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

10965 Toobian-Sani Enterprises, Inc., etc.,
Plaintiff-Appellant,

-against-

Bronfman Fisher Real Estate Holdings, LLC, et al.,
Defendants-Respondents,

Joseph Kranzler,
Defendant,

210 West 91st Street Owner, LLC,
Nominal Defendant.

Index 651847/12

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Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (Jason Keith Blasberg of counsel), for appellant.

Wachtel Missry LLP, New York (Evan S. Weintraub of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 11, 2018, which denied plaintiff's motion to reject a Special Referee's report recommending that the court find that defendant Joseph Kranzler was defendant Avi Dan's agent from May 1, 2008 to July 31, 2008, granted defendants' cross motion to confirm the report, and denied plaintiff's motion to compel Dan and defendant Bronfman Fisher Real Estate Holdings, LLC (Bronfman Fisher) to produce certain documents withheld on attorney-client privilege grounds, unanimously reversed, on the law, with costs, plaintiff's motion to reject the report granted, defendants' motion to confirm the report denied, and the matter remanded for disposition of plaintiff's motion to compel, in a

manner not inconsistent with this order.

The Referee's determination that Kranzler ceased to be Bronfman Fisher's agent on January 1, 2008 and was subsequently Dan's agent from May 1 to July 31, 2008 is unsupported by the record, which contains documentary evidence that contradicts and renders incredible certain testimony offered by defendants on the agency issue (*see Steingart v Hoffman*, 80 AD3d 444 [1st Dept 2011]). Accordingly, defendants' position that Kranzler's communications with the attorneys who at different times represented Bronfman Fisher and Dan, are protected by the attorney-client privilege, is unsustainable. The motion court is directed to consider plaintiff's motion to compel in light of that conclusion.

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

ENTERED: APRIL 30, 2020

CLERK

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11154 U.S. Immigration Fund LLC, et al., Index 159222/18
Plaintiffs-Appellants,

-against-

Douglas Litowitz, Esq., et al.,
Defendants-Respondents,

Reviv-East Legal Consultants (HK) Ltd.
also known as Hong Kong Zhendong Legal
Services Consulting Co., Ltd.,
Defendant.

_____

Otterbourg P.C., New York (Richard G. Haddad of counsel), for appellants.

Douglas Litowitz, respondent pro se.

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Order, Supreme Court, New York County (Melissa A. Crane, J.), entered April 5, 2019, which, to the extent appealed from as limited by the briefs, granted defendants Douglas Litowitz, Esq.'s and Xuejun Makhsous a/k/a Ma Xuejun a/k/a Zoe Ma's motions to dismiss the complaint as against them for lack of personal jurisdiction, unanimously modified, on the law, to extent of reinstating the third cause of action for breach of the Confidentiality Agreement as against defendant Litowitz, and otherwise affirmed, without costs.

Plaintiffs assert two bases for jurisdiction over defendants: the Confidentiality Agreement and long-arm jurisdiction.

The Confidentiality Agreement, which defendant Litowitz signed, provides that he consents to personal jurisdiction in New

York to any "suit, action, or proceeding arising out of" it. Because the third cause of action alleges that he breached the Confidentiality Agreement, his motion to dismiss that cause of action based only on CPLR 3211(a)(8) for lack of personal jurisdiction should have been denied.

The Confidentiality Agreement, however, does not otherwise confer personal jurisdiction over Litowitz on the remaining claims. The crux of the complaint – which alleges fraud and defamation against defendants – fails to plead a sufficient nexus with the alleged breach of the Confidentiality Agreement (*see Schmelkin v Garfield*, 85 AD3d 755 [2d Dept 2011]). Moreover, the Confidentiality Agreement cannot provide a basis for asserting jurisdiction over defendant Ma because she did not sign it, and was not named as a party to it.

As to the remaining claims, New York's long-arm jurisdiction statute (CPLR 302[a][3]) does not serve as a basis for jurisdiction. In the context of commercial torts, where the damages are purely economic, "the situs of the injury is the location where the event giving rise to the injury occurred, and not where the resultant damages occurred" (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 201-202 [1st Dept 2003]; *see McBride v KPMG Intl.*, 135 AD3d 576, 577 [1st Dept 2016]). The motion court correctly found that the critical events associated with the return of the investments occurred in Florida, where the plaintiffs' corporate offices are located, and not in New York,

where the construction projects took place and where one of the plaintiffs was domiciled. Plaintiffs contend that the court erred in relying upon "two accountant malpractice cases" in support of this legal principle. However, the rule extends beyond accounting cases (*see e.g. O'Brien*, 305 AD2d at 199-200), and is applicable here. Defendants have no New York office, no New York mailing address, no New York bank accounts, and no employees working in New York, and they have virtually no other contacts with New York. These factors militate against a finding of personal jurisdiction (*id.* at 201).

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: APRIL 30, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11177-
11178N-
11178NA
M-200 &
M-325 Index 150856/17

Errant Gene Therapeutics, LLC,
Plaintiff-Respondent,

-against-

Sloan-Kettering Institute for Cancer Research, et al.,
Defendants-Appellants.

- - - - -

Errant Gene Therapeutics, LLC,
Plaintiff-Respondent,

-against-

Sloan-Kettering Institute for Cancer Research,
Defendant,

Bluebird Bio, Inc.,
Defendant-Appellant.

_____

Wilmer Hale, New York (Robert J. Gunther, Jr. of counsel), for Sloan-Kettering Institute for Cancer Research, appellant.

Schlam Stone & Dolan LLP, New York (Jeffrey M. Eilender of counsel), for Bluebird Bio, Inc., appellant.

McCue Sussman Zapfel & Cohen P.C., New York (Kenneth Sussmane of counsel), and Wuersch & Gering LLP, New York (Kevin Murphy of counsel), for respondent.

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Orders, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about July 22 and 31, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motions for summary judgment dismissing the complaint, unanimously affirmed. Order, same court and Justice, entered August 27, 2019, imposing sanctions against Bluebird Bio Inc.

(Bluebird) in the amount of $25,000 and denying its motion to hold plaintiff in civil contempt, unanimously modified, on the law and the facts, to vacate the sanctions, and otherwise affirmed, without costs.

In the early 2000's, defendant Sloan Kettering Institute for Cancer Research's (Sloan-Kettering) researcher, Dr. Michel Sadelain, developed an experimental gene therapy treatment for thalassemia using a recombinant "vector," i.e., a DNA molecule used as a vehicle to artificially carry foreign genetic material into another cell (the Sloan vector). In 2001, Sloan-Kettering filed for patent protection on the Sloan vector technology and was granted U.S. Patent No. 7,541,179.

The court properly denied defendant Sloan-Kettering's motion for summary judgment dismissing plaintiff's fraud claim as there remain issues of fact as to whether it was reasonable for plaintiff to rely on Sloan-Kettering's principals' statements about Sloan-Kettering's readiness to proceed to the clinical trial stage and its intentions with respect to its commitment to the research.

The court also properly denied Sloan-Kettering's motion for summary judgment dismissing plaintiff's claim for breach of the 2011 agreement as there remain issues of fact as to whether Sloan-Kettering did not, and never intended to, use its best efforts to create and commercialize the gene therapy vector that was created, in part, by plaintiff and whether plaintiff waived

its claim for breach of the 2011 agreement. Contrary to defendant's contentions, this Court has already determined that "[t]he measure of plaintiff's damages, as alleged, is not speculative as a matter of law" (*Errant Gene Therapeutics, LLC v Sloan-Kettering Inst. for Cancer Research*, 174 AD3d 473, 475 [1st Dept 2019]).

Sloan-Kettering's motion for summary judgment dismissing plaintiff's claim for breach of the 2005 agreement was also properly denied as there are issues of fact as to whether Sloan-Kettering breached the agreement by disclosing to Bluebird confidential information regarding plaintiff's treatment in secret meetings while the agreement was in effect.

The court properly denied Bluebird's motion for summary judgment dismissing plaintiff's unfair competition claim as there are issues of fact as to whether Bluebird used plaintiff's confidential information about the vector as part of a scheme with Sloan-Kettering to market a gene therapy before plaintiff did and, at a minimum, whether Bluebird was aware of any fraud on Sloan-Kettering's part.

Contrary to Bluebird's contention, plaintiff's unfair competition claim is timely. Since plaintiff is a resident of Illinois and it allegedly suffered damage in Illinois, where it does business, New York's borrowing statute applies for statute of limitations purposes (CPLR 202). Under CPLR 202, plaintiff's unfair competition claim must be timely under the shorter of New

York and Illinois' statute of limitations for unfair competition claims. In New York, plaintiff's unfair competition claim is subject to a six-year statute of limitations because it is based on fraud (*see Mario Valente Collezioni, Ltd. v Aak Ltd.*, 280 F Supp 2d 244, 258 [SD NY 2003]; *see generally Katz v Bach Realty, Inc.*, 192 AD2d 307 [1st Dept 1993]). In Illinois, plaintiff's unfair competition claim is subject to a five-year statute of limitations and it accrues when plaintiff either knew or should have known of the existence of the right to sue (*Henderson Sq. Condominium Assn. v LAB Townhomes, LLC*, 2015 IL 118139, 46 NE3d 706 [2015]). Thus, under CPLR 202, Illinois' five-year statute of limitations applies to plaintiff's unfair competition claim. Under that statute of limitations, the unfair competition claim is timely because it accrued less than five years before plaintiff commenced the action on January 27, 2017. Initially, there is no evidence that plaintiff discovered or could have discovered that Bluebird was engaging in fraudulent behavior, allegedly aimed at destroying plaintiff and controlling the market for a gene therapy treatment, prior to January 27, 2012. Plaintiff asserts that it did not discover the facts underlying Bluebird's alleged fraudulent behavior until documents were produced in discovery in a separate litigation in June 2016. Moreover, at the earliest, plaintiff could have discovered Bluebird's alleged fraudulent behavior in September 2012, when Bluebird circulated a presentation it had given in which it

discussed the intellectual property that plaintiff alleges it copied. Bluebird's assertion that the claim is untimely because plaintiff knew of the facts underlying its unfair competition claim as early as 2010 and 2011 based on emails sent by plaintiff's CEO is without merit. The emails referenced by Bluebird merely demonstrate plaintiff's suspicion that Bluebird was acting fraudulently, not that plaintiff had discovered or could have discovered the facts underlying its claim.

