SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 11, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15817 Estate of Helen Del Terzo, et al., Index 154950/12
Plaintiffs-Respondents-Appellants,

-against-

33 Fifth Avenue Owners Corp.,
Defendant-Appellant-Respondent.

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Cantor, Epstein & Mazzola, LLP, New York (Bryan J. Mazzola of counsel), for appellant-respondent.

Smith, Buss & Jacobs, LLP, Yonkers (John J. Malley of counsel), for respondents-appellants.

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Order and judgment (one paper), Supreme Court, New York County (Ellen M. Coin, J.), entered January 13, 2015, declaring that defendant's denial of plaintiffs' application to transfer shares allocated to a cooperative apartment and the proprietary lease appurtenant thereto from plaintiff Estate of Helen Del Terzo, to plaintiffs Michael Del Terzo and Julius Robert Del Terzo, constituted a breach of the lease, directing defendant to consent to the transfer, and awarding plaintiffs costs, and which brings up for review an order, same court and Justice, entered on

or about September 30, 2014, which granted plaintiffs' motion for summary judgment on the first three causes of action, denied their motion for summary judgment on the fourth cause of action, and denied defendant's motion for summary judgment, modified, on the law, to the extent of granting plaintiffs summary judgment on the fourth cause of action for attorneys' fees, and remanding the matter for a hearing with respect thereto, and otherwise affirmed, without costs.

The central issue in this appeal is whether defendant, a residential cooperative corporation, violated the proprietary lease by unreasonably withholding its consent to an assignment of the lease and shares to a member of a lessee's family. We agree with the motion court that defendant violated the proprietary lease.

The Del Terzo family resided in apartments 5C and/or 5D since 1955, before plaintiffs Michael Del Terzo (Michael) and Julius Robert Del Terzo (Robert), were born. In 1986, shortly after the building was converted to cooperative ownership, Michael and Robert's parents bought the apartments, becoming shareholders and proprietary lessees. The apartments had, by then, been combined into one apartment. Both sons lived in the apartment throughout their childhood and as young adults. Their

father predeceased their mother, Helen Del Terzo, who continued to live in the apartment until her death in 2010. Robert moved back into the apartment, with his own family, in 2004, and still lives there with his wife and his cousin, who is Helen's adult nephew. Michael, now married with an adult child, lives in Lancaster, Pennsylvania, where he has an established medical practice. He does not intend to move to New York at the present time, but still visits his brother.

Following Helen's death, Michael and Robert inherited the shares appurtenant to the apartment. The estate has been paying the expenses of the apartment, including the maintenance charges. There are no maintenance arrears, nor have there been any documented complaints about any members of the Del Terzo family.

In 2011, Michael and Robert filed a joint application to have the apartment (shares and proprietary lease) transferred to them, but their application was denied. In its letter of rejection, the board noted the Del Terzos' "long history with the building" and "their special circumstances," but provided Robert with six months in which to vacate the premises. Although the letter does not give a reason for the board's denial of their application, the treasurer of the board of directors was deposed and articulated several reasons.

The board believed that only Michael met the requirement of financial responsibility. Since the application was on behalf of two separate families, their children (three total), and one nephew, defendant believed occupancy would exceed the number of couples who are permitted to live in a single apartment at any one time, without board consent, even though Michael did not intend to live in the apartment. Finally, the board disfavors nonprimary occupants as lessees and since Michael does not intend to presently live in the apartment as his primary residence, this would make the apartment his pied-à-terre.

As an initial matter, we reject defendant's argument that the four-month statute of limitations applies. Defendant waived that defense by failing to raise it in its answer or in a preanswer motion to dismiss the complaint (*see* CPLR 3211[e]; *Marine Midland Bank v Worldwide Indus. Corp.*, 307 AD2d 221, 222 [1st Dept 2003]). In any event, this is an action for breach of a proprietary lease; it was timely commenced within six years of defendant's denial of Michael and Robert's application for transfer of the apartment from their mother's estate.

The parties' substantive dispute is controlled by the terms of paragraph 16 of the proprietary lease. Paragraph 16 applies to assignments and transfers. In general, and in the absence of

illegal discrimination, a cooperative corporation is not restricted in withholding its consent to the transfer to an apartment (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 48, 50 [1st Dept 2012]). This common-law right is also embodied in paragraph 16(c) of the proprietary lease. At bar, however, there is another express contractual provision extending more favorable rights to a family member of a deceased lessee's proprietary lease. Paragraph 16(b) provides that "consent shall not be unreasonably withheld to an assignment of the lease and shares to a financially responsible member of the Lessee's family." Clearly this provision was included to more easily allow an existing coop owner to devise or gift his or her cooperative apartment dynastically. Although defendant contends that its decision to deny the transfer is protected by the business judgment rule, we disagree. The business judgment rule generally insulates a board from attacks on its decisions, provided the board "act[ed] for the purposes of the cooperative, within the scope of its authority and in good faith" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). At bar, however, paragraph 16(b) imposes a heightened standard of reasonableness on the board, and the motion court correctly held that defendant did not satisfy that standard.

Although defendant denies that Robert can afford the maintenance, Michael and Robert, as co-lessees, are jointly and severally liable for any financial obligations pertaining to the apartment. Michael offered to personally guarantee, in writing, payment of those obligations, stating he would be "pleased to sign any further guarantees the board might request." Thus, even affording deference to defendant's assessment of Robert's financial circumstances, Michael is "a financially responsible member" of the decedent's family and there is little financial risk to the coop community as a whole in agreeing to the transfer given his proffered assurances. Certainly, a prospective shareholder's finances are a legitimate area of concern in a coop. In fact, the proprietary lease makes financial responsibility an express condition of obtaining consent to an intrafamily transfer. However, defendant's reliance on Robert's financial qualifications alone as a reason to deny the transfer application is misplaced. By failing to consider the joint application as a whole, refusing to consider Michael's offer to provide further guarantee of payment, and requiring that each coapplicant be individually financially qualified to meet the carrying expenses of the apartment, even though Michael, alone, can easily afford them, defendant unreasonably withheld its

consent to the transfer (*see Stowe v 19 E. 88th St.*, 257 AD2d 355, 356-357 [1st Dept 1999]).

Defendant's concerns about the likelihood of an overcrowded apartment are completely speculative and do not form a "reasonable" basis for defendant to deny plaintiffs' application for a transfer of the decedent's shares (*cf. Leonard v Kanner*, 239 AD2d 153 [1st Dept 1997] [approval of UCC foreclosure sale reasonably withheld], *lv denied* 91 NY2d 805 [1998]). In fact, the concern of overcrowding is completely inconsistent with the board's separate concern that Michael will not be living in the apartment full time. This incongruity highlights the speculative, if not specious nature, of the board's reason for withholding its consent. In any event, if at some future time it actually happens that the apartment is overcrowded, the board can pursue whatever remedies it has. The board's preference for owner occupancy is not implicated by Michael's disclosure that he will not be living in the apartment, because Robert, the co-owner will be living in it, thereby serving the board's goal of owner occupancy.

