SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 4, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Kahn, Gesmer, JJ.

2847-
2848 B and H Florida Notes LLC,
Plaintiff-Respondent,

-against-

Alexander Ashkenazi, et al.,
Defendants,

Amit Louzon,
Defendant-Appellant.

Index 850263/13

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

Marc Scollar Law Office, Staten Island (Marc Scollar of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 10, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment against defendant Amit Louzon, denied Louzon's cross motion for summary judgment dismissing the complaint against him, and denied Louzon's motion to amend his pleadings, unanimously modified, on the law, to the extent of denying plaintiff's motion

for summary judgment, granting Louzon's motion to amend his answer to add the affirmative defense of lack of standing, and otherwise affirmed, without costs; and order, same court and Justice, entered July 31, 2015, which, to the extent appealed from as limited by the briefs, upon plaintiff's motion, appointed a referee to compute the sums due plaintiff under a note and New York mortgage, unanimously reversed, without costs, and the appointment vacated.

Pursuant to CPLR 1018, nonparty W89D5 LLC may continue to prosecute this appeal in Louzon's name, despite Louzon having transferred his interest in the premises to W89D5, which he solely owns, and which neither party has requested be substituted in this action (*Central Fed. Sav. v 405 W. 45th St.*, 242 AD2d 512 [1st Dept 1997]; *cf. HSBC Guyerzeller Bank AG v Chascona N.V.*, 66 AD3d 488, 489 [1st Dept 2009] [party was properly substituted as the foreclosure plaintiff]).

The motion court properly denied Louzon's cross motion for summary judgment. On a prior appeal, this Court unanimously held that Louzon purchased the premises subject to the New York mortgage (*Grand Pac. Fin. Corp. v Ashkenazi*, 108 AD3d 425 [1st Dept 2013], *lv denied* 22 NY3d 1015 [2013]). The Mutual Settlement Agreement and General Release in the Michigan

foreclosure action did not contain or constitute a waiver of plaintiff's foreclosure rights under the New York mortgage. Additionally, RPAPL 1371 does not apply, since there has been no foreclosure sale under the New York mortgage (*Hometown Bank of Hudson Val. v Colucci*, 127 AD3d 702, 704 [2d Dept 2015]). RPAPL 1306 is also inapplicable. That statute is triggered by RPAPL 1304, which applies only to a "home loan," and the New York mortgage is not a "home loan" within the meaning of RPAPL 1304.

However, because Louzon raised triable issues of fact as to plaintiff's standing, the motion court should have granted Louzon's motion under CPLR 3025(b) to the extent of permitting Louzon to amend his answer to add the affirmative defense of standing, and, upon doing so, denied plaintiff's motion for summary judgment. "A plaintiff may establish standing in a foreclosure action either by showing assignment of the mortgage note or physical delivery of the note *prior* to the commencement of the foreclosure action" (*U.S. Bank N.A. v Askew*, 138 AD3d 402, 402 [1st Dept 2016] [emphasis added]). However, a plaintiff may not do so by means of "[c]onclusory, boiler plate statements" (*Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 524 [1st Dept 2016] [internal quotation marks omitted][alteration in original]). In addition, inconsistent statements regarding

possession of the note at the time plaintiff commenced the foreclosure action create a triable issue of fact as to standing precluding summary judgment (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]; *Wells Fargo Bank, N.A. v Ostiguy*, 127 AD3d 1375, 1377 [3d Dept 2015]).

Here, plaintiff commenced this foreclosure action on August 29, 2013. In support of its summary judgment motion, and in reply to Louzon's opposition and cross motion raising the issue of standing, plaintiff submitted conflicting affidavits from Carl Lin, the vice president of Grand Pacific Holdings Corp., the subservicer for Wells Fargo Bank.[1] In support of plaintiff's motion for summary judgment, Lin stated, in an affidavit sworn to on June 3, 2014, that plaintiff was in "physical possession" of the note, the guaranty, the mortgage, and all other loan documents. Specifically, Lin stated that plaintiff came into possession of these documents following their assignment from the trust depositor, Grand Pacific Business Loan LLC, pursuant to an agreement dated October 5, 2012 and recorded on October 25, 2012.

However, in his reply affidavit, sworn to on September 10, 2014, Lin stated that on April 9, 2012, plaintiff sent the note,

[1] Wells Fargo Bank has been succeeded in this action by B&H Florida Notes LLC.

the allonge, the guaranty, and the other loan documents to Grand Pacific. Lin further stated in his reply affidavit that since April 11, 2012, Grand Pacific has "continuously had physical custody" of the note and the other documents.

Although Lin later stated in his reply affidavit that Grand Pacific was entitled to hold the note and related documents for plaintiff pursuant to a servicing agreement, this statement was itself inconsistent. Lin never mentioned this agreement in his first affidavit, in which he stated that plaintiff was in physical possession of the note and related documents.[2]

Accordingly, plaintiff was inconsistent as to whether it physically held the note at the time it commenced this foreclosure action. Therefore, plaintiff's summary judgment motion should have been denied (*see Collymore*, 68 AD3d at 754; *Ostiguy*, 127 AD3d at 1377).

Since we are denying plaintiff's motion for summary judgment, we reverse and vacate the order of reference appointing

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[2] Moreover, we may not consider the servicing agreement because Lin did not authenticate it, either by identifying the signatures or by laying a business records foundation (*see* CPLR 4518; *Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 521-522 [1st Dept 2016]; Aurora *Loan Servs., LLC v Baritz*, 144 AD3d 618, 619-620 [2d Dept 2016]). In both of Lin's affidavits, he fails to plead that he was familiar with plaintiff's record-keeping practices (*see Baritz*, 144 AD3d at 620).

a referee to compute the sum due to plaintiff.

We have considered Louzon's remaining contentions, including his argument that plaintiff has violated RPAPL 1301, and find them unavailing.

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

ENTERED: APRIL 4, 2017

CLERK

Acosta, J.P., Mazzarelli, Feinman, Webber, JJ.

2881 Moughees A. Khan, Index 155050/12
Plaintiff-Respondent,

-against-

Goldmag Hacking Corp., et al.,
Defendants-Appellants.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for appellants.

David Horowitz, P.C., New York (Piotr M. Burdzy of counsel), for respondent.

_____

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered March 15, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted as to the claims raised in the original bill of particulars.

Plaintiff alleges that he suffered serious injuries as the result of a motor vehicle accident that occurred in August 2009, when his vehicle was struck in the rear by defendants' vehicle. Plaintiff's original bill of particulars alleged that he sustained cervical bulges, lumbar strain/sprain, thoracic sprain/strain, and right temporomandibular joint dysfunction of the jaw.

Defendants met their prima facie burden of showing that

plaintiff did not suffer permanent consequential or significant limitations of use of his jaw or his cervical, thoracic, and lumbar spine, through the affirmed reports of a dentist who found no injury in the jaw and a neurologist who found normal range of motion and negative test results upon examination of plaintiff's spine (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011]). Contrary to plaintiff's assertion, defendants' experts were not required to review plaintiff's medical records in order to provide their opinions based on their physical examinations of plaintiff (*see Mena v White City Car & Limo Inc.*, 117 AD3d 441 [1st Dept 2014]; *Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]). Defendants also relied on plaintiff's own MRI reports finding multilevel degenerative disc disease in his cervical and thoracic spine, and his medical records showing that he complained of back pain less than a month before the accident and was diagnosed with thoracic strain and sprain that interfered with his daily activities of living.

