SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 21, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Acosta, Moskowitz, Manzanet-Daniels, JJ.

13242 The People of the State of New York, Respondent, Ind. 4092/07

-against-

Marcos Manon,
Defendant-Appellant.

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

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

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Appeal from judgment, Supreme Court, New York County (Renee A. White, J., at plea; Ronald A. Zweibel, J., at sentencing), rendered July 23, 2009, convicting defendant of criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of 1½ years, further held in abeyance, and the matter remitted for further proceedings in accordance herewith.

We previously held this appeal in abeyance (123 AD3d 467 [1st Dept 2014]) for proceedings relating to defendant's claim under *People v Peque* (22 NY3d 168 [2013], *cert denied* 574 US __,

135 S Ct 90 [2014]). It now appears that although it is likely that the proceedings will require defendant's testimony, he has been involuntarily deported. Accordingly, we conclude that his testimony should be taken by videoconferencing, if possible (*see generally People v Wrotten*, 14 NY3d 33[2009]). Given the historyand circumstances of the case, the hearing should be held before a justice other than the sentencing Justice.

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

ENTERED: JANUARY 21, 2016

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12095-
12096 UBS Securities LLC, et al., Index 650097/09
652646/11
Plaintiffs-Appellants-Respondents,

-against-

Highland Capital Management, L.P., et al.,
Defendants,

Highland Credit Strategies Master
Fund, L.P., et al.,
Defendants-Respondents-Appellants.

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UBS Securities LLC, et al.,
Plaintiffs-Respondents,

-against-

Highland Crusader Holding Corporation,
Defendant-Appellant.

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Appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered November 25, 2013,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 5, 2016,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JANUARY 21, 2016

CLERK

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

15946-
15947 The People of the State of New York,
Respondent,

-against-

Jay Jay Teron,
Defendant-Appellant.

Ind. 46181C/11

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

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (George R. Villegas, J. at plea and original sentencing; John S. Moore, J. at resentencing) rendered January 17, 2012, as amended April 12, 2012, convicting defendant of unlicensed operation of a motor vehicle, and sentencing him to time served, unanimously reversed, as a matter of discretion in the interest of justice, the plea vacated, and the matter remanded for further proceedings.

Initially, we need not address the issue of whether defendant's challenge to his plea has been preserved, as we consider this claim pursuant to our interest of justice jurisdiction (CPL 470.15[3][c]).

Defendant was not informed by the court of any of the rights he was waiving by pleading guilty (*see Boykin v Alabama*, 395 US 238 [1969]). While "the failure to recite the *Boykin* rights does

not automatically invalidate an otherwise voluntary and intelligent plea . . . the record as a whole [must] affirmatively show [] that the defendant intentionally relinquished those rights" in order for the plea to be validly entered (*People v Conceicao*, -NY3d - , 2015 NY Slip Op 08615, *2 [2015]). In this case, since the record is devoid of any indicia that would meet this standard, the plea must be vacated and that matter remanded to the trial court for further proceedings.

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

ENTERED: JANUARY 21, 2016

CLERK

Corrected Order - January 26, 2016

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16334 The People of the State of New York, Respondent,

Ind. 3639/12

-against-

Jesus Rodriguez, Defendant-Appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Patterson Belknap Webb & Tyler LLP, New York (**Stephanie Teplin** of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Michael J. Obus, J. at speedy trial motion; Michael R. Sonberg, J. at jury trial and sentencing), rendered March 11, 2013, convicting defendant of criminal possession of a weapon in the third degree and criminal trespass in the second and third degrees, and sentencing him, as a second felony offender, to an aggregate term of two to four years, reversed, on the law, and the indictment dismissed.

Defendant is entitled to dismissal on speedy trial grounds because the certificates of readiness that the People filed on August 30, 2011 and February 7, 2012 were illusory under the principles that the Court of Appeals discussed in *People v Sibblies* (22 NY3d 1174 [2014]), which was decided after defendant's conviction. The chargeable time, added to the time

the court properly charged to the People, totals 295 days, well over the 184 days within which the People should have been ready for trial.

First, the People provided no explanation why, after filing and serving the certificate of readiness on August 30, 2011, shortly after defendant's arraignment on August 25, 2011, they answered not ready at the next court date on September 7, 2011 (*see People v Bonilla*, 94 AD3d 633, 633 [1st Dept 2012]). Nothing in the record, express or inferred, explains their change in status from ready to not ready. As the People "gave no explanation for the change in circumstances between the initial statement of readiness and the subsequent admission that the People were not ready to proceed," and the statement of readiness thus "did not accurately reflect the People's position," the People should have been charged with the entire period, a total of 70 days (*Sibblies*, 22 NY3d at 1181 [Graffeo, J. concurring]; *see People v Brown*, 126 AD3d 516, 517-518 [1st Dept], *lv granted* 25 NY3d 1160 [2015]; *see also People v England*, 84 NY2d 1, 4-5 [1994]). The People argue that the court did not ask for any reason, but the burden rests on the People to clarify, on the record, the basis for the adjournment (*People v Salgado*, 27 AD3d 71, 75 [1st Dept 2006], *lv denied* 6 NY3d 838 [2006]).