The court providently exercised its discretion in denying Bluebird's motion to hold plaintiff in contempt after a hearing (*see Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]). However, the court improvidently exercised that discretion in awarding sanctions against Bluebird, because, among other reasons, Bluebird's contempt motion was not so clearly meritless as to be deemed frivolous, and the court failed to satisfy the procedural requirements of 22 NYCRR 130-1.2 (*see Gordon Group Invs., LLC v Kugler*, 127 AD3d 592, 595 [1st Dept 2015]).

M-200 &
M-325 - *Errant Gene Therapeutics, LLC v Sloan-Kettering*

Motion and cross motion for sanctions denied.

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

ENTERED: APRIL 30, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11283 David Morera, Index 157570/14
Plaintiff-Appellant,

-against-

The New York City Transit Authority,
Defendant,

George Comfort & Sons, Inc., et al.,
Defendants-Respondents.

- - - - -

George Comfort & Sons, Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

First Quality Maintenance II, LLC doing
business as First Quality Maintenance,
Third-Party Defendant-Respondent.

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

Mischel & Horn, P.C., New York (Lauren E. Bryant of counsel), for George Comfort & Sons Inc., and WWP Office, LLC, respondents.

Gallo Vitucci Klar LLP, New York (Anne Marie Garcia of counsel), for First Quality Maintenance II, LLC, respondent.

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Order, Supreme Court, New York County (W. Franc Perry, J.), entered June 17, 2019, which denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim against defendants WWP Office LLC and George Comfort & Sons Inc., unanimously affirmed, without costs.

Plaintiff testified that he was about 15-to-17 feet above ground on a 24-foot ladder cleaning the windows inside a building owned and managed by defendants WWP and George Comfort, when a ceiling tile suddenly fell and struck him, causing the ladder to

tip backward away from the wall against which it had been leaning. Although the ladder fell against the opposite wall, plaintiff fell off the ladder and was thrown to the ground below. When the accident occurred, the ladder was being held steady at the bottom by a coworker, but was otherwise unsecured.

The court properly denied plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim. There are issues of fact whether the falling ceiling tile was an intervening superceding cause of the accident (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561-562 [1993]). Moreover, in view of plaintiff's testimony that the ladder was not defective, issues of fact also exist as to whether defendant failed to provide proper protection, and whether plaintiff's fall was proximately caused by the statutory violation or by the falling ceiling tile (*see Nazario v 222 Broadway, LLC*, 28 NY3d 1054 [2016]; *Zeitner v Herbmax Sharon Assoc.*, 194 AD2d 414 [1st Dept 1993]; *compare Cutaia v Board of Mgrs. of the Varick St. Condominium*, 172 AD3d 424 [1st Dept 2019]).

The conflicting expert testimony also raises an issue of fact as to whether other adequate devices could have been provided. Plaintiff's reliance on *Ortega v City of New York* (95 AD3d 125 [1st Dept 2012]) is misplaced, as that case does not address the situation where, as here, the accident is precipitated by an unforeseeable external force that is unrelated to the work being performed.

Plaintiff's argument, raised for the first time on appeal, that he may recover under a "falling object" theory, is unpreserved. In any event, the argument is unavailing, as the ceiling tile was not a material that required hoisting or securing for purposes of plaintiff's undertaking (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

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

ENTERED: APRIL 30, 2020

CLERK

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

11422 The People of the State of New York Ind. 178/16
Respondent,

-against-

William Jacobs,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (David Bernstein of counsel), and Weil, Gotshal & Manges LLP, New York (David Fitzmaurice and Richard Gage of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Ronald A. Zweibel, J., at jury trial and sentencing), rendered December 6, 2016, convicting defendant of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

Initially, we find that the People met their burden of going forward with proof demonstrating reasonable suspicion for the initial stop, based on testimony that defendant, who met a specific radioed description, was detained in close temporal and spatial proximity to the reported larceny in progress. We also find that the testifying officer provided competent proof of these facts, notwithstanding the absence of testimony from the officers who made the original stop. Defendant argues that, even if the initial stop was lawful, the search was not incident to an

arrest and therefore, before probable cause for an arrest arose. Defendant's argument is unpreserved, as he did not make any specific arguments challenging the admissibility of the physical property, and the court did not decide the issue in response to protest by either party.

Similarly, defendant's argument that the showup was unduly suggestive is partially unpreserved. While defense counsel argued before the hearing court that the video established that the showup was unduly suggestive, counsel did not argue that statements made by the officer to the identifying witness rendered the procedure suggestive.

We find, however, that the identification procedure was "not so unnecessarily suggestive as to create a substantial likelihood of misidentification" (*People v Duuvon*, 160 AD2d 653 [1st Dept 1990], *affd* 77 NY2d 541 [1991]; *People v Brisco*, 99 NY2d 596 [2003]).

Finally, we find that the trial court properly balanced the probative value of the proposed testimony against any prejudice to defendant in its *Molineux* ruling (*see People v Versage*, 48 AD3d 254, 255 [1st Dept 2008], *lv denied* 10 NY3d 871 [2008]; *People v Hwang*, 2 AD3d 245, 246 [1st Dept 2003], *lv denied* 2 NY3d 738 [2004]). Further, any prejudice was minimized by way of

suitable limiting instructions (*People v Versage*, 48 AD3d at 255).

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: APRIL 30, 2020

CLERK

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

11423 In re Phyllis H., Dkt. O-5247/18
Petitioner-Respondent,

-against-

Didier C.,
Respondent-Appellant.

_____

Tennille M. Tatum-Evans, New York, for appellant.

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about November 27, 2018, which, to the extent appealed from as limited by the brief, upon a factual finding that respondent committed the family offense of aggravated harassment in the second degree, granted a two-year order of protection, unanimously affirmed, without costs.

Family Court properly exercised jurisdiction over this matter pursuant to Family Court Act § 812(1)(e), as the undisputed evidence establishes that the parties previously had an intimate relationship (*see Matter of Kimberly O. v Jahed M.*, 152 AD3d 441 [1st Dept 2017], *lv denied* 30 NY3d 902 [2017]; *Matter of Sonia S. v Pedro Antonio S.*, 139 AD3d 546, 547 [1st Dept 2016]). That they were not romantically involved for a number of years preceding the filing of the petition is of no moment under the statute (*see Matter of Willis v Rhinehart*, 76 AD3d 641, 643 [2d Dept 2010]).

Although the court did not specify the precise criminal offense on which its finding that respondent committed a family

offense was predicated, the record is sufficient to find that a preponderance of the evidence establishes that, with intent to harass petitioner, respondent committed the offense of aggravated harassment in the second degree by communicating to her a threat to cause her physical harm (*see* Penal Law § 240.30[1][a]; *see Matter of Shank v Miller*, 148 AD3d 1160 [2d Dept 2017]).

We discern no basis for disturbing the court's credibility determinations (*see Matter of Fayona C. v Christopher T.*, 103 AD3d 424, 425 [1st Dept 2013]).

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

ENTERED: APRIL 30, 2020

CLERK

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

11424 Elliot Silber, Index 160664/15
Plaintiff-Appellant,

-against-

Sullivan Properties, L.P.,
Defendant-Respondent.

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Law Office of Bryan J. Swerling, P.C., New York (Bryan J. Swerling of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for respondent.

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Order, Supreme Court, New York County (Robert David Kalish, J.), entered March 4, 2019, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion to amend the bill of particulars, unanimously affirmed, without costs.

In this personal injury action, plaintiff, a tenant in defendant's walk-up building, alleged that he sustained injuries while ascending the exterior stoop of defendant's building on a rainy day. In his verified bill of particulars, plaintiff alleged that the accident was due to defendant's negligence in causing and allowing the building's entrance to be in an excessively wet, slippery, and hazardous condition. Plaintiff testified that, he did not see what had caused him to slip, either before or after he fell, but he believed the cause was the slippery marble door saddle at the top of the stairs coupled with the wet surface from the rain.

Defendant made a prima facie showing that there was no dangerous condition in existence when plaintiff slipped and fell, and that it was therefore entitled to summary judgment (*Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015]). Plaintiff's mere speculation about causation is inadequate to sustain a cause of action (*DaSilva v KS Realty, L.P.*, 138 AD3d 619, 620 [1st Dept 2016]). Even if plaintiff was unsure as to the cause of the accident, the record shows that defendant lacked notice of the existence of any dangerous condition (*see Waiters v Northern Trust Co. of N.Y.*, 29 AD3d 325, 327 [1st Dept 2006]; *see e.g. Perez v Abbey Assoc. Corp.*, 103 AD3d 573 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. First, plaintiff's expert opinion was conclusory and speculative, since he did not take measurements of the coefficient of friction of the stairwell or conduct any other tests to show that the combination of the rainwater and marble surface was a hazardous condition (*see Edwards v Levy*, 175 AD3d 1193, 1194 [1st Dept 2019]). Further, plaintiff's expert "improperly raised, for the first time in opposition to the summary judgment motion, a new theory of liability" concerning alleged violations of the 1968 Building Code "that had not been set forth in the complaint or bill[] of particulars" (*see Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]).

We find that the court did not improvidently exercise its discretion in denying plaintiff's cross motion, filed about two

months after plaintiff opposed defendant's summary judgment motion, to amend the bill of particulars. Plaintiff did not submit an affidavit or any other admissible evidence to show a reasonable excuse in moving to amend the bill of particulars about three months after the note of issue was filed and three years after the action was commenced (*see Dimoulas v Roca*, 120 AD3d 1293, 1296 [2d Dept 2014]; *Cintron v New York City Tr. Auth.*, 77 AD3d 410, 410-411 [1st Dept 2010]). Further, the violations plaintiff sought to add to the original bill of particulars - that defendant violated the 1968 Building Code on the basis that the handrails, the riser heights, and the tread widths did not comply with the Code and contributed to the accident - constituted untimely substantive additions to the theory of the case, warranting denial of the motion (*see Garguilo v Port Auth. of N.Y. & N.J.*, 137 AD3d 708, 708 [1st Dept], *lv denied* 28 NY3d 905 [2016]).

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: APRIL 30, 2020

CLERK

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

11425-
11426 Index 651504/18

MacArthur Properties I, LLC,
Plaintiff-Appellant,

-against-

Christina Galbraith, et al.,
Defendants-Respondents.

_____

The Tzanides Law Firm, PLLC, New York (Kirk P. Tzanides of counsel), for appellant.

