SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 5, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7056-
7057 Omar Fuentes-Gil,
Plaintiff-Appellant,

-against-

Zear LLC,
Defendant-Respondent.

- - - - -

[And a Third-Party Action]

Index 301746/14
84043/14

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Talisman & DeLorenz, P.C., Brooklyn (Kevin Cowie of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, White Plains (Tiffany Fendley of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 9, 2017, which, insofar as appealed from as limited by the briefs, granted the cross motion by defendant Zear LLC for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about July 18, 2017, which, upon granting reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

Zear established that it was an out-of-possession landlord

who, under its lease with the tenant, third-party defendant, was not responsible for removing snow or ice from the sidewalk of the premises where plaintiff allegedly slipped and fell (*see Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413, 413 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]). Snow or ice is not a significant structural or design defect for which an out-of-possession landlord may be held liable (*id.* at 414).

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: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, JJ.

7058 In re Marc Salz, etc., File 1729C/81
Petitioner-Appellant, 1729D/81

-against-

Bellagio, LLC, et al.,
Respondents-Respondents.

- - - - -

In re Marc Salz, etc.,
Petitioner-Appellant,

-against-

Christies, Inc., et al.,
Respondents-Respondents.

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Law Office of Irina Tarsis, Brooklyn (Irina Tarsis of counsel), for appellant.f

Jules Martin Haas, New York, for Bellagio LLC, MGM Resorts International and Mirage Resorts, Incorporated, respondents.

Hunton Andrew Kurth LLP, New York (Joseph A. Patella of counsel), for Christie's Inc., respondent.

Cahill Cossu Noh & Robinson LLP, New York (Paul Cossu of counsel), for Sotheby's, Inc., respondent.

McDermott Will & Emery LLP, New York (Lisa A. Linsky of counsel), for Carlyn S. McCaffrey, respondent.

George W. Wright & Associates, LLC, New York (George W. Wright of counsel), for Day & Meyer, Murray & Young Corp., respondent.

Mark N. Bloom, New York, for Carol Chamlin, respondent.

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Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about July 21, 2017, which denied the petitions to discover property withheld from the estate of Sam Salz, and

dismissed the proceedings, unanimously affirmed, with costs.

The Surrogate correctly determined that petitioner's claims were barred by the statute of limitations for fraud (*see Gutkin v Siegal*, 85 AD3d 687 [1st Dept 2011]). It is undisputed that the most recent alleged fraud occurred in 1986, when the decedent's widow (his third wife) presented the estate accounting. By his own account, petitioner's suspicions were aroused in 1999, after his mother (the decedent's second wife) died. However, he did not seek discovery or appointment as an administrator until 2016, 17 years after he had been placed on inquiry notice of the possibility of fraud, and he failed to account for the delay.

Moreover, the petitions failed to identify property owned by the decedent at the time of his death that may not have been properly accounted for (*see Matter of Perelman*, 123 AD3d 436 [1st Dept 2014], *lv denied* 25 NY3d 905 [2015]). The allegations in the petitions about various paintings that may at one time have

been owned by the decedent are insufficient to permit a conclusion that the decedent still owned those paintings at the time of his death, particularly since he was an active art dealer.

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

ENTERED: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7059 The People of the State of New York, Respondent, Ind. 5534/07 5582/07 1404/08

-against-

Richard Kelley, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered May 21, 2013, as amended June 7, 2013, convicting defendant, upon his plea of guilty, of course of sexual conduct against a child and endangering the welfare of a child, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

The court properly denied defense counsel's request to be relieved, made after defendant asserted at sentencing that he had pleaded guilty under duress and that his attorneys had not conducted an adequate investigation or prepared a defense. The court's appropriate inquiry demonstrated that there was no good cause for substitution of counsel. Counsel did not take an adverse position on defendant's pro se plea withdrawal motion, and neither defendant's allegations against counsel, nor

counsel's assertion that she was consequently unable to "really advise him one way or another on how he should proceed" on his motion, warranted assignment of a new attorney (*see People v Garcia*, 71 AD3d 555 [1st Dept 2010], *affd* 16 NY3d 93 [2010]).