Second, after the People answered not ready on January 31,

2012, because the prosecutor was on trial in another case, the matter was adjourned to March 20, 2012. On February 7, 2012, the People filed and served a certificate of readiness. At the next court date, March 20, 2012, however, they again answered not ready because the prosecutor was on trial in another case. The court properly deemed the entire period chargeable to the People, "notwithstanding" the February 7, 2012 certificate of readiness, but should have also charged subsequent adjournments to the People. If the prosecutor was on trial at the prior and subsequent adjournments, it is unclear why the People filed and served an off-calendar certificate of readiness, or whether the prosecutor was on trial in the same or a different case. As a result, the February 7, 2012 certificate of readiness was illusory, and the entirety of subsequent adjournment periods (not merely the number of days the People requested), until the People next announced that they were ready, should have been charged to them. Specifically, the 50 days from March 20, 2012 until May 9, 2012, 61 days from May 9, 2012 to July 9, 2012, and 52 days from July 9, 2012, until August 30, 2012, when the People validly declared their readiness, should have been charged.

The dissent appears to confine the People's illusory statements of readiness in *Sibblies* to a later need for further investigation or to obtain additional records for trial.

However, even though Judge Graffeo's concurrence required some proof that the readiness statement did not accurately reflect the People's position, because the People "gave no explanation for the change in circumstances between the initial statement of readiness and [the admitted later inability] to proceed" (22 NY3d at 1181), the decision is broader and applies to the excuses in this appeal as well.

In view of the foregoing, we find it unnecessary to reach any other issues.

All concur except Andrias, J. who dissents in a memorandum as follows:

ANDRIAS, J. (dissenting)

Based on its holding that the off-calendar certificates of readiness filed by the People on August 30, 2011 and February 7, 2012 must be deemed illusory under *People v Sibblies* (22 NY3d 1174 [2014]), the majority finds that defendant's CPL 30.30 speedy trial motion should have been granted because 295 days are chargeable to the People. However, because I believe that *Sibblies* is inapposite and that defendant is not entitled to dismissal on speedy trial grounds on the record before us, I respectfully dissent.

On August 25, 2011, defendant was arraigned on three misdemeanor charges in Criminal Court, namely criminal possession of a weapon in the fourth degree, criminal trespass in the second degree, and criminal trespass in the third degree. The complaint was deemed an information and the case was adjourned on consent to September 7, 2011 for hearings and trial. The court also ordered the People to provide a Voluntary Disclosure Form (VDF).

On August 30, 2011, the People filed and served their first off-calendar certificate of readiness. On September 7, 2011, without explanation, the People requested "one week for trial." The court, without further inquiry, adjourned the case to November 16, 2011. On November 16, the People requested an unspecified adjournment because "the arresting officer had a

family situation and became unavailable suddenly." The court adjourned the case to January 31, 2012. On November 22, 2011, the People filed their second off-calendar certificate of readiness.

On January 31, 2012, the People requested an unspecified adjournment, stating that they were not ready because the assigned assistant district attorney (ADA) was on trial in another part. The court adjourned the case to March 20, 2012. On February 7, 2012, the People filed their third off-calendar certificate of readiness.

On March 20, 2012, the People again requested a one-week adjournment because the assigned ADA was on trial in another part. The court adjourned the case to May 9, 2012. On May 9, the People requested a one-week adjournment because the assigned ADA was believed to have been out of the country. The court adjourned the case until July 9, 2012. On July 9, the People stated that they were ready on two of the three misdemeanor cases against defendant that were on that day. However, with respect to this case, the People, without explanation, asked for a one-week adjournment. Because no trial parts were available, all three cases were adjourned to September 5, 2012 for hearing and trial.

On July 20, 2012, defendant was indicted by a grand jury on

the underlying felony of criminal possession of a weapon in the third degree. On August 27, 2012, the People filed their fourth off-calendar certificate of readiness.

On August 30, 2012, defendant was arraigned and the matter was adjourned, first, for motion practice and, then, to November 8, 2012, for hearing and trial. On November 8, the People, without explanation, stated that they were not ready and requested a one-week adjournment. Defense counsel requested "at least a month" in order to consult with a knife expert. The court adjourned the case to December 6, 2012.

On December 6, the People declared readiness in court. Defendant, by counsel, filed a motion to dismiss the indictment pursuant to CPL 30.30(1)(a), asserting that the People should be charged for the entire period of each adjournment, rather than the time they had requested, because their certificates of readiness were illusory. Defendant also argued that the People had failed to serve him with a VDF, despite being directed to do so by the court on multiple occasions, which further demonstrated the illusory nature of their certificates. The court adjourned the case to January 13, 2013 for a decision on the motion.