Smith, Gambrell & Russell, LLP, New York (John Van Der Tuin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about July 13, 2018, which, to the extent appealed from as limited by the briefs, granted in part defendants' pre-answer motion to dismiss the complaint, and order (same court and Justice), entered on or about March 18, 2019, which, to the extent appealed from as limited by the briefs, granted in part defendants' motion to dismiss the first amended complaint, unanimously affirmed, without costs.

The motion court properly dismissed plaintiff's claims relating to the prospective change to the allocation of common charges based on plaintiff's percent of the common interest, beginning with the 2017 budget, as flatly contradicted by the condominium's governing documents and RPL § 339-m (CPLR 3211[a][1]). As defendants assert, estoppel cannot "operate to relieve one from the mandatory operation of a statute" (*Matter of Scheurer v New York City Employees' Retirement Sys.*, 223 AD2d 379

[1st Dept 1996]) such as RPL § 339-m, nor can a party use the doctrine of waiver "to frustrate the reasonable expectations of the parties embodied in a [contract] when they have expressly agreed otherwise" (*Jefpaul Garage Corp. v Presbyt. Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]).

Plaintiff's assertion that defendants' position in the parties' 1998 Supreme Court action should control is unavailing. Although plaintiff maintains that defendants asserted in that case that the condominium building contained a single residential unit comprised of 142 apartments, a commercial unit, and a professional unit, the declaration states that the building contains 144 units, not three. Plaintiff also did not provide an instance in which the three-unit theory was successfully employed in securing a judgment in defendants' favor, as judicial estoppel requires (*see Anonymous v Anonymous*, 156 AD3d 412 [1st Dept 2017]). Thus, the areas or services that benefit the 142 residential units would not constitute "limited common elements," defined in the declaration and bylaws as "portions of the Common Elements that are for the use of one Unit to the exclusion of all other Units." Even so, plaintiff's contention that it should not have to pay for expenses that it does not use is contradicted by article V, section 4 of the bylaws, which provides that no unit owner "may exempt himself from liability for his Common Charges by waiver of the use or enjoyment of any of the Common Elements."

Accordingly, the motion court properly dismissed the causes of action relating to the prospective application of the apportionment of common expenses by percent interest.

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

ENTERED: APRIL 30, 2020

CLERK

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

11427 The People of the State of New York, Ind. 3399/12
Respondent,

-against-

Joseph Graham,
Defendant-Appellant.

_____

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

James E. Johnson, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

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Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 8, 2016, convicting defendant of violation of probation, revoking his sentence of probation and resentencing him to a term of 1⅓ to 4 years, unanimously affirmed.

The record does not establish that the resentence was based on bias or other improper consideration. We find no basis for reducing the resentence.

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

ENTERED: APRIL 30, 2020

CLERK

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

11428 Nimer Diaz, Index 26890/15E
Plaintiff-Appellant, 43080/16E

-against-

Raveh Realty, LLC,
Defendant-Respondent,

Jerusalem Carting, Inc.,
Defendant.

- - - - -

[And a Third-Party Action]

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

Carol R. Finocchio, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered February 28, 2018, which denied plaintiff's motion for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims as against defendant Raveh Realty, LLC, unanimously modified, on the law, to grant plaintiff partial summary judgment on his Labor Law § 240(1) claim, and otherwise affirmed, without costs.

Plaintiff, while employed as a carpenter at a construction site owned by defendant Raveh, was injured when he was hit by a heavy 4' x 8' plywood form that fell or was dropped by co-workers who were stripping plywood forms from the cured concrete-poured ceiling. Plaintiff had been instructed to remove plywood form debris from the floor near where co-workers were working on ladders stripping the plywood forms from the ceiling.

Defendants' project overseer acknowledged that such plywood forms would be secured by a rope when being removed from near the building's edge, and plaintiff's expert opined that safety devices were required due to the risk that the formwork would fall. At the time of the accident, plaintiff was looking down to clear the debris, so that it is unclear whether he was hit by a dislodged plywood form that a co-worker dropped or tossed, or was hit by a loosened plywood form that simply fell from the ceiling. We find that, in either instance, plaintiff was entitled to partial summary judgment on his Labor Law 240(1) claim.

The type of work being performed – dislodging heavy plywood forms from a newly-constructed concrete ceiling – involved a load that required securing (*Gutierrez v 610 Lexington Prop., LLC*, 179 AD3d 513 [1st Dept 2020]) and, because plaintiff's injury was the foreseeable consequence of the risk of performing the task without any safety device of the kind enumerated in the statute, he was entitled to partial summary judgment. Raveh's evidence in opposition to the motion failed to raise triable issues as to the claim.

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

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

ENTERED: APRIL 30, 2020

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CLERK

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

11429 In re Trevis L. Funches, Index 101989/16
Petitioner-Appellant,

-against-

Cyrus R. Vance, Jr., etc., et al.,
Respondents-Respondents.

_____

Trevis L. Funches Sr., appellant pro se.

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

James E. Johnson, Corporation Counsel, New York (Julie Steiner of counsel), for municipal respondent.

_____

Judgment, Supreme Court, New York County (Debra A. James, J.), entered October 18, 2018, denying the petition brought pursuant to CPLR article 78 and the Freedom of Information Law (FOIL) for records relating to petitioner's May 2, 2001 arrest and subsequent conviction for multiple counts of first-degree and second-degree robbery and second-degree and third-degree criminal possession of a weapon under New York County Indictment No. 2763/01 and dismissing the proceeding, unanimously modified, on the law, the denial of the petition and dismissal of the proceeding insofar as it relates to FOIL requests propounded on respondents in 2016 vacated, and the proceeding remanded to Supreme Court for a traverse hearing as to respondent New York County District Attorney (DANY), and otherwise affirmed, without costs.

Petitioner never administratively appealed any of the FOIL

requests he propounded on respondents in 2003, and his time to do so lapsed long ago (*see* Public Officers Law [POL] § 89[4][a]). Accordingly, to the extent it relates to the 2003 FOIL requests, the petition was correctly dismissed for failure to exhaust administrative remedies (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *Matter of Cross v Russo*, 132 AD3d 454 [1st Dept 2015]). However, petitioner did not fail to exhaust his administrative remedies with respect to his 2016 FOIL claims. Accordingly, those claims are reinstated.

In the order to show cause commencing this proceeding, Supreme Court directed petitioner to serve respondents, the Attorney General, and Corporation Counsel. Petitioner filed an affidavit of service averring that, on December 28, 2016, he served DANY, Corporation Counsel, and the Attorney General.

Petitioner's failure to serve respondent NYPD mandates dismissal of the petition to the extent it relates to FOIL requests propounded by petitioner against NYPD in 2016 (*see Matter of Smith v New York County Dist. Attorney's Off.*, 104 AD3d 559 [1st Dept 2013]; *Matter of Ruine v Hines*, 57 AD3d 369 [1st Dept 2008]).

Petitioner's facially adequate affidavit of service on respondent DANY notwithstanding, DANY contests service, necessitating a traverse hearing (*see NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]). In light of the dismissal against NYPD, we need not reach the

issue of whether the parties were properly joined in this proceeding.

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

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

ENTERED: APRIL 30, 2020

CLERK

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

11430 Colonial Surety Company, Index 656347/16
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Adam R. Schwartz of counsel), for appellant.

Kelly D. MacNeal, New York (Gil Nahmias of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered August 27, 2018, which granted defendant New York City Housing Authority's (NYCHA's) CPLR 3211(a)(1) motion to dismiss the complaint, unanimously affirmed, without costs.

In support of its motion, NYCHA submitted documentary evidence showing that plaintiff Colonial Surety Company failed to timely notify NYCHA of its equitable adjustment claim. Section 23 of the construction contract between plaintiff's obligee (non-party Pioneer General Construction Company, LLC) and NYCHA required that plaintiff, as Pioneer's surety, file a notice of claim within 20 days after its accrual. Here, plaintiff's claim accrued on September 3, 2013, when NYCHA notified plaintiff that it intended to substantially reduce Pioneer's scope of work under the contract, and reduced the contract price by $2,053,800. Plaintiff's damages were ascertainable as of that point (*see C.S.A. Contr. Corp. v New York City School Constr. Auth.*, 5 NY3d

189, 192 [1st Dept 2005]). We note that plaintiff's notice of claim would still have been untimely even if accrual was calculated from July 2015, when it substantially performed on the contract, or January 7, 2016, the date of submission of the final payment requisition to NYCHA, reflecting the reduction in the contract price (*id.*; *see also D & L Assoc., Inc., v New York City School Constr. Auth.*, 69 AD3d 435, 436 [1st Dept 2010]). Plaintiff did not file a notice of claim until March of 2016, years after NYCHA reduced the contract's scope of work and months after its final payment requisition.

NYCHA's submissions also establish that plaintiff's plenary action is barred by Section 20 of the construction contract, which precludes contractors from commencing such an action for damages upon a determination by the City that the contractor had defaulted under the contract (*see Cal-Tran Assoc., Inc. v City of New York*, 43 AD3d 727 [1st Dept 2007]; *see also Sound Beyond Elec. Corp. v City of New York*, 100 AD3d 412, 413 [1st Dept 2012]). Plaintiff's remedy under the contract was to commence an Article 78 proceeding challenging the default determination

before bringing its claim for equitable adjustment.

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: APRIL 30, 2020

CLERK

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

11431-
11431A The People of the State of New York,
Respondent,

Ind. 448/14

-against-

Gary DuBois,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Arlene D. Goldberg, J. at jury trial and sentencing), rendered June 21, 2016, convicting defendant of attempted gang assault in the first degree, attempted assault in the first degree and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, and order, same court (Arlene D. Goldberg, J.), entered on or about December 17, 2018, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court properly denied defendant's CPL 440.10 motion. A records custodian's trial testimony about the timing of a text message sent by defendant on the day of the crime was later acknowledged to have been mistaken. However, defendant did not establish that he was therefore entitled to a new trial on any of the grounds cited in his motion. There was no evidence of

misconduct by the prosecutor, and, in any event, there was not even a reasonable possibility that the testimony at issue, whether it is described as "false" or mistaken, contributed to the verdict. There was overwhelming direct and circumstantial evidence of defendant's guilt, including, among other things, surveillance videotapes and undisputed phone records. Trial counsel's efforts to challenge the testimony at issue were not deficient under either the state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel's conduct in this regard fell below an objective standard of reasonableness, or that they deprived defendant of a fair trial or affected the outcome of the case.

