass LLP, New York (Philip C. Silverberg of counsel), for Great American Insurance Company of New York, appellant-respondent.

Reed Smith LLP, New York (Brian A. Sutherland of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 12, 2016, which denied plaintiffs' motion for summary judgment declaring that they are not obligated to provide coverage under the policies for defendant's loss caused by a fire, and denied defendant's cross motion for summary judgment dismissing the claims arising under the protective safeguards endorsement or based on its alleged material misrepresentations in its insurance applications, unanimously modified, on the law, to grant plaintiffs' motion and declare that they are not

obligated to cover defendant's loss, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

The property insurance policy issued to defendant by plaintiff Illinois Union Insurance Company contained a protective safeguards endorsement (PSE) that unambiguously required as a condition of insurance that defendant maintain automatic sprinkler systems in complete working order in all buildings in its multi-building condominium complex. The investigation into the fire that spread through the complex causing extensive damage determined, inter alia, that some of the buildings did not have sprinkler systems and others had only limited sprinkler systems and not all of them were working properly. Illinois Union, the primary insurer, and Great American Insurance Company of New York, the excess insurer, denied coverage for the loss on the ground that defendant failed to comply with the PSE.

We reject defendant's attempts to create ambiguity in the PSE where none exists (*see Slattery Skanska Inc. v American Home Assur. Co.*, 67 AD3d 1, 14 [1st Dept 2009]), for example, by arguing that the multiple buildings in the complex are actually multiple coverage locations, so that the absence of sprinklers in one building does not mean that coverage is excluded for all buildings with sprinklers.

We reject defendant's attempts to create coverage where none exists under the policy by arguing that plaintiffs waived the PSE or are otherwise estopped to invoke it (*see Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698 [1980]; *Matter of U.S. Specialty Ins. Co. [DeNardo]*, 151 AD3d 1520 [3d Dept 2017]).

Defendant argues that Great American should be precluded from enforcing the PSE because the addition of the PSE to the excess policy materially changed the excess policy, and defendant received no consideration for the change. Our review of the relevant policies finds no support for this argument. Primary insurance coverage was initially provided to defendant by nonparty Aspen American Insurance Company. Illinois Union replaced the coverage after Aspen cancelled its policy. Both the Aspen and the Illinois Union policies contained the requirement of fully functional sprinkler systems in all buildings in defendant's complex. Even if we were to find that there was a material change in coverage, we would conclude that Great

American provided sufficient consideration to defendant by not cancelling its excess policy, as it had the right to do, when Aspen cancelled its primary policy (*see All Terrain Props. v Hoy*, 265 AD2d 87, 94 [1st Dept 2000]).

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

ENTERED: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4944-
4945-
4946-
4947 Index 603738/08

Lawrence A. Omansky,
Plaintiff,

-against-

160 Chambers Street Owners, Inc.,
Defendant-Respondent,

Mary A Cohen, et al.,
Defendants,

Commerce Court 160 Chambers, Inc.,
Defendant-Intervenor-Appellant.

_____

Seyfarth Shaw LLP, New York (Jerry A. Montag of counsel), for appellant.

Kucker & Bruh LLP, New York (Nativ Winiarsky of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered August 1, 2016, which evicted plaintiff from the subject premises and bringing up for review a supplemental order, same court and Justice, entered January 22, 2016, granting the motion of defendant 160 Chambers Street Owners, Inc. (the Cooperative) for summary judgment on the holdover petition, evicted plaintiff from the subject premises, unanimously affirmed, without costs. Appeal from the supplemental order, unanimously dismissed, without costs, as subsumed in the appeal

from the judgment. Order, same court and Justice, entered April 20, 2017, which denied defendant-intervenor Commerce Court 160 Chambers, Inc.'s motion for leave to renew the order granting the Cooperative's motion for summary judgment, unanimously affirmed, without costs. Appeal from the judgment, same court and Justice, entered July 17, 2017, which ordered plaintiff to pay damages to the Cooperative for unpaid rent and attorneys' fees and costs, unanimously dismissed, without costs, as abandoned.

This landlord-tenant dispute concerns the ground floor commercial space in a cooperative building owned by the Cooperative. Plaintiff was the original tenant and defendant-intervenor Commerce Court 160 Chambers, Inc. (Commerce) purports to be his indirect successor-in-interest.

The Cooperative's motion for summary judgment was properly granted as to its holdover petition.

Plaintiff's attempt to renew the lease by letter in December 1992 - over 15 years prior to its expiration - failed to comply with the lease's condition that the option to renew be exercised "within (60) days before the end of each twenty-five year term." As such, the renewal was not effective. Even if a Cooperative representative countersigned the renewal letter, that did not waive this condition, as the acknowledgment was expressly limited "to the extent permitted by the applicable lease."

