SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 19, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6904 The People of the State of New York, Ind. 3025/13
Respondent,

-against-

Samuel Bell,
Defendant-Appellant.

____

Christina Swarns, Office of the Appellate Defender, New York (Emma Luttrell Shreefter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered October 1, 2015, as amended October 27, 2015, convicting defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree, burglary in the second degree as a sexually motivated felony, burglary in the second degree, robbery in the third degree, and grand larceny in the fourth degree (two counts), and sentencing him to an aggregate term of five years, unanimously affirmed.

The record does not establish that defendant made a valid waiver of his right to appeal. The transcript does not

sufficiently demonstrate that defendant orally confirmed his understanding of the waiver (*see People v Bradshaw*, 18 NY3d 257, 267 [2011]).

However, we find that the court providently exercised its discretion in denying defendant’s request for youthful offender treatment, in light of the seriousness of the offenses, his pattern of aggressive behavior, and his appropriate termination from a treatment program that he was required to complete as a condition of his plea agreement (*see e.g. People v Baptiste*, 116 AD3d 588 [1st Dept 2014], *lv denied* 24 NY3d 1081 [2014]).

The court properly found that there were no issues of fact requiring a hearing on whether defendant was properly terminated from the program. The legitimacy of the termination was abundantly established by the program’s reliable reports setting forth defendant’s increasingly serious misbehavior (*see People v Redwood*, 41 AD3d 275 [1st Dept 2007], *lv denied* 9 NY3d 880 [2007]), and the court’s determination satisfied the requirements

of *People v Fiammegta* (14 NY3d 90, 98 [2010]).

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

ENTERED: JUNE 19, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6905 Wilhelm Derix, Index 158601/14
Plaintiff-Respondent,

-against-

The Port Authority of New York
& New Jersey, et al.,
Defendants,

AlliedBarton Security Services LLC,
Defendant-Appellant.

____

Wood Smith Henning & Berman LLP, New York (Kevin T. Fitzpatrick of counsel), for appellant.

Berkowitz & Weitz, P.C., New York (Andrew D. Weitz of counsel), for respondent.

____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered September 11, 2017, which granted plaintiff's motion for summary judgment as to liability on his negligence claim as against defendant AlliedBarton Security Services LLC, unanimously affirmed, without costs.

Plaintiff established prima facie that defendant created or had notice of the dangerous condition on which he tripped and fell through his own testimony, the testimony of an employee eyewitness and a nonparty eyewitness, and defendant's own internal reports and incident reviews showing that plaintiff tripped and fell on a yellow plastic chain lying on the ground that defendant controlled but had left unattended (*see Uhlich v*

Canada Dry Bottling Co. of N.Y., 305 AD2d 107 [1st Dept 2003]).

In opposition, defendant failed to raise a triable issue of fact. As the motion court found, defendant’s argument that plaintiff was unable to identify the cause of his fall is unsupported by the record. The motion court also correctly rejected as speculative defendant’s argument that black ice may have contributed to the accident. Moreover, plaintiff was not required to demonstrate his own freedom from comparative negligence to be entitled to summary judgment as to defendant’s liability (*see Rodriguez v City of New York*, ___ NY3d ___, 2018 NY Slip Op 02287 [2018]). For this reason, we also reject defendant’s argument that the chain on which plaintiff tripped was open and obvious, since that issue too is relevant to comparative fault and does not preclude summary resolution of the issue of defendant’s liability (*see Westbrook v WR Activities-*

Cabrera Mkts., 5 AD3d 69, 72-74 [1st Dept 2004]).

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

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

ENTERED: JUNE 19, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6906 In re Bryce Raymond R., etc.,

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

Ann M.,
Respondent-Appellant,

New York Foundling Hospital,
Petitioner-Respondent.

____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Daniel Gartenstein, Long Island City, for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Polixene Petrakopoulos of counsel), attorney for the child.

