SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 17, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Friedman, Webber, Oing, Moulton, JJ.

4727-
4728 Index 651100/13

Chittemma Reddy,
Plaintiff-Respondent,

-against-

Evangelos Mihos,
Defendant-Appellant,

Omer Hodzic,
Defendant.

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John Carlson, Merrick, for appellant.

The Law Office of Sidney Baumgarten, New York (Sidney Baumgarten of counsel), for respondent.

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Judgment, Supreme Court, New York County (Robert D. Kalish, J.), entered October 18, 2016, in favor of plaintiff and against defendant Evangelos Mihos, and bringing up for review an order and judgment (one paper), same court and Justice, entered April 21, 2016, as amended by order, same court and Justice, entered on or about October 7, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's renewed motion for summary judgment on her cause of action to enforce a guaranty, and denied Mihos's cross motion for summary judgment dismissing

that cause of action, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's renewed motion denied, and Mihos's cross motion granted. The Clerk is directed to enter judgment dismissing the complaint as against Mihos. Appeal from the aforesaid order and judgment (one paper), unanimously dismissed, without costs, as subsumed in the appeal from the final judgment.

Mihos, an attorney, represented plaintiff, an experienced real estate investor, in real estate transactions for more than a decade. In 2009, Mihos informed plaintiff of an opportunity to make a loan, secured by a mortgage on real property, to a corporation (3058 Godwin) owned by defendant Omer Hodzic, another client of Mihos. In June 2009, plaintiff lent 3058 Godwin the sum of $200,000 at an annual interest rate of 15.75%, with payment of principal to become due in June 2011. After the first several monthly interest payments were timely made, the loan went into default when 3058 Godwin's checks for the months of March and April 2010 were dishonored. At that point, according to Mihos's affidavit, plaintiff "began calling me incessantly about the dishonored checks from Mr. Hodzic's company and complained that she was going to lose her money, and she blamed me. She made outlandish threats about going to the district attorney and told me that this was another 'Madoff.'" Mihos further avers:

"[Plaintiff] demanded that I personally repay her. I decided that one way to appease her and get her to calm down was to offer to sign a guaranty. I was confident I could find her a way out of the deal she was in . . . ." Thereafter, Mihos prepared, signed and delivered to plaintiff a written "Guaranty of Payment," dated May 7, 2010 (the guaranty), which states:

> "In the event [plaintiff] fails to receive the principal sum of $200,000.00 from [3058 Godwin], Omer Hodzic or otherwise, then in such event, I Evangelos Mihos . . . hereby guarantee to pay the principal sum of $200,000.00 to [plaintiff] on, or before, May 7, 2012."

At his deposition, Mihos testified that he gave the guaranty "reluctan[tly] at a moment of weakness. [Plaintiff] kept . . . badgering me, crying, blaming me . . . and kept badgering me until I folded to sign this to appease her, pretty much, to pacify her." Mihos further testified that plaintiff "said she wanted something in writing. You have to promise, I don't lose my money. You have to promise, I want you to put something in writing, you have to guarantee now, you have to — so her constant badgering and I executed the document based on her badgering."

Plaintiff's account of how the guaranty came about, as set forth in her affidavit, is as follows: "When I confronted [Mihos] and requested an explanation [of the default], he became visibly upset. Of his own accord, and without any suggestion from me,

[Mihos] prepared and gave to me, on or about May 7, 2010, the written and signed [guaranty]." In a supplemental affidavit executed after Mihos was deposed, plaintiff stated that "there never was a time that I 'badgered' him or pressured him for anything. The suggestion that he signed the guaranty under some sort of coercion is absolutely preposterous and untrue" (paragraph break omitted).

In October 2012, 3058 Godwin's property was sold in a foreclosure action brought by the senior mortgagee. The proceeds of the foreclosure sale were insufficient to pay any of the outstanding balance on plaintiff's junior mortgage loan, which included the entire principal amount of $200,000. Mihos refused plaintiff's subsequent demand that he make payment on the guaranty.

In March 2013, plaintiff commenced this action against Mihos and Hodzic. Her verified complaint sets forth the following four causes of action: (1) against Mihos, for negligence and malpractice in "fail[ing] . . . to properly investigate and determine the amount of risk" involved in the loan (first cause of action); (2) against Mihos, for recovery upon the guaranty (second cause of action); (3) against Mihos and Hodzic, for fraud in inducing plaintiff to make the loan (third cause of action); and (4) against Mihos, for malpractice in connection with the

foreclosure (fourth cause of action). Mihos answered the complaint and asserted a number of affirmative defenses, including the defenses that "[t]here was no consideration for the guaranty" and that the guaranty was not enforceable under General Obligations Law § 5-1105.[1]

In January 2014, plaintiff moved for summary judgment on her claim for payment under the guaranty. Supreme Court denied that motion in May 2014. Thereafter, Mihos was deposed, and plaintiff withdrew all of her claims other than the second cause of action, the claim for recovery on the guaranty.

In December 2015, plaintiff renewed her motion for summary judgment on the guaranty claim, her sole remaining cause of action. As to the question of the consideration for the guaranty, plaintiff's counsel argued that it could be "infer[red]" that the consideration for the guaranty was plaintiff's "forbearance in reporting [Mihos] to the Departmental Disciplinary Committee, as well as forbearing in bringing this lawsuit." Plaintiff herself, however, nowhere mentioned such

[1]General Obligations Law § 5-1105 provides: "A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be valid consideration but for the time when it was given or performed."

forbearance in either of the two affidavits by her that were submitted in support of the renewed motion.

Mihos opposed plaintiff's renewed motion for summary judgment on the guaranty claim and cross-moved for summary judgment dismissing the claim. He argued, among other things, that the guaranty was not enforceable because plaintiff gave no consideration in exchange for it. In this regard, Mihos noted that plaintiff's original making of the loan did not constitute consideration for the guaranty, because the loan, which had been made in the past, was not expressed as consideration in the guaranty, as General Obligations Law § 5-1105 requires for past consideration to be valid.