In opposition, plaintiff failed to raise a triable issue of fact as to any of the serious injuries alleged in the original bill of particulars. Plaintiff did not submit any evidence of a TMJ injury. His medical expert, who examined him in 2015, failed to raise an issue of fact as to causation regarding plaintiff's

cervical and thoracic spine, because he failed to address the findings of degeneration in plaintiff's own MRIs by offering another, legally sufficient, cause for the claimed spinal injuries (*see Perl v Meher*, 18 NY3d 208, 219 [2011]). Having first seen plaintiff nearly six years after the accident, the expert's opinion that the accident itself caused the injuries was insufficient to raise an issue of fact (*compare Williams v Tatham*, 92 AD3d 472, 473 [1st Dept 2012] [the plaintiff created an issue of fact as to causation by submitting the affidavit of a chiropractor who saw the plaintiff several times, beginning two days after the accident, and attributed the injuries to the accident]). Although the expert acknowledged plaintiff's prior diagnosis of thoracic strain, he did not offer any opinion as to how the claimed thoracic injury differed from the preexisting injury (*see Perl* at 219). Plaintiff submitted no objective medical evidence of injury for the lumbar spine claim. His expert referred to the results of an MRI performed in 2015, which purportedly indicated lumbar disc bulges, but the MRI report was not part of the record, and in any event, was performed more than five years after the accident, which is too remote to show a causal connection to the accident (*see Rosa v Mejia*, 95 AD3d 402 [1st Dept 2012]*; Beatty v Miah*, 83 AD3d 610 [1st Dept 2011]).

As for the 90/180-day claim, defendants met their initial burden by demonstrating that plaintiff's cervical and thoracic spinal injuries were not causally related to the accident, and that he had preexisting back pain that interfered with his activities of daily living, particularly his work as a driver (*see Nakamura v Montalvo*, 137 AD3d 695, 697 [1st Dept 2016]). In opposition, plaintiff did not submit medical evidence to support his claim of a medically determined injury.

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

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

ENTERED: APRIL 4, 2017

CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3326 In re Django K.,
Appellant,

A Child Under Eighteen Years
of Age, etc.,

Administration for Children's Services,
Petitioner,

Carl K.,
Respondent-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Dobrish Michaels Gross LLP, New York (Nina S. Gross of counsel), for Carl K., respondent.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about March 7, 2016, which, after a hearing, dismissed the petition brought by petitioner the Administration for Children's Services (ACS) on behalf of the subject child against respondent father on the ground that petitioner failed to prove by a preponderance of the evidence that respondent sexually abused the child, unanimously affirmed, without costs.

The record provides no basis to overturn the court's credibility finding as to the mother's testimony. Because the child was not called in the proceeding, there are no admissions by the father, and there was no physical evidence of sexual

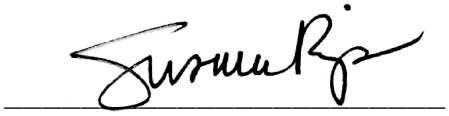
abuse; the only proof offered were hearsay statements. The out-of-court statements of the child were not sufficiently corroborated to establish abuse by a preponderance of the evidence (*Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987]). On this record, the court properly exercised its discretion in refusing to qualify a witness as an expert child sexual abuse validator (*id.* at 118-120).

In any event, even if the witness had been qualified as an expert, there still was not sufficient proof in the record. The out-of-court video statements made by the child have several inconsistencies, and the child stated he could not remember certain details upon further questioning by the Manhattan Child Advocacy Center interviewer. The mother's account, which the court doubted, also had many inconsistencies. Moreover, the child's parents are involved in a custody dispute, and these allegations cannot be separated from the dispute between the parties. Although we recognize the allegations are very serious,

and we are concerned about this young child's familiarity with certain adult sexual terms, on the limited record here, we find no basis to reverse the court's findings.

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

ENTERED: APRIL 4, 2017



CLERK

Acosta, J.P., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3344 [M-401] & M-403 — In re Anthony Thompson, Petitioner, — Ind. 3853/14, O.P. 94/17

-against-

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

_____

Thompson Hine LLP, New York (Maranda E. Fritz of counsel), for petitioner.

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

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Daniel Conviser, respondent.

_____

Application pursuant to CPLR article 78 for a writ of prohibition barring any further proceedings against petitioner under New York County Indictment No. 3853/14, and for related relief, unanimously denied, and the petition dismissed, without costs.

Petitioner seeks to enjoin the Honorable Daniel P. Conviser from conducting a trial in the criminal case, *People v Anthony Thompson et al*. (Sup Ct, NY County, indictment no. 3853/14), and to obtain an order vacating Justice Conviser's January 4, 2017 order denying petitioner's motion to dismiss the indictment for lack of jurisdiction.

The indictment charges that petitioner and his codefendants and accomplices acted together to manipulate the markets for numerous penny stocks in a "pump and dump" scheme. Penny stocks are securities that are traded for less than five dollars per share on the OTC Markets headquartered in New York City. Physical shares of some of the stocks, as well as book entry records of share transfers, were maintained at the Depository Trust Company in New York City.

Petitioner and his accomplices allegedly used promotional email newsletters to generate market interest and induce investment. Petitioner and his accomplices also allegedly used brokerage accounts, some of which were maintained at D. Weckstein & Company and Oppenheimer & Company, both headquartered in New York, to sell stock in furtherance of the alleged scheme.

Petitioner, his companies, the codefendants, and the victims are located outside of New York. To establish geographic jurisdiction within New York County, the People rely on petitioner's and his codefendants' use of certain brokerage firms, OTC Markets, and the Depository Trust Company, all located in New York, to argue that an element of each charged offense was committed in New York.

After being provided with portions of grand jury testimony,

petitioner asked the court to dismiss the indictment for lack of geographic jurisdiction. Supreme Court denied the motion. Shortly before trial was to begin, petitioner filed this article 78 petition seeking a writ of prohibition.

"The extraordinary remedy of prohibition is available 'when a court exceeds its jurisdiction or authorized power in such a manner as to implicate the legality of the entire proceeding, as for example, the prosecution of a crime committed beyond the county's geographic jurisdiction'" (*Matter of Crain Communications v Hughes*, 74 NY2d 626, 627–628 [1989], quoting *Matter of Rush v Mordue*, 68 NY2d 348, 353 [1986]).

"[T]he remedy is not granted as of right, but only in the sound discretion of the reviewing court" (*Matter of Neal v White*, 46 AD3d 156, 159 [1st Dept 2007]).

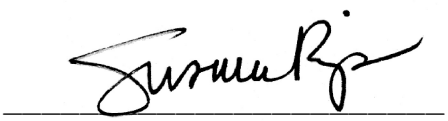
Petitioner fails to establish why he is entitled to such extraordinary relief here. The question of geographic jurisdiction may be raised upon a fuller record at trial, or upon any appeal after any conviction, as "the ordeal of a criminal trial, and the possibility of a conviction are, by themselves, insufficient to warrant the use of a writ" (*Matter of Neal v White*, 46 AD3d at 160). Moreover, petitioner is not incarcerated while awaiting trial.