____

Order of fact-finding and disposition (one paper), Family Court, New York County (Jane Pearl, J.), entered on or about May 24, 2017, which, inter alia, found that respondent mother permanently neglected the subject child, terminated her parental rights, and transferred custody and guardianship of the child to petitioner agency and New York City Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record demonstrates that the agency made diligent efforts to encourage and strengthen the parental relationship by, among

other things, referring the mother for drug treatment programs and mental health services, arranging random drug screens, and monitoring her progress, as well as scheduling visitation with the child (*see Matter of Tion Lavon J. [Saadiasha J.]*, 159 AD3d 579 [1st Dept 2018]; *Matter of Essence T.W. [Destinee R.W.]*, 139 AD3d 403 [1st Dept 2016]). Despite these efforts, the mother failed to plan for the child by complying with the requirements of her service plan. During the relevant period, the mother failed to complete a drug treatment program, or to regularly engage in mental health services and submit to random drug tests. After entering a program, she relapsed to illegal drug use, and failed to visit with the child consistently (see *Matter of Jaydein Celso M. [Diana E.]*, 146 AD3d 448 [1st Dept 2017]).

The mother's contention that she was deprived of her right to counsel during the fact-finding hearing is belied by the record. The mother was at all times, including a brief period when her assigned counsel was late and another attorney from her office appeared for her, represented by counsel. Moreover, there is no showing that the mother was prejudiced by the appearance of the other attorney, and, considering the totality of the circumstances, she was provided with meaningful representation (*see Matter of Brenden O.*, 20 AD3d 722 [3d Dept 2005]).

The record supports the determination that termination is in

the best interests of the child, and a suspended judgment is not warranted under the circumstances. There was no indication the mother was able to care for the child or would be able to do so in the future, and a suspended judgment would only serve to prolong the child's lack of permanence (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). It is clear that the child's interests would best be served by freeing him for adoption by his foster parents, who have raised him since infancy and wish to adopt him (*see Matter of Isiah Steven A. [Anne Elizabeth Pierre L.]*, 100 AD3d 559, 560 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]).

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

ENTERED: JUNE 19, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6907 The People of the State of New York, Ind. 1958/14
Respondent,

-against-

Johnnie Kelley,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered November 5, 2014, convicting defendant, after a jury trial, of robbery in the second degree and grand larceny in the fourth degree, and sentencing her to an aggregate term of 3½ years, unanimously affirmed.

We find defendant’s challenges to the sufficiency and weight of the evidence supporting her robbery conviction to be unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The sequence of events, viewed in its entirety, supports inferences that defendant and two men demanded money from, followed, surrounded, and intimidated the victim, and that defendant thus took the victim’s wallet by the implied threat of

force (*see e.g. People v Spencer*, 255 AD2d 167 [1st Dept 1998], *lv denied* 93 NY2d 879 [1999]), while aided by at least one other person actually present (*see e.g. People v Black*, 121 AD3d 544 [1st Dept 2014], *lv denied* 24 NY3d 1118 [2015]).

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

ENTERED: JUNE 19, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6909 The People of the State of New York, Ind. 5500/14
Respondent,

-against-

Frederick Walker,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer 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 (Thomas Farber, J.), rendered June 28, 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: JUNE 19, 2018

CLERK

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

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6910 87 Mezz Member LLC, et al., Index 654279/16
Plaintiffs-Appellants,

-against-

German American Capital Corporation,
Defendant-Respondent.

____

Press Koral LLP, New York (Matthew J. Press of counsel), for appellants.

Ropes & Gray LLP, New York (Gregg L. Weiner of counsel), for respondent.

____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 24, 2017, which granted defendant's motion to dismiss the complaint based on the documentary evidence and failure to plead a cause of action, unanimously affirmed, with costs.

The court correctly determined that, under the unambiguous language of the Additional Interest Agreement (AIA), an "Event of Default" within the meaning of the AIA occurred when plaintiff 87 Mezz Member LLC (87 Mezz) failed to make a payment under the Mezzanine Loan Agreement (the Loan Agreement) when due thereunder. Because the AIA uses the capitalized term "Event of Default" without defining it, the meaning of the term as used in the AIA is to be found in the Loan Agreement pursuant to section 1.1 of the AIA, which provides that "[a]ll capitalized terms used herein shall have the meanings assigned to such terms in the Loan

Agreement." It is undisputed that 87 Mezz failed to make a payment when due under the Loan Agreement, and this failure constituted an "Event of Default" as defined in the Loan Agreement. Accordingly, as a matter of law, an "Event of Default" occurred under the AIA. The court also correctly determined that the AIA's liquidated damages provision may be given effect before the units of the subject property became individually saleable under the Condominium Act. 87 Mezz's remaining contentions concerning its liability for liquidated damages under the AIA, and the calculation of such damages, are unavailing.