The court providently exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see generally People v Frederick*, 45 NY2d 520 [1978]). Counsel's sound professional advice about the strength of the People's case and the likelihood of conviction after trial was not coercive. Defendant did not substantiate his claim of attorney unpreparedness, including his assertion that counsel was in a position, by calling a witness, to counter or explain damaging admissions that defendant made in certain letters.

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7060 Frederick Tropeano, et al., Index 161062/13
Plaintiffs-Appellants,

-against-

Jaspreet Sandhu, M.D., et al.,
Defendants-Respondents.

_____

The Law Firm of Ravi Batra, P.C., New York (Ravi Batra of counsel), for appellants.

Dopf, P.C., New York (Martin B. Adams of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered May 11, 2017, which, upon granting defendants' motion for a directed verdict, dismissed the complaint, unanimously affirmed, without costs.

Plaintiff Frederick Tropeano, after suffering prostate cancer and undergoing surgery, sought treatment for resulting urinary leakage difficulties. Defendant Jaspreet Sandhu, M.D., recommended and implanted an artificial urinary sphincter (AUS) device, which did not function properly. Plaintiff underwent a second surgical procedure to have the damaged device replaced.

Plaintiff's expert did not specifically opine as to whether Dr. Sandhu departed from a specific standard of accepted medical practice and thus, the trial court correctly granted defendants' motion for a directed verdict. The conduct at issue here, which

involved the implantation of a technologically challenging device, is not within the knowledge of a lay jury. Nor could the jury discern, without expert testimony, whether this was a known risk or the occurrence of negligence (*Calcagno v Orthopedic Assoc. Of Dutchess County, PC*, 148 AD3d 1279 [3rd Dept 2017]; *see also Dosanjh v Satori Laser Center Corp.*, 127 AD3d 531 [1st Dept 2015]).

The trial court also properly dismissed plaintiffs' claim for lack of informed consent. Plaintiff testified that he was advised of the risks, benefits and alternatives to the surgery, and his expert failed to demonstrate that the information disclosed to plaintiff was insufficient (*see Orphan v Pilnik*, 15 NY3d 907, 908 [2010]; Public Health Law § 2805-d [1], [3]).

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

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

ENTERED: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7061 The People of the State of New York, Ind. 4621/15
Respondent,

-against-

Alexander Lozada,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered March 8, 2017,

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: JULY 5, 2018

CLERK

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

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7063 Normandy Real Estate Partners LLC, Index 650984/15
Plaintiff-Appellant,

-against-

24 East 12th Street Associates LLC,
et al.,
Defendants-Respondents.

_____

Meister Seelig & Fein LLP, New York (Stephen B. Meister and Thomas L. Friedman of counsel), for appellant.

Max Markus Katz, P.C., New York (Max Markus Katz of counsel), for 24 East 12th Street Associates LLC, respondent.

Ellenoff Grossman & Schole LLP, New York (John B. Horgan and Fawn Lee of counsel), for Elie Tahari, LTD, respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 6, 2016, which granted defendants' motion to dismiss the amended complaint, unanimously modified, on the law, to deny the motion as to the breach of contract and tortious interference with contract claims, and otherwise affirmed, without costs.

Defendant 24 East 12th Street Associates LLC (Associates) leased property with an option to purchase if certain conditions occurred. After the owner notified Associates that it would sell the property, Associates entered into a letter agreement with plaintiff whereby the parties agreed that they would negotiate plaintiff's purchase of Associates' lease and the option to

purchase. The letter agreement included the purchase price and some relevant terms, provided for plaintiff to provide a deposit, and contemplated a further purchase and sale agreement. It included a confidentiality provision, and provided for an "Exclusivity Period" of 14 days, during which Associates could "continue discussions" with defendant Elie Tahari, Ltd. (Tahari) regarding the sale of the lease and the purchase option.

Plaintiff alleges that, within one day of entering into the letter agreement, Associates disclosed the letter agreement to Tahari in violation of the confidentiality provision and agreed to accept an offer from Tahari in violation of the exclusivity provision.