Supreme Court granted plaintiff's motion and denied Mihos's cross motion. The court observed that "the sole issue of contention between the [p]arties as to the enforceability of the guaranty is whether or not the guaranty was based upon consideration." The court found that the guaranty was supported by consideration because, in the court's view, "[t]he clear implication [of the guaranty was] . . . that [plaintiff] would not pursue any legal action for two years, as she was in possession of a guaranty of payment on or before said time. In effect, Mr. Mihos [was] . . . given a two year reprieve from legal action by [plaintiff] by virtue of the guaranty." Noting

Mihos's allegation that plaintiff had threatened to report him to the district attorney, the court found that the guaranty "gave Mr. Mihos an opportunity to resolve the underlying issue without risk of [plaintiff] pursuing a criminal action or civil action for two years from the date he prepared and entered into the guaranty." On Mihos's appeal from the judgment entered pursuant to the court's decision, we reverse and grant Mihos's cross motion for summary judgment dismissing the claim based on the guaranty.

Initially, we note that General Obligations Law § 5-1105, which, as previously noted, requires that past consideration for a promise in a written contract be expressed in the writing, is not relevant here, because plaintiff has never argued that the consideration for the guaranty was the making of the loan or any other past action of hers. Rather, plaintiff has argued — entirely through her counsel — that the consideration for the guaranty was her agreement to forbear from suing Mihos for two years, until payment under the guaranty, by its terms, would become due.[2] However, no agreement to forbear from suit is

[2]To the extent it is argued on plaintiff's behalf that part of the consideration for the guaranty was an implied promise by her to forbear from filing a criminal or disciplinary complaint against Mihos, a substantial question arises as to whether such consideration would render the guaranty void as against public policy (*see Union Exch. Natl. Bank of N.Y. v Joseph*, 231 NY 250,

stated in the guaranty, which expresses only a promise by Mihos to repay the principal amount of the loan on or before a certain date if it has not otherwise been repaid by then.

New York's statute of frauds requires that an agreement constituting "a special promise to answer for the debt, default or miscarriage of another person" be memorialized in a writing signed by the party to be charged (General Obligations Law § 5-

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253 [1921] ["There is to be no traffic in the privilege of invoking the public justice of the state. One may press a charge or withhold it as one will. One may not make action or inaction dependent on a price"]; *Doucet v Massachusetts Bonding & Ins. Co.*, 180 App Div 599, 602 [1st Dept 1917] [an agreement by the plaintiff to deliver securities to the defendant "in consideration of its agreement not to cause the arrest by warrant and imprisonment of (the plaintiff's) nephew for . . . embezzlement and defalcation" was "against public policy and . . . the court will refuse to extend its aid to either party thereto and will leave them where they have placed themselves"]; Restatement [Second] of Contracts § 176[1][b], Comment *c* ["A bargain to suppress prosecution may be unenforceable on grounds of public policy"]; 7 Richard A. Lord, Williston on Contracts § 15:8 [4th ed] ["The better rule is that all bargains tending to stifle criminal prosecution . . . are void as against public policy"]; 15 Corbin on Contracts § 83.1 at 251 [rev ed 2003] ["(A)ny bargain for the purpose of stifling a criminal prosecution . . . is always contrary to public policy and unenforceable"]; 22 NY Jur 2d, Contracts § 171; NY City Bar Assn Comm on Prof & Judicial Ethics Formal Op 1995-13 [1995] [if a lawsuit settlement "includes a promise, express or implied, not to report (a) crime, it has been held that neither side may avail itself of the usual contractual remedies against the other"]). In any event, even if forbearance from filing a criminal or disciplinary complaint could constitute valid consideration, the guaranty could not be enforced based on such alleged consideration for the same reasons it cannot be enforced based on the alleged consideration of plaintiff's forbearance from bringing suit, as explained below.

701[a][2]; *see Standard Oil Co. of N.Y. v Koch*, 260 NY 150 [1932] [dismissing a complaint based on a written guarantee on the ground that the writing did not sufficiently set forth the consideration for the guarantor's promise]; Restatement [Second] of Contracts § 131, Comment *h*, Illustration 18). While the guaranty given by Mihos to plaintiff otherwise appears to satisfy the statute, it does not express, or even imply, any consideration for Mihos's promise, whether by way of benefit to him or detriment to plaintiff (*see Holt v Feigenbaum*, 52 NY2d 291, 299 [1981] [consideration for a promise may be "either a benefit to the promisor or a detriment to the promisee"]). It may be that, once the guaranty was given, plaintiff was unlikely to sue Mihos before it became due, but nothing stated in the guaranty bound her to refrain for the next two years from commencing an action against him on her common-law claims (which, as previously noted, she has now withdrawn). Nor can any such commitment to forbear from suit be fairly inferred from the language of the guaranty (*see e.g. Korff v Corbett*, 155 AD3d 405, 410-411 [1st Dept 2017] [in holding unenforceable, for want of consideration, the defendants' written agreement to pay the plaintiff certain amounts "'(t)o avoid unproductive controversy,'" this Court noted that "nothing" in the writing supported the plaintiff's claim that he had agreed to "forbear()

pursuing a claim" in exchange for the promised payments]). In the absence of such a binding promise by plaintiff, the guaranty is unenforceable for want of consideration. "Unless both parties to a contract are bound, so that either can sue the other for a breach, neither is bound" (*Schlegel Mfg. Co. v Cooper's Glue Factory*, 231 NY 459, 462 [1921]; *see also Dorman v Cohen*, 66 AD2d 411, 415 [1st Dept 1979] [an agreement was unenforceable where "plaintiffs did not, in effect, bind themselves to do anything"]).