Dismissal of plaintiffs' claim for breach of the implied covenant of good faith and fair dealing was also proper. Under the Loan Agreement, German American Capital Corporation (GACC) had a right to foreclose on its collateral. Moreover, neither the Loan Agreement nor the pre-negotiation agreement required GACC to permit plaintiffs to refinance the loans or to engage in negotiations with plaintiffs. As such, plaintiffs cannot use this claim to "nullify other express terms of a contract, or to create independent contractual rights" (*Feeseha v TD Waterhouse Inv'r Servs., Inc.*, 305 AD2d 268, 268 [1st Dept 2003]; *see also Baker v 16 Sutton Place Apt. Corp.*, 110 AD3d 479, 480 [1st Dept 2013]).

Finally, Supreme Court also properly dismissed plaintiffs' conversion claim as GACC possessed the right to foreclose on the collateral following 87 Mezz's failure to make the necessary payments at maturity, and therefore was not "unauthorized" in its possession of the collateral (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]; *see also Schwartz v Hotel Carlyle Owners Corp.*, 132 AD3d 541, 542 [1st Dept 2015]).

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

ENTERED: JUNE 19, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6911 Sarah Johnson, Index 152444/15
Plaintiff-Appellant,

-against-

Maria Cestone, et al.,
Defendants-Respondents

Hoyt David Morgan, et al.,
Defendants.

____

Judd Burstein, PC, New York (Judd Burstein of counsel), for appellant.

Schenck, Price, Smith & King LLP, New York (Ryder T. Ulon of counsel), for Maria Cestone and Roseland Ventures, LLC, respondents.

Pinnisi & Anderson, Ithaca (Michael D. Pinnisi of counsel), for Christopher Woodrow, respondent.

Quinn McCabe LLP, New York (Simon Block of counsel), for Molly Conners, respondent.

Hogan Lovells US LLP, Los Angeles, CA (Paul B. Salvaty of the bar of the State of California, admitted pro hac vice, of counsel), for Worldview Entertainment Holdings, LLC, Worldview Entertainment Holdings, Inc., Worldview Entertainment Capital, LLC, Worldview Entertainment Capital II, LLC, Worldview Entertainment Partners IV, LLC, Worldview Entertainment Partners V, LLC, Worldview Entertainment Partners VI, LLC, Worldview Entertainment Partners VII, LLC and Worldview Entertainment Partner IX, LLC, respondents.

____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 22, 2017, which, to the extent appealed from as limited by the briefs, granted defendants-appellants' motions to dismiss pursuant to CPLR 3211(a)(1) and (7) the causes of

action for fraud, aiding and abetting fraud, negligent misrepresentation, fraudulent concealment, breach of contract, tortious interference with contract, conversion, and aiding an abetting conversion as against them, unanimously affirmed, without costs.

Plaintiff alleges that defendants fraudulently induced her, through continual misrepresentations, to invest substantial sums of money in various film projects during the period between 2011 and 2014.

As plaintiff argues, the merger clauses in the agreements she executed in connection with her investment in Worldview Entertainment Partners VI, LLC (WEP6), one of the funds defendants created for the purpose of financing a film, do not bar her claims that she was fraudulently induced to invest in that fund (*see P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 377-378 [1st Dept 2003]). However, the complaint fails to state a cause of action for fraud because plaintiff cannot show that in deciding to invest in WEP6 she reasonably relied on the alleged misrepresentations about the returns on her earlier investment in Worldview Entertainment Capital II (WEP2) (*see Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1st Dept 1997]). In the WEP6 agreements, and in similar agreements executed in connection with four earlier

investments, plaintiff acknowledged that there was no financial or operating history upon which to rely, that the investment was speculative, that the success of a film was dependent upon the uncertainties of public acceptance, and that the film might be abandoned and not completed. In light of these warnings, plaintiff, a sophisticated investor, should have known that the success of the film related to WEP2 would not be indicative of the success of films related to subsequent funds and that she should not rely on misrepresentations related to the returns on WEP2 in investing in WEP6 or the subsequent funds.