The complaint states a cause of action for breach of the letter agreement's exclusivity provision. The letter agreement provided only that Associates could "continue negotiations" with Tahari, and did not provide that it could accept an offer, within the 14-day period, and therefore does not utterly refute the complaint's factual allegations or conclusively establish a defense for Associates as a matter of law (*see Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

The complaint states a cause of action for breach of the confidentiality provision by alleging the existence of the letter agreement, plaintiff's performance thereunder, Associates' breach

of the letter agreement's confidentiality provision by disclosing the letter agreement to Tahari, and resulting damages (*see Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]). Although the "lost profits" damages allegation is boilerplate and does not allege facts showing that the damages are attributable to Associates' conduct (*see Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]), the complaint sufficiently alleges other damages, such as incurring expenses in performing due diligence and negotiating and drafting the letter agreement and an ultimately worthless escrow agreement.

The complaint fails to state a cause of action for breach of the duty to negotiate in good faith, which was expressly included in a non-binding section of the letter agreement. Even considered a claim for breach of the implied duty of good faith and fair dealing, the claim was correctly dismissed, because it is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (*see MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 420 [1st Dept 2011] [internal quotation marks omitted]).

The complaint states a cause of action for tortious interference with contract by alleging that plaintiff entered into a valid contract (the letter agreement) with Associates, that Tahari had knowledge of the letter agreement, that Tahari

intentionally and improperly induced Associates to breach the enforceable provisions of the letter agreement by entering into an agreement with it to purchase the lease and purchase option during the exclusivity period, and that as a result plaintiff suffered damages (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). The allegations show that Tahari's inducement of Associates to breach the enforceable provisions of the letter agreement "exceeded a minimum level of ethical behavior in the marketplace" (*id.* at 427 [internal quotation marks omitted]).

Tahari failed to establish the economic interest defense to tortious interference with contract as a matter of law. The complaint's allegations show that Tahari was effectively plaintiff's competitor, that it did not appear to have a prior contractual or economic relationship with Associates, and that it had merely a generalized economic interest in soliciting Associates to sell the lease and the purchase option for profit (*see id.* at 426; *LNYC Loft, LLC v Loo*, 148 AD3d 552 [1st Dept 2017]; *Wells Fargo Bank, N.A. v ADF Operating Corp.*, 50 AD3d 280 [1st Dept 2008]).

Since plaintiff can be adequately compensated for breach of contract and tortious interference by monetary damages, the cause

of action for an equitable lien was correctly dismissed as not warranted (*see Meehan v Meehan*, 227 AD2d 268, 269-270 [1st Dept 1996]; *see also Wolf v National Council of Young Israel*, 264 AD2d 416, 418 [2d Dept 1999]).

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

ENTERED: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7064-
7065 Index 650100/16

Stanley H. Epstein, et al.,
Plaintiffs,

SEP IRA A/C Peter Christopher Gardner,
Derivatively on Behalf of Nominal Defendant
Sequoia Fund, Inc.,
Plaintiff-Appellant,

-against-

Ruane, Cunniff & Goldfarb Inc., et al.,
Defendants-Respondents,

Sequoia Fund, Inc., a Maryland Corporation,
Nominal Defendant-Respondent.

_____

Fensterstock, P.C., New York (Evan S. Fensterstock of counsel), and Nelson & Fraenkel, LLP, Los Angeles, CA (Gretchen M. Nelson of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Willkie Farr & Gallagher LLP, New York (Tariq Mundiya of counsel), for Ruane, Cunniff & Goldfarb Inc., Robert D. Goldfarb and David Poppe, respondents.

Ropes & Gray LLP, New York (Robert A. Skinner of the Commonwealth of Massachusetts, admitted pro hac vice, of counsel), for Robert L. Swiggett, Roger Lowenstein, Edward Lazarus and Sequoia Fund, Inc., respondents.

_____

Orders, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about March 1, 2017 and on or about March 2, 2017, which, insofar as appealed from as limited by the briefs, granted defendants' and nominal defendant's motions to dismiss the complaint as against them, unanimously affirmed, without

costs.

Plaintiff failed to allege sufficient facts to establish that a pre-suit demand on the board of the nominal defendant (Sequoia) to prosecute the action would have been futile under applicable Maryland law (*see Werbowsky v Collomb*, 362 Md 581, 600, 620, 766 A2d 123, 133, 144 [Md 2001]; *see also Simon v Becherer*, 7 AD3d 66, 72 [1st Dept 2004]; *Hart v General Motors Corp.*, 129 AD2d 179, 182-183 [1st Dept 1987], *lv denied* 70 NY2d 608 [1987]). The allegations of the complaint do not "clearly demonstrate, in a very particular manner," that "a majority of the directors are so personally and directly conflicted or committed to the decision in dispute that they cannot reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule" (*Werbowsky*, 362 Md at 620, 766 A2d at 144).