Case law has established that an oral promise to guarantee the debt of another may be enforced, notwithstanding General Obligations Law § 5-701(a)(2), if the plaintiff "prove[s the promise] is supported by new consideration moving to the promisor and beneficial to him and that the promisor has become in the intention of the parties a principal debtor primarily liable" (*Martin Roofing v Goldstein*, 60 NY2d 262, 265 [1983], *cert denied* 466 US 905 [1984]).[3] Thus, plaintiff could enforce Mihos's guaranty if she could prove, through parol evidence, that he gave her the guaranty in exchange for her unwritten promise to forbear from suing him until the due date of the guaranty, which would

[3] Here, the guaranty at issue is in writing, but, as discussed, nothing in the writing expresses or implies the consideration given in exchange for Mihos's promise.

constitute new consideration beneficial to him. Plaintiff fails, however, to offer any admissible evidence (as opposed to unsupported assertions by her counsel) that she actually made such a promise. As noted, the two affidavits by plaintiff that she submitted in support of her renewed motion for summary judgment do not refer to any such promise; neither does the verified complaint. On the contrary, plaintiff alleges in her first affidavit that, when she asked Mihos for "an explanation" of the default on the loan, Mihos, "[o]f his own accord, and without any suggestion from me, . . . prepared and gave to me . . . the [guaranty]."

In short, plaintiff herself does not claim to have made any promise of forbearance to Mihos, express or implied, in exchange for the guaranty. Since the guaranty itself does not express or imply any consideration given for it, and the record on the parties' opposing motions for summary judgment does not contain admissible evidence that any consideration was given for the guaranty, we conclude that the guaranty is unenforceable for want of consideration (*cf. Talansky v Schulman*, 2 AD3d 355, 361 [1st Dept 2003] [denying a motion for summary judgment dismissing a claim based on the defendant's alleged oral promise to pay another party's debt where the plaintiff presented competent evidence, that, "as consideration (for the defendant's promise),

he offered to forbear from suing both (the original debtor) and defendant"]).

In view of the foregoing, we need not consider whether Supreme Court properly permitted plaintiff to renew her summary judgment motion. Finally, we note that, on this appeal, we are concerned solely with the enforceability of the guaranty as a contract, and express no opinion on the propriety of Mihos's conduct as an attorney.

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

ENTERED: APRIL 17, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

6007-
6008 The People of the State of New York, SCI 5874/14
Respondent,

-against-

Yasmine Johnson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered July 8, 2015, as amended July 9 and July 31, 2015, convicting defendant, upon her plea of guilty, of robbery in the first degree, and sentencing her, as a juvenile offender, to a term of one to three years, unanimously reversed, on the law, to the extent of vacating defendant's plea of guilty, dismissing the superior court information and reinstating the indictment.

On January 30, 2015, defendant, age 15, appeared in court with her attorney.[1] The record indicates that at the time, defendant had two previous minor interactions with the criminal justice system (one for disorderly conduct, and the other for

[1]Defendant's mother was also present.

theft of services, resulting in an adjournment in contemplation of dismissal). After consultation with her attorney and her mother, and discussions with the court, defendant, through her attorney, entered a plea of guilty, under a superior court information, to robbery in the first degree. Specifically, defendant admitted that on or about November 9, 2014, at approximately 8:24 p.m., near the corner of East 28th Street and Park Avenue South in New York County, defendant, acting in concert with three other girls, approached the complaining witness; one of the girls had a knife which defendant then possessed and "brandished" toward the complaining witness; a physical altercation ensued during which defendant and her accomplices stole the complaining witness's jacket and shoes. The court stated to defendant that if she abided by certain conditions for one year, she would be adjudicated a youthful offender and sentenced to a conditional discharge. The court explained that the plea agreement required defendant to: complete the Fortune Society program, including abiding by all of the conditions set forth, passing any drug tests administered by the program; not smoke marijuana; attend the charter school that defendant's mother had found for her; obey a curfew that would require defendant to be home by 9:00 p.m. every night; not "hang out" or "run the streets"; and not be rearrested "even for a

small crime such as jumping over the turnstile, or a petit larceny or possessing small amounts of drugs, including marijuana." Defendant acknowledged her understanding of these conditions and requirements.

The court further advised defendant that if she did not fulfill all of the conditions, she "could get up to five to 25 years State prison." Defendant indicated her understanding of the plea agreement. As defendant was 15 yrs of age, and therefore a juvenile offender, her maximum exposure was actually 3 1/3 to 10 years in a juvenile facility.

Despite being given numerous chances, defendant failed to fulfill all the conditions. On July 5, 2015, defendant appeared for sentencing. At that time she moved, in writing, to withdraw her guilty plea on the ground that the court had "mistakenly communicated to the defendant that if she failed to complete the court-mandated program, and abide by other conditions, enumerated by the court, she faced a sentence of 5 - 25 years incarceration," even though she actually "faced a sentence of 3 1/3 – 10 years as a juvenile offender." Defendant argued that she "was under the mistaken impression that if convicted after trial she faced a much more severe sentence than, in fact, she actually faced," and that she was therefore "induced to plead guilty by mistake." The matter was adjourned to July 8, 2015.

On July 8, 2015, at defendant's sentencing hearing, counsel again argued that defendant should be entitled to withdraw her plea since she had pleaded guilty, in part, based on the court's mistaken representation of the sentence she faced.

The court denied defendant's motion[2]. The court stated that this was not a situation where a defendant faced more jail time as a result of the court's possible factual mistake. It reasoned that as it was willing to sentence defendant as a juvenile offender, she would necessarily receive less jail time than under the plea agreement, and therefore she would not experience any prejudice. The court proceeded to sentence defendant as a juvenile offender, to 1 1/3 to 3 years incarceration. Defendant was not adjudicated a youthful offender.[3]

Defendant argues that her plea must be vacated as involuntary, unknowing and unintelligent because it was based on the court's incorrect statements regarding her sentencing exposure and the parties' mutual misunderstanding as to the sentencing range. We agree.

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[2]It is unclear from the record as to whether the People opposed the motion. Defendant argues that they did not oppose the motion to vacate the plea.

[3] The court later amended defendant's sentence to a term of incarceration of from one to three years.