By order dated January 10, 2013, the trial court, in a decision that predated the Court of Appeals decision in *Sibblies*, denied defendant's motion. The court found that the People's

"discovery lapses" in providing a VDF did not "implicate [the People's] ability to proceed" and thus, were not "includable events." Rejecting defendant's claim that the People's four off-calendar certificates of readiness were illusory, the court then found that only 90 days were chargeable to the People, consisting of: (a) the 7-day adjournment requested without explanation on September 7, 2011; (b) the 6-day adjournment granted on November 16, 2011 because the arresting officer was not available; (c) the entire 49-day adjournment granted on November 22, 2011 when the assigned ADA was on trial in another matter; (d) the 7-day adjournment requested on March 20, 2012 when the assigned ADA was on trial in another matter; (e) the 7-day adjournment requested on May 9, 2012 when the assigned ADA may have been out of the country; (f) the 7-day adjournment requested on July 9, 2012 when the People were ready for the other two cases against defendant, but not this one; and (g) the 7-day adjournment requested on November 8, 2012, without explanation.

For the purpose of calculating the six-month speedy trial limitation in CPL 30.30(1)(a), the People, following a valid statement of readiness, are chargeable only with the time actually requested by them. However, if the certificate of readiness is illusory, the People are charged with the full

duration of the adjournment (*see People v Carter*, 91 NY2d 795 [1998]; *People v Young*, 110 AD3d 1107 [2nd Dept 2013], *lv denied* 23 NY3d 1044 [2014]).

In *Sibblies*, the three judge concurrence by Chief Judge Lippman stated that, "if challenged, the People must demonstrate that some exceptional fact or circumstance arose after their declaration of readiness so as to render them presently not ready for trial" at the next court appearance after filing the certificate (22 NY3d at 1178). Chief Judge Lippman found that the People's desire to strengthen their case after they filed the certificate of readiness did not satisfy this requirement.

The three judge concurrence by Judge Graffeo took a narrower approach (22 NY3d at 1179). Judge Graffeo recognized established precedent that the requirement of actual readiness under CPL 30.30 "will be met unless there is proof that the readiness statement did not accurately reflect the People's position" and that "there is a presumption that a statement of readiness is truthful and accurate" (22 NY3d at 1180 [internal quotation marks and citation omitted]). However, she found the statement of readiness in *Sibblies* was illusory because the People "gave no explanation for the change in circumstances between the initial statement of readiness and the[ir] subsequent admission that the[y] . . . were not ready to proceed without the medical

records" (22 NY3d at 1181). In *People v Brown* (126 AD3d 516, 517-518 [1st Dept]), *lv granted* 25 NY3d 1160 [2015]), this Court held that Judge Graffeo's concurrence, as the narrowest holding in *Sibblies* plurality opinion, should be followed.

The majority finds that the certificate of readiness filed on August 30, 2014 must be deemed illusory under *Sibblies* because the People provided no explanation why they were not ready at the next court date on September 7, 2011, and nothing in the record, express or inferred, explains their change in status. Insofar as the People argue that the court did not ask for any reason, the majority states that the burden rests on the People to clarify, on the record, the basis for the adjournment. Thus, the majority holds that the People should have been charged with the entire 70-day period from September 7, 2011 to November 16, 2011.

However, *Sibblies* is inapposite. In *Sibblies,* Judge Graffeo stated that the People should be charged with speedy trial time when a statement of readiness is followed by an unexplained lack of readiness and there is "proof that the readiness statement did not accurately reflect the People's position" (*Sibblies*, 22 NY3d at 1180-1181 quoting *People v Carter*, 91 NY2d at 799). Thus, she found that the People's silence was enough to defeat the presumption that their prior statement of readiness was valid because the record demonstrated that they requested the

adjournment to obtain additional evidence for trial. However, here "unlike, *Sibblies*, there is no 'proof that the readiness statement did not accurately reflect the People's position,' so as to render the prior statement of readiness illusory" (*People v Brown*, 126 AD3d at 518, quoting *Sibblies*, 22 NY3d at 1180 [Graffeo, J., concurring]). There is nothing in the record to show that the People requested the brief adjournment of "one week for trial" on September 7, 2011 because they needed to gather further evidence. Thus, the trial court correctly charged the People with only the 7-day adjournment they requested, not the full 70-day period (*see People* v *Brown* 126 AD3d 516).

The majority also finds that the certificate of readiness filed on February 7, 2012 must be deemed illusory because "[i]f the prosecutor was on trial at the prior and subsequent adjournments, it is unclear why the People filed and served an off-calendar certificate of readiness, or whether the prosecutor was on trial in the same or a different case." As a result, the majority finds that the entirety of subsequent adjournment periods until the People next announced that they were ready should have been charged to them, namely the 50-day period from March 20, 2012 until May 9, 2012; the 61-day period from May 9th to July 9, 2012; and the 52-day period from July 9th to August 30, 2012.

