SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 31, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Andrias, Moskowitz, Richter, JJ.

302N Skyline Steel, LLC, Index 650531/15
Petitioner-Appellant,

-against-

PilePro LLC, et al.,
Respondents-Respondents.

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Winston & Strawn LLP, New York (Aldo A. Badini of counsel), for appellant.

Law Office of Paul E. Dans, New York (Paul Edouard Dans of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 15, 2015, which denied the petition to stay arbitration and granted the cross motion to compel arbitration and dismiss the proceeding, unanimously affirmed, with costs.

Both the arbitration clause and the JAMS rule incorporated therein confer on the arbitrators the power to resolve arbitrability (*see Matter of Gramercy Advisors LLC v J.A. Green Dev. Corp.*, 134 AD3d 652, 653 [1st Dept 2015]). These

provisions, governing the specific issue, take precedence over the arbitration clause's generic incorporation of the "New York statutes governing arbitration" (*cf. Matter of ROM Reins. Mgt. Co., Inc. v Continental Ins. Co., Inc.*, 115 AD3d 480, 481-482 [1st Dept 2014]). The issues of whether the parties manifested an intent that the arbitration clause survive termination of the settlement agreement containing it (*see Matter of Baker v Bajorek*, 133 AD3d 421, 421 [1st Dept 2015]) and whether the agreement was induced by fraud (*see McDonald v McBain*, 99 AD3d 436, 437 [1st Dept 2012], *lv denied* 21 NY3d 854 [2013]) are also to be resolved by the arbitrators.

The question of whether respondents waived their right to arbitrate by their litigation-related conduct is for the court to decide (*see Cusimano v Schnurr*, 26 NY3d 391, 401 n 3 [2015]; *Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272 [1985]). Whether analyzed under the CPLR or the Federal Arbitration Act, respondents' conduct, viewed in its entirety, does not constitute a waiver of arbitration. Throughout the parties' dispute, respondents repeatedly made clear their position that the matter belongs in arbitration. In light of this, respondents' assertion of counterclaims in a separate federal action, standing alone, is

insufficient to establish that they waived arbitration (*see Singer v Seavey*, 83 AD3d 481, 482 [1st Dept 2011]; *Lodal, Inc. v Home Ins. Co.*, 309 AD2d 634 [1st Dept 2003]). Petitioner points to no record proof that respondents took any steps to pursue these counterclaims, which have been dismissed by the federal court.

We have considered the parties' other contentions and find them unavailing.

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

ENTERED: MAY 31, 2016

CLERK

Mazzarelli, J.P., Renwick, Saxe, Gische, Kahn, JJ.

1086 Robert Butt, Index 110784/10
Plaintiff-Appellant,

-against-

Equinox 63rd Street, Inc., doing business as Equinox Fitness Club, et al.,
Defendants-Respondents,

Amin El Ghouaye,
Defendant.

_____

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

LaRocca Hornik Rosen Greenberg & Blaha LLP, New York (Jared E. Blumetti of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered May 28, 2014, which granted the motion of the fitness club defendants (Equinox) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Equinox established entitlement to judgment as a matter of law, in this action where plaintiff was injured while weightlifting at Equinox with an Equinox personal trainer. Equinox submitted evidence showing that plaintiff was an experienced weightlifter, that he understood the techniques involved and the inherent risks in the sport from publications,

and from his personal training sessions, that he knew and appreciated the 230 to 240 pounds of weight the personal trainer had set up on his barbell for a single, bench press to close out the training session, and that he elected to attempt the bench press when the trainer encouraged him following plaintiff's brief questioning of the amount of weight. Such evidence established that plaintiff appreciated the risks, including the weight to be lifted, and that he voluntarily assumed the common and inherent risks associated with the sport (*see Lee v Maloney*, 270 AD2d 689 [3d Dept 2000]; *see also Feeney v Manhattan Sports Club*, 227 AD2d 293 [1st Dept 1996]).

In opposition, plaintiff failed to raise a triable issue of fact. There was no evidence that the personal trainer provided inadequate attention as a spotter during plaintiff's attempted bench press. Plaintiff's testimony that the personal trainer engaged in conversations with plaintiff and two other trainers at the time plaintiff questioned his ability to lift the weight is insufficient, absent speculative assumptions, to raise a factual issue as to whether the conversations continued during the actual attempted lift. In fact, the record shows that the personal trainer stood behind plaintiff in the spotter's position, and within seconds of plaintiff's failed lift attempt, the trainer

assisted plaintiff in placing the weight safely back on the bench post. Plaintiff also offered no expert testimony to indicate that the weight lifted at the time of his injury was inordinate and beyond his capacity. Plaintiff admittedly bench pressed 220 pounds on a repetition basis earlier in the same training session and had lifted more weight in the past.

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: MAY 31, 2016

CLERK

Friedman, J.P., Acosta, Moskowitz, Kapnick, Gesmer, JJ.

1111 Greenwich Insurance Company, Index 154552/12
Plaintiff-Respondent,

-against-

The City of New York, et al.,
Defendants-Appellants,

Triumph Construction Corporation,
et al.,
Defendants.

_____

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for appellants.

Kaufman Dolowich & Voluck LLP, Woodbury (Michael Zigelman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered April 9, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to compel the City defendants to provide outstanding discovery responses, and denied the City defendants' cross motion for summary judgment dismissing the complaint or to stay the action, unanimously reversed, on the law, without costs, the City defendants' cross motion granted solely to the extent of staying this action pending resolution of the liability phase of the underlying actions, and plaintiff's motion denied as moot.

Plaintiff insurance company commenced this action seeking a

declaration that it is not required to defend or indemnify the City defendants in connection with the six underlying lawsuits. The City defendants are "additional insureds" on the insurance policy, as to which coverage is limited to injuries caused, in whole or in part, by the acts or omissions of the named insured, defendant Triumph Construction Corporation or those acting on its behalf.

In a prior appeal, this Court found that plaintiff is obliged to defend the City defendants in the underlying negligence actions, and so declared (*Greenwich Ins. Co. v City of New York*, 122 AD3d 470 [1st Dept 2014]).

Plaintiff's remaining cause of action regarding its duty to indemnify depends on factual issues that will be resolved in the underlying actions. Whether the injuries suffered by the individual plaintiffs in the underlying actions arose out of work performed by Triumph, as required to trigger additional insured coverage, focuses "'not on the precise cause of the accident but the general nature of the operation in the course of which the

injury was sustained'" (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 416 [2008], quoting Impulse Enters./F&V Mech. Plumbing & Heating v St. Paul Fire & Mar. Ins. Co., 282 AD2d 266, 267 [1st Dept 2001]; *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010]). Therefore, because those issues will be resolved in the liability phase of the underlying negligence actions, all discovery and motion practice in this declaratory judgment action should be stayed pending the resolution of the liability phase in those negligence actions.

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

ENTERED: MAY 31, 2016

CLERK

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

1146 The People of the State of New York, Ind. 1694/14
Respondent,

-against-

Omar Pereira-Orlando,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (George Villegas, J.), rendered October 1, 2014, convicting defendant, upon a plea of guilty, of aggravated driving while intoxicated, in violation of Vehicle and Traffic Law section 1192(2-a)(b), and sentencing him to a term of probation of 5 years and imposing a fine of one thousand dollars, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal (*see People v Powell*, __ AD3d __ [1st Dept 2016]), we perceive no basis for reducing the sentence.

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1292 In re Akiko Miami-Lyn A.,

A Dependant Child Under Eighteen
Years of Age, etc.,

Ann Althea A.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent,

The Commissioner of the Administration for
Children's Services of the City of New York,
Petitioner.

_____

Steven N. Feinman, White Plains, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about February 13, 2015, which, upon a fact-finding determination that respondent mother suffers from a mental illness within the meaning of the Social Services Law, terminated her parental rights to the subject child and committed custody and guardianship of the child to petitioners for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence established that the mother is

presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child and that the child would be in danger of becoming a neglected child if she were placed in the mother's care (Social Services Law § 384-b[4][c], [6][a]). Petitioner the Children's Aid Society submitted, among other things, unrebutted expert testimony that the mother suffers from long-standing schizoaffective disorder that renders her unable to care for the special-needs child, as well as the expert's detailed report, which was prepared after an interview with the mother and a review of her mental health records (*see Matter of Isis S.C. [Doreen S.]*, 98 AD3d 905, 905-906 [1st Dept 2012]). The expert noted the mother's limited insight into her condition, long-standing pattern of intermittent compliance with medication and treatment, and recurrent hospitalizations (*id.*). In addition, the mother testified that she did not have a mental illness and

that she would not take medication if court supervision ceased. We have considered the mother's remaining contentions and find them unavailing.

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1293 Richard Greco, et al., Index 301406/10
Plaintiffs-Appellants,

-against-

Luigi Pisaniello, et al.,
Defendants-Respondents.

_____

Daniel Szalkiewicz & Associates, New York (Daniel S. Szalkiewicz of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered December 1, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly found that defendants were entitled to summary judgment where plaintiff slipped and fell on the terra cotta-tiled upper landing of a four-step stairway leading to defendants' door, which tiles were wet from a light rain. Mere wetness on a walking surface due to rain does not constitute a dangerous condition (*see McGuire v 3901 Independence Owners, Inc.*, 74 AD3d 434, 435 [1st Dept 2010]; *Grinberg v Luna Park Hous. Corp.*, 69 AD3d 793 [2d Dept 2010]). In opposition, plaintiffs' expert failed to raise a triable issue of fact as to

whether the terra-cotta tiles were interior tiles improperly used for an outdoor surface. Finally, no issue of fact was raised by the assertion that the landing lacked a handrail, as plaintiff clearly testified that he never tried to hold on to anything as he fell, because it happened too quickly.

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1294 Mark C. Denison, as Executor and Beneficiary of the Estate of Erika Pozsonyi,
Plaintiff-Appellant,

-against-

Anthony Pozsonyi,
Defendant-Respondent,

107 West 86th Street Owners Corporation, et al.,
Defendants.

Index 156362/12

Siegel & Siegel, PC, New York (Michael D. Siegel of counsel), for appellant.