The dissent places emphasis on paragraph 16(b)'s reference to the benefit belonging to "a" family member, noting that here more than one family member applied for the transfer of the

deceased lessee's rights. Paragraph 16(b), however, does not limit the application to "only one" family member and there is no prohibition in the lease against a "Lessee" being more than one person. The only requirement is that in a situation where there are co-lessees, they agree to be held jointly and severally liable for any obligations under the lease. While the dissent correctly points out that paragraph 14 of the lease does restrict occupancy to no more than one married couple, unless board approval is obtained, there was no basis for the board to conclude that this lease provision would be violated in the foreseeable future. The board was advised that the occupants of the apartment would be the status quo, meaning Robert, his wife, and Robert's cousin (Helen's nephew). Michael will only be staying at the apartment occasionally when he visits New York.

The court erred in denying plaintiffs' claim for attorneys' fees and costs. Where, as here, a residential lease provides that the landlord may recover legal fees incurred in an action resulting from the tenant's failure to perform a covenant in the lease, Real Property Law § 234 provides the tenant with an

implied reciprocal right to recover attorneys' fees "incurred . . . as the result of the failure of the landlord to perform any covenant or agreement ... under the lease."

All concur except Friedman, J.P. and Saxe, J. who dissent in a memorandum by Saxe, J. as follows:

SAXE, J. (dissenting)

The decision of defendant cooperative corporation 33 Fifth Avenue Owners Corp. (the Coop) to withhold its consent to the transfer of the decedent's shares and proprietary lease to both of her adult sons was not unreasonable. The proprietary lease at issue here does not absolutely require that in the event of a cooperator's death, the Coop permit the assignment of the cooperator's shares and lease to all applying family members, as long as one of them is financially responsible. Rather, the proprietary lease imposes on the Coop only the obligation that "consent shall not be unreasonably withheld to an assignment of the lease and shares to a financially responsible member of the Lessee's family." Because the Coop's decision was not unreasonable, I would reverse the grant of plaintiffs' motion for summary judgment, and would instead grant defendant's motion for summary judgment dismissing the complaint.

Facts

Plaintiffs' decedent, Helen Del Terzo, began residing at 33 Fifth Avenue, apartment 5C, with her husband, Robert Del Terzo, Sr., in 1955; in 1965, they began renting apartment 5D as well. In late 1985, the building was converted to cooperative ownership, and the couple obtained the appurtenant shares and

proprietary lease for the combined apartment in 1986. Helen died on November 17, 2010, having been predeceased by her husband. At the time of Helen's death, she resided in the apartment with her son Robert, Robert's wife and their two sons, and her nephew Gregory Donio, all of whom continued to reside there after her death.

In November 2011, Helen's two adult sons, plaintiffs Michael Del Terzo and Julius Robert Del Terzo (Robert), applied for the transfer of the apartment to them jointly. The application identified a total of eight proposed occupants: Michael, Robert, their wives and children, and their cousin. However, the employment, educational, and financial information in the application concerned only Michael, although Michael and his family were not going to primarily reside there; the application stated that Michael's family would reside there two to eight days per month. Michael is a urologist with a practice in Pennsylvania, where he resides with his family. His income is approximately $500,000 per year, he has assets valued at $6,427,901, and a net worth of $5,890,115.

The Coop informed plaintiffs that it required Robert's financial information as well, and plaintiffs' follow-up application informed the Coop that Robert had $1,787 in cash and

an annual income of approximately $48,000 -- less than his annual expenses of about $76,000 -- with the remainder of his assets consisting of his half share of the apartment itself, valued at $945,000, and the remainder of his mother's estate, valued at $595,787. The application acknowledged that Robert "has not had meaningful earned income in recent years" and that his finances alone "would not appear to support the retention of the apartments," but emphasized that his mother's trust assets had supported his family's living expenses, and that those assets remain available to them. Additionally, from the documentation Robert provided, the Coop learned that the address Robert and his wife used for purposes of filing federal tax returns was in Las Vegas, Nevada, a piece of information that called into question the bona fides of Robert's proposed tenancy.

The Coop unanimously denied plaintiffs' application, and directed plaintiffs to vacate the apartment within six months. Helen's estate, along with Michael and Robert individually, then commenced this action.

The majority agrees with the motion court that the Coop's rejection of plaintiffs' application was unreasonable as a matter of law, since one of the two applicants was financially responsible, and, implicitly, since the lease's prohibition

against two or more families residing in one apartment is immaterial where that apartment is made up of two combined apartments. I disagree.

Paragraph 16(b) of the proprietary lease provides that consent to an assignment "to *a* financially responsible member of the Lessee's family," "shall not be *unreasonably* withheld" (emphasis added). Importantly, the lease also prohibits more than one married couple from occupying the apartment without written consent.

The consent sought here was not for *a* "financially responsible" family member. It was for *two* adult family members, each of whom has his own family, but only one of whom the corporation considered to be financially responsible -- and the intended present occupant was *not* the financially responsible family member. Moreover, the joint application sought approval for the possible future occupancy by both families. Thus, the Coop was being asked to do several things it had valid reasons to reject: one, to give present possession of the apartment to a family that lacked the requisite financial responsibility; two, to approve part ownership of the apartment by an individual who would not be residing there; and three, to authorize possible future shared possession by two families of what is now a single

apartment -- a single unit covered by a single lease.

It was certainly reasonable for the Coop to decline to give part ownership and possession of the apartment to a family lacking the financial ability to maintain it; that was the basis for the refusal to consent to a family member's taking over possession of the apartment at issue in *Gleckel v 49 W. 12 Tenants Corp.* (52 AD3d 469 [2d Dept 2008]). Nor is that problem resolved by the joint ownership arrangement plaintiffs propose; rather, joint ownership in the manner proposed could create more potential complications.

Indeed, the reasonableness of the Coop's concerns about the proposed joint ownership arrangement is illustrated by the conflict between the two brothers' views or assumptions regarding future possession of the apartment. While the complaint asserts that when Michael and his family eventually returned to New York and to live in the apartment, Robert and his family would vacate, Robert himself testified that "[t]here was never a discussion of one leaves and the other one comes in." Any future disagreement between the two joint owners as to their rights to possession could undoubtedly entangle the Coop in the legal problems that could ensue.

The fact that the apartment was made up of what had at one

time been two distinct apartments does not make it unreasonable for the Coop to treat it as the single apartment it has been for decades; the lease and shares are for one apartment. By directing the Coop to allow both brothers to become lessees, the majority creates a situation in which the Coop must allow two individuals with families to each acquire the right to occupy the entire apartment, and the Coop would be unable to limit occupancy by each family to just a portion of the apartment.

Further, the Coop may reasonably rely on its legitimate policy against nonresident owners, which provides an additional ground to deny the application, since at least one of the two owners would not be residing in the apartment for the foreseeable future.

All that is necessary to justify withholding consent is a reasonable basis for that denial. The Coop had several reasonable grounds to do so.

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

16650 The People of the State of New York, SCI 2542/11
Respondent,

-against-

Natalio Pastor,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Emily A. Aldridge of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered October 5, 2011, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to a term of nine months, affirmed.

Defendant's challenges to his plea are unpreserved, and they do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, __NY3d__, NY Slip Op 08615, *2 [2015]; *People v Peque*, 22 NY3d 168, 183 [2013], *cert denied sub nom Thomas v New York*, 574 US __, 135 S Ct 90 [2014]). We decline to review these claims in the interest of justice. As an alternate holding, we find no basis for reversal.