Although the Cooperative failed to comply with its obligation to notify plaintiff of his right to exercise the renewal option within 15 days of expiration of the lease, this failure did not have the effect of automatically renewing the lease. Nor did the Cooperative somehow waive the right to object to the failure to renew by accepting rent checks from Omansky post-termination, as continued acceptance of rent post-lease termination merely creates a month-to-month holdover tenancy (Real Property Law § 232-c; *cf. Jefpaul Garage Corp. v Presbyt. Hosp. in NY*, 61 NY2d 442, 448 [1984]).

Because the lease was never validly renewed, it expired at the end of its initial 25 year term in June 2008. As a result, plaintiff's leasehold interest ceased to exist and could not have been assigned to Commerce over one year later.

Additionally, even if the assignment to Commerce from Nicolena's B and B II Inc. (Nicolena's) (an entity wholly owned by plaintiff) was valid, the prior assignment from plaintiff to Nicolena's was not, because plaintiff failed to notify the Cooperative of the purported assignment within 30 days, as required by the lease. As such, Nicolena's had nothing to assign. Further, even if the Cooperative retained Commerce's checks, this did not waive the notice requirement because the lease contained a specific "No Waiver" provision (*see Jefpaul*, 61

NY2d at 446).

Commerce's motion to renew was properly denied because it was not "based upon new facts" and did not "contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2]-[3]; *Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010], *lv dismissed* 15 NY3d 820 [2010]). The documents publicly filed in the related defamation action were available to Commerce at the time of its opposition to the instant summary judgment motion, and those that were not yet available merely reiterated the same points (*see Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014]; *Whalen v NYC Dept. of Envtl. Protection*, 89 AD3d 416, 417 [1st Dept 2011]). Commerce fails to adequately explain why it did not search for these documents earlier. Alternatively, on the merits these documents would not change the results.

Because of our disposition of these issues, we need not

reach the issues of whether the lease was validly terminated for nonpayment of rent or whether reversal would be warranted if the motion to renew were granted. We have considered the remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4948 The People of the State of New York, Ind. 1232/09
Respondent,

-against-

Michael Rutledge,
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 (Hope Korenstein 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 (Neil Ross, J.), rendered May 3, 2016,

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.

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

ENTERED: NOVEMBER 14, 2017

CLERK

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

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4950-
4951 The People of the State of New York,
Respondent,

-against-

Fidel Vega,
Defendant-Appellant.

Ind. 3112/13

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered December 8, 2014, as amended July 18 and August 19, 2016, convicting defendant, after a jury trial, of burglary in the first degree (two counts), assault in the second degree (two counts), and endangering the welfare of a child, and sentencing him to an aggregate term of 8 years, unanimously affirmed, without prejudice to further litigation relating to defendant's sentence in accordance with this decision.

Because defendant's dismissal motion only addressed other elements of burglary, he failed to preserve his challenge to the sufficiency of the evidence supporting the dwelling element of the burglary convictions, and we decline to review it in the interest of justice. As an alternative holding, we reject it on

the merits. We also reject defendant's remaining legal sufficiency arguments and find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The evidence abundantly established that the victim's room was a dwelling because, under the particular living arrangements presented, it was a "separately secured or occupied" unit (Penal Law § 140.00[2]), albeit within defendant's mother's apartment, where defendant also resided. The victim, defendant's daughter, had a key to her bedroom. The victim shared the room only with her child, and she regularly locked the room. The victim's testimony and photographic evidence showed that defendant broke down the locked door to the room, establishing that he knowingly entered the room without being "licensed or privileged to do so" (Penal Law §140.00[5]; *see People v Clarke*, 185 AD2d 124 [1st Dept 1992], *affd* 81 NY2d 777 [1993]). The jury could have reasonably found that the living arrangements were not that of a typical family whose members generally have access to the entire residence. The victim's testimony, as well as photographs, also established that defendant's belt was a dangerous instrument under the circumstances in which it was used, since defendant repeatedly beat his daughter using the metal belt buckle, causing facial swelling, bruising on her arm and leg, a cut to her knee, and an imprint that remained visible

for at least one month (*see People v Rollins*, 120 AD2d 896, 897 [3d Dept 1986], *lv denied* 68 NY2d 773 [1986]).