The court properly denied defendant's suppression motion. The motion court correctly determined that although the police made an entry in violation of *Payton v New York* (445 US 573 [1980]), suppression of defendant's phone was not required, since the seizure of the phone from defendant's person occurred at the police station and had no connection with the police entry into defendant's residence (*see People v Padilla*, 28 AD3d 236, 237 [1st Dept 2006], *lv denied* 7 NY3d 760 [2006]; *People v Jackson*, 17 AD3d 148 [2005], *lv denied* 5 NY3d 790 [2005]). Before inspecting the phone, the police obtained an undisputedly valid warrant, which addressed the special privacy concerns involved with phones.

The court providently exercised its discretion in admitting a phone call defendant made while in custody awaiting trial that could reasonably have been interpreted as an admission, or evidence of his consciousness of guilt. The possibility of innocent interpretations went to the weight to be given this evidence, not its admissibility (*see People v McKenzie*, 161 AD3d 703, 704 [2018], *lv denied* 32 NY3d 1113 [2018]).

In any event, in light of the overwhelming evidence of defendant's guilt, there was no reasonable possibility that any of the errors claimed by defendant contributed to the conviction (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 30, 2020

CLERK

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

11432 In re Asar S. W., Dkt. B-4384/18

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

Marie G.,
Respondent-Appellant,

Little Flower Children and
Family Services of New York, etc.,
Petitioner-Respondent,

Administration for Children's Services,
Respondent.

_____

Bruce A. Young, New York, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Maria Arias, J.), entered on or about April 25, 2019, which, inter alia, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and transferred custody of the child to petitioner agency and the Administration for Children's Services for the purposes of adoption, unanimously affirmed, without costs.

The court's determination that the mother permanently neglected the child is supported by clear and convincing evidence. In devising a suitable service plan, making appropriate referrals, providing frequent casework counseling and scheduling regular visitation, the agency exercised the requisite

diligent efforts to encourage and strengthen the parental relationship (*see Matter of Malcolm M.L. [Ruby C.]*, 177 AD3d 442 [1st Dept 2019]). The mother's service plan was specifically tailored to her mental health needs, and while the mother completed a parenting skills program, she did not comply with mental health services, an essential part of her service plan, and she failed to visit her son consistently. She attended only about half of the visits she was offered, and for the three months preceding the filing of the petition she did not visit or make contact with him at all.

A preponderance of the evidence also supports the court's determination that termination of the mother's parental rights was in the best interests of the child, who has been in a stable foster home for his entire life, where all of his needs were being met, and the foster mother wished to adopt him (*see Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573, 574 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]). As the Family Court found, the mother has not put forth a realistic, feasible plan to provide an adequate and stable home for the child, and therefore a suspended

judgment was not appropriate (*see Matter of Lorenda M. [Lorenzo McG.]*, 2 AD3d 370, 371 [1st Dept 2003]).

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

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

ENTERED: APRIL 30, 2020

CLERK

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

11433 The People of the State of New York, Ind. 3112/16
Respondent,

-against-

Carlos Ramos,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Rafael Curbelo 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 (Ralph Fabrizio, J.), rendered March 28, 2018,

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: APRIL 30, 2020

CLERK

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

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

11434 East Fordham DE LLC, Index 260551/14
Plaintiff-Respondent,

-against-

U.S. Bank National Association, etc., et al.,
Defendants-Appellants,

KeyBank National Association,
Defendant.

_____

Allegaert Berger & Vogel LLP, New York (Alexander H. Shapiro and Partha P. Chattoraj of counsel), for U.S. Bank National Association and Torchlight Loan Services, LLC, appellants.

Zeichner Ellman & Krause LLP, New York (Jantra Van Roy of counsel), for Berkadia Commercial Mortgage LLC, appellant.

Morrison Cohen LLP, New York (Brett D. Dockwell of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered on or about February 19, 2019, which found, after a framed-issue hearing, that plaintiff complied with the directive of the parties' loan modification agreement (LMA) to provide reliable as-stabilized property values so that the minimum net proceeds could be ascertained, unanimously affirmed, with costs.

The plain language of the LMA required that the "as-stabilized value of the Property . . . shall be established by the average of two MAI [Member of the Appraisal Institute] appraisals." The appraisers for both parties were MAIs, and both parties' experts agreed that the appraisers provided "as stabilized" values in their direct capitalization and comparable

sales analyses. Despite the fact that certain portions of the appraisal reports were labeled "as-is" with respect to valuation, plaintiff's expert explained that the terms "as-is" and "as-stabilized" may be interchangeable when dealing with a multi-tenant commercial property, and Supreme Court did not improvidently exercise its discretion in crediting this testimony (*Rodriguez v Ford Motor Co.*, 17 AD3d 159, 160 [1st Dept 2005]). Contrary to defendants' contention, Supreme Court's reliance on the Dictionary of Real Estate Appraisal was appropriate "to determine the plain and ordinary meaning of words to a contract" (*Lend lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 57 [1st Dept 2015], *affd* 28 NY3d 675 [2017]). Further, the appraisal reports were correctly admitted into evidence, as an expert's "opinion may be received in evidence even though some of the information on which it is based is inadmissible hearsay, if the hearsay is 'of a kind accepted in the profession as reliable in forming a professional opinion, or if it comes from a witness subject to full cross-examination on . . . trial'" (*Matter of*

Chi-Chuan Wang, 162 AD3d 447, 449 [1st Dept 2018]; *see also* *Matter of New York State Dev. Corp. v 230 W. 41st St. Assoc. LLC*, 77 AD3d 479, 480 [1st Dept 2010], *lv denied* 16 NY3d 703 [2011]).

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

ENTERED: APRIL 30, 2020

CLERK

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

11435 First Commercial Bank, Index 654760/16
Plaintiff-Respondent,

-against-

Grand Grace Holding, LLC, et al.,
Defendants-Appellants.

_____

Kaiser Saurborn & Mair, P.C., New York (Henry L. Saurborn, Jr. of counsel), for appellants.

Kevin Kerveng Tung, P.C., Flushing (Kevin K. Tung of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about November 30, 2018, which, upon reargument, granted plaintiff's motion to extend its time for service under CPLR 306-b, unanimously affirmed, without costs.

The motion court correctly considered the merit of the cause of action and the lack of prejudice to defendants in extending plaintiff's time to serve (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]).

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

ENTERED: APRIL 30, 2020

CLERK

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

11436 In re Correction Officers' Benevolent Association,
Petitioner,

-against-

New York City Board of Collective Bargaining, et al.,
Respondents.

Index 101012/18

Koehler & Isaacs LLP, New York (Liam L. Castro of counsel), for petitioner.

Abigail R. Levy, New York, for New York City Board of Collective Bargaining, respondent.

James E. Johnson, Corporation Counsel, New York (Zachary S. Shapiro of counsel), for municipal respondents.

Determination of respondent New York City Board of Collective Bargaining, dated June 14, 2018, which, after a hearing, dismissed petitioner's improper practice petition, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Arlene P. Bluth, J.], entered January 23, 2019), unanimously dismissed, without costs.

The hearing after which respondent Board of Collective Bargaining (BCB) made its determination was discretionary, not mandatory (*see* 61 RCNY 1-07[c][8]; *Matter of United Fedn. of Teachers v City of New York*, 154 AD3d 548, 550 [1st Dept 2017]). Therefore, the standard of judicial review is whether the determination is arbitrary and capricious, and transfer to this

Court was unwarranted (*see Matter of Lippman v Public Empl. Relations Bd.*, 263 AD2d 891, 894-895 [3d Dept 1999]; CPLR 7804[g]). Nevertheless, we dispose of the matter on the merits and review BCB's determination for rationality (*see id.*; *Matter of Social Serv. Empls. Union, Local 371 v New York City Bd. of Collective Bargaining*, 47 AD3d 417 [1st Dept 2008]; *Matter of Angelopoulos v New York City Civ. Serv. Commn.*, 176 AD2d 161 [1st Dept 1991], *lv denied* 79 NY2d 751 [1991]).

BCB's determination that the operations order issued by the Department of Corrections (DOC) does not impose a substantive change to the process of awarding job assignments is rational. There is testimony in the record that the information now required to be considered about an officer's history of use of force was already considered under the previous operations order and that the divisions now required to be contacted during the process of awarding assignments were regularly consulted when the previous order was in effect.

The determination that the new training requirements contained in the operations order are not a mandatory subject of bargaining is rational. It is supported by witness testimony about the role seniority played under both the current and previous operations orders, that lack of training did not prevent an officer from applying for or being awarded an assignment, and that the language of the operations order and DOC practice allowed for officers to be awarded new assignments and receive

required training before beginning assignments.

BCB rationally determined that the inclusion of employee evaluation criteria based on an assessment of an officer's use of force is not subject to mandatory bargaining (*see* Administrative Code of City of NY § 12-307[a]; *Matter of Levitt v Board of Collective Bargaining of City of N.Y., Off. of Collective Bargaining*, 79 NY2d 120, 127 [1992]). BCB rationally concluded that the new evaluation procedures do not concern procedural aspects of officers' performance evaluations and do not require any participation by officers, but only alter the supervisory functions and discretion of the supervisors who perform such evaluations.

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

ENTERED: APRIL 30, 2020

CLERK

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

11437 Mario Kucher, Index 156221/16
Plaintiff-Respondent-Appellant,

-against-

Elliot Sohayegh, et al.,
Defendants-Appellants-Respondents.

_____

The Price Law Firm LLC, New York (Joshua C. Price of counsel), for appellants-respondents.

Sutton Sachs Meyer PLLC, New York (Zachary G. Meyer of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about October 9, 2019, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment dismissing the counterclaim, and denied defendants' cross motion for summary judgment dismissing the cause of action for breach of contract and on its counterclaim, unanimously modified, on the law, to grant defendants' motion as to the breach of contract cause of action, and otherwise affirmed, without costs.

The record demonstrates that plaintiff, who is not a licensed real estate broker, may not recover for breach of contract pursuant to Real Property Law § 442-d because the subject property was the dominant feature of the transaction at issue. Plaintiff failed to raise a factual issue that the "Management Fee Agreement" that provided plaintiff with a "Management Fee" of $1 million is a finder's fee or a fee for

services facilitating the purchase and sale of that property (Real Property Law § 440[1]; *Sorice v Du Bois*, 25 AD2d 521 [1st Dept 1966]). The record does not support plaintiff's claim that the compensation he seeks is for any non-brokerage, management services he rendered in connection with the transaction (*see Futersak v Perl*, 84 AD3d 1309 [2d Dept 2011], *lv denied* 18 NY3d 943 [2012]).

The court otherwise correctly denied the parties' motions.