Defendant argues that his guilty plea was not knowingly, intelligently and voluntarily made because the trial court failed

to ask him about a possible justification defense. Defendant argues that at sentencing, the court noted it had read the presentence report, and the court should have advised defendant about a possible justification defense. However, during the plea allocution itself, defendant said nothing that negated any element of the crime (*see People v Toxey*, 86 NY2d 725 [1995]), or raised the defense of justification. In the absence of a motion to withdraw the plea, the court had no obligation to conduct a sua sponte inquiry into a statement by defendant, reflected in the presentence report, that alluded to a possible justification defense (*see e.g. People v Praileau*, 110 AD3d 415 [1st Dept 2013], *lv denied* 22 NY3d 1202 [2014]).

Defendant further claims his plea was not knowingly, intelligently and voluntarily made because he was misadvised about potential immigration consequences of his plea. During the allocution, the court stated, "Now under the law, I have the responsibility to tell you if you are not a citizen, you may face deportation or denial of your naturalization given this plea today; is that understood?" Defendant replied yes. Defense counsel then said, "Judge, I want to put on the record that although I fully discussed the consequences of this plea with my client, although it is not relevant to this case [sic]." Here,

as required, the court correctly notified defendant that if he was not a United States citizen, he may be deported upon a guilty plea (*see Peque*, 22 NY3d at 196-197). The court assured itself that defendant knew of the possibility of deportation prior to entering the guilty plea, and therefore the plea was knowing, intelligent and voluntary (*id.* at 176, 196-197). Additionally, counsel stated that he had fully discussed the consequences of the plea with defendant.

The dissent focuses on the portion of defense counsel's statement, which was made following the court's immigration warning, that "it is not relevant to this case," and argues the court should have "rectified" the misstatement. However, nothing in the record shows this was a misstatement. Defendant was not here legally, and counsel's statement could have been based on the fact that defendant was subject to removal for other reasons, which would have made the deportation consequences of this plea irrelevant. It also is possible counsel made this statement because defendant was prepared to plead guilty despite any potential immigration consequences of this plea. In any event, on this record, we do not know exactly what counsel was thinking, but it is not correct to characterize this as incorrect legal advice. *Peque* does not require that the court ascertain more

information about counsel's discussions with defendant. Rather, it mandates that the court give defendant the appropriate warning.

The dissent cites *People v Belliard*, (__AD3d__, 2016 NY Slip Op 00033 [2016]), to show that the trial court's failure to clarify defense counsel's statement amounted to a *Peque* violation. In *Belliard* however, the trial court did not apprise defendant that, if he was not a United States citizen, he could be deported as a consequence upon his guilty plea. Here, the court gave the correct warning and satisfied *Peque* (*Peque* at 176, 196-197).

Finally, defendant in his appellate brief expressly states he is seeking only vacatur of the plea and dismissal of the indictment, and not a remand. Yet, despite this statement, the dissent would order a hearing before the trial court. We note vacatur of the plea and dismissal of the indictment is not a remedy available to defendant because no *Peque* violation appears

on the record and he has not established prejudice as a matter of law. To the extent that defendant is suggesting his attorney gave him misadvice, his remedy, if any, is to file a CPL 440.10 motion.

All concur except Manzanet-Daniels, J. who dissents in part in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting in part)

On September 20, 2011, defendant appeared before the court with a Spanish interpreter. Defendant pleaded guilty to assault in the second degree, the sole original charge against him, in exchange for a term of nine months.

During the allocution, the court informed defendant that "if you are not a citizen, you may face deportation or denial of your naturalization given this plea today; is that understood?" After a pause, defendant replied, "Yes." Counsel added that he had fully discussed the consequences of the plea with his client, although "it is not relevant to this case." On October 5, 2011, the court sentenced defendant in accordance with the plea agreement. The court noted that it had read the presentence report, but did not refer to its contents. The report indicated that defendant had been born in Mexico on April 3, 1970, and had been in the country illegally since 2001. Defendant and his wife had five children born in the United States.

Defendant's plea was not knowingly and voluntarily made because he was misadvised about the immigration consequences flowing from his plea. In *People v Peque* (22 NY2d 168 [2013], *cert denied sub nom Thomas v New York*, 574 US __, 135 S Ct 90 [2014]), the Court of Appeals held that before accepting a plea,

due process requires that a court "apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony" (*id.* at 176). The Court reasoned that "fundamental fairness . . . requires a trial court to make a noncitizen defendant aware of the risk of deportation because deportation frequently results from a noncitizen's guilty plea and constitutes a uniquely devastating deprivation of liberty" (*id.* at 193). Accordingly, "a noncitizen defendant convicted of a removable crime can hardly make a 'voluntary and intelligent choice among the alternative courses of action'" unless informed of the possibility of deportation (*id.* at 192).

The court's initial advice to defendant – i.e., that if he were a noncitizen there might be immigration consequences – was immediately negated by counsel, who noted that he had discussed the consequences of the plea with his client and stated – incorrectly – that those consequences were "not relevant to this case." The court did nothing to rectify the misstatement, essentially endorsing it. This case is in all relevant respects similar to a recent one in which we found that the court's failure to clarify defense counsel's statement that "[immigration consequences are] not applicable to this case," amounted to a

Peque violation (*People v Belliard*, __ AD3d __ 2016 NY Slip Op 00033 [2016]). In *Belliard*, the court's failure to countermand defense counsel's erroneous statements that "immigration consequences" were "not applicable in this case," left the defendant with a mistaken view regarding the immigration consequences of his plea; so too, here, counsel's statement that immigration consequences were "not relevant to this case" had the effect of undermining the court's initial advice to defendant.

Defendant should be afforded the opportunity to move to vacate his plea upon a showing of a "reasonable probability that, had the court warned the defendant of the possibility of deportation, he or she would have rejected the plea and opted to go to trial" (*Peque*, 22 NY3d at 176). After 10 years in the United States, with five minor citizen children reliant on him for support, defendant was potentially eligible to become a lawful permanent resident (*see* 8 USC § 1229b[b][1] [cancellation of removal and adjustment of status for certain nonpermanent residents]). Such relief is not available to one convicted of a "crime involving moral turpitude" such as the one to which defendant pleaded guilty (8 USC § 1182[a][2][A][I]). I would accordingly hold the appeal in abeyance pending remand for a prejudice hearing. Defendant has not expressly requested a

hearing, believing the prejudice to him to be patent from the record; however, a majority of the *Peque* court decreed that a hearing, and not automatic vacatur of the plea, is the proper remedy for the violation.

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

ENTERED: FEBRUARY 11, 2016

CLERK

Tom, J.P., Friedman, Saxe, Kapnick, JJ.

16720 The People of the State of New York, Ind. 99151/08
Respondent,

-against-

Andres Segura,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about December 1, 2009, which adjudicated defendant a level three sexually violent offender, unanimously reversed, on the law, without costs, and the matter remanded for a new hearing.

In completing defendant's risk assessment instrument under the Sex Offender Registration Act (SORA) (Correction Law, article 6-C), the Board of Examiners of Sex Offenders did not assess any points against him for forcible compulsion. On May 4, 2009, during the course of defendant's SORA hearing, the court, without prior notice to defendant, proceeded to consider whether to assess points against him for forcible compulsion. Defendant vigorously objected, arguing that he was entitled to 10 days'

prior notice under Correction Law § 168-n(3) if there were to be a departure from the Board's recommendation. Nevertheless, the Court proceeded to assess 10 points for forcible compulsion, resulting in defendant's being adjudicated a level three sex offender.