In its justification charge, the court properly instructed the jury to apply the deadly force standard if it found that defendant used a dangerous instrument, because, given the relationship between the relevant statutory definitions (Penal Law § 10.00[11],[13]), the latter finding would necessarily imply that defendant used deadly force (*see People v White*, 66 AD3d 585, 586 [1st Dept 2009], *lv denied* 14 NY3d 807 [2010]). Thus, the relevant factual issue was submitted to the jury in an appropriate manner. Defendant's constitutional challenges to the court's justification charge, and his contention that the court should have charged that he had no duty to retreat, are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that they are without merit. In any event, any error in any portion of the justification charge was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's challenge to the court's rulings precluding his counsel from questioning the victim and defendant about the victim's mental health is unpreserved. When the court denied counsel's request on the ground that statements by defendant's and the victim's relatives did not provide a good faith basis for

such an inquiry in the absence of any expert opinion, counsel acquiesced in that ruling rather than offering any further proof (*see People v Cortez*, 85 AD3d 409, 411 [1st Dept 2011], *affd* 22 NY3d 1061 [2014], *cert denied* __ US __, 135 S Ct 146 [2014]). As an alternative holding, we find that the court properly exercised its discretion (*see People v Rivera*, 105 AD3d 1343, 1345 [4th Dept 2013], *lv denied* 21 NY3d 1045 [2013]; *People v Lugo*, 227 AD2d 247 [1st Dept 1996], *lv denied* 88 NY2d 1022 [1996]). The court made it clear that it would entertain an offer of competent medical proof, and there was no violation of defendant's right to impeach witnesses and present a defense. In any event, any error was harmless.

We conclude that defendant's excessive sentence claim is premature, and we decline to address it. Defendant's ultimate sentence as a first felony offender resulted from his successful CPL 440.20 motion to set aside, on grounds related to *People v Catu* (4 NY3d 242 [2005]), his original sentence as a second violent felony offender. However, the People, who assert that, under *People v Smith* (28 NY3d 191 [2016]), the original sentence should be reinstated, have taken an appeal from the order granting the motion, as well as challenging it through further motion practice in Supreme Court. Our present affirmance of the amended judgment of conviction is without prejudice to any of the

pending litigation over defendant's second felony offender status, or to any appeal from any new resentencing that may result from that litigation, or to any appropriate application to this Court in the event that no further resentencing is forthcoming.

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

ENTERED: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4952 Ada Damla Demir, Index 150954/15
Plaintiff-Respondent,

-against-

Sandoz Inc., et al.,
Defendants-Appellants.

_____

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for appellants.

McCallion & Associates LLP, New York (Kenneth F. McCallion of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 17, 2017, to the extent it denied defendants' motion to dismiss the Labor Law § 740 claim and employment discrimination claim under the New York State Human Rights Law, unanimously affirmed, with costs.

The court properly applied the relation back doctrine (CPLR 203[f]) to plaintiff's whistleblower claim pursuant to Labor Law § 740, which requires such actions to be commenced within one year of the alleged retaliatory action (Labor Law § 740[4][a]). Although that claim was not asserted until the Second Amended Complaint, filed on October 19, 2015, more than one year after her termination on February 4, 2014, the original complaint, filed on January 31, 2015, alleged that on February 3, 2014, plaintiff reported to the defendants' Business Practices Office

defendants' improper practices regarding its procurement of chemicals to manufacture its highest grossing drug, and that those practices did not comply with FDA regulations. It further alleged that she was terminated the next day in retaliation for that conduct. This sufficed to give defendants notice of the transactions or occurrences to be proved in asserting the Section 740 claim in the later Second Amended Complaint (*see Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546 [1st Dept 2013]). Nor is there any basis or sound policy reason to deem the relation back doctrine inapplicable to such whistleblower claims. The right to sue an employer for an allegedly retaliatory discharge predates enactment of that statute and thus is not the kind of "statute of repose" to which the relation back doctrine does not apply (*Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 521 [2009]), nor is the time limit "so incorporated with the remedy given as to make it an integral part of it and the condition precedent to the maintenance of the action at all" (*Wong v Yee*, 262 AD2d 254 [1st Dept 1999]).

Next, liberally construing the complaint, presuming its factual allegations to be true, and giving the allegations every favorable inference, as required on a CPLR 3211 motion to dismiss, plaintiff adequately pleaded a Labor Law § 740 violation against defendants in alleging that its manufacturer and

procurement of chemical ingredients for defendants' highest grossing product was not compliant with FDA regulatory requirements governing the drug's safety and efficacy, and she need not plead an actual violation of laws or regulations (*see Webb-Weber v. Community Action for Human Servs., Inc.*, 23 NY3d 448 [2014]).

The motion court correctly concluded that Labor Law § 740(7), the "election-of-remedies" provision, does not waive plaintiff's claim of discrimination under the New York State Human Rights Law (State HRL) (Executive Law § 296) because, in alleging discrimination on account of plaintiff's gender, national origin, and religion, plaintiff does not seek the same rights and remedies as she does in connection with her whistleblowing claim, notwithstanding that both claims allege that she was wrongfully terminated (*Knighton v Municipal Credit Union*, 71 AD3d 604, 605 [1st Dept 2010]; *see also Collette v St. Luke's Roosevelt*, 132 F Supp 2d 256, 267, 274 [SDNY 2001]; *Lee v Woori Bank*, 131 AD3d 273, 277 [1st Dept 2015]; *Sciddurlo v Financial Indus. Regulatory Auth.*, 144 AD3d 1126 [2d Dept 2016]).