It is well settled that in determining whether a plea is voluntarily, knowingly and intelligently made, courts look to the totality of the circumstances (*People v Acevedo*, 14 NY3d 113, 118 [2010]). Whether a plea is knowing, intelligent and voluntary is dependent upon a number of factors "including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused" (*People v Hidalgo*, 91 NY2d 733, 736 [1998]). This Court has repeatedly held that defendants must also be made aware of the sentencing parameters so that they may access the propriety of entering a plea of guilty (*see People v Achaibar*, 49 AD3d 389 [1st Dept 2008], *lv denied* 10 NY3d 931 [2008]; *see also People v Vickers*, 84 AD3d 627 [1st Dept 2011]). To that end, a defendant's receipt of inaccurate information regarding her possible sentence exposure is clearly a factor which must be considered by the court on a plea withdrawal motion (*see People v Garcia*, 92 NY2d 869, 870 [1998]; *People v Nettles,* 30 NY2d 841, 842 [1972]).

In *Nettles*, the Court of Appeals held that a defendant should be permitted to withdraw his guilty plea that had been entered into based upon a mutual mistake of the parties. In *People v Camacho*, this Court held that defendant was entitled to withdraw his guilty plea, entered on the assumption that defendant was over 18 years old at the time of crime, when in

fact he was between 15 and 16 years old, because it did not represent a "voluntary and intelligent choice among the alternative courses of action open to the defendant" (102 AD2d 728, 729 [1st Dept 1984], citing *North Carolina v Alford*, 400 US 25, 31 [1970]).

Here, the record fails to establish that defendant's plea was made knowingly, intelligently and voluntarily. There was an explicit misunderstanding and miscommunication to the defendant that she faced an adult sentencing range of 5 to 25 years in State prison when, as a 15-year-old juvenile offender, she in fact faced a minimum sentence of one to three years and a maximum sentence of 3 1/3 to 10 years in the custody of the Office of Children and Family Services. While incarceration for any length of time is still incarceration, there is a marked difference between 3 1/3 to 10 years in a juvenile facility and 5 to 25 years in a State prison. Defendant's belief that she was avoiding a much greater risk than she actually was casts doubt on a finding that she had a clear understanding of her guilty plea. Defendant's age and lack of familiarity with the criminal justice system only reinforce that doubt (*see People v Vickers*, 84 AD3d at 628).

That defendant was offered an extremely beneficial plea that would allow her to be afforded youthful offender treatment and

avoid incarceration does not, as argued by the People, detract from the fact that defendant was misinformed as to her sentencing exposure. Similarly, that defendant received a lesser sentence than what was promised by the court does not remedy the involuntariness of her plea of guilty (*see People v Camacho*, 102 AD2d at 729). Under the circumstances presented, it cannot be found that defendant would have accepted the promised plea and entered a plea of guilty, if she had been accurately informed of the sentencing parameters.

In light of the foregoing, we need not reach any other issue on appeal.

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

ENTERED: APRIL 17, 2018

CLERK

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

6277 The People of the State of New York, Respondent, Ind. 4323/10

-against-

Jose Vasquez, Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Katherine M.A. Pecore of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered September 12, 2013, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 16 years to life, unanimously affirmed.

Because defendant made a generalized CPL 30.30 motion and did not, by way of a reply or otherwise, challenge the People's claimed exclusions, defendant did not preserve any of his speedy trial claims (*see People v Allard*, 28 NY3d 41, 46-47 [2016]; *People v Beasley* 16 NY3d 289, 292 [2011]), and we decline to review them in the interest of justice. As an alternative holding, we find that the time chargeable to the People fell far short of the amount required for dismissal. On the limited

record before us, which includes the prosecutor's unrefuted affirmation in opposition to defendant's motion, we conclude that all of the periods of delay at issue were excludable as resulting from the substitution or unavailability of defense counsel (*see* CPL 30.30[4][f]).

The People concede that they were not entitled to question a defense witness about her prior arrests. However, we find that the error was harmless in light of the overwhelming evidence that defendant possessed a firearm (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant did not preserve any of his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The remarks at issue constituted permissible comment on credibility issues and were responsive to defendant's summation arguments.

We have considered and rejected defendant's ineffective assistance of counsel claims relating to the issues we have found to be unpreserved. To the extent the record permits review, it establishes 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]). Regardless of whether defense counsel should have made a more appropriate speedy trial motion, and made particularized objections and requests for relief during the People's summation, defendant has not established that any of these actions would have affected the outcome or fairness of the proceedings.

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

ENTERED: APRIL 17, 2018

CLERK

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

6280 In re Ishmael D.,
Petitioner-Appellant,

-against-

Yaw B.,
Respondent-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Hogan Lovells US LLP, New York (Alan M. Mendelsohn of counsel), for respondent.

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 18, 2017, which dismissed with prejudice the petition for an order of protection against respondent due to a lack of jurisdiction, unanimously affirmed, without costs.

It is undisputed that respondent and petitioner's children are not members of the same family or household (*see* Family Ct Act § 812[1]). Further, based on the existing record, Family Court properly concluded that petitioner's speculative claims were insufficient to establish an intimate relationship within the meaning of Family Ct Act § 812(1)(e), so as to afford the Family Court jurisdiction (*see e.g. Matter of Tyrone T. v*

Katherine M., 78 AD3d 545 [1st Dept 2010]*; compare Matter of Winston v Edwards-Clarke*, 127 AD3d 771 [2d 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 17, 2018

CLERK

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

6288 Nelux Holdings International, N.V., Plaintiff-Respondent, Index 652562/15

-against-

Gila Dweck, Defendant-Appellant.

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Flemming Zulack Williamson Zauderer LLP, New York (Richard A. Williamson of counsel), for appellant.