I disagree. On the record before us, defendant did not rebut the presumption of truthfulness and accuracy afforded to the People's February 7, 2012 certificate of readiness.

"No amount of prosecutorial assets or careful planning or preparation can allow one person to be in two places at the same time. No wrongdoing or dereliction has occurred if an assigned [a]ssistant, in good faith, is ready for trial and is ordered to trial on another matter or a trial which is expected to end carries over" (*People v McBee*, 172 Misc 2d 196, 199 [Sup Ct, Kings County 1997]; *see also People v Goss*, 87 NY2d 792 [1996]). Here, on January 31, 2012 the court adjourned the case to March 20, 2012 because the assigned ADA was on trial in another part. On March 20, 2012, the People again requested a one week adjournment because the assigned ADA was on trial. There is nothing in the record from which to infer that when the People filed their certificate of readiness on February 7, 2012, they had reason to know that the assigned ADA would still be unavailable six weeks later and that they would require another short adjournment. The subsequent adjournment requests relating to the February 7, 2012 certificate of readiness were due to the assigned ADA being out of the country, the People being ready on only two of the three cases against defendant involving the same ADA, and defendant's indictment by a grand jury on the underlying

felony of criminal possession of a weapon in the third degree. Each time these factors prevented the People from being ready, the People asked for only a short adjournment to be ready for trial. Defendant offers only speculation to contradict the record's showing of valid statements of readiness. Accordingly, the People should not be charged for the entire 295 days of adjournments following the February 7, 2012 certificate of readiness.

The court properly instructed the jury regarding defendant's possession of a gravity knife (*see People v Herbin*, 86 AD3d 446, 447 [1st Dept 2011], *lv denied* 17 NY3d 859 [2011]). The verdict was not against the weight of the evidence (*see People v Parrilla*, 112 AD3d 517, 517 [1st Dept 2013], *lv granted* 26 NY3d 933 [2015]).

Accordingly, I would affirm the judgment.

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

ENTERED: JANUARY 21, 2016

CLERK

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

16723 The People of the State of New York, Respondent, Ind. 2271/01

-against-

Kent Edwards, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered February 25, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed defendant points under the risk factors for prior criminal history and recency of prior offense, even though he had not yet been sentenced on the relevant prior conviction at the time he committed the underlying sex offense (*see People v Franco*, 106 AD3d 417, 417 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]).

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors alleged by defendant were already taken into account in the risk assessment instrument, and

the record does not establish any basis for a downward departure, given the seriousness of defendant's sex offense.

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

ENTERED: JANUARY 21, 2016

CLERK

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

16724 In re Peter Sell, Index 101291/13
Petitioner-Respondent,

-against-

New York City Department
of Education, et al.,
Respondents-Appellants.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for appellants.

Peter Sell, respondent pro se.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered September 8, 2014, which, after an in camera inspection, pursuant to the Freedom of Information Law (FOIL), directed respondent Department of Education (DOE) to disclose the investigative file concerning Office of Special Investigation Case 08-4247, except for certain pages, with all Social Security numbers redacted, unanimously modified, on the law, to except from disclosure additional pages or portions of pages as indicated herein, and otherwise affirmed, without costs.

Petitioner seeks the records of an investigation by the Office of Special Investigations (OSI) into a complaint he filed alleging that school administrators had improperly influenced the re-scoring of a Regents Examination with the intent of improving the number of students who passed "with distinction." DOE denied

the request, citing the statutory exemptions from disclosure of unwarranted invasion of privacy and inter- or intra-agency materials (Public Officers Law § 87[2][b], [g]). The article 78 court ordered the file produced for an in camera inspection, and the matter is before us following that inspection.

The court properly directed the disclosure of some portions of these records, notwithstanding that OSI found the complaint "unsubstantiated" (*see Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 498 [1st Dept 2013]).

The page in which a nonparty FOIL requester, Michael Thomas, discussed certain sensitive matters is not covered by the personal privacy exemption to FOIL (Public Officers Law § 87[2][b]), because Thomas "consent[ed] in writing to disclosure" (Public Officers Law § 89[2][c][ii]) by waiving in an affidavit any right to confidentiality in any of the records sought. We note that the remaining records at issue largely relate to petitioner, who expressly waived his right to confidentiality in those records in writing.