We further conclude that plaintiff alleged sufficient facts to show that she was subjected to adverse employment actions under circumstances giving rise to an inference of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]),

including that she was passed over for a promotion for no legitimate reason, that she was "demoted in title," and eventually terminated on February 4, 2014, and that she and other women, including other Muslim women, had been subjected to abusive and derogatory remarks and questions about her accent and her religious practices in a male-dominated environment.

Similarly, these and additional allegations regarding the other women, including Muslim women, who were denied promotions or subjected to other adverse treatment, and her resulting severe anxiety disorder requiring medication sufficed to allege a hostile work environment (*Forrest* at 311).

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

ENTERED: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4953-
4954 Index 653412/14

Patrick Moses, et al.,
Plaintiffs-Appellants,

-against-

Scott Dunlop, et al.,
Defendants-Respondents.

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Johnson Gallagher LLC, New York (Peter J. Gallagher of counsel), for appellants.

Abrams Garfinkel Margolis Bergson, LLP, New York (Barry G. Margolis of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 16, 2015, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to deny the motion as to the breach of contract claims to the extent they allege breaches of continuing obligations that accrued during the six years before the commencement of the action, with appropriate credit for any applicable tolling periods pursuant to the parties' agreements, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered December 16, 2016, which denied plaintiffs' motion to renew certain parts of defendants' motion, unanimously dismissed, without costs, as abandoned.

Plaintiffs Patrick Moses and Kevin Kaufman, two of the three

creators and executive producers of the first season of the reality television series *The Real Housewives of Orange County* (the Series), and Ventana Ventures LLC, the production company through which they provided these services, seek to recover against defendant Scott Dunlop, the third executive producer of the Series, related entities, and defendant Bravo Media LLC, for monies allegedly owed them in connection with the Series.

By Co-Production Agreement (the CPA) dated January 23, 2005, Dunlop of defendant Dunlop Group (DG) and Kaufman and Moses, of nonparty Kaufman Films (KF), agreed to exclusively produce the Series and share equally all fees, profits, and revenues generated by the Series and any sequels or spin-offs. In the spring of 2006, after meeting with Bravo, Dunlop allegedly informed Moses and Kaufman that Bravo had terminated Ventana's services as producer of the Series but retained Dunlop as a "local fixer," a limited role for which Dunlop would receive a few thousand dollars at most. Two senior executives at Bravo later confirmed to Moses that Bravo had decided to replace Ventana with another production company. Later that summer, Dunlop entered into a letter agreement (the Dunlop Agreement), with defendant Realand Productions LLC, an affiliate of Bravo, to serve as executive producer for the Series, for which he would receive, inter alia, a per-episode fee, an executive producer

credit, and a share of "Modified Adjusted Gross Receipts" from the exploitation of the Series.

In January 2007, Dunlop presented Moses and Kaufman each with a settlement and release agreement. Under the terms of the release, which only Kaufman signed, Kaufman and Moses were to relinquish "any and all rights [they] may have had in the Series" and "in Ventana," in exchange for, inter alia, $30,000, and were to "release ... Dunlop ... from any and all claims." In the release, the parties acknowledged that they had been given the opportunity to consult with counsel and entered into the agreement "after independent investigation and in the absence of fraud, duress, or undue influence." By Termination Agreement and Release (the Termination Agreement) dated June 23, 2009, between Realand, Dunlop, and Ventana Ventures Inc. (Ventana Inc.), a corporation organized during production of the Series, the parties agreed, inter alia, to terminate the Ventana Agreement, by which Bravo Company had retained Ventana to produce the Series if Bravo ordered its production, and the Dunlop Agreement.

The fraud claims, to the extent they arise from conduct that occurred in 2006, are time-barred (*see* CPLR 213[8]). Plaintiffs failed to establish that the fraud could not have been discovered earlier (*see CSAM Capital, Inc. v Lauder*, 67 AD3d 149, 156-157 [1st Dept 2009]). At the very latest, they were on inquiry

notice by January 2007, when Dunlop presented Moses and Kaufman with the settlement and release agreement – more than two years before the commencement of this action (*see* CPLR 213[8]; *Bezoza v Bezoza*, 83 AD3d 578, 580 [1st Dept 2011]). Unlike the situation in *CSAM Capital*, plaintiffs allowed years to go by without confronting Dunlop or Bravo about any concerns they may have had in the face of Dunlop's highly publicized continued involvement in the Series, his participation in and receipt of credits for spin-offs in other locations.