M-403 ***In re Anthony Thompson v Cyrus R. Vance, Jr., et al.,***

Motion for a stay denied. Interim stay granted by a Justice of this Court vacated.

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

ENTERED: APRIL 4, 2017



CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3615 The People of the State of New York, Ind. 3318/12
Respondent,

-against-

Damian Jones,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Scott M. Danner of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered August 8, 2013, as amended October 2, 2013, convicting defendant, after a jury trial, of enterprise corruption, and sentencing him, as a second felony offender, to a term of 5 to 10 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence, and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence demonstrated the existence of a criminal enterprise (*see* Penal Law §§ 460.10[3], 460.20[1][a]), with a common purpose of making money by obtaining stolen motorcycles and reselling them in the United States and overseas (*People v Wright*, 139 AD3d 1094, 1098-1100 [3d Dept], *lv denied* 28 NY3d 939 [2016]). There was a

sufficiently ascertainable structure in which members of the enterprise played specific roles and worked collaboratively to effectuate the common purpose of the enterprise. There were procurers like defendant, who stole the bikes on the streets, distributors or brokers who found a market for the bikes, and dealers who resold the stolen bikes in the United States and overseas. In addition, the enterprise members worked together to swap parts on bikes, alter vehicle identification numbers, and remove any antitheft devices. Bikes were also shipped overseas, which could only be done through clandestine methods in packing them in shipping containers, and which required the coordination of an employed shipper (*see People v Conigliaro*, 290 AD2d 87, 88 [2d Dept], *lv denied* 98 NY2d 650 [2002]). In addition, the enterprise operated for at least well over a year. The evidence demonstrated a level of coordinated activity that went beyond what would be expected in a mere market, and instead evinced the existence of a distinct criminal enterprise with a common purpose and ascertainable structure (*see People v Western Express Intl., Inc.*, 19 NY3d 652, 658-659 [2012]).

Regarding defendant's knowledge of and participation in the enterprise, defendant met over 40 times with one of the other members, directly interacted with three other members on more

than one occasion, sold four motorcycles on three different dates, and transacted business at his house. The evidence warrants an inference that he knew of and intentionally participated in the enterprise (*see People v Kancharla*, 23 NY3d 294, 305-306 [2014]).

Defendant, who only objected on grounds relating to uncharged crimes and lack of notice thereof, failed to preserve the distinct claim that the People constructively amended the indictment, and we decline to review it in the interest of justice. As an alternative holding, we find no material variance between the People's trial theory and the theory alleged in the indictment (*see generally People v Grega*, 72 NY2d 489, 495-496 [1988]). Where defendant was alleged to have participated in the criminal enterprise by acting as a procurer of stolen motorcycles, admission of evidence at trial that he altered certain identifying evidence on the stolen motorcycles was not an additional theory of criminal liability.

We find the repeated mistakes and missteps taken by the prosecution troubling. Nonetheless the ameliorative action taken by the trial judge, including curative instructions and striking

the October 24 incident as a pattern act for the enterprise corruption charge, were appropriate to ensure that the defendant did not suffer any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]).

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

ENTERED: APRIL 4, 2017

CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3617 In re Paul P.,
Petitioner-Respondent,

-against-

Tonisha J.,
Respondent-Appellant.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Daniel R. Katz, New York, for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

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Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about January 15, 2016, which, after a hearing, denied respondent mother's request for custody, and granted petitioner father's petition for modification of visitation to the extent of, among other things, modifying the mother's visitation to one day a week, unanimously affirmed, without costs.

The mother's unsubstantiated claim that she completed drug treatment and received therapy for her depression was not a substantial change in circumstances to warrant a change in custody from the father to the mother (Family Ct Act § 652[b][ii]; *Matter of Leonard F. v Jolanta J.*, 162 AD2d 215,

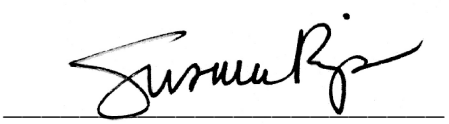
216 [1st Dept 1990]). Nor was there any evidence that the father was an unfit father or that continued custody with him was not in the best interest of the parties' child (*see Matter of Isaac C. v Veronica R.*, 18 AD3d 327 [1st Dept 2005]).

Family Court providently exercised its discretion in denying the mother's request for an in camera interview of the child. The court was aware of the child's preferences, since the child's counsel stated during the hearing that the child wanted to live with the father and visit the mother (*see Matter of Martin V. v Karen Beth G.*, 305 AD2d 305, 306 [1st Dept 2003]).

Family Court's finding that it is in the child's best interest to change the mother's visitation to once a week has a sound and substantial basis in the record. The evidence shows that the mother failed to supervise the child and did not adhere to the court's prior order (*see Matter of Thomas v Osborne*, 51 AD3d 1064, 1068 [3d Dept 2008]).

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

ENTERED: APRIL 4, 2017



CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3618 Wilmington Trust Company, as Successor Trustee to Bank of America National Association, etc., Plaintiff-Respondent,

-against-

Audrey Walker, et al., Defendants-Appellants,

Bank of America, N.A., et al., Defendants.

Index 381935/09

Law Office of Peter A. Hurwitz, PLLC, New City (Peter A. Hurwitz of counsel), for appellants.

Hogan Lovells US LLP, New York (Heather R. Gushue of counsel), for respondent.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered September 21, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment in this mortgage foreclosure action, unanimously affirmed, without costs.

Defendants Audrey Walker and Dawn Walker are individuals who executed a mortgage and corresponding promissory note in connection with a residential property located in Bronx County. On appeal, they argue that plaintiff, the trustee of a Trust which holds their mortgage, does not have standing to bring this

action.

Plaintiff has standing in this residential mortgage foreclosure action, as it provided prima facie evidence that it was the assignee of the subject mortgage, and the holder and assignee of the underlying note at the time this action was commenced in September 2009 (*OneWest Bank FSB v Carey*, 104 AD3d 444, 445 [1st Dept 2013]; *Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d 695, 695-696 [1st Dept 2012]). Plaintiff submitted a pooling and servicing agreement which shows that both the mortgage and the note were assigned to the Trust in June 2007.

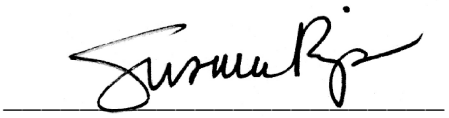
In addition, plaintiff submitted the affidavit of the Vice President for Loan Documentation for the Trust's Servicer, who attested that, on July 1, 2009, the original note was physically delivered to plaintiff's attorneys, and that they retained this note at the time of commencement. These statements are sufficient to show that plaintiff had physical possession of the note prior to commencement of this action (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 523-524 [1st Dept 2016]; *U.S. Bank N.A. v Askew*, 138 AD3d 402, 402 [1st Dept 2016]; *Deutsche Bank Natl. Trust Co. v Idarecis*, 133 AD3d 702, 703 [2d Dept 2015]).