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

ENTERED: APRIL 30, 2020

CLERK

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

11438 The People of the State of New York, Ind. 5093N/16
Respondent,

-against-

Jackson Cepeda,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Victoria Muth 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 (Michael Sonberg, J.), rendered January 24, 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: APRIL 30, 2020

CLERK

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

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

11439-
11439A Index 100835/18

Dervanna H.A. Troy-McKoy,
Plaintiff-Appellant,

-against-

Mount Sinai Beth Israel,
Defendant-Respondent.

_____

Dervanna H.A. Troy-McKoy, appellant pro se.

Rubin, Fiorella, Friedman & Mercante LLP, New York (Rebecca Rose of counsel), for respondent.

_____

Orders, Supreme Court, New York County (David B. Cohen, J.), entered March 14, 2019, which granted defendant's motion to dismiss the complaint as barred by the statute of limitations and for failure to state a cause of action and denied plaintiff's motion for a default judgment, unanimously affirmed, without costs.

Plaintiff seeks to recover damages for the destruction of his medical records in a January 31, 2015 fire at a storage facility owned by a nonparty contractor. He alleges that defendant and the FBI conspired to destroy his records so that he could not sue the FBI for allegedly poisoning him at a Manhattan gym in 2011. Plaintiff allegedly became aware of the destruction on April 21, 2017, when defendant advised him that it was unable to produce the medical records because of a fire.

This action, commenced June 22, 2018, is barred by the three-year limitations period for destruction of property claims

(*see* CPLR 214[4]). Plaintiff's claim accrued on the date of the fire, not on the date of discovery of the damage (*Verizon-New York, Inc. v Reckson Assoc. Realty Corp.*, 19 AD3d 291, 291 [1st Dept 2005]; *see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). The service of a notice of claim upon defendant in July 2017, without the commencement of an action, is of no moment.

The civil conspiracy claim fails because there is no such independent cause of action in New York, and the untimely property damage claim cannot be the predicate for a civil conspiracy claim (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 110 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

Plaintiff's motion for a default judgment was correctly denied because he failed to demonstrate that defendant or its authorized agent was served with process (*see* CPLR 311[a][1]; 318; 3215[f]). Plaintiff effected service upon a law firm that represented defendant in connection with the unfiled notice of claim. We note that the motion to dismiss, filed before plaintiff's motion, extended defendant's time to answer (*see* CPLR 320[a]; 3211[f]).

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: APRIL 30, 2020

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CLERK

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

11440-
11440A B and H Florida Notes LLC, Index 850263/13
Plaintiff-Respondent-Appellant,

-against-

Alexander Ashkenazi, et al.,
Defendants,

Amit Louzon,
Defendant-Appellant-Respondent.

_____

McLaughlin & Stern, LLP, Great Neck (John M. Brickman of counsel), for appellant-respondent.

Marc E. Scollar, Staten Island, for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered May 29, 2019, dismissing the action without prejudice, unanimously affirmed, without costs. Appeals from order, same court and Justice, entered April 17, 2019, which vacated an order entered April 9, 2019, after a nonjury trial, dismissing the action with prejudice, and dismissed the action without prejudice, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The trial court correctly determined after a nonjury trial that plaintiff failed to establish that Wells Fargo Bank, N.A., which commenced this foreclosure action and was succeeded by plaintiff, had possession of the note at the time the action was commenced (*see B & H Florida Notes LLC v Ashkenazi*, 149 AD3d 401, 402 [1st Dept 2017]). The trial evidence establishes, at most, that the note was in the possession of Grand Pacific Holdings

Corp. at that time, and there is no evidence showing that, as the complaint alleges, Grand Pacific Holdings was Wells Fargo's subservicer or that there was any other connection between the two entities (*see US Bank N.A. v Ezugwu*, 162 AD3d 613, 614 [1st Dept 2018]; *U.S. Bank N.A. v Brjimohan*, 153 AD3d 1164, 1165 [1st Dept 2017]; *Wilmington Trust Co. v Walker*, 149 AD3d 409, 410 [1st Dept 2017]).

Defendant Amit Louzon argues correctly that the court's vacatur of its April 9, 2019 order dismissing the action with prejudice and issuance of an order dismissing the action without prejudice was procedurally improper, because the substitution of "without prejudice" for "with prejudice" is a substantive revision (*see* CPLR 5019[a]; *Johnson v Societe Generale S.A.*, 94 AD3d 663, 664 [1st Dept 2012]). However, on appeal from the judgment (which brings up for review the order [CPLR 5501]), the parties dispute whether the action should be dismissed with or without prejudice, and we find that the action was correctly dismissed without prejudice, because the dismissal is based on lack of standing, not on the merits (*Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13-14 [2008]; *Wells Fargo Bank, N.A. v Ndiaye*, 146 AD3d 684 [1st Dept 2017]).

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

ENTERED: APRIL 30, 2020

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CLERK

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

11441- Index 350252/07
11442-
11443-
11443A Xiaodong Lin,
Plaintiff-Respondent,

-against-

David McGhee,
Defendant-Appellant.

_____

McLaughlin & Stern LLP, New York (Peter C. Alkalay of counsel), for appellant.

Elliott Scheinberg, New City, for respondent.

Parmet Zhou & Denney LLC, New York (Wendy J. Parmet of counsel), attorney for the child.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered on or about February 10, 2017, which, to the extent appealed from as limited by the briefs, prohibited defendant father from communicating with the parties' child except as deemed appropriate by the Wellspring Foundation (Wellspring), and required him to pay 50% of costs incurred in connection with her residential treatment at Wellspring and her education at its school (Arch Bridge), unanimously modified, on the law, to delete the provision requiring defendant to pay 50% of costs incurred at Wellspring and Arch Bridge and to remand for a hearing to determine whether such provision is warranted, and otherwise affirmed, without costs. Parental access order, same court and Justice, entered June 25, 2018, which, to the extent appealed from as limited by the briefs, limited defendant's access to the

child to visits initiated by the child in consultation with her treatment team, and ordered that such visits take place in public and under supervision by Comprehensive Family Services (CFS), prohibited defendant from initiating contact with the child and limited his responsive communications, and prohibited him from communicating with the child's Wellspring treatment team or school personnel upon her release from Wellspring, unanimously affirmed, without costs. Supervised visitation order, same court and Justice, entered June 25, 2018, which, inter alia, appointed a CFS social worker to supervise his access time with the child and ordered him to pay 100% of the CFS social worker's retainer and hourly fees, unanimously affirmed, without costs. Order, same court and Justice, entered June 25, 2018, which, to the extent appealed from as limited by the briefs, denied defendant's motion to appoint a forensic expert, unanimously affirmed, without costs.

Defendant's argument that his parental rights were effectively terminated is unavailing. The parental access order allowed him to seek review of the order starting in January 2019, allowed him to communicate with Wellspring's Children's Program Director, from whom he could obtain treatment information, allowed supervised visits with the child when she, as advised by Wellspring, wished to see him, and allowed him to respond to the child's communications.

Defendant's argument that the orders were improperly issued

without an evidentiary hearing is unavailing. The parental access order recites that it is based on, among other things, a June 19, 2018 hearing. During proceedings on that date, defendant presented his views, under oath, and was given ample time to do so. The attorney for the child (AFC) provided the court with current information based upon meetings with the child and her treatment team at Wellspring, and the AFC's report was consistent with Wellspring's recommendations in its letter to the court dated May 24, 2018, the authenticity of which defendant does not question.

Defendant alludes to cross-examinations of medical care providers that he should be allowed to conduct. He does not adequately address the fact that, pursuant to the divorce judgment, plaintiff mother, who entrusted the child to Wellspring, had the authority to do so without his consent.

Defendant's claim that plaintiff failed to fulfill her obligations as custodial parent is unsubstantiated. Plaintiff's choice of Wellspring was informed by research, and, while defendant had an opportunity to suggest alternatives, he failed to do so. Moreover, Wellspring praised plaintiff for her supportive participation in the child's treatment and her efforts to establish post-discharge supports for the child.

The court amply articulated the grounds for its decisions. It thoroughly explained its perspective, which is informed by more than a decade of presiding over this case, and the basis for

each order. Contrary to defendant's contention, the child's voice was not silenced. The court recognized during the January 25, 2017 proceedings that the AFC had not recently met with the child and, in the order entered on or about February 10, 2017, reappointed the AFC and directed her to visit Wellspring to obtain up-to-date information, which she promptly did. Defendant presents no reason to question that the AFC accurately represented the child's views to the court.

Plaintiff did not alienate the child from defendant by unilaterally placing her out of state at Wellspring. As indicated, she had the right to do so under the divorce judgment, and when she suggested Wellspring, defendant offered no alternatives.

Plaintiff concedes that the judgment and financial settlement should not have been modified to require defendant to share in the child's medical and educational expenses without a showing of changed financial circumstances (*see Lonsdale v McEwen*, 33 AD3d 225, 228 [1st Dept 2006]; *Mandell v Karr*, 7 AD3d 382 [1st Dept 2004]). Accordingly, we modify the February 10, 2017 order to delete the provision requiring defendant to pay 50% of costs incurred in connection with the child's treatment and education at Wellspring and Arch Bridge and remand for a hearing to determine whether such provision is warranted.

The court properly required defendant to pay the CFS social worker's retainer and fees. These costs were not addressed by

stipulation or judgment, and it was solely his conduct that necessitated the social worker's involvement. Nor has defendant shown that his resources are so limited that he is unable to pay these costs (*cf. Licitra v Licitra*, 232 AD2d 417 [2d Dept 1996] [court erred in directing mother to pay visitation costs, given her limited resources]).

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: APRIL 30, 2020

CLERK

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

11444N-
11444NA Adam Robinson,
Plaintiff-Respondent-Appellant,

-against-

Laura Day, et al.,
Defendants-Appellants-Respondents,

David J. DePinto, et al.,
Defendants.

Index 600907/10

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Capuder Fazio Giacoia LLP, New York (Douglas M. Capuder of counsel), for appellants-respondents.