To the extent the fraud claims arise from Dunlop's entering into the Termination Agreement, in 2009, the claims fail to state a cause of action since plaintiffs could not have relied upon an agreement that they were unaware of (*see generally Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

To the extent the breach of fiduciary duty claim arises from Dunlop's entering into the Termination Agreement, it is subject to a three-year, rather than a six-year, statute of limitations, because the fraud allegations are incidental to the claim, and only money damages are sought (*see Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). By the time Dunlop entered into the Termination Agreement, plaintiffs had not had a relationship with the Series for years, and any alleged fraud had already occurred and was not essential to the fiduciary duty claim.

The complaint states causes of action for breaches of the CPA and the Ventana Agreement, to the extent indicated above, because the contracts impose continuing obligations, each of which can be breached, triggering a new cause of action with its own limitations period (*see Makarchuk v Makarchuk*, 59 AD3d 1094, 1095 [4th Dept 2009]; *see also Jobim v Songs of Universal, Inc.*, 732 F Supp 2d 407, 422 [SD NY 2010]; *Kermanshah v Kermanshah*, 580 F Supp 2d 247, 261 [SD NY 2008]).

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

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

ENTERED: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4955 The People of the State of New York Ind. 5550/14
Respondent,

-against-

Raul Medero,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered May 13, 2015, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him to a term of 2½ years, unanimously affirmed.

Although defendant did not make a valid waiver of his right to appeal, we perceive no basis for reducing the sentence, or remanding for resentencing. Defendant did not preserve his argument that his presentence report was deficient because he was not produced for an interview, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. As in *People v Rosa* (150 AD3d 442, 443 [1st Dept 2017], *lv denied* 29 NY3d 1094 [2017]), "[d]efendant received the precise sentence he bargained for, and had he wished to be interviewed by the Probation Department, he could have called the

court's attention to the fact that he had not been produced for such an interview. Moreover, there is no indication that defendant was inclined to ask the court to exercise its discretion to impose a more lenient sentence than the one the parties agreed upon" (internal quotation marks and citations omitted). In any event, there is no statutory requirement that a defendant be interviewed (*see* CPL 390.30; *People v Perea*, 27 AD3d 960, 961 [3d Dept 2006]), and defendant's presentence report contained all the necessary information.

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

ENTERED: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4956 Bobbie Thompson, Index 101661/15
Plaintiff-Appellant,

-against-

District Council 37, et al.,
Defendants-Respondents.

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Bobbie Thompson, appellant pro se.

Robin Roach, New York (Ximena Castro of counsel), for District Council 37, AFSCME and AFL-CIO, respondents.

Zachary W. Carter, Corporation Counsel, New York (Kathy C. Park of counsel), for Board of Education, respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about June 3, 2016, which granted defendants' CPLR 3211 motion to dismiss the, in effect, hybrid complaint and CPLR Article 78 petition, unanimously affirmed, without costs.

As the latest adverse action alleged by plaintiff occurred on September 17, 2012, when defendant union informed her that it would not arbitrate her termination, and plaintiff did not commence this action until September 10, 2015, all of her claims against defendant New York City Department of Education (DOE), sued herein as "Board of Education," are time-barred, either under the four-month limitations period governing claims under CPLR Article 78 (*see* CPLR 217[1]; *Matter of Lipton v New York City Bd. of Educ.*, 284 AD2d 140, 140-41 [1st Dept 2001]) or the

one-year limitations period applicable to other claims against DOE (*see* Education Law § 3813[2-b]; *Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367, 369 [2007]).

Plaintiff's claims against the union for breach of the duty of fair representation are likewise untimely under the applicable four-month limitations period (*see* CPLR 217[2][a]; *Cruz v United Fed. of Teachers*, 128 AD3d 526, 526-27 [1st Dept 2015]). All of her discrimination claims against the union relating to events alleged to have occurred prior to September 10, 2012 are untimely under the governing three-year limitations periods (*see* CPLR 214[2]; Admin Code of City of NY § 8-502[d]; *Santiago-Mendez v City of New York*, 136 AD3d 428, 428 [1st Dept 2016]). Plaintiff's facially timely claim that the union discriminated against her by refusing to arbitrate her termination fails to state a cause of action, as plaintiff has failed to allege any facts which could support an inference of bias (*see Llanos v City of New York*, 129 AD3d 620, 620 [1st Dept 2015]; *Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]).

Plaintiff's remaining contentions, including her constitutional claims and her claims under Civil Service Law § 75, are unpreserved and without merit.

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

ENTERED: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4957- Ind. 3350N/13
4958 The People of the State of New York, 67N/14
Respondent,

-against-

Earl Campbell,
Defendant-Appellant.

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Marianne Karas, Thornwood, for appellant.

Earl Campbell, appellant pro se.