Schlam Stone & Dolan LLP, New York (Niall D. Ó Murchadha of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 21, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

This action to recover on a loan was commenced in July 2015. Defendant borrower established prima facie through the loan agreement and the notes that the loan was due to be paid by May 10, 2004, and that the six-year statute of limitations for a breach of contract claim expired on May 10, 2010. In opposition, plaintiff lender raised an issue of fact as to whether the statute of limitations was extended by "a new or continuing contract" pursuant to General Obligations Law § 17-101 (*see State of N.Y. Workers' Compensation Bd. v Wang*, 147 AD3d 104, 110 [3d

Dept 2017]; *see also TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 97 [1st Dept 2015]). Plaintiff submitted emails that it had received in 2009 from a law firm seeking to discuss repayment of defendant's loan. This Court and other Departments of the Appellate Division have recognized that a written acknowledgment of a debt signed by the agent of the party to be charged may be sufficient to invoke the statute (*see Hakim v Hakim*, 99 AD3d 498 [1st Dept 2012]; *Chase Manhattan Bank v Polimeni*, 258 AD2d 361 [1st Dept 1999], *lv dismissed* 93 NY2d 952 [1999]; *see also Sullivan v Troser Mgt., Inc.*, 15 AD3d 1011, 1012 [4th Dept 2005]; *Park Assoc. v Crescent Park Assoc.*, 159 AD2d 460 [2d Dept 1990]). An issue of fact arises from the conflicting evidence in the record as to whether the law firm was acting as defendant's agent when it sent the emails to plaintiff.

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

ENTERED: APRIL 17, 2018

CLERK

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

6289 Robert Rodriguez, Index 152127/14
Plaintiff-Appellant,

-against-

P.S. 065 Mother Hale Academy,
et al.,
Defendants-Respondents.

Pillsbury Winthrop Shaw Pittman LLP, New York (Stephen R. Weingold of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Noah M. Kazis of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered February 23, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's alleged agreement to provide a theater arts afterschool program at P.S. 065 lacked the requisite written justification for awarding a contract using a procurement method other than competitive sealed bidding (*see* Department of Education Procurement Policy and Procedures § 3-01[d]; Education Law § 2590-h[36][a][vii]; *Casa Wales Hous. Dev. Fund Corp. v City of New York*, 129 AD3d 451 [1st Dept 2015], *lv denied* 26 NY3d 917 [2016]). Plaintiff's claim that the alleged agreement was ratified fails for the same reason (*see Seif v City of Long*

Beach, 286 NY 382, 387 [1941]). Plaintiff submitted no evidence suggesting that further discovery would lead to facts essential to justify his opposition to defendants' motion (*see* CPLR 3212[f]; *RXR WWP Owner LLC v WWP Sponsor, LLC*, 145 AD3d 494, 495 [1st Dept 2016]).

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

ENTERED: APRIL 17, 2018

CLERK

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

6290 In re Geonni J. R.,

A Person Alleged to be
A Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for presentment agency.

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Appeal from order of disposition, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about June 16, 2016, which, upon appellant's admission to violation of probation, revoked a prior order of disposition that had placed appellant on probation and instead placed him with the Administration for Children's Services' Close to Home program for a period of 12 months, unanimously dismissed, without costs, as moot.

This appeal challenging the dispositional order, but not the

underlying adjudication, is moot because the placement has expired (*see e.g. Matter of Gabriel N.*, 144 AD3d 443 [1st Dept 2016]).

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

ENTERED: APRIL 17, 2018

CLERK

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

6291 Esteban Donoso, Index 100228/16
Plaintiff-Appellant,

-against-

New York University,
Defendant-Respondent.

_____

Law Offices of Michael Dachs, New York (Michael Dachs of counsel), for appellant.

Jeffrey Metzler, New York, for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about January 11, 2017, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1), (5) and (7), unanimously affirmed, without costs.

Plaintiff, an Ecuadorian attorney, applied for admission to the Doctor of Juridical Science (JSD) program at defendant's School of Law and was admitted instead to the Master of Laws (LLM) program. The application instructions stated that admission to the LLM program did "not guarantee or assure admission to the J.S.D. program." While enrolled in the LLM program, plaintiff applied again to the JSD program and was admitted. He then signed a "Graduate Division Intention to Enroll" form stating, in pertinent part, "I understand that my admission and enrollment is conditional upon the continued

excellence in my LLM coursework." Plaintiff's GPA dropped in his second semester, and in June 2015 defendant "withdrew" him from the JSD program. Plaintiff initiated a voluntary student grievance and, about four months after the grievance was denied, commenced this action alleging breach of contract, fraud, and violation of General Business Law § 349. After defendant moved to dismiss, plaintiff filed an amended complaint adding a promissory estoppel claim and a claim for violation of civil rights pursuant to 42 USC § 1983.

In its motion to dismiss, defendant addressed the amended complaint, which plaintiff filed at the same time as his opposition to the motion (*see Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 [1st Dept 1998]). Under the circumstances, since the additional causes of action were essentially a "repackaging" of the original claims, the court providently exercised its discretion in denying plaintiff's request to submit a sur-reply (*see DiPasquale v Security Mut. Life Ins. Co. of N.Y.*, 293 AD2d 394, 395 [1st Dept 2002]).

Regardless of how plaintiff frames his complaint, all his claims challenge defendant's academic determination to withdraw his admission to the JSD program and therefore should have been brought via an article 78 proceeding (*see Peterman v New York Coll. of Traditional Chinese Medicine*, 129 AD3d 474 [1st Dept

2015]; *Alrqiq v New York Univ.*, 127 AD3d 674 [1st Dept 2015], *lv denied* 27 NY3d 910 [2016]; *Keles v Trustees of Columbia Univ. in the City of N.Y.*, 74 AD3d 435, 436 [1st Dept 2010], *lv dismissed* 16 NY3d 890 [2011], *cert denied* 565 US 884 [2011]).

The four-month statute of limitations applicable to article 78 proceedings (CPLR 217[1]) was not tolled by plaintiff's invocation of defendant's voluntary student grievance procedure (*see Matter of Bargstedt v Cornell Univ.*, 304 AD2d 1035, 1036 [3d Dept 2003]; *Matter of Jones v McGuire*, 92 AD2d 788, 789 [1st Dept 1983]; *see also Matter of Queensborough Community Coll. of City Univ. of N.Y. v State Human Rights Appeals Bd.*, 41 NY2d 926, 926 [1977] [limitation period is not tolled "by the invocation of (a) grievance procedure which is merely an alternative remedy"]). Since this action was commenced some eight months after plaintiff was notified of defendant's decision to withdraw him from the JSD program, it is time-barred.