CKR Law LLP, New York (Rosanne E. Felicello of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about January 17, 2019, which, to the extent appealed from as limited by the briefs, failed to direct The Princeton Review, Inc. (TPR), Random House, Inc., and Lowenstein Associates Inc. (the Royalty Payors) to pay defendant Laura Day, Inc. (LDI) 100% of certain royalties until plaintiff satisfies the conditions precedent of the parties' settlement agreement, failed to require that LDI approve the terms on which a related action (the TPR litigation) is resolved, and required LDI to sign the instructions to be given to the Royalty Payors, unanimously modified, on the law, to direct the Royalty Payors to pay LDI 100% of the royalties until plaintiff satisfies the conditions precedent, to delete the requirement that LDI sign the instructions, and to add the language about instructions set

forth below, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about March 7, 2019, which granted defendants Laura Day, RobinsonDay, LLC, and LDI's (the Day Parties) motion to reargue and, upon reargument, denied their motion to clarify and resettle the January order, unanimously modified, on the law, to delete the paragraphs about royalties accruing after March 6, 2018, to grant the Day Parties' motion to clarify and resettle to the extent of requiring the Royalty Payors to pay 100% of the royalties payable since March 6, 2018 to LDI until the conditions precedent are satisfied, and to extend plaintiff's deadline for providing written instructions to the Royalty Payors to 21 days after entry of this Court's decision and order, and otherwise affirmed, without costs.

The settlement agreement says, "The Royalties are owned 100% by [LDI]. LDI assigns 25% to [plaintiff] during his lifetime . . . (It is condition precedent to the assignment that LDI received general releases as set forth below, and sign off on TPR litigation as set forth below)." Reading the agreement as a whole and avoiding an interpretation that renders any portion of it meaningless (*see Beal Sav. Bank v Sommer,* 8 NY3d 318, 324-325 [2007]), we find that, contrary to plaintiff's contention that the assignment became effective upon the signing of the settlement agreement, the assignment does not become effective until the conditions precedent are satisfied.

LDI has neither received general releases nor signed off on

the TPR litigation as contemplated by the settlement agreement. Plaintiff's contention that the conditions precedent should be excused on the ground that the Day Parties prevented their satisfaction (*see Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 534 [2012]) was not raised before the motion court, and since the argument is not a purely legal one, plaintiff may not raise it for the first time on appeal.

Because the conditions precedent have neither been satisfied nor excused, LDI is currently entitled to 100% of the royalties. Thus, in the January order, the court should not have prohibited the Royalty Payors from making payments until written agreements have been signed and delivered and general releases exchanged. Nor, in the March order, should it have said that the payment of royalties accruing after March 6, 2018 depends on whether the settlement agreement was breached (*see generally Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 113 [1984]). The first "ordered and adjudged" paragraph of the January order should include the language italicized in the paragraph below:

> It [plaintiff's instructions to the Royalty Payors] shall include a statement that, *once the conditions precedent mentioned in the settlement agreement have been satisfied*, LDI assigns 25% to [plaintiff] . . .; (2) in the same written instruction, [plaintiff] shall request the Royalty Payors to pay [LDI] and him in accordance with the terms of the Agreement (75/25%) *once the conditions precedent have been satisfied*).

The Day Parties contend that LDI has the right to approve the terms of the resolution of the TPR action. However, as indicated, the settlement agreement says, "sign off on TPR

litigation *as set forth below."* The section of the agreement captioned "Katzman/TPR Action" says:

- [Plaintiff] irrevocably instructs TPR to pay pursuant to the terms of this Agreement.
- In consideration of TPR/Random House/Katzman agreement in writing to pay royalties directly to recipient in accordance with terms above and in consideration of a full general release in favor of LD [Laura Day] from TPR/Katzman/Random House, LD waives claims against them.
- [Plaintiff] shall use best efforts to cause TPR/ Katzman/Random House to execute a stipulation of discontinuance of all claims and counterclaims with prejudice and without costs.

Read as a whole, the agreement merely gives LDI the right to receive TPR/Random House/Katzman's agreement in writing to pay royalties to it in accordance with the terms of the settlement agreement, a full general release in favor of Day from TPR/Katzman/Random House, and a stipulation of discontinuance by TPR/Katzman/Random House of all claims and counterclaims with prejudice and without costs.

In the January order, the court observed that the settlement agreement does not and cannot mandate that the Royalty Payors and Katzman provide a release to LDI. However, although the Royalty Payors and Katzman are not parties to the settlement agreement, the agreement can still make "a full general release in favor of L[aura] D[ay] from TPR/Katzman/Random House" a condition precedent to LDI's assignment of 25% of the royalties to plaintiff (*see MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 643 [2009]).

Plaintiff contends that the court should not have added the condition that LDI sign the instructions to be given to the Royalty Payors. He is correct. The settlement agreement nowhere gives LDI that right (*see id.* at 645; *Lexington 360 Assoc. v First Union Natl. Bank of N. Carolina*, 234 AD2d 187, 191 [1st Dept 1996]).

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

ENTERED: APRIL 30, 2020

CLERK

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

11445N Nationstar Mortgage LLC, Index 32324/16E
Plaintiff-Appellant,

-against-

Claudette Fuller, et al.,
Defendants-Respondents,

New York State Department of Taxation
& Finance, et al.,
Defendants.

_____

Taroff & Taitz, LLP, Bohemia (Linda D. Calder of counsel), for appellant.

Michael Kennedy Karlson, New York, for respondents.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about August 27, 2018, which denied plaintiff's motion to amend the complaint, unanimously affirmed, without costs.

The court providently exercised its discretion in declining to permit plaintiff to add to its foreclosure complaint, inter alia, an equitable subrogation cause of action and a cause of action under Real Property Law § 306 (*see Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]; CPLR 3025[b]). Plaintiff failed to demonstrate that the proposed claims had some arguable merit. Having considered and rejected plaintiff's summary judgment and reargument motions, the court was well aware of the merits of the original claims and the deficiencies of the proposed new claims.

Contrary to plaintiff's contention, the proposed claim under

Real Property Law § 306 is, like the other proposed claims, dependent on the validity of Fuller's signature on the note. The recording of a forged instrument does not transform the instrument into a document with legal authority to establish a valid property interest (*Faison v Lewis*, 25 NY3d 220, 226 [2015]).

Moreover, plaintiff failed to explain its delay in moving to amend. It was aware when the action was filed that documentation of the Wells Fargo mortgage and of its satisfaction, which provided the factual predicate for the equitable subrogation claim, was missing and that the mortgage was in arrears. Moreover, defendants' answers, in which they asserted that Fuller's signature on the note was a forgery, put plaintiff on notice in May 2016 that the validity of the note and mortgage were being challenged. Yet plaintiff waited until 4½ months after filing the note of issue, on January 23, 2018, to seek amendment.

It also appears that defendants were prejudiced by being confronted with new claims after plaintiff had stated that the

case was ready for trial. Moreover, they assert that potential witnesses to fraud by plaintiff's predecessors are no longer available or cannot be located at this time.

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: APRIL 30, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Barbara R. Kapnick
Angela M. Mazzarelli
Troy K. Webber, JJ.

Ind. 7466/98
10764

_____x

The People of the State of New York,
Respondent,

-against-

Gustavo Lantigua,
Defendant-Appellant.
_____x

Defendant appeals from an order of the Supreme Court, New York County (Gilbert C. Hong, J.), entered on or about March 27, 2017, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered November 5, 1998.

The Law Office of Andrew L. Friedman, New York (Andrew L. Friedman of counsel), for appellant.

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

RENWICK, J.P.

This appeal involves a summary denial, without a hearing, of a postjudgment, CPL 440.10 motion claiming ineffective assistance of counsel regarding a guilty plea that subjected defendant to mandatory deportation. We find that the trial court improperly denied the motion without a hearing pursuant to CPL 440.30(4)(d)(i) & (ii). This section permits a court to reach the merits of a postjudgment motion without a hearing to dismiss frivolous claims (*see People v MacKenzie*, 224 AD2d 173 [1st Dept 1996]). In the case at bar, however, as the dissent concedes, there is independent support for defendant's assertion that his plea was induced by erroneous advice given by his trial counsel, namely that his felony guilty plea would not subject defendant to mandatory deportation. Nevertheless, the dissent argues that summary denial of the CPL 440.10 motion is still proper, because defendant's allegations did not raise a reasonable possibility that he was prejudiced by the misadvice. We disagree. Like the court below, the dissent applies the wrong prejudice standard, by focusing exclusively on defendant's alleged lack of a viable defense and the likelihood he would have been convicted after trial, and disregards the particular circumstances of defendant's desire to remain in the United States. The dissent's reasoning is contradicted by the recent United States Supreme Court holding

in *Lee v United States* (582 US __, 137 S Ct 1958, 1966 [2017]), which rejects any per se rule that prevents a defendant from establishing prejudice by an attorney's erroneous advice simply because the defendant may not have a strong defense. Instead, as *Lee v United States* mandates, even if the chance of success at trial is low, the prejudice inquiry should focus on the defendant's decision-making and whether it was reasonable for one in defendant's position, facing mandatory deportation, to choose to take a shot a trial.

Factual and Procedural Background

Defendant was arrested on August 4, 1998, and was charged with one count of criminal possession of a controlled substance in the third degree, a class B felony. The charge stemmed from a police officer's allegations that prior to defendant's arrest, the officer had observed several unapprehended individuals, each separately approaching defendant and handing him what appeared to be money. On each occasion, defendant and the unapprehended individual would enter a building. A few minutes later, defendant and the unapprehended individual would exit the building, with defendant then remaining outside the building and the unapprehended individual leaving the location. Eventually, the police officer apprehended defendant inside the building and recovered a tin of cocaine from defendant's person. A grand jury

indicted defendant on September 25, 1998. After arraignment on the same day, defendant pleaded guilty to the charge of attempted criminal possession of a controlled substance in the third degree, a class C felony. On November 5, 1998, defendant received the promised sentence of five years probation. The plea to a class C drug felony subjected defendant to mandatory deportation (*see Padilla v Kentucky*, 559 US 356, 367-369 [2010], citing 8 USC § 1227[a][2][B][i]; *see also People v McDonald*, 1 NY3d 109, 113-115 [2003]; *People v Mebuin*, 158 AD3d 121, 126 [1st Dept 2017]; *People v Doumbia*, 153 AD3d 1139, 1140 [1st Dept 2017]).

On August 15, 2016, defendant moved in Supreme Court, New York County, to vacate the 1998 judgment of conviction pursuant to CPL 440.10, claiming a violation of the right to effective assistance of counsel as guaranteed by the United States and New York Constitutions (US Const Amend VI; NY Const art I, § 6). The crux of defendant's claim was that his trial counsel affirmatively misrepresented to him that there were no deportation consequences to his felony guilty plea and, in fact, advised him that he would not be deported if he pleaded guilty. Defendant supported his claim by, among other things, an unsworn but signed letter by his trial counsel, who admitted that, at the time of defendant's plea, he did not believe that a non-

incarceratory sentence would trigger negative immigration consequences because a defendant would not be transferred to immigration custody at the conclusion of a defendant's sentence. Counsel added that at times he would proffer this advice to a defendant or refer a defendant to an immigration attorney. In support of his motion, defendant also included a copy of the transcript of the 1998 plea proceedings, which contained no advice by either defense counsel or the judge about the immigration consequences of the plea.