The individual defendants' argument that plaintiff violated

a rule promulgated by Chief Judge Lippman (Administrative Order of the Chief Administrative Judge of the Courts 548/2010, dated October 20, 2010) by not submitting an attorney affirmation certifying that the residential mortgage documents were complete and accurate is unavailing. Administrative Order 548/2010 was amended in March 2011 by Administrative Order 431/2011, which provided that, in pending cases, such affirmation could be submitted along with the proposed judgment of foreclosure. Here, as the proposed judgment of foreclosure had not been submitted to the trial court as of the date of the trial court's decision, there is no violation.

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

ENTERED: APRIL 4, 2017



CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3620 The People of the State of New York, Dkt. 58534/10
Respondent,

-against-

Eric Brown,
Defendant-Appellant.

_____

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

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

_____

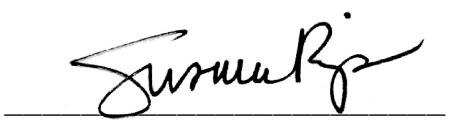
Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered May 11, 2011, which adjudicated defendant a level two predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, on the law, to the extent of vacating the predicate sex offender designation, and otherwise affirmed, without costs.

The record supports the court's discretionary upward departure to level two (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]). There was clear and convincing evidence to establish aggravating factors that were not otherwise adequately accounted for by the risk assessment instrument, including defendant's pattern of predatory conduct, and his history of poor compliance with supervision, including multiple parole violations

and a conviction for failing to register as a sex offender (*see e.g. People Solis*, 143 AD3d 585 [1st Dept 2016], *lv denied* 28 NY3d 912 [2017]). However, as the People concede, defendant did not qualify as a predicate sex offender.

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

ENTERED: APRIL 4, 2017



CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3621 In re Haijin Cho-Brellis, Index 101564/13
Petitioner-Appellant,

-against-

Board of Education of the
City School District of the
City of New York, et al.,
Respondents-Respondents.

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 4, 2015, denying the petition to annul respondents' determination, dated April 7, 2015, which upheld an unsatisfactory rating for the 2012-2013 school year and terminated petitioner's employment as a probationary teacher, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

A "probationary employee may be discharged for any or no reason at all in the absence of a showing that [the] dismissal was in bad faith, for a constitutionally impermissible purpose, or in violation of law" (*Matter of Brown v City of New York*, 280 AD2d 368, 370 [1st Dept 2001]). Where there is evidence to

rationally support an unsatisfactory rating, the rating must be upheld (*see Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]).

Here, the record supported the unsatisfactory rating that petitioner received for the 2012-2013 school year. Petitioner was assigned a mentor and a co-teacher in October 2012, and acknowledged that she received an informal observation in November 2012. The log of assistance showed that the problems with the her pedagogical techniques and relations with staff and parents persisted throughout the school year, and showed little, if any, improvement. Moreover, the principal's testimony at a Chancellor's Committee hearing and a conference summary documented petitioner's problems with record keeping, which worked to the detriment of at least one student.

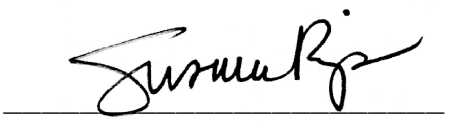
Respondents' failure to follow certain procedures set forth in their manual for rating employees did not deprive petitioner of a substantial right or undermine the fairness and integrity of the rating process (*see Matter of Cohn v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 102 AD3d 586 [1st Dept 2013]; *compare Matter of Murray v Board of Educ. of the City Sch.*

Dist. of the City of N.Y., 131 AD3d 861, 866-867 [1st Dept 2015]).

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

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

ENTERED: APRIL 4, 2017



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Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3623 The People of the State of New York, Ind. 4504/13
Respondent,

-against-

Julius Graham,
Defendant-Appellant.

_____

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

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

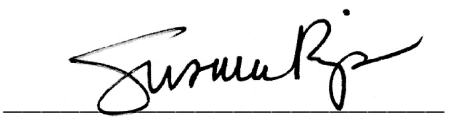
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on May 12, 2015,

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

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

ENTERED: APRIL 4, 2017



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

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3624 Valley National Bank, as successor to the Park Avenue Bank, Plaintiff-Respondent, Index 102457/10

-against-

Stephen L. Gurba, et al., Defendants-Appellants.

_____

The Law Offices of Thomas M. Mullaney, New York (Thomas M. Mullaney of counsel), for Stephen L. Gurba, appellant.

Fischer Law Group, New York (Andrea Fischer of counsel), for Evelyn Gurba, appellant.

Kriss & Feuerstein LLP, New York (Dwight Yellen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered December 15, 2014, which, after an inquest, dismissed defendants' affirmative defense of failure to mitigate and directed entry of judgment in plaintiff's favor in the total amount of $4,905,185.26, unanimously affirmed, without costs.

The motion court correctly dismissed the defense of failure to mitigate, since plaintiff had no duty to sell the nonperishable collateral at any particular time, regardless of the demand of defendants (*see First Intl. Bank of Israel v Blankstein & Son*, 59 NY2d 436, 447 [1983]). The court also correctly allowed the calculation of the debt based on default

interest, where plaintiff had the clear contractual right to impose such interest once a default occurred.

The fraud defenses were dismissed in another order not appealed from, and, in any event, the defenses were correctly dismissed, as there was no writing that met the requirements of 12 USC § 1823(e)(1) (*see Aurora Loan Services LLC v Sadek*, 809 F Supp 2d 235, 241 [SD NY 2011]).

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

ENTERED: APRIL 4, 2017

CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3625-
3626 Index 155657/15

Dr. Robert N. Taub,
Petitioner-Respondent,

-against-

Columbia University in the
City of New York, et al.,
Respondents-Appellants.

_____

Proskauer Rose LLP, New York (Bettina B. Plevan of counsel), for appellants.

Hoguet Newman Regal & Kenney, LLP, New York (Richard M. Reice of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered July 26, 2016, which, among other things, granted the petition to the extent of remanding the matter to respondents (Columbia) for completion of the multistep process, delineated in the Faculty Handbook and in the University Statutes, for terminating professors with tenure and tenure of title; enjoined Columbia from, among other things, removing petitioner from his position and job duties, and ending his salary until the completion of the multistep process; and denied Columbia's cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition denied, the injunction vacated, and

Columbia's cross motion granted. The Clerk is directed to enter judgment dismissing the proceeding. Amended order, same court and Justice, entered December 7, 2016, which, to the extent appealed from as limited by the briefs, granted petitioner's motion to expand the injunctive relief provided in the order entered July 26, 2016, unanimously reversed, on the law, without costs, the motion denied, and the injunction vacated.

The record establishes that Columbia had a rational basis for preserving petitioner's title, but removing his job duties, salary, laboratory space, and administrative support, without a hearing (*see* CPLR 7803[3]; *see also O'Neill v New York Univ.*, 97 AD3d 199, 213 [1st Dept 2012]). The controlling Faculty Handbook makes clear that faculty possessing tenure of title, as petitioner did, are not entitled to a hearing unless their title itself is eliminated, which did not happen here. Given the foregoing, there is no basis for an injunction.