To the extent the fraud, General Business Law § 349, and promissory estoppel claims are based on allegations that defendant's application instructions are misleading concerning the requirements for admission to the JSD program, the claims were correctly dismissed, because the allegations are refuted by the documents themselves, which are referenced and quoted in the amended complaint, and plaintiff could not reasonably have relied

on any implication that he would be admitted (*see Gomez-Jimenez v New York Law Sch.*, 103 AD3d 13 [1st Dept 2012], *lv denied* 20 NY3d 1093 [2013]).

The claim alleging a violation of plaintiff's civil rights (42 USC § 1983) was correctly dismissed, because defendant, a private university, was not acting under "color of state law" (*see American Mfrs. Mut. Ins. Co. v Sullivan*, 526 US 40, 49-50 [1999]; *Kahn v New York Univ. Med. Ctr.*, 328 Fed Appx 758 [2nd Cir 2009]; *Consumers Union of U.S., Inc. v State of New York*, 5 NY3d 327, 347 n 14 [2005]; *Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344, 361–362 [1985]).

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

ENTERED: APRIL 17, 2018

CLERK

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

6292 In re Keenan C. Britt, Index 105655/11
Petitioner-Appellant,

-against-

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 (Devin Slack of counsel), for respondents.

_____

Order and judgment (one paper) Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered June 21, 2016, which denied petitioner's motion to hold respondents in contempt and/or for clarification of an earlier judgment, same court and Justice, dated April 10, 2014, denied the petition, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

In the interest of justice, and on our own motion, we grant petitioner leave to appeal from the judgment denying his motion to hold respondents in contempt of the judgment of April 2014, which was "made in a proceeding against a body or officer pursuant to article 78" and therefore was not appealable as of right (CPLR 5701(b)(1); *Matter of Storman v New York City Dept. of Educ.*, 95 AD3d 776, 777 [1st Dept 2012], *appeal dismissed* 19

NY3d 1023 [2012]). Upon review of the merits, however, we find that the IAS court was well within its discretion to deny petitioner's contempt motion. Respondents did not violate any "clearly express[ed]" or "unequivocal" mandate of the IAS court (*Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]). Specifically, the April 2014 judgment directed respondents to reinstate petitioner to his "permanent civil service title of computer aide" and to pay him back pay, interest, and other benefits lost. Respondents did just that by reinstating petitioner to his prior permanent position of computer aide and paying him $123,063.16 in back pay and $23,258.94 in interest – arguably more than he was entitled to receive. The judgment did not specifically direct respondents to reinstate petitioner to a Computer Aide, Level II position, and the IAS court confirmed that its intent was for respondents to restore petitioner to the position of a computer aide, Level I. Respondents, thus, did not run afoul of any clear or unequivocal mandate.

Nor is there any merit to petitioner's contention that a hearing was necessary to resolve the contempt motion. While petitioner maintains that there remains a triable issue of fact as to whether he previously held the permanent position of a

computer aide Level I or II, his argument really goes to the merits of the court's directives in the April 2014 judgment – which were themselves made after an evidentiary hearing – as opposed to whether respondents complied with them. The purpose of a civil contempt motion is to compel compliance with a prior court order, not to challenge whether that order was proper in the first place. Neither petitioner nor respondents appealed from the April 2014 judgment, and petitioner cannot now use his contempt motion as a vehicle to collaterally attack it.

Further, while petitioner argues that the court erred in denying the motion for clarification, the court did, in fact, clarify the April 2014 judgment. In denying the contempt motion, the IAS court confirmed that it never intended to compel respondents to reinstate petitioner to the higher, Level II computer aide position.

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

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

ENTERED: APRIL 17, 2018

CLERK

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

6293 The People of the State of New York, Respondent, Ind. 3948/14

-against-

Josue Alicea, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered October 28, 2015), convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a second felony offender, to a term of seven years, with five years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to five years, and

otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: APRIL 17, 2018

CLERK

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

6294 Ollie Whitt Shaw, et al., Index 20966/12E
Plaintiffs-Appellants,

-against-

Rush Management Company, LLC., et al.,
Defendants-Respondents.

_____

Slavin & Slavin, New York (Barton L. Slavin of counsel), for appellants.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lizbeth González, J.), entered July 8, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff Ollie Whitt Shaw was injured when, while cooking in her apartment in a residential building owned and maintained by defendants, she opened the door to her oven and there was an explosion.

There are unresolved issues as to the cause of the incident. For example, the record reveals that defendants failed to show that their employees did not cause or create the condition by placing the can of oven cleaner into the broiler section of the stove. The Fire Incident Report only states that the oven

cleaner caused the fire and does not address who put it there. Furthermore, the testimonial evidence in the record raises multiple questions as to the number of individuals that performed renovation work in plaintiff's apartment the day before the explosion, and whether the stove was moved during the course of such renovation work. Such conflicting testimony as to the events leading up to the fire precludes the granting of defendants' motion (*see e.g. Nyala C. v Miniventures Child Care Dev. Ctr., Inc.*, 133 AD3d 467 [1st Dept 2015]).

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

ENTERED: APRIL 17, 2018

CLERK

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

6295-
6296 Index 108948/10

Terrastone Audubon, L.P.,
Plaintiff,

-against-

Blair Ventures, LLC,
Defendant-Appellant,

Arthur Fein, et al.,
Defendants,

Mont York Associates, L.P.,
Defendant-Intervenor.

- - - - -

Kosoff, PLLC, et al.,
Nonparty Respondents.

_____

Bronstein, Gewirtz & Grossman, LLC, New York (Edward N. Gewirtz of counsel), for appellant.