Finally, in support of his motion, defendant submitted a personal affidavit in which he asserted: At the time of his arrest, he was particularly concerned with the immigration consequences of the arrest; he made sure to ask his attorney about them; and, counsel told him that his guilty plea would not trigger any adverse immigration consequences. Further, defendant asserted that he pleaded guilty under the mistaken belief that, in the future, he would be eligible to become a lawful permanent resident of the United States. Defendant explained: "If my attorney had properly advised me concerning the definite nature of severe immigration consequences and the absence of any immigration discretion to allow me to legalize my status in the United States, I would not have pleaded guilty but instead would have proceeded to trial so that I could remain with [my] family."

Defendant explained that his decision to go to trial in the face of permanent ineligibility for legalization of his immigration status would have been buttressed by the following facts:

> "I faced only a limited period of incarceration if [defense counsel] lost at trial and I consequently would not have been intimidated in challenging the People's case. Prior to pleading guilty, my attorney explained to me that I would receive a sentence of either 1-3 or 2-6 years of incarceration for a first offense if I lost at trial. I ultimately decided to plead guilty because I did not want to be separated from my family for any length of time. However, if I was aware that my plea of guilty would inevitably ban me from ever securing legal status in this country, I would have fought to insure family unity and remain in the United States, especially since I only risked a relatively limited period of incarceration after trial. . . . At the time of my plea, my entire immediate family resided lawfully in the United States. Certainly, the presence of my family in the United States would have inspired me to fight my criminal case and prevent my inevitable permanent banishment from the United States and permanent ineligibility for legalization of status if I was properly informed of the severe immigration consequences surrounding my guilty plea."

Supreme Court summarily denied the motion without an evidentiary hearing, pursuant to CPL 440.30(4)(d), on the ground that defendant submitted unsupported allegations. Specifically, the court found that defendant's affidavit "provide[d] little or no objective, identifiable facts upon which [the] court [could] rely to find that [his counsel] affirmatively gave the defendant bad advice, or how [defendant] was prejudiced by that advice." The court noted that the letter from his counsel was not a sworn

statement and did "not definitively state how [he] counseled this defendant." Additionally, the court concluded, "even if all statements regarding what advice was provided to the defendant are taken as facts, it is not clear that defendant would have been in any better position had he not relied on it." In that regard, the court noted that defendant had failed to "set forth any basis of a defense" or "mention what trial strategy he believe[d] could have successfully overcome the case against him" and had not asserted "any grounds to suppress any testimony or evidence against him." The court continued: "Instead, [defendant] relie[d] on general personal reasons why he would not have pled guilty to the instant charge since essentially, he had nothing to lose." A justice of this Court granted defendant leave to appeal. We now reverse.

Discussion

A defendant has the right to the effective assistance of counsel before deciding whether to plead guilty (see US Const amend VI; NY Const, art I, § 6; *Padilla v Kentucky*, 559 US at 364). In *Padilla*, the United States Supreme Court held that constitutionally effective assistance of counsel requires defense counsel to advise a defendant whether a plea carries the risk of deportation (*id.* at 367-369; *see People v Haffiz*, 19 NY3d 883, 884 [2012]). Whether a defendant is entitled to relief on his

claim will depend upon whether he can satisfy the prejudice prong of the *Strickland v Washington* test (466 US 668 [1984]; see *Padilla*, 559 US at 369; *People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied* 572 US 1070 [2014]). In the context of a guilty plea, a defendant must show that there was a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial (*Lafler v Cooper*, 566 US 156, 163 [2012]; *Hill v Lockhart*, 474 US 52, 59 [1985]; *People v McDonald*, 1 NY3d at 113-114).

Unlike the dissent, we find that the trial court erred in failing to conduct a hearing on defendant's motion. As indicated, the court relied on CPL 440.30(4)(d) in summarily denying defendant's postjudgment motion. That subsection permits denial of a CPL 440.10 motion without a hearing where "[a]n allegation of fact essential to support the motion . . . is made solely by the defendant and is unsupported by any other affidavit or evidence, and . . . under these and all other circumstances attending the case, there is no reasonable possibility that such allegation is true" (CPL 440.30(4)(d)(i) & (ii)). "This provision, which permits a trial court to reach the merits of a post-judgment motion without a hearing, is designed to weed out manufactured claims premised on nothing more than a defendant's self-serving affidavit" (*People v MacKenzie*, 224 AD2d at 173).

But that is not the situation here.

First, as the dissent concedes, the trial court erred in finding that there is no reasonable possibility that defendant's allegations of misadvice -- that counsel misadvised him about the immigration consequences of his plea -- are true. Defendant asserted that counsel misadvised him, and counsel's letter articulated that this was not only possible but probable. That the letter was not sworn is of no moment because we do not "always require [] an attorney affidavit on a motion under CPL 440.10" (*People v Mebuin*, 158 AD3d at 127 [The absence of an affidavit by counsel does not support the summary denial of the defendant's CPL 440.10 motion]). In the letter, counsel admitted that, at the time of the plea, he had a misconception about immigration consequences in a case like defendant's. Counsel further admitted that when a defendant inquired, he would either refer the defendant to an immigration lawyer, or convey the inaccurate information he possessed at the time to his client. Under these circumstances, we cannot say that there is no reasonable possibility that counsel misadvised defendant.

Second, we find that defendant's allegations are sufficient to warrant a hearing as to whether defendant was prejudiced by the attorney's misadvice. Initially, we reject the trial court's argument, adopted by the dissent, that there is no reasonable

possibility that defendant's allegation is true, that he would not have pleaded guilty had he been aware that his plea subjected him to mandatory deportation. To reach its conclusion, the dissent relies entirely on the supposition that the People's case was strong and defendant had not demonstrated a viable defense. Specifically, the dissent points out:

> "[D]efendant . . . relies on general personal reasons why he would not have pled guilty to the instant charge since essentially, he had nothing to lose . . . [D]efendant failed to set forth any basis of a defense or mention of what trial strategy he believed could have successfully overcome the case against him. . . . The record indicates that the cause against defendant was straightforward. . . . Consistent with his actual plea of guilty, defendant pointed to no reason for him to have believed he would not be found guilty. As noted by the motion court, defendant did not allege a defense he could have employed at a trial nor did he assert any grounds to suppress any testimony or evidence against him."

Insofar as the dissent, like the court below, refers to the strength of the People's case to suggest that a conviction was inevitable and therefore no prejudice existed, the dissent misconstrues the focus of the prejudice inquiry in cases involving guilty pleas. The dissent assumes that the likelihood of success at trial is the determinative factor for all defendants. However, the United States Supreme Court in *Lee v United States* (137 S Ct at 1958) expressly rejected any categorical rule whereby the prosecution could negate a

defendant's prejudice claim by pointing out that a defendant had no viable trial defense or that the government had a particularly strong case against a defendant.

In doing so, the Supreme Court in *Lee v United States* drew an important distinction between ineffective assistance that occurs during a trial and ineffective assistance that occurs during plea negotiations (*Lee*, at 1964-1965). A claim of ineffective assistance of counsel will often involve a claim of attorney error "during the course of a legal proceeding," for example, that counsel failed to raise an objection at trial or failed to present an argument on appeal (*id.* at 1964 [internal quotation marks omitted], citing *Roe v Flores-Ortega*, 528 US 470, 481 [2000]). A defendant raising such a claim can demonstrate prejudice by showing "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'" (*Flores-Ortega*, 528 US at 482, quoting Strickland, 466 US at 694).

In contrast, a claim of ineffective assistance of counsel in plea negotiations, *Lee v United States* explained, amounts to an averment that counsel's "'deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself'" (*Lee*, 137 S Ct at 1965, quoting *Flores-Ortega*, 528 US at 483). When a defendant alleges

that his counsel's deficient performance led him to accept a guilty plea rather than go to trial, a court does not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain (*id.*). "That is because, while we ordinarily apply a strong presumption of reliability to judicial proceedings, a court 'cannot accord' any such presumption to judicial proceedings that never took place" (*Lee* at 1965, quoting *Flores-Ortega*, 528 US at 482-483). A court should instead consider whether a defendant would not have pleaded guilty if he had been correctly advised of the deportation consequences of the plea. Thus, the focus remains on the defendant's decision-making, which necessarily requires a full development of all the pertinent facts (*Lee*, at 1965-1967 [prejudice inquiry "demands a 'case-by-case examination' of the totality of the evidence"], quoting *Williams v Taylor*, 529 US 362, 391 [2000]; *see also People v Gaston*, 163 AD3d 442 [1st Dept 2018]; *People v Samuels*, 143 AD3d 401 [1st Dept 2016] [credibility of the defendant's *Padilla* and *McDonald* claims should be determined only after a hearing]; *People v Picca*, 97 AD3d 170 [2nd Dept 2012] [same]).

Of course, *Lee v United States* did not hold that the likelihood of conviction at trial is irrelevant to prejudice. On the contrary, the Supreme Court specifically held that a

defendant's trial prospects must be considered as part of the totality of the evidence regarding the decision to accept a guilty plea (*Lee*, at 1966-1967). More importantly, because *Lee* operates under the reasonable assumption that for some defendants deportation could be functionally as severe as imprisonment, an ineffective assistance of counsel claim regarding a plea may succeed even where the likely outcome of a favorable trial is slim to none (*Lee v United States*, 137 S Ct at 1966-1967 ["[When] the respective consequences of a conviction after trial and by plea . . . are . . . similarly dire, even the smallest chance of success at trial may look attractive"]).

Ultimately, what the dissent overlooks is that the prejudice standard "does not require a defendant to show that going to trial would have been the best objective strategy or even an attractive option" (*United States v Swaby*, 855 F3d 233, 243-244 [4th Cir 2017]). "It merely requires the defendant to show a reasonable likelihood that a person in the defendant's shoes would have chosen to go to trial. The decision does not need to be optimal and does not need to ensure acquittal; it only needs to be rational" (*id.* at 244).