SORA protects a defendant's due process rights by requiring written notice, at least 10 days prior to the hearing, to determine his risk level, if a determination differing from the Board's recommendation is to be sought (Correction Law § 168-n[3]). The purpose of the notice is to afford the defendant a meaningful opportunity to respond at the hearing (*see People v Neish*, 281 AD2d 817 [3d Dept 2001]). No less than when the People fail to give the required notice that they will seek a departure from the Board's recommendation, a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond (*see People v Hackett*, 89 AD3d 1479 [4th Dept 2011] [the court's sua sponte assessment in its decision of additional points not assessed by the Board violated the defendant's due process rights]; *cf. People v Wheeler*, 59 AD3d 1007 [4th Dept 2009] [the defendant's rights were not violated when the court, upon stating that it would consider, sua sponte, an upward

departure from the Board's recommendation, adjourned the hearing to afford him a meaningful opportunity to respond], *lv denied* 12 NY3d 711 [2009]). Defendant is therefore entitled to a new hearing at which he is afforded a meaningful opportunity to respond to the contention that he should be assessed points for forcible compulsion.

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: FEBRUARY 11, 2016

CLERK

Friedman, J.P., Acosta, Andrias, Saxe, JJ.

179-
180 Index 20450/13

Dieudonne Muboyayi,
Plaintiff-Appellant,

-against-

Monica Quintero, et al.,
Defendants-Respondents.

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Law Offices of William Pager, Brooklyn (William Pager of counsel), for appellant.

Freehill Hogan & Mahar LLP, New York (Justin T. Nastro of counsel), for respondents.

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Order, Supreme Court, Bronx County (Laura Douglas, J.), entered August 1, 2014, which, insofar as appealed from as limited by the briefs, granted defendants' motion to strike the complaint pursuant to CPLR 3126 to the extent of striking the complaint unless plaintiff appeared for completion of his deposition by August 29, 2014, and order, same court (Betty Owen Stinson, J.), entered November 7, 2014, which, insofar as appealed from as limited by the briefs, granted defendants' motion to strike the complaint due to plaintiff's failure to comply with the August 1, 2014 order, and dismissed the action, unanimously affirmed, without costs.

After plaintiff failed to comply with a court order

mandating that his deposition be completed on March 20, 2014, and failed to provide a reasonable excuse for this failure, the court providently exercised its discretion in issuing the conditional order of preclusion (*see Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]; *Casas v Romanelli*, 232 AD2d 445 [2d Dept 1996]).

Although defendant's counsel promptly requested that plaintiff's counsel identify the dates on which plaintiff would be available to complete his deposition on or before the August 29 deadline set by the conditional order, plaintiff's counsel failed to respond. Instead, it was not until August 28 that plaintiff's counsel called defendant's counsel and advised him that he had unilaterally scheduled plaintiff's deposition for the deadline date of August 29. Defense counsel replied that he could not proceed with the deposition on such short notice and asked for a date on or before September 12. Plaintiff's counsel refused and did not respond to defense counsel's subsequent requests to reschedule.

On this record, the motion court correctly determined that plaintiff's counsel's conduct was egregious and that plaintiff failed to comply in good faith with the conditional order. Accordingly, the motion court "applied the correct legal

standards, properly considered all the facts and circumstances of the case, and did not abuse [its] discretion in dismissing plaintiff[']s . . . action pursuant to CPLR 3126(3)" (*Arts4All, Ltd. v Hancock*, 12 NY3d 846, 847 [2009], *cert denied* 559 US 905 [2010]).

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

192 The People of the State of New York, Ind. 119/11
Respondent,

-against-

Kevin Johnson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered June 27, 2012, convicting defendant, after a jury trial, of kidnapping in the second degree, criminal possession of a weapon in the second degree and assault in the second degree, and sentencing him to an aggregate term of seven years, unanimously affirmed.

Defendant's nickname, "Danger," was not so inflammatory that he was deprived of a fair trial when the court permitted a witness who knew defendant by that name to use it in his testimony as he described the roles of the participants in the crime. Since defendant never accepted the court's offer to deliver a curative instruction, he failed to preserve his claim that the court should have done so, and we decline to review it

in the interest of justice. In any event, any error regarding the nickname was harmless (*see People v Santiago*, 255 AD2d 63, 66 [1st Dept 1999], *lv denied* 94 NY2d 829 [1999]).

Defendant's remaining claims are similar to arguments this Court rejected on a codefendant's appeal (*People v Harriott*, 128 AD3d 470 [1st Dept 2015], *lv denied* 26 NY3d 1008 [2015]), and we find no reason to reach a different result here.

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

193 Nancy Solomon-Cox, et al., Index 24195/14E
Plaintiffs-Appellants,

-against-

Expert Builders 26, Inc.,
Defendant-Respondent,

Edison L. Sanchez,
Defendant.

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Law Office of David A. Zelman, Brooklyn (David A. Zelman of counsel), for appellants.

Law Offices of Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered January 20, 2015, which denied plaintiffs' motion for a preliminary injunction, "deem[ed]" defendant Expert Builders 26 Inc. the bona fide purchaser and owner of the subject premises, directed entry of a money judgment against plaintiffs for use and occupancy, and vacated all stays of the warrant of eviction, unanimously modified, on the law, to vacate so much of the order as deemed Expert Builders 26, Inc. the owner of the premises and directed entry of a money judgment for use and occupancy, and otherwise affirmed, without costs.

The court erred in resolving a factual issue in deciding

plaintiffs' motion for a preliminary injunction (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 272 [1977]). Before a court may treat a motion addressed to the pleadings as a summary judgment motion, it must give notice to the parties (*id.*). Moreover, whether defendant was a bona fide purchaser of the subject property for value is an issue of fact that cannot be resolved on the pleadings. While defendant's president asserted in his affidavit that plaintiffs represented that they rented the subject premises, construed in a light most favorable to plaintiffs, the complaint and plaintiff's other submissions establish that plaintiffs held themselves out as the owners of the property.

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

194 The People of the State of New York, ex rel. Richard Meyers, Petitioner-Appellant,

-against-

Warden, Rikers Island, Respondent-Respondent.

Index 100401/15

Richard Meyers, appellant pro se.

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

Appeal from judgment (denominated an order), Supreme Court, New York County (Larry R.C. Stephen, J.), entered April 1, 2015, denying the petition for a writ of habeas corpus and dismissing the proceeding brought pursuant to CPLR article 70, unanimously dismissed, without costs, as moot.

This appeal challenging the legality of petitioner's preconviction detention is moot, since petitioner is currently incarcerated pursuant to a judgment of conviction (*see People ex rel. Macgiollabhui v Schriro*, 123 AD3d 633 [1st Dept 2014]).

Petitioner has failed to demonstrate the applicability of an exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

195 Mark Family Realty, LLC, Index 105924/11
Plaintiff-Appellant,

-against-

Anton Sanko,
Defendant-Respondent.

- - - - -

Mary Burnette,
Third-Party Plaintiff-Respondent,

-against-

Ira Mark, et al.,
Third-Party Defendants.