The representations of which plaintiff complains that were made after the investment in WEP6 were not misrepresentations but projections of future returns on the other investments (*see ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398 [1st Dept 2008]). In any event, the record belies any claim that plaintiff could have reasonably relied on them.

Given the failure to allege reasonable reliance, the complaint also fails to state a cause of action for negligent misrepresentation (*see Hudson Riv. Club v Consolidated Edison Co. of N.Y.*, 275 AD2d 218, 220 [1st Dept 2000]).

The complaint fails to state a cause of action for breach of section 2.7.6 of the operating agreement that plaintiff executed in connection with her investment in Worldview Entertainment

Partners IV, LLC (WEP4), because section 2.7.6 does not prohibit the payment of a "producer/financing fee" prior to recoupment of WEP4's equity investment.

To the extent the complaint alleges tortious interference with the WEP4 operating agreement, the claim fails in the absence of a breach of that agreement, as indicated. To the extent it alleges tortious interference with certain oral agreements by defendant Maria Cestone, a member of the board of defendant Worldview Entertainment Holdings, Inc., the allegations show that Cestone was acting in the economic interest of the corporate defendants and are insufficient to show malice or fraudulent or illegal means (*see Foster v Churchill*, 87 NY2d 744, 750 [1996]). The allegations are insufficient to show that defendants Christopher Woodrow and Molly Conners, the officers of Worldview Entertainment Holdings, Inc., were acting outside the scope of their employment or were motivated by personal gain (*see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109-110 [1st Dept 2002]; *Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1st Dept 1998]).

The conversion and aiding and abetting conversion claims are duplicative of the breach of contract claims, i.e., they are predicated on breaches of contract and allege no facts that would give rise to tort liability (*see Fesseha v TD Waterhouse Inv.*

Servs., 305 AD2d 268, 269 [1st Dept 2003]). The fact that the motion court upheld the unjust enrichment claim because defendants dispute the existence of the oral agreements does not alter this result (*see e.g. Hochman v LaRea*, 14 AD3d 653 [2d Dept 2005]; *see also Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600-601 [1st Dept 2014]).

In light of the foregoing, we do not reach plaintiff's remaining contentions.

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

ENTERED: JUNE 19, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6912-
6912A U.S. Bank N.A., etc.,
Plaintiff-Appellant,

Index 381315/13

-against-

Diana Martinez, et al.,
Defendants.

- - - - -

Rafael Badalov, et al.,
Intervenors-Respondents.

____

Friedman Vartolo LLP, New York (Henry P. DiStefano of counsel), for appellant.

Stern & Stern, Brooklyn (Pamela Esther Smith of counsel), for respondents.

____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered September 8, 2016, which, to the extent appealed from as limited by the briefs, denied, after a hearing, plaintiff's motion to set aside a mortgage foreclosure sale, and order, same court and Justice, entered on or about July 13, 2017, insofar as it denied its second motion to renew its motion to set aside the sale pursuant to RPAPL 231(6), unanimously affirmed, with costs.

This appeal is not moot, since the relief plaintiff seeks is at least theoretically available (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172 [2002]).

The appeal from the July 13, 2017 order, which denied renewal, is properly before this Court (CPLR 5701[a][2][viii]).

The motion court's determination is supported by a fair interpretation of the evidence and will not be disturbed on appeal (*AGCO Corp. v Northrop Grumman Space & Mission Sys. Corp.*, 61 AD3d 562, 563-564 [1st Dept 2009]). Moreover, the court's credibility determinations are entitled to deference by this Court and are supported by the record herein (*see Watts v State of New York*, 25 AD3d 324 [1st Dept 2006]).

A court may exercise its equitable powers to set aside a foreclosure sale where there is evidence of fraud, mistake, exploitative overreaching, or collusion. However, the mere inadequacy of price is an insufficient ground to set aside a sale, unless the price is so inadequate as to shock the court's conscience (*see Guardian Loan Co. v Early*, 47 NY2d 515, 521 [1979]; *NYCTL 2005-A Trust v Rosenberger Boat Livery, Inc.*, 96 AD3d 425, 426 [1st Dept 2012]; *Thornton v Citibank*, 226 AD2d 162, 163 [1st Dept 1996], *lv denied* 89 NY2d 805 [1996]). A unilateral mistake does not justify vacating a foreclosure sale (*Dime Sav. Bank of N.Y. v Zapala*, 255 AD2d 547, 548 [2d Dept 1998]).