Petitioner improperly raised a breach of contract claim in this article 78 proceeding (*see Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *see also Keles v Trustees of Columbia Univ. in the City of N.Y.*, 74 AD3d 435, 435-436 [1st Dept 2010], *lv denied* 16 NY3d 890 [2011], *cert denied* 565 US 884 [2011]), and there is no basis to convert the article 78 petition into a hybrid petition

and complaint. The Faculty Handbook explicitly states that it is not a contract (*see Gomariz v Foote, Cone & Belding Communications*, 228 AD2d 316, 317 [1st Dept 1996]), and petitioner did not allege that any other contract had been breached. Petitioner improperly argues for the first time on appeal that Columbia breached his original appointment letter, and, in any event, the argument is unavailing.

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

ENTERED: APRIL 4, 2017

CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3627 The People of the State of New York, Ind. 3143/09
Respondent,

-against-

Johnathan Villafuerte,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Katherine M. A. Pecore of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert McIver of counsel), for respondent.

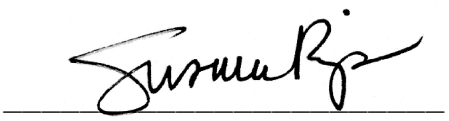
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Barrett, J.), rendered on July 3, 2013,

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

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

ENTERED: APRIL 4, 2017



CLERK

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

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3628-
3628A The People of the State of New York, Respondent,

Ind. 2313/14
2338/14

-against-

Thomas Luckey,
Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

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

_____

Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 24, 2015, convicting defendant, upon his pleas of guilty, of conspiracy in the second and fourth degrees, criminal possession of a controlled substance in the third degree and grand larceny in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 12 years, unanimously affirmed.

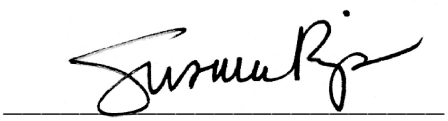
Defendant's challenges to his plea do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review defendant's unpreserved claims in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently and

voluntarily made. The circumstances of the plea were not coercive (*see People v Fiumefreddo*, 82 NY2d 536, 544 [1993]), notwithstanding the fact that the court warned defendant that the plea offer would be revoked if not accepted immediately, because defendant had already received an extensive opportunity to consider the strength of the People's case and confer with counsel about the advisability of pleading guilty. Furthermore, defendant's factual allocution did not cast doubt on his guilt, the court's recitation of defendant's rights under *Boykin v Alabama* (395 US 238 [1969]) was satisfactory (*see People v Sougou*, 26 NY3d 1052 [2015]), and the sequence in which the court conducted the allocution was permissible (*see People v Gillegbower*, 143 AD3d 479 [1st Dept 2016]).

At sentencing, the court substantially complied with the requirements of CPL 380.50 (*see People v McClain*, 35 NY2d 483, 491-492 [1974], *cert denied sub nom. Taylor v New York*, 423 US 852 [1975]).

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

ENTERED: APRIL 4, 2017



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Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3629 2390 Creston Holdings LLC, et al., Index 850261/14
Plaintiffs-Appellants,

-against-

Oliver Bivins, II, etc.,
Defendant-Respondent,

Edward Mermelstein, et al.,
Defendants.

_____

Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City (James E. Dunso of counsel), for appellants.

Vernon & Ginsburg, LLP, New York (Mel B. Ginsburg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered on or about January 5, 2016, which granted defendant Oliver Bivens, II's motion for summary judgment dismissing the complaint as against him individually and as administrator of the Estate of Lorna M. Bivins, and denied plaintiffs' cross motion for summary judgment, unanimously affirmed, with costs.

Defendant established prima facie that plaintiffs' predecessor in interest, Capital One, N.A., intentionally waived its right to acceleration of the loan with interest at the default rate and reinstated the loan (*see Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34, 37 [1917]). Capital

One's October 22, 2102 statement to the decedent borrower's estate, issued after receiving defendant's payment of the amount of the monthly installments outstanding, shows an "[a]djustment" to the estate's account consisting of a credit of the difference between the amount of accrued interest at the default rate and the amount at the note rate, less the principal payment for October 2012. Capital One subsequently sent the estate 20 consecutive invoices consistent with the original loan terms and inconsistent with a demand for full payment of the principal and interest at the default rate. In opposition, plaintiffs failed to raise an issue of fact as to Capital One's intent in so acting.

Even if the waiver constituted a loan modification, which pursuant to the note and mortgage was required to be "in writing," the motion court correctly found that "Capital One

expressly reversed the default interest rate and the default interest charges" (*compare e.g. Bercy Invs. v Sun*, 239 AD2d 161 [1st Dept 1997] [no evidence of relinquishment of right to accelerate loans]).

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

ENTERED: APRIL 4, 2017

CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3630-
3631 Index 653665/13

Coöperative Centrale Raiffeisen-Boerenleenbank B.A., "Rabobank International," New York Branch,
Plaintiff-Appellant,

-against-

Atradius Credit Insurance N.V., et al.,
Defendants-Respondents.

_____

Haynes and Boone, LLP, New York (Jonathan D. Pressment of counsel), for appellant.

Katten Muchin Rosenman LLP, New York (Anthony L. Paccione of counsel), for Atradius Credit Insurance N.V., respondent.

Cahill Gordon & Reindel LLP, New York (Edward P. Krugman of counsel), for Chartis Insurance Company of Canada, respondent.

_____

Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about October 23, 2015, and on or about November 24, 2015, which granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

The complaint fails to allege facts that would establish a special relationship in support of the causes of action for negligent misrepresentation, fraudulent concealment, and breach of fiduciary duty, separate from the parties' arm's-length contractual relationship under the insurance policy (*see e.g. Kobre v United Jewish Appeal-Fedn. of Jewish Philanthropies of*

N.Y., Inc., 32 AD3d 218, 223 [1st Dept 2006], *lv denied* 7 NY3d 715 [2006]; *Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260, 264 [1st Dept 2001]; *Jansen v Fidelity & Cas. Co. of N.Y.*, 79 NY2d 867 [1992]). Defendants' publicly available marketing materials and links to its website do not create a special relationship (*see Batas*, 281 AD2d 264; *cf. Kimmell v Schaefer*, 89 NY2d 257, 264-265 [1996] [defendants found to owe duty of care to plaintiffs where they provided projections for distribution to plaintiffs in particular]). Neither do the marketing materials' general assertions of defendants' experience and expertise in the area of credit risk management give rise to a special relationship (*Gaidon v Guardian Life Ins. Co. of Am.*, 255 AD2d 101, 102 [1st Dept 1998], *mod on other grounds* 94 NY2d 330 [1999]).

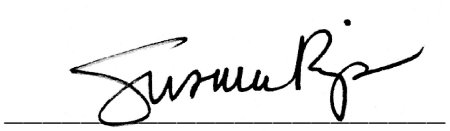
In support of the fraud cause of action, the complaint fails to allege facts that would establish reasonable reliance (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Plaintiff agreed, under Article 7B of the insurance policy, to exercise due care and diligence with respect to the underlying receivables transaction. Moreover, the documentary evidence submitted establishes that defendants' credit limit decisions and endorsements were merely prerequisites to coverage,

and reflected the maximum credit limit that defendants were willing to insure.