Cooperman Lester Miller Carus LLP, Manhasset (Lynda J. Goldfarb of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about January 2, 2015, which, inter alia, denied plaintiff's motion to dismiss the counterclaims of defendant Anthony Pozsonyi (Pozsonyi), and granted Pozsonyi's cross motion for summary judgment and declared that Pozsonyi is entitled to 70% of the net estate of decedent, that Pozsonyi is permitted to assert a claim against the estate for his attorney's fees, court costs, and expenses from the proceeding, that there shall be a constructive trust over certain property and income derived from that property, and that

plaintiff is prohibited from transferring, selling, mortgaging, pledging or otherwise encumbering that property without the express permission of the court, unanimously affirmed, with costs.

Plaintiff, the widower of decedent, failed to challenge the asserted conflict between the provisions of the separation agreement between Pozsonyi and decedent and his right of election before the motion court and thus, his challenge is unpreserved. In any event, former spouses may enforce a separation agreement even at the expense of the widower's right of election *(see Wagner v Wagner,* 58 AD2d 7, 11-12 [1st Dept 1977], *affd* 44 NY2d 780 [1978]; *Matter of Barabash*, 84 AD3d 1363 [2d Dept 2011]).

Supreme Court has concurrent jurisdiction with the Surrogate's Court (*see Matter of Mizrahi,* 178 AD2d 349 [1st Dept 1991]), and did not improvidently exercise its discretion in determining the motions, in that plaintiff filed the initial

action challenging the provisions of the separation agreement in Supreme Court, which has general jurisdiction.

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: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1295-
1296 70th Street Apartments Corp., Index 161709/14
Petitioner-Respondent, 103223/09

-against-

Phoenix Construction, Inc.,
Respondent-Appellant.

- - - - -

Phoenix Construction, Inc.,
Plaintiff-Appellant,

-against-

70th Street Apartments Corp.,
Defendant-Respondent.

_____

Friend & Reiskind, PLLC, New York (Edwin M. Reiskind, Jr. of counsel), for appellant.

Marin Goodman, LLP, Harrison (Alexander J. Drago of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Donna M. Mills, J.), entered March 4, 2015, which, in the second action, denied plaintiff Phoenix Construction, Inc.'s motion for leave to renew and reargue the parties' prior motions for summary judgment, unanimously dismissed, without costs, as taken from a nonappealable paper. Amended order, same court and Justice, entered March 30, 2015, which, in the first action, granted petitioner 70th Street Apartments Corp.'s motion to discharge

respondent Phoenix's mechanic's lien, unanimously affirmed, without costs.

Although Phoenix sought leave to renew and reargue the parties' prior motions for summary judgment in its action against 70th Street, the motion was actually a motion for leave to reargue, since it did not proffer any "new facts" in support of the motion (CPLR 2221[e][2]; *see Prime Income Asset Mgt., Inc. v American Real Estate Holdings L.P.*, 82 AD3d 550, 551 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]). We decline to consider the affidavit improperly submitted for the first time by Phoenix in reply to 70th Street's opposition. Accordingly, the motion court's denial of the motion is not appealable (*see* CPLR 5701[a][2][viii]; *Prime*, 82 AD3d at 551).

The motion court properly granted 70th Street's motion to discharge Phoenix's mechanic's lien, since the court was bound by

its prior finding that Phoenix had released 70th Street from the lien (*see People v Evans*, 94 NY2d 499, 502 [2000]). It is not disputed that Phoenix had a full and fair opportunity to litigate the motion court's initial determination on this issue (*id.*).

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1297 The People of the State of New York, Respondent,

Ind. 1037/08

-against-

Kevin Rios,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered May 6, 2010, convicting defendant, after a jury trial, of rape in the first degree (three counts), criminal sexual act in the first degree (three counts), sexual abuse in the first degree and robbery in the first degree, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

Defendant's legal sufficiency claims as to the sexual abuse and robbery counts are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. We also reject defendant's remaining challenges to the sufficiency of the evidence and find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for

disturbing the jury's determinations concerning credibility. Among other things, we note that defendant's arguments concerning the victim's motive to falsify are unconvincing, and that defendant's testimony was completely contradicted by his prior statements and was otherwise incredible.

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that the challenged remarks generally constituted fair comment on the evidence, and reasonable inferences to be drawn therefrom, made in response to defense arguments, and that the summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside, or not fully explained by, the record, including matters of strategy (*see People v Rivera*, 71 NY2d 705 [1988]; *People v Love*, 57 NY2d 998 [1982]). Although many of defendant's complaints about trial counsel involve failure to make objections, the record does not reveal whether counsel had

strategic reasons for not making those objections; for example, "it is understandable that a defense counsel may wish to avoid underscoring a prejudicial remark in the minds of the jury by drawing attention to it" (*United States v Grunberger*, 431 F2d 1062, 1069 [2d Cir 1970]). 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]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence, or running it concurrently with the sentence on defendant's other rape conviction.

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1299-
1300-
1301-
1302 Index 651863/12

Culligan Soft Water Company,
et al.,
Plaintiffs-Appellants,

-against-

Clayton Dubilier & Rice LLC,
et al.,
Defendants-Respondents,

Culligan, Ltd., etc.,
Nominal Defendant-Respondent.

_____

Singler Professional Law Corporation, Sebastopol, CA (Peter A. Singler of the bar of the State of California, admitted pro hac vice, of counsel), for appellants.

Debevoise & Plimpton LLP, New York (Shannon Rose Selden of counsel) for Culligan Ltd., Clayton Dubilier & Rice, LLC, Clayton Dubilier & Rice, Inc., Bruno Deschamps, Michael J. Durham, Daniel R. Frederickson, Thomas A. Hays, Michael Kachmer, Mark Seals, Nathan K. Sleeper, George W. Tamke, James Uselton and David H. Wasserman, respondents.

Akin Gump Strauss Hauer & Feld LLP, New York (Brian T. Carney of counsel), for Centerbridge Special Credit Partners, L.P., CCP Acquisition Holdings, L.L.C. and CCP Credit Acquisition Holdings, L.L.C., respondents.

Simpson Thacher & Bartlett LLP, New York (Brian T. Carney of counsel), for Angelo Gordon & Co., L.P. and Silver Oak Capital, L.L.C., respondents.

_____

Order, Supreme Court, New York County (Jeffrey Oing, J.),

entered June 11, 2015, which, based on the so-ordered transcript

of a hearing dated May 28, 2015, granted the motion to dismiss the third amended complaint without prejudice, unanimously affirmed, without costs. Order, same court and Justice, entered August 17, 2015, which insofar as appealable and appealed from, denied plaintiffs' motion for leave to file a fourth amended complaint, unanimously reversed, on the law, without costs, and the motion granted. Order, same court and Justice, entered September 24, 2015, which denied plaintiffs' motion to disqualify Debevoise & Plimpton, LLP from representing any party in this action, unanimously affirmed, without costs.

Contrary to the decision of the lower court and the decision in *Kenney v Immelt* (41 Misc3d 1225[A] [Sup Ct, NY County 2013]), under BCL § 626(c), there is no pleading standard requiring that a shareholder bringing a derivative action who alleges the efforts he or she made, in making a pre-suit demand on the board to take action, also allege that the board wrongfully rejected the demand, and this Court's decision in *Tomczak v Trepel* (283 AD2d 229 [1st Dept 2001], *lv denied*, *dismissed* 96 NY2d 930 [2001]) should not be read to support such conclusion. However, plaintiffs here, who made pre-suit demands but then filed the complaint without giving the board a reasonable opportunity to investigate and respond to the demands, did not satisfy the

demand requirement and cannot satisfy the BCL § 626(c) pleading standards based on their allegations of their efforts to obtain board action (*see Barr v Wackman*, 36 NY2d 371, 381 [1975]; *MacKay v Pierce*, 86 AD2d 655 [2d Dept 1982]). But, compliance may be found in these circumstances where the complaint alleges "demand futility" (*see Marx v Akers*, 88 NY2d 189, 198 [1996]) with adequate particularity (*Mackay*, 86 AD2d at 655; *see also Soho Snacks Inc. v Frangioudakis*, 129 AD3d 636 [1st Dept 2015]). Here we find that the allegations of demand futility in the third amended complaint were inadequate to satisfy the pleading requirements of BCL § 626(c), and thus the complaint was properly dismissed.

We further find that the court erred in denying plaintiffs' motion for leave to file a fourth amended complaint. While the proposed complaint submitted by plaintiffs was also palpably insufficient with respect to its allegations of demand futility, plaintiffs repleaded the complaint to comply with the dictates of the erroneous prior order, which held that allegations of demand futility were irrelevant given the fact plaintiffs had made pre-suit demands. Plaintiffs should be afforded the opportunity to amend their complaint to satisfy the correct pleading standard.

The court properly denied the motion to disqualify Debevoise

& Plimpton, LLP from representing any party in this action. However, to the extent plaintiffs' complaint, as repleaded, survives the pleading stage, the nominal defendant should, at that time, obtain separate counsel (*see MacKay*, 86 AD2d at 655).

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1304 In re Rakeem M., and Others,

Children Under the Age of Eighteen Years, etc.

Marissa M.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

Carol L. Kahn, New York, for Rakeem M., child.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Bles M., child.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for Raymond M., child.

_____

Order of fact-finding, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about January 14, 2014, which, after a hearing, found that respondent neglected the subject children, unanimously affirmed, without costs.

Petitioner established by a preponderance of the evidence that the children's physical, mental or emotional condition had been impaired or was in imminent danger of becoming impaired as a result of respondent having her family live a transient, homeless

lifestyle, sleeping in subways, 24-hour restaurants, or storage facilities (*see Matter of Ronald Anthony G. [Sammantha J.]*, 83 AD3d 608 [1st Dept 2011]). Such an arrangement left the children without shelter and relegated them to eating junk food for their meals. Respondent's poor decision-making also led to the molestation of her daughter by a felon who also stayed in the storage facility. The Family Court properly declined to credit the mother's and daughter's recantation of the details of the abuse (*see Matter of Martha Z.*, 288 AD2d 706, 707 [3d Dept 2001]).

Furthermore, by allowing her children to spend their days in the library with their computers, under the guise of "home-schooling," without approval from the Board of Education, respondent educationally neglected them, as this amounted to no

more than absenteeism from school (*see Matter of Kaila A. [Reginald A.—Lovely A.]*, 95 AD3d 421 [1st Dept 2012]; *Matter of Joyitha M. [Reshemi M.]*, 121 AD3d 900, 901 [2d Dept 2014]).