When this action was commenced, Sequoia's board had five members. Defendants do not seriously dispute that defendants Robert D. Goldfarb and David Poppe (the Inside Directors) were conflicted. However, plaintiff failed to demonstrate that any of the Outside Directors (defendants Robert L. Swiggett, Roger Lowenstein, and Edward Lazarus), who are "presumed to be disinterested" (*Matter of Franklin Mut. Funds Fee Litig.*, 388 F Supp 2d 451, 470 [D NJ 2005]; *see* Md Code Ann, Corps. & Assns.

§ 2-405.3[b]; 15 USC § 80a-2[a][19][A]), was also conflicted.

The complaint alleges no specific facts about Lazarus to rebut the presumption. It alleges that Lowenstein and Swiggett were conflicted due to their longstanding history as Sequoia board members and relationships with Goldfarb, Poppe, and defendant Ruane, Cunniff & Goldfarb Inc. (the Adviser). However, "[e]vidence of personal and/or business relationships" is not sufficient to excuse a demand (*Sekuk v Global Enters. Profit Sharing Plan v Kevenides*, 2004 WL 1982508, *5, 2004 Md Cir Ct LEXIS 20, *13, [Md Cir Ct, May 25, 2004]; *accord Oliveira v Sugarman*, 226 Md App 524, 544, 130 A3d 1085, 1097 [Md Ct Spec App 2016], *affd* 451 Md 208, 152 A3d 728 [Md 2017]; *Smith v Stevens*, 957 F Supp 2d 466, 473 [SD NY 2013]). Nor is it sufficient that Swiggett and Lowenstein were compensated for their services as board members (*see Werbowsky*, 362 Md at 618, 622, 766 A2d at 143-144, 145-146; *Scalisi v Fund Asset Mgt., L.P.*, 380 F3d 133, 140-141 [2d Cir 2004]; *Smith*, 957 F Supp 2d at 472; *Ryan v Morgan Asset Mgt., Inc.*, 694 F Supp 2d 879, 887 [WD Tenn 2010]).

The fact that Lowenstein and Swiggett "approved or participated in some way in the challenged transaction or decision," and thus may be subject to liability therefor, is also insufficient to demonstrate demand futility (*see Werbowsky*, 362 Md at 618, 766 A2d at 143; *Gomes v American Century Cos., Inc.*,

710 F3d 811, 817-818 [8th Cir 2013]; *Weinberg v Gold*, 838 F Supp 2d 355, 360 [D Md 2012]; *Seidl v American Century Cos., Inc.*, 713 F Supp 2d 249, 260-261 [SD NY 2010], *affd* 427 Fed Appx 35 [2d Cir 2011], *cert denied* 565 US 1092 [2011]; *Franklin Mut. Funds Fee Litig.*, 388 F Supp 2d at 470).

Poppe's purported "admission" in a New York Times article that he and Goldfarb made all investment decisions does not prove that the Outside Directors were under their domination or control, since they may have acquiesced in these decisions for legitimate business reasons. Moreover, Poppe also admitted that, although he and Goldfarb made the final decisions, they nonetheless "listened to their [the Outside Directors'] input." This is consistent with Poppe's and Goldfarb's roles as portfolio managers and representatives of the Adviser, and typical of the role of an investment adviser to a mutual fund (*see Jones v Harris Assoc. L.P.*, 559 US 335, 338 [2010]).

It is immaterial to the issue of demand futility that two

former directors resigned in connection with the decisions at issue here.

In view of the foregoing, we do not reach the merits of plaintiff's underlying claims.

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

ENTERED: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7066 The People of the State of New York, Respondent, Ind. 3173/14

-against-

Michael Ross, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Daniel R. Lambright of counsel), for appellant.