Since, as respondents concede, none of the statutorily enumerated categories of "unwarranted invasion of personal privacy" is relevant here (*see* Public Officers Law § 89[2][b]), we must determine, "by balancing the privacy interests at stake against the public interest in disclosure of the information,"

whether any invasion of privacy is unwarranted (*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]). We find that there is significant public interest in the proper academic assessment of public school students and therefore in the requested materials, which may shed light on the adequacy of OSI's investigation into the allegedly improperly influenced assessment in this case (*see Matter of Thomas v Condon*, 128 AD3d 528, 530 [1st Dept 2015]). Respondents failed to establish that this significant public interest is outweighed by the privacy interests of those involved. Contrary to respondents' argument, there is no indication in the record that any interviewees were promised confidentiality, explicitly or implicitly. However, all contact information other than the interviewees' names and official titles (such as identification numbers, home addresses, phone numbers, and dates of birth) should be redacted; indeed, petitioner expressly clarified in his administrative appeal that he does not seek that information.

As to the statutory exemption for inter- or intra-agency materials (Public Officers Law § 87[2][g]), the court erred in directing disclosure of the pages or portions of pages listed below, which are not "factual tabulations or data" or "final agency policy or determinations" (Public Officers Law § 87[2][g][i], [iii]). Parts of the witness statements, email

correspondence, and other materials consist of "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making," rather than "factual account[s] of the witness's observations" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 277 [1996]). The following pages or portions of pages need not be disclosed: page 27, page 28, page 33 (the 2nd and 3rd sentences of the portion outlined in red by respondents), page 48 (the 12th to 27th lines), page 49 (the last word of the 2nd line through the 7th line), page 51, page 52 (the 2nd red-outlined box and the question in the 3rd red-outlined box), page 53 (the 2 questions in the red-outlined box), page 55 (the 1st red-outlined box, and the 2nd to 4th paragraphs of the 2nd red-outlined box), page 59 (the 2nd to 5th and 12th to 15th lines), page 62 (last 5 lines), page 68 (first 8 lines), page 68 (18th line), page 70 (3rd to 10th lines and last 2 lines), and page 96 (15th to 19th lines and last 4 lines).

As to the remaining materials at issue, the court correctly found that respondents failed to meet their burden of articulating a "'particularized and specific justification'" for withholding them or redacting them as sought (*Matter of Gould*, 89 NY2d at 275). There is no blanket exemption for handwritten reports of witness interviews (*see id.* at 277, *citing Matter of Ingram v Axelrod*, 90 AD2d 568 [3d Dept 1982]).

Petitioner's request for litigation costs is not properly before this Court, since he did not appeal from the order that denied that request.

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

ENTERED: JANUARY 21, 2016

CLERK

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

16729 The People of the State of New York, Ind. 3068/11
Respondent,

-against-

David Hernandez,
Defendant-Appellant.

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The Legal Aid Society, New York (Amy Donner and Seymour W. James, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered February 16, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of 1½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, in which it accepted an officer's testimony that

he saw defendant with contraband in plain view (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

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

ENTERED: JANUARY 21, 2016

CLERK

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

16730 Anna Pezhman, Index 104778/11
Plaintiff-Appellant,

-against-

Chanel, Inc.,
Defendant-Respondent.

Debbie Dayton, et al.,
Defendants.

_____

Anna Pezhman, appellant pro se.

Proskauer Rose LLP, New York (Daniel L. Saperstein of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered May 21, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to sanction defendant, unanimously affirmed, with costs.

The motion court providently exercised its discretion in denying plaintiff's motion, made only one day after the court, at oral argument, denied a motion made by plaintiff seeking nearly identical relief. The evidence does not support a finding of civil contempt against defendant, as there is no showing that defendant violated an order of the court (*see* Judiciary Law § 753[A]; *El-Dehdan v El-Dehdan*, _ NY3d _, 2015 NY Slip Op 07579, *28-29 [2015]). Nor was defendant's cross motion seeking sanctions frivolous (*see* 22 NYCRR 130-1.1). Although the motion

court denied defendant's cross motion, it correctly admonished plaintiff for her multiple after-hours telephone calls, and for her communications threatening to report defense counsel to the disciplinary committee unless his firm withdrew as counsel.

Defendant did not commit fraud upon the court by providing it with a copy of a redacted email from plaintiff (*see generally CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 320-321 [2014]). The redactions were obvious and involved settlement negotiations. Moreover, defendant obtained an unredacted copy of the email for the court's review and read almost all of the email into the record at oral argument, except for the proffered settlement amounts.

Discovery sanctions, such as striking defendant's answer, are unwarranted (*see* CPLR 3126; *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]). Although defendant failed to appear at a nonparty deposition, it contacted plaintiff in

advance and advised her that the witness could not appear on the date she had selected.

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: JANUARY 21, 2016

CLERK

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

16731 Winnie Tsui, et al., Index 652840/13
Plaintiffs-Appellants,

-against-

Katherine Chou, et al.,
Defendants-Respondents,

The Board of Managers of Empire Condominium, et al.,
Necessary Party Defendants.

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The Catafago Law Firm, New York (Jacques Catafago of counsel), for appellants.