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1305 The People of the State of New York, Ind. 1741/11
Respondent,

-against-

Tisha J. Dingle,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John Moore, J.), rendered January 8, 2014, convicting defendant, upon her plea of guilty, of attempted arson in the third degree, Penal Law §§ 110.00/150.10, and sentencing her to a split sentence of six years and five years' probation, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1306 Hearst Magazines, etc., Index 101809/10
Plaintiff-Respondent,

-against-

Greenstone/Fontana Corp., et al.,
Defendants,

Jeanne Fontana,
Defendant-Appellant.

_____

Peter C. Kaiteris, P.C., Bayport (Peter C. Kaiteris of counsel), for appellant.

Law Offices of Bernard D'Orazio & Associates, P.C., New York (Bernard D'Orazio of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 4, 2015, after a bench trial, in favor of plaintiff and against, inter alia, defendant Jeanne Fontana in the aggregate amount of $88,353.81, unanimously affirmed, with costs.

As a general matter, the unasserted claim by plaintiff magazine against its frequent advertiser would not constitute a cognizable claim for damages (*see Phillips-Smith Specialty Retail Group II v Parker Chapin Flattau & Klimpl*, 265 AD2d 208, 210 [1st Dept 1999], *lv denied* 94 NY2d 759 [2000]). Moreover, where the funds were converted by defendant advertising agency, but the ad

for which it received the funds nevertheless ran, there is no claim for conversion of the funds (*see generally Hillsley v State Bank of Albany*, 24 AD2d 28, 30 [1st Dept 1965]).

However, where, as here, a fiduciary profits from a breach of loyalty, those profits must be paid over to the principal (*see Tsutsui v Barasch*, 67 AD3d 896, 898-899 [2d Dept 2009]). Accordingly, the trial court properly entered judgment in plaintiff's favor in the amount of the ill-gotten proceeds.

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1307 Nissan Mizrahi, Index 601291/10
Plaintiff-Appellant,

-against-

Gregory R. Hovas, et al.,
Defendants-Respondents.

_____

Law Offices of Michael N. David, New York (Stacy N. Baden of counsel), for appellant.

Mitchell B. Craner, New York, for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 29, 2015, which granted defendants' motion, pursuant to CLR 3211(a)(7), to dismiss the amended complaint for failure to state a cause of action, unanimously affirmed, without costs.

Although a real estate broker who produces a person ready and willing to enter into a contract upon the seller's terms, is generally entitled to a commission, the "parties to a brokerage agreement are free to add whatever conditions they may wish to their agreement" (*Feinberg Bros. Agency v Berted Realty Co.*, 70 NY2d 828, 830 [1987], citing *Levy v Lacey*, 22 NY2d 271, 274 [1968]). The brokerage agreements unambiguously conditioned plaintiff's entitlement to a commission on the "sale" and

"purchase" of the subject property, which commission was to be paid at closing. As the sale was never consummated, and no closing took place, plaintiff did not earn his commission (*see Liggett Realtors, Inc. v Gresham*, 38 AD3d 214 [1st Dept 2007] *Corcoran Group v Morris*, 107 AD2d 622, 623-624 [1st Dept 1985], *affd* 64 NY2d 1034 [1985]). Contrary to plaintiff's contention on appeal, there is no indication that defendants' failure to close was the result of their conduct. Indeed, in *Sapir v Hovas* (71 AD3d 566 [1st Dept 2010]), a prior action involving this same aborted sale, this Court affirmed the dismissal of the *purchaser's* action for recovery of the down payment, on the ground that he was the defaulting party.

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

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1309 The People of the State of New York, Ind. 2855/12
Respondent,

-against-

Christopher Krieg,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered May 5, 2014, as amended May 29, 2014, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree (two counts), criminal sale of a controlled substance in the second degree (two counts), criminal sale of a controlled substance in the third degree (three counts), criminal sale of a controlled substance in the fourth degree, criminal diversion of prescription medications and prescriptions in the fourth degree (seven counts) and criminally using drug paraphernalia in the second degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of 20 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The record contains ample evidence that, at the time of trial, defendant, a paraplegic, was afflicted with a combination of conditions – including severe bedsores, and colitis that sometimes prevented him from controlling his bowel movements – that made his physical attendance at trial (which was expected to last three weeks) extremely physically distressing and often excruciatingly painful. The trial court expressed no doubt as to the genuineness of defendant's medical difficulties.

The court suggested that defendant appear at trial by videoconferencing from his place of incarceration on Rikers Island and, despite practical obstacles, the court arranged for defendant to do so. However, believing that, pursuant to CPL article 182 ("Alternate Method of Appearance"), the prosecutor's consent to the arrangement was required, the court determined that it could not carry through with its plan when the prosecutor refused to consent. Notably, consent was withheld based principally on a contention that the court found to be without basis – that defendant's appearance before the jury on a television monitor would improperly allow defendant to "take action that would be prejudicial to the People's case" such as "hold[ing] up a note to the jury" or "say[ing] something" before anyone could intervene.

Throughout the discussion of the subject, over numerous court appearances, the court consistently stated that, short of allowing a "remote" appearance, it would make every possible accommodation to defendant's needs, including having shorter court days and taking breaks whenever necessary. Defendant and his counsel persistently argued that such measures would be inadequate in light of, among other things, the necessity for defendant to spend 12 hours in his wheelchair, both in and out of the courtroom, on days he was brought to court, the unavailability of appropriate medical attention during those periods, and the acute pain and discomfort defendant would suffer.

Although defendant made numerous appearances in court during the several months leading up to the trial, he ultimately chose not to appear. Believing that an electronic appearance was not possible without prosecutorial approval, and seeing no other option, the court elicited from defendant a waiver of his right to be present, and the trial proceeded in his absence.

We agree with defendant that, under the unusual circumstances presented here, he was denied his constitutional

right to be present at trial (*see generally Massachusetts v Snyder*, 291 US 97, 105-06 [1933]; *People v Morales*, 80 NY2d 450, 456 [1992]). In this exceptional case, defendant's choices should not have been limited to appearing in person despite his medical problems, or waiving his appearance entirely, because his request to appear by videoconferencing should have been granted.

First, the court erred in believing that CPL article 182 restricted its authority to use video conferencing to effectuate a defendant's right to be present at trial. "Although the Legislature has primary authority to regulate court procedure, the Constitution permits the courts latitude to adopt procedures consistent with general practice as provided by statute," and "[b]y enacting Judiciary Law § 2-b(3), the Legislature has explicitly authorized the courts' use of innovative procedures where necessary to carry into effect the powers and jurisdiction possessed by [the court]" (*People v Wrotten*, 14 NY3d 33, 37 [2009] [internal citations and quotation marks omitted]). Accordingly, "courts may fashion necessary procedures consistent with constitutional, statutory, and decisional law" (*id.*).

The People argue that the courts are absolutely prohibited from employing their inherent powers to allow a consenting, medically disabled defendant from attending a hearing or trial

via videoconferencing because CPL 182.20 permits electronic appearance by a defendant "except at a hearing or trial." In the People's view, the procedure proposed by the trial court would have been inconsistent with the statute and thus was beyond the court's discretion to order. We disagree. CPL article 182 is plainly focused on administrative convenience and conservation of resources in routine nonsubstantive court appearances, and it does not address a defendant's appearance at trial by videoconferencing for valid and exceptional medical reasons. In light of a court's broad discretion inherent in the Constitution and Judiciary Law § 2-b(3) to use appropriate innovative procedures to fulfill the court's functions, we reject the notion that the statute precluded the procedure considered but rejected by the trial court.

Further, we conclude that where the court essentially accepted defendant's claims of extreme pain and physical distress, where the alternative of electronic appearance was actually available based on the court's own efforts, where it was not employed only because the court wrongly believed that it lacked the required discretion (*see People v Cronin*, 60 NY2d 430, 433 [1983]), and where the accommodations actually offered by the court were far less efficacious, the court, despite the best

intentions, failed to reasonably accommodate defendant's medical concerns (*see People v Trubin*, 304 AD2d 312 [1st Dept 2003], *lv denied* 100 NY2d 588 [2003]). In these circumstances, defendant's waiver of the right to be present was not knowing, voluntary, and intelligent (*see People v Parker*, 57 NY2d 136, 140 [1982]).

We also note that, although the error was harmless and would thus not constitute an additional ground for reversal, the uncharged crimes evidence at issue on appeal was unduly prejudicial.

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1312N Shalaine Y. Jones, Index 401917/13
Plaintiff-Appellant,

-against-

FEGS-WeCARE/Human Resources, NYC,
Defendant-Respondent.

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Shalaine Y. Jones, appellant pro se.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Steven C. Mandell of counsel), for respondent.

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Order, Supreme Court, New York County (Frank P. Nervo, J.), entered on or about April 10, 2015, which, insofar as appealed from, denied plaintiff's motion for a protective order as to requested Health Insurance Portability and Accountability Act of 1996 (HIPAA) authorizations and granted defendants' cross motion to compel plaintiff to produce those authorizations, unanimously modified, on the law and the facts, to limit the discovery from August 2012 to the present, and otherwise affirmed, without costs.

Plaintiff was a participant in defendant FEGS-WeCARE's (FEGS) mental health program. Plaintiff seeks damages from FEGS for its alleged negligence and violation of her privacy and confidentiality rights in connection with its role in having her

involuntarily admitted to a hospital emergency psychiatric ward. As part of discovery, FEGS seeks HIPAA-compliant authorizations enabling it to obtain plaintiff's mental health-related medical records from 2007 to the present.

Plaintiff waived the physician-patient and psychologist-patient privileges that apply to the records (CPLR 4504, 4507; *Dillenbeck v Hess*, 73 NY2d 278, 283-286 [1989]; *Brown v Telerep, Inc.*, 263 AD2d 378, 379 [1st Dept 1999]), because she placed her mental condition at issue by requesting damages for psychological injuries (*see Starling v Warshowski*, 148 AD2d 441, 442 [2d Dept 1989]; *see also Churchill v Malek*, 84 AD3d 446, 446 [1st Dept 2011]) and by challenging the reasonableness of FEGS's assessment of her psychological state. We find the motion court properly determined that the requested authorizations are discoverable, but should have limited it from August 2012 to the present.