_____

Law Offices of Jeffrey H. Roth, New York (Jeffrey H. Roth of counsel), for appellant.

Steven Landy & Associates PLLC, New York (David A. Wolf of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 18, 2015, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment dismissing defendant's counterclaim for partition and sale, and granted defendant's motion for partial summary judgment to the extent of declaring that his right to seek partition had been established and referring the matter to a special referee, unanimously affirmed, with costs.

We decline to dismiss plaintiff's appeal on the ground that

it failed to assemble a proper appendix; defendant moved neither to dismiss on this ground nor to submit his own supplemental appendix.

Plaintiff suggests that partition is inconsistent with the right of first refusal in the parties' agreement. This argument is unavailing. "Partition ... is incompatible with the right of first refusal, *at least for such time (30 days) as plaintiff's cotenants have in which to exercise that right* (*see Tramontano v Catalano,* 23 AD2d 894 [1965])" (*Sanko v Mark*, 52 AD3d 225, 227 [1st Dept 2008] [emphasis added]). In turn, *Tramontano* – which involved a 60-day right of first refusal – said, "[A]t the end of this 60-day period, those proposing to sell can either sell *or seek partition* should the other set of cotenants choose not to exercise the option" (23 AD2d at 895 [emphasis added]). If defendant indeed received a bona fide offer for his one-third tenant-in-common interest (an issue we discuss below), more than 30 days have elapsed since defendant notified plaintiff and his other tenant-in-common, third-party defendant Selrob Family LP, of that offer, and neither plaintiff nor Selrob matched it.

Plaintiff's contention that partition is inconsistent with the alleged intent of the parties that the subject properties remain a family tenancy-in-common is unavailing. The parties'

agreement does not limit sale, assignment, devise, transfer, or conveyance of tenancy-in-common interests to members of the Mark family.

Plaintiff improperly contends for the first time in its reply brief that the term sheet of nonparty Rubicon Companies was too indefinite to constitute an offer. Were we to consider this argument, we would find it without merit. "Striking down a contract as indefinite and in essence meaningless is ... a last resort" (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991] [internal quotation marks omitted]). Rubicon's term sheet was more definite than the lease in *Joseph Martin, Jr., Delicatessen v Schumacher* (52 NY2d 105 [1981]), which merely said, "Tenant may renew this lease for an additional period of five years at annual rentals *to be agreed upon"* (*id.* at 108 [emphasis added]).

The fact that Rubicon's offer was subject to conditions does not prevent it from being bona fide (*see Story v Wood*, 166 AD2d 124, 128 [3d Dept 1991]). Neither does the fact that Rubicon ultimately did not sign a contract with defendant (*see generally id.* ["(A) 'good faith offer' ... means(s) (1) a genuine outside offer rather than one contrived in concert with the seller solely for the purpose of extracting a more favorable purchase price

from the holder of the right of first refusal ... and (2) an offer which the seller honestly is willing to accept"]).

Contrary to plaintiff's contention, defendant did not have to show that the relationship between the parties was acrimonious, that they were in deadlock, or that the subject property was mismanaged (*see Manganiello v Lipman,* 74 AD3d 667, 668 [1st Dept 2010] ["Pursuant to both the common law and statute, a party, jointly owning property with another, may *as a matter of right,* seek physical partition of the property or partition and sale *when he or she no longer wishes to jointly use or own the property*" (emphasis added)]). Even if, arguendo, defendant had to show fundamental disagreement among the tenants-in-common (*see Estate of Steingart v Hoffman,* 33 AD3d 465, 466 [1st Dept 2006]), he did so.

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

196 The People of the State of New York, Ind. 3711/12
Respondent,

-against-

Miguel Casteleiro,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about April 4, 2013, unanimously affirmed.

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

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

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

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

197 Orrathai Pwangsunthie, Index 308520/09
Plaintiff-Appellant,

-against-

Marco Realty Associates, L.P., et al.,
Defendants,

Dr. Jay's, Inc.,
Defendant-Respondent.

_____

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Brielle C. Goldfaden of counsel), for appellant.

Eustace, Cotter & Bender, White Plains (Julie C. Hellberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 11, 2014, which, insofar as appealed from as limited by the briefs, granted the motion of defendant Dr. Jay's, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff was injured when she lost her balance while descending the first of two steps leading down from the mezzanine area to the main floor of defendant Dr. Jay's store. Although plaintiff reached for a handrail to prevent her from falling, the stairs did have handrails.

The motion court properly found that the two steps between

the mezzanine and ground-floor level of the store constituted "access stairs," and not "interior stairs," within the meaning of the 1968 Building Code (Administrative Code of City of NY §§ 27-232, 27-375[f]). Therefore, the Code's requirement that "interior stairs" have handrails has no applicability, whether or not the 1968 Building Code applied to defendant's renovation of the store (*see* Administrative Code § 27-232; *Cusumano v City of New York*, 15 NY3d 319, 324 [2010]; *Martin v DNA Rest. Corp.*, 103 AD3d 575 [1st Dept 2013]; *Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665 [1st Dept 2010]).

Defendant demonstrated through photographs, as well as plaintiff's testimony, that the steps inside its store were without defects or debris, and were well lit. Plaintiff failed to contradict, or submit evidence to rebut the showing that the

two steps did not constitute a dangerous condition on the premises (*see Remes* at 666; *Burke v Canyon Rd. Rest.*, 60 AD3d 558 [1st Dept 2009]).

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

200 The People of the State of New York, ex rel. Johnny Mason, Petitioner-Appellant,

-against-

Antonio Cuin, Jr., etc., Respondent-Respondent.

Index 400931/14

Johnny Mason, appellant pro se.

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

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), entered on or about August 12, 2014, denying the petition for a writ of habeas corpus and dismissing the proceeding brought pursuant to CPLR article 70, unanimously affirmed, without costs.

The court properly found CPL 180.80 inapplicable since petitioner was indicted without the filing of a felony complaint. We have considered petitioner's remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

204 In re Mark Crichlow, Index 251548/13
Petitioner-Appellant,

-against-

NYS Office of
Mental Health, et al.,
Respondents-Respondents.

_____

Mark Crichlow, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered May 28, 2014, denying the petition seeking, inter alia, to annul respondents' determination, dated September 18, 2000, which terminated petitioner's employment, granting respondents' cross motion to dismiss the petition, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

It is undisputed that petitioner failed to serve the notice of petition and petition upon the agency respondents, as required by CPLR 307(2). The failure to properly effectuate service on, and acquire personal jurisdiction over, the agency respondents warrants dismissal (*see Matter of Vargas v State of New York*, 95 AD3d 588, 589 [1st Dept 2012]). Respondents did not concede to

the court's jurisdiction by seeking an adjournment, and the cross motion to dismiss the petition on jurisdictional grounds was properly brought prior to the time that the answer was required to be served (*see* CPLR 3211[a][8] and [e]; *see also* CPLR 320[b]).

Furthermore, the petition, brought more than 13 years after petitioner's termination, is time barred (*see* CPLR 217[1]). Petitioner failed to establish entitlement to a tolling of the time within which to bring this proceeding, as there is no "evidence that [petitioner] was lulled into inaction by [respondents] in order to allow the statute of limitations to lapse" (*East Midtown Plaza Hous. Co. v City of New York*, 218 AD2d 628, 628 [1st Dept 1995]).