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

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

ENTERED: APRIL 4, 2017



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Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3632-
3633 Index 160413/14

Northfield Insurance Company,
Plaintiff-Appellant,

-against-

Midtown Restorations LLC,
Defendant,

Fortuna Pheasant Close LLC,
Defendant-Respondent.

_____

Kenney Shelton Liptak Nowak LLP, Buffalo (Adam R. Durst of counsel), for appellant.

Barry S. Schwartz, New York, for respondent.

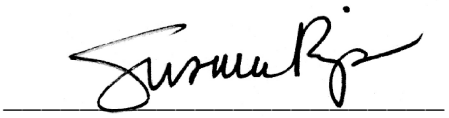
_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 16, 2016, which, insofar as appealed from, denied plaintiff's motion for summary judgment as against defendant Fortuna Pheasant Close LLC (Fortuna), unanimously reversed, on the law, with costs, the motion granted, and it is declared that plaintiff has no duty to defend or indemnify any entity in the underlying property damage action. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered on or about September 26, 2016, which, insofar as appealed from, denied plaintiff's motion for leave to renew, unanimously dismissed, without costs, as academic.

The record establishes that plaintiff is entitled to the declaration sought, where the underlying action seeks damages in connection with the insured's (Midtown) waterproofing work of Fortuna's premises. The subject insurance policy's Classification Limitation endorsement, as reflected in the Declarations page, limits the scope of coverage to four classifications, none of which encompass waterproofing, thereby precluding coverage (*see Black Bull Contr., LLC v Indian Harbor Ins. Co.*, 135 AD3d 401, 403 [1st Dept 2016]; *New York City Hous. Auth. v United States Underwriters Ins. Co.*, 7 AD3d 393 [1st Dept 2004]).

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

ENTERED: APRIL 4, 2017



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Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3634 Estate of Kathryn P. Faughey, by her Executor Walter B. Adam, etc., Plaintiff-Appellant, Index 101854/10

-against-

New 56-79 IG Associates, L.P., et al., Defendants-Respondents.

Friedman Friedman Chiaravalloti & Giannini, New York (Mariangela Chiaravalloti of counsel), for appellant.

Perry, Van Etten, Rozanski & Primavers, LLP, Melville (Jeffrey Van Etten and Elizabeth Gelfand Kastner of counsel), for New 56-79 IG Associates, L.P., New 57-79 IE Associates, L.P., BLDG Management Co., Inc., Building Management Co., Inc. and Lloyd Goldman, respondents.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for 435 East 79 Street Associates, LLC and Charles A. Murkofsky, respondents.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered December 16, 2015, which granted the motions of defendants 435 East 79 Street Associates, LLC and Charles A. Murkofsky (Tenants) and defendants New 56-79 IG Associates, L.P., New 57-79 IE Associates, L.P., BLDG Management Co., Inc., Building Management Co., Inc., and Lloyd Goldman (Owners) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The instant negligence action arises from the tragic murder of Kathryn P. Faughey (decedent) by nonparty David Tarloff while in her office in a suite leased by Tenants in a building owned by Owners.

The motion court correctly dismissed the complaint. Even though the building contained a psychiatric suite, defendants had no duty to protect decedent from the violent actions of third parties, including former patients like Tarloff; such actions were not foreseeable, given the absence of prior violent criminal activity by Tarloff or other third parties in the building (*Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]; *see Buckeridge v Broadie*, 5 AD3d 298, 300 [1st Dept 2004]).

Even assuming that defendants had a duty to provide "minimal precautions" (*Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]), that duty was satisfied by the provision of 24/7 doorman coverage, surveillance cameras, controlled building access, and functioning locks on the doors of the office suite and decedent's personal office (*see James v Jamie Towers Hous. Co.*, 99 NY2d 639, 641 [2003]; *Nash v Port Auth. of N.Y. & N.J.*, 51 AD3d 337, 348 [1st Dept 2008], *revd on other grounds by Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428 [2011]). It is purely speculative that additional security measures — such as

announcing visitors, installing an office intercom or buzzer, or keeping the office doors locked after hours — would have prevented Tarloff from killing decedent.

Any claims that the door man was negligent in failing to recognize Tarloff's suspicious behavior was not a proximate cause of decedent's death because it was still not foreseeable that Tarloff was about to engage in a murderous rampage. Tarloff's conduct was a superceding cause severing the causal chain. Given that the attack was targeted and premeditated, it is "unlikely that any reasonable security measures would have deterred [Tarloff]" (*Cerda v 2962 Decatur Ave. Owners Corp.*, 306 AD2d 169, 169 [1st Dept 2003] [internal quotation marks omitted]; *accord Buckeridge*, 5 AD3d at 300).

Given the foregoing determination, we need not reach the issue of Murkofsky's individual liability.

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

ENTERED: APRIL 4, 2017

CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3635 Simranjit Kaur, Index 652288/10
Plaintiff-Appellant-Respondent,

-against-

Veniamin Gokfeld,
Defendant-Respondent-Appellant,

Daniella Hacking Corp.,
Defendant.

_____

Kent, Beatty & Gordon, LLP, New York (Joshua B. Katz of counsel), for appellant-respondent.

Piken & Piken, New York (Robert W. Piken of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 10, 2014, which denied defendant Veniamin Gokfeld's motion to dismiss the complaint as against him, and denied plaintiff's cross motion for summary judgment dismissing Gokfeld's agency defense, unanimously affirmed, without costs.

Plaintiff and defendant Gokfeld signed a three-year lease agreement for two New York City taxi medallions owned by defendant Daniella Hacking Corp., with an option for plaintiff to purchase the medallions during the lease period. Plaintiff alleges that she timely sought to exercise her option to purchase the medallions and that defendants refused to sell them to her.

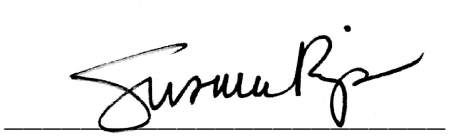
Resorting to the contract language alone, plaintiff failed to establish prima facie that Gokfeld's agency defense should be dismissed as a matter of law and Gokfeld held personally liable under the agreement. His signature indicates that Gokfeld signed the lease agreement in his personal capacity. However, the agreement also contains a recitation indicating that Gokfeld held a second loan on the medallions, which is inconsistent with personal ownership of the medallions and therefore raises an ambiguity as to whether Gokfeld intended to be personally bound by the agreement.

Gokfeld failed to demonstrate his entitlement to summary dismissal of the complaint as against him personally. The extrinsic evidence he submitted to resolve the ambiguity in the agreement (*see Sound Distrib. Corp. v Richmond*, 213 AD2d 178 [1st Dept 1995], *lv denied* 86 NY2d 702 [1995]) does not support his claim that he was merely acting as an agent for Daniella Hacking and its true owner, Frida Bolucher, and had no control over the

corporation. Rather, as the motion court concluded, at this juncture, with discovery and depositions yet to be completed, numerous issues of fact remain unresolved, including Gokfeld's relationship to Daniella Hacking.

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

ENTERED: APRIL 4, 2017



CLERK

Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3637N In re BMW of North America, LLC, Index 650716/15
Petitioner-Appellant,

-against-

Howard Riina, et al.,
Respondents-Respondents.