Seyfarth Shaw LLP, New York (Richard M. Resnik of counel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 10, 2014, which granted defendants-respondents' motion to dismiss the amended complaint, and vacated plaintiffs' notices of pendency, unanimously modified, on the law, to the extent of denying defendants' motion to dismiss the claims for breach of contract, breach of fiduciary duty, and attorneys' fees, and otherwise affirmed, without costs.

The motion court incorrectly determined that plaintiffs' breach of fiduciary duty and breach of contract claims are barred by the business judgment rule. Plaintiffs, suing derivatively on behalf of all unit owners of a condominium, allege in the amended complaint that the Chou defendants breached their fiduciary

duties by, among other things, failing to disclose various lawsuits and defendant Robert Chou's criminal record, failing to account for missing monies and receipts, commingling funds, denying access to information and documentation, and improperly renewing defendant Chou Management's management agreement. Plaintiffs also allege that defendant board members improperly extended their terms on the board beyond the allowable period under the bylaws. There is nothing in the record to indicate that the board discussed or informed themselves as to these allegations. The board's determination not to pursue these claims was arbitrary and therefore not protected under the business judgment rule (*see 40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 157 [2003]). Moreover, even if the board did consider the allegations of improper extension of their terms, any determination on that issue would not be protected under the business judgment rule, as the voting members were clearly self-interested (*see Simpson v Berkley Owner's Corp.*, 213 AD2d 207, 207 [1st Dept 1995]).

There is nothing in the record to indicate that the board discussed or informed themselves as to plaintiffs' breach of contract cause of action, which is based on allegations that, among other things, defendant sponsor breached the offering plan and declaration by refusing to sell condominium units. The

board's decision not to pursue these allegations was arbitrary and therefore not entitled to deference under the business judgment rule (*see 40 W. 67th St. Corp.*, 100 NY2d at 157).

Plaintiffs may pursue their claim for attorneys' fees to the extent it relates to the breach of contract and breach of fiduciary duty causes of action (*see* Business Corporation Law § 626[e]).

The motion court correctly dismissed plaintiffs' trespass and constructive trust causes of action. The board's decision not to pursue those claims is entitled to deference under the business judgment rule, because the record shows that the board considered the allegations underlying the claims and that the voting board members did not have an interest in the claims (*see Simpson*, 213 AD2d at 207-208). The notices of pendency, which were based upon the trespass and constructive trust claims, were properly cancelled.

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

ENTERED: JANUARY 21, 2016

CLERK

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

16732 The People of the State of New York, Ind. 2305/12
Respondent,

-against-

David May,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), and White & Case, LLP, New York (Louis O'Neill of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert H. Straus, J.H.O. at suppression hearing; Ronald A. Zweibel, J. at suppression decision, plea and sentencing), rendered January 9, 2014, convicting defendant of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree, and sentencing him to concurrent terms of 3½ years, unanimously affirmed.

Defendant's suppression motion was properly denied since the record supports the conclusion that the police entry into defendant's apartment was justified under the emergency exception to the warrant requirement (*see generally People v Mitchell*, 39 NY2d 173, 177-178 [1976], *cert denied* 426 US 953 [1976]). The totality of the information available to the police at the time

of the intrusion warranted a reasonable belief that there was potentially a shooting victim inside the apartment. Reports of possible gunshots near defendant's apartment were confirmed when the police found defendant, who had sustained a gunshot wound, in an apartment across the hall from his own apartment. Defendant's claim that he had been shot outside the building was rendered suspicious by various surrounding circumstances, and his claim that he could not enter his apartment because he had lost his keys was plainly contradicted by other information known to the police. Thus, the police were confronted with a serious danger that defendant was concealing the full details of the shooting, and that another victim or victims might be in his apartment. Furthermore, there is no indication that the police entry was motivated by an intent to make an arrest or seize evidence.

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

ENTERED: JANUARY 21, 2016

CLERK

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

16733 Irene David Realty, Inc., et al., Index 110014/09
Plaintiffs-Respondents,

-against-

David Moyal, et al.,
Defendants-Appellants,

121 Varick Street Corp.,
Nominal Defendant-Appellant.

_____

White Fleischner & Fino, LLP, New York (Gil M. Coogler of counsel), for appellants.

Sternbach, Lawlor & Rella LLP, New York (Anthony J. Rella of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about April 21, 2015, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiffs, minority shareholders in 121 Varick Street Corp. (Varick), a commercial cooperative corporation, allege that defendant Moyal, as president of the board of directors, engaged in self-dealing and breached his fiduciary duties through a series of transactions where he, among other things, surreptitiously and without board approval obtained majority control of the cooperative, pressured the board of directors into approving loans for an unnecessary electricity upgrade in the

building, and entered into subleases providing him and the entities he controlled with a substantial profit. Defendants sought summary judgment dismissing the complaint, which the IAS court denied. We affirm.