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

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

207 The People of the State of New York, Ind. 185/08
Respondent,

-against-

Juliette Ward,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lisa A. Packard of counsel), for appellant.

Thomas P. Zugibe, District Attorney, New City (Itamar J. Yeger of counsel), for respondent.

_____

Judgment, Supreme Court, Rockland County (Thomas A. Breslin, J.), rendered November 15, 2012, convicting defendant, upon her guilty plea, of aggravated harassment in the second degree, and sentencing her to three years' probation, unanimously affirmed.

Defendant's claim that a special prosecutor should have been appointed is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside, or not fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10

motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713–714 [1998]; *see People v Ford*, 86 NY2d 397, 404 [1995]) *Strickland v Washington*, 466 US 668 [1984]).

Defendant's challenge to former Penal Law § 240.30(1)(a), which has been declared unconstitutional (*People v Golb*, 23 NY3d 455, 466–468 [2014], *cert denied* __US__, 135 S Ct 1009 [2015]), is unpreserved (*see e.g. People v Scott*, 126 AD3d 645, 646 [1st Dept 2015], *lv denied* 25 NY3d 1171 [2015]), and we decline to vacate her bargained-for aggravated harassment conviction in the interest of justice.

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

208 Leonardo Lopez-Ramos, Index 158935/12
Plaintiff-Respondent,

-against-

New York City Housing Authority,
et al.,
Defendants-Appellants.

_____

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

Matthew Gaisi, New York, for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 10, 2015, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Dismissal of the complaint is warranted in this action where plaintiff alleges that he was injured when, while descending the interior stairway in defendants' building, he slipped and fell down the stairs. Although plaintiff submitted evidence showing

areas of worn paint by the metal nosing of the stairs, such a condition is not an actionable defect under the circumstances presented (*see e.g. Sims v 3349 Hull Ave. Realty Co. LLC*, 106 AD3d 466 [1st Dept 2013]; *Budano v Gurdon*, 110 AD3d 543 [1st Dept 2013]).

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

ENTERED: FEBRUARY 11, 2016

CLERK

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

209 Edward Mermelstein, Index 114029/09
Plaintiff-Appellant,

-against-

The East Winds Company, also
knows as East Winds Condominium,
Defendant-Respondent.

_____

Law Offices of Paul C. Cavaliere, New York (Paul C. Cavaliere and David De Andrade of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Joseph A.H. McGovern of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered December 12, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff allegedly slipped and fell on an external staircase outside of defendant's building, where he lived. Plaintiff testified that the staircase was slippery, but he did not know what caused him to fall. He also testified that he could not remember if it had rained that day, but it was misting in the evening, when he fell. After defendant moved for summary judgment, plaintiff claimed in his affidavit in opposition that the stairs were wet and slippery from rain earlier in the day,

and that he slipped and fell as he descended the stairs.

Defendant made a prima facie showing of its entitlement to summary judgment by pointing to plaintiff's deposition testimony that he did not know what caused him to fall (*Washington v New York City Bd. of Educ.*, 95 AD3d 739, 739-740 [1st Dept 2012]).

Plaintiff's affidavit, which contradicted his deposition testimony, created only a feigned issue of fact, and was insufficient to defeat defendant's motion (*see Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]). Moreover, mere wetness on a walking surface due to rain is insufficient to raise a triable issue of fact, especially since plaintiff failed to submit any expert testimony showing that the staircase was dangerous when wet (*see Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015]).

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: FEBRUARY 11, 2016

CLERK

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

210N Yeun-Ah Choi, Index 314516/14
Plaintiff-Respondent,

-against-

Joshua Shoshan,
Defendant-Appellant.

_____

Berkman Bottger Newman & Rodd, LLP, New York (Walter F. Bottger of counsel), for appellant.

Mayerson Abramowitz & Kahn, LLP, New York (Karen M. Platt of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered July 7, 2015, which, insofar as appealed from, granted plaintiff wife's cross motion for an award of sanctions, and referred the matter to a special referee to determine the amount of the sanctions, unanimously affirmed, without costs.

The record supports Supreme Court's finding that defendant's motion to vacate the so-ordered stipulation wherein he agreed to pay plaintiff's reasonable interim counsel fees constituted "frivolous" conduct within the meaning of 22 NYCRR 130-1.1(c)(1), and warranted the imposition of sanctions (*see Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999]). There was no legal merit to defendant's motion and we reject his contention that sanctions were not warranted because his motion was based on a

good-faith argument that was ultimately found to be unpersuasive (*see id.* at 35; *W.J. Nolan & Co. v Daly*, 170 AD2d 320, 321 [1st Dept 1991]). Defendant failed to allege any facts, much less prove, that the stipulation was the result of "fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015[a][3]), or that to enforce the stipulation would be "unjust or inequitable or permit the other party to gain an unconscionable advantage" *(Weitz v Murphy*, 241 AD2d 547, 548 [2d Dept 1997] [internal quotation marks omitted]). Defense counsel's claim that he had been "misled" into entering the stipulation was properly rejected, given counsel's significant legal experience, and the fact that plaintiff never made any representation in the stipulation regarding future increases in her counsel's average monthly legal fees.

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

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

ENTERED: FEBRUARY 11, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

344-
345N Anonymous,
Plaintiff-Respondent,

-against-

Anonymous,
Defendant-Appellant.

Index 350007/15
350033/12

_____

Boies, Schiller & Flexner LLP, New York (Charles Fox Miller of counsel), for appellant.

Cohen Rabin Stine Schumann LLP, New York (Bonnie E. Rabin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about July 14, 2015, which denied defendant husband's motion to dismiss the amended complaint, without prejudice to renewal, unanimously affirmed, without costs. Order, same court and Justice, entered July 17, 2015, which granted plaintiff wife's motion for fees to the extent of awarding her $976,186.44 in interim counsel fees in connection with child-related issues, and $121,973 in interim child-related forensic accounting fees and disbursements, unanimously affirmed, without costs.

The breach of fiduciary duty cause of action is timely, since it was commenced in January 2015, less than three years

after process was served in the divorce action, in April 2012 (*see* Domestic Relations Law § 250[2]). The breach of fiduciary duty claim is not duplicative of the breach of contract claim, since the breach of contract claim is based on defendant's failure to transfer the Michigan property to plaintiff in accordance with the prenuptial agreement, while the breach of fiduciary duty claim is based on defendant's sale of the Michigan house to a third party allegedly for less than its market value.

The breach of fiduciary duty claim is not barred by the doctrine of res judicata, since the issue of claims that plaintiff might have with respect to the Michigan property was never decided on the merits (*see Browning Ave. Realty Corp. v Rubin*, 207 AD2d 263 [1st Dept 1994], *lv denied* 85 NY2d 804 [1995]). Any statement we made about this issue in the prior appeal in this case is not binding on the parties (*see* 123 AD3d 581, 583 [1st Dept 2014]).

The court providently exercised its broad discretion in denying defendant's motion to dismiss the breach of contract cause of action pursuant to CPLR 3211(a)(4) (*see Whitney v Whitney*, 57 NY2d 731 [1982]), since the relief sought under that claim is not the same or substantially the same relief as that sought in the divorce action (*see Kent Dev. Co. v Liccione*, 37

NY2d 899, 901 [1975]; *Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 95-96 [1st Dept 2013]).