_____

Biedermann Hoenig Semprevivo, P.C., New York (Philip C. Semprevivo, Jr. of counsel), for appellant.

Law Office of Louis Venezia, P.C., Forest Hills (Louis Venezia of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered May 14, 2015, which, inter alia, denied BMW's motions to vacate an arbitration award, dated February 19, 2014, and for a preliminary injunction to stay its compliance with the arbitration award, confirmed the arbitration award, and awarded judgment in favor of respondents in the total amount of $96,724.24, unanimously reversed, on the law, without costs, and the petition granted.

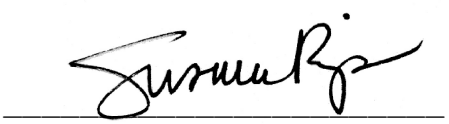
Respondents' complaint - that the new car they purchased from BMW was inappropriately outfitted with "runflat" tires and 19" wheel rims that regularly developed "bubbles" in the sidewalls of the tires due to the rough road conditions in Westchester County and New York City, thereby compromising the

car's safety and handling - failed to state a claim under the Lemon Law (General Business Law [GBL] § 198-a). Respondents failed to present any evidence to show a defect in materials or workmanship that was covered by the car manufacturer's express warranties (*see generally* GBL § 198-a [b][1]; *Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653 [2006]; *Motor Veh. Mfs. Assn. of U.S. v State of New York*, 75 NY2d 175 [1990]).

Tires were expressly excluded from BMW's warranties. No evidence was offered to show that the tires and wheel rims used on the vehicle were incompatible with the car and its operation. There was no basis to find that the value of the car was substantially impaired by the use of the alleged inappropriate tires and wheel rims (*see generally* GBL § 198-a [c][1]; *Spitzer*, 7 NY3d 653). Accordingly, we find that the arbitration award lacks a rational basis, and is unsupported by adequate evidence in the record (*see generally Motor Veh. Mfrs. Assn.*, 75 NY2d 175).

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

ENTERED: APRIL 4, 2017



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Friedman, J.P., Sweeny, Moskowitz, Gische, Kapnick, JJ.

3638N J. Christopher Flowers, Index 651036/10
Plaintiff-Appellant,

-against-

73rd Townhouse LLC, et al.,
Defendants-Respondents.

_____

Brem Moldovsky, L.L.C., New York (Brem Moldovsky of counsel), for appellant.

Goldberg Weprin Frinkel Goldstein LLP, New York (Christopher R. Clarke of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy Bannon, J.), entered October 15, 2014, which denied plaintiff's motion for leave to amend the second amended complaint, unanimously modified, on the law and the facts and in the exercise of discretion, to grant the motion except as to beneficiary liability (part of proposed new count XVI), and, as so modified, affirmed, without costs.

Defendants failed to show that they would be prejudiced by the amendment (*see* CPLR 3025[b]; *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). Mere delay is not a sufficient basis on which to deny amendment (*Cherebin*, 43 AD3d at 365). Defendants' argument that plaintiff's new theory is surprising and will require further discovery is unavailing.

The amendment is based on evidence learned during discovery (*see Cherebin*, 43 AD3d at 365). In any event, the need for additional discovery does not justify denying amendment (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654 [1st Dept 2009]), especially in light of defendants' belated discovery responses (*see Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 60 AD3d 585 [1st Dept 2009]).

The proposed third amended complaint states a claim against defendant executors of defendant estate of Milton S. Rinzler, but not against its beneficiaries (*see* EPTL 1-2.13; 11-4.7[b]; *Matter of Rothko*, 43 NY2d 305, 318 n 2 [1977]; *Matter of Ledyard's Estate*, 21 NYS2d 860, 885, 889 [Sur Ct, Nassau County 1939], *affd* 259 App Div 892 [2d Dept 1940]).

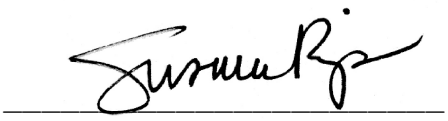
It also states a claim to hold Milton Rinzler liable for the actions of defendant Dominion Management Company LLC because Dominion was an unregistered d/b/a under which Rinzler conducted business (*see Apparel Corp. [Far E.] v Sheermax LLC*, 126 AD3d 413 [1st Dept 2015], *lv denied* 26 NY3d 905 [2015]). The doctrine of piercing the corporate veil applies to limited liability companies (*Matias v Mondo Props. LLC*, 43 AD3d 367, 368 [1st Dept 2007]), and the proposed third amended complaint states a claim for piercing the corporate veil (*see Cortlandt St. Recovery Corp.*

v Hellas Telecom., S.A.R.L., 142 AD3d 833, 834 [1st Dept 2016]; *2406-12 Amsterdam Assoc. LLC v Alianza LLC*, 136 AD3d 512 [1st Dept 2016]); *Shisgal v Brown*, 21 AD3d 845, 848-849 [1st Dept 2005]; *Chase Manhattan Bank [N.A.] v 264 Water St. Assoc.*, 174 AD2d 504 [1st Dept 1991]).

Except for beneficiary liability, defendants failed to overcome the presumption of validity in plaintiff's favor (*see Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]).

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

ENTERED: APRIL 4, 2017



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

2767- Index 305863/14
2768 Anonymous,
Plaintiff-Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Bernard E. Clair of counsel), for appellant.

Alter Wolff & Foley LLP, New York (Alan Feighenbaum of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered October 19, 2015, reversed, on the law, without costs, the declaration vacated, and the matter remanded for further proceedings, including discovery and an evidentiary hearing to determine the ownership of the disputed art. Order, same court (Deborah A. Kaplan, J.), entered March 15, 2016, modified, on the law, to direct discovery and a hearing to determine ownership of all disputed works of art purchased during the marriage, and otherwise affirmed, without costs.

Opinion by Webber, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Angela M. Mazzarelli
Sallie Manzanet-Daniels
Troy K. Webber, JJ.

2767-2768
Index 305863/14

_____x

Anonymous,
Plaintiff-Respondent,

-against-

Anonymous,
Defendant-Appellant.
_____x

Defendant appeals from the order of the Supreme Court, New York County (Ellen Gesmer, J.), entered October 19, 2015, which, to the extent appealed from as limited by the briefs, declared that art purchased in either party's sole name during the marriage, regardless of vendor, is that party's separate property pursuant to the terms of the prenuptial agreement, and from the order of the same court (Deborah A. Kaplan, J.), entered March 15, 2016, which, to the extent appealed from as limited by the briefs, upon reargument, modified the October 19, 2015 order only to the extent of ordering discovery and a hearing to determine ownership of works of art, including four specified works of art, purchased during the marriage for which the purchase invoice is on its face ambiguous or inconsistent.

Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Bernard E. Clair Jad Greifer and Benjamin A. Lilien of counsel), for appellant.

Alter Wolff & Foley LLP, New York (Alan Feighenbaum, Eleanor B. Alter and Adam John Wolff of counsel), for respondent.

WEBBER, J.

In this appeal we are called upon to rule on the appropriate method of determining ownership of valuable works of art in the parties' art collection.