Here, plaintiff did not establish fraud, collusion, exploitative overreaching, or mutual mistake in support of its motions to vacate the sale. At most, the record demonstrates plaintiff's unilateral mistake in failing to make a bid higher than respondents' bid. Moreover, even if the sale price was

lower than plaintiff's claimed upset price, it was not fundamentally unfair and was not so inadequate as to shock this Court's conscience (*see South Point, Inc. v Rana*, 139 AD3d 936, 936-937 [2d Dept 2016]; *Guardian Loan Co.*, 47 NY2d at 521; *Thornton*, 226 AD2d at 163; *see also DeRosa v Chase Manhattan Mtge. Corp.*, 10 AD3d 317, 322 [1st Dept 2004]).

Plaintiff's claim, even if regarded as timely made, that the sale should have been vacated because the notice of sale was published in only one paper by plaintiff, in violation of the trial court's order, is without merit since it failed to allege that a substantial right of any party was prejudiced (RPAPL 231[6]).

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

ENTERED: JUNE 19, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6913 The People of the State of New York, Ind. 2917/15
Respondent,

-against-

Carliss Mishoe,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Ellen N. Biben, J.), rendered August 16, 2016, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to withdraw his plea. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]). Defendant received a full opportunity to present his challenges to the plea, both in writing and during a colloquy with the court regarding the

motion. Although defendant claimed that he pleaded guilty under duress because he had been attacked at Rikers Island, his allegations and supporting documentation fell far short of describing the type of extreme jail violence, directed at a particular defendant, that the Court of Appeals recognized in *People v Flowers* (30 NY2d 315 [1972]) as potentially tainting a guilty plea. Furthermore, defendant's claims of duress and innocence were contradicted by his thorough plea allocution.

To the extent the existing record permits review, it establishes that defendant received effective, conflict-free representation at sentencing (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Counsel adopted defendant's plea withdrawal motion, and he did not take an adverse position on its merits merely by stating that he had advised his client against seeking to withdraw the plea (*see People v Anonymous*, 148 AD3d 647 [1st Dept 2017], *lv denied* 29 NY3d 1075 [2017]). Furthermore, defendant was not prejudiced when counsel stated that defendant was ready for sentencing, and that there was no legal impediment to imposing sentence, while also advising the court that defendant wanted to be interviewed for a presentence report. There is no statutory requirement that

a defendant be interviewed (*see People v Serrano*, 158 AD3d 467 [1st Dept 2018]), defendant received the minimum lawful sentence, and the court gave defendant the opportunity to place on the record any corrections to the presentence report.

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

ENTERED: JUNE 19, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6914-
6915-
6916 Index 652058/17

Randolph Slifka, et al.,
Plaintiffs-Respondents,

-against-

Barbara Slifka, et al.,
Defendants-Appellants.

____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Allan J. Arffa of counsel), for Barbara Slifka, 477 Madave Associates, 477 Madave Management Corp., 477 Madave Holdings, LLC, J.A.B. Madison Associates LLC, J.A.B. Madison Management Corp. and J.A.B. Madison Holdings LLC, appellants.

Shearman & Sterling LLP, New York (K. Mallory Brennan of counsel), for SRI Ten 477 Madison LLC and SRI Ten 477 Madison TRS LLC, appellants.

Proskauer Rose LLP, New York (Steven H. Holinstat of counsel), for David Slifka, for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondents.

____

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered January 31, 2018, which held in abeyance defendants' motions to dismiss the complaint pending a decision by the Surrogate's Court on plaintiffs' petition for, inter alia, revocation of the letters testamentary appointing defendant Barbara Slifka as executor of Joseph Slifka's estate and a declaration that Barbara Slifka is no longer managing partner of defendant 477 Madave Associates, and continued a "stay/TRO"

prohibiting any transfer and/or sale of real property and the commercial building at 477 Madison Avenue until the issuance of the Surrogate's decision, unanimously modified, on the law, to remand the matter for the fixing of an undertaking, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered October 30, 2017, unanimously dismissed, without costs, as academic.

Upon due consideration of the goals of judicial economy and the prevention of inequitable results, we conclude that Supreme Court providently exercised its discretion in staying this action pending resolution of the related action pending in Surrogate's Court.