Contrary to defendant's contention, the award of "child-related" interim counsel and forensic accounting fees is not in violation of the counsel fee provision in the prenuptial agreement, since, as the court found, plaintiff submitted "extensive" documentation establishing that the legal and expert services for which she sought interim fees were reasonable and necessary (*see Lazich v Lazich*, 189 AD2d 750 [2d Dept 1993], *appeal dismissed* 81 NY2d 1007 [1993]). The awards for prospective interim fees are not improper, and are consistent with our decision in the prior appeal which, importantly, observed that such fees were subject to documentation at the end of the litigation and possible recoupment (*see* 123 AD3d at 584), ensuring that any unnecessary or unreasonable fees are repaid.

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

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

ENTERED: FEBRUARY 11, 2016

CLERK

Tom, J.P., Friedman, Saxe, Kapnick, JJ.

16716 The People of the State of New York, Ind. 743/13
Respondent,

-against-

William Jenkins,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered March 20, 2014, affirmed.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
David B. Saxe
Barbara R. Kapnick, JJ.

16716
Ind. 743/13

_____x

The People of the State of New York,
Respondent,

-against-

William Jenkins,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Roger S. Hayes, J.), rendered March 20, 2014, convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second drug felony offender, to an aggregate term of 1 1/2 to 3 years.

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

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

TOM, J.P.

In this appeal, defendant asks this Court to exercise its interest-of-justice power to review and reduce his sentence, negotiated pursuant to a plea agreement, on the grounds that his waiver of his right to appeal was invalid and that his sentence was excessive.

In February 2013, defendant was arrested after selling crack cocaine and marijuana to an undercover police officer. After apprehending him, the police recovered two credit cards and one photo ID card from his pocket, all belonging to an individual who was not defendant. Defendant was indicted for one count of criminal sale of a controlled substance in the third degree, one count of criminal sale of marijuana in the fourth degree, and two counts of criminal possession of stolen property in the fourth degree.

Before trial, defendant agreed to plead guilty to criminal sale of a controlled substance in the third degree and one count of criminal possession of stolen property in the fourth degree in satisfaction of all charges and in exchange for concurrent sentences of 2 1/2 years on the criminal sale count and 1 1/2 to 3 years on the stolen property count. As part of the bargain, he agreed to waive his right to appeal and judgment was entered as agreed upon.

Notwithstanding the waiver, defendant appealed to this Court asserting that his appeal waiver was invalid and unenforceable and that his sentence was excessive and should be modified in the interest of justice. We find that the record establishes that defendant was properly apprised of the implications of waiving his right to appeal and that defendant made a valid waiver of his right to appeal, which forecloses review of his excessive sentence claim (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]).

The record discloses that upon accepting defendant's guilty plea, the court, in a lengthy plea allocution, and after explaining all the "trial rights" defendant was waiving and ensuring he spoke to his attorney about the plea, and was satisfied with his legal help, then engaged in the following colloquy:

> "THE COURT: Now, in this case as part of the plea and sentence I promised you, you're being required to waive or give up your right to appeal this conviction.
>
> "Let me explain to you what that means. This is a separate right. It is not a trial right. It's a separate right, the right to appeal.
>
> "So normally a defendant has the right to appeal a criminal conviction . . .
>
> "An appeal is a legal proceeding before another court. It's a higher court. It's not before me or Judge Ward, it's before an appeals court.
>
> "On the appeal a defendant, through his lawyer,

> can argue that some mistake was made in connection with his case, some error, something was wrong. You could also argue that the sentence was too much, too harsh and ask for a lower sentence if one was allowed by law . . .
>
> "Now, normally even when a defendant pleads guilty he still has certain rights. With the guilty plea you don't give up all your rights normally.
>
> "In this case because of the sentence that I'm promising you, you're being required to give up your right to appeal any aspect of this case in return for the plea and sentence I promised you.
>
> "So do you understand that explanation?
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: Are you willing to do that?
>
> "THE DEFENDANT: Yes, sir."

This language exceeds the colloquy that provided for a valid waiver in *People v Nicholson*, one of the cases consolidated under *People v Lopez* (6 NY3d at 254-255). The trial court ensured that defendant understood that the right to appeal was separate from the "panoply of trial rights automatically forfeited upon pleading guilty," and advised him that while he "ordinarily retains the right to an appeal even after pleading guilty, in this case he was being offered a particular plea by the prosecution on the condition that he give up that right" (*Lopez*, 6 NY3d at 257; *see also People v Rahman*, 129 AD3d 553, 554 [1st

Dept 2015], *lv denied* 26 NY3d 933 [2015] ["The court discussed the waiver in detail and sufficiently ensured that defendant understood that the right to appeal is separate and distinct from the other rights automatically forfeited by pleading guilty"]). As was the case in *Nicholson*, it would have been better to secure a written waiver of the right to appeal. However, the record is sufficient to establish that defendant knowingly, voluntarily and intelligently waived his right to appeal (*Lopez*, 6 NY3d at 256, citing *People v Calvi*, 89 NY2d 868, 871 [1996]).

A defendant who has validly waived his right to appeal may not invoke this Court's interest-of-justice jurisdiction to reduce a bargained-for sentence (*Lopez*, 6 NY3d at 255-256). "By pleading guilty and waiving the right to appeal, a defendant has forgone review of the terms of the plea, including harshness or excessiveness of the sentence" (*id.* at 256).

To be sure, as the Court of Appeals clarified in *Lopez*, the Appellate Division may be divested of its unique interest-of-justice jurisdiction only by constitutional amendment (6 NY3d at 255, citing *People v Pollenz*, 67 NY2d 264, 267-268 [1986]). However, as *Lopez* went on to hold, "a defendant is free to relinquish the right to invoke that authority and indeed does so by validly waiving the right to appeal" (*id.* at 256).

In *People v Seaberg* (74 NY2d 1 [1989]), the Court of Appeals further explained that "[b]y pleading guilty a defendant forecloses the appellate court from reviewing the merits of the plea bargain in the interest of justice and there is nothing inherently wrong in a defendant similarly electing to foreclose review of a negotiated sentence" (*id.* at 10). Stated another way, "a bargained-for waiver of the right to appeal . . . does not operate to deprive the appellate court of its jurisdiction of the appeal. Instead, it merely forecloses appellate review of all claims that might be raised on appeal, except, of course, those categories of claims that survive such waivers under our case law" (*People v Callahan*, 80 NY2d 273, 285 [1992]).

Further, as the majority in *Lopez* noted, as a practical matter the request to reduce a sentence as excessive is "brought to an appellate court's attention only when raised by defendants" (6 NY3d at 256). Thus, while the Appellate Division may technically retain its interest-of-justice jurisdiction at all times, a defendant cannot "eviscerate" an agreement not to appeal a conviction and rely on the Court's inherent discretionary powers to reduce the sentence. Indeed, such a result would render a valid waiver of appeal meaningless and would be detrimental to the goals of "fairness and finality in criminal matters[, which] are accomplished only insofar as the parties are

confident that the 'carefully orchestrated bargain' of an agreed-upon sentence will not be disturbed as a discretionary matter" (*id.* at 256, quoting *People v Seaberg*, 74 NY2d at 10).