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

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Judgments, Supreme Court, New York County (Bonnie Wittner, J.), rendered May 21, 2015, convicting defendant, upon his pleas of guilty, of criminal sale of a firearm in the first and second degrees and conspiracy in the fourth degree, and sentencing him to an aggregate term of 16 years, unanimously affirmed.

Defendant's challenges to the validity of 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 record as a whole establishes that the plea was knowingly, intelligently and voluntarily made. Defendant's challenges to the form and content of the plea colloquy are without merit (*see e.g. People v Rivera*, 112 AD3d 626 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]).

We perceive no basis for reducing the sentence.

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

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

ENTERED: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4959 The People of the State of New York, Respondent, Ind. 4566N/12

-against-

Lamont Johnson, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Richard M. Weinberg, J.), rendered May 9, 2013, 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: NOVEMBER 14, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Moulton, JJ.

4960-
4961-
4962N

150585/11

Tishman Construction Corp., et al.,
Plaintiffs-Respondents,

-against-

United Hispanic Construction
Workers, Inc.,
Defendant-Appellant.

- - - - -

David Rodriguez,
Nonparty Appellant.

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Trivella & Forte, LLP, White Plains (Christopher A. Smith of counsel), for appellant.

Milman Labuda Law Group PLLC, Lake Success (Joseph M. Labuda of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered January 27, 2016, which, after a hearing, found defendant United Hispanic Construction Workers, Inc. (UHCW) and nonparty David Rodriguez guilty of civil contempt for, inter alia, failure to abide by the stipulation, and order of the same court and Justice, entered May 22, 2012, and imposed a $1,000 fine on UHCW and a $500 fine on Rodriguez, in addition to awarding attorney fees, costs and expenses, and disbursements, unanimously affirmed, without costs.

The court properly found that appellants disobeyed the stipulation and order, which was negotiated by the parties and

set forth the conditions for protests held by UHCW. These conditions expressed an unequivocal mandate of which appellants were well aware, and their violation of the order prejudiced plaintiffs' right to conduct business without disturbance, thus justifying the finding of contempt (*see El-Dehdan v El-Dehdan*, 26 NY3d 19 [2015]; *McCain v Dinkins*, 84 NY2d 216 [1994]).

The court properly exercised jurisdiction over Rodriguez, who is president of UHCW and who signed the 2012 stipulation and order that was subsequently violated. Although Rodriguez was not personally served in the action, it is undisputed that he was involved in the negotiation of the stipulation, and was knowledgeable of the conditions set forth therein. Furthermore, the evidence presented at the contempt hearing demonstrated that Rodriguez himself violated the court's mandates. Under these circumstances, Rodriguez, even as a nonparty, can be punished for UHCW's violations of the stipulation and order (*see 1319 Third*

Ave. Realty Corp. v Chateaubriant Rest. Dev. Co., LLC, 57 AD3d 340 [1st Dept 2008]).

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

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

ENTERED: NOVEMBER 14, 2017

CLERK

Tom, J.P., Mazzarelli, Andrias, Oing, Singh, JJ.

4539 Linda G., Index 300828/10
Plaintiff-Respondent,

-against-

James G.,
Defendant-Appellant.

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Kantor, Davidoff, Mandelker, Twomey, Gallanty & Kersten, P.C., New York (Matthew C. Kesten of counsel), for appellant.

Goldweber Epstein LLP, New York (Nina S. Epstein of counsel), for respondent.

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Judgment, Supreme Court, New York County (Deborah A. Kaplan, J.), entered May 24, 2016, modified, on the law an the facts, to provide for a 60%/40% equitable division of the marital home, and otherwise affirmed, without costs.

Opinion by Singh, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
Richard T. Andrias
Jeffrey K. Oing
Anil C. Singh, JJ.

4539
Index 300828/10

_____x

Linda G.,
Plaintiff-Respondent,

-against-

James G.,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered May 24, 2016, granting, among other things, a 75%/25% division of the value of the marital home.

Kantor, Davidoff, Mandelker, Twomey, Gallanty & Kersten, P.C., New York (Matthew C. Kesten of counsel), for appellant.

Goldweber Epstein LLP, New York (Nina S. Epstein and Aimee L. Davis of counsel), for respondent.

SINGH, J.

The primary issue on this appeal is whether there can be an unequal distribution of the marital home under the "just and proper" standard set forth in Domestic Relations Law § 236(B)(5)(d)(14) where a spouse's criminal conduct and subsequent incarceration impacts the family. We agree that Supreme Court providently exercised its discretion in awarding the wife the greater value of the marital residence. However, we modify the court's ruling to provide for a 60%/40% division rather than a 75%/25% division.

The parties were married in June of 1989. They have two children from the marriage. The first son was born in 1996. A younger son was born in 2001. Shortly after the older son was born, the family purchased and moved into a cooperative apartment on Park Avenue in Manhattan.