Kossoff, PLLC, New York (Stacie B. Feldman of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered August 25, 2016, adjudging defendant Blair Ventures, LLC liable to Kossoff PLLC, counsel to court-appointed receiver Paul Sklar, for $117,321.99 in fees, and bringing up for review an order, same court and Justice, entered August 23, 2016, which, to the extent appealed from as limited by the briefs, granted Sklar's motion to confirm a referee's report and directed defendant to pay Sklar's counsel fees of $117,321.99, unanimously affirmed, with costs. Appeal from the August 23, 2016 order,

unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court appropriately awarded Sklar his legal fees (*see* CPLR 8004[b]) and, further, properly adjudged defendant liable for them, even though defendant did not move for Sklar's appointment (*see De Nunez v Bartels*, 264 AD2d 565 [1st Dept 1999]). Also, notwithstanding an agreement by Mont York, the purchaser of the premises at issue, to assume responsibility for funds disbursed by the receiver after August 29, 2012, defendant, rather than Mont York, was properly held responsible for the fees, including those incurred after that date. The record reflects that defendant, on meritless grounds, has, for years, obstructed approval of Sklar's final accounting and, in the process, caused Sklar to incur significant legal fees. The court accordingly, and regardless of defendant's separate agreement with Mont York, properly held it responsible (*see Seligson v Russo,* 39 AD3d 408 [1st Dept 2007]).

We also reject defendant's argument, raised for the first time on appeal (*see Chateau d'If Corp. v City of New York*, 219 AD2d 205 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]), that the fee award constitutes sanctions it never had a chance to challenge. The record shows that, contrary to defendant's assertion, defendant had ample opportunity to challenge the fees,

but chose not to, either in written objections or at the hearing before the referee, where its counsel expressly stated it would not challenge fees.

Supreme Court also properly confirmed the referee's report, as his recommendation to approve the final accounting was supported by the record (*see Sichel v Polak*, 36 AD3d 416 [1st Dept 2007]; *Baker v Kohler*, 28 AD3d 375 [1st Dept 2006], *lv denied* 7 NY3d 885 [2006]).

That record consisted of Sklar's testimony about the extensive repair efforts needed by the severely dilapidated premises, how such repairs were necessary to cure violations, and how they were done at the direction of, and paid by, plaintiff Terrastone, and, accordingly, within the scope of the order appointing Sklar as receiver. The record before the referee also consisted of defendant's counsel's deliberate decision not to cross-examine Sklar or the managing agent, and a deliberate waiver of the opportunity to otherwise meaningfully participate in the hearing, for instance, by presenting its own witnesses. In confirming the referee's report, the court appropriately deferred to him, since he had the opportunity to assess Sklar's credibility in person and was given no reason by defendant to call that credibility into question (*see Anonymous v Anonymous*,

289 AD2d 106 [1st Dept 2001]).

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

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

ENTERED: APRIL 17, 2018

CLERK

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

6297-
6298-
6299 Index 603449/07

Eric Frankel, as Executor of the
Estate of Gloria Frankel,
Plaintiff-Appellant,

-against-

Vernon & Ginsburg, LLP, et al.,
Defendants-Respondents.

_____

Garvey Schubert Barer, New York (Maurice W. Heller of counsel), for appellant.

Gordon & Rees LLP, New York (Robert Modica of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about November 30, 2016, which granted defendants' motion to dismiss the claim for legal fees pursuant to the fee-shifting provision of the retainer agreement signed by plaintiff's decedent (Mrs. Frankel) and Vernon & Ginsburg, LLP, unanimously reversed, on the law, with costs, the motion denied, and the matter remanded for a determination of the amount of reasonable attorneys' fees. Order, same court and Justice, entered March 21, 2017, which granted defendants' motion to set aside the jury verdict to the extent of reducing the abatement of Mrs. Frankel's maintenance charges from 50% to 10%, unanimously reversed, on the law, with costs, and the jury verdict

reinstated. Order, same court and Justice, entered March 27, 2017, which denied plaintiff's motion for fees and disbursements pursuant to Real Property Law § 234, unanimously reversed, on the law, with costs, the motion granted, and the matter remanded for a determination of which fees and disbursements relate to Mrs. Frankel's claim for breach of the warranty of habitability.

Vernon & Ginsburg's retainer agreement with Mrs. Frankel says, "In the event of a dispute between you and the firm regarding *any* matters *relating to* the retention . . ., the prevailing party shall be entitled to recover reasonable attorney's fees" (emphasis added). Plaintiff claims that defendants committed malpractice while representing Mrs. Frankel in a lawsuit is a dispute regarding a matter relating to the firm's retention (*see GoTek Energy, Inc. v SoCal IP Law Group, LLP*, 3 Cal App 5th 1240, 1250, 208 Cal Rptr 3d 428, 436 [Cal Ct App 2016]). Plaintiff is the prevailing party. The jury found that defendants committed malpractice and that the malpractice caused Mrs. Frankel damage. Although the amount of the award was reduced by the trial court, this court has reinstated the amount awarded by the jury, which is more than nominal.

Although the first amended complaint, dated May 28, 2008, did not request attorneys' fees, on November 16, 2016, plaintiff moved to amend the complaint to add a request for attorneys'

fees, and the court granted the motion (*see Hancock v 330 Hull Realty Corp.*, 225 AD2d 365 [1st Dept 1996]). Defendants were not prejudiced, as they had demanded (in one of their counterclaims) attorneys' fees pursuant to the fee-shifting clause.

Defendants' claim that plaintiff are entitled to attorneys' fees only for breach of contract is unavailing (*see GoTek*, 3 Cal App 5th at 1250, 208 Cal Rptr 3d at 435; *see also Klapper v Graziano*, 41 Misc 3d 401, 410 [Sup Ct, Kings County 2013], *affd* 129 AD3d 674 [2d Dept 2015], *lv denied* 30 NY3d 988 [2017]; *ProHealth Care Assoc., LLP v Prince*, 101 AD3d 699, 700-701 [2d Dept 2012]).

Nor does *Leach v Bailly* (57 AD3d 1286 [3d Dept 2008]) preclude plaintiff from recovering attorneys' fees. The defendants therein "fail[ed] to submit any retainer agreement" (*Leach v Bailly*, 37 AD3d 897, 898 [3d Dept 2007]), so one cannot tell whether the agreement contained a fee-shifting clause.