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: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1313N-
1314N Index 158618/14

Laurence Gluck, et al.,
Plaintiffs-Appellants,

-against-

James McDonough, Jr., et al.,
Defendants-Respondents.

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Meister Seelig & Fein LLP, New York (Thomas L. Friedman of counsel), for appellants.

Zetlin & DeChiara, LLP, New York (Joeann E. Walker of counsel), for respondents.

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Orders, Supreme Court, New York County (Robert R. Reed, J.), entered October 28, 2015 and on or about November 9, 2015, which granted defendants' motion to vacate a default judgment entered against them, unanimously affirmed, without costs.

Plaintiffs allege that they retained defendant architects to prepare the building plans for a mansion in Southampton, New York, and that defendants negligently designed the house with a roof five feet lower than the maximum allowed by zoning law, notwithstanding plaintiffs' requests. In September 2014, plaintiffs served a summons and complaint asserting causes of action for breach of contract and professional misconduct. Defendants did not answer or otherwise appear and plaintiffs

moved for, and were granted, a default judgment. When defendants received plaintiffs' notice of an inquest to determine the amount of damages, they promptly moved to vacate the default judgment, contending, among other things, that they did not believe that plaintiffs were pursuing litigation, that settlement discussions were ongoing even after the service of the summons and complaint, and that plaintiffs had sent notice of their motion to an address where mail could not be received.

The lower court providently exercised its discretion in vacating plaintiffs' default judgment based on consideration of the relevant factors and in the interests of justice (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012]). It properly considered defendants' assertions of ongoing settlement discussions, that plaintiffs never told them that they intended to seek a default judgment, and the absence of any prejudice to plaintiffs resulting from the relatively short delay (*see Performance Constr. Corp. v Huntington Bldg., LLC*, 68 AD3d 737 [2d Dept 2009]; *Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]; *Scarlett v McCarthy*, 2 AD3d 623 [2d Dept 2003]).

Defendants also established a meritorious defense to

plaintiffs' claims of breach of contract and professional misconduct (*Batra v Office Furniture Serv.*, 275 AD2d 229, 231 [1st Dept 2000]), and strong public policy favors resolving cases on the merits (*New Media Holding Co.*, 97 AD3d at 465).

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

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1315N Stephany Hosking, Index 157081/13
Plaintiff-Appellant,

-against-

The City of New York, et al.,
Defendants-Respondents.

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

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondents.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered April 30, 2014, which denied plaintiff's motion to deem her previously served notice of claim timely, nunc pro tunc, or for leave to file a late notice of claim, unanimously reversed, on the law and the facts, without costs, and the motion granted to the extent of deeming the previously served notice of claim timely.

The court improvidently exercised its discretion in denying plaintiff's motion. There is no dispute that the motion for leave was timely made and the lack of a reasonable excuse for the delay or a causative nexus between the delay and plaintiff's

infancy is not fatal (*see Matter of Thomas v City of New York*, 118 AD3d 537 [1st Dept 2014]; *Lisandro v New York City Health & Hosps. Corp. [Metropolitan Hosp. Ctr.]*, 50 AD3d 304 [1st Dept 2008], *lv denied* 10 NY3d 715 [2008]).

The record shows that defendants received actual knowledge of the essential facts constituting the negligent supervision claim within the 90-day statutory period or within a reasonable time thereafter because the February 10, 2004 Occurrence Report was created within five days of the incident, and plaintiff testified at a General Municipal Law § 50-h hearing that she and her mother spoke with the principal of the school about the incident on February 9, 2004 (*see Alvarez v New York City Health & Hosps. Corp. [North Cent. Bronx Hosp.]*, 101 AD3d 464 [1st Dept 2012]; *Matter of Whittaker v New York City Bd. of Educ.*, 71 AD3d 776 [2d Dept 2010]; *Matter of Allende v City of New York*, 69 AD3d 931 [2d Dept 2010]).

Furthermore, defendants failed to establish that they would be substantially prejudiced if plaintiff's motion was granted. Defendants have not demonstrated that any necessary witness is unavailable or that they are unable to obtain information from

any investigation conducted by the City of New York (*see Matter of Kellel B. v New York City Health & Hosps. Corp.*, 122 AD3d 495, 497 [1st Dept 2014]; *Gibbs v City of New York*, 22 AD3d 717, 719-720 [2d Dept 2005]).

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1316N JTS Trading Ltd., Index 651936/15
Plaintiff-Appellant,

-against-

Trinity White City Ventures Limited, et al.,
Defendants.

- - - - -

Sahara US Corp., et al.,
Nonparty Respondents.

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Garvey Schubert Barer, New York (Malcolm Seymour, III of counsel), for appellant.

Milbank, Tweed, Hadley & McCloy LLP, New York (Antonia M. Apps of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 15, 2015, which denied the motion of plaintiff JTS Trading Ltd. seeking prejudgment attachment of properties under CPLR 6212 and 6201(1) and (3), unanimously affirmed, without costs.

The court properly declined to pierce the corporate veil to attach the properties of nonparties Sahara Plaza LLC and Sahara Dreams LLC. The corporate veil of a business entity may be pierced where a plaintiff sufficiently states that "(1) the owners exercised complete domination of the corporation in

respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *see TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 90 [1st Dept 2015]).

Here, JTS demonstrated that defendant Aamby Valley (Mauritius) Ltd. (Aamby Mauritius) dominated and controlled Sahara Plaza LLC and Sahara Dreams LLC (collectively Sahara LLCs) by submitting proof showing absence of corporate formalities between these entities. While nonparty respondents claim that the Sahara LLCs own the hotels sought to be attached, they do not dispute that Aamby Mauritius had negotiated deals concerning the sale or refinancing of the hotels with defendant Trinity White City Ventures Limited (TWCV) and nonparty Mirach Capital Group. Indeed, the director of Aamby Mauritius, Sandeep Wadhwa, acknowledged as much in his affidavit. Wadhwa also admitted that "Aamby Mauritius sought approval for its transaction with Mirach from the Supreme Court of India" in a regulatory proceeding in India, and that "Aamby Mauritius always intended to repay the loan and retain its ownership interest in the Properties." A lack of corporate formalities is also demonstrated by the fact

that the parties to the regulatory proceeding, Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited, had successfully sought permission by the Supreme Court of India to sell the subject properties to meet their owner's bail conditions.

Nevertheless, JTS has not shown that Aamby Mauritius used its domination of the Sahara LLCs to commit a fraud or a wrong against JTS. JTS argues that Aamby Mauritius "abetted TWCV's breaches of fiduciary duty while dominating the Sahara LLCs" and that such domination "enabled" Aamby Mauritius to negotiate a financing transaction with TWCV concerning the properties, causing TWCV to breach a joint venture agreement between TWCV and JTS. However, JTS has not shown that Aamby Mauritius entered into negotiations with TWCV for the purpose of causing TWCV to breach its fiduciary duty to JTS. Rather, Aamby Mauritius and TWCV were engaged in an arms-length transaction and, even though TWCV breached it fiduciary duty to JTS, nothing shows that Aamby Mauritius entered into the transaction for the purpose of harming

JTS (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339-340 [1998]; *Fairpoint Cos., LLC v Vella*, 134 AD3d 645 [1st Dept 2015]).

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

ENTERED: MAY 31, 2016

CLERK

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

1317 The People of the State of New York, Ind. 3818/10
Respondent,

-against-

Jesus Jimenez,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Fried, Frank, Harris, Shriver & Jacobson (Julia A. Gomez Hernandez of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered December 20, 2012, as amended January 17, 2013, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first degree, and sentencing him to a term of nine years, unanimously affirmed.

Regardless of any question of preservation, defendant's claim that the court improperly refused to accept a guilty plea is unreviewable on direct appeal because it turns on unrecorded discussions and other matters not reflected in the record (*see People v Kinchen*, 60 NY2d 772 [1983]). To the extent the present record permits review, we find that the court properly exercised its discretion in not completing defendant's plea allocution and

in declining to accept his plea. The totality of defendant's responses, over the course of a lengthy process, failed to demonstrate unequivocally that he was pleading guilty knowingly, intelligently and voluntarily (*see People v Hankins*, 286 AD2d 639 [1st Dept 2001], *lv denied* 97 NY2d 755 [2002]). Although the decision to plead guilty is one to be made by a defendant personally, it was appropriate for counsel, who had made every effort to assist his client in pleading guilty, to alert the court to his own doubts about defendant's ability to enter a voluntary plea, and for the court to take the attorney's doubts into consideration. The record fails to support defendant's assertion that the court simply "deferred" to the attorney's concerns, or that the attorney interfered with his client's choice to plead guilty.

The court properly instructed the jury on the automobile presumption set forth in Penal Law § 220.25(1). All of the elements of that presumption were satisfied, where a codefendant threw drugs out of the window of the stopped car defendant was driving, and the police immediately recovered the drugs (*see e.g. Matter of Rhamel C.*, 261 AD2d 125 [1st Dept 1999] [applying analogous automobile presumption for weapons]). Unlike the situation in *People v Kims* (24 NY3d 422, 432-438 [2014]), which

found the drug factory presumption inapplicable to a defendant who had departed from the premises before the police arrived, here defendant was still in the location where the drugs had been, i.e. the car, at the time the drugs were found (albeit on the ground next to the car rather than inside it). There was no evidence that the drugs had been "concealed upon the person" (Penal Law § 220.25[1]) of the codefendant, so as to render the presumption inapplicable. Moreover, such concealment was unlikely given the size of the drug package and other evidence, and the court's charge submitted the concealment issue to the jury as a factual issue.

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

ENTERED: MAY 31, 2016

CLERK

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

1318 Claudia Clarke, Index 307005/10
Plaintiff-Respondent,

-against-

Arnold Clarke,
Defendant-Appellant.

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Callender Law Offices PLLC, Brooklyn (Tracia Callender of counsel), for appellant.

Ingrid Gherman, P.C., New York (Ingrid Gherman of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about November 17, 2014, which, to the extent appealed from as limited by the briefs, confirmed a special referee's recommendation that defendant husband not be granted a judgment of divorce in his favor on the grounds of abandonment, unanimously affirmed, without costs.