This Court noted, on plaintiffs' prior motion for partial summary judgment on their claims, that issues of fact exist concerning whether defendants as a whole, and Moyal in particular, "exceeded the protection of the business judgment rule" (107 AD3d 430, 431 [2013]). Defendants have presented neither argument nor evidence sufficient to alter this determination.

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

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

ENTERED: JANUARY 21, 2016

CLERK

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

16734 Lumen at White Plains, LLC, et al., Index 653052/13
Plaintiffs-Appellants,

-against-

Moses Stern also known as Mark Stern, et al.,
Defendants,

Reiss Eisenpress LLP, et al.,
Defendants-Respondents.

_____

Sheikh Partners P.C., New York (Umar A. Sheikh of counsel), for appellants.

Kaufman Dolowich & Voluck, LLP, Woodbury (Amanda Gurman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol Edmead, J.), entered August 19, 2014, which granted defendants-respondents' (defendants) motion to dismiss the complaint as against them, unanimously affirmed, without costs.

The motion court correctly dismissed the claim that defendants aided and abetted a fraud, as plaintiffs failed to adequately plead that defendants had actual knowledge of the fraud, or that they provided substantial assistance in the fraud's commission (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]). The complaint does not allege that defendants knew about the fraudulent transactions, but only that

they and other defendant lawyers "knew of each other's involvement" and failed to, among other things, "advise the Plaintiffs once the fraud was discovered." Such limited allegations amount to, at best, constructive knowledge, which is insufficient to support an aiding and abetting fraud claim (*see Gregor v Rossi*, 120 AD3d 447, 448-449 [1st Dept 2014]). Further, plaintiffs' allegations that defendants failed to act are insufficient to show "substantial assistance," as plaintiffs do not sufficiently allege that defendants had a duty to act to protect plaintiffs' interests (*see Stanfield*, 64 AD3d at 476; *see also Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]). Plaintiffs' allegations of an attorney-client relationship between them and defendants are conclusory (*see Denenberg v Rosen*, 71 AD3d 187, 196 [1st Dept 2010], *lv dismissed* 14 NY3d 910 [2010]) and refuted by the documentary evidence submitted by defendants. Plaintiffs' allegations that defendants released signed documents from escrow in connection with a sale of an interest in plaintiff LLC are insufficient to show "substantial assistance," because defendants' acts fall within the scope of their duties as counsel for defendant Stern, the buyer (*Barbarito v Zahavi*, 107 AD3d 416, 420 [1st Dept 2013]).

Plaintiffs have abandoned any claim of fraud against defendants, and, in any event, the complaint fails to allege that

defendants themselves engaged in fraud. Plaintiffs' unjust enrichment claim is conclusory, as they failed to allege, among other things, how defendants were unjustly enriched (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 183 [2011]).

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

ENTERED: JANUARY 21, 2016

CLERK

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

16735-
16735A In re Iasha Tameeka McL., and Others.,

Dependent Children Under the Age
of Eighteen Years, etc.,

Herbert McL.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

_____

Douglas H. Reiniger, New York, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Jess Rao of counsel), attorney for the children.

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Orders of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about August 19, 2014, which, upon findings of permanent neglect, terminated respondent father's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The findings of permanent neglect were supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). Notwithstanding petitioner's diligent efforts, the father failed to plan for the children's future by neither acknowledging nor

meaningfully addressing the conditions that led to the children's removal in the first instance, namely, the underlying sexual abuse of another older daughter (not one of the subject children) (*see Matter of Gloria Melanie S.*, 47 AD3d 438 [1st Dept 2008]; *see also Matter of Myles N.*, 49 AD3d 381 [1st Dept 2008], *lv denied* 11 NY3d 709 [2008]).

A preponderance of the evidence supports the determination that it was in the children's best interests to terminate the father's parental rights and enable the foster parents to adopt the children. The record shows that the foster parents wished to adopt the children, have provided a loving and stable home, and have met the children's special needs (*see Matter of Isis M. [Deeanna C.]*, 114 AD3d 480, 481 [1st Dept 2014]; *see also Matter of Jaelyn Hennesy F. [Jose F.]*, 113 AD3d 411 [1st Dept 2014]).

The father's continued failure to complete a sex offender program and meaningfully address his deviant sexual behavior, as well as the evidence that the children would not be safe in his care, demonstrates that a suspended judgment would not have been an appropriate dispositional alternative (*see generally Matter of Michael B.*, 80 NY2d 299, 311 [1992]).

We have considered the father's remaining contentions, including that the court was biased against him in favor of the agency, and find them unavailing.

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

ENTERED: JANUARY 21, 2016

CLERK

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

16736 The People of the State of New York, Ind. 2887/12
Respondent,

-against-

Ricky Cavener,
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 (Luis Morales of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered March 18, 2014,

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.