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

_____

Amended judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 10, 2015, convicting defendant, after a nonjury trial, of assault in the second degree, criminal possession of a forged instrument in the second degree (two counts), forcible touching, obstructing governmental administration in the second degree, resisting arrest and sexual abuse in the third degree, and sentencing him, as a second felony offender, to an aggregate term of seven years, unanimously modified, on the facts and as a matter of discretion in the interest of justice, to the extent of vacating the forged instrument convictions and dismissing those counts, and otherwise affirmed.

Defendant's argument that the assault count was not supported by legally sufficient evidence of physical injury is

unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We similarly find that the verdict was not against the weight of the evidence in this regard (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. There was ample evidence to support the conclusion that, at the very least, the injuries to an officer went beyond mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that they caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). During a struggle with defendant, an officer sustained lacerations, abrasions, and contusions on his elbow, hands and knees, and he reported significant pain that persisted for more than a week, and made it difficult to use his thumb.

However, we find that the evidence failed to establish the knowledge element of criminal possession of a forged instrument. While the two MetroCards, bent in a manner known to permit unpaid rides, qualified as forged instruments (*see People v McFarlane*, 63 AD3d 634 [1st Dept 2009], *lv denied* 13 NY3d 837 [2009]), the totality of circumstances did not establish, beyond a reasonable

doubt, that defendant knew the cards were bent in that manner. The evidence was consistent with innocent explanations, such as that defendant picked up discarded MetroCards in the hope that they might have fares remaining on them.

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

ENTERED: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7067 Luther S. Pate, IV, Index 654058/15
Plaintiff-Appellant,

-against-

BNY Mellon-Alcentra Mezzanine III, LP, et al.,
Defendants-Respondents.

_____

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

Reed Smith LLP, New York (Casey D. Laffey of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 2, 2017, which granted defendants' motion to dismiss the amended complaint, unanimously affirmed, without costs.

Because the parties' release agreement contains a merger clause, the release agreement supersedes the preceding term sheet, and the breach of contract claim was correctly dismissed. Contrary to plaintiff's assertions, both agreements concern the same subject matter, that is, the default under the loan and the parties' negotiations in an attempt to avoid the impending foreclosure of the assets securing the loan (*see Oorah, Inc. v Covista Communications, Inc.*, 149 AD3d 552 [1st Dept 2017]; *Xi Mei Jia v Intelli-Tec Sec. Servs., Inc.*, 114 AD3d 607 [1st Dept

2014]; *Kindler v Newsweek, Inc.*, 277 AD2d 159, 160 [1st Dept 2000]). *LaRosa v Arbusman* (74 AD3d 601, 603 [1st Dept 2010]), on which plaintiff relies, is factually distinguishable.

The fraudulent inducement claim was correctly dismissed because the merger clause in the release is not a general merger clause but by its express terms supersedes "any prior term sheet or correspondence," which is the basis for plaintiff's claims (*compare White v Davidson*, 150 AD3d 610, 612 [1st Dept 2017]; *Remediation Capital Funding LLC v Noto*, 147 AD3d 469, 471 [1st Dept 2017]; *Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 169 [1st Dept 2015]). Moreover, the release contains a "No Other Representations" clause (*see WT Holdings Inc. v Argonaut Group, Inc.*, 127 AD3d 544 [1st Dept 2015]).

For the foregoing reasons, the complaint fails to allege, in support of the fraudulent inducement claim, that plaintiff justifiably relied on defendants' representations that he was entitled to a 10% participation interest in a certain nonparty entity (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043 [2015]).

In addition, the fraudulent inducement claim is duplicative of the breach of contract claim, since it is predicated on an alleged expression of a future expectation or intent to perform, rather than on a misrepresentation of present fact (*see*

Laduzinski, 132 AD3d at 168; *Mañas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008]).

The breach of the implied warranty of authority claim was correctly dismissed because the underlying allegations are conclusory and fail to establish the existence of an agreement concerning the 10% participation interest that would have been enforceable against the defendant entities had it been authorized (*Gracie Sq. Realty Corp. v Choice Realty Corp.*, 305 NY 271, 282 [1953]; *Broughton v Dona*, 101 AD2d 897 [3d Dept 1984], *appeal dismissed* 63 NY2d 769 [1984]).

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

ENTERED: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7068 The People of the State of New York, Respondent, Ind. 4586/14

-against-

Desmond Mazone, Defendant-Appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered May 12, 2016, unanimously affirmed.