The court erred in enjoining the sale of property at issue pending the decision by the Surrogate pursuant to a temporary restraining order, which does not require an undertaking (CPLR 6313[c]). The TRO is merely a provisional remedy pending a hearing on a motion for a preliminary injunction (*see* CPLR 6313[a]), and the court did not schedule a hearing on plaintiffs' motion. However, it issued the "stay/TRO" after allowing both sides an opportunity to be heard. Thus, the relief is in fact a preliminary injunction, and plaintiffs are required to post an

undertaking (CPLR 6312[b]). We remand to Supreme Court to fix the amount of the undertaking (*see Shagalov v Edelman*, ___, AD3d ___, 2018 NY Slip Op 03240 [1st Dept 2018]; *Matter of G Builders IV, LLC v Madison Park Owner, LLC*, 84 AD3d 694, 695 [1st Dept 2011]).

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

ENTERED: JUNE 19, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6918 The People of the State of New York, Ind. 3803/12
Respondent,

-against-

Octavio Vargas,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael D. Tarbutton of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered February 20, 2013, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to a term of two years, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea is unpreserved, and we decline to review it in the interest of justice. Because "defendant said nothing at the plea colloquy or sentencing proceeding that negated an element of the crime," the narrow exception to the preservation rule does not apply (*see People v Pastor*, 28 NY3d 1090-1091 [2016]; *People v Lopez*, 71 NY2d 662, 665 [1988]). The court was not required to make a sua sponte inquiry into defendant's assertion of a justification defense in his postarrest statement to the police (*see e.g.* *People v Negron*, 222 AD2d 327 [1st Dept 1995], *lv denied* 88 NY2d

882 [1996]), or in his presentence interview (*see e.g. People v Rojas*, 159 AD3d 468 [1st Dept 2018]).

In any event, the only relief defendant requests is dismissal of the indictment rather than vacatur of the plea, and he expressly requests this Court to affirm the conviction if it does not grant a dismissal. Since we do not find that dismissal would be appropriate, we affirm on this basis as well (*see e.g. People v Teron*, 139 AD3d 450 [1st Dept 2016]).

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

ENTERED: JUNE 19, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6919 Lauren Abraham, etc., et al., Index 158515/13
Plaintiffs-Appellants,

-against-

Consolidated Edison Company of New York, Inc., et al.,
Defendants-Respondents,

John Doe, et al.,
Defendants.

____

Wigdor LLP, New York (Bryan Arbeit of counsel), for appellants.

Davis Polk & Wardwell LLP, New York (Frances E. Bivens of counsel), for respondents.

____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered September 13, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The decedent was killed during Superstorm Sandy when she twice ventured outside her home to photograph downed power lines, and was electrocuted when one of the lines came in contact with her ankle. Her friend, who witnessed the incident, provided statements attesting to the fact that decedent left her home to investigate whether there was a fire, was shocked when she touched a metal gate in her front yard, returned to her home, and then exited the house again, barefoot this time, in order to

photograph the scene. Decedent's friend stated that he warned her repeatedly to stay away from the live wires and to get back inside, but she disregarded his warnings.

Defendants' motion for summary judgment was properly granted since decedent's recklessness in approaching live power wires in the midst of a major storm in order to take photographs was the sole legal cause of her death (*see Brown v Metropolitan Tr. Auth.*, 281 AD2d 159, 160 [1st Dept 2001]; Spooner v Sears, Roebuck & Co., 161 AD2d 103 [1st Dept 1990], *lv denied* 76 NY2d 712 [1990]). Plaintiffs contend that defendants were negligent in failing to properly maintain the power wires, adequately prepare for the storm, and respond rapidly enough to the notice of the emergency situation resulting from the downed wires. However, even if defendants were negligent, decedent's recklessness was a superseding cause of her death (*compare Powers v 31 E 31 LLC*, 123 AD3d 421, 423 [1st Dept 2014]).

The court did not exercise its discretion in an improvident manner in finding that the written statement of decedent's friend qualified as an excited utterance (*see People v Wongshing*, 245 AD2d 120 [1st Dept 1997], *lv denied* 91 NY2d 1014 [1998]). The friend witnessed decedent's electrocution, after warning her of the dangers and refusing to approach the wires himself, despite decedent's urging.