Supreme Court properly declined to grant a judgment of divorce in favor of defendant on his counterclaim for abandonment, since he failed to establish that plaintiff's departure from the marital home was unjustified (*see Del Galdo v Del Galdo*, 51 AD2d 741, 741 [2d Dept 1976]; *see also Heilbut v Heilbut*, 297 AD2d 233, 233-234 [1st Dept 2002], *lv dismissed in part and denied in part* 99 NY2d 643 [2003]). Both plaintiff and

the parties' adult daughter testified regarding defendant's physical and mental abuse of plaintiff during the course of the parties' marriage.

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: MAY 31, 2016

CLERK

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

1319-
1320-
1321 In re Tavene H., and Another,

Dependent Children Under Eighteen
Years of Age, etc.,

William G, et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

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Andrew J. Baer, New York, for William G., appellant.

Steven N. Feinman, White Plains, for Daverne H., appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Emily M. Olshansky, J.), entered on or about July 27, 2015, to the extent it brings up for review an order of fact-finding, same court (Stewart H. Weinstein, J.), entered on or about November 14, 2014, which, after a hearing, found that respondent mother had neglected the subject children, unanimously affirmed, without costs. Mother's appeal from the fact-finding order, unanimously dismissed as subsumed in her appeal from the order of

disposition, and, insofar as the fact-finding order found that respondent stepfather had neglected the subject children, the order unanimously affirmed, without costs.

A preponderance of the evidence demonstrated that the stepfather had neglected the subject children by committing acts of domestic violence against the mother in the children's presence on July 1, 2013, and that the mother had neglected the children by failing to shield them from the violence (*see* Family Ct Act § 1012[f][i][B]; *Matter of Jalicia G. [Jacqueline G.]*, 130 AD3d 402, 403 [1st Dept 2015]). The children's out-of-court statements that they saw the stepfather hit the mother in the back were corroborated by the testimony of caseworkers (*Matter of Kaila A. [Reginald A.-Lovely A.]*, 95 AD3d 421, 421 [1st Dept 2012]). The autistic daughter's out-of-court statement that she cried when she saw the stepfather hit the mother demonstrated that her emotional and physical condition was at imminent risk of harm (*see Matter of Serenity H. [Tasha S.]*, 132 AD3d 508, 509 [1st Dept 2015]). The autistic son's emotional and physical condition was also at imminent risk of harm, because the mother told a caseworker that the child did not like it when she and the stepfather argued. Moreover, the police responded to respondents' apartment on other occasions due to altercations

between them, and the mother continued to live with the stepfather, despite her awareness of a pending neglect case against him based on his acts of domestic violence against his former partner in the presence of his daughter.

A preponderance of the evidence also demonstrated that the mother neglected the children by leaving them alone in the apartment on two occasions in May 2013, even though the children have a limited ability to communicate and are unable to care for themselves, and one child had suffered from recent seizures (*see Matter of Stoops v Perales*, 117 AD2d 7 [3d Dept 1986]).

There is no basis to disturb the Family Court's credibility determinations (*see Matter of Kaila A.*, 95 AD3d at 421).

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

ENTERED: MAY 31, 2016

CLERK

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

1322 Capin & Associates, Inc., Index 650888/13
Plaintiff-Respondent,

-against-

599 West 188th Street Inc., et al.,
Defendants,

PR 599 West 188 LLC, et al.,
Defendants-Appellants.

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Meister Seelig & Fein LLP, New York (Howard S. Koh of counsel), for appellants.

Claude Castro & Associates, PLLC, New York (Claude Castro of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered March 18, 2015, which, to the extent appealed from as limited by the briefs, denied defendants PR 599 West 188 LLC, Nathaniel Rahav, Joan Price and Michael Rahav's (collectively, the Rahav defendants) motion to dismiss the ninth and tenth causes of action as against them, unanimously modified, on the law, to grant the motion as to the ninth cause of action, and otherwise affirmed, without costs.

With respect to the allegations of the tenth cause of action that defendants "tortiously conspired together to defeat the Plaintiff's claim to its Commission on the transaction at issue,"

New York does not recognize an independent cause of action for conspiracy to commit a civil tort (*see Loeb Partners Realty v Sears Assoc.*, 288 AD2d 110, 111 [1st Dept 2001]). Nevertheless, plaintiff has a cause of action against the Rahav defendants for tortious interference with contract (*see e.g. Lansco Corp. v Strike Holdings LLC*, 90 AD3d 427 [1st Dept 2011]). The complaint alleges that the Rahav defendants were aware of plaintiff's brokerage agreement with the Gazivoda defendants, that they procured the Gazivoda defendants' breach of the agreement, and that such breach resulted in plaintiff's loss of commission (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Accordingly, we sustain the tenth cause of action as against the Rahav defendants as a claim for tortious interference with contract.

The complaint fails, however, to state a cause of action against the Rahav defendants for fraudulent misrepresentation. Assuming the truth of the allegations that the Rahav defendants misrepresented to plaintiff that they were not interested in purchasing the subject property from plaintiff's clients, the complaint fails to allege any specific detrimental reliance by

plaintiff on this misrepresentation, inasmuch as plaintiff could not have compelled the Rahav defendants to speak with plaintiff. We therefore modify the order appealed from to dismiss the ninth cause of action as against the Rahav defendants.

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

ENTERED: MAY 31, 2016

CLERK

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

1324N Richard Kahn, Index 654542/12
Plaintiff-Appellant,

-against-

Leo Schachter Diamonds, LLC, et al.,
Defendants-Respondents.

_____

Goldberg & Rimberg PLLC, New York (Brad Coven and Zachary Rockoff of counsel), for appellant.

Cohen Tauber Spievack & Wagner P.C., New York (Stephen Wagner of counsel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 16, 2015, which, inter alia, denied plaintiff's application for the issuance of letters rogatory, unanimously affirmed, with costs.

Plaintiff failed to establish that the discovery he seeks from nonparty entities in Brazil is "crucial" to the resolution of a key issue in this case (*see Richbell Info. Servs., Inc. v Jupiter Partners L.P.*, 32 AD3d 150, 156-157 [1st Dept 2006]). He contends that the discovery will show that he was responsible for introducing the Brazilian entities to defendants, and will establish the amount of commissions owed to him. However, he does not seek to request anything from the Brazilian entities that he could not obtain (or has not already obtained) from

defendants (*see id.* at 155). Defendants have produced more than 8,000 pages of documents, including sales information from before and after the termination of their relationship with plaintiff and communications to third parties concerning their business in Brazil and Argentina and their agreement with plaintiff. Plaintiff has not identified any deficiencies in that production or any reasons to doubt the completeness of defendants' compliance with discovery.

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

ENTERED: MAY 31, 2016

CLERK

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

1325-
1326 Index 103108/11

Michelle Branda,
Plaintiff,

-against-

MV Public Transportation, Inc.,
et al.,
Defendants-Respondents-Appellants,

John Doe, etc.,
Defendant,

Personal-Touch Home Care of N.Y., Inc.,
Defendant-Appellant-Respondent.

- - - - -

MV Public Transportation, Inc., et al.,
Third-Party
Plaintiffs-Respondents-Appellants,

-against-

Personal Touch Home Care of N.Y., Inc.,
Third Party
Defendant-Appellant-Respondent.

_____

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for appellant-respondent.

Shein & Associates, P.C., Syosset (Charles R. Strugatz of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered June 5, 2015, which denied defendants/third-party plaintiffs MV Public Transportation, Inc. and New York City Transit Authority and third-party plaintiff Domingo Matos's

motion for summary judgment dismissing the complaint as against them, and, upon defendant Personal Touch Home Care, Inc.'s motion for reargument, adhered to the determination on the original motion denying Personal Touch's motion for summary judgment dismissing all claims against it, unanimously modified, on the law, to grant Personal Touch's motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered January 30, 2015, unanimously dismissed, without costs, as superseded by the appeal from the June 5, 2015 order.

Plaintiff, who was seated in a wheelchair, alleged that she was injured while traveling in a Transit Authority Access-A-Ride van leased to defendant MV and operated by Matos. Before the van departed, Matos brought plaintiff into the van, attached her wheelchair to the van, and secured plaintiff and her wheelchair in place using the van's harness and straps. Plaintiff was accompanied by her home health aide, who was provided to her by defendant Personal Touch.

Plaintiff, her aide, and another passenger testified that, during the journey, the van struck a bump with enough force to cause plaintiff's home health aide to rise "a little" out of her chair and the other passenger to come off her seat, although her

motorized scooter was secured. The force caused plaintiff's wheelchair to rise, allegedly injuring her back.

Personal Touch established prima facie, through the deposition testimony of the parties, that it did not cause or contribute to plaintiff's injuries (*see Olan v Farrell Lines*, 64 NY2d 1092 [1985]. Plaintiff, who was physically disabled, but had no mental or cognitive deficits, repeatedly declined to use the seatbelt attached to her wheelchair in addition to the seatbelt and shoulder harness provided by the Access-A-Ride service, even after her home health aide asked her several times. The aide had no duty to restrain plaintiff against her will (*see generally Matter of Fosmire v Nicoleau*, 75 NY2d 218, 226 [1990]). In any event, the fact that the wheelchair seatbelt was not fastened did not cause or contribute to plaintiff's injuries.

In opposition, MV failed to raise an issue of fact. Matos's testimony established that he alone was responsible for securing plaintiff's wheelchair in the van once he had taken hold of it to place it in the van.

Summary judgment in MV's favor was correctly denied since the testimony describing the force of the bump raises issues of

fact as to whether the movement of the van was "unusual and violent," rather than belonging to the class of "jerks and jolts commonly experienced in city bus travel" (*see Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 830 [1995]).

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

ENTERED: MAY 31, 2016

CLERK

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

1327 The People of the State of New York, Ind. 3941/13
Respondent,

-against-

Brian Reyes,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered November 5, 2014, 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: MAY 31, 2016

CLERK

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

1328-
1328A Index 650797/14

CRAFT EM CLO 2006-1, Ltd., et al.,
Plaintiffs-Appellants,

-against-

Deutsche Bank AG,
Defendant-Respondent.

_____

Wollmuth Maher & Deutsch LLP, New York (William A. Maher of counsel), for appellants.