In short, "[h]aving received the benefit of his bargain, defendant should be bound by its terms" (*People v Lopez*, 190 AD2d 545, 545 [1st Dept 1993]). This record provides no compelling evidence of special circumstances warranting the contrary.

Accordingly, the judgment of the Supreme Court, New York County (Roger S. Hayes, J.), rendered March 20, 2014, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second drug felony offender, to an aggregate term of 1 1/2 to 3 years, should be affirmed.

All concur.

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

ENTERED: FEBRUARY 11, 2016

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
David B. Saxe
Barbara R. Kapnick, JJ.

16716
Ind. 743/13

_____x

The People of the State of New York,
Respondent,

-against-

William Jenkins,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Roger S. Hayes, J.), rendered March 20, 2014, convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second drug felony offender, to an aggregate term of 1 1/2 to 3 years.

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

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

TOM, J.P.

In this appeal, defendant asks this Court to exercise its interest-of-justice power to review and reduce his sentence, negotiated pursuant to a plea agreement, on the grounds that his waiver of his right to appeal was invalid and that his sentence was excessive.

In February 2013, defendant was arrested after selling crack cocaine and marijuana to an undercover police officer. After apprehending him, the police recovered two credit cards and one photo ID card from his pocket, all belonging to an individual who was not defendant. Defendant was indicted for one count of criminal sale of a controlled substance in the third degree, one count of criminal sale of marijuana in the fourth degree, and two counts of criminal possession of stolen property in the fourth degree.

Before trial, defendant agreed to plead guilty to criminal sale of a controlled substance in the third degree and one count of criminal possession of stolen property in the fourth degree in satisfaction of all charges and in exchange for concurrent sentences of 2 1/2 years on the criminal sale count and 1 1/2 to 3 years on the stolen property count. As part of the bargain, he agreed to waive his right to appeal and judgment was entered as agreed upon.

Notwithstanding the waiver, defendant appealed to this Court asserting that his appeal waiver was invalid and unenforceable and that his sentence was excessive and should be modified in the interest of justice. We find that the record establishes that defendant was properly apprised of the implications of waiving his right to appeal and that defendant made a valid waiver of his right to appeal, which forecloses review of his excessive sentence claim (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]).

The record discloses that upon accepting defendant's guilty plea, the court, in a lengthy plea allocution, and after explaining all the "trial rights" defendant was waiving and ensuring he spoke to his attorney about the plea, and was satisfied with his legal help, then engaged in the following colloquy:

> "THE COURT: Now, in this case as part of the plea and sentence I promised you, you're being required to waive or give up your right to appeal this conviction.
>
> "Let me explain to you what that means. This is a separate right. It is not a trial right. It's a separate right, the right to appeal.
>
> "So normally a defendant has the right to appeal a criminal conviction . . .
>
> "An appeal is a legal proceeding before another court. It's a higher court. It's not before me or Judge Ward, it's before an appeals court.
>
> "On the appeal a defendant, through his lawyer,

> can argue that some mistake was made in connection with his case, some error, something was wrong. You could also argue that the sentence was too much, too harsh and ask for a lower sentence if one was allowed by law . . .
>
> "Now, normally even when a defendant pleads guilty he still has certain rights. With the guilty plea you don't give up all your rights normally.
>
> "In this case because of the sentence that I'm promising you, you're being required to give up your right to appeal any aspect of this case in return for the plea and sentence I promised you.
>
> "So do you understand that explanation?
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: Are you willing to do that?
>
> "THE DEFENDANT: Yes, sir."

This language exceeds the colloquy that provided for a valid waiver in *People v Nicholson*, one of the cases consolidated under *People v Lopez* (6 NY3d at 254-255). The trial court ensured that defendant understood that the right to appeal was separate from the "panoply of trial rights automatically forfeited upon pleading guilty," and advised him that while he "ordinarily retains the right to an appeal even after pleading guilty, in this case he was being offered a particular plea by the prosecution on the condition that he give up that right" (*Lopez*, 6 NY3d at 257; *see also People v Rahman*, 129 AD3d 553, 554 [1st

Dept 2015], *lv denied* 26 NY3d 933 [2015] ["The court discussed the waiver in detail and sufficiently ensured that defendant understood that the right to appeal is separate and distinct from the other rights automatically forfeited by pleading guilty"]). As was the case in *Nicholson*, it would have been better to secure a written waiver of the right to appeal. However, the record is sufficient to establish that defendant knowingly, voluntarily and intelligently waived his right to appeal (*Lopez*, 6 NY3d at 256, citing *People v Calvi*, 89 NY2d 868, 871 [1996]).

A defendant who has validly waived his right to appeal may not invoke this Court's interest-of-justice jurisdiction to reduce a bargained-for sentence (*Lopez*, 6 NY3d at 255-256). "By pleading guilty and waiving the right to appeal, a defendant has forgone review of the terms of the plea, including harshness or excessiveness of the sentence" (*id.* at 256).

To be sure, as the Court of Appeals clarified in *Lopez*, the Appellate Division may be divested of its unique interest-of-justice jurisdiction only by constitutional amendment (6 NY3d at 255, citing *People v Pollenz*, 67 NY2d 264, 267-268 [1986]). However, as *Lopez* went on to hold, "a defendant is free to relinquish the right to invoke that authority and indeed does so by validly waiving the right to appeal" (*id.* at 256).

In *People v Seaberg* (74 NY2d 1 [1989]), the Court of Appeals further explained that "[b]y pleading guilty a defendant forecloses the appellate court from reviewing the merits of the plea bargain in the interest of justice and there is nothing inherently wrong in a defendant similarly electing to foreclose review of a negotiated sentence" (*id.* at 10). Stated another way, "a bargained-for waiver of the right to appeal . . . does not operate to deprive the appellate court of its jurisdiction of the appeal. Instead, it merely forecloses appellate review of all claims that might be raised on appeal, except, of course, those categories of claims that survive such waivers under our case law" (*People v Callahan*, 80 NY2d 273, 285 [1992]).

Further, as the majority in *Lopez* noted, as a practical matter the request to reduce a sentence as excessive is "brought to an appellate court's attention only when raised by defendants" (6 NY3d at 256). Thus, while the Appellate Division may technically retain its interest-of-justice jurisdiction at all times, a defendant cannot "eviscerate" an agreement not to appeal a conviction and rely on the Court's inherent discretionary powers to reduce the sentence. Indeed, such a result would render a valid waiver of appeal meaningless and would be detrimental to the goals of "fairness and finality in criminal matters[, which] are accomplished only insofar as the parties are

confident that the 'carefully orchestrated bargain' of an agreed-upon sentence will not be disturbed as a discretionary matter" (*id.* at 256, quoting *People v Seaberg*, 74 NY2d at 10).

In short, "[h]aving received the benefit of his bargain, defendant should be bound by its terms" (*People v Lopez*, 190 AD2d 545, 545 [1st Dept 1993]). This record provides no compelling evidence of special circumstances warranting the contrary.

Accordingly, the judgment of the Supreme Court, New York County (Roger S. Hayes, J.), rendered March 20, 2014, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second drug felony offender, to an aggregate term of 1 1/2 to 3 years, should be affirmed.

All concur.

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