Applying the mandates of *Lee v United States* to the instant claim of prejudice, defendant's allegations are more than minimally sufficient to warrant an evidentiary hearing. In his

affidavit in support of the postjudgment motion, defendant stated that had counsel properly advised him concerning the mandatory consequences of the plea, he would not have pleaded guilty but instead would have proceeded to trial.[1] Defendant explained with sufficient evidentiary detail why avoiding deportation was important to him: His desire to remain with his immediate family required him to remain in the United States. Further, the unique plea calculus for defendant included his understanding that if convicted at trial, he most likely faced a relatively short period of incarceration as a first felony offender. In light of these circumstances, there is a question of fact as to whether it is reasonably probable that had counsel properly advised him, defendant would not have pleaded guilty and instead would have gone to trial (*see People v Abdallah*, 153 AD3d 1424 [2d Dept 2017]; *People v Roberts*, 143 AD3d 843 [2d Dept 2016]).

To be sure, I do recognize that factors such as the length of time defendant had been present in this country and his ties to his country of origin, which are absent from the record, are important to evaluating whether there is a reasonable probability

[1]The dissent characterizes the statements contained in defendant's affidavit as "self-serving," a characterization that adds nothing to the analysis of whether he was entitled to a hearing on his CPL 440.10 motion, claiming ineffective assistance of counsel; any affidavit a party submits in support of his or her position can be so characterized.

that defendant was prejudiced by the misadvice (*see People v Alvarracin*, 148 AD3d 1041, 1042 [2d Dept 2017], *lv denied* 29 NY3d 1075 [2017]). However, the question now is whether defendant has made sufficient allegations to warrant an evidentiary hearing, not whether defendant has satisfied his burden of proof (*see People v Mebuin*, 158 AD3d at 121; *People v Samuels*, 143 AD3d at 401; *People v Picca*, 97 AD3d at 170).

Still, the dissent speculates "[t]hat defendant would have risked years in prison as opposed to accepting a probationary sentence is all the more unlikely given that defendant was not deported in the 18 years between his [guilty plea] and his motion to vacate [his] conviction." Again, what the dissent overlooks is that the appropriate inquiry on the issue of prejudice is limited to the defendant's circumstances as they were at the time of entry of the guilty plea (*see Roe v Florez-Ortega*, 528 US at 480). Thus, that defendant was not deported in the 18 years between his guilty plea and his motion to vacate his conviction is of no moment, since such future event played no part in defendant deciding whether to plead guilty years earlier (*see People v Martinez*, 180 AD3d 190 [1st Dept 2020] [trial court improperly found lack of prejudice based on the defendant's explanation on what motivated him to find out about the immigration consequences of his guilty plea, because the

appropriate inquiry on the issue of prejudice should have been limited to his circumstances as they were at the time of the guilty plea]).

In sum, under the particular circumstances here, a proper determination of the CPL 440.10 motion to vacate the judgment called for factual findings as to whether the alleged misadvice was indeed given and whether it is reasonably probable that had counsel properly advised him, defendant would not have pleaded guilty and instead would have gone to trial. In as much as those essential facts were in dispute, the CPL 440.10 motion was not susceptible to a decision without first conducting a hearing (*Lee v United States*, 137 S Ct at 1966-1967; *see People v Mebuin*, 158 AD3d at 121; *People v Samuels*, 143 AD3d at 401; *People v Picca*, 97 AD3d at 170).

Accordingly, the order of the Supreme Court, New York County (Gilbert C. Hong, J.), entered on or about March 27, 2017, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered November 5, 1998, should be reversed, on the law, and the matter remanded for a hearing on defendant's claim of ineffective assistance of counsel and prejudice by such misadvice, and for a decision de novo on the motion.

All concur except Webber, J. who dissents in an Opinion.

WEBBER, J.(dissenting)

I would affirm Supreme Court's denial of defendant's CPL 440.10 motion to vacate his 1998 judgment of conviction.

Some 18 years after his conviction by plea to attempted criminal possession of a controlled substance in the third degree, defendant moves pursuant to CPL 440.10 to vacate the plea. Defendant now claims that his attorney rendered ineffective assistance of counsel because the attorney affirmatively misadvised him that his guilty plea would not trigger adverse immigration consequences. Defendant argues that the attorney's representation "fell far below an objective standard of reasonableness" and that, but for the misadvice, he would have proceeded to trial on the drug possession charge.

In support of his motion, defendant submitted a self-serving personal affidavit in which he asserted that at the time of his arrest, he was particularly concerned with the immigration consequences of the arrest, that he made sure to ask his attorney about the immigration consequences, and that his attorney told him that his guilty plea would not trigger any adverse immigration consequences. According to the affidavit, defendant pled guilty under the mistaken belief that, in the future, he would be eligible to become a lawful permanent resident of the United States. Defendant asserted that his attorney told him

that a conviction after trial would likely have resulted in a prison sentence of one to three years, the minimum legal sentence, or perhaps two to six years. In his affidavit, defendant repeatedly stated that he would not have pled guilty had he known that doing so would result in his being automatically deported and permanently separated from his entire immediate family.

Defendant asserted that he did not learn until "years later," when he consulted an immigration attorney, that his attorney had misinformed him and that his conviction "subjected me to deportation" and barred him from ever obtaining lawful permanent residence status. Defendant does not state why he waited 18 years to move to vacate his plea. He does not state exactly when he learned of the misinformation, and/or what prompted him to consult with an immigration attorney.

Annexed to defendant's motion was an unsworn, May 2016 letter from defendant's attorney to the court. In the letter, the attorney stated that he had "been made aware" that he represented defendant in the instant case, however, he did not remember having any "immigration discussions" with defendant, and "certainly [could] not confirm" the allegations in defendant's postjudgment motion. The attorney stated that, in 1998, he "did not believe that a non-incarceration sentence would trigger

negative immigration consequences because [a] defendant would not be automatically transferred to immigration custody at the conclusion of his sentence." Rather, he "believed that a defendant sentenced to incarceration would suffer immigration consequences because immigration could easily pick him up from his penal institution at the conclusion of his sentence." The attorney further stated: "[t]here were times when criminal defendants would inquire about immigration consequences and I either referred them to an immigration attorney or reiterated what little knowledge I had at the time."

There is no dispute that as *Padilla v Kentucky* (559 US 356 [2010]), was not retroactive to cases prior to 2010 (*see Chaidez v United States* (568 US 342 [2013]), when defendant pled guilty in 1998, his attorney was not obligated to inform him that the plea might have adverse immigration consequences. Thus, to prevail on an ineffective assistance of counsel claim based on his attorney's advice regarding such consequences, defendant must show (1) that his attorney made an affirmative misstatement regarding the immigration consequences of defendant's plea and (2) that there was a reasonable probability that defendant would not have pleaded guilty but for that misadvice (*see People v McDonald*, 1 NY3d 109, 114-115 [2003]). In my opinion, defendant failed to make such a showing.

While I agree with the majority that it cannot be fairly concluded that "there is no reasonable possibility" that defendant's attorney misadvised defendant, I do not agree that defendant made a sufficient showing that he would not have pled guilty if accurately informed of the immigration consequences.

This Court has consistently held that a defendant's motion papers must sufficiently allege that his attorney's performance fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance (*People v Mebuin*, 158 AD3d 121 [1st Dept 2017] [the defendant sufficiently alleged that he was prejudiced by counsel's incorrect advice, his allegations were corroborated by other parts of record]; *People v Samuels*, 143 AD3d 401 [1st Dept 2016] [the motion court erred in finding that the defendant's claim was not "credible," given the length of time the defendant resided legally in the United States, and the other factors raised in his motion papers]; *People v Rosario*, 132 AD3d 454 [1st Dept 2015] [the defendant made a sufficient showing to warrant a hearing; his claim was corroborated by the plea and sentencing minutes, including the attorney's statements to the court]).

Contrary to the majority's arguments, the Supreme Court's analysis in *Lee v United States* (582 US __, 137 S Ct 1958, 1966 [2017]) does not support a different result. In *Lee*, the Court

found that the defendant demonstrated a reasonable probability that he would not have pled guilty if he had known that it would lead to mandatory deportation. Specifically, the Court held that Lee had provided "substantial and uncontroverted evidence" (*id.* at 1969) establishing that he would not have accepted a plea had he known it would lead to deportation. Lee asserted that "[he] had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents" (*id.* at 1968). The Court further noted that both Lee and his attorney testified that "deportation was the determinative issue" to Lee; his responses during his plea colloquy confirmed the importance he placed on deportation; and he had strong connections to the United States, while he had no ties to South Korea (*id.* at 1963 [internal quotation marks omitted]).

Here, defendant has made no such showing. Rather, he relies on general personal reasons why he would not have pled guilty to the instant charge since essentially, he had nothing to lose.

Further, defendant failed to set forth any basis of a defense or mention of what trial strategy he believed could have successfully overcome the case against him (*see People v McDonald*, 296 AD2d 13, 20 [3d Dept 2002], *affd* 1 NY3d 109

[2003]). The record indicates that the case against defendant was straightforward. Defendant was observed engaging in three separate drug sales and was found in possession of cocaine. Consistent with his actual guilty plea, defendant pointed to no reason for him to have believed he would not be found guilty. As noted by the motion court, defendant did not allege a defense he could have employed at a trial nor did he assert any grounds to suppress any testimony or evidence against him.

The majority states that "even if the chance of success at trial is low, the prejudice inquiry should focus on the defendant's decision-making and whether it was reasonable for one in defendant's position, facing mandatory deportation, to choose to take a shot at trial." The majority concedes however, that the chance of success at trial is a determinating factor. Here, defendant failed to show that given the evidence of his commission of the crime charged, there was a reasonable likelihood that he would have proceeded to trial; that a trial would have been optimal or strategically plausible or even that it would have been rational to do so (*see United States v Swaby*, 855 F3d 233, 243 [4th Cir 2017]). That defendant would have risked years in prison as opposed to accepting a probationary sentence is all the more unlikely given that defendant was not deported in the 18 years between his plea of guilty and his

motion to vacate the judgment of conviction.

Order, Supreme Court, New York County (Gilbert C. Hong, J.), entered on or about March 27, 2017, reversed, on the law, and the matter remanded for a hearing on defendant's claim of ineffective assistance of counsel and prejudice by such misadvice, and for a decision de novo on the motion.

Opinion by Renwick, J.P. All concur except Webber, J. who dissents in an Opinion.

Renwick, J.P., Mazzarelli, Kapnick, Webber, JJ.

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

ENTERED: APRIL 30, 2020

CLERK