Jones Day, New York (Jayant W. Tambe of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 26, 2015, which granted defendant's motion to dismiss the amended complaint with prejudice, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 9, 2014, which granted defendant's motion to dismiss the original complaint without prejudice, unanimously dismissed, without costs, as moot.

Plaintiffs allege that defendant breached two credit default swap agreements between defendant and CRAFT. However, in the indentures, CRAFT granted nonparty HSBC Bank USA, as trustee, all of CRAFT's rights under the swap agreements, including the right to bring actions and proceedings. Therefore, the motion court, on the record before it, properly found that CRAFT lacked

standing to sue (*see James McKinney & Son v Lake Placid 1980 Olympic Games,* 61 NY2d 836, 838 [1984]; *National Fin. Co. v Uh,* 279 AD2d 374, 375 [1st Dept 2001]; *Wagner v Braunsberg,* 5 AD2d 564, 568 [1st Dept 1958]).

Defendant also contends that CRAFT lacks standing because it lacks damages, in that it is a pass-through entity – any recovery it obtains will be passed on to the noteholders. We rejected precisely this argument in *Hildene Capital Mgt., LLC v Bank of N.Y. Mellon,* 105 AD3d 436, 437-438 [1st Dept 2013]).

As noted earlier, the contracts for whose breach plaintiffs are suing are between defendant and CRAFT; plaintiff Arco Capital Corporation Ltd. is not a party to those contracts. That plaintiff Arco is a note holder and a third-party beneficiary under the indentures does not mean that it is a third-party beneficiary of the swap agreements (*see ASR Levensverzekering NV v Breithorn ABS Funding plc,* 102 AD3d 556, 557 [1st Dept 2013]).

We have considered plaintiffs' remaining arguments and find that they do not warrant reversal or further modification of the 2015 order.

The original complaint was superseded by the amended complaint (*see e.g. Plaza PH2001 LLC v Plaza Residential Owner LP,* 98 AD3d 89, 99 [1st Dept 2012]). Therefore, we dismiss as

moot plaintiffs' appeal from the order dismissing the original complaint (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 n 5 [1st Dept 2011]).

CRAFT now asserts that it subsequently entered into an agreement in which HSBC assigned back to CRAFT any and all rights it had to sue defendant under the swap agreement relating to the Class E and F notes. However, that agreement is not part of the appellate record and the issue should be addressed in the first instance in the motion court.

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

ENTERED: MAY 31, 2016

CLERK

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

1329 Timothy Robinson, et al., Index 654009/13
Plaintiffs-Appellants,

-against-

Oz Master Fund, Ltd., et al.,
Defendants-Respondents.

_____

Robins Kaplan LLP, New York (David Leichtman of counsel), for appellants.

Blank Rome LLP, New York (Kenneth L. Bressler of counsel), for Oz Master Fund, Ltd., Denarius Touch, L.L.C., Highbridge International LLC and OZ Financial Investors II, Inc., respondents.

Kaplan Rice LLP, New York (Howard J. Kaplan and Justin M. Garbaccio of counsel), for Plainfield Special Situations Master Fund Limited, Plainfield Asset Management LLC, Plainfield Direct West IV, LLC and Plainfield Direct LLC, respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 19, 2015, which granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

Contrary to plaintiffs' assertion, none of the agreements at issue barred defendants from participating in debtor-in-possession financing for Solidus Networks, Inc. (Solidus), and in that new capacity seeking superpriority of the new indebtedness over unsecured claims. Plaintiffs point to only one specific contract provision, which is in the Consent Agreement. However,

plaintiffs are not party to the Consent Agreement, which was only between defendants and Solidus. Because that agreement was entered into for a separate purpose (to allow Solidus to enter into the transaction with plaintiffs), pursuant to a prior securities purchase agreement, entered into well before and unconnected to the current transaction, and is between defendants and Solidus, but not plaintiffs, it cannot be said that the Consent Agreement should be read together with the other agreements in the transaction.

The cause of action for breach of the covenant of good faith and fair dealing was properly dismissed, since such a claim may not be used to impose obligations that alter or add to the express terms of the parties' agreements (*see Peter R. Friedman, Ltd. v Tishman Speyer Hudson L.P.*, 107 AD3d 569, 570 [1st Dept 2013]). Furthermore, the claim for unjust enrichment was properly dismissed, because the subject matter of the claim is

covered by the various express agreements in the transaction (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

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

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

ENTERED: MAY 31, 2016

CLERK

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

1330 Suzanne McDowell, as Administratrix of the Estate of Judy McDowell,
Plaintiff-Respondent,

-against-

Eric J. Tatar, M.D., et al.,
Defendants,

Nyack Hospital,
Defendant-Appellant,

New York Presbyterian Hospital,
Defendant.

Index 800115/11

_____

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Angela M. Ribaudo of counsel), for appellant.

David P. Kownacki, P.C., New York (David P. Kownacki of counsel), for respondent.

_____

Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered on or about October 30, 2015, which denied defendant Nyack Hospital's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against defendant Nyack Hospital.

Plaintiff's decedent sought treatment from defendant Eric Tatar, and signed a consent form acknowledging that she was

seeking treatment from him and/or his partner. In June 2009, Tatar performed a procedure on the decedent at defendant Nyack Hospital (Nyack), where he had privileges, and admitted her following the procedure. The decedent remained at Nyack under Tatar's care until October 2009, and was seen there by both Tatar and his partner, as well as other physicians. Plaintiff alleges a number of negligent delays in the decedent's treatment, all of which are attributable to Tatar's partner.

Nyack established prima facie that Tatar's partner was neither a hospital employee nor an independent contractor for whose acts or omissions it may be held liable (*see Walter v Betancourt*, 283 AD2d 223, 224 [1st Dept 2001]). In opposition, plaintiff failed to raise an issue of fact.

Nor did plaintiff present evidence that Nyack's nursing staff failed to timely notify any physicians of a change in the decedent's condition on September 27, 2009. Tatar's partner saw the decedent on that day, as indicated by his note in her record. Plaintiff's expert asserted that there was no indication in Tatar's partner's note that he was aware of a change in the decedent's condition. However, the decedent's condition was

documented in the nursing note immediately preceding Tatar's partner's note.

We have considered the remaining issues and find them unavailing.

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

ENTERED: MAY 31, 2016

CLERK

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

1331-
1332 The People of the State of New York,
Respondent,

-against-

Johnny Blanding,
Defendant-Appellant.

Ind. 4598/12

_____

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

Johnny Blanding, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Natalia Bedoya McGinn of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered June 21, 2013, convicting defendant, upon his guilty plea, of attempted assault in the first degree, and sentencing him, as a second violent felony offender, to a term of 7½ years, and order (same court and Justice), entered on or about June 13, 2014, denying defendant's CPL 440.10 motion to vacate his conviction, unanimously affirmed.

Because defendant's motion to withdraw his guilty plea was premised on completely different grounds from those he asserts on appeal, his present claim that his plea was coerced by the

court's statements during the plea proceeding is unpreserved (*see People v Tabares*, 52 AD3d 437 [1st Dept 2008], *lv denied* 11 NY3d 835 [2008]), and we decline to review it in the interest of justice. As an alternative holding, we find the plea was knowingly, voluntarily, and intelligently entered, and that the court's accurate description of the potential consequences of a conviction after trial was not coercive (*see id.*).

Defendant's ineffective assistance of counsel claims regarding defendant's desire to testify before the grand jury are without merit (*see People v Hogan*, 26 NY3d 779 [2016]; *People v Simmons*, 10 NY3d 946, 949 [2008]).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se claims.

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

ENTERED: MAY 31, 2016

CLERK

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

1333-
1334 The People of the State of New York,
Respondent,

-against-

Kenneth Isaac,
Defendant-Appellant.

Ind. 1485/13
SCI 2860/09

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

Judgments, Supreme Court, New York County (James D. Gibbons and Richard M. Weinberg, JJ. at pleas; Richard M. Weinberg, J. at sentencing), rendered October 31, 2013, convicting defendant of criminal sale of a controlled substance in the third degree and bail jumping in the first degree, and sentencing him to concurrent terms of one year, unanimously affirmed.

We do not find any compelling circumstances that would warrant dismissal of the accusatory instruments in the interest of justice. The court ultimately imposed sentences that were fair under all the circumstances.

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

ENTERED: MAY 31, 2016

CLERK

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

1335 I.R., an Infant Under the Age of Eighteen Years Old by His Mother and Natural Guardian, Norma C., Plaintiff-Respondent, Index 350589/09

-against-

Leake and Watts Services, Inc., Defendant-Appellant,

The City of New York, et al., Defendants.

_____

Kaufman, Dolowich & Voluck, LLP, New York (Kevin J. O'Donnell of counsel), for appellant.

Mallilo & Grossman, Flushing (Ann Jen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered April 9, 2015, which denied defendant Leake and Watts Services, Inc.'s motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as to it. The Clerk is directed to enter judgment accordingly.

Even assuming that defendant owed a duty of adequate care to plaintiff for an assault that occurred on a school bus it neither

owned nor operated (*see Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 671 [1999]; *David XX. v Saint Catherine's Ctr. for Children*, 267 AD2d 813, 815 [3d Dept 1999]), there were no issues of fact as to whether "school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). There was no evidence in the record to suggest that defendant had prior knowledge of any propensity or inclination of violence on the part of plaintiff's assailant demonstrating that the assault could have been anticipated or was foreseeable (*see Hallock v Riverhead Cent. School Dist.*, 53 AD3d 527 [2d Dept 2008]; *Dia CC. v Ithaca City School Dist.*, 304 AD2d 955 [3d Dept 2003], *lv denied* 100 NY2d 506 [2003]; *Shante D. v City of New York*, 190 AD2d 356, 362 [1st Dept 1993], *affd* 83 NY2d 948 [1994]).

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

ENTERED: MAY 31, 2016

CLERK

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

1336 Richard Sitomer, Index 158325/13
Plaintiff-Appellant-Respondent,

-against-

Goldweber Epstein, LLP, et al.,
Defendants-Respondents-Appellants.

_____

Jaffe & Asher LLP, New York (Ira N. Glauber of counsel), for appellant-respondent.