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

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

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

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

ENTERED: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7069 Seth Leist, et al., Index 653768/16
Plaintiffs-Appellants,

-against-

JMC Pharmacy Inc., et al.,
Defendants-Respondents.

Gray Tsirelman, P.C., Brooklyn (Stefan Belinfanti of counsel), for appellants.

Allegaert Berger & Vogel LLP, New York (Lauren J. Pincus of counsel), for respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 26, 2017, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

There is no written contract, and the documents submitted by plaintiffs in an effort to show a purported meeting of the minds "flatly contradict[]" their allegations that the parties had come to an agreement on the contract's material terms (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]*; see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]). The transcribed conversation submitted by plaintiffs to the court demonstrates that the parties were continuing to negotiate the services plaintiffs were to provide and the form that the written agreement between them would take. Given this lack of agreement, there was only an unenforceable agreement to agree between the

parties, which is not subject to a breach of contract claim (*id.*).

The statute of frauds bars plaintiffs' claim of breach of the oral commission agreement. The type of agreement alleged here is the very type of agreement that has been held unenforceable under the statute (General Obligations Law § 5-701[a][10]; *Fitz-Gerald v Donaldson, Lufkin & Jenrette, Inc.*, 294 AD2d 176 [1st Dept 2002]). The agreement was also void because it was not in writing and was not capable of being performed within one year, as the performance of the contract was dependent upon the will of third parties (General Obligations Law § 5-701[a][1]; *Apostolos v R.D.T. Brokerage Corp.*, 159 AD2d 62, 64-65 [1st Dept 1990]).

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

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

ENTERED: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7071N OneWest Bank F.S.B., Index 112383/09
Plaintiff-Appellant,

-against-

Helen Woodford,
Defendant-Respondent,

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

_____

RAS Boriskin, LLC, Westbury (Joseph F. Battista of counsel), for appellant.

Law Office of Laurence D. Gerowitz, New York (Laurence D. Gerowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 15, 2017, which denied plaintiff's motion to vacate an order, same court and Justice, entered December 22, 2015, denying its motion for a default judgment, and dismissed the complaint pursuant to CPLR 3215(c), unanimously affirmed, without costs.

Supreme Court properly denied plaintiff's motion for entry of default judgment and referral in its action seeking to foreclose on a residential mortgage and dismissed the action pursuant to CPLR 3215(c). Supreme Court's February 10, 2015 mortgage foreclosure part conference order required plaintiff to file a motion on notice for appointment of a referee within 90

days, and warned that the failure to make a timely motion could subject it to dismissal. Plaintiff then waited seven months before seeking a default judgment and an order of reference.

Furthermore, as noted by Supreme Court, this residential foreclosure action remained pending for more than six years, and the record reveals that during this time, plaintiff did little to evidence an intention to prosecute. Accordingly, dismissal was appropriate under CPLR 3215(c).

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

ENTERED: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7072-
7073N Lisa J. Weksler, etc.,
Plaintiff-Respondent,

-against-

Joseph Weksler, etc., et al.,
Defendants-Appellants,

Mitchel D. Hollander, et al.,
Defendants.

- - - - -

In re Lisa J. Weksler, etc.,
Petitioner-Respondent,

-against-

Bruce Supply Corp., et al.,
Respondents-Appellants.

Index 603288/07
652843/11

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Putney, Twombly, Hall & Hiron LLP, New York (Thomas A. Martin of counsel), for appellants.

Kleinber, Kaplan, Wolff & Cohen P.C., New York (David M. Levy of counsel), for respondent.

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Orders, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 25, 2018, which denied defendants/respondents' motion for the entry of a judgment in accordance with a so-ordered stipulation of settlement, and granted plaintiff/petitioner's cross motion to vacate the stipulation of settlement and an order, same court and Justice, entered on or about February 1, 2017, which marked the case settled, unanimously affirmed, with costs.