The parties were married on May 5, 1992. Plaintiff husband commenced the instant matrimonial action on May 6, 2014, claiming separate ownership of tens of millions of dollars' worth of art, while defendant wife claims the art was jointly owned. The wife also claims to separately own four specified works of art purportedly worth a total of approximately $22 million.

The parties executed a prenuptial agreement on April 21, 1992. The prenuptial agreement does not specifically address how the parties should divide their art collection upon dissolution of the marriage. It provides that any property owned on the date of execution of the prenuptial agreement, April 21, 1992, or "hereafter . . . acquired" by one party remains that party's separate property. It provides that "[n]o contribution of either party to the care, maintenance, improvement, custody or repair of . . . [the other's party] . . . shall in any way alter or convert any of such property . . . to marital property."

The prenuptial agreement further provides that "any property acquired after the date of the marriage that is jointly held in the names of both parties" shall, upon dissolution of the

marriage – which occurred on March 25, 2014 – be divided equally between the parties. Under the heading, Non-Marital Property, the agreement provides:

> "No property hereafter acquired by the parties or by either of them . . . shall constitute marital property . . . unless (a) pursuant to a subscribed and acknowledged written agreement, the parties expressly designate said property as marital property . . . or (b) title to said property is jointly held in the names of both parties."

During the marriage, the parties agreed to acquire certain art as a joint collection, including pieces acquired through Art Advisory Services, Luhring Augustine, and The Kitchen. The wife claims that all art acquired through those vendors was jointly held. The husband claims that there was no blanket agreement that all pieces from those vendors would be considered marital property. Rather, he states that he relied on the prenuptial agreement and purchased certain works solely in his name when he wanted them to remain his separate property.

The husband moved, inter alia, for a declaratory judgment that, "consistent with the Prenuptial Agreement, the title to the art purchased during the marriage determines whether it is marital or separate property, regardless of the source of funds used to acquire it or the alleged intent behind the purchase." He argued that title should be determined based solely on the invoice or bill of sale.

The motion court construed the prenuptial agreement to provide that any art purchased solely in one party's name remained that party's separate property (*see Van Kipnis v Van Kipnis*, 11 NY3d 573, 577 [2008]; *Strong v Dubin*, 75 AD3d 66, 68-69 [1st Dept 2010]) and relied on the invoices as proof of whether the art was jointly or individually held. We conclude, to the contrary, that invoices, standing alone, may not be regarded as evidence of title or ownership of the art.

An invoice is defined as "[a] list of goods sent or services provided, with a statement of the sum due for these" (Oxford Living Dictionaries [https://en.oxforddictionaries.com/definition/invoice]).

> "An invoice . . . is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, or cost of the goods, or price of the things invoiced, and it is as appropriate to a bailment as a sale. Hence, standing alone, it is never regarded as evidence of title" (*Sturm v Boker*, 150 US 312, 328 [1893] [internal quotation marks omitted]).

An invoice cannot be said to be dispositive of ownership. The purpose of the invoice is not to identify the titled owner. Moreover, there is always the potential unreliability of the information contained on the invoice. For example, for one reason or another, the price of the item(s) purchased may be inflated or deflated or the description of the merchandise or services rendered may be inaccurate or distorted.

The unreliability of an invoice as sole proof of title is evidenced by various invoices in the record before us. The parties concede that some of the invoices are inconsistent on their face, in that the name of the only party listed is not consistent with the name of that party's account with the auction house of purchase or conflicts with the party to whom the item purchased should have been shipped. For example, the wife points to a jointly acquired and owned Jeff Koons painting, "the Empire State of Scotch, Dewars," the invoice for which lists only the husband's name.

The husband's reliance upon *Tajan v Pavia & Harcourt* (257 AD2d 299 [1st Dept 1999], *lv dismissed in part, denied in part* 94 NY2d 837 [1999]) in support of his argument that title should be determined based solely on the invoice or bill of sale is misplaced. In *Tajan*, the plaintiff sued an attorney administrator of an estate and his firm for negligent misrepresentation. There, a valuable painting was stolen from the home of Enzo Colombo, an Italian citizen. Although Mr. Colombo left a will, he died intestate as to this painting. The painting reappeared some years later at Christie's auction house in New York. Mr. Colombo's heirs instituted a turnover proceeding in Surrogate's Court, New York County, and the defendant attorney was appointed as ancillary administrator

of Mr. Colombo's estate in the United States. Ultimately, Davide Colombo was declared the sole heir, and obtained sole title to the painting. The plaintiff, relying upon an opinion by the defendant assuring them of Davide's good title, purchased the painting and then consigned it to another entity. The Italian government seized the painting on the ground that Davide had committed the crime of illegal exportation by not returning the painting to Italy.

In analyzing who held good title to the painting, this Court noted that the bill of sale transferring the painting to the buyer "warranted the painting's good title" (257 AD2d at 303). In determining who held valid title to the painting when the defendant attorney administrator issued the opinion letter, this Court did not, as argued by the husband, rely upon the bill of sale. Instead, it considered the parties' admissions and releases of claims by others against the painting (*id.* at 304).

Conversely, the wife cites *Lindt v Henshel* (25 NY2d 357 [1969]) and *Susan W. v Martin W.* (89 Misc 2d 681 [Sup Ct, Kings County 1977]). While neither case involved a prenuptial agreement, they both offer some guidance as to the factors that in addition to the name listed on the invoice, should be considered in determining title. In *Lindt*, the Court of Appeals held that a sculpture belonged to the wife, rather than the

husband's estate, because the wife, "on her own initiative and without any prior arrangement with her husband, attended the auction and bought the statue" (25 NY2d at 362). The Court noted also that "[t]he bid card was signed by her, the price was charged to her account and the invoice was rendered and sent to her" (*id.*). Thus, in *Lindt*, the Court appears to recognize that the person to whom an invoice is rendered, while relevant to the issue of title, is not, in and of itself, dispositive, and that therefore other factors are also relevant and should be considered. In *Susan W. v Martin W.*, the court, when faced with the same issue, looked at the parties' interest in art, joint involvement in the purchase of art by attending auctions and exhibits together to seek items to buy, and payment for the art from joint accounts (89 Misc 2d at 687-688).

We conclude that title to personalty cannot be determined by relying solely upon an invoice. In determining title to the artwork in question, all the facts and circumstances of the acquisition and indicia of ownership must also be considered.

Accordingly, the order of the Supreme Court, New York County (Ellen Gesmer, J.), entered October 19, 2015, which, to the extent appealed from as limited by the briefs, declared that art purchased in either party's sole name during the marriage, regardless of vendor, is that party's separate property pursuant

to the terms of the prenuptial agreement, should be reversed, on the law, without costs, the declaration vacated, and the matter remanded for further proceedings, including discovery and an evidentiary hearing to determine the ownership of the disputed art. The order of the same court (Deborah A. Kaplan, J.), entered March 15, 2016, which, to the extent appealed from as limited by the briefs, upon reargument, modified the order entered October 19, 2015 only to the extent of ordering discovery and a hearing to determine ownership of works of art, including the four specified works of art, purchased during the marriage for which the purchase invoice is on its face ambiguous or inconsistent, should be modified, on the law, to direct discovery and a hearing to determine ownership of all disputed works of art purchased during the marriage, and otherwise affirmed, without costs.

All concur.

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