ENTERED: JANUARY 21, 2016

CLERK

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

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

16738 The People of the State of New York, Respondent, Ind. 4016/11

-against-

Michael James, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra H. Keeling of counsel), and Jones Day, New York (Briana R. Hulet of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered April 13, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fourth degrees, and sentencing him, as a second felony drug offender, to an aggregate term of eight years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term for the conviction for third-degree possession to six years, resulting in a new aggregate term of six years, and otherwise affirmed.

We find that the *Allen* charge, read as a whole, was balanced and not coercive (*see People v Pagan*, 45 NY2d 725, 727 [1978]). The court encouraged the jurors to reach a verdict if possible,

while reminding them not to give up their conscientiously held positions.

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

ENTERED: JANUARY 21, 2016

CLERK

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

16739- SCI 5515/13
16740 The People of the State of New York, 5516/13
Respondent,

-against-

Michael Boykin,
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 (Julia P. Cohen of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Larry Stephen, J.), rendered May 22, 2014,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgments so appealed from be and the same are hereby affirmed.

ENTERED: JANUARY 21, 2016

CLERK

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

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

16743 The People of the State of New York, Ind. 599/13
Respondent,

-against-

Daunell Davis,
Defendant-Appellant.

_____

Dennis J. Doody, Tarrytown, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered April 30, 2014,

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.

ENTERED: JANUARY 21, 2016

CLERK

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

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

16744 Noel Brown, as Administrator of the Estate of Sharon Brown, Deceased, Plaintiff-Respondent, Index 309647/10

-against-

Addison Hall Owners Corp., et al., Defendants-Appellants.

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Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants.

The Law Offices of Thomas J. Lavin, Bronx (John O'Halloran of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered April 13, 2015, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action alleging a slip and fall on a wet floor inside defendants' building shortly after it had been raining, triable issues of fact exist as to defendants' claimed lack of notice and their precautions in light of the dangerous condition. Even though the building doorman testified that there was no wet condition when he left for lunch 40 minutes before the accident, the building's "either...negligent or willful" failure to preserve the entire surveillance video of the area where plaintiff slipped and fell is sufficient under the circumstances

of this case to defeat summary judgement at this time, with the specific spoliation sanction, if any, to be determined at trial (*see Pegasus Aviation I v Varig,* 2015 NY Slip Op 09187). Contrary to the defendant's contention, the court's prior order regarding production of the entire surveillance video, which was denied without prejudice, has no preclusive effect.

Although defendants were not required to mop continuously, and there was testimony that they usually mopped when it rained, there was no evidence that they mopped at all on the day of the accident (*see e.g. Lorenzo v Plitt Theatres*, 267 AD2d 54, 56 [1st Dept 1999]). Furthermore, while defendants were not required to cover the entire floor with mats, under the facts of this case the gap between the mat and the stairs raised an issue of fact as to the adequacy of defendants' precautions.

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

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

ENTERED: JANUARY 21, 2016

CLERK

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

16745 The People of the State of New York, Ind. 2642/13
Respondent,

-against-

Leonard Jones,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J. at plea; Patricia Nunez, J. at sentencing), rendered May 29, 2014,

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.

ENTERED: JANUARY 21, 2016

CLERK

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

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

16746 The People of the State of New York, Ind. 146/10
Respondent,

-against-

Eric George,
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 (Kelly L. Smith 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 (Eduardo Padro, J.), rendered May 14, 2014,

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.

ENTERED: JANUARY 21, 2016

CLERK

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

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

16747N Alpida Navarro, Index 21180/13
As Administratrix of the
Estate of Epifanio Abreu, Deceased,
Plaintiff-Respondent,

-against-

Williamsbridge Manor Nursing Home
Center, etc.,
Defendant,

Montefiore Medical Center,
Putative Defendant-Appellant.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Edward J. Guardaro, Jr. of counsel), for appellant.

Krentsel & Guzman, LLP, New York (Steven E. Krentsel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about October 17, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion permitting her to serve a supplemental summons and amended complaint adding Montefiore Medical Center as a defendant, unanimously reversed, on the law, without costs, to deny the motion to amend without prejudice to renewal in the Supreme Court.

Plaintiff moved to amend the caption of the within action to name Montefiore Medical Center as a defendant in the "summons and complaint." To the extent plaintiff seeks to add Montefiore as a

named party defendant to this medical malpractice action by this motion, the court improvidently exercised its discretion in permitting her to serve a supplemental summons and amended complaint on Montefiore, especially where she failed to submit a copy of her proposed pleadings and an affidavit of merit with her motion to amend (*see Perez v Paramount Communications*, 92 NY2d 749, 754 [1999]; *Torchia v Garvey*, 118 AD3d 426 [1st Dept 2014]).

However, in light of the minimal delay in making the motion, and the fact that the motion was made prior to the statute of limitations' expiration, plaintiff may submit proper papers, including a medical expert's affidavit of merit, so that the court may examine the proposed pleading for sufficiency (*see Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 [1989]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]).

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

ENTERED: JANUARY 21, 2016

CLERK