On November 10, 2016, the parties put the "broad outline" of the terms of their settlement agreement on the record. The terms included the payment of a sum certain by defendants in exchange for plaintiff's interest in defendant Bruce Supply Corp. and five other defendant entities, and would be structured with a lump sum down payment and 15 annual installment payments. When the motion court asked whether the parties intended to be bound by the settlement, counsel for both sides stated that the settlement was subject to the execution of a formal settlement agreement and corporate documents, and defendants' counsel stated that it would be "an extensive agreement because of the transfer of shares." In their ensuing attempts to consummate the settlement, the parties were not able to reach an agreement on certain terms, including when the installment payments would be made, when plaintiff's corporate shares would be transferred, whether plaintiff would receive security during the 15-year payment period, and the default provisions that should be included.

Given the number of open terms not contemplated by the stipulation of settlement but customarily included in corporate buyout agreements and the parties' understanding that the on-the-record stipulation was subject to further documents, the stipulation of settlement is an unenforceable agreement to agree

(*see IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209 [2009]; *Argent Acquisitions, LLC v First Church of Religious Science*, 118 AD3d 441, 444-445 [1st Dept 2014]; *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]).

We have considered defendants-respondents' remaining arguments and find them unavailing.

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

ENTERED: JULY 5, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7074N Steven R. Leventhal, etc., Index 100530/11
Plaintiff-Appellant,

-against-

Bayside Cemetery, et al.,
Defendants-Respondents,

Community Association for Jewish
At-Risk Cemeteries, Inc.,
Defendant.

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Michael M. Buchman, New York (Michael M. Buchman of counsel), for appellant.

Axinn, Veltrop & Harkrider LLP, New York (Russell M. Steinthal of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered May 15, 2017, which denied plaintiff's motion to vacate a status conference order to the extent it denied his request for the disclosure of certain documents, unanimously affirmed, without costs.

Plaintiff seeks documents that defendants Bayside Cemetery and Congregation Shaare Zedek claim are subject to the attorney-client privilege on the ground that defendants have been committing a crime or fraud by commingling monies and diverting Bayside Cemetery's perpetual care trust monies for Shaare Zedek's benefit since the 1960s, and deceptively solicited his purchase price of a perpetual care trust fund in 1985 for three graves

with the intent not to fulfill their perpetual care obligations.

On the prior appeal, we found that plaintiff failed to establish a claim of fraud because he alleged only that defendants entered into the perpetual care agreements with no intent to perform (*Lucker v Bayside Cemetery*, 114 AD3d 162, 175 [1st Dept 2013], *lv denied* 24 NY3d 901 [2014]). Therefore, plaintiff's argument that the crime-fraud exception applies to pierce the attorney-client privilege is barred by the doctrine of law of the case (*see Matter of McGrath v Gold*, 36 NY2d 406, 413 [1975]; *Carmona v Mathisson*, 92 AD3d 492, 492-493 [1st Dept 2012]; *Politi v Irvmar Realty Corp.*, 13 AD2d 469, 469 [1st Dept 1961]).

In any event, plaintiff failed to show a factual basis for a finding of probable cause to believe that defendants committed a fraud or crime either when the perpetual care trust fund was created in 1985 or thereafter (*see United States v Zolin*, 491 US 554, 572 [1989]; *Matter of New York City Asbestos Litig.*, 109 AD3d 7, 10 [1st Dept 2013], *lv dismissed* 22 NY3d 1016 [2013]; *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223 [1st Dept 2003]).

Plaintiff seeks production of the subject documents on the additional ground that defendants waived the attorney-client privilege by requesting legal advice from the Attorney General.

In the letter making this request, defendants sought advice about financing Bayside Cemetery. As we determined on the prior appeal that plaintiff's only viable claim is to enforce the charitable trust (114 AD3d at 175), the financial records and perpetual care contracts submitted with the request for advice about financing are not material and plaintiff is not entitled to their production (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 107 AD3d 451, 452 [1st Dept 2013]; *Surgical Design Corp. v Correa*, 21 AD3d 409, 410 [2d Dept 2005]).

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

ENTERED: JULY 5, 2018

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Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

7075 In re Junior Burgos, Ind. 3815N/17
[M-2032] Petitioner,

-against-

Hon. Neil Ross, et al.,
Respondents.

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Junior Burgos, petitioner pro se.

Barbara D. Underwood, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Neil Ross, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Justin Ashenfelter of counsel), for Bridget Brennan, respondent.

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: JULY 5, 2018

CLERK