The parties were gainfully employed at the time of their marriage. The husband began working for Ernst & Young (E&Y) in 1991 and was made partner in 1996. In October 2007, due to a pending Securities and Exchange Commission insider trading investigation, the husband resigned at the request of E&Y. At that time, he had been earning $1.25 million a year. The wife started working for JPMorgan Chase in 1982. In 2000, the wife voluntarily left JP Morgan to raise their two sons. When she

resigned to become a stay-at-home mother, she was earning a salary of approximately $200,000 with annual bonuses nearing $500,000.

In 2010, the husband was indicted on charges of conspiracy and insider trading. At trial, the husband maintained his innocence and claimed that a woman with whom he was having an affair stole his BlackBerry and used the information to engage in insider trading. He was found guilty and served a one year and one day sentence in federal prison from May 2010 through January 2011. The SEC investigation and criminal trial depleted the joint assets of the parties. The divorce proceedings started on January 26, 2010.

The parties were unemployed from October 2007 through February of 2010. In the matrimonial action, the wife testified that she attempted unsuccessfully to secure employment starting in 2008. She finally returned to work at JP Morgan in February of 2010, shortly before the husband was imprisoned. In 2013, her base salary was $300,000 and her bonus was more than $200,000. The husband began working at Sherwood Partners after his release from incarceration and testified that, as of 2013, his base salary was $226,000.

At the time of the trial, the apartment was valued at $4.75 million. The husband admitted that he stopped contributing to

the mortgage shortly before he went to prison in May 2010.

The parties offered testimony regarding the children's living arrangements and significant emotional issues that occurred after the husband's criminal actions and incarceration. In January 2014, the younger son threatened to kill himself and the other students in his middle school class. He was hospitalized and transferred to a mental health facility, where he remained for approximately two weeks. At the time of trial, the younger son had been expelled from two schools, and was taking classes at home. He was not allowed in a school facility given his behavior and mental state.

The older son also suffered from severe emotional issues. In October of 2012, he attempted suicide at his boarding school and was asked to withdraw. He was later officially expelled following a separate incident.

The mother testified that in 2013, after the parties were separated, the younger son called her hysterically crying because the father had apparently abused and bitten him. She testified that the child had a bite mark on his thigh that was three to four inches in diameter, and that he was crying and shaking for two hours after the incident occurred.

Following that event, the younger son lived exclusively with the wife. The husband was arrested for assault and child

endangerment, and an order of protection was entered against him pertaining to the younger son. The wife testified that the older son began living with the father because the children had a strained relationship with each other and it was difficult for them to live in the same home.

Supreme Court distributed the marital home in the amount of 75% to the wife and 25% to the husband, rejecting the husband's contention that the value should be allocated on a 50%/50% basis. The court cited to general authority supporting its broad discretion and found that the 75%/25% apportionment was "justified upon the record" given the husband's "behavior and activities." The court found that the husband had failed to prove that such a split was "unjust, inappropriate or inequitable."

Supreme Court also determined that the Referee's recommended credits pertaining to the legal fees should be awarded "on the basis that they are just and proper within the meaning of Domestic Relations Law § 236(B)(5)(d)(14)." The court found that the wife was entitled to a 50% credit because it is "not necessary to have a finding of marital waste" in order to impose financial responsibility on a party for the "expenses arising from his criminal activit[y]."

Finally, in making its child support calculations, the court

below used the 2013 income figures and a 17% child support percentage for one child. The record and evidence at trial showed that a shared custody arrangement no longer existed at the time of trial. Each parent was "both a custodial parent and a non custodial parent for child support purposes." Accordingly, each party owed child support to the other only for their non-custodial child.

We turn first to the division of the marital home. Our precedents hold that equitable distribution of assets does not necessarily mean equal distribution (*Greenwald v Greenwald*, 164 AD2d 706 [1st Dept 1991] *lv denied*, 78 NY2d 855 [1991]). Rather, under section 236(B)(5)(c) of the Domestic Relations Law, "[m]arital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties" (*see McKnight v McKnight*, 18 AD3d 288, 289 [1st Dept 2005]). As Justice Titone aptly noted in *Rodgers v Rodgers* (98 AD2d 386, 391 [2d Dept 1983], *appeals dismissed*, 62 NY2d 646 [1984]), "fairness, not mathematical precision, is the guidepost. Under equitable distribution, a court possesses flexibility and elasticity to mold an appropriate decree because what is fair and just in one circumstance may not be so in another."