We remand to Supreme Court for a determination of the amount of reasonable attorneys' fees (*see Haselton Lbr. Co., Inc. v Bette & Cring, LLC*, 123 AD3d 1180, 1183 [3d Dept 2014]).

The court improvidently reduced the jury's award from a 50% abatement to a 10% abatement of Mrs. Frankel's maintenance (*see Po Yee So v Wing Tat Realty*, 259 AD2d 373, 374 [1st Dept 1999]).

Comparing "similar appealed verdicts" (*Donlon v City of New York*, 284 AD2d 13, 14 [1st Dept 2001]; *see also id.* at 16, 18), we find that the 50% abatement does not "deviate[] materially from what would be reasonable compensation" (CPLR 5501[c]). In *Matter of Nostrand Gardens Co-Op v Howard* (221 AD2d 637 [2d Dept 1995]), the court upheld a 50% abatement of rent where "there was excessive noise emanating from an apartment that neighbored the respondents' apartment through the late night and early morning hours" (*id.* at 638). While the noises in the instant action did not last throughout the late night into the early morning, Mrs. Frankel and plaintiff suffered from leaks as well as noise.

Since defendants did not cross-appeal from the order, they may not request that we vacate the entire abatement of plaintiff's maintenance for 1994 and 1995 (*see Hecht v City of New York*, 60 NY2d 57 [1983]).

Plaintiff is entitled to fees and disbursements pursuant to Real Property Law § 234 (*see Lynch v Leibman*, 177 AD2d 453, 454-456 [1st Dept 1993] [tenant who obtained 20% rent abatement was entitled to attorney's fees]), but only for Mrs. Frankel's claim

against her landlord, not her claim against her upstairs neighbors. Therefore, we remand for a determination of which fees and disbursements are attributable to Mrs. Frankel's claim for breach of the warranty of habitability.

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

ENTERED: APRIL 17, 2018

CLERK

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

6300 The People of the State of New York, Ind. 3193/15
Respondent,

-against-

Hernan Pacheco,
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 (Alexander Michaels 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 (Bonnie Wittner, J. at plea; A. Kirke Bartley, Jr., J. As sentence), rendered July 14, 2016,

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

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

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

ENTERED: APRIL 17, 2018

CLERK

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

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

6301 The People of the State of New York Ind. 2125/12
Respondent, 1483/13

-against-

Amit Patel,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J., at speedy trial motion; Michael R. Sonberg, J. at nonjury trial and sentencing), rendered January 28, 2016, convicting defendant of driving while ability impaired, and sentencing him to a term of 180 days, unanimously affirmed.

Defendant's speedy trial arguments are unpreserved because they were not raised in his motion (*see People v Allard*, 28 NY3d 41, 46-47 [2016]; *People v Beasley*, 16 NY3d 289, 292 [2011]), and we decline to review them in the interest of justice. As an alternative holding, we find no violation of defendant's right to a speedy trial. The period from March 20, 2013 to May 1, 2013 was excludable as a reasonable time to prepare after the court's decision on defendant's pretrial motion, where the court had dismissed, with leave to re-present, the second count of the

indictment and adjourned for a control date (CPL 30.30[4][a]; *People v Davis*, 80 AD3d 494 [1st Dept 2011]). The period from August 7, 2013 to October 23, 2013 was excludable because of defense counsel's clear consent to the adjourned date, which was set primarily for his convenience (CPL 30.30[4][b]; *People v Barden*, 27 NY3d 550, 555 [2016]). The period from November 5, 2014 to January 7, 2015 was excludable because the record attributes the adjournment to the court, and defendant did not meet his "ultimate burden" (*People v Brown*, 28 NY3d 392, 406 [2016]) of showing that this postreadiness adjournment "occurred under circumstances that should be charged to the People" (*id.* at 404).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence clearly established, at least, that defendant was driving while impaired.

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

ENTERED: APRIL 17, 2018

CLERK

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

6302 Annette Vodola, Index 20458/14E
Plaintiff-Appellant,

-against-

Parkash 3250 LLC,
Defenant-Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Doris Gonzalez, J.), entered on or about January 4, 2017,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 26, 2018,

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

ENTERED: APRIL 17, 2018

CLERK

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

6303 The People of the State of New York, Respondent, Ind. 4803/15

-against-

Michael Bailey, 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 March 3, 2016, 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: APRIL 17, 2018

CLERK

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

6304N- Index 653736/16
6304NA Black Rhino Investments LLC, et al.,
Plaintiffs-Respondents,

-against-

John P. Wilson,
Defendant-Appellant.

_____

Victor M. Serby, Woodmere, for appellant.

Lowenstein Sandler LLP, New York (Jeffrey J. Wild of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 10, 2017, which granted plaintiffs' motion to compel arbitration, unanimously reversed, on the law, without costs, and the motion denied. Order, same court and Justice, entered March 10, 2017, which, to the extent appealed from as limited by the briefs, denied defendant's motion to disqualify plaintiffs' counsel, unanimously affirmed, without costs.

Plaintiffs commenced this action upon an alleged oral agreement entered into in October 2015 involving the ownership of plaintiff Black Rhino and the licensing of defendant's intellectual property. Upon defendant's motion to dismiss the complaint, plaintiffs claimed for the first time that the controversy had to be arbitrated, pursuant to a separate

agreement entered into in April 2015 involving services to be performed for Black Rhino by plaintiff Levitt. We find that plaintiffs waived their right, if any, to arbitration (*see Cusimano v Schnurr*, 26 NY3d 391, 400-401 [2015]; *Louisiana Stadium & Exposition Dist. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F3d 156, 159 [2d Cir 2010]).

Supreme Court correctly concluded that counsel retained to represent Black Rhino did not represent defendant individually (*see Campbell v McKeon*, 75 AD3d 479, 480-481 [1st Dept 2010], citing, inter alia, *Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 149 [1st Dept 1994], *affd* 87 NY2d 826 [1995]).

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

ENTERED: APRIL 17, 2018

CLERK