Housman & Associates, P.C., Tarrytown (Mark E. Housman of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 17, 2015, which granted defendants' motion to dismiss the complaint to the extent of dismissing five of plaintiff's six legal malpractice allegations, and otherwise denied the motion, and denied plaintiff's request for a stay of the motion pending further discovery, unanimously modified, on the law, to dismiss the complaint in its entirety, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

This malpractice action arises from defendants' representation of plaintiff in a contentious divorce proceeding, and focuses primarily on the matrimonial court's purported improper valuation of plaintiff's interests in two marital

assets: Blue Star Jets LLC (Blue Star) and International Star Investments Limited (ISI Ltd.). Plaintiff contends that, but for the negligence and malpractice of defendants, the court's valuation of his interest in Blue Star and ISI Ltd. would have been lower, and that he would have had to pay his ex-wife a lower distributive award.

Plaintiff failed to state a malpractice claim regarding defendants' failure to present independent expert testimony to rebut the court-appointed expert's valuation report regarding Blue Star, because the record shows that defendants' decision not to call such a witness was a strategic and reasonable one (*Pouncy v Solotaroff*, 100 AD3d 410, 410 [1st Dept 2012], *lv denied* 21 NY2d 857 [2013]). Plaintiff also has not alleged adequately that this decision was the proximate cause of his damages (*Bender Burrows & Rosenthal, LLP v Simon*, 65 AD3d 499, 499 [1st Dept 2009]).

Plaintiff failed to state a malpractice claim with respect to defendants' failure to move for a reappraisal or revaluation of Blue Star and ISI Ltd., since plaintiff failed to allege adequately that such a motion would have been successful (*id.*), particularly given the matrimonial court's discretion in

determining valuation issues (*see McSparron v McSparron*, 87 NY2d 275, 287 [1995]).

Plaintiff failed to state a cause of action based on defendants' failure to move to reargue or reconsider the divorce judgment, since the decision of whether to make such a motion is a strategic one and plaintiff has not alleged adequately that such a motion would have been successful (*Warshaw Burnstein Cohen Schlesinger & Kuh, LLP v Longmire*, 106 AD3d 536, 536 [1st Dept 2013], *lv dismissed* 21 NY3d 1059 [2013]).

The motion court correctly dismissed plaintiff's allegation that defendants failed to appeal from the divorce judgment, because the record shows that defendants informed plaintiff of his right to appeal, but that he chose not to do so in light of the cost and his minimal chance of success (*Rodriguez v Fredericks*, 213 AD2d 176, 177-178 [1st Dept 1995], *lv denied* 85 NY2d 812 [1995]).

The motion court should have dismissed the allegations regarding defendants' failure to present "appropriate evidence" at trial to establish the correct value of plaintiff's interest in ISI Ltd. The record does not support plaintiff's allegation that defendants possessed this documentation but failed to submit it to the matrimonial court. In any event, the admission of this

documentation would not have altered the matrimonial court's calculations and distributive award.

The motion court providently exercised its discretion in denying plaintiff's request for further discovery, since he failed to specify how additional discovery would enable him to state a sufficient claim with respect to the dismissed allegations (*see* CPLR 3211[d]; *Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 554 [2006]).

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

ENTERED: MAY 31, 2016

CLERK

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

1338N John Toscani, et al., Index 305428/08
Plaintiffs-Respondents,

James Jackson, et al.,
Plaintiffs,

-against-

One Bryant Park, LLC, et al.,
Defendants-Appellants.

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Alan Kaminsky of counsel), for appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for John Toscani and Patricia Toscani, respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 24, 2015, which granted plaintiffs' motion for renewal and/or reargument of their motion for severance of the consolidated personal injury actions and separate damages trials, and upon renewal, granted the motion for severance, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting plaintiffs leave to renew on the ground that plaintiffs would be unduly prejudiced by consolidated damages trials, i.e.,

"so as not to defeat substantive fairness" (*Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 365 [1st Dept 2001] [internal quotation marks omitted]).

Summary judgment on the issue of liability under Labor Law § 240(1) having been granted in plaintiffs' favor against defendants One Bryant Park, LLC and Tishman Construction Corporation, plaintiffs' individual issues will predominate; severance is warranted to avoid substantial prejudice to the individual claims arising from potential juror confusion or comparative review of the claims (*see Bender v Underwood*, 93 AD2d 747 [1st Dept 1983] CPLR 603).

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

ENTERED: MAY 31, 2016

CLERK

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

1339N David Moyal, Suing Individually and on Behalf of Circle Press, Inc., Plaintiffs, Index 157850/14

-against-

Joseph Sullo, Defendant-Respondent,

Robert Malta, et al., Defendants-Appellants,

Circle Press, Inc., Nominal Defendant.

_____

Catafago Fini LLP, New York (Adam Sherman of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about October 19, 2015, which, to the extent appealed from, denied defendants Robert Malta and GMD 444, LLC's (collectively Malta) motion for leave to amend their answer to add a usurious loan cross claim against defendant Joseph Sullo, unanimously affirmed, with costs.

The motion court properly denied the motion, because the proposed usurious loan cross claim is palpably without merit (*see Gordon v Oster*, 36 AD3d 525, 525 [1st Dept 2007]). The per annum

interest rate on the note executed by Malta does not exceed the maximum per annum interest rate provided in either the civil usury statute or the relevant criminal usury statute (*see* General Obligations Law § 5-501 [civil]; Banking Law § 14-a[1] [civil]; Penal Law § 190.40 [criminal]; *Blue Wolf Capital Fund II, L.P. v American Stevedoring Inc.*, 105 AD3d 178, 182 [1st Dept 2013]).

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

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

ENTERED: MAY 31, 2016

CLERK

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

1340N New York City Housing Authority, Index 450151/14
Plaintiff-Appellant,

-against-

Starr Indemnity & Liability Company, et al.,
Defendants-Respondents,

Liro Engineering & Construction Management, et al.,
Defendants.

_____

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Michael T. Reagan of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson (William J. Mitchell of counsel), for Starr Indemnity & Liability Company, respondent.

Miranda Sambursky Slone Sklarin Verveniotis, LLP, Mineola (Neil L. Sambursky of counsel), for Endurance American Insurance Company, respondent.

Law Offices of Cheng & Associates, PLLC, Long Island City (Pui Chi Cheng of counsel), for Corbex, Inc., respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about April 21, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to strike certain language in defendant insurers' discovery demands and to limit the scope of those demands, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying plaintiff's motion to strike certain parts of defendants' discovery demands and to limit the scope of its own preliminary conference order (*see e.g. Reyes v Riverside Park Community [Stage 1], Inc.*, 47 AD3d 599 [1st Dept 2008]). The information defendants seek is material and necessary to the defense of this action *(see e.g. Johnson v National R.R. Passenger Corp.*, 83 AD2d 916 [1st Dept 1981]).

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: MAY 31, 2016

CLERK

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

1341N In re Global Liberty Insurance Co., Index 261079/14
Petitioner-Appellant,

-against-

Professional Chiropractic Care, P.C., etc.,
Respondent-Respondent.

_____

The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

The Law Office of Sukhibir Singh, Richmond Hill (Ralph C. Caio of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 10, 2015, which denied the petition to vacate a master arbitrator's award, unanimously reversed, on the law, without costs, the petition granted, and the award vacated. The Clerk is directed to enter judgment accordingly.

The Master Arbitrator's award was arbitrary because it irrationally ignored the law, which petitioner insurer had presented to the Master Arbitrator, that the no-fault policy issued by petitioner was void ab initio due to respondent's assignor's failure to attend duly scheduled independent medical exams (*see American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 424 [1st Dept 2013]). The alleged error in petitioner's denial of claim

form is of "no moment" (*Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]), and was not a sufficient or rational basis for the award (*see Auto One Ins. Co. v Hillside Chiropractic, P.C.*, 126 AD3d 423, 424 [1st Dept 2015], citing *Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 211 [1981]).

Respondent waived its objections regarding improper service of the petition, since it never moved to dismiss the petition on those grounds (*see* CPLR 3211[e]; *B.N. Realty Assoc. v Lichtenstein*, 21 AD3d 793, 796 [1st Dept 2005]; *Matter of Resnick v Town of Canaan*, 38 AD3d 949, 951 [3d Dept 2007]).

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

ENTERED: MAY 31, 2016

CLERK

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

1342 In re Anthony Jones, OP 57/16
[M-1737] Petitioner,

-against-

The Bronx County Supreme Court,
etc.,
Respondent.

_____

Anthony Jones, petitioner pro se.

John W. McConnell, Office of Court Administration of the State of New York (Shawn Kerby of counsel), for respondent.

_____

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

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

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

ENTERED: MAY 31, 2016

CLERK

Tom, J.P., Saxe, Richter, Gische, Webber, JJ.

1205 MP Cool Investments Ltd., Index 650730/15
Plaintiff-Appellant,

-against-

Dan Forkosh, et al.,
Defendants-Respondents.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (David S. Rosner of counsel), for appellant.

Troutman Sanders LLP, New York (Aurora Cassirer of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 29, 2015, affirmed.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Rosalyn H. Richter
Judith J. Gische
Troy K. Webber, JJ.

1205
Index 650730/15

_____x

MP Cool Investments Ltd.,
Plaintiff-Appellant,

-against-

Dan Forkosh, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 29, 2015, which granted defendants' motion to dismiss the complaint.

Kasowitz, Benson, Torres & Friedman LLP, New York (David S. Rosner, Michael C. Harwood and Hershy Stern of counsel), for appellant.

Troutman Sanders LLP, New York (Aurora Cassirer and Bennett Moskowitz of counsel), for respondents.

GISCHE, J.

In this appeal over allegations of common law fraud in connection with the production and sale of a commercial heating and ventilation system by an Israeli-based company, we are asked to scrutinize every required element of a claim of fraud with specific emphasis on the effect of the claimant's status as a so-called sophisticated investor. Plaintiff alleges, among other things, that defendants, formerly controlling shareholders in DuCool, Ltd., intentionally provided plaintiff with false information over an extended period of time, inducing it to repeatedly invest in DuCool, by claiming the company possessed new technology for innovative heating, ventilation and air conditioning systems (HVAC), the units were more efficient than conventional units in the United States, and DuCool products could be installed without any expensive on-site retrofitting. Plaintiff also alleges that defendants intentionally concealed and withheld critical information regarding mounting maintenance and quality problems with these HVAC systems and that all the data defendants provided, including economic and technical models, and studies of current product installations, were false.