In any event, the unchallenged statement of a neighbor was sufficient to show that decedent's reckless conduct was the cause of her demise, and this statement was consistent with the statement of decedent's friend.

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: JUNE 19, 2018

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6920N Wilmer E. Villalba, Index 157091/17
Plaintiff-Appellant,

-against-

John ("Jack") R. Brady, et al.,
Defendants-Respondents,

DM Carpentry Corp., et al.,
Defendants.

____

Law Office of Robert F. Danzi, Jericho (Christine Coscia of counsel), for appellant.

DeSena & Sweeney, LLP, Bohemia (Shawn P. O'Shaughnessy of counsel), for respondents.

____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered February 8, 2018, which granted the motion of defendants John ("Jack") R. Brady and Jack R. Brady d/b/a Jack Brady Custom Builder (collectively Brady defendants) to change venue from New York County to Suffolk County, unanimously reversed, on the law, without costs, and the motion denied.

The Brady defendants failed to timely serve a demand to change venue based on the placement of venue in an improper county and thus were not permitted to seek a change of venue pursuant to CPLR 511(a) (*see Kurfis v Shore Towers Condominium*, 48 AD3d 300 [1st Dept 2008]).

In any event, plaintiff properly placed venue in New York

County based upon defendant DM Carpentry Corp.’s certificate of incorporation, filed in 2011, which designated New York County as the location of its corporate office (*see* CPLR 503[c]; *Hill v Delta Intl. Mach. Corp.*, 16 AD3d 285 [1st Dept 2005]). Although the Brady defendants provided a 2017 printout of information from the Department of State showing that DT Carpentry’s initial filing date was 2011 and that its principal executive offices are in Suffolk County, absent any indication that the 2011 certificate of incorporation was ever amended, the residence designated in that certificate controls for venue purposes (*see Martirano v Golden Wood Floors Inc.*, 137 AD3d 612, 613 [1st Dept 2016]; *Krochta v On Time Delivery Serv., Inc.*, 62 AD3d 579, 580 [1st Dept 2009]).

Furthermore, while defendants could seek a discretionary change of venue without complying with the timing requirements of CPLR 511 (*see Conway v Gateway Assoc.*, 166 AD2d 388 [1st Dept 1990]), they failed to make any showing justifying such a request. The Brady defendants failed to set forth the identity and availability of any proposed witnesses, the nature and

materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the designated venue (*see Leopold v Goldstein*, 283 AD2d 319 [1st Dept 2001]).

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

ENTERED: JUNE 19, 2018

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Mazzarelli, JJ.

15741 The People of the State of New York, Ind. 1581/09
Respondent,

-against-

Herbert Henriquez,
Defendant-Appellant.

____

Christina Swarns, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered April 20, 2010, convicting defendant, upon his plea of guilty, of grand larceny in the second and third degrees, and sentencing him, as a second felony offender, to an aggregate term of four to eight years, unanimously affirmed.

We previously held the appeal in abeyance (145 AD3d 543 [1st Dept 2016]) and remanded for further proceedings pursuant to *People v Peque* (22 NY3d 168 [2013], *cert denied sub nom. Thomas v New York*, 574 US —, 135 S Ct 90 [2014]). On remand, the court correctly determined that defendant failed to show a reasonable probability that he would not have pleaded guilty had the court advised him of the possibility of deportation.

While defendant had significant ties to this country, that factor is outweighed by other factors. At the time he pleaded

guilty to grand larceny in this case, defendant was well aware that a prior grand larceny conviction in another county had already rendered him deportable, and that deportation proceedings on the basis of that conviction were already in progress; it was the earlier conviction that ultimately led to his removal, wholly independent of this matter. Furthermore, the disposition offered in the present case was favorable, given the strength of the case and defendant's prior record. In addition, while defendant's trial counsel averred that although he did not specifically recall advising defendant of possible immigration consequences, it was his custom to do so, and the record contains multiple examples of trial counsel discussing his client's immigration issues with the court. Under these circumstances, defendant was not prejudiced by the court's failure to advise him of the possibility of deportation, and vacatur of the plea is not warranted (*see People v Manon*, 151 AD3d 626 [1st Dept], *lv denied* 30 NY3d 981 [2017]).

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

ENTERED: JUNE 19, 2018

CLERK