Section 236(B)(5)(d) of the Domestic Relations Law, which

specifies the factors to be considered in making an award of equitable distribution, includes a catch-all provision that empowers a court to look at "any other factor which the court shall expressly find to be just and proper" (DRL §236[B][5][d][14]). However, marital fault may not be considered as "just and proper" except in "a truly exceptional situation, due to outrageous or conscience-shocking conduct on the part of one spouse, that will require the court to consider whether to adjust the equitable distribution of the assets" (*Howard S. v Lillian S.*, 14 NY3d 431, 436 [2010] [adultery, by itself, is not egregious conduct]; *Havell v Islam*, 301 AD2d 339 [1st Dept 2002] [malicious assault of a spouse in the proximity of children amounts to egregious conduct]; *Pierre v Pierre*, 145 AD3d 586 [1st Dept 2016] [stabbing and physically assaulting wife is egregious conduct]).

Supreme Court took into account the husband's "adulterous and criminal behavior" in awarding the wife 75% of the marital home. The husband's adulterous conduct is not sufficiently egregious and shocking to the conscience to justify making an unequal distribution of the marital home. However, we hold that the impact of the husband's criminal conduct on the family may be considered in making an unequal distribution. In *Kohl v Kohl* (6 Misc 3d 1009[A], 2004 NY Slip Op 51759[U], *24 [Sup Ct, NY County

2004], *affd* 24 AD3d 219 [1st Dept 2005]), the wife sought an unequal distribution of the marital estate based on the husband's criminal conviction. The trial court denied the request as the father supported his family by borrowing money from friends and business acquaintances until such time that he was able to resume his career (*id.* at *25). The husband accepted a plea that allowed him to resume his career and business (*id.*). Within a few years after his indictment, he was earning as much income as he had prior to the criminal proceeding (*id.*). Also, the parties' standard of living did not change as a result of the husband's actions (*id.*). On that record, we affirmed the distribution of the value of the parties' residences at 50%/50% (*id.* at *25, 26, 27).

Unlike *Kohl*, the record in this case supports an unequal distribution. The parties were required to spend down their savings from 2007 through 2010 when the husband was forced to resign due to the SEC investigation. He refused to take a plea bargain and insisted on going to trial, blaming a woman with whom he had an extramarital affair for his insider trading. He was convicted of a felony and lost his license to practice law. The husband's post-incarceration earnings at the time of the trial dropped significantly to less than 20% of his prior income. His income never returned to the level he earned prior to the

conviction.

As a result of the husband's criminal actions, the wife, who had left a lucrative career to raise their children, was compelled to return to work after being out of the work force for almost a decade. This meant that the wife could no longer remain at home with the children. During this time, the younger son suffered from psychiatric issues and the older son from significant emotional issues.

In short, the husband's insider trading, and ensuing criminal trial, conviction and incarceration caused the family to undergo financial losses and a substantial decrease in the standard of living. These events also significantly disrupted the family's stability and well-being. Based on our review of the record, we find that a 60%/40% equitable division of the value of the marital estate is just and proper when taking into account the hardship that the husband put his family through as a result of his volitional and irresponsible behavior.

Next, the husband challenges Supreme Court's award to the wife of a credit of 50% of marital funds expended in connection with the SEC investigation and criminal proceedings. In *Kohl*, the court found that the husband should be responsible for 65% of the legal fees for civil forfeiture proceedings and the wife responsible for 35% (2004 NY Slip Op 51759[U], *30). We agreed

that the wife should not bear equally the sums incurred for legal debts while the parties were married. Here, the wife maintains that she should not be liable for legal fees as she was not a party to the SEC action and also believed the husband's assertions of innocence.

We agree that to hold the wife responsible for the accumulation of substantial legal fees for which she shares no culpability would be inequitable. It is not necessary for a court to make a finding of marital waste to impose financial responsibility on a party for expenses arising from his or her criminal activities (*Kohl*, 24 AD3d at 220). Accordingly, the portion of the judgment awarding the wife a 50% credit for the legal fees arising from the husband's criminal activity is affirmed.

The husband's arguments with respect to Supreme Court's calculation of child support are unfounded. The record supports the court's finding that the wife is currently the custodial parent of the younger son and that the husband was the custodial parent of the older son, before his emancipation. While the husband argues that the court erred by failing to apply the parties' 2013 income figures, the underlying order and the face of the judgment appealed from clearly indicate that the 2013 figures were, in fact, used by the Court. The court also

correctly applied the 17% child support percentage for the care of one child as opposed to the care of two, which is in line with its finding that the parties were each the custodial parent of one child only (Family Ct Act § 413[1][b][3][i]). The court properly calculated a net amount of $1,884.17 per month in child support due to the husband.

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

Accordingly, the judgment of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered May 24, 2016, granting, among other things, a 75%/25% division of the value of the marital home should be modified, on the law and the facts, to provide for a 60%/40% equitable division of the marital home, and otherwise affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 14, 2017

CLERK