We affirm the motion court's dismissal of plaintiff's fraud claims because they were not pleaded with the requisite particularity (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173,

178 [2011]; CPLR 3016[b]). Moreover, plaintiff's allegations do not establish justifiable reliance as required to prove fraud because plaintiff is a sophisticated investor that had the means available to it to learn the true nature and real quality of the investment it made *(ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015]). Nor do the allegations support the element of scienter necessary for fraud. We also hold that the facts alleged do not support a claim for breach of fiduciary duty or breach of an implied covenant of good faith and fair dealing.

Plaintiff is presently the majority owner of DuCool, an Israeli company that manufactures commercial and industrial heating and ventilation systems. In December 2009, plaintiff entered into an exclusive option agreement with DuCool to obtain a majority interest in the company. Pursuant thereto, plaintiff made an initial investment, by which it acquired an initial 49% interest in the company for $30 million and installed three officers on the board. Plaintiff had the option to make additional investments in DuCool, which ultimately would permit plaintiff to acquire a majority interest in the company. In May 2012, plaintiff exercised its option, thereby acquiring an additional 23.2% equity interest in DuCool, by investing the sum of $30 million, and also purchased defendants' shares in the company for $10 million. Altogether, by 2012, plaintiff had

invested $70 million in DuCool and acquired a 72% majority interest in the Company. Subsequent investments, although not at issue here, brought plaintiff's equity interest in the Company to 90%.

The parties' agreement makes it clear that before making any investment in DuCool, plaintiff had a 90-day due diligence period during which it was afforded full access to the company's business operations, properties, technology data and plans. Plaintiff also had the right to direct access to all of DuCool's customers, but exercised that right only as to one customer. Plaintiff alleges that it availed itself of the right to conduct "extensive" due diligence by, among other things, hiring two consultants. It hired one company (QuinetiQ) to perform technical evaluations of DuCool's technology, manufacturing facility, and installation sites, and another company (McKinsey) to evaluate the company's business model, financial information, and market potential. McKinsey drafted a proposed business plan for the company that was included in the parties' initial purchase agreements. After the initial investment, but before the second investment, plaintiff appointed three of the seven members of the board of directors and two of McKinsey's representatives were installed as officers of DuCool.

Plaintiff claims that in the period before it purchased any

interest in DuCool (pre-investment) and during the two year period after its first investment (i.e. 2010 through 2012), when it acquired a majority interest in the company, defendants made numerous knowingly false representations and provided inaccurate data about DuCool's air conditioning technology, financial condition and overall successes in the United States and other markets. Plaintiff alleges that it relied on this information, inducing it to repeatedly invest in DuCool, believing it was a better performing company than it was. In support of its claim that defendants made certain pre-investment false representations, plaintiff largely relies on the fact that defendants provided it with an October 2009 study, titled "Overview, Advantages and Case Studies," falsely claiming, among other things, that DuCool's systems were 25% more efficient at removing humidity than conventional HVAC units and could be incorporated into existing, conventional systems, with no need to add additional applications. Plaintiff contends these representations were critical in inducing it to invest the initial sum and the second tranche, because they reflected highly appealing key benefits over existing commercial air conditioning technology. Other deceptions defendants allegedly made include providing false information about successful DuCool product installations in China and India, when

in fact there were rampant failures. Another false representation involved an installation project at an ice skating rink in Florida. Defendants allegedly reported to plaintiff that the project was stopped due to "regulatory" problems when, in actuality, the units had malfunctioned, resulting in a $200,000 loss to the company.

With respect to plaintiff's allegations of defendants' post-investment fraud, plaintiff claims that defendants deceived it by intentionally concealing known problems with DuCool's installations in at least three major sites in the United States and Costa Rica. Other alleged falsehoods pertain to inflated energy cost savings in an April 2011 "study" touting DuCool products' performance and cutting edge technology.

It is unrefuted that plaintiff is a sophisticated investor; in fact a share purchase agreement (SPA) was executed by the parties before the initial acquisition occurred, in which plaintiff made the following express representations:

> "Section 4.06 Investment Experience. The Investor [plaintiff] has substantial experience in evaluating and investing in securities of companies similar to [DuCool] and acknowledges that the Investor can protect its own interests. The Investor has such knowledge and experience in financial and business matters so that the Investor is capable of evaluating the merits and risks of its investment in the Company."

The SPA also warns of the "highly speculative nature" of the investment:

> "Section 4.07 Speculative Nature of Investment. The Investor understands and acknowledges that [DuCool] has a limited financial and operating history and that an investment in the Company is highly speculative and involves substantial risks. The Investor can bear the economic risk of the Investor's investment and is able, without impairing the Investor's financial condition, to hold the Purchased Shares for an indefinite period of time and to suffer a complete loss of the Investor's investment."

Section 4.08 of the SPA pertains to plaintiff's access to information about the company and ability to seek additional information directly from DuCool's officers:

> "Section 4.08 Access to Data. The Investor has had an opportunity to ask questions of, and receive answers from, the officers of the Company concerning the Transaction Documents, the exhibits and schedules attached thereto and the transactions contemplated by the Transaction Documents, as well as the Company's business, operations, properties, technology, prospects and plans, management and financial affairs, which questions were answered to its satisfaction. The Investor believes that it has received all the information the Investor considers necessary or appropriate for deciding whether to purchase the Purchased Shares. The Investor acknowledges that any business plans prepared by the Company have been, and continue to be, subject to change and that any projections included in such business plans or otherwise are necessarily speculative in nature, and it can be expected that some or all of the

> assumptions underlying the projections will not materialize or will vary significantly from actual results."

Where a cause of action is based in fraud, "the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury" (*see Dembeck v 220 Cent. Park S.*, LLC, 33 AD3d 491, 492 [1st Dept 2006]). Furthermore, where the plaintiff is a sophisticated party, "if the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations" (*ACA Fin. Guar. Corp.*, 25 NY3d at 1044). Circumstances constituting fraud must be set forth in a complaint in detail (CPLR 3016[b]).

The complaint fails to allege fraud with sufficient specificity as to each individual defendant and the various time frames involved. There are no misrepresentations or omissions attributed directly to defendants Vromen or Rosenblum, each of whom at all times only held a minority interest in DuCool. The

only allegations are generally that neither Vromen nor Rosenblum corrected misinformation that the other named defendants provided, despite their "superior knowledge" of the company. The superiority of their knowledge is based solely upon the fact that Vromen and Rosenblum were "insiders" and long time friends of the Forkosh defendants. With respect to the Forkosh defendants, they are alleged to have known of and intentionally misrepresented or concealed information about DuCool's poor performance, motivated by a desire to stay employed by the company and derive hefty bonuses. Actual specific false factual statements are not identified. Nor is specific false concealment identified. Such bundled, bare-boned and conclusory allegations do not establish the basic elements of fraud, namely a "representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Pope v Saget*, 29 AD3d 437, 441 [1st Dept 2006] lv denied 8 NY3d 803 [207], citing *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406-407 [1958]).

Plaintiff is an experienced and sophisticated investor. It did not plead facts to support the justifiable reliance element of fraud (*see ACA Fin. Guar. Corp.*, 25 NY3d at 1044). Plaintiff

had total, unfettered access to every aspect of DuCool's company information both before and after its initial investment, even before it held a controlling interest in DuCool. Although learning through the due diligence conducted by its own technology and business consultants that there were frequent technological problems with DuCool products, some of them "severe," plaintiff proceeded to invest in the company. Thereafter, as the 49% shareholder, plaintiff had the largest percentage ownership of any individual shareholder and it had access to information concerning the operations of the business. There is no factual basis on which to conclude that the alleged fraud involved matters peculiarly within defendants' knowledge, because plaintiff had the means to discover the truth behind any false claims about the condition of the company and whether this was a feasible investment (*see ACA Fin. Guar. Corp.*, 25 NY3d at 1044).

With respect to the scienter element of its claim, although "most likely to be within the sole knowledge of the defendant and least amenable to direct proof," plaintiff is still required to allege facts "from which it is possible to infer defendant[s'] knowledge of the falsity of [their] statements" when they were made (*Houbigant, Inc. v Deloitte & Touche,* 303 AD2d 92, 98, 99

[1st Dept 2003]). It has not done so. Plaintiff, based upon its own due diligence, concluded that DuCool presented a profitable, albeit speculative, investment opportunity given its development of new technology and registered patents. Although the company may not have performed as plaintiff expected, this does not support a reasonable inference that defendants knew that DuCool would fall short of its business projections. The parties' agreement not only contained plaintiff's express acknowledgment that success was speculative, but also a further acknowledgment that "any business plans prepared by the Company, have been, and continue to be, subject to change and that any projections included in such business plans or otherwise are necessarily speculative in nature. . ."

Plaintiff argues that the court erred in dismissing its claim based upon defendants' breach of their fiduciary duty to, among other things, impart critical information. This claim was properly dismissed because the relationship alleged does not support a finding of a fiduciary relationship. A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v Goldman, Sachs & Co.* 5 NY3d 11, 19 [2005]). The

transactions at their inception were arm's length transactions between sophisticated commercial parties. The SPA identifies plaintiff as an experienced investor. Defendants did not provide plaintiff with financial advice; nor was a relationship of higher trust created at that time (*see id.* at 19-22). Plaintiff hired its own investment adviser and engineer, seeking their advice about the viability of DuCool's products and whether this was a good investment opportunity. In the absence of a fiduciary relationship between these sophisticated entities, plaintiff cannot maintain a claim for breach of a fiduciary duty, and that claim was properly dismissed. Nor does a breach of fiduciary duty claim exist based upon the parties' status as co-shareholders after the initial investment, because once plaintiff acquired a 49% interest in DuCool, it became the largest single shareholder.

Plaintiff's claim for breach of the implied covenant of good faith and fair dealing was also correctly dismissed. Implicit in every contract is a covenant that in the course of performing the contract, "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [internal quotation marks

omitted]). The facts alleged describe little more than a breach of contract claim and, in any event, the SPA was not signed by defendants in their individual capacities.

Given our decision dismissing the complaint, we need not reach the other issues raised by the parties.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 29, 2015, which granted defendants' motion to dismiss the complaint should be affirmed, with costs.

All concur.

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

ENTERED: MAY 31, 2016

CLERK